Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 4 WEDNESDAY, 26 MARCH, 2003 Vol. 83—Part 1

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

THIS EXTRA SUB-PART IS ISSUED DUE TO THE VOLUME OF MATERIAL TO BE PUBLISHED. CONTENTS APPEAR AT THE END OF THIS PUBLICATION. THE CUMULATIVE CONTENTS AND DIGEST WILL BE PUBLISHED IN THE NEXT SUB-PART.

INDUSTRIAL APPEAL COURT—Appeals against decision of Full Bench—

[2003] WASCA 28

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	JAMES TURNER ROOFING PTY LTD -V- PETERS [2003] WASCA 28
CORAM	:	ANDERSON J (PRESIDING JUDGE) SCOTT J PARKER J
HEARD	:	3 DECEMBER 2002
DELIVERED	:	10 MARCH 2003
FILE NO/S	:	IAC 7 OF 2002
BETWEEN	:	JAMES TURNER ROOFING PTY LTD Appellant AND CHRISTOPHER LAWRENCE PETERS Respondent

Catchwords:

Industrial law - Breach of award - 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 - Whether claim truly for breach of award or for breach of over award agreement - Claim procedures - General jurisdiction - Prosecution jurisdiction

Legislation:

Annual Holidays Act 1944 (NSW)

Industrial Relations Act 1979, Pt III, s 81CA(5), s 83

Justices Act

Result:

Appeal allowed

Category: A

Representation:

Counsel:

Appellant	:	Mr D G Taylor
Respondent	:	Ms Y D Henderson

Solicitors:

Appellant	:	David Taylor Solicitors
Respondent	:	Gibson & Gibson

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

Amalgamated Collieries of WA Ltd v True (1938) 59 CLR 417.
ANZ Banking Group Ltd v Finance Sector Union of Australia [2001] FCA 1785.
Churchill Engineering Contractors Pty Ltd v Dortmans (1987) 22 IR 278.
Josephson v Walker (1914) 18 CLR 691.
Logan v Otis Elevator Co Pty Ltd [1999] IRCA 4.
Pacific Publications Pty Ltd v Cantlon (1983) 4 IR 415.
Poletti v Ecob (No 2) (1989) 31 IR 321.
Ray v Radano (1967) AR (NSW) 471.

Case(s) also cited:

Club Sierra v ALHMWU (1994) 74 WAIG 2637
Construction, Forestry, Mining and Energy Union v Warren (1999) 85 FCR 599
Ingamells v Petroff (1934) 50 CLR 451
Jose v Geraldton Resource Centre Inc (1995) 75 WAIG 2316
Metropolitan Health Services Board v Australian Nursing Federation (2000) 99 FCR 95
Silberschneider v MRSA Earthmoving Pty Ltd 68 WAIG 1004
Transport Workers' Union v Arrow Holdings Pty Ltd 69 WAIG 1050

1 **ANDERSON J (PRESIDING JUDGE)**: This is an appeal from a decision of the Full Bench dismissing an appeal against orders made by an Industrial Magistrate sitting as an Industrial Magistrate's Court in Perth. The appeal is by an employer who was found by the Industrial Magistrate, Mr Cicchini SM, to have committed numerous breaches of an award, mostly in the form of underpayments. The Industrial Magistrate imposed monetary penalties and administered cautions and he also made an order for payment to the employee of $18,992.78, being his assessment of the value of the underpayments.

2 Industrial Magistrate's Courts are established under Pt III of the *Industrial Relations Act 1979* with jurisdiction to hear applications by employees for enforcement of awards and employer/employee agreements: Section 83(1), s 83(2). The Court has the power to issue cautions and impose monetary penalties (s 83(4)) and may order that any monetary penalty be paid to the employee affected by the contravention: Section 83F(2). The Court may order also that the employer pay to the employee any amount which the employee has been underpaid: Section 83A(1). That amount then becomes a "penalty" and may be recovered accordingly: Section 83A(3). Applications for enforcement of awards brought under s 83 and s 83A are heard by the Industrial Magistrate's Court exercising its "general jurisdiction": Section 81CA. As well the Court has what is called a "prosecution jurisdiction" to hear complaints for contraventions or failures to comply with the Act: Section 81CA(1), s 83D. Ordinarily a breach of a statutory obligation which constitutes an offence is prosecuted in the Court of Petty Sessions by complaint laid under the *Justices Act*. However, complaints of contraventions against the *Industrial Relations Act* may only be heard by an Industrial Magistrate's Court so that complaints under the *Justices Act* alleging a contravention of the *Industrial Relations Act* must be laid in the Industrial Magistrate's Court: Section 83D(3). Nevertheless the proceedings are criminal in their nature: Section 81CA(5).

3 The proceedings in question here arise out of the relationship which was entered into between the appellant and the respondent in July 1998. The appellant carries on business as a roofing contractor and the respondent is a roofing plumber. According to the findings of the Industrial Magistrate, a short time prior to 9 July 1998 the respondent answered a newspaper advertisement placed by the appellant seeking the services of a roof plumber. This brought him into contact with the appellant's proprietor, Mr Turner, and there was a discussion between the two men on the terms of the engagement. The evidence as to exactly what was said is not very clear but the effect of Mr Turner's evidence which was accepted by the Industrial Magistrate was that he offered employment to the respondent on the basis that he would be paid $25 an hour "all-in" for all hours worked.

4 Mr D Taylor, who appeared for the appellant, informed us that at the material time the relevant award prescribed an hourly rate for roof plumbers of not more than $16.92 for ordinary time or $642.96 per week for 38 hours. Ms Y Henderson, who appeared for the respondent, did not dispute this and I would deal with this appeal on the basis that the ordinary hourly rate prescribed in the award with respect to work done by the respondent for the appellant was at all times $16.92 or not more than that amount.

5 As it turns out the appellant intended to engage the respondent as a sub-contractor and not an employee whereas the respondent thought he had been offered employment as an employee and accepted the engagement on that basis. The appellant, believing that it had employed the respondent as a sub-contractor at an hourly all-in rate of $25, made payments to the respondent at that rate for every hour worked. The rate of $25 per hour was later increased to $28 per hour and for a brief time I think $30 per hour but the appellant made no extra payment to the respondent specifically for overtime nor for time worked on public holidays. The appellant did not allow the respondent a rostered day off on full pay nor did it recognise any obligation to make payments for sick leave or to allow holidays on full pay; nor did the appellant make any additional payments on account of superannuation. For his part, the respondent believed that he was entitled to these benefits and almost from the inception of his employment he complained about not getting them.

6 There was apparently no system of invoicing whereby the appellant's sub-contractors would present individual invoices claiming payment for work done. There was instead a timesheet system on which the time worked by each "sub-contractor" was recorded and periodically paid at the rate agreed between the appellant and that "sub-contractor". We were told in the course of argument that this is how the respondent's payments were calculated and paid. He put in timesheets and was paid for every hour worked at the flat rates mentioned.

7 The relationship between the parties came to an end after about a year and some months later the respondent commenced these proceedings by making a complaint before a Justice of the Peace and lodging it in the Industrial Magistrate's Court in Perth. The complaint alleged that the appellant had failed to comply with the provisions of a Federal award called the Plumbing Industry (Queensland and WA) Award 1976, alternatively the Building Trades (Construction) Award 1978 in failing to pay to him a range of benefits provided for in those awards including overtime, public holidays worked and a redundancy payment; and in failing to allow him other benefits such as rest and meal breaks, rostered days off and the like.

Nature of proceedings

8 I think it is clear that the respondent intended to invoke the general jurisdiction of the Industrial Magistrate's Court not its prosecution jurisdiction. Resort to the complaint procedures was therefore wholly inappropriate. The only complaint that is authorised to be made pursuant to s 83D is a complaint of an offence against the Act. There is no such allegation in the complaint lodged by the respondent. The allegation is of a breach of one or other or both of the awards. The complaint ought to have been dismissed as disclosing no offence known to the law. A claim should have been lodged pursuant to s 83 and Reg 19 and initiated by the filing of a form of claim prescribed by the regulations (Form 1). No point was taken about this at any stage below or before us.

9 Even if we were to ignore this fundamental irregularity in the proceedings and treat the complaint as in substance a claim pursuant to s 83 and Reg 19 it remains a claim for enforcement of the applicable award. There is no allegation against the appellant that it breached an employer/employee agreement. The complaint alleges that the appellant:

> "…being a party bound by Award No E1939(P0090) of 1979 Plumbing Industry Queensland and WA Award 1979 or in the alternative the Building Trades (Construction) Award 1987, Award No R14 of 1978 … underpaid the complainant and denied him benefits provided by the Plumbing Industry Award in breach of clauses 17, 19, 9, 32, 23, 11, 18, 1, 12, 16, 38, 10, 34 and 20 or in the alternative underpaid the complainant and denied him benefits provided by the Building Trades (Construction) Award 1987 in breach of clauses 25, 16, 17, 50, 15, 20, 27, 51, 22, 9, 8, 27 and 13."

10 There are 51 paragraphs of particulars which enumerate failures to pay amounts allegedly prescribed in the awards. The heads of claim and the amounts claimed under each head are summarised in the Industrial Magistrate's judgment at Appeal Book page 77 as follows:

"Overtime	$5,744.76
Meal and Rest Breaks	388.21
Public Holidays	1,224.00
Rostered Days Off	2,950.00
Superannuation	2,153.34
Redundancy	1,137.50
Annual Leave	2,295.83
Annual leave loading	401.77
Insulation Allowance	531.57
Special Allowance	246.40
Tool Allowance	604.80
Industry Allowance	544.00
Plumbing Allowance	435.20
Meal Allowance	335.40
Total	$18,992.78"

11 It is now common ground that the applicable award is the State award, ie the Building Trades (Construction) Award, and it is the provisions of that award which are relevant. The Industrial Magistrate, after a detailed consideration of the evidence, expressed his final conclusion as follows:

> "Mr Peters has proved that at all material times he was an employee of the defendant. He has also proved that his employment was governed by the Building Trades (Construction) Award 1978 and that Award binds the defendant. I am satisfied that the defendant breached the award by failing to pay Mr Peters various entitlements. I am further satisfied that in consequence of the breaches Mr Peters was underpaid a total amount of $18,992.78. I find that the defence of estoppel does not apply and further that any amounts paid to Mr Peters in excess of the award rate cannot be set off."

12 There is no appeal against the finding that the respondent was an employee whose employment was covered by the award.

13 I note that the "total amount of $18,992.78" is arrived at not by reference to the hourly rates prescribed in the award but by reference to the higher rate agreed between the parties and actually paid to the appellant for the hours which he worked. For myself, I can see no basis upon which the amount due upon enforcement of an award can be calculated by reference to an hourly rate which is not the rate prescribed in the award. This is not to say that an employer and an employee may not enter into an over-award agreement, ie an agreement, express or implied, most of the content of which is supplied by the terms of the award but with agreed additions. There is no reason why parties cannot contract by reference to the terms and conditions of an award. So for example, an employer might offer employment expressly or impliedly on the basis that the employee is to receive all of the benefits of the award save that instead of the ordinary hourly base rate prescribed by the award, a higher base rate will be paid. But then the employee who complains of a breach of the obligation to pay at the higher rate is not seeking to enforce the award but is seeking to enforce the agreement: ***Amalgamated Collieries of WA Ltd v True*** (1938) 59 CLR 417 per Evatt J at 434 and Dixon J at 431. See also (1940) 62 CLR 451 (Privy Council) per Lord Russell at 455. The failure to pay at the agreed rate would be a breach of the agreement, not a breach of the award. No employer/employee agreement is averred in the complaint which started these proceedings. Whilst unquestionably the Industrial Magistrate's Court has the jurisdiction to enforce employer/employee agreements: (Section 83(1), s 83(2)) the Court was not called on to do so in this case. It is not possible to read the complaint or the particulars of the complaint in any other way than as a claim to enforce the award. It is not a claim to enforce an over award agreement.

14 I should perhaps say that it was not submitted that agreed over award payments are picked up by the award and become part of its terms and conditions; nor was our attention drawn to any statute which brings about such situation, that is, which converts an over award arrangement into an award condition. Therefore an application for enforcement of the terms and conditions of the award, which is what this application is, cannot proceed on the basis that what is due under the award is to be calculated by reference to the over award rate agreed between the parties.

15 On this ground alone the order of the Industrial Magistrate cannot stand and must be set aside.

16 It should also be observed that, *prima facie*, it is only where the award provides for payment in *lieu* of an entitlement (such as for example, in the case of holidays worked, as per cl 17(4)) that an order for monetary payment by way of enforcement of the award can be made. Where the award does not provide for monetary payment in *lieu* of a (denied) entitlement, an order for the payment of money would have to be justified on some basis other than that the amount was due under the terms of the award. I have in mind for example, meal breaks, crib time, annual leave etc which the award obliges the employer to allow but (so far as I can see) with no penalty rates of pay prescribed in the event that the benefits are not allowed. However, we do not have the whole of the award before us and we were not addressed on this aspect of the matter and I therefore say no more about it.

Set off

17 I now turn to the rather vexed question of so-called set off.

18 It should be recognised at the outset that the term "set off" is used loosely in this area of industrial law. Strictly speaking it is a misuse of the term. The right of set off is a common law right to plead a debt due from the claimant as a defence to his claim

and in partial satisfaction or extinction of it. The right arises at common law only where there are mutual debts between claimant and defendant. Meagher, Gummow and Lehane, "Equity: Doctrines and Remedies" (3rd ed) par [3704]. In the area of law with which we are dealing there is no question of mutual debts between employer and employee. The term "set off" is conveniently used merely to denote a defence by the employer to the effect that the payments which he actually made to the employee were sufficient to discharge all of his obligations. That is not really a claim of set off. It involves no allegation of mutual indebtedness.

19 With this understanding, the question of set off arises in this case because the appellant contends that the amount paid to the respondent exceeds the maximum amount which the appellant was obliged to pay to the respondent under the award in respect of any of the periods of work in question. For his part the respondent contends that none of the money which was paid by the appellant over and above the award entitlement for ordinary time can be applied in satisfaction of the appellant's obligation under the award to pay the other entitlements claimed.

20 What is at issue here is the manner in which amounts which had been paid to the respondent should be credited to the appellant's obligations under the award. Cases in which this question has been discussed include ***Ray v Radano*** (1967) AR (NSW) 471;***Pacific Publications Pty Ltd v Cantlon*** (1983) 4 IR 415; ***Poletti v Ecob (No 2)*** (1989) 31 IR 321; ***Logan v Otis Elevator Co Pty Ltd*** [1999] IRCA 4 and ***ANZ Banking Group Ltd v Finance Sector Union of Australia*** [2001] FCA 1785.

21 These cases must be discussed in some detail, which I will do later, but meanwhile I think the relevant principles that are to be extracted from them can be stated as follows:

1. If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid for that work; then the whole of the amount paid can be credited against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award.
2. However, if the whole or any part of the payment is appropriated by the employer to a particular incident of employment the employer cannot later claim to have that payment applied in satisfaction of his obligation arising under some other incident of the employment. So a payment made specifically for ordinary time worked cannot be applied in satisfaction of an obligation to make a payment in respect to some other incident of employment such as overtime, holiday pay, clothing or the like even if the payment made for ordinary time was more than the amount due under the award in respect of that ordinary time.
3. Appropriation of a money payment to a particular incident of employment may be express or implied and may be by unilateral act of the employer debtor or by agreement express or implied.
4. A periodic sum paid to an employee as wages is *prima facie* an appropriation by the employer to all of the wages due for the period whether for ordinary time, overtime, weekend penalty rates or any other monetary entitlement in respect of the time worked. The sum is not deemed to be referable only to ordinary time worked unless specifically allocated to other obligations arising within the employer/employee relationship.
5. Each case depends on its own facts and is to be resolved according to general principles relating to contracts and to debtors and creditors.

22 Applying these principles to the case before us, the first question is whether the appellant made any implied or express allocation to a particular incident of employment, such as ordinary time.

23 In this respect, the Industrial Magistrate's findings are quite clear. He said:

> "I am satisfied that the defendant [appellant] has throughout his relationship with Mr Peters [respondent] operated on the basis that the hourly rate paid to Mr Peters constituted an 'all-in rate'. I accept that Mr Turner may have expressed the rate to be an all-in rate when he initially spoke to Mr Peters."

24 The Industrial Magistrate made no express finding as to the meaning of the expression "all-in rate" but it is implicit in his reasons that he took it to mean payment to cover all the monetary obligations arising in the employment relationship whatever they may be.

25 On this finding the question might be thought to be simply whether the all-in rate actually paid did in fact, as a matter of arithmetic, cover all the money entitlements provided for in the award.

26 The Industrial Magistrate (and the Full Bench in upholding his decision) saw the case differently but this was I think due to a misconception on their part that the law is that there is no right by an employer to rely on higher than award rates actually paid unless there was an express or implied allocation of that payment to obligations **arising under the award** which in this case there was not. Mr Turner did not say to the respondent that the $25 per hour flat rate for every hour worked was to cover all obligations arising under the award to pay for time worked whether ordinary time, overtime, weekend work or holidays worked.

27 It was this which led the Industrial Magistrate to say:

> "The agreement as to the payment by the defendant of an 'all up' or 'all in rate' had nothing to do with its obligation under the award. It was a term of a private contract that did not in any way contemplate the application of an award. Indeed Mr Turner's evidence dictates that he had little or no knowledge of the award. He did not even contemplate that the defendant might be bound by it. He dealt with Mr Peters on the basis that he was a sub-contractor. In those circumstances the application of the expression 'all in' or 'all up' could have nothing to do with the defendant's satisfaction of any of the particular components of the award."

28 Later he said:

> "The $25 per hour payment that later increased to $28 must in all the circumstances be seen as a private contract between the parties for purposes outside an award."

29 Literally what this means is that amounts paid in excess of an award obligation cannot be relied on in defence to a claim for enforcement of the award obligation unless the payment was made with reference to and in order to cover that award obligation; and as the appellant never had the award in mind when it engaged the respondent, the appellant cannot now claim that the payments it made to the respondent did in fact satisfy its obligations under the award. The Full Bench appears to have upheld this reasoning. With respect it cannot be right and is, I think, contrary to the decision in ***ANZ Banking Group Ltd v Finance Sector Union*** (*supra*), to which case I will return in a moment. If the proposition is correct it would seem to be a warrant to claim double payment of wages, that is, to accept and retain all payments made pursuant to an employment contract in which there is no reference to the award and as well claim all payments prescribed in the award. Justice and the law would have parted company.

30 The claim for underpayment does not go so far as to claim that the payments made under what the Industrial Magistrate referred to as the "private contract" satisfied none of the appellant's obligations under the award. There is no claim for

underpayment with respect to ordinary time worked. It is therefore implicit in the claim that the respondent accepts that the flat rate which was paid to him did at least satisfy the appellant's obligations to pay him for ordinary time worked even although the flat rate was paid under a contract and without any regard at all for the provisions of the award and without reference to the award. However, the respondent made no such concession in formulating the claims which he made for underpayment of overtime, etc. An examination of those claims, which were allowed in full by the Industrial Magistrate, whose judgment the Full Bench upheld, shows that the amounts which were actually paid to the respondent have been left out of account altogether in calculating the underpayments.

31 Take the first item in the particulars of claim by way of example. Under the heading "Particulars of Breaches" it is pleaded:

> "1. On and about 9 July 1998 at Perth the respondent failed to pay the complainant for two hours overtime worked at time and a half pursuant to [cl 15] of the award and the respondent owes the complainant $75 for this breach."

32 The evidence shows that on 9 July 1998 the respondent worked 10 hours for which he put in a timesheet or "invoice" and was paid $250 being $25 multiplied by 10. His claim of underpayment is based on the proposition that for the last two hours (hours 9 and 10) he should have been paid time and a half; that is according to him $75 instead of the $50 which he was paid. Yet the claim is not for the difference but for $75 with no credit given for the $50 received. In this regard the proposition, which I have said cannot be right, does appear to have been literally applied. The Industrial Magistrate allowed the claim in full (as he did in respect to each other similar claim) holding that the $50 which had been paid could not be brought to account in assessing the extent of the underpayment because the $50 had been paid under a "private contract that did not in any way contemplate the application of the award" and the Full Bench held that he was correct. So the most astonishing result is that by judicial decree the respondent, who was entitled under cl 15 of the award to time and a half for each of the two overtime hours worked (a total of $50.76 at the award rate of $16.92) will receive a total of $125 for those two hours.

33 With respect I cannot accept the reasoning which produces this result nor do I consider any support for it can be found in the leading cases on the subject. It is now necessary to turn to those cases.

34 ***Ray v Radano*** (*supra*) concerned a claim for overtime payments. By agreement the employee, a chef, had been paid a weekly wage in excess of the award wage. The finding was that agreed wage was for 40 hours. The majority (Richards and Sheehy JJ) in the New South Wales Industrial Commission held that the employer was entitled to set off the amount by which the agreed wage exceeded the award wage against the amount due under the award for overtime. Sheldon J dissented and his opinion has been widely accepted as correct and repeatedly applied. He held that because the agreed weekly wage was for ordinary time the employer could not answer the claim for overtime by now seeking to allocate the over award payments in discharge of the obligation to pay overtime. Having made payments on one account the employer could not claim that that same payment discharged his liability on another account. It is important to understand that it was a case in which no payment at all had been made for the overtime which the chef actually worked. And neither was his weekly wage an "all-in" wage. It is not this case.

35 In ***Pacific Publications Pty Ltd v Cantlon*** (*supra*) the employee, a journalist, was retrenched without notice and claimed 16 weeks pay in *lieu* of notice as provided for in the relevant award. That amounted to $6,203.20. When he was retrenched he was given a letter to which was attached a cheque for $4,999.20 made up of various amounts itemised in the letter including an amount of $4,000 designated as a "special gratuity". In the claim for salary in *lieu* of notice the employer sought to off set the $4,000 as a *pro tanto* satisfaction of its obligation to pay salary in *lieu* of notice. The court held that on the wording of the letter the payment of $4,000 was intended to be in the nature of a bonus in addition to any amount to which the employee might be legally entitled and the employer could not therefore later seek to make an appropriation of the payment in purported satisfaction of its legal obligations. See especially at 421. That is not this case.

36 ***Poletti v Ecob (No 2)*** (*supra*) concerned a stable foreman in the racing industry employed by a horse trainer. The arrangement was that the employee could live on the training premises without payment of rent and would be paid cash wages each week and other non-cash benefits and would work as many hours as were needed to get the work done. The cash wages were placed in an envelope on which was written an amount but the envelope usually contained an additional cash amount, the purpose of this being to enable the additional amount to be received tax free. This arrangement continued for seven or eight years and when it terminated the employee's union through its authorised representative, Mr Ecob, made several complaints against the employer alleging underpayment of annual leave entitlements, underpayment of wages, underpayment of public holiday entitlements and non-payment of overtime. The employer sought to aggregate the total amount of the payments made to the employee, including the additional cash payments, and to off set this against the total amount found to have been under paid. The court held that there was in fact "an agreement between the employer and the employee as to the manner in which the amounts paid were to be applied" (335). This agreement was to the effect that all of the payments, including the additional cash payments, were to cover the ordinary time worked by the employee (40 hours per week) plus annual leave and hence because the total payment exceeded the award entitlement for ordinary time and annual leave there was no underpayment in respect of those entitlements. However, as the additional cash payments had been appropriated by agreement to those entitlements only, no part of the payments in excess of what was required to satisfy them could be appropriated to any other incident of employment. In particular, the employer could not seek to appropriate any of the excess in satisfaction of its obligation to pay overtime. Once again, that is not this case.

37 In ***Logan v Otis Elevator Co Pty Ltd*** (*supra*) the employee was employed as a local representative for the employer in a country area of New South Wales. On termination of his employment he claimed to be entitled to various sums of money under his award. Essentially these claims were for "standing by" and "call backs". The employer had paid a salary in excess of the wages prescribed for ordinary time and sought to off set the difference against the payments due to the employee for standing by and call backs. The Court held that the employer was not entitled to do so. As I understand the judgment this was because the annual salary, which was higher than ordinary wages calculated in accordance with the award, was paid for the additional responsibilities which attended the position of a local representative. The court said at [30]:

> "The whole of the excess was paid and received as an amount appropriate to reflect the difference between the position of a local representative, with all that entails, and an ordinary electrician special class."

38 The court held that none of the excess could be reasonably identified as intended to cover overtime and call backs and it held that "accordingly, set off against the overtime and call back payments due to Mr Logan under the 1989 Award" were not permissible. Again, that is not this case.

39 I now come to ***ANZ Banking Group Ltd v Finance Sector Union*** (*supra*). The facts of this case are complex to say the least. At the risk of over-simplification it is perhaps enough to say that six bank managers had been retrenched and were paid a final amount on termination under a special retirement/severance allowance scheme into which they had agreed to enter a few years previously. The effect of this scheme operating in conjunction with the relevant award (ANZ Group Award 1991) was that participants would be paid a termination entitlement based on length of service from which was to be deducted the award entitlement for unused long service leave. The latter sum would be paid separately and specifically as an award entitlement.

The aggregate scheme entitlement was always greater than the award entitlement due to calculation provisions in the scheme which were somewhat more generous than those prescribed in the award; so there would always be a balance in favour of the employee after deduction and separate payment of the award entitlement. The six retrenched managers each received a "Payment Summary" on retrenchment which showed the way in which the Bank calculated the payment which was made to them. The method of calculation was as follows (***Finance Sector Union v Australia and New Zealand Banking Group Ltd*** [2000] FCA 1748 par 38). The Bank calculated the total retirement benefits due under the scheme. Then it calculated the unused long service leave entitlement due under the award. That amount was then deducted from the entitlement due under the scheme and paid as an award entitlement designated "long service leave" and the difference was designated in five cases as "retiring allowance" and in one case "ex gratia payment". The total payment received by each employee was the sum of the two that is, the amount designated "long service leave" and the amount designated "retiring allowance" or "ex gratia payment".

40 The Union disputed the correctness of the calculation of "long service leave" contending that it was less than it should have been and made an application in the Federal Court under s 178 of the *Workplace Relations Act 1996* (Cwth) seeking penalties for breach of the award. The Bank said that, in the first place, its calculation was correct; and in the second place, even if the Union's calculation was correct, the aggregate amount actually paid to each of the six managers was in excess of the award entitlement for long service leave so that the Bank was not in contravention of the award. North J at first instance held that the Union's calculation was correct and on that basis the amount calculated as payable for unused long service leave was less than it should have been. But as the aggregate payment was more than enough to cover the true amount due for unused long service leave was the Bank guilty of breach of the award? The question was expressed by North J in the following terms:

> "Thus, the question arises whether the respondent is able to rely on the payment of the amount designated as a retirement allowance or an ex gratia payment under the scheme in the Final Payment Summary to discharge the obligation to pay out unused long service leave under the award as construed in these reasons for decision."

41 North J said that because the additional payments had been made to the employees in discharge of the contractual obligation under the scheme and not to cover the award liability the payments could not be offset against the award liability and the Bank was therefore in breach of the award.

42 This is much the same reasoning as was adopted by the Industrial Magistrate and the Full Bench in the case that is before us. However, on appeal to the Full Court of the Federal Court (Black CJ, Wilcox and von Doussa JJ) the approach was rejected. The Full Court held that because the payment under the scheme was itself and in reality a payment in respect of untaken or unused long service leave it could be set off against the liability under the award to make a payment on that account. The Court held that whilst there must be a close correlation between the nature of the contractual obligation and the nature of the award obligation before one could be off set against the other it was a matter of looking to see whether both the award entitlement and the contractual payment arose out of the same agreed purpose. It was not necessary that the same label be used in describing each. Because both the award obligation and the obligation imposed by the scheme were obligations to make money payments in respect of long service the Court said at par 57:

> "The whole of the money paid to each of the six employees is to be taken into account in determining whether they have received the moneys due to them under the ANZ Group Award. On that approach, ANZ has not contravened the award."

43 If the term "all-in" rate has the meaning which the Industrial Magistrate implicitly took it to have in this case namely, a rate paid in satisfaction of the whole of the employee's legal obligations to make monetary payments for hours worked, the case before us would appear to be on all fours with ***ANZ Banking Group Ltd v Finance Sector Union*** (*supra*). Both the award obligation and the obligation arising under the contract may each aptly be described as an obligation to make money payments in respect of hours worked. Their purpose is the same, namely, to remunerate the respondent for the hours which he has worked. Reducing this to concrete terms the appellant paid the respondent the sum of $25 flat for each of the 10 hours of work on 9 July 1998. In terms of the award the respondent was entitled to be paid ordinary rate of $16.92 for the first eight hours ($135.36) and time and a half at award rates for the ninth and tenth hours ($50.76). The amount paid to him in respect of the ten hours of work ($250) substantially exceeded that entitlement. Therefore, in making the payment which it did make for the work done on that day the appellant did not contravene the award.

44 There is nothing in the cases referred to which is to the effect that, where payments are made pursuant to a contractual arrangement without regard for award obligations, they are to be completely ignored and left out of account in looking to see whether an obligation imposed by the award has been satisfied. At their highest they are authority for the proposition that if an employer impliedly or expressly appropriates a payment of money to a particular obligation arising in the employment relationship (ie to a particular incident of employment) the employer is to be held to that appropriation and cannot seek later to reappropriate or "reprobate". The cases are not authority for the proposition (upon which the judgments below seem to have proceeded) that unless there is an express appropriation to a particular award entitlement the sums paid by the employer to the employee are to be ignored or treated as referable only to ordinary time worked.

Conclusion

45 The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award. This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case.

46 In this case, if the arrangement between the respondent and the appellant had been (which it was not) that the respondent would be paid a base rate of $25 per hour for ordinary time the difference between that rate paid for ordinary time and the base rate prescribed in the award for ordinary time could not go in discharge of an obligation with respect to other entitlements such as overtime, holidays worked and so on.

47 These are the principles according to which this case should have been decided and the case should be remitted to the Industrial Magistrate for reconsideration in the light of this judgment.

48 I do not say that in no instance has the appellant contravened the award. It may be, for example, that some of the entitlements prescribed in the award and which were denied to the respondent cannot be discharged by payment of money. The obligation to provide those entitlements may not be capable of being discharged by the payment of an all-in rate, no matter how much it may exceed the rates set forth in the award. In that case there could be no question of set off. For example, I would doubt that

there is a sufficient degree of correlation between the nature of the payment made to the respondent and the nature of the obligation to pay untaken long service leave. I would doubt that the over award payment for hours worked could be set-off against the obligation to pay untaken long service leave. It will be for the Industrial Magistrate to consider these matters.

49 It is worth making one other observation. We heard no argument on the question whether an agreement to pay over award rates for ordinary time carries through to overtime and penalty rates. The question does not arise in this case because the Industrial Magistrate found that the flat rate which was agreed was "all-in", that is, to cover everything, not just ordinary time. I therefore express no concluded view but, in case it may be of some assistance and recognising that what I am about to say is mere obiter, it seems to me that the question is to be resolved by the ordinary rules which apply to the construction of contracts. The worker seeking to recover penalty rates calculated by reference to an agreed over award base rate is not seeking to recover an amount to which he is entitled by virtue of a statutory obligation arising from the award provisions but is seeking to recover moneys due by virtue of the contract to pay more than is prescribed in the award. The worker would have to prove not only that he had a contract under which he was to be paid over the award for ordinary time but also that under the contract he was to be paid overtime etc calculated by reference to the over award amount agreed for ordinary time. See ***Josephson v Walker*** (1914) 18 CLR 691 especially per Isaacs J at 700.

50 Of course, the award itself may provide that the overtime and penalty rates, etc are to be calculated by reference to such over award arrangement as may have been entered into. For example, the award may define "ordinary rates" or "ordinary time" for the purpose of calculating penalty rates as meaning the rate usually paid to a worker for ordinary time as distinct from the rate prescribed in the award for ordinary time. This seems to be what Watson J was referring to in ***Churchill Engineering Contractors Pty Ltd v Dortmans*** (1987) 22 IR 278 at 279-280. In that case there was a claim for accrued holiday pay on termination of employment. The claim was made under the *Annual Holidays Act* which provided for the recovery of pro rata holiday pay calculated by referenceto the employee's "ordinary pay". The Industrial Magistrate upheld a claim for payment calculated by reference to the award wage payable to each employee which was less than the wage actually being paid. In confirming this decision Watson J commented, obiter, that "ordinary pay" as defined in the Act may mean the wage actually paid so as to permit a claim for accrued annual leave to be based upon that higher rate of pay. I mention this case only because it was included in Ms Henderson's list of authorities and only to distinguish it from the case which we have under consideration. Although we were not provided with the whole of the relevant award it is not suggested in the judgments below nor was it argued that the award provisions themselves provided for a calculation of overtime based upon rates actually paid. ***Churchill Engineering Contractors Pty Ltd v Dortmans*** is therefore clearly distinguishable and would not assist the respondent to contend that his claim for entitlements based on an hourly rate higher than those provided in the award is a claim to enforce the award rather than a claim of breach of contract.

51 The orders should be that the appeal be allowed and the matter should be remitted to the Industrial Magistrate to be dealt with according to law in the light of this judgment.

52 **SCOTT J**: In this matter I have had the opportunity of reading in draft the reasons of the Presiding Judge. I generally agree with those reasons and the disposition proposed by his Honour. There are, however, a few observations I would like to add.

53 This matter was commenced by a document which purports to be a charge by summons on a complaint and pursuant to the Western Australian *Industrial Arbitration Act 1979* ("the *Industrial Relations Act*"). It is a complaint made by the present respondent.

54 The complaint purports to be made before a Justice of the Peace and alleges that the appellant, being bound by a specified award, committed a breach thereof in certain specified ways which are particularised in the summons.

55 The summons commands the appellants to appear before the Industrial Magistrate.

56 The summons also specified that the appellant may enter a plea of guilty by completing the appropriate section on the reverse side of the summons and returning it to the clerk of courts to reach him prior to the hearing date or enter a plea of not guilty within certain time limits and with specified consequences.

57 The complaint was followed by a document in the appeal book called "Re-amended Particulars of Claim" which purported to particularise the breaches of the Plumbing Industry (Queensland and WA) Award 1999 committed by the appellant.

58 In response to that document the present appellant filed an amended defence and set off and the matters appears to have proceeded to trial in that form.

59 The first thing to note about the document which initiated these proceedings is that it purported to be a complaint which could lead to a conviction. The particulars of the complaint, however, do not identify any offence of which the appellant could be guilty or, indeed, to which it was required to plead.

60 It would have been open to the present appellant to plead under the provisions of s 616 of the *Criminal Code* of Western Australia that the complaint did not disclose any offence cognisable by the Court.

61 As the Presiding Judge points out, in the schedule to the *Industrial Relations Commission Regulations 1985* there is a provision for an application in Form 1 and a further Form 21 which may have been modified to accommodate the present application. Neither of those forms were used in this case.

62 Whilst it is appreciated that the exercise of jurisdiction under the *Industrial Relations Act 1979* is governed by s 26 which requires the Commission to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, that provision, in my view, would not save the form of summons used in this case which was appropriate for a criminal prosecution leading to a conviction.

63 The application here appears to have been brought under s 83 and s 83A of the *Industrial Relations Act*. Section 83 provides:

> "83. **Enforcement of certain instruments**
>
> (1) Subject to this Act, where a person contravenes or fails to comply with a provision of an instrument to which this section applies any of the following may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the provision."

64 Thereafter in subs (a) to subs (f) various organisations and persons are designated who may bring such an application.

65 By the provisions of s 83(4) of the *Industrial Relations Act*:

> "On the hearing of an application under subsection (1) the industrial magistrate's court may, by order —
>
> (a) if the contravention or failure to comply is proved —
>
> (i) issue a caution; or
>
> (ii) impose such penalty as the industrial magistrate's court thinks just but not exceeding $2000 in the case of an employer, organisation or association and $500 in any other case;
>
> or
>
> (b) dismiss the application."

66 In my view, it is clear from those provisions that to proceed in this case by complaint was wholly inappropriate and could have resulted in the complaint being struck out had an application been made to do so. However, the matter has progressed through to this Court without the point having been taken. I would add that there was no challenge to the complaint in this Court.

67 In the circumstances, therefore, and as the matter has not been argued before us, it is inappropriate to say any more about the matter, except that, as the matter is to be remitted to the Industrial Magistrate to be further dealt with accordingly to law, in my view, this issue should be exposed at least for the assistance of the Industrial Magistrate to whom the matter will ultimately be returned.

68 **PARKER J**: I have had the advantage of reading in draft the reasons of the Presiding Judge with which I respectfully concur.

69 For those reasons the orders proposed by his Honour should be made.

2003 WAIRC 07924

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	JAMES TURNER ROOFING PTY LTD, APPELLANT
	-v-
	CHRISTOPHER LAWRENCE PETERS, RESPONDENT
CORAM	**ANDERSON J (Presiding Judge)**
	SCOTT J
	PARKER J
DATE OF ORDER	WEDNESDAY, 12 MARCH 2003
FILE NO/S	IAC 7 OF 2002
CITATION NO.	2003 WAIRC 07924

Result	Appeal Allowed
Representation	
Appellant	Mr D G Taylor
Respondent	Ms Y D Henderson

Order

Having heard Mr D Taylor (of Counsel) for the Appellant and Ms Y D Henderson (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT:

1. The appeal be and is hereby allowed.
2. That the order of the Industrial Magistrate given on 25th October 2001 be set aside.
3. The matter be remitted to the Industrial Magistrate to be dealt with according to the law in light of the judgment in this matter.

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

[2003] WASCA 24

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	UNITED CONSTRUCTION PTY LTD -V- BIRIGHITTI [2003] WASCA 24
CORAM	**:**	ANDERSON J (PRESIDING JUDGE)
		SCOTT J
		HASLUCK J
HEARD	**:**	3 FEBRUARY 2002
DELIVERED	**:**	27 FEBRUARY 2003
FILE NO/S	**:**	IAC 11 OF 2002
BETWEEN	**:**	UNITED CONSTRUCTION PTY LTD
		Appellant
		AND
		JOHN BIRIGHITTI
		Respondent

Catchwords:

Industrial law - Arrangement to pay employee on a sub-contract basis - Effect of arrangement - Whether still an employee - Entitlement to long service leave under *Long Service Leave Act 1958*, s 8

Courts and judges - Appeals jurisdiction - Industrial Appeal Court - Jurisdiction to hear appeal from Full Bench - Decision of Full Bench that worker an employee for purposes of *Long Service Leave Act* - Appeal on ground that worker an independent contractor - Whether appeal raised question of "construction and interpretation" of *Long Service Leave Act - Industrial Relations Act 1979*, s 90(1)

Legislation:
Industrial Relations Act 1979 (WA), s 85, s 86, s 90, s 96K
Long Service Leave Act 1958 (WA), s 4, s 6, s 7, s 8, s 9(2), s 11
Result:
Appeal dismissed
Category: A
Representation:
Counsel:

Appellant	:	Mr T H F Caspersz and Mr D Brajevic
Respondent	:	Mr G McCorry

Solicitors:

Appellant	:	Blake Dawson Waldron
Respondent	:	Labourline

Case(s) referred to in judgment(s):
Cam & Sons Pty Ltd v Sargent (1940) 14 ALJR 162
Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280
Connelly v Wells (1993) 55 IR 73
Glass v Pioneer Rubber Works of Australia Ltd [1906] VLR 754
Haynes v McNeil (1906) 8 WALR 186
Hollis v Vabu Pty Ltd (2001) 207 CLR 21
Logan v Otis Elevator Co Pty Ltd [1999] IRCA 4
Magrath v Goldsbrough Mort & Co Ltd (1932) 47 CLR 121
Massey v Crown Life Insurance Co [1978] 2 All ER 576
Narich Pty Ltd v Commissioner of Pay-Roll Tax [1983] 2 NSWLR 597
Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16

Case(s) also cited:
Davies v Youngs (WA) Pty Ltd 82 WAIG 1114
Vincent v Commissioner for Taxation 2000 ATC 4490

1 **ANDERSON J (PRESIDING JUDGE)**: This is an appeal from a judgment of the Full Bench delivered on 19 August 2002 in which it dismissed an appeal from the decision of an Industrial Magistrate to award to the respondent a total of $21,711.78 for long service leave entitlements pursuant to the *Long Service Leave Act 1958*. The claim was calculated on the basis of 19 years continuous service. The appellant did not dispute that the respondent had performed work for the appellant for a continuous period of 19 years from January 1981 until retrenchment in January 2000. However, in the proceedings before the Industrial Magistrate the appellant contended that between July 1988 and October 1992 the respondent was not an "employee" of the appellant within the meaning of s 8 of the *Long Service Leave Act.*

2 The relevant provisions of the Act are as follows:

> "4(i) …
>
> **'employee'** means, subject to subsection (3) -
>
> (a) any person employed by an employer to do work for hire or reward including an apprentice or industrial trainee;
>
> (b) any person whose usual status is that of an employee;
>
> …
>
> **'employer'** includes -
>
> (a) persons, firms, companies and corporations; and
>
> (b) …
>
> employing one or more employees;
>
> …
>
> **8. Long Service Leave**
>
> (1) An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer…
>
> (2) Subject to subsections (4) and (5) of this section, an employee who has completed at least fifteen years of such continuous employment, as is referred to in subsection (1) of this section, is entitled to an amount of long service leave as follows -
>
> (a) in respect of fifteen years so completed, thirteen weeks;
>
> (b) in respect of each ten years' continuous employment so completed after such fifteen years, eight and two-thirds weeks; and
>
> (c) on the termination of the employee's employment -
>
> (i) by his death
>
> (ii) in any circumstances otherwise than by his employer for serious misconduct,

> in respect of the number of years of such continuous employment completed since the employee last became entitled under this Act to an amount of long service leave, a proportionate amount on the basis of thirteen weeks for fifteen years of such continuous employment."

3 There are provisions for proportionate entitlement in the event of more than ten years but less than fifteen years' continuous service.

4 It will be seen therefore that if the respondent ceased to be an employee in 1988 and did not again become an employee until 1992 he did not qualify for payment of any long service leave as neither the first period of employment nor the second were of ten years duration.

5 It is therefore yet another case raising the question whether the true legal relationship between the parties was that of employer and employee or principal and independent contractor.

6 There is no question that during the first period of employment, between January 1981 and July 1988, the respondent was the appellant's employee engaged by the appellant under a contract of service. He was paid a salary and all the usual allowances. Neither is it in dispute that after about July 1992 and until his retrenchment the respondent was the appellant's employee. However, the evidence discloses that in about July 1988 there was a conversation or conversations between the respondent and a representative of the appellant after which the respondent ceased to be paid a salary and allowances. Instead, with the assistance of the appellant's accountant invoices were rendered to the appellant by a firm "J & L Birighitti Engineers". The evidence was that this firm was a partnership of which the members were the respondent and his wife Lucy, who also performed work for the appellant. The invoices were in a form devised by the appellant's accountant and were rendered approximately monthly and charged a lump sum for work performed by the respondent and his wife. At first, the invoices detailed the hours worked by each and the lump sum was calculated according to a flat hourly rate, initially $22 per hour for the appellant and $10 per hour for his wife. These hourly rates increased over the years and ultimately the invoices showed very little detail. Many of the later invoices, which were accepted and paid by the appellant, were simply for a lump sum. For example, the invoice of 29 June 1992 was in the following terms:

"Lump sum payment for work undertaken during the month of June 1992	$3,600.00
Less 20% tax	720.00
Total	$2,880.00"

7 The "tax" was the tax withheld under the prescribed payments system applicable to contractors, not PAYE deductions.

8 Although the Industrial Magistrate made no findings as to what were the terms of the arrangement between the respondent and his wife on the one hand and the appellant on the other the evidence is that the respondent and his wife agreed with the appellant, expressly, that they would be paid as sub-contractors, in order that both parties could obtain what were perceived to be the advantages of such an arrangement. The advantages to the respondent and his wife were that they would receive higher remuneration and would pay less tax. The accounting details were not gone into to any great extent but it would appear that it was more advantageous to the respondent for the remuneration earned by him to be received by a partnership between himself and his wife and returned as partnership income. Throughout the period the respondent and his wife kept partnership accounts and did in fact put in partnership tax returns showing their earnings as a distribution of partnership profits after business expenses.

9 Apparently the practice of "sub-contracting" had become rather widespread in the construction industry and may have excited the interest of the income tax authorities. As a result of advice received from its accountants in mid-1992 to the effect that the respondent was not a "true sub-contractor" the appellant decided not to continue this manner of remunerating the respondent and the respondent was told that he was to go back onto wages, which he did. The respondent's wife meanwhile had ceased to perform work for the appellant and was engaged elsewhere.

10 As has been noted the respondent continued in the employ of the appellant until about July 2000 when he was retrenched.

11 The Industrial Magistrate held that in truth and in substance the respondent's status never changed from that of an employee and the Full Bench upheld that decision.

12 The primary contention on behalf of the appellant advanced in the first ground of appeal is that there was an express arrangement between the parties that the appellant would perform his work in the period in question on a sub-contract basis and that this was conclusive of the relationship between the parties unless the sub-contract arrangement was a sham, which it was not. As Mr Caspersz, who appeared for the appellant pointed out, the Industrial Magistrate made no finding that the sub-contract arrangement was a sham and neither did the Full Bench. Both judgments below proceed, or appear to proceed from the premise that there was indeed an express sub-contracting arrangement entered into *bona fide*. The alternative is that the arrangement was entered into dishonestly, without any genuine intention to change the relationship between the parties and for the sole purpose of income tax avoidance. He submitted that there was no evidence upon which any such finding could have been made and no such finding was made. In my opinion, this submission should be accepted.

13 Therefore, it is a case in which there was an express agreement between the parties pursuant to which it was intended that the appellant was no longer to be an employee but instead was to be an independent contractor. If that was the beginning and end of the arrangement it would be a most important if not decisive consideration in deciding whether the relationship of employer and employee had ceased and the relationship of principal and independent contractor had commenced: ***Massey v Crown Life Insurance Co*** [1978] 2 All ER 576 per Lord Denning MR at 580. But there was obviously more to it than that, as the Industrial Magistrate and the Full Bench found. The fact is that the respondent continued to enjoy benefits that were inconsistent with a simple sub-contract relationship. It is well settled that the true relationship of the parties is to be gathered from the effect of the arrangement as a whole and not just from a single term of the arrangement which seeks to put a label on that relationship. ***Massey v Crown Life Insurance Co*** (*supra*) per Lord Denning MR at 579; ***Narich Pty Ltd v Commissioner of Pay-Roll Tax*** [1983] 2 NSWLR 597 at 601, 606. Whilst the parties may have genuinely expressed an intention in one part of their contract to enter into a relationship of principal and independent contractor and may have genuinely desired to do so the question remains whether in point of law they succeeded in doing so. That involves a consideration of all of the terms of the arrangement not just the declaration by the parties that their relationship is one thing or the other. It is the effect of the arrangement as a whole which is decisive and if the effect of the arrangement as a whole is to create (or in this case maintain) the relationship of employer and employee then a statement that the relationship is to be that of principal of independent contractor is of no effect: ***Narich Pty Ltd v Commissioner of Pay-Roll Tax*** (*supra*) at 606.

14 The Industrial Magistrate examined the conduct of the parties in order to reach a conclusion as to the terms and conditions on which they were contracting with one another. As the contract was not in writing and was entered into in circumstances of considerable informality and the evidence as to its formation was very vague the strict rule against the admission of extrinsic

evidence and post-contract conduct in the interpretation of a written contract were not relevant. In the case of informal oral agreements the terms of which are not the subject of direct evidence the content of the arrangement may be inferred by examining events which succeeded the contract and from the course of dealing between the parties themselves, that is to say, their post-contract conduct: ***Haynes v McNeil*** (1906) 8 WALR 186; ***Glass v Pioneer Rubber Works of Australia Ltd*** [1906] VLR 754. As it is put in Lindgren, Carter and Harland: Contract Law in Australia (Butterworths, 1986) at [205]:

> "the formation of agreement will in many cases be inferred from the conduct of the parties. Sometimes there may be no identifiable offer and acceptance because the parties have not expressly discussed the formation of contract but have indicated by their conduct that they did in fact intend to contract. In many cases a more realistic explanation is that by the time a dispute arises, perhaps many years after the alleged contract was entered into, no direct evidence is available of what was said by the parties and yet their conduct is consistent only with the hypothesis that an agreement was in fact made by them."

15 I think it was permissible to examine the conduct of the parties, to see what their agreement was in its entirety. This was done by the Industrial Magistrate and by the Full Bench. I have already referred to the cessation of the payment of wages and allowances and the establishment of a partnership between the respondent and his wife and to the system whereby that partnership rendered accounts to the appellant calculated by reference to a flat hourly rate for work done by both the respondent and his wife which accounts were accepted and paid by the appellant. I have also referred to the fact that this enabled the respondent to submit partnership taxation returns and so on; and to present himself to the Australian Taxation Office as an independent contractor not as an employee and claim and obtain all of the income tax benefits attendant on that status. These facts tend to indicate that the relationship between the parties really was intended to be that of principal and independent contractor. On the other side of the coin, there was no change whatever in the manner in which the respondent performed his work for the appellant. He performed exactly the same duties of a senior supervisor and site administrator. He took on no other business activities and continued to work full time and exclusively for the appellant. All of the respondent's tools and work clothing continued to be provided by the appellant. The respondent continued to be provided with a company utility with all running costs paid for by the appellant. The appellant continued to direct the respondent as to where he should work and as to what work he should do; and there is no evidence that the appellant relinquished control over how he should do the work. The respondent remained at all times under the direction and control of the appellant.

16 I think it was permissible to receive this evidence as evidence of the agreement as a whole and what emerges, it seems to me, is that although the form of remuneration changed there was no other material change in the relationship between the parties. In all other respects the respondent continued to be treated as an employee with the duties and benefits of a senior supervisor acting as the servant of the appellant not on his own behalf. On the whole of the circumstances of the relationship between the parties it was open to the Industrial Magistrate and to the Full Bench to conclude that the relationship of employer and employee was never terminated in point of law. The most important indicia pointing to the continuation of the relationship as one of master and servant is the degree of control which the appellant obviously continued to have and to exercise with respect to the work of the respondent. He was not at liberty to elect not to work at a particular site or on a particular day nor was he at liberty to elect what kind of work to do. There is evidence that at one stage he took a holiday in Phuket during which he was paid. On the whole of the evidence and on the findings below he did what he was told to do, when he was told to do it and the appellant continued to exercise ultimate authority over the manner in which that work was to be performed and gave him at least some benefits (paid holiday, motor vehicle, tools, clothing and equipment) as if he was an employee. He remained essentially part of the appellant's organisation and under the close control of the appellant at all times. The most striking single piece of evidence to this effect is that when the appellant decided to put the respondent back on wages, it did so with little discussion, no negotiation and without demur on the respondent's part. He was simply told that he was going back onto the pay-roll.

17 I would dismiss the first ground of appeal.

18 The only other ground of appeal which was pressed was ground 3 expressed in the following terms:

> "The Full Bench erred in its construction of s 11(1)(b) of the *Long Service Leave Act* which, properly construed, confers a discretion to determine whether the respondent was entitled to any payment for long service leave under the Act even if he was an employee at all material times."

19 The section of the Act referred to is as follows:

> "11(1) An industrial magistrate's court has jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under this Act, including without limiting the generality of the foregoing, questions and disputes -
>
> (a) …
>
> (b) whether and when and to what extent an employee is or has become entitled to long service leave, or payment in lieu of long service leave;"

20 This section does not confer any discretion as to the manner in which an Industrial Magistrate is to exercise the jurisdiction to hear and determine disputes in relation to entitlements to long service leave. It does not confer upon the Industrial Magistrate a discretion to refuse to award long service leave entitlements prescribed in the Act. The purpose of the section is to define the jurisdiction of the Industrial Magistrate's Court, not to prescribe the manner of exercise of that jurisdiction. This ground of appeal must be rejected.

Jurisdiction of this Court

21 Mr McCorry, who appeared for the respondent, submitted that this appeal was incompetent because it did not fall within the ambit of the appeal jurisdiction conferred by s 90(1) of the *Industrial Relations Act 1979* in its amended form. The amendment came into effect on 1 August 2002 and this appeal was instituted on 28 August so that the new provisions must be applied to it. In its amended form the section reads:

> "90(1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in court session -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter;
>
> (b) erroneous in law in that there has been an error in the construction or interpretation of any act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard."

22 It is accepted on all sides that s 90(1)(a) and s 90(1)(c) are irrelevant and that this Court can only entertain the appeal if the decision of the Full Bench involved "an error in the construction or interpretation of" the *Long Service Leave Act*.

23 Mr McCorry contended that, putting to one side the ground of appeal based upon s 11(1)(b) of the Act, the decision of the Full Bench involved no matter of construction or interpretation. I think, for myself, that this submission must be accepted. There was no dispute between the parties as to the true meaning of the Act. Both parties accepted that whether or not the respondent was entitled to long service leave depended upon whether or not he was an employee between 1988 and 1992 and this question depended not on any point of statutory construction or interpretation but on common law principles. The question was not whether "employee" had a special meaning in the *Long Service Leave Act* but whether, according to the common law rules under which the character of the relationship was to be determined, the respondent was the appellant's employee. Putting that another way, it was accepted on both sides that if the application of the common law rules to the facts of this particular case resulted in a finding that the respondent was the appellant's employee in the years in question the respondent was entitled to long service leave calculated in accordance with the formula set out in the Act.

24 I agree that the appeal is incompetent, so that even if I am wrong as to the merits of the appeal, I am of the opinion that the appeal should be dismissed.

25 **SCOTT J**: In this matter I have had the opportunity of reading in draft the reasons to be published by the presiding Judge.

26 I agree that this appeal should be dismissed for reasons that his Honour gives.

27 In relation, however, to the jurisdictional considerations referred to by his Honour, I take a different view.

28 Section 90(1) of the *Industrial Relations Act 1979* at the relevant time provided:

> "90. **Appeal to Court from Commission**
>
> (1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session —
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter;
>
> (b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,
>
> but upon no other ground."

29 In my view, the decision in this case turns upon the definition of "employee" in s 4 of the *Long Service Leave Act 1958* which is defined in the following way:

> **"'Employee'** means, subject to subsection (3) —
>
> (a) any person employed by an employer to do work for hire or reward including an apprentice or industrial trainee;
>
> (b) any person whose usual status is that of an employee;
>
> (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
>
> (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee."

30 The first thing to note about the definition of "employee" is that it is not an inclusive definition, but a defined term for the purposes of the *Long Service Leave Act*. In my view, the issue as to whether the respondent was an employee at the relevant time can only be determined by reference to the definition of that term in the Act. The interpretation, of course, may be assisted by the construction of the word "employee" at common law, but at the end of the day it is the construction of the statutory provision which is critical to this decision.

31 It follows, in my view, that the Industrial Appeal Court has jurisdiction to entertain this appeal because the issue turns upon the definition of "employee" in the *Long Service Leave Act* and is therefore a question of construction or interpretation of that Act.

32 In view of the fact that s 90(1) of the *Industrial Relations Act* is a jurisdictional provision, in my opinion, it should not be construed narrowly so as to restrict the right of appeal: ***Magrath v Goldsbrough Mort & Co Ltd*** (1932) 47 CLR 121 at 134. In my view, the amended section was formulated in such a way as to preserve the right of appeal to any party coming within its terms properly construed. It may cause injustice if this section is interpreted narrowly and in such a way as to confine the right of appeal to this Court.

33 **HASLUCK J**: The appellant, United Construction Pty Ltd, employed the respondent, John Birighitti, in 1982 to work in the appellant's business at Kwinana as Master of Apprentices and General Foreman. The company was involved in the fabrication of pipelines, tanks and conveyers. Repairs were effected in the workshop. At a later stage his wife was employed by the company in preparing invoices and timesheets.

The 1988 arrangement

34 In July 1988 the respondent entered into an arrangement with the appellant whereby he would be paid an hourly rate following the submission of monthly invoices.

35 In the course of the hearing before the Industrial Magistrate, the circumstances giving rise to this arrangement were described by the company's former secretary, Mr Carmignani, in this way:

> "Can you tell us what happened in or about June of 1988 in relation to the earnings of ---?--- Yeah. He went from wages as PAYE to what they call --- as a subcontract system where he was paid by the hour, so much an hour. No tax was deducted from his salary or his income and ---
>
> How did that arrangement come to --- come into existence? --- Well, it was decided by the directors to try and get some of the workers onto subcontract whereby there was a saving for both parties. For United Construction there was no holiday pay, sick pay, workers comp payments. Super wasn't there at the time so --- and that sort of thing there. For the employee you had a way of minimising his tax by splitting the income with his wife."

36 Mr Carmignani's evidence in chief continued in this way:

> "And what happened in relation to Mr Birighitti? --- He was offered this system of payment and he asked me and I --- I said "Yes. It could be a good way of doing it, and you pay less tax as well, and you'd have your wife included at the time" when she wasn't working at Alcoa with John, 'and it was a way of minimising your tax.'
>
> Now, there's been some evidence about a business name registration. What, if anything --- ? --- J & L---
>
> --- can you tell us about that? --- I think --- I can't remember, but I think I registered his business name, J & L Birighitti Engineering, for this purpose here. So his payment was made to this company --- to this business name, rather than to his sole name."

37 Mr Carmignani also provided evidence to this effect:

> "You have given evidence of how what Mr Birighitti was doing down at Alcoa when he was receiving wages? --- Yeah.
>
> To your knowledge was there any change in that when this payment system came into effect? --- What he was actually working as --- what his work was?
>
> Yes? --- No, not really. The only thing is he had his wife helping him. They put her with him to help him because it was getting too much for one person to do all the paperwork, but otherwise he did the same thing. Yeah."

38 In October 1992 the appellant was minded to end the "sub-contract" arrangements and thereafter the respondent was treated as an employee with taxes being deducted from his wages by the appellant. Some years later his position was made redundant and he was retrenched on 21 January 2001.

39 It was not in dispute that upon the termination of his employment the respondent had been associated with and remunerated by the appellant for a period of 19 years. However, a difference of opinion arose between the parties as to whether the respondent was entitled to certain payments in respect of long service leave. The appellant contended that from July 1988 until about October 1992 the respondent was employed as a sub-contractor, with the result that the four year period allegedly served in that capacity was not a qualifying period for the purposes of long service leave entitlements.

The proceedings

40 The respondent commenced proceedings pursuant to s 11 of the *Long Service Leave Act 1958* upon the basis that he had not been paid long service leave entitlements in accordance with s 8 and s 9(2) of the Act. He alleged in par 6 of his particulars of claim dated 17 July 2001 that "At all times between 1988 and 1992, notwithstanding payment being made as a contractor, the Claimant remained an employee of the Respondent."

41 The particulars of claim go on to allege that on termination of his employment the respondent had completed 19 years continuous service with the appellant and was entitled, pursuant to the *Long Service Leave Act* to 16.47 weeks pay in *lieu* of long service leave or, in the alternative, he was deemed to have completed 15 years continuous service and was entitled to 13 weeks pay in *lieu* of long service leave. A claim was advanced in the sum of $19,223.68 (in the alternative $15,173.52).

42 The appellant denied that the respondent had served the requisite minimum period of 15 years continuous service in order to qualify for long service leave. It alleged that during the contested period of four years between 1988 and 1992 he was not an employee of the appellant. Further, when the matter was brought on for hearing, the appellant submitted that the payments made to the respondent during the relevant four year period were inclusive of long service leave benefits and should be brought to account as the payments made were intended to cover all leave obligations.

43 In his reasons for decision handed down on 10 January 2002 the learned Industrial Magistrate held that the respondent had at all times been an employee and was entitled to long service leave benefits. The appellant was required to pay long service leave entitlements plus interest in the total amount of $21,711.78. When the matter was subsequently taken on appeal the Full Bench affirmed the decision below.

The appeal

44 By its notice of appeal dated 9 September 2002 the appellant seeks an order quashing the decision of the learned Industrial Magistrate or, alternatively, an order that the matter be remitted for consideration as to whether any amounts paid by the appellant during the relevant period should be taken into account under s 7(2) of the *Long Service Leave Act* or, alternatively for the exercise of a discretion under s 11(1)(b) of the Act.

45 I note in passing that at the hearing of the appeal counsel for the appellant abandoned the ground of appeal set out in par 2 of its notice of appeal. Accordingly, it is only necessary to give consideration to the grounds of appeal set out in par 1 and par 3 of the notice of appeal. For ease of reference, I will continue to refer to the ground in par 3 as the third ground of appeal.

46 The appellant contends in its first ground of appeal that the Full Bench erred in its interpretation of the *Long Service Leave Act* when it determined that the respondent was, at all material times, an employee for the purposes of the Act. Particulars in support of this ground of appeal are set out in sub-paragraphs (i) to (viii) and bring under notice various facets of the relationship between the parties during the relevant four year period including principally that the respondent, knowingly and willingly, entered into an arrangement lasting over four years pursuant to which he registered a business name and submitted invoices to the appellant for work done by he and his wife. It is said further that in the absence of any finding that the arrangement was a sham, the arrangement in question was wholly inconsistent with a finding that the respondent was an employee of the appellant.

47 By its third ground of appeal the appellant contends that the Full Bench erred in its construction of s 11(1)(b) of the *Long Service Leave Act* which, properly construed, confers a discretion to determine whether the respondent was entitled to any payment for long service leave under the Act even if he was an employee at all material times.

48 A question arose at the hearing as to whether the Industrial Appeal Court had jurisdiction to deal with an appeal based upon such grounds. By an amendment to s 90 of the *Industrial Relations Act* that took effect upon 1 August 2002, shortly before the present appeal was instituted, an appeal can only be brought in the circumstances of the present case upon the ground that the decision below was erroneous in law in that there has been an error in the construction or interpretation of the *Long Service Leave Act*. I will come back to this issue later. For the moment, I will assume that the two grounds of appeal relied upon can be advanced by the appellant. It will therefore be useful to begin by looking at the statutory provisions and legal principles bearing upon the matters brought into issue by the grounds of appeal.

Statutory provisions

49 Section 8(1) of the *Long Service Leave Act* provides that an employee is entitled in accordance with, and subject to, the provisions of the Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer. By s 4, the term "employee" means, subject to certain qualifying provisions, any person employed by an employer

to do work for hire or reward including an apprentice or industrial trainee. It means also any person whose usual status is that of an employee.

50 Section 6 deals with what constitutes continuous employment. By s 6(1)(a) employment of an employee shall be deemed to include any period of absence from duty for (i) annual leave; (ii) long service leave; or (iii) public holidays or half holidays, or, where applicable to the employment, bank holidays. By s 6(1)(c) it is also deemed to include any period following any termination of the employment if such termination has been made merely with the intention of avoiding obligations under the Act in respect of long service leave.

51 Section 6(2) provides that for the purposes of the Act, the employment of an employee whether before or after the commencement of the Act shall be deemed to be continuous notwithstanding certain specified events such as the transmission of a business or any absence of the employee from his employment if the absence is authorised by his employer.

52 Section 7(2) provides that any long service leave or payment in *lieu* thereof granted under any long service leave scheme and irrespective of the Act to an employee in respect of any period of continuous employment with his employer shall be taken into account in the calculation of the employee's entitlement to long service leave under the Act.

53 By s 8(2) an employee who has completed at least 15 years of continuous employment with one and the same employer is entitled to an amount of long service leave to the extent set out in that and following provisions.

54 Section 11 of the Act is expressed in these terms:

> "(1) An industrial magistrate's court has jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under this Act, including without limiting the generality of the foregoing, questions and disputes -
>
> (a) as to whether a person is or is not an employee, or an employer, to whom this Act applies;
>
> (b) whether and when and to what extent an employee is or has become entitled to long service leave, or payment in lieu of long service leave;
>
> (c) as to the ordinary rate of pay of an employee;
>
> (d) as to whether the employment of the employee was or was not ended by an employer in order to avoid or to attempt to avoid liability for long service leave; and
>
> (e) with respect to a benefit in lieu of long service leave under an agreement made under section 5.
>
> (2) Jurisdiction granted under subsection (1) is exclusive of any other court except where an appeal lies to that other court."

55 It emerges from a consideration of these provisions that, on one view of the matter, the task of the Industrial Magistrate was to determine whether the respondent was an employee within the meaning of the Act and then to determine whether he had been in continuous employment with the same employer, namely, the appellant, for the minimum requisite period of 15 years. On this view of the matter, as a line of argument going to the jurisdictional issue, it might be said that in circumstances in which both parties accepted that the respondent was undoubtedly an employee before and after the relevant four year period, it was not necessary to resolve any issue of interpretation in that regard. It was only necessary for the Industrial Magistrate to make a finding of fact as to whether there had been continuity of employment.

56 Nonetheless, it is significant that the issue raised by par 6 of the respondent's particulars of claim was whether the respondent remained an employee of the appellant during the relevant four year period. Certainly, it is apparent from the reasoning of the Industrial Magistrate and of the Full Bench that it was thought necessary to determine whether he was an employee during that period. Accordingly, it will be useful to look at some of the decided cases concerning the distinction between an employee and an independent contractor.

Legal principles

57 Until comparatively recent times disputed cases of employment were usually resolved by reference to the so-called "control test", namely, whether the person said to be the employer can direct the person claimed to be a worker not only as to what the worker does but also as to how he or she does it. Increasing dissatisfaction with a test of this kind appears to underlie the observations of various members of the High Court in ***Stevens v Brodribb Sawmilling Company Pty Ltd*** (1986) 160 CLR 16. Mason J observed at 24 that the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. It is merely one of a number of indicia which must be considered in the determination of such an issue. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee. He went on to say it is the totality of the relationship between the parties which must be considered.

58 A similar approach is reflected in the judgment of Wilson and Dawson JJ in the same case. They said at 36 that in many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. However, that is not now a sufficient or even an appropriate test in its traditional form in all cases because in modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and yet nevertheless be a servant. This has led to the observation that it is the right to control rather than its actual exercise which is the important thing. But in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which the work is performed for another.

59 These two members of the High Court went on to say that any attempt to list the relevant matters may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf. The answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.

60 The observations of Wilson and Dawson JJ were cited with approval by Kirby J of the New South Wales Court of Appeal (as he then was) in ***Connelly v Wells*** (1993) 55 IR 73. Further, in ***Hollis v Vabu Pty Ltd*** (2001) 207 CLR 21 a majority of the High Court adopted a similar approach. In that case, the majority held that bicycle couriers performing work for a courier firm should not be classified as independent contractors. The majority noted that the couriers were not providing skilled labour, they had little control over the manner of performing their work, they were presented to the public in their uniforms and by the use of the Vabu logo as emanations of Vabu and their finances were superintended by Vabu. It followed that the relationship between Vabu and the bicycle courier who had caused an injury to a third party was that of employer and employee.

61 The majority said at par 47:

> "In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them

> and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independent in the conduct of their operations."

62 These previously decided cases indicate that care must be exercised in applying general precepts to particular circumstances. However, the decided cases strongly suggest that in having regard to the totality of the relationship between the parties the control test remains relevant and an important factor will be whether a person is acting on his own behalf or simply as a representative of the putative employer's enterprise.

63 The decided cases indicate also that the nature of the relationship between the parties in an employment situation must be resolved not by reference to the label used but by an examination of the substance of the matter.

64 For example, in ***Cam & Sons Pty Ltd v Sargent*** (1940) 14 ALJR 162 Dixon J said that the Court should look at the substance of the transaction and not treat a written agreement, which was designed to disguise its real nature, as succeeding in doing so if it amounted merely to a cloud of words and, without really altering the substantial relations between the parties, described them by elaborate provisions expressed in terms appropriate to some other relation.

65 In ***Massey v Crown Life Insurance Co*** [1978] 2 All ER 576 the appellant was employed as a branch manager of an insurance company under two contracts. Under one contract he was treated as an employee and under the other as a general agent. The Court of Appeal held that the appellant could not say that for the purpose of claiming tax advantages he was not an employee and then say that for the purpose of claiming compensation or unfair dismissal he was an employee. The agreement whereby he was appointed an agent was held to be a genuine transaction which had been aimed to effect, and did in fact effect, a change in the appellant's status from that of an employee to that of a self-employed person. He was therefore not an employee within the meaning of the subject legislation and could not bring a claim for unfair dismissal.

66 Lord Denning said this at 579:

> "A claim for unfair dismissal was quite admissible if he was employed by the company under a contract of service, but not if he was employed under a contract for services. So here he was claiming as a servant whereas, for the last two years, he had been paid on the basis that he was an independent contractor.
>
> The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it."

67 Lord Denning went on to say later that when the situation is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be. So the way in which they draw up their agreement and express it may be a very important factor in defining what the true relationship was between them. If they declare that he is self-employed, that may be decisive.

68 It was common ground in the present case (as appears from the evidence of Mr Carmignani mentioned earlier) that the relationship between the parties was informal, both as to the initial contract of employment and as to the subsequent arrangement in 1988 whereby the respondent and his wife were remunerated by submitting invoices to the appellant. Unlike the situation in ***Massey v Crown Life Insurance Co*** (*supra*), being a case upon which the appellant in the present case relied, the appellant was not able to point to any agreement drawn up between the parties which could be used as a point of reference in resolving any ambiguity as to the nature of their relationship. Thus, essentially, the Industrial Magistrate, in reviewing the totality of the relationship, was obliged to take account of a variety of factors bearing upon the employment issue, and purported to do so. The Full Bench followed a similar approach.

69 Against this background I must now return to the grounds of appeal.

First ground of appeal

70 The first ground of appeal is to the effect that the Full Bench erred in its interpretation of the *Long Service Leave Act* when it determined that the respondent was at all material times an employee of the appellant for the purposes of the Act.

71 I noted in earlier discussion that the appellant supported this contention by reference to a number of matters specified in the notice of appeal including that the respondent, knowingly and willingly, entered into an arrangement lasting over four years whereby he held himself out as a partner in a business partnership, he was paid in response to invoices submitted to the appellant, he and his wife paid income tax and claimed expenses as contractors and not employees.

72 In essence, counsel for the appellant submitted that the arrangement made by the parties in 1988 for the respondent to be paid as an independent contractor should be treated as decisive because no specific finding had been made by either the Industrial Magistrate or the Full Bench that the arrangement in question was a sham. Long service leave is a benefit to which an employee does not become entitled until he has completed 15 years of continuous service. The respondent had failed to discharge his onus to establish that he was an employee during the relevant four year period, and therefore had failed to establish that he had completed 15 years of continuous service.

73 This brings me to the reasoning of the Full Bench and to the principal reasons for decision provided by his Honour the President P J Sharkey. The President reviewed the evidence and the findings of the learned Industrial Magistrate. It is not necessary for present purposes to summarise the findings in their entirety. It emerges from the President's review that the appellant, on the evidence of Mr Carmignani, was keen to introduce the tax minimisation scheme. However, apart from the registration of a business name and the preparation of invoices, there was no evidence that the respondent was running a business or regarded himself as being free to work for anyone else without resigning from the appellant company. The Industrial Magistrate found that the method of payment made in July 1988 was for the purpose of expediency on the part of the appellant and for tax minimisation on the part of the respondent, and although the respondent was for that purpose described as a sub-contractor, he remained, in fact, an employee and was so for the duration of his employment with the appellant.

74 President Sharkey then referred to a number of principles bearing upon the question of whether the respondent could be characterised as an employee during the relevant four year period. He referred to ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (*supra*) and other cases concerning this issue. Having regard to ***Connelly v Wells*** (*supra*) he noted that in circumstances such as the present where there was no written contract to express the intention of the parties it was necessary to look at the conduct of the parties and to consider the totality of the contract in order to ascertain its true nature. He concluded that the control test remains the soundest guide in determining whether the relationship between the parties is that of employer and employee but it should not be regarded as the sole criterion. It is necessary to have regard to a range of indicia concerning such matters as the provision of tools and equipment and the existence of books and accounts for the partnership. He distinguished ***Massey v Crown Life Insurance Co*** (*supra*) upon the basis that in this case the avowed objective of conferring tax benefits had been initiated by the employer. The plan of action was later unilaterally re-characterised by the employer as a contract of employment shorn of tax benefits.

75 It follows from my earlier observations on the law that, to my mind, the views expressed by President Sharkey were consistent with the definition of the term "employee" in the *Long Service Leave Act* and with the principles reflected in previously decided cases. The President did not refer to the decision of the High Court in ***Hollis v Vabu Pty Ltd*** (*supra*). However, it is

apparent from my review of the decided cases that the reasoning of the High Court in ***Hollis v Vabu Pty Ltd*** (*supra*) is consistent with the views expressed by the President. Accordingly, to this point, I am not persuaded that the reasoning of the Full Bench revealed a misunderstanding of the relevant principles of law or that it erred in its interpretation of the *Long Service Leave Act*.

76 According to counsel for the appellant, in circumstances where the parties had applied their minds to a change of some sort in the relationship in 1988, the crucial question was whether sufficient weight had been given to the evidence that there was a common intention to effect a change. In the absence of a finding that the arrangement was a sham, counsel for the appellant argued, it had to be accepted that the avowed intention of the parties to proceed upon the basis that the respondent was an independent contractor should be treated as decisive. A subjective intention that the respondent remain as an employee for purposes other than implementation of the tax objective should be disregarded.

77 I am not persuaded that this ground of appeal has been made out. In my view, it was not necessary for the Industrial Magistrate or for the Full Bench to make an explicit finding that the arrangement was a sham. It emerges from my review of the decided cases that both the Industrial Magistrate and the Full Bench were entitled to have regard to the totality of the relationship between the parties and to examine various indicia suggesting the presence of a master and servant relationship before moving to a conclusion as to how the relationship should be characterised. It is apparent from the various reasons for decision that the task was approached in that manner and with a view to determining what was the substance of the relationship. In effect, the Full Bench concluded, correctly in my view, that work undertaken by the respondent during the relevant four year period was not undertaken on his own behalf but as a representative of the employer's enterprise with the result that he should be regarded as an employee. To echo Lord Denning in ***Massey v Crown Life Insurance Co*** (*supra*), the true relationship of the parties was that of master and servant and the parties could not alter the truth of that relationship by putting a different label on it.

78 A conclusion of the kind I have just described was open on the evidence and I am therefore not persuaded that the Full Bench erred in its interpretation of the *Long Service Leave Act* when it determined that the respondent was an employee during the relevant four year period.

Third ground of appeal

79 The third ground of appeal is that the Full Bench erred in its construction of s 11(1)(b) of the *Long Service Leave Act* which, properly construed, confers a discretion to determine whether the respondent was entitled to any payment for long service leave under the Act even if he was an employee at all material times.

80 I remind myself that s 11(1)(b) of the Act requires the Court to make findings of fact and law in relation to "whether and when and to what extent an employee is or has become entitled to long service leave or payment in *lieu* of long service leave".

81 Counsel for the appellant submitted that it could be inferred from the payments made to the respondent that he received payments equivalent to at least what he would have received on account of accrual for long service leave during the period that he was engaged as a contractor. Supplementary written submissions were provided to the Industrial Appeal Court in the course of argument with a view to demonstrating that the amount actually earned by the respondent during the relevant four year period exceeded what he would have earned as a staff employee at the relevant time.

82 This set the scene for submissions directed to s 7(2) of the Act whereby any leave in the nature of long service leave or payment in *lieu* thereof, granted, whether before or after the coming into operation of the *Long Service Leave Act*, under any long service leave scheme to an employee in respect of any period of continuous employment with his employer shall be taken into account in the calculation of the employee's entitlement to long service leave or payment in *lieu*.

83 When the payments made to the respondent were considered within the framework of s 7(2) and s 11(1)(b), counsel argued, it became apparent that a determination would have to be made by the Industrial Magistrate as to how certain payments should be regarded, for it would be contrary to public policy to allow the respondent to have the benefit of both a favourable tax position as a contractor, and benefits under the Act as an employee. A determination of this kind imported an element of value judgment and thus, in determining to what extent the employee had become entitled to payment in *lieu* of long service leave in these circumstances, the Industrial Magistrate was, in effect, exercising a discretionary power. The Full Bench had erred in misconstruing the nature of the power allowed to the Industrial Magistrate.

84 As the learned Industrial Magistrate noted, and as the Full Bench affirmed, there was no evidence that the parties turned their minds to long service leave when the arrangement of 1988 was entered into or at any time in the course of the existence of the arrangement. The term "scheme" in s 7(2) requires the parties to come up with a coherent plan directed to the issue of long service leave or payment in *lieu* thereof and the evidence does not support a conclusion that this course of action was pursued.

85 Where the parties to a contract of employment have agreed that a sum of money will be paid and received for express purposes it is questionable whether the employer can claim subsequently that payments made pursuant to the contractual obligation can be relied upon in satisfaction of entitlements arising outside the agreed purpose of the payment: ***Logan v Otis Elevator Co Pty Ltd*** [1999] IRCA 4.

86 However, for present purposes, it is not necessary, in my view, to review the evidence bearing upon this aspect of the matter in order to resolve the issue raised by the third ground of appeal. I am of the view that s 11(1)(b) does not in its terms purport to confer a discretionary power to determine whether the respondent was entitled to any payment for long service leave. It may prove necessary in certain cases for some careful calculations to be made as to the extent of the entitlement, if any, in a particular case but the careful exercise of a power to award relief in that manner does not, of itself, establish that the Industrial Magistrate is empowered to exercise a discretion.

87 It follows that I am not prepared to allow the appeal on this ground.

Jurisdictional issue

88 I indicated in my introductory observations that an issue was raised at the hearing as to whether the Industrial Appeal Court had jurisdiction to deal with an appeal upon the grounds reflected in the notice of appeal. In dealing with this issue it will be useful to look briefly at the relevant provisions of the *Industrial Relations Act 1979* and some recent amendments to the same.

89 Section 85 of the *Industrial Relations Act* deals with the constitution of the Western Australian Industrial Appeal Court, being a Court consisting of four members. The members of the Court shall be such Judges as the Chief Justice of Western Australia shall from time to time nominate to be members of the Court. Section 86 provides that subject to the Act, the Court has jurisdiction to hear and determine appeals under s 90 and s 96K. It is not necessary to look at s 96K for present purposes.

90 Until comparatively recent times s 90(1) provided that, subject to the section, an appeal lies to the Industrial Appeal Court in the manner prescribed from any decision of the President, the Full Bench or the Commission in Court Session on the ground that the decision is erroneous in law or is in excess of jurisdiction but upon no other grounds.

91 On 19 February 2002 the Minister for Consumer and Employment Protection introduced in the Legislative Assembly the Labour Relations Reform Bill 2002 which reflected a considerable number of proposed amendments to the *Industrial Relations Act*. In the course of his second reading speech the Minister referred to amendments affecting the Industrial Appeal Court and observed that under the new legislation, the Industrial Appeal Court's role would be limited to important legal and jurisdictional matters. Further, the Court will be required to dismiss an appeal that is technically correct, if the Court finds that the appellant has not suffered an injustice. The reforms were intended to ensure that the discretionary exercise of power by the Industrial Relations Commission was not overturned by the Court unless there was some significant specified error. This would reduce the increasing tendency to legal technicality that detracts from the proper role of the commission in conciliating and arbitrating industrial matters in a practical manner.

92 The *Labour Relations Reform Act 2002*, in so far as it affected s 90 of the *Industrial Relations Act*, took effect on 1 August 2002, that is to say, shortly before the appeal was instituted in the present case. The former s 90(1) was replaced by a new provision which now reads as follows:

> "(1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter;
>
> (b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,
>
> but upon no other ground."

93 It is apparent that in the context of the present case the question that arises is whether, having regard to the new s 90(1)(b) the present appeal is advanced upon the ground that a decision of the Full Bench is erroneous in law in that there has been an error in the construction or interpretation of the *Long Service Leave Act*. I note in passing that the grounds of appeal in the present case have clearly been prepared with an eye to the restrictions reflected in the new provision. The first and third grounds of appeal assert that the Full Bench erred in its interpretation of the *Long Service Leave Act*.

94 Statutory provisions have frequently sought to limit the right of appeal from specialised tribunals with a view to ensuring that the tribunal is not impeded in the exercise of its functions and that it becomes the principal arbiter of disputes within its own field. However, the principles according to which the jurisdiction of the Appeal Court is limited are not always easy of application. Distinctions between a question of fact and a question of law can be elusive. The question of what constitutes an error of law has been considered by the courts on various occasions.

95 In ***Collector of Customs v Agfa-Gevaert Ltd*** (1996) 186 CLR 389 an appeal was brought against a decision of the Administrative Appeals Tribunal that held that certain goods were not free of import duty. The right of appeal was limited to appeals on questions of law. The principal question in the appeal was whether the Full Court erred in finding that it is an error of law to construe a phrase in a legislative instrument by giving a trade meaning to some words in the phrase and the ordinary meaning to the rest of the words in the phrase.

96 The Tribunal had found that the phrase "silver dye bleach reversal process" in a tariff concession order had no technical or trade meaning but that the words "silver dye bleach process" did have such a meaning. The Tribunal construed the composite phrase by reference to the technical or trade meaning of "silver dye bleach process" and the ordinary meaning of "reversal". The High Court held that the Tribunal's construction involved no error of law. It held that it was sufficient to raise a reviewable question of law that the composite phrase was identified as being used in a sense different from that which it had in ordinary speech.

97 In the course of a joint judgment the High Court observed at 395 that in ***Collector of Customs v Pozzolanic Enterprises Pty Ltd*** (1993) 43 FCR 280 five general propositions had been identified as bearing upon the distinction between law and fact in a statutory context. The five general propositions were as follows:

> "1. The question whether a word of phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.
>
> 2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.
>
> 3. The meaning of a technical legal term is a question of law.
>
> 4. The effect or construction of a term whose meaning or interpretation is established is a question of law.
>
> 5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law."

98 The High Court went on to observe that in ***Collector of Customs v Pozzolanic Enterprises Pty Ltd*** (*supra*) the Full Court had qualified the fifth proposition. The High Court said that, when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or do not is one of fact. The High Court said further that such general expositions of the law were helpful in many circumstances. But they lost a degree of their utility when, as in the case before the High Court, the phrase or term in issue was complex or the inquiry that the primary decision-maker embarked upon was not clear.

99 Let me now apply reasoning in these cases to the circumstances of the present case. Section 90(1) in its amended form clearly reflects a parliamentary intention to limit the jurisdiction of the Industrial Appeal Court to certain prescribed areas of disputation and that intention must be respected. For myself, I cannot see that the new phrase "erroneous in law" represents any significant departure from the former concept of "error in law". The term "erroneous in law" seems to have been used principally so that the grammar conforms to the structure of the provision.

100 It follows from this view of the matter that the restriction intended to be imposed is to be found principally in the following words "in that there has been an error in the construction or interpretation of any Act…". This clearly suggests that it is not enough for the prospective appellant to point to some error of law according to common law principles. That which is said to be "erroneous in law" must be linked to the presence of a statutory provision which purports to govern the situation.

101 Thus, in the present case, counsel for the respondent contended, as to the first ground of appeal, that the requirements of s 90(1)(b) of the *Industrial Relations Act* had not been satisfied. In essence, he submitted that in the context of the present case the question of whether the respondent was an "employee" during the relevant period ultimately had to be resolved by common law principles of the kind reflected in the decided cases mentioned earlier with the result that the decision appealed from was not erroneous in law in that there had been an error in interpreting the *Long Service Leave Act*. In any event, once it was

accepted that the respondent was an employee initially the only issue remaining was the factual question of whether there had been any change in his circumstances sufficient to interrupt the requirement of continuity.

102 As to the first ground of appeal, I recognise that much of the reasoning of the Full Bench is devoted to a review of common law principles bearing upon the contentious issue. Nonetheless, it is quite clear that both the Industrial Magistrate and the Full Bench were conscious that at the end of the day the operative point of reference was the definition of "employee" in the *Long Service Leave Act*. The issue presented to the Industrial Magistrate by the respondent's particulars of claim at the outset was whether he could be characterised as an employee within the meaning of the *Long Service Leave Act* during the relevant four year period. It is well known that in the field of industrial legislation including statutes concerning workers compensation that special and extended meanings are given to terms bearing upon master and servant relationships. Accordingly, a term such as "employee" cannot be regarded simply as a term with an ordinary meaning so that, in accordance with proposition two of the ***Collector of Customs***' case mentioned earlier, the ordinary meaning of the word can be regarded as a question of fact.

103 In the circumstances of the present case, I consider, having regard to the propositions set out in the ***Collector of Customs***' case, that the meaning of the term "employee" as it is used in the *Long Service Leave Act* is a technical legal term which should be characterised as a question of law. It was not possible ultimately to resolve that question of law without being conscious of and giving proper weight to the way in which the term "employee" was defined and used in the *Long Service Leave Act*. Likewise, it was not possible to determine whether there had been sufficient continuity of employment without taking account of and construing the provisions concerning that concept set out in s 6 of the *Long Service Leave Act.*

104 It follows that, in my view, the Industrial Appeal Court has jurisdiction to deal with the first ground of appeal upon the basis that it is an appeal against a decision which is said to be erroneous in law in that there has been an error in the interpretation of the *Long Service Leave Act*.

105 Similar considerations apply when I turn to a consideration of the third ground of appeal. What I have just said in respect of the term "employee" applies in this context also. Additionally, in this case, a question was raised as to the nature of the power being exercised by the Industrial Magistrate under s 11 of the *Long Service Leave Act*. That issue could only be resolved by close attention to the language used in the relevant statutory provision. It therefore seems to me that this too represented a challenge to a decision which was said to be erroneous in law in that there has been an error in the interpretation of the legislation in question.

Summary

106 I consider that the Industrial Appeal Court has jurisdiction to deal with the appeal instituted by the notice of appeal dated 9 September 2002. However, for the reasons previously given, I consider that the appeal should be dismissed.

2003 WAIRC 07909

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	UNITED CONSTRUCTION PTY LTD, APPELLANT
	-v-
	JOHN BIRIGHITTI, RESPONDENT
CORAM	**ANDERSON J (Presiding Judge)**
	SCOTT J
	HASLUCK J
DATE OF ORDER	TUESDAY, 11 MARCH 2003
FILE NO/S	IAC 11 OF 2002
CITATION NO.	2003 WAIRC 07909

Result	Appeal dismissed.
Representation	
Appellant	Mr T H F Casperz & Mr D Brajevic (both of Counsel)
Respondent	Mr G. McCorry

Order

Having heard Mr T H F Casperz and Mr D Brajevic (both of Counsel) for the Appellant and Mr G McCorry on behalf of the Respondent, THE COURT HEREBY ORDERS THAT:

The Appeal be dismissed

(Sgd.) JOHN SPURLING,

[L.S.] Clerk of the Court.

FULL BENCH—Appeals against decision of Commission—

2003 WAIRC 07804

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	CLINT EDWARDS, APPELLANT
	- and -
	P G DORN, R PRINCI & M TOLICH TRADING AS NAVAL BASE GARDEN SUPPLIES AND CIVIL AND EARTHMOVING CONTRACTORS OF KWINANA PTY LTD, RESPONDENTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 27 FEBRUARY 2003
FILE NO/S.	FBA 45 OF 2002
CITATION NO.	2003 WAIRC 07804

Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr M Cox (of Counsel), by leave
Respondent	Mr R Collinson (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") against the decision of the Commissioner at first instance made on 23 August 2002 in matter No 1626 of 2001.

2 The decision appealed against (see page 31 of the appeal book (hereinafter referred to as "AB")) is an order made on 23 August 2002 dismissing an application made by the above named appellant.

GROUNDS OF APPEAL

3 The amended grounds of appeal are as follows (see pages 10-18 (AB)):-

"1. The Learned Commissioner erred in the exercise her discretion by dismissing the application to substitute the name of the respondent to the unfair dismissal application. The Learned Commissioner's error was based on—

1.1 an error of law, namely an incorrect identification of the applicable legal principles and or an erroneous application of the relevant legal principles to the facts;

1.2 a failure to take into account or give due weight to relevant considerations, and;

1.3 findings of fact that were based on a misunderstanding of counsel's submissions, and or based on facts that did not exist and or based on irrelevant considerations.

1. The Learned Commissioner based her exercise of discretion on an error as to the relevant law or application of the relevant law to the facts of the application to substitute the respondent.

PARTICULARS

1.1 The Learned Commissioner did not correctly identify and or apply the principles set down in Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 173 CLR 231 and discussed and applied in Parveen Kauer Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375 (WAIRC Full Bench) and Woodings (as Receiver and Manager of Elcos Australia Ltd) (in Liq)) v Stevenson and Jefferson (as Liquidators of Elcos Australia Pty Ltd (In Liq)) [2001] WASC 174 (Decision paras 10—12, see also Transcript pp 17-18, 23, 25-26).

1.2 The Learned Commissioner erred in placing too much emphasis on the finding that the applicant and or his solicitors ought to have known the correct identity of the employer prior to filing the unfair dismissal application, which finding was erroneous in any event (Decision paras 12—13).

1.3 The Learned Commissioner erred in placing too much emphasis on the delay on the part of the applicant to make the substitution application, and, in any event, did not have regard to the explanation given for (at least part of) the delay, namely that the applicant worked away in remote areas for extensive periods and so was not able to give regular and prompt instructions (Decision paras 3,4,13)

2. The Learned Commissioner erred in failing to take into consideration or give sufficient weight to factors demonstrating the reasonableness of the mistake by the applicant as to who he was employed by and demonstrating that there was no prejudice to the respondent if the application were allowed.

PARTICULARS

The Learned Commissioner should have found that the applicant gave instructions to make his unfair dismissal application against the presently named respondent due to a mistake as to the identity of the respondent, that that mistake was reasonable because—

2.1 The applicant was advised to seek employment with CECK, which he did. He was interviewed by Mr Vince Princi, a director of CECK Pty Ltd (who is also a director of Civil & Earthmoving Contractors of Kwinana Pty Ltd) at the premises of CECK Pty Ltd (which is also the premises of Civil & Earthmoving Contractors of Kwinana Pty Ltd). After being interviewed by Mr Princi the

applicant obtained employment (see transcript pp3-4; paragraph 5 of the decision; Edwards Affidavit 26 July 2002 para 4.1);

2.2 The applicant was directed to and did wear the Uniform of CECK Pty Ltd (or of Civil & Earthmoving Contractors of Kwinana Pty Ltd — if CECK is to be understood as an acronym), as did all his workmates (transcript p 4; paragraph 5 of the decision; Edwards Affidavit 26 July 2002 para 4.2);

2.3 A workmate of the applicant was provided with a Naval Base Garden Supplies uniform "by accident" and was directed not to wear it. The applicant witnessed that workmate being directed to wear a CECK uniform (transcript p8; paragraph 10 of the decision; Edwards Affidavit 26 July 2002 para 4.3);

2.4 The applicant was provided with a security pass to access the BP Refinery that stated "Name: Clint Edwards. Company: CECK Pty LTD" (Exhibit 5, transcript pp4,5);

2.5 The applicant always attended work meetings at the registered address of CECK, and never at the registered premises of Naval Base Garden Supplies (transcript 6; decision para 5);

2.6 For the purposes of carrying out his work duties, the applicant was supplied with the vehicles and tools of CECK or Civil & Earthmoving Contractors Pty Ltd, which were identifiable as such by the acronym and logo, throughout his employment and never those of Naval Base Garden Supplies (Edwards Affidavit 26 July 2002 para 4.4, transcript p6);

2.7 Whenever the applicant was required to fill out paperwork on behalf of his employer during the course of his work duties, such as permits and fuel dockets, he was required to do so on behalf of CECK or alternatively it was on paperwork with the CECK letterhead or banner (Edwards Affidavit para 4.5; transcript p 6);

2.8 The Applicant's knowledge of Naval Base Garden Supplies was that it was a garden and hardware tools retail store next door to the CECK premises. That shop premises was accessed via a separate driveway. He only ever attended that premises to purchase work tools. He did not work or attend work meetings at that premises (transcript p5-6).

2.9 The applicant is a scaffolder, not a white collar professional or a person with knowledge of company law or corporate structure and practice. He did not appreciate the significance of his pay-slips, group certificate and unregistered workplace agreement stating the employer or payer was Naval Base Garden Supplies. The applicant believed this was merely for CECK's own company law and taxation reasons (Edwards Affidavit 26 July 2002 para 5; transcript p6,7);

2.10 The applicant was never told he was employed by anyone other than CECK (Edwards Affidavit 26 July 2002, para4.6);

2.11 All of the entities involved in this application, namely, CECK Pty Ltd, Civil & Earthmoving Contractors of Kwinana Pty Ltd, Naval Base Supplies Pty Ltd and Naval Base Garden Supplies—

2.11.1 instruct the same solicitors (transcript p 6, Cox Affidavit 14 August 2002);

2.11.2 have, as shown on Australian Securities and Investment Commission searches, the same or adjacent addresses and substantially the same and or family related corporate and human persons as directors and or partners and or persons carrying on business (transcript p 6, Cox Affidavit 14 August 2002)—

- **Navel Base Garden Supplies**, 45 Hope Valley Rd, Naval Base WA, P0 Box 202, Kwinana 6167—

  Persons carrying on business: PG Dorn — 122 Richmond St; M Tolich — 55 De Burgh Rd, R Princi — 28 Hookwood Rd, KS Princi (previous) — 1 Brunel P1;

  corporations carrying on business: Civil & Earthmoving Contractors of Kwinana Pty Ltd — 43 Hope Valley Rd, Naval Base, WA, 6165

- **Naval Base Supplies Pty Ltd**, 45 Hope Valley Rd, Naval Base, WA, 6165—

  Directors: R Princi — 28 Hookwood Rd, PG Dorn — 122 Richmond St, M Tolich — 55 De Burgh Rd.

- **CECK Pty Ltd**, 43 Hope Valley Rd, Naval Base, WA 6165:

  Directors: KW Dorn —122 Richmond St, M Tolich —55 De Burgh Rd, V A Princi — 28 Hookwood Rd, M Jeffermans — 16 Almond Way, A Haslam — 13 Taylor Close, T Creighton — 71 Amethyst Cres

- **Civil & Earthmoving Contractors of Kwinana Pty Ltd**, 43 Hope Valley Pd, Naval Base, WA 6165—

  Directors: KW Darn, M Touch, VA Princi (Note the names of the persons/partners of the proposed substituted respondent, Naval Base Garden Supplies, at 2.14 below).

2.12 Some of the above entities share employees so that one may pay a certain employee at one time and another entity pay that employee at a different time, whilst both entities give that employee the same employee number (Cox Affidavit 14 August 2002 paras 6 — 12; transcript 18 —22)

2.13 An Australian Securities and Investment Commission search at Lawpoint on 26 March 2002 of the name Naval Base Garden Supplies did not reveal any such entity (Cox Affidavit 27 March 2002, p23).

2.14 A "Business Entry Point" search (http://www.abr.business.gov.au) done by the respondents' solicitor on 14 August 2002 (transcript p30-31) reveals the trading name "Naval Base Garden Supplies" ABN 46 700 864 827, the legal name for which is PG Dorn, R Princi and M Tolich, with business location WA 6165. At the time of filing the application for unfair dismissal, the legal name was Naval Base Garden Supplies.

3. The Learned Commissioner made findings of fact based on a misunderstanding of the submissions of the applicant's counsel and thus made findings based on facts that did not exist and or findings based on erroneous and or irrelevant considerations.

PARTICULARS

3.1 The Learned Commissioner attributed to the applicant's Counsel the statement that the documents referred to in ground 2 and the Cox Affidavit sworn 14 August 2002 "demonstrated that the respondent was attempting to conceal the name of the employer (Decision para 8). No such submissions were made. The point sought to be submitted was that the way in which the Respondent and the associated entities operated, the premises and addresses, pay systems, personalities and so on show that the applicant's mistake - as to who his employer was - was reasonable.

3.2 The Learned Commissioner erred in finding that the documents referred to "do on more than indicate that at different times these two persons [other workmates of the applicant] may have been the subject of pay information by differently named businesses or companies."

3.3 The Learned Commissioner misunderstood the point sought to be made by the applicant's counsel when continuing from the sentence in the above paragraph to say: "This is of no assistance in resolving the question of who employed the applicant." The point sought to be advanced is set out in 3.1 above.

REMEDY

4. That the orders of the Learned Commissioner given on 23 August 2002 be quashed, the application to change the name of the respondent be allowed and the application alleging unfair dismissal and seeking remedies pursuant to the Industrial Relations Act 1979 (WA) be remitted to a differently constituted Commission.

Further Ground of Appeal (added 26 September 2002)

The learned Commissioner erred in the exercise of her discretion in failing to allow counsel for the applicant leave to adduce further evidence demonstrating the reasonableness of the applicant's mistake as to the name of his employer. Counsel sought leave to adduce the evidence, in the form of a "CECK Quick Cut Saw Safety" Certificate, either through the applicant in re-examination or by way of reopening examination in chief. (Transcript 14—15)

Application to Adduce Further Evidence

With reference to ground 2 of the Grounds of Appeal, the appellant seeks leave to adduce further evidence for the reasonableness of his mistake as to the name of his employer. That evidence is a letter from Zurich "i.super_invest" dated 10 May 2002 providing information on the applicant's superannuation contributions during his employment with the respondent, and reference is made to C.E.C.K. Pty Ltd as the employer. This was provided by the appellant to his solicitors on 23 September 2002.

Statement on Public Interest in Appeal (Regulation 29(3) of the Industrial Relations Commission Regulations 1985)

The decision of the Learned Commissioner was to dismiss the application to substitute the Respondent to the Unfair Dismissal application (1626/01). This effectively means that the substantive application can not proceed as the named respondent was not the Applicant's employer as specified in his Group Certificate and unregistered Workplace Agreement. On that basis, the Applicant contends that the Commissioner's decision is effectively a final one because the application can not proceed. In other words the Learned Commissioner's decision disposes of the application for relief for unfair dismissal.

However, if that view is not accepted by the Full Bench, and consequently the Learned Commissioner's decision is a "finding" within the meaning of Regulation 29(3) of the Industrial Relations Commission Regulations 1985, then it is submitted that this appeal is of such importance that it is in the public interest that it should lie.

The public interest is served by allowing an applicant seeking relief on a claim for unfair dismissal to advance his claim by way of appeal against a refusal to substitute the name of his employer in a case where (it appears) he has misnamed his employer. The public interest is also served by allowing an appeal that is based on, inter alia, a submission that the Learned Commissioner has misidentified and or misapplied the relevant principles governing such applications, If the submission is sustained on appeal, it will have the effect of ensuring the proper law is identified and applied to such applications."

4 A question arises whether the decision appealed against is a "finding" within the meaning of s.49(2a) of *the Act.*

S.49(2a) OF *THE ACT* – SHOULD AN APPEAL LIE?

5 The appeal is against a "finding" as that term is defined in s.7 of *the Act*, because the decision appealed against is clearly "a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate".

6 That is so because the decision at first instance was the dismissal of a mere application to substitute for one respondent two other respondents. It is obvious that a decision not to accede to such an interlocutory or procedural application could not finally decide, determine or dispose of the matter to which the proceedings relate. It could only, by its very nature, determine what the application sought. By its very nature, an order made on application to join or substitute parties is an application which does not seek an order for the final decision upon determination of or disposition of the matter to which the proceedings relate. What happens after that depends on what the Commissioner decides as a final matter after hearing the parties, which is when the Commissioner finally disposes of the application made pursuant to s.29(1)(b)(i) or (ii). Patently, the Commissioner then makes a decision to grant the application and makes orders under s.23A of *the Act,* or to dismiss the application proper, and that is a totally different order in its effect from an order on an interlocutory or procedural application such as the order appealed against on this appeal. By comparison, the most likely orders which might be made at first instance are, first, that the application at first instance should be dismissed, which it was, or second, that it should be granted, in which case different or some different parties would be involved in the proceedings. That either of those orders could be made illustrates the manifest fact that the decision on such an application is a "finding" only.

7 In my opinion, however, this question was of such importance that the Full Bench should opine that an appeal should lie because of the objection taken by a party who, on the face of the proceedings, would suffer no detriment if the order sought was made, and who, in fact, was constituting itself as an obstacle to the appeal proceeding when it had no material interest in so doing. That is a matter which is unusual enough in itself and its potential effect upon the appellant is sufficient to justify the Full Bench in opining that in the public interest an appeal should lie against the finding made at first instance.

8 In my opinion, too, an appeal should lie also because the power of the Full Bench to substitute parties, join parties, or amend parties where a limitation period applies requires some further consideration. I have formed that opinion even though a Full

Bench of this Commission will exercise particular caution in undertaking the review of a decision on a matter of practice or procedure or upon an interlocutory application. (See generally in relation to s.49(2a), *Pam Alderson v St Columba - Kingswood College* (unreported) delivered 30 January 2003, FBA 41 of 2002, 2003 WAIRC 07575 (FB) and see also *Hamersley Pty Ltd v AMWSU* (1989) 69 WAIG 1024 (FB).

FRESH EVIDENCE

9 The appellant sought to adduce fresh evidence in the form of a letter from Zurich Australia Superannuation Pty Limited to Mr Edwards dated 10 May 2002. Attached to it were copies of account statements about his participation in an employment superannuation plan in which CECK Pty Ltd is identified as his employer. Zurich identified itself to be the trustee of the superannuation fund "i.super_invest". His evidence was, too, that he did not provide this letter to his solicitors before the hearing because he had misplaced it amongst his girlfriend's superannuation documents, and it was only found by her after the hearing of his application.

10 Further, there was sought to be adduced a copy of the document being a pamphlet entitled "CECK Quick Cut Saw". This, the appellant deposed, was a document which was issued to him when he had completed the safety course for the purposes of work with the respondent at the BP Refinery (at Kwinana). He also deposed that his solicitor was refused leave to adduce it at the hearing at first instance, even though he, the appellant, had it in his pocket at the time.

11 Another document sought to be adduced is a copy of two pages from the business entry website with details of the business name of "Navel Base Garden Supplies". Since the first document, what I will call the Zurich letter, does no more than augment the evidence before the Commissioner at first instance, of the appellant's relationship and dealings with CECK Pty Ltd, then that evidence would not if admitted be at all likely to achieve a different result from what was achieved in the order appealed against. Further, on the facts, I am not of the opinion that it could not have been made at the first instance as the result of a diligent search, since it was in the possession of a person with whom the appellant lived.

12 In addition, the two other documents sought to be adduced as fresh evidence were not fresh evidence. The first was not admitted in evidence at first instance and that ruling is not appealed against. The second document was simply not tendered when it could have been. It was in the Commission at the time, could have been tendered, and is simply not fresh evidence for that reason.

13 Not only were these two documents procurable, they were actually available, but they were not either tendered or accepted as an admissible tender (see *Blakeman ATF The Blakeman Family Trust t/a McBride's Collectables and Giftware v Gudgin* (2000) 80 WAIG 457 (FB), *FCU v George Moss Ltd* (1990) 70 WAIG 3040 (FB), *Sulman v Waratah Child Care Centre* (1999) 79 WAIG 3196 (FB) and *Orr v Holmes and Another* [1948] 76 CLR 632 at 641-643).

14 The affidavit and other evidence sought to be adduced as fresh evidence was not admitted by the Full Bench and I joined my colleagues in that decision for those reasons.

BACKGROUND

15 The appellant made application on 10 September 2001, through his solicitors, alleging pursuant to s.29(1)(b)(i) of *the Act* that he had been harshly, oppressively or unfairly dismissed by a respondent, identified as Civil and Earthmoving Contractors of Kwinana Pty Ltd in the application. The appellant alleged that he had been harshly, oppressively or unfairly dismissed by Civil and Earthmoving Contractors of Kwinana Pty Ltd on 15 August 2001, which company was named as the sole respondent.

16 On 4 October 2001, the respondent filed a notice of answer and counter-proposal. The notice of answer filed was in the following terms (see pages 25-26 (AB)):-

> "The Respondent objects to and opposes the application for a range of reasons, including but not limited to the following:-
>
> 1. The applicant was not employed by and has never been employed by Civil and Earthmoving Contractors of Kwinana Pty Ltd."

17 The matter, after certain correspondence passed between the Commission and the appellant's solicitors, was listed for hearing on 20 March 2002, the hearing being one to require that the appellant show cause why the application should not be dismissed. This hearing was listed of the Commission's own motion.

18 On 20 March 2002, the Commission convened to hear that matter.

19 On 27 March 2002, an application was made on behalf of the abovenamed appellant to change the name of the respondent by adding as "the first proposed substituted respondent", Naval Base Supplies Pty Ltd (ACN 096 981 190) of 45 Hope Valley Road, Naval Base, WA 6165 and by adding "the second proposed substituted respondent", Naval Base Garden Supplies (Registration No 0019936C) of 45 Hope Valley Road, Naval Base, WA 6165.

20 It is important to pay some attention to the text of the notice of application which commenced the proceedings the subject of this appeal (see page 27 (AB)).

21 The application first is an application "to change name of Respondent to this Application" (see page 27 (AB)). The application describes Civil and Earthmoving Contractors of Kwinana Pty Ltd as "The Presently Named Respondent", and Naval Base Supplies Pty Ltd as "The First Proposed Substituted Respondent", with Navel (sic) Base Garden Supplies as "The Second Proposed Substituted Respondent".

22 The grounds of the application are expressed as follows:-

> "The grounds on which the application is made are that the Applicant was apparently in fact employed by either the First or the Second Proposed Substituted Respondent, both of which are companies related to each other and to the presently named Respondent. See the affidavit of Mark David Cox sworn 27 March 2002 attached".

23 The application in substance was not an application to change the name of the respondent but to have substituted two other parties as respondents in lieu of the named respondent.

24 The actual order sought is not set out in the application itself, although it is clear what is sought. The above named respondent, the respondent at first instance, opposed the application and filed an answer to that effect.

25 This application was listed for hearing on 15 August 2002, and at the time the appellant gave evidence as to his understanding of the identity of his employer. There was evidence that included that a friend of his who worked for Alcoa spoke to a person called Vince Princi who is alleged to have said that the appellant should go to the office of the respondent referred to in the appellant's affidavit as "CECK" to obtain work. The appellant did so and gained employment starting a couple of days after an interview. During the course of his work, the appellant wore a uniform of CECK which carried the acronym and logo of CECK on it, carried a security card with a company recorded as CECK Pty Ltd, attended meetings at the offices of the respondent, not at the offices of any other company or business and his tools were supplied by Civil and Earthmoving Contractors of Kwinana Pty Ltd. He therefore believed, he said, that the respondent was his employer.

26 Before the Commission were ASIC company extracts of records relating not only to Civil and Earthmoving Contractors of Kwinana Pty Ltd, the respondent mentioned then in the proceedings, but also for CECK Pty Ltd, both companies having the same registered office address.

27 As soon as he commenced work the above named appellant signed a document headed "workplace agreement" which referred to his employer as being Naval Base Garden Supplies. Indeed, he received a group certificate for the name Naval Base Garden Supplies as his employer and regularly received payslips headed "Naval Base Garden Supplies". The security card provided to him, however, had the words "Company: CECK Pty Ltd" on it.

FINDINGS AT FIRST INSTANCE

28 The Commissioner at first instance referred to *Parveen Kaur Rai v Dogrin Pty Ltd* 80 WAIG 1375, which dealt with the Commission's powers to make orders of the type sought by the respondent. It was then a question of whether there was a matter of discretion to be exercised, and the Commissioner decided that there was and that the discretion should be exercised against the appellant because he knew the name of his employer. It was, she held, included in the workplace agreement signed by him two weeks after he commenced employment; it was contained on the group certificate issued to him at the end of the financial year during his employment and which he used for completing his tax return; it also appeared on the payslips which he received almost every week and he had these documents prior to the application being filed. In short, the Commissioner held that the documents provided to the appellant on a regular basis by his employer clearly identified who his employer was. A number of facts relevant to this conclusion were found by the Commissioner (see paragraph 12, page 35 (AB)). (As a result of those findings, she found that the appellant ought to have known who his employer was at the beginning).

29 The question whether to amend the claim is a matter of discretion and one of the considerations is whether the appellant ought to have known of the defect, and, if he had, then the discretion should be exercised against him, the Commissioner held.

30 Next, the Commissioner also found that it was not until five months had expired after the answer was filed, denying that the respondent was the employer, and the Commission had listed the matter for the appellant to show cause why the claim should not be dismissed, that this application was made. That was a fact, and the Commissioner considered it a relevant consideration.

31 Further, there were other delays in first of all filing the application at first instance to amend the name, and then having to correct the name again (see paragraph 13, page 35 (AB)).

32 The Commissioner also took account of the fact that the appellant was acting on legal advice and with legal representation at the material times, and that it was hardly a difficult or complex matter to properly identify the employer. She therefore held that the appellant ought to have known of the defect in the name of the respondent. Even if he did not, the Commissioner found he was advised by the notice of answer filed, and yet made no reasonable efforts to correct it.

33 It was therefore decided by the Commissioner that it was inappropriate that the discretion of the Commission be exercised in the appellant's favour given the lack of diligent investigation to identify the employer when it was hardly a difficult or complex matter to properly identify the employer.

ISSUES AND CONCLUSIONS

34 I refer to the affidavit sworn by Mr Mark Cox, solicitor for the appellant (see pages 128-130 (AB)), on 14 August 2002 which was before the Commissioner at first instance. In that document he advised that he had ascertained that all of the respondents named were represented by the same firm of solicitors, and, in fact, had the same address. He also said that he had ascertained that there were mixed employee records, that is the mixed records of all of these persons, with the same employee number for employees and that the entities all had common directors or partners. That evidence does not seem to have been contradicted.

35 Paragraphs 4 and 5 of the appellant's affidavit sworn on 26 July 2002 read as follows (see pages 124-125 (AB)):-

> "4. For the following reasons, my belief that I was employed by the presently named Respondent, (referred to herein as 'CECK') was entirely reasonable and based on the representations and conduct of the Respondents:-
>
> 4.1 I got the job in the first place after a friend of mine told me and I verily believe that he asked Vince Princi of the Respondent for work. My fried told me, and I verily believe that, Mr Princi told him, and my friend in turn told me, that we should apply to CECK for work. I did so and subsequently obtained work with, as I was led to believe, CECK;
>
> 4.2 I was provided with and directed to wear the uniform of CECK. The uniform had the acronym and logo of CECK on it;
>
> 4.3 All of my work mates employed by the Respondent at the BP Refinery, where I was employed, were also provided with and directed to wear the uniform of CECK. In fact, I personally witnessed one work mate, Scott Gibbs, being told by Mr Tim Crighton of the Respondent not to wear the Naval Base Garden Supplies' Uniform that had been sent to him, but to wear the CECK uniform;
>
> 4.4 We used the vehicles and tools of the CECK. They were identifiable as such because they were marked with the acronym and logo of CECK.
>
> 4.5 When we completed any paperwork, such as job permits and so on, it was under the banner or letterhead of CECK. When getting fuel we had to put it under the name of CECK;
>
> 4.6 I was never told I was employed by any body other than CECK;
>
> 5. I did notice that my pay-slips and unregistered workplace agreement referred to Naval Base Garden Supplies as the payer, but did not occur to me that this meant I was not employed by CECK. In light of all the above, I thought this was merely for tax and company law reasons to the advantage of the Respondent. I am not a lawyer or an accountant and so I did not know the significance of the appearance of a different name of the party to the unregistered Workplace Agreement and payer on my pay-slips."

Principles

36 First, the power to accede to the application existed and is contained in s.27(1)(j), (l) and (m) of *the Act.* S.27, of course, is expressed to be subject to *the Act* because it commences with the words "except as otherwise provided in this Act".

37 The decision at first instance was a discretionary decision as that term is defined in *Norbis v Norbis* (1986) 161 CLR 513 and also *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194.

38 For the appellant to succeed, he/she must establish that the exercise of the discretion at first instance miscarried in accordance with the principles laid down in *House v The King* [1936] 55 CLR 499 (and see also *Gromark Packaging v FMWU* 73 WAIG 220 (IAC)).

39 The Full Bench dealt with these matters in *Parveen Kaur Rai v Dogrin Pty Ltd* (op cit) referring to *Bridge Shipping Pty Ltd v Grand Shipping SA and Another* [1991] 173 CLR 231. (The Full Bench was referred to *Woodings (as Receiver and Manager of Elcos Australia Pty Ltd (in liq)) v Stevenson and Jefferson (as Liquidators of Elcos Australia Pty Ltd (in liq))* 2001 WASC 174, on the hearing of this appeal also).

40 The relevant objects of *the Act* are contained in s.6(b) and (c), and they read as follows:-

> "The principal objects of this Act are—
>
> …
>
> (b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;
>
> (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"

41 S.26(1)(a) of *the Act* requires the Commission to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal form.

42 S.26(1)(c) also applies and reads as follows:-

> "(1) In the exercise of its jurisdiction under this Act the Commission—
>
> …
>
> (c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and"

43 As a matter of principle, all parties who are necessary for the complete adjudication of the dispute should be joined (see *Amon v Raphael Tuck and Sons Ltd* [1956] 1 All ER 273 at 283, 285-286 per Devlin J).

44 A person should be added as a party where that person's rights or liabilities against any party in respect of the subject matter of the proceeding would be directly affected by an order that could be made in the proceeding (see *Penang Mining Co Ltd v Choong Sam* [1969] 2 Malayan LJ 34 (PC)).

45 Usually, but not invariably, it is clear at the outset who the plaintiff should sue. The defence may make it clear, however, as it did in this case, that another defendant should be joined. For the court to allow the plaintiff to join a defendant, the plaintiff must show that the new defendant could be liable in the proceedings as originally instituted. So long as the plaintiff can show a prima facie case against a proposed defendant a joinder is allowed. A joinder, for the purpose of making an alternative claim against the new defendant, is also allowed. It does not seem to have been argued that the respondents sought to be named could not be liable.

46 A plaintiff is, as a general rule, not allowed to circumvent a statute of limitations by adding a defendant after a fresh action could be statute limited (see "*Australian Civil Procedure*", 4th Edition, Cairns pages 324-325). However, that very often depends on the rules of the court concerned.

47 It is necessary to say something about the authorities. A major authority relied on by the Full Bench, including myself in *Parveen Kaur Rai v Dogrin Pty Ltd* (op cit), was *Bridge Shipping Pty Ltd v Grand Shipping SA and Another* (op cit). In that case, the High Court had to consider the effect of the then rule 36.01 of the rules of the Supreme Court of Victoria, which was relevantly reproduced by Their Honours in reasons for judgment as follows:-

> "(1) For the purpose of determining the real question in controversy between the parties to any proceeding, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings, the Court may at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.
>
> …
>
> (4) A mistake in the name of a party may be corrected under paragraph (1), whether or not the effect is to substitute another person as a party.
>
> …
>
> (6) The Court may, notwithstanding the expiry of any relevant limitation period after the day a proceeding is commenced, make an order under paragraph (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.
>
> …"

48 In that case, the majority, Brennan, Deane, Toohey and McHugh JJ, held that that rule covered not only cases of misnomer, clerical error and misdescription but also those where the plaintiff, intending to sue a person identified by a particular description, was mistaken as to the name of the person who answered that description.

49 The Supreme Court of this state has a similar provision in Order 21.

50 That rule, as it was observed by Seaman in "*Civil Procedure Western Australia*", Volume 1, is remedial and is to be given the widest beneficial interpretation which its language would permit so that it covers not only cases of misnomer, but also cases where the plaintiff intending to sue a person he/she identifies by a particular description was mistaken as to the name of the person who answers the description (see *Bridge Shipping Pty Ltd v Grand Shipping SA and Another* (op cit) and see the commentary in Seaman "*Civil Procedure Western Australia*", Volume 1, Supreme Court, at page 5703).

51 By the application in this instance, there is an application to substitute two other parties for the first named party who is the above named respondent. That would mean, one presumes, that, if the application were granted, then the respondent would be struck out as a party either by the order or upon its application and would no longer be in jeopardy.

52 It is fair to observe that there is no express power in the relevant rule to order that a party be joined after the expiry or a relevant period of limitation (see *Fernance v Nominal Defendant and Another* (1989) 17 NSWLR 710 at 731).

53 In relation to substitution of a party after the expiry of the period of limitation, even though the rule permits a new party to be substituted for an original party, this does not involve a new cause of action. The new party is substituted because he/she has succeeded to a claim or liability already represented in the action and sues or is sued in respect of the existing cause of action. Thus, the expiry of the limitation period is quite irrelevant to the making of the order (see *Yorkshire Regional Health Authority v Fairclough Building Ltd and Another* [1996] 1 All ER 519 at 525, 529 and 531 and *Industrie Chimiche Italia Centrale and Another v Alexander Tsaviliris and Sons Maritime Co and Others (The Choko Star)* [1996] 1 All ER 114 at 123).

54 What is, of course, significant in this matter is that there was and still is the limitation period on the referral of a s.29(1)(b)(i) matter limited to 28 days from the date of dismissal. S29(2), which reads as follows, applies:-

> "(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated."

That limitation existed when the substantive application was filed at first instance on 10 September 2001.

55 The first question which arises in this matter is whether the joinder of the party is barred by the limitation period. Nominally, when a party is added under the joinder rules, the proceeding against the added party commences on service on that party of the amended proceeding and the order for joinder (see, for example, *Liff v Peasley* [1980] 1 All ER 623 and see the rules of the Supreme Court of Western Australia, Order 18, Rule 8). If that is the case, of course, the respondent can plead the limitation period ((ie) the new joined respondent). (The interesting question of whether leave can be granted to proceed with a referral outside the s.29(2) limitation period when the dismissal occurred before the amendment of *the Act*, has not yet been argued).

56 First, no regulation of this Commission exists in terms similar to those of the rules of the Supreme Courts of Western Australia or of New South Wales. The Commission's powers are purely statutory in this context. They are wide and as remedial provisions should be interpreted widely and generously (see *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB)). It is also noteworthy that there is no express prohibition, statutory or otherwise, upon the Commission exercising power under s.27(1) after the expiry of the limitation period prescribed by s.29(2).

57 In my opinion, insofar as either *Parveen Kaur Rai v Dogrin Pty Ltd* (op cit) or *Bridge Shipping Pty Ltd v Grand Shipping SA and Another* (op cit) is concerned and insofar as either case might be based as *Bridge Shipping Pty Ltd v Grand Shipping SA and Another* (op cit) at least, is on the words of Order 31 of the Victorian Supreme Court Rules, then they are not authorities which are a bar to making an order in the terms sought by the appellant after the expiry of the limitation period prescribed by s.29(2). In fairness, it was not so argued in this case.

58 The powers conferred by s.27(1)(j), (l) and (m) of *the Act* should be read having regard to s.6(b) and (c) and s.26(1)(a) of *the Act*, provisions to which I have referred to above in these reasons. In particular, I refer to s.6(c) and the objects of *the Act* to provide a means for preventing and settling industrial disputes with the minimum of legal form and technicality.

59 The requirement that the Commission is to act without regard to technicality and legal form, as it appears in s.26(1)(a) of *the Act*, is also well known.

60 The application, if it were successful, would require the substitution of parties outside the 28 day limitation period. However, there is no prohibition upon this being effected in *the Act* or any regulation.

61 S.27(1)(j), (l) and (m) of *the Act* allow the amendment of any proceedings on such terms as the Commission thinks fit, and also the correction of or amendment or waiver of any error, defect or irregularity whether in substance or in form. I do not read s.29 or any other provision of *the Act* to except a s.29 matter from the operation of s.27(1)(j), (l), (m) or (v).

62 In my opinion, once an industrial matter is correctly referred by the applicant within the time prescribed by s.29(1)(b)(i) of *the Act*, then, having regard to s.6(c), s.27(1)(j), (l) and (m) and s.26(1)(a), the Commission has powers to substitute parties, join parties, strike others out, etc, in order to resolve the industrial dispute before it, and it has the power to do so retrospectively. That is inherent in the unlimited power conferred by s.27(1)(m) (see also s.27(1)(v)).

63 Put another way, once an "industrial matter" whether it is a claim of unfair dismissal or any other "industrial matter" as defined in s.7 of *the Act*, is referred to the Commission, the objects of *the Act* and s.26(1)(a) and (c) require the dispute at the heart of the matter to be resolved by the Commission without undue regard to technicality or legal form. Further, that dispute as an industrial matter undergoes the process of conciliation and/or arbitration and it is not contemplated by *the Act* that it is subject to the strict rules which might apply in courts having civil jurisdiction.

64 Matters before the Commission are for the most part not inter partes. The Commission is required to provide a means of resolving disputes in carrying out its jurisdiction and functions under *the Act*, with expediency. It has the power to join or substitute parties, or otherwise deal with an "industrial matter" before it, so as to achieve the expeditious and just hearing and determination of the matter without regard to technicality and legal form (see s.27(1)(v) and s.26(1)(a)). Thus the expiry of the limitation period prescribed by s.29(2) cannot prevent the orders sought at first instance being made and as I have already said it was not so argued.

65 In any event, on the authority of *Parveen Kaur Rai v Dogrin Pty Ltd* (op cit), this was the referral of the same industrial matter as was submitted on behalf of the appellant. That the power under s.27(1)(m) to substitute a new party at any time is not confined to circumstances of clerical error or misnomer and can relate to matters of substance was properly conceded on behalf of the respondent and is part of the ratio in *Parveen Kaur Rai v Dogrin Pty Ltd* (op cit).

66 The evidence of Mr Cox and Mr Edwards, which was before the Commissioner at first instance in affidavit form and was not controverted, was open to be accepted and should have been so accepted.

67 First, it was clear that the mistake as to the name of the employer was genuine given the unshaken evidence that:-

(a) The appellant signed a workplace agreement and was given a group certificate and payslips in the name of "Naval Base Garden Supplies".

(b) Naval Base Garden Supplies was a trading name and the natural persons who conducted the business were the employers, although they were not named in the workplace agreement.

(c) There was conflicting and not insignificant evidence as to whether CECK Pty Ltd was the employer, or at least that the employer's identity was not clear because, as the Commissioner at first instance correctly found:-

  (i) The appellant was required to go to the office of CECK Pty Ltd to find work.

  (ii) He and his workmates were directed to wear the uniform of CECK Pty Ltd.

  (iii) He was provided with a security pass under the name of CECK Pty Ltd.

  (iv) He was supplied with tools and vehicles by CECK Pty Ltd identified as such by the logo and acronym stamped on them.

  (v) He completed fuel records as CECK Pty Ltd required.

  (vi) The ASIC searches revealed a coincidence between directors of CECK Pty Ltd of Naval Base Supplies Pty Ltd and the partners or persons conducting the business of Naval Base Garden Supplies.

  (vii) The businesses were conducted at the same address.

(d) That no-one ever told the appellant that he was employed by anyone other than CECK Pty Ltd.

(e) The appellant did notice that his payslips and the unregistered workplace agreement named another employer but he was not a lawyer or accountant and did not understand the significance of the agreement or payslips. It is therefore understandable that he might have instructed his solicitors as he did, and that the first substantive application was filed naming the above named respondent to this appeal as the respondent to that application.

68 In my opinion, there was more than sufficient evidence, on those facts, of facts which purported to point to an employer with a different name from that sought to be joined or substituted as respondents, namely CECK Pty Ltd, notwithstanding what purported to appear on the workplace agreement.

69 The part played by CECK Pty Ltd in the everyday concerns of the employees, is, on the above evidence, particularly clear. For those reasons, it was clearly open to the appellant to assume, in the first place, that CECK Pty Ltd was his employer, notwithstanding documents which conflicted with the actions taken on behalf of CECK Pty Ltd in relation to the employees.

70 In any event, I simply do not agree that by itself a finding that an applicant ought to have known the correct identify of the employer, given these conflicting facts, or at all, can necessarily determine an application to join or substitute. That might be different if there is sheer negligence or incompetence and a great deal of time has elapsed since the application was first made without that matter being remedied. However, that is not the case here.

71 The purpose of joining parties or substituting parties, which I have referred to above, and the remedial nature of s.27(1) of *the Act*, raise sign posts in a different direction. In any event, in this matter there was, for the reasons which I have explained, a genuine and reasonable mistake as to the identity of the employer which did not come to a head until there was a denial contained in the answer filed.

72 In my opinion, given the uncontroverted evidence at first instance for the appellant, it was quite clear that there were three possible respondents. It was also open to find that this was not apparent until it was denied in the answer that the first respondent was his employer. In this case, the five months delay after the answer was filed in making the application at first instance, which is the subject of the appeal, was not relevant, because the Commission had, in fact, given leave to the applicant to make the application. There was then no application to strike out the application proper and is no evidence that when the Commissioner gave leave to make the application at first instance, the making of that order was at all opposed when it should have been if it were to be. The delay thereafter in the matter coming to hearing was not a matter of blame to be laid at the feet of the appellant.

73 The question of the delay was relevant to whether the matter should have been struck out in March 2002 or this application permitted to proceed. The decision was made to permit this application to proceed and thus the fact of the five months delay became and was irrelevant for the Commission's purposes to the issue of whether a joinder or substitution of parties should occur, because it occurred before the Commission gave leave as it were to the appellant to apply to substitute the parties.

74 Further, the Commissioner did not consider the very relevant fact that there is no detriment occasioned to the respondent by any order to join other parties, whereas the detriment which might be occasioned to the appellant by not permitting him 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. That is the case because it would prevent the appellant possibly succeeding against the right party, or parties. That was a relevant and weighty factor not taken into account. That, in my opinion, is emphasised by the fact that it is difficult to understand why the respondent should in its own interests at least have opposed the application, because if the application were successful the respondent would be no longer in jeopardy and would have the right to have itself removed from the proceedings. The Commissioner at first instance erred in failing to do so, and, indeed, had the Commissioner taken that factor into account she would have reached an entirely different conclusion.

75 I would add that I do not agree that it was correct to exercise the discretion as it was exercised in this matter, and, in particular, that it was a relevant factor or could always be a fatal relevant factor that the true respondent to an application for unfair dismissal, for example, had not been properly ascertained.

76 I am not persuaded that there was any denial of justice in the two proposed defendants being joined. I note that any party named as respondent can oppose the application once it is served on it, and such a process would be available to the respondents in these proceedings if they wished to oppose the application under s.29(1)(b)(i) of *the Act*.

77 Having said that, I have difficulty in understanding why the original application was not made against all three named respondents both jointly and in the alternative, particularly in a jurisdiction such as this where costs are not liberally granted.

Finally

78 For those reasons, it is clear that the exercise of the discretion at first instance miscarried and has been established to have miscarried, having regard to the principles laid down in *House v The King* (op cit). I would therefore, for those reasons, uphold the appeal and vary the order made at first instance to make the order sought at first instance by the appellant, on the facts which I say should have been found and for the reasons which I have expressed. That is, I would say that there should be a substitution of the discretion of the Full Bench for that of the discretion exercised by the Commission at first instance. I would, however, add an order that the documents be served within seven days on the other two entities, as respondents jointly and in the alternative, in substitution for the above named respondents. I would also include in that order, an order striking out the above named respondent as a respondent at first instance, since I assume that both parties require it. However, I would regard them as being at liberty to inform the Full Bench otherwise provided it was done within 24 hours of the delivery of this decision.

SENIOR COMMISSIONER A.R. BEECH—

79 The Commission has the power by virtue of s.27(1)(m) of the Act to issue an order to correct the name of the employer where the applicant mistakenly believes that the name of the employer was a name different from the name in fact. Following the decision of the Full Bench in *Parveen Kaur Rai v. Dogrin Pty Ltd* (1990) 80 WAIG 1375 there can be no further doubt upon the matter.

80 The Commission having the power pursuant to s.27(1)(m), whether or not the Commission should make the order sought is a matter for the proper exercise of the Commission's discretion. The exercise of the Commission's discretion will involve considering a number of criteria. Those criteria would include at least—

(1) the circumstances which led the applicant to mistake the name of the employer;

(2) whether the conduct of the employer assisted in the applicant's mistaken belief;

(3) whether the applicant ought to have known of the mistake;

(4) whether the applicant has taken all reasonable steps to ensure the naming of the correct employer;

(5) the prejudice occasioned to either party in granting or not granting the application.

81 In the proceedings at first instance, the Commission considered the criterion of whether the applicant ought to have known of the mistake. The Commission also considered the delay which had occurred on the part of the appellant or his solicitors in seeking to amend the name of the respondent once the appellant was placed on notice that the correct identity of the employer was in doubt.

82 However, the Commission did not consider the prejudice occasioned to either party in granting or not granting the application. The prejudice to the appellant of an adverse finding is most significant: it would lead to the dismissal of his claim of unfair dismissal. Therefore, the criterion is important and in failing to have regard to it, the Commission erred.

83 In this case I am satisfied from the reasons given by his Honour the President that the delay in this matter is not so significant that it warranted what was effectively the dismissal of the substantive application.

84 Further, in the circumstances of this case, the evidence that the principals of the respondent and the prospective respondent are the same, or substantially the same, is a factor of significance. This is not a circumstance where it can be said that the proposed respondent is an entity entirely separate from the prospective respondent, and is, in my view a factor which goes to assessing whether there is any prejudice to the respondent. It is not clear that any prejudice is suffered by the prospective respondent given that it can be taken to have been made aware of the claim of unfair dismissal from at least 27 November 2001.

85 For all of those reasons I agree with the order proposed by his Honour the President in this matter.

COMMISSIONER S WOOD—

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

THE PRESIDENT—

87 For those reasons, the appeal is upheld and the decision at first instance varied in the terms expressed above.

Order accordingly

2003 WAIRC 07830

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLINT EDWARDS, APPELLANT
	- and -
	PG DORN, R PRINCI & M TOLICH TRADING AS NAVAL BASE GARDEN SUPPLIES AND CIVIL AND EARTHMOVING CONTRACTORS OF KWINANA PTY LTD, RESPONDENTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 27 FEBRUARY 2003
FILE NO/S.	FBA 45 OF 2002
CITATION NO.	2003 WAIRC 07830

Decision	Appeal upheld and order at first instance varied
Appearances	
Appellant	Mr M Cox (of Counsel), by leave
Respondent	Mr R Collinson (of Counsel), by leave

Order

This appeal having come on for hearing before the Full Bench on the 3rd day of February 2003, and having heard Mr M Cox (of Counsel), by leave, on behalf of the appellant, and Mr R Collinson (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision being delivered on the 27th day of February 2003, it is this day, the 27th day of February 2003, ordered as follows:-

(1) THAT appeal No. FBA 45 of 2002 be and is hereby upheld.

(2) THAT the decision of the Commission in matter No. 1626 of 2001 given on the 23rd day of August 2002 be and is hereby varied by deleting the whole of the order made at first instance and substituting therefor an order in the following terms:-

"(a) THAT Rosa Princi, Miryana Tolich and Pauline Dorn trading as Naval Base Garden Supplies and Naval Base Supplies Pty Ltd be substituted for the abovenamed respondent Civil and Earthmoving Contractors of Kwinana Pty Ltd as the first and second named respondents herein.

(b) THAT within 7 days of the date of this order, the applicant/appellant do serve a copy of the application at first instance on each of the substituted parties.

(c) THAT the said respondent Civil and Earthmoving Contractors of Kwinana Pty Ltd named as the respondent be struck out of the application at first instance."

(3) THAT within 24 hours of the delivery of this order the parties do have liberty to apply to the Full Bench in accordance with the reasons for decision herein, paragraph 78.

By the Full Bench

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

[L.S.]

2003 WAIRC 07784

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	EPATH PTY LTD, APPELLANT
	- and -
	IHANN ADRIANSZ, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	FBA 47 OF 2002
CITATION NO.	2003 WAIRC 07784

Decision	Appeal dismissed
Appearances	
Appellant	Dr J J Edelman (of Counsel), by leave
Respondent	Mr T H F Caspersz (of Counsel), by leave

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	IHAAN ADRIANSZ, APPELLANT
	- and -
	EPATH WA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	FBA 48 OF 2002
CITATION NO.	2003 WAIRC 07784

Decision	Appeal upheld in part and decision at first instance varied
Appearances	
Appellant	Mr T H F Caspersz (of Counsel), by leave
Respondent	Dr J J Edelman (of Counsel), by leave

Reasons for Decision

THE PRESIDENT AND CHIEF COMMISSIONER W S COLEMAN—

INTRODUCTION

1 These are the joint reasons for decision of Chief Commissioner W S Coleman and myself.

2 These are two appeals against the decision of the Commission, constituted by a single Commissioner, given on 27 September 2002 in matter No 537 of 2002. The appeals are brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"). The first appeal is by the employer company, which was the respondent at first instance, and the second appeal is by the employee, who was the applicant at first instance. Both appeals were heard together.

3 A decision was made by the Commission in matter No 537 of 2002. The decision is contained in an order (see page 27 of the appeal book (hereinafter referred to as "AB")) which, formal parts omitted, reads as follows:-

> "… the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-
>
> (1) DECLARES that the applicant, Ihaan Adriansz, was unfairly dismissed by the respondent on the 28th day of February 2002;
>
> (2) DECLARES that reinstatement is impracticable;
>
> (3) ORDERS that the respondent, within 14 days of the date of this order, do hereby pay, in compensation, the amount of $ 14,197.26 to Ihaan Adriansz.
>
> (4) ORDERS that the respondent, within 14 days of the date of this order, do hereby pay, as and by way of a denied contractual entitlement, the amount of $8,492.00 to Ihaan Adriansz.
>
> (5) ORDERS that the application for costs be dismissed."

APPEAL NO FBA 47 OF 2002 - GROUNDS

4 The appeal by Epath Pty Ltd (hereinafter referred to as "Epath") appears to be against the whole of the decision at first instance and the grounds of it are as follows:-

> "1. The Commissioner erred in law in finding that the Respondent (the Applicant in the initial proceedings) had been unfairly dismissed due to the absence of reasonable notice by finding that the Respondent only received notice of termination of his employment when the Respondent was notified that the purchaser of the business had decided not to re-employ him in circumstances in which—
>
> a) Any decision by the purchaser of the business not to re-employ the Respondent in the purchaser's business was a decision for the purchaser of the business;

b) Upon sale of the Appellant's business all of the employees' positions with the Appellant ceased to exist (as the Respondent knew); and

c) The Respondent was a director of the Appellant's business, supported the sale from mid-January 2002 and had reasonable notice of the sale;

2. The Commissioner erred in law in finding that the Respondent had been "unfairly dismissed" because the Appellant failed to pay the Respondent a redundancy payment and treat the Respondent in like manner to other employees when—

a) there is no legal entitlement to a redundancy payment

b) there was no evidence that any redundancy payment was made to any other employee

3. The Commissioner erred in law in finding that the Respondent had been denied a contractual entitlement for unpaid "call outs" when the Respondents claim was for rostered overtime which was to be unpaid in the Respondent's contract of employment."

APPEAL NO FBA 48 OF 2002 - GROUNDS

5 The appeal by Ihaan Adriansz (hereinafter referred to as "Mr Adriansz") is against part of the decision only and is on the following grounds:-

"(i) the Commissioner's decision not to apply the reasoning in the decision of the Full Bench of the Commission in *Rogers v Leighton (1999) 79 WAIG 355* concerning the relevance of a reasonable redundancy payment to a determination of whether a dismissal is unfair, and the consequent failure by the Commission to exercise a discretion in accordance with that decision, when;

(a) the Commissioner was bound by such decision;

(b) alternatively, bound to apply it as a matter of equity and good conscience;

(ii) the Commissioner's failure to take into account relevant factors, namely, the time that the appellant would take to return to his previous remuneration levels following his unfair dismissal by the respondent, and the Commission's consequent failure to compensate the appellant for such loss and injury as a consequence of his unfair dismissal;

(iii) the Commissioner's finding, in effect, that even if one Mr Mabarack (sic) obstructed or did not fully represent the appellant's interest to one Clinipath, then that did not make the dismissal of the appellant unfair when—

(a) the Commissioner found that the disappointment of the appellant at being dismissed in circumstances in which he was not offered employment by Clinipath was enhanced by his expectation of employment with Clinipath, and his position as a founder of the respondent and a vital component of the respondent;

(b) the evidence was that Mr Mabarack (sic) had, despite requests by the appellant, refused the appellant the opportunity to represent his own interests to Clinipath;

(c) the Commission found that the appellant did not at any time take any other step to directly put his case for employment to Clinipath contrary to the evidence that he did take such steps, albeit after the dismissal, but received no response from Clinipath;

(d) the only inference available on the evidence before the Commission was that the respondent, through Mr Mabarack (sic), advised Clinipath about the qualifications of the respondents employees to assist Clinipath in determining whether it would offer employment to any such employees;

(e) the only inference available on the evidence before the Commission is that Mr Mabarack (sic) obstructed or did not fully represent the appellant's interest to Clinipath and, therefore, did not fully and properly advise Clinipath of the appellant's capabilities;

(f) the only inference, on the evidence before the Commission, is that the reason, or a reason, for Clinipath not offering employment to the appellant was the advice concerning the appellant given to it by Mr Mabarrack;

(g) an offer of employment of Clinipath to the appellant would have been a material circumstance in considering whether, in all the circumstances, the dismissal of the appellant by the respondent.

(iv) the Commissioner's finding that the appellant was not entitled to compensation for hurt and humiliation when—

(a) the Commissioner took into account irrelevant factors, namely, whether Mr Mabarrack had had "*callous disregard*" for the appellant, the issue being whether, as a matter of fact, the appellant had suffered hurt and humiliation as a consequence of his unfair dismissal;

(b) the evidence was that the appellant did, in fact, suffer hurt and humiliation as a consequence of his unfair dismissal

(c) the Commissioner failed to properly exercise a discretion based on his finding that the disappointment of the appellant was enhanced by his expectation for employment with one Clinipath, and his position as a founder of the respondent and a vital component of the respondent;

(d) the Commissioner failed to draw, and act upon, the inference that Mr Mabarack (sic) did not cover all of the appellant's qualities with Clinipath on the grounds that whilst such a thing might be inferred, the Commissioner could not be sure of it when, on the evidence before the Commission, no other inference could be drawn and, therefore, had to be made and acted upon in the proper exercise of the Commission's discretion."

APPLICATION TO EXTEND TIME

6 In appeal No FBA 47 of 2002 there was an application to extend time within which to file and serve appeal books which was granted, and there was consent to the use of one appeal book for both appeals, which was, of course, acceptable to and approved by the Full Bench.

BACKGROUND

7 An application was made by Mr Adriansz, an employee of Epath, pursuant to s.29(1)(b)(i) and (ii) of *the Act*. That application was filed on 27 March 2002 claiming that Mr Adriansz was harshly, oppressively or unfairly dismissed and claiming also

contractual benefits to which it was alleged he was entitled and which he was not paid. The application was opposed by Epath as respondent. It would seem that, at all material times, the business of Epath was that of providing laboratory services in the field of pathology.

8 Mr Adriansz claimed, at first instance, that his dismissal was unfair because:-

(a) No reasonable notice had been given and that proper reasonable notice was at least six months.

(b) He was not paid a reasonable severance payment.

(c) It would take time for him to return to his previous remuneration level and he had lost income.

(d) He had suffered hurt and humiliation from the dismissal.

(e) His reputation had been damaged and there was a loss of opportunity to develop his career prospects.

9 He claimed compensation in the sum of $30,000.00 maximum and payment for call-outs allegedly owed under his contract of employment, in the sum of $8,000.00.

10 Mr Adriansz was employed by Epath, which is a company, firstly in September 1999, and then continuing until 28 February 2002 when his employment was terminated upon his position having been made redundant. The business of Epath had been sold to an entity called Clinipath Laboratories at the beginning of March 2002. It would seem that Clinipath Laboratories was a business name of Sonic Health Care Limited (hereinafter referred to as "Clinipath").

11 During his employment by Epath he was progressively responsible as an employee in the roles of medical scientist, plant and equipment manager, technology manager and marketing support officer. In addition, he was a director of and shareholder of Epath and at various times gave personal loans and guarantees to/or on behalf of the business. His salary and/or remuneration consisted of the following entitlements, namely, $55,000.00 annual salary, 8% superannuation, sick leave, annual leave, unpaid overtime and on-call retainer with time and a half for a minimum of two hours for all call-outs.

12 The following facts were agreed, namely that Mr Adriansz was an employee of Epath, that he attended directors' meetings on 29 November 2001 and 11 April 2002 and Epath shareholder meetings on 29 January 2002 and 12 February 2002, that he was aware at the Epath shareholder meeting of 29 January 2002 of the resolution of the directors to pursue the sale of the business; and that at the Epath shareholder meeting of 12 February 2002, that he was aware that the shareholders had confirmed approval of the sale of the business with Sonic Health Care Limited, carrying on business as Clinipath, being the preferred purchaser. There is no evidence that he was then aware of the date on which the sale would be effected or when the purchaser would enter into possession of the business.

13 At the time that this matter was heard, he was employed as an information technology manager by the Perth Pathcentre at Queen Elizabeth II Medical Centre in Perth. He had been employed there since 4 June 2002 at a salary of $44,613.00 gross together with 8% superannuation. It was not in issue that he had properly sought to mitigate his loss since the time of his dismissal.

14 No evidence was adduced on behalf of Epath, the respondent, at first instance, at all.

15 The only evidence at first instance was given by Mr Adriansz. His evidence was largely unchallenged and it was as follows. In late December 1998, he had discussions with a Mr Gerald Anthony (Gerry) Mabarrack and others at the house of that gentleman about the prospect of establishing a new pathology business in Perth. As a result, in July/August 1999, Epath Pty Ltd was incorporated as a company. Epath subsequently commenced to carry on business.

16 On 4 August 1999, Mr Adriansz accepted the terms and conditions offered to him for employment by the company and commenced work in mid-September 1999. Significantly, those terms and conditions contain a reference (see pages 72-73 (AB)), inter alia, to the main terms and conditions of employment of Mr Adriansz, including salary. Those conditions provided for unpaid overtime and for no payments for on-call retainers, but expressly provided payments at the rate of time and a half for a minimum of two hours for all call-outs.

17 At the beginning of his employment, Mr Adriansz was not a director of the company. However, later, he did agree to become a director and provided personal guarantees for some loans for the business. Indeed, he gave personal guarantees for about $280,000.00 using his home as security.

18 At the beginning of his contract, the three scientists employed by Epath were advised by Mr Mabarrack that the business could not afford to pay overtime and on-call; a record of hours worked was to be kept with a view to their being compensated for that unpaid work at a later date.

19 The call-out system was the service provided outside normal operating hours (see pages 55-57 of the transcript at first instance (hereinafter referred to as "TFI")). However, Mr Adriansz did not keep a record of the hours which he worked (see page 57 (TFI)). The call-outs to which he referred in evidence were the rostered call-outs. He also said in evidence that rostered overtime was a separate issue to on-call payments. That evidence was, of course, uncontroverted. It was open to accept it, and it should have been accepted in the absence of any inherent inconsistency in Mr Adriansz's evidence.

20 Initially, the employees were all to be paid the same package. In mid-October 1999, Mr Adriansz became a director of the company. At times the company was struggling financially and he did not draw a salary, in order to assist the company. He lent the company $22,000.00 in two instalments in January 2001. He said that there were never any complaints about his performance. From May to December 2001, in particular, Epath was struggling, financially.

21 In late December 2001, the directors of the company Mr Gerry Mabarrack, Mr Adriansz and Mr Brian Tucker met and discussed how to keep the company going, given its financial position. (Mr Tucker was also company secretary). There were various options which were considered including two options for the sale of the company. It was probably in January 2001 that it was decided to sell the company, at a directors' meeting. A meeting of shareholders, of whom Mr Adriansz was one, on 12 February 2002, decided to pursue the option of sale on the basis that any purchaser employed all staff. The heads of agreement for sale were drafted and Mr Adriansz saw this agreement in late February 2002. That document is dated 20 February 2002 (see pages 74-82 (AB)).

22 In late December 2001 or early January 2002, the three directors met to recommend which staff would be transferred with the business to any purchaser. Mr Adriansz was recommended as one of the staff to transfer. It was also decided that Mr Mabarrack would negotiate the sale with Clinipath, which was a likely purchaser of the business, but Mr Adriansz was not involved in the negotiations.

23 In mid-January 2002, Mr Adriansz understood that Clinipath would be the buyer of Epath. Mr Adriansz said that he learnt that it was likely that he would be transferred to Clinipath given his skills and experience and the fact that he had worked previously for that entity and left it on good terms.

24 He admitted in evidence that Epath would be ceasing to trade and could not employ him (see page 84 (TFI)). He was, it should be observed, by virtue of directors and shareholders meetings, constantly kept up to date with negotiations for the sale of the business.

25 On 22 February 2002, staff were advised of the sale of Epath. Mr Adriansz had asked to be at that meeting when the staff were to be and were advised of the impending sale. However, he was out on business and the meeting was conducted in his absence. He asked Mr Mabarrack later that day why they had not waited for him to return before informing staff. He was told by Mr Mabarrack that there was not enough time. He also asked what had been decided regarding which staff were to transfer. Mr Mabarrack said that he was having discussions with Clinipath on the following Sunday. Mr Adriansz also asked Mr Tucker that day, about which staff would transfer to Clinipath, and he said that Mr Tucker's reply was that he, Mr Tucker, did not know and it was best that Mr Adriansz look after himself.

26 Mr Adriansz said that earlier in the week he had had a discussion with one Michelle Grey who worked for Epath in marketing. She told him that Mr Mabarrack had given her an assurance that she would have a job with Clinipath. Mr Adriansz was surprised at this. He then became concerned and rang Mr Mabarrack that weekend to ask if he could attend the Sunday meeting of 24 February 2002 with Clinipath. He wanted to put his own case for employment by Clinipath. Mr Mabarrack denied his request. Mr Mabarrack said that it would not be appropriate or professional for Mr Adriansz to attend, so Mr Adriansz did not attend that meeting.

27 At approximately 10.00am to 10.30am on Monday, 25 February 2002, Mr Mabarrack asked to see Mr Adriansz, and, when he did, Mr Mabarrack advised him that he, Mr Adriansz, would not be transferring in his employment to Clinipath. Mr Mabarrack, on Mr Adriansz's recollection, said "They haven't offered you a position". He advised Mr Adriansz that he was to finish his employment on 28 February 2002. Mr Mabarrack then gave to Mr Adriansz the name of Mr John Kozinski, an information technology professional whom Mr Mabarrack suggested would be able to assist Mr Adriansz in finding a job. There was a discussion about Mr Adriansz being paid two weeks notice and annual leave. Mr Adriansz said that he did not take in the full discussion because he was shocked. He worked until Friday, 28 February 2002 with Epath and negotiated with Clinipath to work for it on a fixed contract to assist with the technology changeover. He received $1,000.00 for this work. He did not contact Mr Kozinski, he said, because he had no formal qualifications in information technology. He did, however, seek employment through other on-line services.

28 It should be added that Mr Adriansz gave evidence that, when the directors were initially discussing the staff whom they would recommend for transfer in employment to Clinipath, Mr Mabarrack said that he had received legal advice that the maximum payment for redundancy which should be made to employees was an amount equal to two weeks salary.

29 Mr Adriansz was presented by Epath with a draft deed of release which incorporated some suggested payments in settlement of any claims by him, on 12 March 2002, but he did not sign it. This was because he did not agree to the conditions contained in it. He called a meeting of the board of Epath because he wanted to know what the company would do regarding an application made by him for unfair dismissal filed in this Commission on 27 March 2002. He admitted, that, after the 4 December 2001 directors' meeting, he was aware of the negotiations to sell the business, and was informed of the progress of the negotiations.

30 Mr Adriansz said in cross-examination that it was at the directors' meeting in mid-January 2002 that he became aware that the business could be sold and that Clinipath would be the purchaser. It is, of course, the fact that some employees, including Mr Adriansz, did not find employment with Clinipath when the employer, Epath, ceased to carry on business.

FINDINGS AT FIRST INSTANCE

31 The Commissioner at first instance accepted and found:-

(a) That Mr Adriansz had worked the on-call arrangements, that he was entitled to the payment claimed pursuant to his contract and had not been paid all of that benefit.

(b) That he was entitled to a payment of $8,492.00 gross for call-outs worked during the term of his contact.

(c) That *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193 is authority for the proposition that a redundancy payment cannot be implied into a contract of employment and thus he is not legally entitled to a redundancy payment.

(d) That since there was no express provision in the contract it was difficult to see how that could be an aspect of unfairness given the absence of a legal entitlement.

(e) That any suggestion that there was unfairness due to lack of a redundancy payment since other employees may have received payment was not relevant.

(f) That Mr Adriansz had a reasonable expectation of gaining employment with Clinipath.

(g) That Mr Adriansz was entitled to three months notice less the payment already made and the absence of reasonable notice paid was a factor in the unfairness of the dismissal.

(h) That there was no unfairness on the basis that he was not paid his accrued and unpaid entitlements for call-outs and that he was presented with a deed the purported to compromise any rights he had to Epath in return for payment of amounts to which he was in any event entitled.

(i) That he did not receive proper outplacement assistance in the form of search assistance but this claim it was said was not made out because he was directed to meet with Mr Kozinski for assistance and did not for his own reasons take up that offer.

(j) That there was no proper consultation with him as required by s.41 of the *Minimum Conditions of Employment Act* 1993 and he did not receive a proper severance payment.

(k) That since Mr Adriansz was not paid in the same fashion as other employees for a redundancy payment this was unfair.

(l) That Mr Adriansz's claim for hurt and humiliation was not made out and there was no callous disregard for him.

(m) That Mr Adriansz was entitled to the contractual benefit claimed.

(n) That Mr Adriansz was dismissed unfairly due to the absence of reasonable notice and the absence of a redundancy payment given the payment afforded to other staff.

ISSUES AND CONCLUSIONS

Appeal No FBA 47 of 2002

- Ground 1

32 This was a ground by which it was asserted that the finding that Mr Adriansz was unfairly dismissed because he had not received reasonable notice of termination of his employment was erroneous.

33 It was asserted that it was an error to find that Mr Adriansz only received notice of termination of his employment when he was notified that the purchaser had decided not to re-employ him in circumstances in which any decision not to re-employ him in Clinipath's business was a decision for Clinipath as the purchaser of the business.

34 It was also alleged and submitted that, upon the sale of Epath's business, all of the employees' positions with Epath ceased to exist, and Mr Adriansz, who was a director of Epath's business and a shareholder, because of his knowledge of the forthcoming sale to Clinipath, had reasonable notice by virtue of that fact.

35 A valid notice of termination will operate according to its terms and will bring the contract to an end when the notice expires or is due to expire (see *Hill v C A Parsons Ltd* [1972] 1 CH 305 at 313-314 per Lord Denning MR, *Grout v Gunnedah Shire Council* (1) (1994) 57 IR 243 at 251-252, *APESMA and Another v Skilled Engineering Pty Ltd and Others* (1994) 54 IR 236 at 246 and *Fryar and Others v Systems Services Pty Ltd and Others* (1995) 60 IR 68 at 87).

36 A notice of termination which is invalid because it is not given in accordance with the requirements of an award or contract, or because it specifies too short a period of notice, will not operate to end the contract (see *Re Journalists (Metropolitan Daily Newspapers) Award* (1959) 4 FLR 164 at 166-168).

37 Inadequate notice, however, may be made effective by the recipient's acceptance of it (see *Gunnedah Shire Council v Grout* (1995) 134 ALR 156 at 166). Such notice may also be treated as an offer to terminate capable of an acceptance.

38 A purported acceptance of a supposed repudiation will not bring a contract to an end, however, nor will it operate as a valid notice of termination under the contract (see *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361).

39 It is trite to observe that a contract which may be terminated by notice, unless required by an agreement or award to be in writing, is not required to be in writing.

40 If the period of notice to be given on either side is not specified in the contract then a term of reasonable notice may be implied. What is reasonable notice is decided as at the time when the notice is given (see *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567 at 580, *Logan v Otis Elevator Co Pty Ltd* (1999) 94 IR 218 and *Marine Power International Pty Ltd v Rankin* [2001] VSC 150 at paragraph 232 per Gillard J). There was no such express provision for the period of notice in this contract of employment.

41 If the words of termination are ambiguous or uncertain, then whether oral or written, notice of termination must specify when the termination is to occur or must at least make it possible for that to be ascertained (see *The Burton Group Ltd v Smith* [1977] IRLR 351 at 354 and *Thickbroom and Another v Newcastle Wallsend Coal Company Pty Ltd and Another* (1998) 83 IR 193 at 197).

42 It is trite to observe that a director of a company may also and separately be an employee of a company and as such can claim to have been unfairly dismissed. Indeed, as an employee she/he has a contract of employment with her/his employer company. It is trite to so observe (see *Koivisto v Barrett Koivisto Scatena Pty Ltd* 74 WAIG 867 (FB))and *Lee v Lees Air Farming Ltd* [1961] AC 12). Accordingly, Epath was required to give notice to Mr Adriansz, its employee, in accordance with the contract of service.

43 The case for Epath was that, as admitted by him in evidence, Mr Adriansz knew that the sale of the business, when completed, would bring his employment to an end, and he knew this because he took part, as a director, in the making of decisions to sell the business. He was also involved as a shareholder. However, the person with the main carriage of the process of purchase was another director, Mr Gerry Mabarrack.

44 It is trite to observe that the purchaser of the business, Clinipath, was not a party to the contract of employment which was terminated by Epath. It is, of course, clear that Mr Adriansz had an expectation of obtaining employment with the purchaser Clinipath. However, he had been told by Mr Brian Tucker, on 22 February 2002, that he should look out for himself. That should have been a warning to him that he could not necessarily have an expectation of employment by Clinipath. He was finally told on 25 February 2002 by Mr Mabarrack that he would not be "transferred" in his employment.

45 Mr Adriansz, as a director and shareholder, as it was found, had clearly had knowledge as and from mid-January 2002 that his position would be made redundant on the sale of the business unless he obtained further employment. It is and was irrelevant to the question whether he would be able to be transferred in his employment with Clinipath, except that it might be relevant as to the reasonableness of notice given. We say that because, quite clearly, if an Epath employee was to be "transferred" in employment to Clinipath, and was due to start on a particular date, then short notice to him by his employer might not be unreasonable.

46 We would, however, observe that if notice of termination was given in January 2002, which it was not, then it was about six weeks, and was entirely inadequate and unfair for the reasons found by the Commissioner at first instance. That is, of course, putting it at best for Epath, and based upon a finding that Mr Adriansz did have notice, as an employee, as and from mid-January 2002, which he did not.

47 We would, however, observe that a mere indication that he would become redundant and would be retrenched upon the sale to Clinipath being completed, was not a notice in accordance with the contract of employment. It would at best constitute advice that his employment would come to an end when the contract of sale of the business was completed, whenever that might be.

48 However, there was notice given to him. There was express oral notice of the termination of his contract of employment given to him on 25 February 2002 by Mr Mabarrack, and that was entirely borne out by the fact that it was given to him on behalf of Epath, and therefore considered to be necessary to be given on behalf of Epath by Mr Mabarrack. That notice was given on 25 February 2002 directly to him naming a precise date for the termination of his contract of employment when he was advised by Mr Mabarrack that he would be made redundant as at 28 February 2002 in accordance with the contract. It was valid insofar as it identified the date on which his employment would end.

49 It constituted valid notice under the contract subject to it being reasonable in length. It constituted, too, a recognition of the fact that reasonable notice was required to be given, and, indeed, that notice was required to be given direct to Mr Adriansz by Epath, his employer, of the termination of employment. That was the only notice, and no other notice was purported to be given to him in accordance with the contract of employment. In addition, it is quite clear that that sort of notice was intended to be given to employees by reference also to exhibit A2 (see pages 140, 141 and 144-152 (AB)). That contains an example of a

letter giving notice of redundancy and retrenchment which is dated 25 February 2002, the same date as that on which notice to the same effect was given to Mr Adriansz.

50 It must be clearly understood that notice was required to be given in accordance with the contract. What had to be implied was not that notice of termination must be given in accordance with the contract, but what was reasonable notice. The requirement to give notice itself was a contractual obligation. Notice was given in accordance with the contract but it was too short, not reasonable and was therefore prima facie invalid. The term of the actual notice was also evidenced, to some extent, as we have said, by the payment of two or three weeks pay by way of notice.

51 No notice was, or was purported to be given, earlier than 25 February 2002. The attempt to say that the "notice" said to have been given to Mr Adriansz because of his knowledge of the proposed sale as a director, was notice, was an attempt to mend matters after the event. There was no suggestion prior to this that there was any notice given, save and except that of 25 February 2002. It is noteworthy that the notice, when given for the first time, identified the actual date of termination of employment and the date when the purchase of Epath's business was to take effect, also. Clearly, knowledge as a director did not constitute reasonable notice in accordance with the contract of employment. Further, a mere indication that Mr Adriansz might be employed by the purchaser of the employer's business could not be accounted as notice, nor might it subsequently be used as notice of termination by the employer as purported notice in accordance with the contract of employment.

52 There was no appeal against the finding that three months notice was reasonable and for the reasons given by the Commissioner at first instance that period clearly was reasonable.

53 It was open to find, and the Commissioner should have found, applying *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC), that the dismissal was harsh, oppressive and unfair because such manifestly inadequate notice rendered it invalid and effectively because he was given the manifestly inadequate period of notice of about three days only.

54 In our opinion, too, since a finding whether a dismissal is harsh, oppressive and unfair is a discretionary decision, as that term is defined in *Norbis v Norbis* (1986) 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194, then the appellant has not established, in accordance with the principles laid down in *House v The King* [1936] 55 CLR 499 that there was a miscarriage of the discretion at first instance. Even if we are wrong in finding that there was an error for that reason, then for the reasons which we have expressed above, the Commissioner at first instance erred in law in finding that the dismissal was not unfair.

55 For that reason, it will be clear that the particulars of ground 1 are irrelevant or unavailing. For those reasons, ground 1 is not made out, in our opinion.

- Ground 2

56 Because of our reasons expressed in relation to ground 1, it is clear that it was correct to find that the dismissal was harsh, oppressive and unfair. For the reasons which we now express, it was not necessary to find that the dismissal was unfair for other reasons. However, as will be clear, it was open to so find.

57 By this ground, it is alleged that the Commissioner at first instance erred in finding that Mr Adriansz had been unfairly dismissed because Epath failed to pay Mr Adriansz an adequate redundancy payment. It was submitted that, in fact, there was no entitlement to a redundancy payment. Further, it was submitted that there was no evidence that any redundancy payment was made to any other employee. In support of those submissions, it was also submitted that a failure to make a redundancy payment to the respondent could not by itself be unfair.

58 That submission relied on the dictum of the Industrial Appeal Court in *Dellys v Elderslie Finance Corporation Ltd* (op cit) at paragraph 21 per Anderson P (IAC). His Honour there observed that an obligation to make a redundancy payment or severance could not be implied into a contract of employment as a term, and said "neither does it appear reasonable or equitable, that an employer should be obliged to both give reasonable notice, and as well pay a redundancy sum". It was submitted for Mr Adriansz that the absence of a legal entitlement to a redundancy payment does not preclude a finding that a person is entitled to consideration of that matter, as a matter of fairness. The finding was, as was submitted, not based on any legal entitlement.

59 It was clearly, as was submitted, a finding that Mr Adriansz had been treated unfairly because he was not paid a redundancy payment, or an adequate redundancy payment, which accorded with the finding made in *Rogers v Leighton Contractors Pty Ltd* (1999) 79 WAIG 3551 (FB). That finding was based on the fact that other employees were to be paid an amount equal to two weeks wages or salary for a redundancy or severance payment. It was submitted for Epath that there was no evidence of that fact.

60 Exhibit A2 is a document called "E-Path Redundancy Kit" (see pages 144-152 (AB)). That document bears the name "Julian Johnson Lawyers". (It was formally marked as an exhibit without objection (see pages 114-117 (TFI)). It is not dated but contains, inter alia, an example of a letter of advice of redundancy to be forwarded to employees. That letter is dated, quite clearly, 25 February 2002. By the letter it is advised that, as a gesture of goodwill, a redundancy payment will be made in the case of a person employed for more than one year but not more than three years, in an amount equal to two weeks wages or salary. There are other provisions for employees employed for different periods of time. Further, Epath, on Mr Adriansz's uncontroverted evidence, had clearly gone to the trouble of obtaining legal advice as to what were appropriate severance or redundancy payments to employees who were retrenched. In our opinion, in the absence of a denial by Epath, there being no evidence adduced to the contrary, it was open to find that Epath, through its directors, had approved and/or embarked on such a course. It was therefore open to the Commissioner to so conclude, on the balance of probabilities, accordingly.

61 It is necessary to make clear that the fairness or unfairness of a dismissal in a case such as this does not depend on whether there is a legal obligation to pay redundancy payments. Whether one can imply such a term is, we think, irrelevant. *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) is authority for the proposition that a termination of employment for redundancy not accompanied by a reasonable redundancy or severance payment may be harsh, oppressive and unfair (see also the cases cited in *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit), including, in particular, *Wynn's Winegrowers Pty Ltd v Foster* [1986] 16 IR 381 at 392). (We refer also to *Commercial Computer Centre Pty Ltd v Holman* (2001) 105 IR 222, Fosters Brewing Group Ltd v Industrial Commission of South Australia (1993) 51 IR 228 and Matthews v Coles Myer Ltd (1993) 47 IR 229). As was properly observed in *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) at page 3554 by Beech C, as he then was, severance or redundancy payments may also include compensation for accrued benefits lost, or forgone, the lack of availability of alternative employment, and other items. Beech C also characterised the unfairness of the failure to pay an adequate redundancy payment. Again, it is to be emphasised that whether there is a failure to pay an adequate redundancy payment depends on the circumstances of the case.

62 We would also observe that some of the items which are covered by a severance or redundancy payment are not necessarily matters relevant to or coincidental with those factors which should be taken into account in deciding what is reasonable notice. Severance pay can clearly be set-off in part against compensation for loss for failure to provide adequate notice.

63 In this case, it is quite clear, having regard to the factors referred to in *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit), that two weeks redundancy pay for Mr Adriansz was inadequate, and that an amount equal to one month's salary by way of redundancy payments was adequate, given that an amount of salary equal to three months notice was already ordered to be paid. Those relevant factors were his seniority, his voluntary work for his employer, an amount for benefits forgone, the time required to re-establish himself, the amount clearly contemplated to be paid to other employees, his brief length of service, his work as a manager, and the admission by Epath as to the necessity for such a payment in the non-privileged offer of settlement.

64 It is quite clear from the deed of release forwarded to him that Epath was prepared to pay a redundancy payment, in any event, and that that offer was probative of that obligation, given that it was not expressed without prejudice.

65 In our opinion, both exhibit A5 and the deed of release, which were not paid to Mr Adriansz in any form, were evidence of loss. In the absence of any denial, these documents implicitly acknowledged a loss separate from that occasioned by lack of reasonable notice.

66 It was open, too, to find that the dismissal was unfair because of a failure to pay adequate redundancy or severance payment, and that the loss established as caused by the dismissal in that respect included an amount equal to one months salary for a redundancy payment. The Commissioner at first instance erred in failing to so find and in failing to follow *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit).

67 Accordingly, whether there was a legal obligation to pay the redundancy payment or not, the failure to do so, for the reasons which we have expressed, amounted to unfairness. It should be emphasised that the question to be answered was whether there was an "unfair" dismissal, not whether there was a wrongful dismissal ((ie) whether the statutory tort of unfair dismissal had been committed and whether there was also a loss for which he should be compensated).

68 It was clearly open to the Commissioner at first instance to find as he did, that is that the failure to give reasonable notice was unfair. That, of course, was sufficient to justify a finding that the dismissal was harsh, oppressive and unfair. In addition, it was open to find, and the Commissioner should have found, that the failure to pay a reasonable redundancy payment was unfair also. That ground also is not made out for those reasons.

- Ground 3

69 By ground 3, it is alleged that the Commissioner at first instance erred in law in finding that Mr Adriansz had been denied a contractual benefit for unpaid "call-outs" when Mr Adriansz's claim was for rostered overtime which was to be unpaid, in Mr Adriansz's contract of employment (see pages 72-73 (AB)).

70 It was submitted that pursuant to the contract of employment, which it seems to have been accepted, was constituted by the offer of employment dated 4 August 1999 (see pages 72-73 (AB)), Mr Adriansz undertook to work unpaid overtime and rostered overtime on weekends (see page 72 (AB)). The only evidence, it was submitted, of rostered overtime was that some call-outs were rostered. The Commissioner at first instance held that these call-outs attracted payment at the rate of time and a half for a minimum of two hours for all call-outs (see page 72 (AB)) but not for "overtime" or "rostered overtime on weekends". It was therefore submitted that the Commissioner fell into error in failing to confine the meaning of the word "call-out" in the agreement, to either un-rostered call-outs or call-outs that did not occur during overtime.

71 It is clear from the terms of employment (see page 72 (AB)) that there were six separate main terms and conditions of employment including annual salary. Two of those separate terms are "Unpaid overtime and on-call retainer" and "Time and one half for a minimum of two hours for all callouts". As we read those two clauses, they provide that Mr Adriansz was not to be paid for overtime worked and that would include any overtime worked by way of rostered overtime (see the second last paragraph at page 72 (AB)). That term, on a fair reading, also precludes any payment of an amount paid for his being available on-call whilst not actually working.

72 However, the last term of those main terms and conditions unequivocally, separately and expressly prescribes that Mr Adriansz was to be paid for "all call-outs" at a rate of time and a half for all call-outs. If there was any doubt about that, and if there was any ambiguity in the terms of the agreement, which there was not, Mr Adriansz in his uncontroverted and indeed unchallenged evidence expressly said that call-out payments were a separate issue from rostered overtime.

73 What the clause means, on a fair reading, however, is that, if Mr Adriansz was "called out", then he was to be paid. A call-out is not and was not in the category of unpaid overtime, because it is required to be paid for by one of the express main terms of the contract.

74 It is clearly not overtime of the general kind, and it is certainly not an on-call retainer which we would understand to be a retainer paid to a person who made him or herself available to be called out.

75 For those reasons, therefore, there was no error demonstrated in the finding at first instance that there was owing a sum of money for call-out payments. That ground is accordingly, for those reasons, not made out.

Appeal No FBA 48 of 2002

- Ground (i)

76 By ground (i) of this appeal, it is alleged that *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) which is authority for the proposition that all reasonable factors should be taken into account in assessing what constitutes a reasonable redundancy payment (see also *Transfield v Parker* 81 WAIG 990 (FB)) was not applied. That was so.

77 The Commissioner at first instance expressly did not follow that approach in determining what constituted a fair redundancy payment, although it was binding upon him. (We would also observe that *Dellys v Elderslie Finance Corporation Ltd* (op cit), as we read it, is not an authority relevant to the question of unfairness, but whether a term to pay redundancy can be implied into a contract of employment). It is not necessary, on this occasion, to consider the ambit of the ratio in that case. The Commissioner found that it was unfair that Mr Adriansz was not paid what other non-transferring employees were paid, and awarded that amount without analysing whether the amount constituted a fair redundancy payment, and, in particular, without taking into account Mr Adriansz's individual circumstances. It was submitted that, having regard to a number of factors which were expressed, the exercise of the discretion miscarried in accordance with the principles laid down in *House v The King* (op cit).

78 Particular emphasis was laid on the offer to settle contained in a deed of release, to pay $10,000.00 for a redundancy payment and which amount was not offered without prejudice.

79 In answer to those submissions, the submission was that the decision in *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) did not apply because of the higher authority of the Industrial Appeal Court in *Dellys v Elderslie Finance Corporation Ltd* (op cit) and the statement by Anderson P in that case which we have already quoted above, that it does not appear reasonable or equitable that an employer should be obliged to both give reasonable notice and in addition a sum for redundancy. Of course, as the authorities reveal, the two can be set-off one against the other (see *Black v Brimbank City Council* (1998) 152 ALR

491). We wish to make it clear that, for the reasons expressed above in paragraphs 62-65, not only was the denial unfair, for the reasons therein expressed, but the loss established was proven (see *Furey v CSA* (1999) 91 FCR 407).

80 We adopt what we have already observed above in relation to ground 2 of appeal No FBA 47 of 2002. No adequate compensation for the loss occasioned by the failure to pay an adequate redundancy payment was ordered. For those reasons, this ground is made out, in our opinion.

- Ground (ii)

81 We have already addressed that ground above. That ground is made out.

- Ground (iii)

82 Because of our findings that, in our opinion, the dismissal was unfair, expressed above, it is unnecessary to address that ground.

- Ground (iv)

83 Next it was submitted that the Commissioner at first instance erred in failing to find that Mr Adriansz was not injured and therefore was not entitled to compensation for hurt and humiliation. The only evidence was that he felt hurt and humiliated. The submission is correct that an applicant under s.29(1)(b)(i) of *the Act* is not injured merely because her/his feelings are hurt (see *Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986, paragraphs 56 and 59, (per Sharkey P) (FB)). There is no evidence of any hurt, injury or humiliation such as should attract an order for compensation within the principles laid down in *Lynam v Lataga Pty Ltd* (op cit). That ground is not made out.

Finally

84 It is necessary to observe that whether Clinipath chose to employ Mr Adriansz or not is entirely irrelevant to questions of compensation or to the fairness or otherwise of his dismissal.

85 Our views of these appeals expressed above can be summarised as follows:-

(a) 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 as reasonable notice.

(b) The loss caused by the unfair dismissal was the loss of reasonable notice quantifiable at and compensable by an amount equal to three months salary as ordered.

(c) It was also open to be found, further, or in the alternative, that there having been a scheme adopted to pay redundancy or severance payments, further acknowledged by the open offer by Epath to Mr Adriansz, that no adequate redundancy or severance payment was made to him, and the dismissal was harsh, oppressive or unfair, for that reason.

(d) The loss suffered thereby could properly be found, for the reasons applied in *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit), and taking into account his status, time of service and the fact that two weeks was to be offered to other employees, to be one months salary.

(e) That is not an amount which was required to be set-off against the amount of loss for failure to give reasonable notice because redundancy payments were obviously separately characterised correctly by Epath.

(f) The amounts of compensation to be ordered were amounts of loss suffered as a result of the industrial unfairness of the dismissal. They were not claims pursuant to the contract of service whether pursuant to express or implied terms.

(g) The losses arose because it was found and should have been found correctly that in two serious respects the employer, Epath, had been harsh, oppressive and unfair in the exercise of its right under the contract to dismiss Mr Adriansz.

86 For those reasons, having considered all of the submissions and all of the relevant material and evidence, we would dismiss appeal No FBA 47 of 2002.

87 We would uphold appeal No FBA 48 of 2002 in part, and vary 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. We would add that the decision is a discretionary decision in which an error occurred in accordance with the principles laid down in *House v The King* (op cit). If that is not the case, then the Commissioner at first instance erred, in any event, for the reasons which we have expressed.

88 For those reasons, we would dismiss appeal No FBA 47 of 2002 and we would vary the decision made at first instance, upholding appeal No FBA 48 of 2002, as we have indicated that we would.

SENIOR COMMISSIONER A R BEECH—

89 The facts of the matter are sufficiently set out in the Reasons for Decision of his Honour the President and I have no need to repeat them here. I have found it convenient to refer to Mr Adriansz by his name and to ePath WA Pty Ltd as "the company".

Appeal No. 47 of 2002

90 At paragraph [29] of the Reasons for Decision at first instance (AB 21) the Commission states—

91 "In other words the only point at which Mr Adriansz was given notice was on 25 February 2002."

92 Although, with all due respect, it is not entirely clear from the context whether this sentence is a conclusion reached by the Commission or is part of the submissions of the company, I assume for present purposes that it is a conclusion of the Commission. The company alleges in the first ground of appeal that the Commission erred in law in finding that Mr Adriansz had been unfairly dismissed due to the absence of reasonable notice. On the evidence, the above conclusion was correct as a matter of fact. Mr Adriansz's evidence of the conversation of 25 February 2002 is given at AB 47. Mr Adriansz's evidence of that conversation, for present purposes, is that Mr Mabarrack stated two things: 1. that Clinipath had not offered Mr Adriansz a position, and: 2. that Mr Adriansz "would be finishing up on 28 February 2002". This evidence was confirmed in response to a question from the Commission at AB 65. That was the only evidence before the Commission of any notice of termination given to Mr Adriansz by his employer. The Commission at first instance was entitled to accept that evidence and did so. The notice of termination which was given to Mr Adriansz by his employer is a matter of fact and I detect no error of law as alleged.

93 I totally agree with the company's submission that any decision by the purchaser of the company not to offer Mr Adriansz employment is a decision for the purchaser. Furthermore, upon the sale of the company's business all of the employee's positions with that business would cease to exist. However, what is required to validly bring Mr Adriansz's contract of

employment to an end is for Mr Adriansz to be given reasonable notice of the termination of his employment by his employer. It was not submitted, either at first instance or on this appeal, that Mr Adriansz had waived any right to notice. The only evidence before the Commission at first instance of notice of termination being given is the evidence of Mr Adriansz of the conversation of 25 February 2002. That evidence was not that Clinipath would not be employing Mr Adriansz. The relevant evidence is that Mr Adriansz was told he would be finishing up on 28 February 2002.

94 The company further submits that Mr Adriansz was a director of it and had reasonable notice of the sale of the business from mid January 2002. However, I have not found the submission is to the point. Even if the evidence permits the conclusion that Mr Adriansz was aware that there were negotiations to sell the company, and later that the business would be sold, there is no evidence that Mr Adriansz in his capacity as director was aware that the sale date was 28 February 2002. For the notice of termination to an employee to be valid, the notice must either specify the date, or contain material from which that date is positively ascertainable (*Morton Sundour Fabrics Ltd v. Shaw* [1967] ITR 84 at 86, as quoted in *The Burton Group Ltd v. M Smith* [1977] IRLR 351 at 354). On the evidence before the Commission at first instance the time that Mr Adriansz knew the date his employment was to end was in the conversation of 25 February 2002. There is no evidence that Mr Adriansz was otherwise aware of the date of the sale of the business. For those reasons, ground 1 is not made out.

95 The second ground of appeal raises other considerations. The submission before the Full Bench from the company is that the decision of the Industrial Appeal Court in *Dellys v. Elderslie Finance Corporation Limite*d (2002) 82 WAIG 1193 is authority for the proposition that there is not an implied term in a contract of employment for the payment of a redundancy payment in addition to that of reasonable notice. That conclusion is relevant because two of the claims before the Commission at first instance sought "balance of payment equivalent to six months reasonable notice of termination of employment" and "redundancy pay" (AB 7).

96 In my view, there is considerable confusion regarding these issues as they are to be addressed by this Commission pursuant to the *Industrial Relations Act 1979*. I have found it helpful to set the issue out in the following manner.

97 (1) The claim before the Commission by Mr Adriansz was that his dismissal was harsh, oppressive or unfair: s.29(1)(b)(i). It is not in dispute that the company had the legal right to dismiss Mr Adriansz pursuant to his contract of employment. It is common ground that the contract of employment was silent regarding the notice to be given by either party to terminate the contract of employment. It was nevertheless accepted by both parties, and properly so, that the contract of employment was lawfully terminable by the company giving Mr Adriansz a period of reasonable notice of termination. That is quite consistent with the leading authority on the point (*Byrne v. Australian Airlines Ltd* (1995) 185 CLR 410 at 429).

98 (2) The question before the Commission was not, however, whether the termination of Mr Adriansz's employment was lawful. The question was whether the legal right of the employer to dismiss him was exercised so harshly or oppressively against him as to amount to an abuse of that right: *Undercliffe Nursing Home v. FMWU* (1985) 65 WAIG 385. The question is not answered by stating that the company paid Mr Adriansz all the entitlements that were due at the point of termination. Nor is it answered by stating that there was no term of the contract of employment, either implied or express, that Mr Adriansz was entitled to a redundancy payment.

99 It is not irrelevant to observe that the Commission's jurisdiction differs significantly from the common law courts which may be concerned only with the lawfulness of a dismissal. The Commission is, however, concerned with the fairness of any particular dismissal and the lawfulness of that dismissal is but a relevant factor to be taken into account by the Commission in deciding whether the dismissal was unfair (*Newmont Australia Ltd v. AWU (1988) 68 WAIG 677 at 679).*

100 (3) A dismissal, though lawful, may nevertheless be harsh, oppressive or unfair: *R v. The Industrial Court of South Australia,* ex parte *Mt Gunson Mines Pty Ltd* (1982) 2 IR 336. Whether that is so will depend upon all of the circumstances. One of those circumstances, however, can arise where an employee is dismissed by reason of redundancy but the method of dismissal adopted was harsh, oppressive or unfair or because the length of notice given might be inadequate or because a redundancy payment made was, in all of the circumstances, totally inadequate: *Wynn's Winegrowers Pty Ltd v. Foster* (1986) 16 IR 381 at 384.

101 (4) There is a distinction between the nature and purpose of a period of notice (or payment in lieu of notice) and a redundancy payment: *Fryar v. System Services* (1996) 137 ALR 321 (the subsequent appeal against this decision was upheld but only on jurisdictional grounds: 5/9/96, unreported). In *Fryar,* von Doussa J drew a distinction by referring to Articles 11 and 12 of the Termination of Employment Convention and stated that whilst the two are often treated together to arrive at a global redundancy package the separate nature and purpose of the two entitlements remains. He stated—

102 "A period of notice is to give an employee the opportunity to adjust to the change in circumstances which is to occur and to seek other employment: *Matthews v. Coles Myer Ltd* (1993) 47 IR 229.

103 …

104 A severance payment, however, is intended to provide a payment as compensation for the loss of non-transferable credits and entitlements that have been built up through length of service such as sick leave and long service leave, and for inconvenience and hardship imposed by the termination of employment through no fault of the employee: *Termination, Change and Redundancy* case (1984) 8 IR 34 at 62, 73. The inconvenience and hardship includes the disruption to an employee's routine and social contacts and the competitive disability to long term employees arising from opportunities forgone in the continuous service of the employer: *Food Preservers' Union of Australia v. Wattie Pict Ltd* (1975) 172 CAR 227."

105 I pause to note that the decisions in paragraphs (3) and (4) above form the foundation of the decision of the Full Bench in *Rogers v. Leighton Contractors* (1999) 79 WAIG 355. That decision, underpinned as it is by the decisions referred to, is authority for the proposition that the dismissal of a long serving employee by reason of redundancy without payment in compensation for the loss of non-transferable credits and entitlements that have been built up through length of service may be, in all the circumstances, a dismissal that is harsh, oppressive or unfair.

106 (5) The decision in *Dellys* (op.cit.) is not authority to the contrary. In *Dellys*, Anderson J dealt with whether a redundancy entitlement is implied in employment contracts. He held at [18] that it is not. That, however, was not the issue before the Commission in this case. The Commission was not asked to decide whether it was a term of Mr Adriansz's contract of employment that he would be paid a redundancy payment upon the termination of his employment for redundancy. The issue before the Commission was whether, Mr Adriansz having been dismissed by reason of redundancy, the dismissal was harsh, oppressive or unfair. That is an entirely different question that is not answered by ascertaining whether or not there was an entitlement to a redundancy payment implied in the contract of employment.

107 (6) In *Dellys*, his Honour states that it did not appear "reasonable or equitable" that an employer should be obliged to both give reasonable notice, and as well, pay a redundancy sum [at 21]. Those comments must be seen in their context. His Honour was there assessing, in the context of whether or not a redundancy entitlement is implied in contracts of employment, whether or not the test in *BP Refinery (Westernport) Pty Ltd v. The Shire of Hastings* (1978) 52 ALJR 20 at 26 that the term must be "reasonable and equitable" was met.

108 (7) However, the Commission in a case of unfair dismissal does not under s.23A order a reasonable redundancy payment separately from any order that may be made in respect of a claim for payment in lieu of reasonable notice. The Commission makes an order for compensation for the loss or injury caused by the dismissal: s.23A(1)(ba) of the Act as it was prior to the amendment which took effect on 1 August 2002 (see s.138 (2) of the *Labour Relations Reform Act 2002*). That is what the decision of the Commission was in this matter: see AB 27. If the Commission finds that a dismissal is unfair because the dismissal was effected without the employer giving the employee reasonable notice of termination, it may find the loss caused by that dismissal is compensated by ordering payment to the employee of a sum of money equivalent to the reasonable notice which should have been given.

109 If the Commission also finds that a loss caused by the dismissal is loss of non-transferable credits and entitlements built up through length of service, it may order compensation be paid to the employee of that loss. The two concepts are different (*Fryar v. System Services* op.cit.) and the Commission should ensure there is no double counting of criteria when they are considered together.

110 The Commission at first instance held the absence of "a reasonable notice payment" to be a factor in the unfairness of the dismissal (at [29]). With all due respect to the Commission at first instance, the correct finding was that the absence of "reasonable notice to Mr Adriansz" is a factor in the unfairness of the dismissal. It is common ground that Mr Adriansz's contract of service was silent regarding the notice to be given to terminate the contract. At common law a contract of employment for no set term is to be regarded as containing an implied term that the employer give reasonable notice of termination except in circumstances justifying summary dismissal (*Byrne v. Australian Airlines Ltd*, op.cit.).

111 The implied term is not necessarily that the employer give payment in lieu of reasonable notice. It may be possible to argue in some industries at least that payment in lieu of notice is so well established as to constitute an industry custom or practice to be implied into contracts of employment in that industry: Law of Employment, Macken, O'Grady, Sappideen and Warburton, Lawbook Co, 5th ed. p185. That was not argued here. Therefore what was implied into Mr Adriansz's contract of employment was a term that the company could give Mr Adriansz reasonable notice of the termination of his employment, not that it could pay him in lieu of that notice.

112 On the facts, Mr Adriansz was given three days' notice of termination. The Commission at first instance considered that three months' notice was an appropriate period of reasonable notice. That finding of itself is not attacked on appeal and, again with respect, is a finding that was reasonably open to the Commission at first instance on the facts before him. Those facts included Mr Adriansz's evidence that the position in which he was employed at the time of the hearing had taken him 3 months to find and was at a lower remuneration (transcript at first instance pp. 75 and 76).

113 The Commission concluded at the end of [29] that Mr Adriansz is entitled to "three months' notice (incorporating salary and superannuation) less the payment already made …". I read those words as meaning that the Commissioner concluded that, as Mr Adriansz was entitled to three months' notice, one loss caused by the dismissal is the payment of the salary and superannuation he would have earned for the duration of that notice. Properly expressed in that way, no quarrel can be taken with that finding.

114 The Commission then considered some other claims advanced as reasons for the dismissal being unfair and rejected them. However, the Commission at first instance held at [35] that an aspect of unfairness in the dismissal was that Mr Adriansz was not treated in a like fashion to other employees and paid a redundancy payment. It is this latter finding which is squarely attacked in ground 2 of the appeal. It is alleged that the Commissioner erred in law in this finding. In its ground of appeal the company states that there is no legal entitlement to a redundancy payment. On the evidence before the Commission the submission is correct. There was indeed no legal entitlement to a redundancy payment. However, for the reasons already explained, whether or not a person is legally entitled to a redundancy payment does not fully answer the question of whether the dismissal of a person by reason of redundancy is harsh, oppressive or unfair.

115 The company then states that there was no evidence before the Commission that any redundancy payment was made to any other employee. The evidence before the Commission and upon which the Commission relied at [35] is a document referred to by the Commission as "exhibit A2". This was described by the Commission as the "ePath Redundancy Kit".

116 The company attacked the Commission's reliance on this document submitting that it was a document which had been marked for identification: MFI. I observe that a document that is merely marked for identification is not in evidence before the Commission. It is so marked to identify it when it is subsequently shown to a later witness. It should remain in the custody of the Commission's Associate until, or unless, it is subsequently entered into evidence. If it is not entered into evidence, at the conclusion of the hearing it is returned to the person who produced it to the witness.

117 However, the submission is not valid. The document was marked for identification (as MFI 2) but it was later admitted into evidence: transcript pages 114-115. Furthermore, the company did not object to that document going into evidence. Thus, although the document was not a document that could be vouched for by Mr Adriansz, his evidence being that he had never seen the document until it was produced by the company as part of Commission proceedings (AB 49), the company did not object to it being received by the Commission as part of the evidence in the proceedings.

118 The weight to be attached to that evidence is, however, a different matter. On the evidence before the Commission, Mr Adriansz did not receive the document. There is no evidence of any other employee of the company ever receiving the document. There is no evidence at all before the Commission regarding the extent to which it was used by the company. It cannot, therefore, be properly held to be evidence of redundancy payments made by the company to its employees who did not transfer to Clinipath. With all due respect, it was not open to the Commission at first instance to infer so from the document. Whilst the Commission at first instance stated that he did not know what Mr Bonar was paid (AB 23) it is more accurate to say that the Commission had no evidence before it whether Mr Bonar had been paid anything at all.

119 Therefore, it also was not open to the Commission to conclude that an aspect of unfairness to Mr Adriansz was that he was not treated "in a like fashion to other employees and paid a redundancy payment" (at [32]). The Commissioner therefore fell into error in so concluding. It was not open to him to order payment of two weeks' salary solely on the basis of his finding that Mr Adriansz had not been paid "at least what other employees were paid".

120 On appeal it was submitted in paragraph 3 that there are ten circumstances to be taken into account in deciding what constituted a fair redundancy payment for Mr Adriansz in accordance with the reasoning in *Rogers v. Leighton Contractors.*

121 An examination of those circumstances reveals as follows. Mr Adriansz's senior role, the long time it would take to return to similar remuneration levels and his status as a director who provided personal guarantees were factors relied upon by the

Commission at first instance to consider what was reasonable notice. These circumstances cannot be counted again to attempt to establish yet further loss.

122 I see little reason to separately distinguish from the above circumstances the circumstance that Mr Adriansz did not draw a salary at a time when the respondent was struggling financially.

123 The circumstance of damage to reputation was a claim made, not a finding of the Commission and does not form part of the consideration.

124 It is submitted that the circumstance of the respondent's description of an amount in a settlement offer as a "redundancy payment" is relevant. In the absence of any authority to support that submission, I am unable to agree with it. The characterisation of an offer made in settlement of a claim is simply that: an offer to settle.

125 The remaining circumstances submitted, they being issues relating to job placement or outplacement, and the effect of the dismissal on Mr Adriansz as referred to in [12] of the Reasons for Decision are matters which, in the circumstances of this case, in my view support the payment ordered by the Commission, albeit for different reasons.

126 I would therefore dismiss the appeal on this ground.

127 The third and final ground of appeal relates to the Commission's finding that Mr Adriansz had a benefit under his contract of employment to which he was entitled and which had not been paid to him, being unpaid "call outs". For the reasons given by his Honour the President I agree that the ground is not made out.

Appeal No. 48 of 2002

128 In relation to ground (i) the Commission at first instance was obliged to follow the decision of the Full Bench in *Rogers* op. cit. in all cases where it cannot be distinguished on the facts. In relation to ground (ii), I adopt what I have written regarding the second ground of appeal in Appeal 47.

129 The distinction drawn by von Doussa J in *Fryar v. System Services* (referred to above) is authority for the proposition that a period of notice is to give an employee the opportunity to adjust to the change in circumstances which is to occur and to seek other employment. Mr Adriansz's evidence on this point is evidence which went to the finding of the period of reasonable notice and care must be taken to avoid double-counting that evidence under s.23A for the purposes of considering loss caused by the dismissal. I find grounds (i) and (ii) are therefore not made out.

130 As to the balance of this appeal, I have had the advantage of reading in draft form the Reasons for Decision of his Honour the President. I agree with his decision on these grounds and desire to add only the following points.

131 There is a distinction to be drawn between the termination of an employee's employment by reason of redundancy when the employer's business is sold and whether or not the purchaser of that business offers employment to that employee. The issue that was before the Commission is the former and not the latter.

132 The issue before the Commission was whether or not the dismissal of Mr Adriansz by reason of redundancy upon the sale of ePath to Clinipath was harsh, oppressive or unfair. The termination of his employment occurred irrespective of whether Clinipath offered Mr Adriansz employment after ePath was sold. If it did not offer that employment, and the dismissal was otherwise unfair, one aspect of Mr Adriansz's loss may be the loss of non-transferable credits or the difficulties which may attend an employee finding alternative work.

133 These are all aspects of loss for which compensation may, depending on the circumstances, be ordered by the Commission. If Clinipath had offered Mr Adriansz employment, and he had accepted, then evidence would need to be brought as to whether or not Mr Adriansz's employment was deemed to be continuous such that he carried over with him entitlements such as his sick leave accrual and service towards long service leave, in which case, it would be very difficult for him to establish a loss for which compensation would be ordered pursuant to s.23A. There is authority also for a submission that where an employer such as ePath is the agent in finding an employee such as Mr Adriansz acceptable alternative employment, redundancy payments are not paid to the employee, or are reduced (*Termination, Change and Redundancy* case, (1984) 8 IR 34 and 9 IR 115; *Clothing and Allied Trades Union v. Hot Tuna Pty Ltd* (1988) 27 IR 266).

134 For the above Reasons, I would dismiss the Appeal 48 of 2002.

THE PRESIDENT—

135 For those reasons, we would dismiss appeal No FBA 47 of 2002 and we would vary the decision made at first instance, upholding appeal No FBA 48 of 2002.

Order accordingly

2003 WAIRC 07785

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EPATH PTY LTD, APPELLANT
	- and -
	IHANN ADRIANSZ, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	FBA 47 OF 2002
CITATION NO.	2003 WAIRC 07785

Decision	Appeal dismissed
Appearances	
Appellant	Dr J J Edelman (of Counsel), by leave
Respondent	Mr T H F Caspersz (of Counsel), by leave

Order

This appeal having come on for hearing before the Full Bench on the 24th day of January 2003 and having heard Dr J J Edelman (of Counsel), by leave, on behalf of the appellant, and Mr T H F Caspersz (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision having been delivered on the 21st day of February 2003, it is this day, the 21st day of February 2003, ordered by the Full Bench that appeal No FBA 47 of 2002 be and is hereby dismissed.

By the Full Bench
(Sgd.) P. J. SHARKEY,
President.

[L.S.]

2003 WAIRC 07792

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	IHAAN ADRIANSZ, APPELLANT
	- and -
	EPATH WA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	FBA 48 OF 2002
CITATION NO.	2003 WAIRC 07792

Decision	Appeal upheld in part and order at first instance varied
Appearances	
Appellant	Mr T H F Caspersz (of Counsel), by leave
Respondent	Dr J J Edelman (of Counsel), by leave

Order

This appeal having come on for hearing before the Full Bench on the 24th day of January 2003 and having heard Mr T H F Caspersz (of Counsel), by leave, on behalf of the appellant, and Dr J J Edelman (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision having been delivered on the 21st day of February 2003, it is this day, the 21st day of February 2003, ordered and declared as follows:-

(1) THAT appeal No. FBA 48 of 2002 be and is upheld in part.

(2) THAT the decision of the Commission in matter No. 537 of 2002 made on 27 September 2002 be and is hereby varied so that Order (3) thereof will read:-

"ORDERS that the respondent, within 14 days of the date of the 21st day of February 2003, do pay in compensation the sum of $14 197.26, together with the further amount $ 4583.33 being an amount equal to one month's salary."

(3) THAT appeal No. FBA 48 of 2002 be and is otherwise dismissed.

By the Full Bench
(Sgd.) P. J. SHARKEY,
President.

[L.S.]

2003 WAIRC 07720

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	RENE KOSTER, APPELLANT
	- and -
	VOLUTE PTY LTD TRADING AS CATT DESIGN, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER J L HARRISON
DELIVERED	WEDNESDAY, 12 FEBRUARY 2003
FILE NO/S.	FBA 32 OF 2002
CITATION NO.	2003 WAIRC 07720

Decision	Order issued
Appearances	
Appellant	Mr P Mullaly, as agent
Respondent	Mr T Crossley-Solomon, as agent

Supplementary Reasons for Decision

THE PRESIDENT—

1. We have heard what you gentlemen have had to say, and we thank you for it. We are of the view that the order should issue in the form in which the minute is. It reflects the reasons for decision in the matter, and the fact that monies might have been paid in reduction of the amount which the order subsequently ordered, or will order to be paid, is not a matter for the Full Bench. It is a matter for the parties and relevant to any question of enforcement if the amount of the order is not paid.
2. It is sufficient to say that what has occurred is that there has been a part payment of the amount that the Full Bench ordered for the reasons which it published, in anticipation of the order which the Full Bench eventually made. To that end, the fact of the part payment of the amount of the order is not a matter relevant to the order made, or the reasons for decision, and not a matter relevant to a speaking to the minutes.
3. So thank you for your assistance, gentlemen, and an order will issue in terms of the minute of proposed order issued by the Full Bench in this matter for those reasons.

FULL BENCH—Procedural Directions and Orders—

2003 WAIRC 07800

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPELLANT
	- and -
	MIDLAND BRICK COMPANY PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DELIVERED	WEDNESDAY, 26 FEBRUARY 2003
FILE NO/S.	FBA 51 OF 2002
CITATION NO.	2003 WAIRC 07800

Decision	Appeal discontinued by consent

Order

This appeal having been listed for hearing and determination before the Full Bench on the 26th day of February 2003, and the parties herein, on the 21st day of February 2003, having filed in the Registry of the Commission a Minute of Consent Order that the said appeal be discontinued by consent, and the parties herein having waived their rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 26th day of February 2003, ordered, by consent, as follows:-

(1) THAT there be leave granted and leave is hereby granted for appeal No. FBA 51 of 2002 to be discontinued.

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

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2003 WAIRC 07546

CHILDREN'S SERVICES (GOVERNMENT) AWARD 1989

Nos. A29 of 1985 and PSA A29 A of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	HONOURABLE MINISTER FOR COMMUNITY SERVICES & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 1000 OF 2002
CITATION NO.	2003 WAIRC 07546

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondents	Mr A Harper on behalf of the DOCEP

Order

HAVING heard Mr J Welch on behalf of the applicant and Mr A Harper on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Children's Services (Government) Award 1989 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January 2003.

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

SCHEDULE

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

(4) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $8.60 for a meal, and if, owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each meal by the employer or be paid $5.00 for each meal so required.

And further, with the consent of the parties, the Commission records the following basis for variations—

1. For Expense Related Allowances—

- Clause 10. - Overtime has been varied for the CPI Take Away Food for the period March 2001 to September 2002 giving the percentage of 5.30%.

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause		A	B	C
Clause 10. – Overtime	(4)(a)	$8.15 $4.75	$8.58 $5.00	$8.60

2003 WAIRC 07799

PORT HEDLAND PORT AUTHORITY PORT CONTROL OFFICERS AWARD 1982

NO. A1 OF 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN MARITIME OFFICERS UNION - WESTERN AREA UNION OF EMPLOYEES, APPLICANT
	v.
	PORT HEDLAND PORT AUTHORITY, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 26 FEBRUARY 2003
FILE NO.	APPLICATION 1558 OF 2002
CITATION NO.	2003 WAIRC 07799

Result Award varied.
Representation
Applicant Mr B. George
Respondent No appearance

Order

HAVING HEARD Mr B. George on behalf of the applicant and there being no appearance on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders—

THAT the *Port Hedland Port Authority Port Control Officers Award 1982* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 26 February 2003.

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

SCHEDULE

Clause 23. - Avoidance of Disputes Procedure: Delete this clause and insert in lieu thereof the following—

CLAUSE 23. - AVOIDANCE OF DISPUTES PROCEDURE

It is the intention of the parties to endeavour to provide a mechanism by which any or all grievances/disputes shall be promptly resolved by conciliation—

(1) Any grievance of a Port Control Officer shall be submitted to the Harbour Master through the Marine Supervisor as soon as practical.

(2) The Harbour Master and the Port Control Officer shall discuss the matter in full.

(3) In the event of there being no settlement of the grievance at this level, the matter shall be referred to the General Manager or their representative.

(4) If the matter remains unresolved, the Authority and a representative of The Australian Maritime Officers Union - Western Area Union of Employees shall confer in an endeavour to reach a satisfactory settlement.

(5) Once all the above procedures have been complied with and there is still no resolution, either party may refer the matter to the State Industrial Relations Commission.

(6) Without prejudice to either party, it is the intention of all parties that work shall continue, pending determination of any grievance or dispute, in accordance with the above procedures except where changed work practices, which are the subject of disputation, directly threaten the personal safety of employees.

(7) Provided that nothing contained above shall prevent either party referring the matter to the State Industrial Relations Commission at any time.

(8) In the event of a pending industrial dispute, the Harbour Master shall be provided with details of such industrial action by an official of the Australian Maritime Officers Union Western Area Union of Employees. All endeavours shall be made to resolve the dispute prior to the commencement of such industrial action.

(9) It is agreed that during periods of industrial disputation, exemptions shall include the following vessels—
  (a) any vessel in an emergency circumstance;
  (b) naval vessels.

AWARDS/AGREEMENTS—Variation of—

2003 WAIRC 07563

ABORIGINAL MEDICAL SERVICE EMPLOYEES' AWARD

No. A26 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
v.
BROOME REGIONAL ABORIGINAL MEDICAL SERVICE AND OTHERS, RESPONDENTS
CORAM CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER TUESDAY, 28 JANUARY 2003
FILE NO. APPLICATION 999 OF 2002
CITATION NO. 2003 WAIRC 07563

Result Award varied
Representation
Applicant Mr J Welch
Respondents Ms S Laferla

Order

HAVING heard Mr J Welch on behalf of the applicant and Ms S Laferla on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Aboriginal Medical Service Employees' Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

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

(4) (b) An employee shall be paid $3.00 for each hour or part thereof they are on call. Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is made in accordance with the overtime provisions of this award when the employee is recalled to work.

2. Clause 18. – Laundry and Uniforms: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof—

(1) The employer shall provide all uniforms which shall at all times remain the property of the employer. Provided that in lieu of providing uniforms the employer may pay an allowance of $3.70 per week, and the employee shall wear uniforms which conform to the uniform stipulated by the employer with respect to material, colour, pattern and conditions. Where the employer does not require the employee to wear a uniform no allowance shall be payable.

(2) Each employee shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms the employee shall be paid an allowance of $1.95 per week.

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

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

COLUMN I	COLUMN II	COLUMN III	COLUMN IV
DISTRICT	STANDARD RATE	EXCEPTIONS TO STANDARD RATE	RATE
	$ per week	Town or Place	$ per week
6	63.43	Nil	Nil
5	51.85	Fitzroy Crossing	69.76
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	64.96
		Marble Bar	
		Wittenoom	
		Karratha	61.17
		Port Hedland	56.77
4	26.10	Warburton Mission	70.38
		Carnarvon	24.57
3	16.49	Meekatharra	26.10
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	11.69	Kalgoorlie	3.90
		Boulder	
		Ravensthorpe	15.59
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

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

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after 28th January, 2003.

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

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

Level 1 - $1206.54 per annum.

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

Level 2 - $2414.35 per annum.

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

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

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

		$ Per Week
(a)	When in charge of not less than 3 and not more than 10 other employees	16.53
(b)	When in charge of more than 10 and not more than 20 other employees	24.71
(c)	When in charge of more than 20 other employees	32.90

And further, with the consent of the parties, the Commission records the following basis for variations—

1. The agreed Key Minimum Classification in this Award is Qualified Cook.

2. The Work Related Allowances – the percentage increase in—

- Clause 6 – Hours and Duty, Overtime and On Call
- Clause 24 – Outpost – Availability Allowance
- Clause 24A – Bilingual Allowance
- Clause 26 – Wages
- Clause 27. – Call Allowance

is 3.6% derived from $18 divided by $497.80 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances—

- Clause 18 – Laundry and Uniforms has been varied for the CPI Clothing Services and Shoe Repair - Perth for the period December 2000 to September 2002 giving the percentage of 1.81%.
- Clause – District Allowance has been varied for the CPI All Groups, Index Numbers (a) – Perth for the period December 2000 to September 2002 giving the percentage of 5.43%.

ABORIGINAL MEDICAL SERVICE EMPLOYEES AWARD

Key Minimum Classification - Health Worker Grade 1 - Level 2

Clause 6 - Hours of Duty, Overtime and On Call

		103.6%	
	2001	2002	Rounding Use
(4)(b)	2.91	3.015342	3

Clause 18 - Laundry and Uniforms

September 2002 Quarter 157.3

December 2000 Quarter 154.5

(CPI Clothing Services and Shoe Repair - Perth)

157.3/154.5 x 100 - 100 = 1.81%

	192.30%	101.81%	
	2001	2002	Rounding Used
-1	3.65	3.71983197	3.7
-2	1.92	1.9578063	1.95

Clause 23 - District Allowance

September Quarter 2002 135.8

December Quarter 2000 128.8

(CPI - All Groups, Index Numbers(a)	COL. A	COL. B	COL A	COL. B
135.8/128.8 x 100 - 100 = 5.43%	107.15%	105.43%		

-6 Column I District	Column II Standard Rate	2001 Column II Standard Rate	2002	Column III Exceptions to Standard Rate	2001 Column III Exceptions to Standard Rate	Column IV Rate	2001 Column IV Rate	2002
	$ per week	$ per week		Town or Place	Town or Place	$ per week	$ per week	
6	56.15	60.16	63.43	Nil		Nil		
5	45.90	49.18	51.85	Fitzroy Crossing		61.75	66.17	69.76
				Halls Creek				
				Turner River Camp				
				Nullagine				
				Liveringa (Camballin)		57.50	61.61	64.96
				Marble Bar				
				Wittenoom				
				Karratha		54.15	58.02	61.17
				Port Hedland		50.25	53.84	56.77
4	23.10	24.75	26.10	Warburton Mission		62.30	66.75	70.38
				Carnarvon		21.75	23.31	24.57
3	14.60	15.64	16.49	Meekatharra		23.10	24.75	26.10
				Mount Magnet				
				Wiluna				
				Laverton				
				Leonora				
				Cue				
2	10.35	11.09	11.69	Kalgoorlie				
				Boulder		3.45	3.70	3.90
				Ravensthorpe		13.8	14.79	15.59
				Norseman				
				Salmon Gums				
				Marvel Loch				
				Esperance				
1	Nil	Nil		Nil		Nil		

Clause 24 – Outpost – Availability Allowance

	COLUMN A 144.80% 2001	COLUMN B 103.6% 2002	COLUMN C Rounding Use
-1 56.10	81.23	84.1571808	84.15
42.00	60.82	63.005376	63
28.00	40.54	42.003584	42
28.00	40.54	42.003584	42

Clause 24A - Bilingual Allowance

	COLUMN A 102.60% 2001	COLUMN B 103.6% 2002
(a)	$1.164.61	$1,206.54
(b)	$2,330.46	$2,414.35

Clause 26 – Wages

	102.60% 2001	103.6% 2002
	20.01	
(18)(a)	$15.95	$16.53
(18)(b)	$23.85	$24.71
18(c)	$31.75	$32.90

2003 WAIRC 07561

AERATED WATER AND CORDIAL MANUFACTURING INDUSTRY AWARD 1975

NO. 10 OF 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COCA-COLA BOTTLERS (PERTH) PTY LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 998 OF 2002
CITATION NO.	2003 WAIRC 07561

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondents	Ms S Laferla

Order

HAVING heard Mr J Welch on behalf of the applicant and Ms S Laferla on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Aerated Water and Cordial Manufacturing Industry Award 1975 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

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

(4) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that he will be so required to work shall be supplied with a meal by the employer or be paid $7.80 for a meal.

If the amount of overtime required to be worked necessitates a second or subsequent meal the employer shall, unless he has notified the employees concerned on the previous day or earlier that such second or subsequent meal will also be required, provide such meals or pay an amount of $5.45 for each such second or subsequent meal.

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

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

2. Clause 10. – Wages: Delete subclause (1)(b) of this clause and insert the following in lieu thereof—

(b)	Production Employee - Grade 2 Shall mean an employee classified as such who is engaged on work in connection with or incidental to the production and distribution operations of the employer and who in addition to the duties of a Production Employee - Grade 1 may be required to regularly carry out the specific duties listed hereunder Specific Duties - Grade 2 - Syrup and/or cordial makers mixing recipes or formulae who are not solely responsible for ensuring adherence to quality standards of batches. - Operators of Filling machines - Operators of labelling, palletising or depalletising, case packing or unpacking, carton or multi packing machines. - Employees engaged on routine line testing - Employees engaged on routine line testing. - Forklift Driver - Truck Driver Provided that drivers who are required to collect money during any week or portion of a week as part of their duties and account for it shall be paid $4.25 for such a week in addition to the rate of wage prescribed above.	410.00	106.00	516.00

3. Clause 10. – Wages: Delete subclause (2)(c) and insert the following in lieu thereof—

(c)	Driver of motor vehicle	387.70	106.00	493.70
	Provided that drivers who are required to collect money during any week or portion of a week as part of their duties and account for it shall be paid $3.95 for such week in addition to the rate of wage prescribed above			

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

(4) Leading Hands—

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

		$ Per Week
(a)	If placed in charge of not less than 3 and not more than 10 other employees	20.60
(b)	If placed in charge of more than 10 and not more than 20 other employees	31.70
(c)	If placed in charge of more than 20 other employees	42.10

5. Clause 34. – Superannuation: Delete subclause (1)(a) of the clause and insert the following in lieu thereof—

(1) Employer Contributions—

(a) An employer shall contribute 9% of ordinary time earnings per eligible employee into one of the following Approved Superannuation Funds—

(i) Westscheme; or

(ii) an exempted Fund allowed by subclause (4) of this clause.

And further, with the consent of the parties, the Commission records the following basis for variations—

1. The agreed Key Minimum Classification in this Award is Production Employee Level 2.

2. The Work Related Allowances – the percentage increase in—

- Clause 10 – Wages

is 3.6% derived from $18 divided by $498.00 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances—

- Clause 9 – Overtime has been varied for the CPI for the period March 2001 to September 2002 giving the percentage of 5.30%.
- Clause 28 – Vehicle Allowance

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

4. Clause 34 – Superannuation has been amended in accordance with Principle 2(i).

AERATED WATER & CORDIAL MANUFACTURING AWARD NO. 10 OF 1975

Key Minimum Classification - Production Employee Level 2

Clause 10 - Wages

	COLUMN A 102.68%		**COLUMN B** 103.60%	**COLUMN C**
	2001	Rounding Used	2002	Rounding Used
-1				
(b)	$ 4.11	4.10	4.2476	**4.25**
(c)	$ 3.80	3.80	3.9368	**3.95**
-4				
(a)	$ 19.87	19.85	20.5646	**20.60**
(b)	$ 30.60	30.6	31.7016	**31.70**
(c)	$ 40.66	40.65	42.1134	**42.10**

The 2000 formula equals $15.00 divided by $470.00 equals 3.1%

The 2001 formula equals $13.00 divided by $485 equals 2.68%

The 2002 formula equals $18.00 divided by $498 equals 3.6%

	COLUMN A		COLUMN B	COLUMN C
Clause 9 – Overtime	110.24%		105.30%	
	2001	Rounding Used	2002	Rounding Used
-4	7.38608	7.4	7.7922	**7.80**
	5.18128	5.2	5.4756	**5.45**

2003 WAIRC 07577

AGED AND DISABLED PERSONS HOSTELS AWARD, 1987

NO. A 6 OF 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ANGLICAN HOMES FOR THE AGED (INCORPORATED) & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 997 OF 2002
CITATION NO.	2003 WAIRC 07577

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondents	Ms S Laferla

Order

HAVING heard Mr J Welch on behalf of the applicant and Ms S Laferla on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Aged & Disabled Persons Hostels Award 1987 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003

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

SCHEDULE

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

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work, the employee shall be provided with a meal free of cost, or shall be paid the sum of $7.35 as meal money.

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

(3) The ordinary wages of any employee other than a supervisor or assistant supervisor placed in charge of three or more employees shall be increased by $17.40 per week.

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

(4) Each employee shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms, the employee shall be paid an allowance of $1.27 per week.

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

(b) paid an on call allowance at the rate of $5.80 for each hour spent on call.

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

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

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

Schedule 1 - Motor Vehicle Allowances

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	71.6	62.1	55.1
South West Land Division	73.6	63.9	56.8
North of 23.5o South Latitude	80.7	70.4	62.7
Rest of the State	76.0	66.0	58.6

Schedule 2 - Motor Cycle Allowances

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	24.7

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

And further, with the consent of the parties, the Commission records the following basis for variations—

1. The agreed Key Minimum Classification in this Award is Qualified Cook.
2. For Work Related Allowances – the percentage increase in—
   - Clause 18. – Wages
   - Clause 27. – Call Allowance

   is 3.26% derived from $18 divided by $550.90 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

   "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."
3. For Expense Related Allowances—
   - Clause 10. - Overtime has been varied for the CPI Take Away Food – Perth for the period March 2001 to September 2002 giving the percentage of 5.30%.
   - Clause 20. - Uniforms and Laundry has been varied for the CPI Clothing Services and Shoe Repair – Perth for the period June 2001 to September 2002 giving the percentage 1.61%.
4. The application to amend the Fares and Travelling Allowances in 2001 used the incorrect CPI (Private Motoring Perth) – 134.63 rather than 137.7.

   This application therefore seeks to address that error by reverting to the 2000 rates and redoing the calculations on the basis of June 2000 to September 2002.

   Calculations are therefore:

   $$\text{September 2002} \quad \frac{137.6}{130.1} \quad X \quad \frac{100}{1} \quad = \quad 5.76\%$$

   For all allowances (except Fares and Travelling) previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

EXPENSE RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – QUALIFIED COOK

Clause	A	B	C
Clause 18. – Wages (3)	16.84	$17.39	$17.40
Clause 27 – Call Allowance	$5.60	$5.78	$5.80

CPI Take Away Food – Perth

Clause	A	B	C
Clause 10. – Overtime	$7.00	$7.37	$7.35

CPI Clothing Services and Shoe Repair - Perth

Clause	A	B	C
Clause 20. – Laundry	$1.25	$1.27	

2003 WAIRC 07634

AMBULANCE SERVICE COMMUNICATION CENTRE EMPLOYEES' AWARD 1991

NO. A 4 OF 1991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ST JOHN AMBULANCE AUSTRALIA, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY 28 JANUARY 2003
FILE NO.	APPLICATION 995 OF 2002
CITATION NO.	2003 WAIRC 07634

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondent	No Appearance

Order

HAVING heard Mr J Welch on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Ambulance Service Communication Centre Employees' Award 1991 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (3)(a) & (b) of this clause and insert the following in lieu thereof—

(3) (a) Subject to the provisions of this clause an Officer who is required to continue working after the usual ceasing time for more than one hour shall be supplied with a meal by his employer or be paid $8.30 for a meal.

(b) Where the amount of overtime worked necessitates more than one meal, the employer shall supply such additional meal or pay to the Officer $8.30 for each such additional meal. The Officer shall be entitled to the additional meal or meal allowance after each four hours.

And further with the consent of the parties, the Commission records the following basis for variations—

1. For Expense Related Allowances—

- Clause 8. - Overtime has been varied for the CPI Take Away Food for the period March 2001 to September 2002 giving the percentage of 5.30%.

2003 WAIRC 07635

AMBULANCE SERVICE EMPLOYEES' AWARD, 1969

NO. 50 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ST JOHN AMBULANCE AUSTRALIA, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 996 OF 2002
CITATION NO.	2003 WAIRC 07635

Result Award varied
Representation
Applicant Mr J Welch
Respondent No Appearance

Order

HAVING heard Mr J Welch on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Ambulance Service Employees' Award 1969 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (3)(a) & (b) of this clause and insert the following in lieu thereof—

(3) (a) Subject to the provisions of this clause an Officer who is required to continue working a after the usual ceasing time for more than one hour shall be supplied with a meal by his employer or be paid $8.35 for a meal.

(b) Where the amount of overtime worked necessitates more than one meal, the employer shall supply such additional meal or pay to the Officer $8.35 for each such additional meal. The Officer shall be entitled to the additional meal or meal allowance after each four hours.

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

(1) In addition to any other allowance prescribed in this Award, an Officer working in any of the undermentioned towns shall be paid the allowances specified—

	Weekly Zone Allowance	Weekly Country Allowance	Weekly Total
	$	$	$
Albany	4.18	16.77	20.95
Bunbury	4.18	16.77	20.95
Collie	4.18	16.77	20.95
Geraldton	7.39	33.56	40.95
Kalgoorlie	6.31	21.02	27.33
Kambalda	6.31	21.02	27.33
Mandurah	1.83	7.29	9.11
Norseman	6.31	21.02	27.33
Port Hedland	41.93	92.31	134.24

3. Clause 28. – Country Conditions: Delete subclause (5) of this clause and insert the following in lieu thereof—

(5) Where the employer requires an Officer to attend an area or town other than that sub-centre to which the Officer is stationed (for the purpose of training or any other work related matter), the employer shall pay the Officer an allowance of $102.85 for each night the Officer is away from home.

4. Clause 28. – Country Conditions: Delete subclause (7)(a) & (c) of this clause and insert the following in lieu thereof—

(7) (a) The Officer shall, in addition to any other allowances or benefits prescribed under this Award, be entitled to an allowance of $266.75 per week and will be accommodated in a hotel/motel, or such other accommodations as agreed, and the employer will be responsible for the payment of bed and breakfast.

(c) Where an Officer so chooses to find accommodation, the employer shall pay such Officer $453.35 per week in addition to that amount prescribed in paragraph (a) of this subclause. The Officer shall then be responsible for finding and funding his/her own accommodation, and any other expenses incurred whilst on country relief duties.

5. Clause 28. – Country Conditions: Delete subclause (8)(f) of this clause and insert the following in lieu thereof—

(8) (f) The maximum amount of rent that any Officer posted to a country sub-centre shall pay for the accommodation referred to in paragraph (e) of this subclause shall be $43.80 per week.

And further, with the consent of the parties, the Commission records the following basis for variations—

1. For Expense Related Allowances—

- Clause 8 – Overtime has been varied for the CPI for the period September 2001 to September 2002 giving the percentage of 3%.
- Clause 15 – Location Allowance has been varied for the CPI for the period September 2001 to September 2002 giving the percentage of 3.2%.
- Clause 17 – Travelling Expenses has been varied for the CPI for the period June 2001 to September 2002 giving the percentage of 2.2%.
- Clause 28 – Country Conditions has been varied for the CPI for the period June 2001 to September 2002 giving the percentage of 3.34%.

EXPLANATION
Clause 8 – Overtime
September Quarter 2002 150.8
September Quarter 2000 141.6
(CPI Meals out and take away foods – Perth)
Clause 15 – Location Allowance
September Quarter 2002 135.8
September Quarter 2001 131.5
(CPI – All Groups, Index Numbers- Perth)
Clause 17 – Travelling Expenses
September Quarter 2002 134.63
June Quarter 2001 134.63
(CPI Transportation Private Motoring – Perth)
Clause 28 – Country Conditions
September Quarter 2002 135.8
June Quarter 2001 131.4
(CPI – All Groups, Index Numbers – Perth)

AMBULANCE SERVICE EMPLOYEES AWARD 1969

		COLUMN A	**COLUMN B**	**COLUMN C**
Clause 8 - Overtime	103.30%		103.00%	
	2001	Rounding Use	Commission's Order	2002	Rounding Use
(3)(a)	8.0574	8.05	8.1	8.343	8.35
(3)(b)	8.0574	8.05	8.1	8.343	8.35

September Quarter 2001 146.3
September Quarter 2000 141.6
146.3 divided by 141.6 times 100 take 100 = 3.3%
(From CPI Meals out and take away foods - Perth)

September Quarter 2002 150.8
September Quarter 2001 146.3
150.8 divided by 146.3 times 100 take 100 = 3%
(From CPI Meals out and take away foods - Perth)

		COLUMN A	**COLUMN B**
Clause 15 - Location Allowance	102.30%		**103.20%**
-1	Weekly Zone Allowance	2001	**Commission's Order**	**2002**
	$			
ALBANY	3.82	4.05	**4.05**	**4.18**
BUNBURY	3.82	4.05	**4.05**	**4.18**
COLLIE	3.82	4.05	**4.05**	**4.18**
GERALDTON	5.76	7.16	**7.16**	**7.39**
KALGOORLIE	5.76	6.11	**6.11**	**6.31**
KAMBALDA	5.76	6.11	**6.11**	**6.31**
MANDURAH	1.67	1.77	**1.77**	**1.83**
NORSEMAN	5.76	6.11	**6.11**	**6.31**
PORT HEDLAND	38.34	40.64	**40.63**	**41.93**

	Weekly Country Allowance	2001	**Commission's Order**	**2002**
	$			
ALBANY	15.34	16.26	**16.25**	**16.77**
BUNBURY	15.34	16.26	**16.25**	**16.77**

	Weekly Country Allowance	2001	**Commission's Order**	**2002**
COLLIE	15.34	16.26	**16.25**	**16.77**
GERALDTON	30.68	32.52	**32.52**	**33.56**
KALGOORLIE	19.18	20.33	**20.37**	**21.02**
KAMBALDA	19.18	20.33	**20.37**	**21.02**
MANDURAH	6.66	7.06	**7.06**	**7.29**
NORSEMAN	19.18	20.33	**20.37**	**21.02**
PORT HEDLAND	84.39	89.45	**89.45**	**92.31**

	Weekly Total $	2001	**Commission's Order**	**2002**
ALBANY	19.17	20.32	**20.30**	**20.95**
BUNBURY	19.17	20.32	**20.30**	**20.95**
COLLIE	19.17	20.32	**20.30**	**20.95**
GERALDTON	36.43	38.61	**39.68**	**40.95**
KALGOORLIE	24.94	26.43	**26.48**	**27.33**
KAMBALDA	24.94	26.43	**26.48**	**27.33**
MANDURAH	8.33	8.83	**8.83**	**9.11**
NORSEMAN	24.94	26.43	**26.48**	**27.33**
PORT HEDLAND	122.73	130.09	**130.08**	**134.24**

September Quarter 2001 131.5
September Quarter 2000 128.6
131.5 divided by 128.6 times 100 - 100 = 2.3%
(From CPI - All Groups, Index Numbers (a)- Perth)

September Quarter 2002 135.8
September Quarter 2001 131.5
135.8 divided by 131.5 times 100 - 100 = 3.2%
(From CPI - All Groups, Index Numbers (a)- Perth)

	COLUMN A	**COLUMN B**	**COLUMN C**
Clause 17 - Travelling Expenses			
	102.20%	102.20%	

	2001	Commission's Order	2002	Rounding Use
(1)(a)	0.42	0.42	0.42924	0.43
(2(a)	0.36	0.37	0.37814	0.38
(3)(b)	0.36	0.37	0.37814	0.38

June Quarter 2001 - 134.63
June Quarter 2000 - 131.7
143.63 divided by 131.7 times 100 - 100 = 2.2%
(CPI Transportation Private Motoring – Perth)
September Quarter 2002 - 137.6
June Quarter 2001 - 134.63
137.6 divided by 134.63 times 100 - 100 = 2.2%
(CPI Transportation Private Motoring - Perth)

	COLUMN A	**COLUMN B**	**COLUMN C**
	107.80%	103.40%	
Clause 28 - Country Conditions			

	2001	Commission's Order	2002	Rounding Use
5	99.38	99.5	102.883	102.85

		COLUMN A	COLUMN B	COLUMN C
(7)(a)	257.70	258	266.772	266.75
(c)	437.96	438.47	453.378	453.35
8	42.31	42.36	43.80024	43.80

June Quarter 2001 131.4
December Quarter 1999 122.7
CPI All Groups for Perth
131.4/122.7 x 100 - 100 = 7.8%
September Quarter 2002 135.8
June Quarter 2001 131.4
135.8 divided by 131.4 times 100 - 100 = 3.34%
(CPI All Groups, Index Numbers - Perth)

2003 WAIRC 07570

ANIMAL WELFARE INDUSTRY AWARD

No. 8 of 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* MR PS ADAMS & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 994 OF 2002
CITATION NO.	2003 WAIRC 07570

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondent	Ms S Laferla

Order

HAVING heard Mr J Welch on behalf of the applicant and Ms S Laferla on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Animal Welfare Industry Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

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

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.25 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.95 for each meal so required.

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

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

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

Schedule 1 - Motor Vehicle Allowance

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	71.6	62.3	55.1
South West Land Division	73.6	63.9	56.8
North of 23.5o South Latitude	80.7	70.4	62.7
Rest of the State	76.0	66.0	58.6

Schedule 2 - Motor Cycle Allowance

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	24.7

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

3. Clause 19. – Rates of Pay: Delete subclauses (7) and (8) of this clause and insert the following in lieu thereof—

(7) An employee placed in charge of three or more other employees shall be paid an amount of $21.20 per week in addition to his/her ordinary rate of pay.

(8) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift an allowance of $1.92 per day shall be paid.

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

(5) In lieu of the provision of uniforms the employer may pay an allowance of $3.80 per week.

(6) Each employee shall be entitled to all reasonable laundry work at the expense of the employer but where the employer elects not to launder the uniforms, the employee shall be paid an allowance of $1.04 per week.

5. Clause 29. – Superannuation: Delete subclause (1)(a) of this clause and insert the following in lieu thereof—

(1) Employer Contributions—

(a) An employer shall contribute 9% of ordinary time earnings per eligible employee into one of the following Approved Superannuation Funds—

(i) Westscheme; or

(ii) An exempted Fund allowed by subclause (4) of this clause.

And further, with the consent of the parties, the Commission records the following basis for variations—

1. The agreed Key Minimum Classification in this Award is Veterinary Nurse.

2. For Work Related Allowances – the percentage increase in—

- Clause 19 – Rates of Pay
- Clause 20 – Protective Clothing Uniforms

is 4% derived from $18 divided by $447.40 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances—

- Clause 9 – Meal Money has been varied for the CPI Take Away Foods - Perth for the period March 2001 to September 2002 giving the percentage of 5.30%.
- Clause 17 – Travel Time and Expenses

The application to amend the Travel Time and Expenses in 2001 used the incorrect CPI (Private Motoring Perth) – 134.63 rather than 137.7.

This application therefore seeks to address that error by reverting to the 2000 rates and redoing the calculations on the basis of June 2000 to September 2002.

Calculations are therefore:

September 2002	137.6	X	100	=	5.76%
June 2000	130.1		1		

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

4. Clause 29 – Superannuation has been amended in accordance with Principle 2(i).

ANIMAL WELFARE INDUSTRY AWARD

Key Minimum Classification - Veterinary Nurse	**COLUMN A**			**COLUMN B**	**COLUMN C**
	103%			104%	
	2001	Rounding Use		2002	Rounding Use
Clause 19 - Rates of Pay			WAIRC Order		
(7)	20.34	20.35		21.164	21.20
(8)	1.85	1.90	1.85	1.92	
Clause 20 - Protective Clothing and Uniforms					
(5)	3.66	3.65		3.80	
-6	0.98	1.00		1.04	

The 2000 formula equals $15 divided by $419.40 equals 3.5%.

The 2001 formula equals $13 divided by $434.40 equals 3%

The 2002 formula equals $18 divided by $447.40 equals 4%

Clause 9. - Meal Money	**COLUMN A**		**COLUMN B**	**COLUMN C**
	110.27%		105.30%	
	2001	Rounding Use	2002	Rounding Use
(1)	$ 6.89	6.9	7.2657	7.25
	$ 4.69	4.7	4.9491	4.95

Clause 28 - Vehicle Allowance

Schedule 1 - Motor Vehicle Allowance

(2)(c) Area and Details — Engine Displacement (in cubic centimetres)
Rates per kilometre (Cents)

	COLUMN A **105.76%**	**COLUMN B**
Over 2600cc	2000	2002
Metropolitan Area	67.7	71.6
South West Land Division	69.6	73.6
North of 23.5 South Latitude	76.3	80.7
Rest of State	71.9	76.0

Schedule 1 - Motor Vehicle Allowance

(2)(c) Area and Details — Engine Displacement (in cubic centimetres)
Rates per kilometre (Cents)

	COLUMN A **105.76%**	**COLUMN B**
Over 1600cc- & 2600cc	2000	2002
Metropolitan Area	58.9	62.3
South West Land Division	60.4	63.9
North of 23.5 South Latitude	66.6	70.4
Rest of State	62.4	66.0

Schedule 1 - Motor Vehicle Allowance

(2)(c) Area and Details — Engine Displacement (in cubic centimetres)
Rates per kilometre (Cents)

	COLUMN A	**COLUMN B**
1600cc Under	2000	2002
Metropolitan Area	52.1	55.1
South West Land Division	53.7	56.8
North of 23.5 South Latitude	59.3	62.7
Rest of State	55.4	58.6

Note: Metropolitan Area 58.9 Commission's final order not 58.7 as per Union's calculations

Schedule 2 - Motor Cycle Allowance		**COLUMN A**	**COLUMN B**
Distance Travelled During a Year on Official Business	Rate c km	2000	**2002**
Rate per kilometre	21.9	23.4	**24.7**

2003 WAIRC 07815

AWU GOLD (MINING AND PROCESSING) AWARD 1993

No. A 1 of 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD & OTHERS, RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 28 FEBRUARY 2003
FILE NO/S.	APPLICATION 899A OF 2002
CITATION NO.	2003 WAIRC 07815

Result Variation of an award
Representation
Applicant Mr C Young
Respondent Mr R Gifford as agent and Mr K Dwyer as agent

Order

HAVING heard Mr C Young on behalf of the applicant and Mr R Gifford and Mr K Dwyer as agents on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby—

(1) ORDERS that the AWU Gold (Mining and Processing) Award 1993, No. A1 of 1992 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 31 January 2003.

(2) RECORDS by consent of the parties, the following—

(a) The allowances at Clause 7. – Shift Work; Clause 16. - Wages; Clause 17. - Allowances of the award have been adjusted by consent for Arbitrated Safety Net Increases totalling $98.00 arising from the 1995-2002 State Wage Case decisions. The key classification award rate used was that for a "Mining Open Cut - Mining Employee Grade 3" prior to the awarding of 1995 Arbitrated Safety Net Increase - $370.30.

(b) Meal allowances at Clause 9. – Rest Breaks and Recall to Work - All Employees of the award have been adjusted by consent for movements in CPI from the quarter ending June 1995 up to and including the quarter ending June 2002. The index used was CPI : Food : Meals out and Take-away Foods.

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

SCHEDULE

1. Clause 2. - Arrangement: Delete this Clause and insert in lieu thereof the following:

2. - ARRANGEMENT

1. Title
2. Arrangement
3. Term and Application
4. Area and Scope
5. Contract of Employment
6. Hours
7. Shift Work
8. Overtime
9. Rest Breaks and Recall to Work - All Employees
10. Saturday Work
11. Sunday and Holiday Work
12. Public Holidays
13. Leisure Days
14. Special Provisions for Cycle Working
15. Definitions
16. Wage Rates
17. Allowances
18. Employee Relieving in a Higher Capacity
19. Payment of Wages
20. Piece Work
21. Annual Leave
22. Sick Leave
23. Accident Pay
24. Re-Employment after an Accident
25. Inclement Weather
26. Bereavement Leave
27. Jury Service
28. Protective Clothing
29. First Aid
30. Representative Interviewing Employees
31. Time and Wages Record
32. Inspections
33. Recognised Crib Place
34. Long Service Leave
35. Redundancy
36. Maternity Leave
37. Structural Efficiency
38. Enterprise Flexibility
39. Consultation in the Workplace

40. Disputes Procedure
41. Parties Bound To This Award
42. Supersession
43. Liberty to Apply

Appendix 1 – Make Up of Total Wage
Appendix 2 - Resolution of Disputes Requirements
Appendix 3 - S.49B - Inspection Of Records Requirements

2. Clause 5. – Contract of Employment: Delete this Clause and insert in lieu thereof the following—

5. - CONTRACT OF EMPLOYMENT

(1) Employment under this award may occur on the following basis—

(a) (i) A casual employee is one who is engaged and paid as such.

(ii) A casual employee is to be informed, in writing, that he or she is employed on a casual basis before he or she is engaged.

(iii) A casual employee shall not be entitled to the benefit of Clause 12. - Public Holidays, Clause 13. - Leisure Days, Clause 21. - Annual Leave, Clause 22. - Sick Leave and Clause 27. - Jury Service.

(iv) A casual employee shall be paid 20 per cent in addition to the rate prescribed by this Award for work performed.

(b) Part time: part time employees are engaged as such and work less than an average of 8 hours per day or less than 5 consecutive days per week. Part time employees shall be paid per hour one fortieth of the weekly wage prescribed by the award. Entitlements to authorised leave of absence arising under this award shall be on the same proportion as the hours per week represent as a percentage of the average normal hours worked in a week by the part time employee.

(c) Full time: full time employees are employees engaged as such who work 40 ordinary hours per week.

(d) Temporary: temporary employees may work on a full time or part time basis for a limited or specified period of employment. Such employees are to be informed in writing prior to their engagement. The initial period of employment may be extended by agreement between the employer and the employee. If, due to circumstances beyond the control of the employer, it becomes necessary to shorten the period of employment, the employer shall be entitled to do so by giving the notice in accordance with subclause (4) of this clause.

(e) Probationary employee: an employee may be engaged on a probationary basis provided the employee is advised in writing on engagement that employment is on a probationary basis for a defined period, not in excess of three months.

(2) (a) The contract of service for employees covered by this award shall be by the day, where expressly agreed between the employer and employee on commencement of employment.

(b) In the absence of such agreement, the contract of service shall be weekly.

(c) Notwithstanding the provisions of subclause (b) hereof the employment contract can be in excess of one week.

(3) It is a condition of employment that the employee perform such work as an employer requires from time to time on the days and during the hours usually worked by the employee and subject to the following conditions—

(a) The employee shall perform such work within the employee's skill, competence and training according to classification structure and the roster as the employer may require.

(b) The employee shall work such overtime as required by the employer in addition to the rostered hours of duty.

(c) The employee shall use such safety and protective clothing and equipment provided by the employer for specific circumstances as directed by the employer.

(d) An employee not relieved as scheduled at the end of a shift shall continue to work until relieved or otherwise authorised by the employer to finish work provided that the employee will not be required to work unreasonable overtime.

(e) Employees shall perform work to the level of their competence in accordance with the classification definitions, assist in the training or supervision of other employees as required by an employer, perform the task of any lower grouping, and be ready and willing to participate in training programmes applicable to operations of an employer.

(4) Termination of Employment

(a) Full time and Part time employees

(i) Should an employer wish to terminate a full time or part time employee, the following period of notice shall be provided—

	Period of Notice
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

(ii) Employees over 45 years of age with 2 or more years' continuous service at the time of termination, shall receive an additional week's notice.

(iii) Where the relevant notice is not provided, the employee shall be entitled to payment in lieu. Provided that employment may be terminated by part of the period of notice and part payment in lieu.

(iv) Payment in lieu of notice shall be calculated using the employee's weekly ordinary time earnings.

(v) The period of notice in this clause shall not apply in the case of dismissal for serious misconduct, that is, misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.

(vi) Notice of termination by employee. Except in the first three months of service, one week's notice shall be necessary for an employee to terminate his or her engagement or the forfeiture or payment of one week's pay by the employee to the employer in lieu of notice.

(vii) Probation. Notwithstanding plactum (i) of paragraph (a) of subclause 4 above, should an employer wish to terminate an employee still on probation, one day's notice shall be given by either party, or one day's pay in lieu shall be paid or forfeited.

(b) Casual Employees: the employment of a casual employee may be terminated by one hour's notice given by either party.

(5) The employer shall provide a safe working environment, and all employees and parties to the award shall observe at all times regulations and rules in order to achieve an orderly and safe working environment.

(6) An employer may dismiss an employee without notice for serious misconduct and in such cases, wages shall be paid up to the time of dismissal only.

(7) An employee who, without prior notification to and the prior or subsequent approval of an employer, is absent from work for one week shall be deemed to have abandoned the employment contract.

For the purpose of this subclause "one week" shall mean an unauthorised absence from work of seven consecutive days or five consecutive rostered shifts, whichever occurs first.

In the case of employees on a daily contract of service an employee absent from work for two consecutive days without prior or subsequent approval of the employer shall be deemed to have abandoned the employment contract, and the contract of employment shall be deemed to have been terminated for neglect of duty from the start of the unauthorised absence.

Where an employee has terminated in accordance with the provisions of this subclause, wages shall be paid up to and including the last day of work performed by the employee.

(8) Except as provided in the leave related clauses of this award which authorise an employee to be absent from work with pay, an employee not attending for duty will not be paid for the time of absence.

(9) The employer may deduct payment for any day an employee can not be usefully employed arising out of any cessation of operations, either wholly or partially due to industrial disputes, including any strike, bans or limitations, or arising out of any cause which is beyond the control of the employer.

(10) Provided that an employee has not been notified on the preceding rostered work period or day, and the employee reports for duty, the employee shall be paid for a full shift except where,

(a) The employee has been dismissed in accordance with the award;

(b) Circumstances arise which are beyond the control of the employer.

3. Clause 7. - Shift Work: Delete subclause (2) of this Clause and insert in lieu thereof the following—

(2) A shift employee, in addition to that employee's ordinary rate of pay, shall be paid an additional flat payment of **$10.10** per rostered afternoon or night shift.

4. Clause 9. - Rest Breaks and Recall to Work - All Employees: Delete subclause (4) of this Clause and insert in lieu thereof the following—

(4) An employee who without notification on the prior day or shift is required to work overtime shall be supplied with a meal (or **$8.60** in lieu) when that employee works more than one hour beyond the rostered ordinary hours of the day or shift.

5. Clause 16. - Wage Rates: Delete this Clause and insert in lieu thereof the following:

16. - WAGE RATES

Classification and wage per week.

(1) **Underground**	**Total Weekly Minimum Rate (includes Industry Allowance)**
	$
Group 1	
Trucker	
Toolcarrier	
Salvage Man	
Pass Runner	488.60
Group 2	
Pipe Sampler	
Sampler	
Popper Machineman	
Diamond Drillers Assistant	
Air Hoist Operator	
Ventilation Man	
Pump Attendant (as distinct from Pumpman)	
Hydraulic Fill Operator	502.40
Group 3	
Platelayer	
Train Crew	
Mechanical Loader Operator	
Scraper Hauler Operator	
Braceman	507.60

Underground	**Total Weekly Minimum Rate (includes Industry Allowance)**
Group 4	
Scaler	
Pumpman (engaged dewatering a mine)	512.40
Group 5	
Rock Drill Man in other places	
Rock Bolter	
Powder Monkey	
Percussion Drill Operator	
Sanitary Man	
Crusher Operator	520.40
Group 6	
Rock Drill Man in Rises	
Rock Drill Man in Winzes	
Raise Drill Operator	
In-The-Hole-Hammer Operator	
Diamond Driller up to 15kw	
Timberman	529.20
Group 7	
Rock Drill Man in Shaft	
Timberman in Shaft	
Diamond Driller over 15kw	537.50
Group 8	
Diesel Truck and Loader Operator	
Diesel Personnel Carrier Operator	**545.60**
Group 9	
Hydraulic Jumbo Drill Operator	**558.30**

(2) (a) **Mining - Open Cut**

	Total Weekly Minimum Rate (includes Industry Allowance)
	$
Mine Employee - Grade 1	
Labourer	
Spotter	
Sampler	489.50
Mine Employee - Grade 2	
Blast Crew	
Trainee - Mobile Plant Operator	
Serviceman	
Production	
Driller	511.90
Mine Employee - Grade 3	
Trained - Mobile Plant Operator	
Serviceman	
Production	
Driller	**554.10**
Mine Employee - Grade 4	
Shot Firer	
Skilled - Mobile Plant Operator	
Serviceman	
Production	
Driller	**563.70**
Mine Employee - Grade 5	
Multiskilled	**577.20**

(b) **Ore Processing**

	Total Weekly Minimum Rate (includes Industry Allowance)
	$
Process Operator - Grade 1	481.80
Process Operator - Grade 2	498.80
Process Operator - Grade 3	515.30
Process Operator - Grade 4	531.10
Process Operator - Grade 5	**563.70**
Laboratory	
Laboratory Employee - Grade 1	481.80
Laboratory Employee - Grade 2	498.80
Laboratory Employee - Grade 3	515.30
Laboratory Employee - Grade 4	531.10
Laboratory Employee - Grade 5	**563.70**

(c) **Mine Services Employees (MSE)**

	Total Weekly Minimum Rate
	$
MSE - Grade 1	489.50
MSE - Grade 2	506.10
MSE - Grade 3	522.30

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

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

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

(4) **Leading Hands**

In addition to the highest relevant wage rates for his or her classification an employee appointed as a leading hand shall be paid per week, the following—

(a) In charge of not less than three and not more than ten other employees $18.10

(b) In charge of more than ten and not more than twenty other employees $27.30

(c) In charge of more than twenty employees $35.40

(5) Wage rates under this award may be adjusted in accordance with applicable decisions of the Western Australian Industrial Relations Commission.

(6) Minimum Adult Award Wage

Notwithstanding the terms of this subclause no adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided in this clause.

(a) The Minimum Adult Award Wage for full time adult employees is $431.40 per week payable from the beginning of the first pay period on or after 1st August 2002.

(b) The Minimum Adult Award Wage of $431.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(c) Unless otherwise provided in this subclause, adults employed as casual or part time employees shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(d) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $431.40 per week.

(e) (i) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships, or Jobskills traineeships or to other categories of employees who by prescription are paid less than the minimum award rate.

(ii) Liberty to apply is reserved in relation to employees excluded under (i) above and any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(f) Subject to this subclause the Minimum Adult Award Wage shall —

(i) apply to all work in ordinary hours.

(ii) apply to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave and for all other purposes of this award.

(g) Nothing in this subclause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force on 13 November 1987.

Notwithstanding the foregoing, where in this award an additional rate is prescribed for any work as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the classification in which the employee is employed.

6. Clause 17. – Allowances: Delete this Clause and insert in lieu thereof the following:

17. - ALLOWANCES

(1) **Industry Allowance**

(a) Each employee shall be paid the all purpose allowance of **$83.80** per week which is included in the total minimum wage of the Wage Schedule of Clause 16. - Wage Rates of this award. The make up of the total wage including the industry allowance is shown in Appendix 1.

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

(2) Height Money: An employee shall be paid an allowance of **$1.40** flat each day for work at a height of 15.5 metres or more above the nearest horizontal plane.

(3) A employee assisting a tradesperson shall, when the tradesperson is in receipt of a disability allowance, be paid an equal disability allowance.

(4) Travel

(a) If transport to and from the job is not provided by the employer, a travelling allowance of **$4.35** per day shall be paid where an employee's usual place of residence is more than 30 kilometres from the job by the shortest practicable route.

(b) The allowance specified in this subclause shall be paid to an employee to compensate for excess travelling expenses from an employee's usual place of residence to the place of work and return.

(c) The allowance shall not be paid where the employee has refused company provided accommodation and has elected to live elsewhere.

(5) First Aid

Any qualified person appointed by the employer to perform first aid duties shall be paid an additional flat allowance of **$1.90** per shift.

(6) Wet Places

An employee working in wet places shall be paid an allowance of **$1.65** per day or shift or part of a day or shift provided that—

(a) The allowance shall not be payable to employees working on natural surfaces made wet by rain.

(b) Where waterproof boots and clothing are provided by the employer, no claim shall be allowed under this provision for wet feet or clothing. The employee shall be paid the allowance where the employees clothing have become wet, notwithstanding the wearing of protective clothing and boots.

(c) Where an employee is compelled to work in water to thigh level the employee shall receive the allowance.

(d) A place shall be deemed to be wet when water other than rain is continually dropping from overhead so as to saturate the clothing of the employee if unprotected or when the water in the place where the employee is standing is over 2.5 centimeters deep and the employee has not been supplied with waterproof boots.

7. Clause 21. – Annual Leave: Delete this Clause and insert in lieu thereof the following:

21. ANNUAL LEAVE

(1) Annual leave shall be taken at the convenience of the management of the mine but employees shall receive one month's notice of the date of which the leave is to commence.

(2) (a) Except as hereinafter provided a period of four weeks' leave with payment of ordinary wages as prescribed in paragraph (b) hereof shall apply for each year of service and accrue pro rata on a weekly basis.

(b) (i) An employee before going on leave, shall be paid the wages the employee would have received in respect of the ordinary time the employee would have worked had the employee not been on leave during the period of leave.

(ii) By agreement with the employee concerned and in lieu of subparagraph (i) of paragraph (b) hereof, payment of annual leave may be made in the same manner as payment of wages occurs pursuant to Clause 19. - Payment of Wages of this award.

(iii) During a period of annual leave the employee shall be paid—

(aa) The rate applicable to the employee as prescribed by Clause 16. - Wage Rates and Clause - 17. - Allowances of this award.

(bb) Subject to subparagraph (ii) of paragraph (c) hereof, the rate prescribed for work in ordinary time by Clause 7. - Shift Work, Clause 10. - Saturday Work and Clause 11. - Sunday and Holiday Work of this award according to the employee's roster or projected roster including Saturday and Sunday shifts;

(cc) Any other rate to which the employee is entitled in accordance with the employee's contract of employment for ordinary hours of work. Provided that this provision shall not operate so as to include any payment which is of a similar nature to or is paid in lieu of those payments prescribed by Clause 8. - Overtime, subclause (4) of Clause 17. - Allowances, and other special rates and provisions of this award, nor any payment which might have become payable to the employee as reimbursement for expenses incurred.

(dd) The rate payable to Clause 18. - Employee Relieving in a Higher Capacity calculated on a daily basis, which the employee would have received for ordinary time during the period of leave whether on a shift roster or otherwise.

(c) During a period of annual leave, an employee shall receive a loading calculated on the wage rate prescribed by placitum (aa) of subpargraph (iii) of paragraph (b) hereof. The loading shall be as follows—

(i) Day Employees - A loading of 17.5 per cent to an employee who would have worked on day work had the employee not been on leave.

(ii) Shift Employees - A loading of 17.5 per cent to an employee who would have worked on shift work had the employee not been on leave.

Provided that where the employee would have received a shift loading prescribed by Clause 7. - Shift Work, Clause 10. - Saturday Work and Clause 11. - Sunday and Holiday Work of this award, and such loadings would have entitled the employee to a greater amount **than** the loading of 17.5 per cent, then the shift loadings shall be added to the rate prescribed by placitum (aa) of subparagraph (iii) of paragraph (b) hereof and shall apply in lieu of the shift loadings prescribed by this subclause.

Provided further, that if the shift loadings would have entitled the employee to a lesser amount than the loading of 17.5 per cent then the 17.5 per cent shift loading shall be added to the wage rate prescribed by placitum (aa) of subparagraph (iii) of paragraph (b) hereof in lieu of shift loadings.

The loading prescribed by this subclause shall not apply to proportionate leave on termination.

(3) Continuous shift employees, that is, employees engaged in a continuous process who are rostered to work regularly on Sundays and holidays, shall be allowed **an additional** weeks annual leave accrued on a weekly basis.

(4) The amounts to be paid hereunder shall be calculated at the rate prevailing at the time the payment is made.

(5) (a) If, after one week's continuous service in any qualifying twelve month period an employee lawfully leaves the employment or the employment is terminated by the employer through no fault of the employee, the employee shall be paid in lieu the proportion that the number of shifts worked by the employee at the rate prescribed by paragraphs (b) and (c) **of** subclause (2) of this clause in the qualifying period bears to the full number of shifts worked in a qualifying twelve month period.

(b) If an employee's employment terminates in circumstances other than those referred to in paragraph (a) of subclause (5) before he or she has taken the leave prescribed under this award he or she shall be paid for any untaken leave that relates to any completed year of service or, in a case to which subclause (7) of this clause applies in lieu of so much of that leave as has been accrued, unless—

(i) The employee has been justifiably dismissed for misconduct; and

(ii) The misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.

(6) If any of the holidays prescribed in Clause 12. - Public Holidays of this award, fall during an employee's period of annual leave and on a day which would have been an ordinary working day for the employee, the employee shall have one extra day added to the period of annual leave for each such public holiday.

(7) An employer may close down an operation or a section or sections thereof for the purposes of allowing annual leave to all or the majority of employees employed generally or in any such section or sections and in the event of an employee being employed for portion only of a year the employee shall only be entitled to such leave on full pay as is proportionate to the employee's length of service during that period with such employer and if such leave is not equal to the leave given to the other employees, the employee shall not be entitled to work or pay whilst the other employees of the employer are on leave on full pay.

(8) By mutual agreement between the employer and the employee, annual leave may be taken in not more than two periods per annum, but neither of such periods shall be less than one week.

Notwithstanding the above, and in special circumstances, provided the employee so requests and the employer so agrees, annual leave may be taken in periods of less than one week with a maximum of five single day absences, or combination of such five single day absences, in any one year of service.

(9) Any time in respect of which an employee is absent from work, except time **spent** which the employee is entitled to claim sick leave, or spent on holidays, annual leave or bereavement leave as prescribed by this award, shall not count for the purpose of determining an entitlement to annual leave.

(10) (a) An employee who, at the commencement of a period of annual leave, has accrued an entitlement to paid sick leave of not less than forty hours under the provisions of Clause 22. – Sick Leave of this award, and who within 14 days of resuming work following a period of annual leave produces to the employer a certificate from a qualified medical practitioner stating that during the period of annual leave the employee was confined at home or to a hospital for a period of at least seven consecutive days for a reason which if the employee had not been on annual leave, would have entitled the employee to payment under the provisions of Clause 22. – Sick Leave of this award, the employee shall be deemed to have been absent from work through sickness for so much of that period as the employee would otherwise have been entitled to payment under that clause.

(b) An employee to whom paragraph (a) hereof applies shall take the period deemed to be absence through sickness as annual leave at a time convenient to the employer, but on ordinary pay without the annual leave loading prescribed by paragraph (c) of subclause (2) of this clause.

(11) This clause shall not apply to casual employees.

8. Clause 22. – Payment for Sickness: Delete this Clause and insert in lieu thereof the following—

22. – SICK LEAVE

(1) Subject as hereinafter provided a full-time employee shall be entitled to payment for non-attendance on the ground of personal ill health or injury for up to 10 working days or 80 hours, whichever is the lesser, each year accrued on a weekly basis. Part-time employees who are paid a proportion of a full-time employee's pay or paid according to the number of hours worked shall be entitled to the proportion of the number of hours worked each week that the average number of hours worked each week bears to 40, up to 80 hours each year. This clause shall not apply where the employee is entitled to compensation under the Workers' Compensation and Rehabilitation Act 1981.

(2) A employee shall not be entitled to receive wages from the employer for any time lost through an illness or injury caused by the employee's own serious and wilful misconduct or gross and wilful neglect.

(3) An employee, who claims to be entitled to paid leave under this clause, is to provide the employer with evidence that would satisfy a reasonable person of the entitlement.

(4) Sick leave shall accumulate from year to year so that any balance of the period specified in subclause (1) of this clause which has in any year not been allowed to any employee by the employer as paid sick leave may be claimed by the employee and subject to the conditions hereinbefore prescribed, shall be allowed by the employer in any subsequent year without diminution of the sick leave prescribed in respect of that year.

(5) The provisions of this clause do not apply to casual employees.

9. Clause 26. – Bereavement Leave: Delete this Clause and insert in lieu thereof the following—

26. - BEREAVEMENT LEAVE

When it is necessary for an employee to be absent from work for the purposes of attending or arranging a funeral an employee shall be entitled to up to three days' leave at ordinary wages on each occasion and on production of evidence that would satisfy a reasonable person of the death of the employee's wife, husband, father, mother, grandfather, grandmother, brother, sister, child, father-in-law, mother-in-law, brother-in-law and sister-in-law. Wife or husband as referred to in this clause shall include de-facto wife or husband.

10. Clause 31. – Records: Delete the title and insert in lieu thereof the following new title—

31. – TIME AND WAGES RECORD

11. Clause 41. – Parties Bound: Delete this Clause and insert in lieu thereof the following—

41. - PARTIES BOUND TO THIS AWARD

The named parties to this award are—

UNION

The Australian Workers Union
Western Australian Branch
Industrial Union of Workers
Cnr Moore & Lord Streets
EAST PERTH WA 6004

MINING COMPANIES

Kalgoorlie Consolidated Gold Mines Pty Ltd
Black Street
KALGOORLIE WA 6430

Dominion Mining NL
15 Outram Street
WEST PERTH WA 6005

Newmont Wownaminya Pty Ltd
100 Hutt Street
ADELAIDE SA 5000

Newcrest Operations Limited
Hyatt Business Centre
Terrace Road
EAST PERTH WA 6004

National Mine Management Pty Ltd
30 Brookman Street
KALGOORLIE WA 6430

MacMahon Underground Pty Ltd
44 Kurnall Road
WELSHPOOL WA 6106

Sons of Gwalia (Murchison) NL
16 Parliament Place
WEST PERTH WA 6005

Bamboo Creek Management Pty Ltd
Suite 21, Cnr Nash and Short Streets
PERTH WA 6000

MINING CONTRACTORS

Eltin Underground Operations Pty Ltd
74 Great Eastern Highway
SOUTH GUILDFORD WA 6055

Boral Contracting Pty Ltd
69 Abernethy Road
BELMONT WA 6104

Leighton Contractors Pty Ltd
1 Altona Street
WEST PERTH WA 6005

MacMahon Contractors (WA) Pty Ltd
40-42 Kurnall Road
WELSHPOOL WA 6106

Byrnecut Mining Pty Ltd
15 Hunter Street
KALGOORLIE WA 6430

Little Transport & Processing Industries
19 New Clayton Street
KAMBALDA WA 6442
Wallis Drilling Pty Ltd
54 Beaconsfield Avenue
MIDVALE WA 6056
Ausdrill Limited/Ausdrill Australiasia Pty Ltd
170 Kewdale Road
KEWDALE WA 6105

12. Appendix 1 – Make Up of Total Wage: Insert a new Appendix as follows—

APPENDIX 1 – MAKE UP OF TOTAL WAGE

This appendix shows how the total wages in this award are made up detailing both base wage rates and safety net adjustments as well as the industry allowance and total rate published in Clause 16 - Wages.

Classification and wage per week.

(1) Underground	Base Rate	Industry Allowance	Arbitrated Safety Net Adjustment	Total Weekly Minimum Rate (includes Industry Allowance)
	$	$	$	$
Group 1				
Trucker				
Toolcarrier				
Salvage Man				
Pass Runner	298.80	83.80	106.00	488.60
Group 2				
Pipe Sampler				
Sampler				
Popper Machineman				
Diamond Drillers Assistant				
Air Hoist Operator				
Ventilation Man				
Pump Attendant (as distinct from Pumpman)				
Hydraulic Fill Operator	312.60	83.80	106.00	502.40
Group 3				
Platelayer				
Train Crew				
Mechanical Loader Operator				
Scraper Hauler Operator				
Braceman	317.80	83.80	106.00	507.60
Group 4				
Scaler				
Pumpman (engaged dewatering a mine)	322.60	83.80	106.00	512.40
Group 5				
Rock Drill Man in other places				
Rock Bolter				
Powder Monkey				
Percussion Drill Operator				
Sanitary Man				
Crusher Operator	330.60	83.80	106.00	520.40
Group 6				
Rock Drill Man in Rises				
Rock Drill Man in Winzes				
Raise Drill Operator				
In-The-Hole-Hammer Operator				
Diamond Driller up to 15kw				
Timberman	339.40	83.80	106.00	529.20
Group 7				
Rock Drill Man in Shaft				
Timberman in Shaft				
Diamond driller over 15kw	347.70	83.80	106.00	537.50

Underground	Base Rate	Industry Allowance	Arbitrated Safety Net Adjustment	Total Weekly Minimum Rate (includes Industry Allowance)
Group 8				
Diesel Truck and Loader Operator Diesel Personnel Carrier Operator	353.80	83.80	**108.00**	**545.60**
Group 9				
Hydraulic Jumbo Drill Operator	366.50	83.80	**108.00**	**558.30**

(2) (a) **Mining - Open Cut**	Base Rate	Industry Allowance	Arbitrated Safety Net Adjustment	Total Weekly Minimum Rate (includes Industry Allowance)
	$	$	$	$
Mine Employee - Grade 1				
Labourer Spotter Sampler	299.70	83.80	106.00	489.50
Mine Employee - Grade 2				
Blast Crew Trainee - Mobile Plant Operator Serviceman Production Driller	322.10	83.80	106.00	511.90
Mine Employee - Grade 3				
Trained - Mobile Plant Operator Serviceman Production Driller	362.30	83.80	**108.00**	**554.10**
Mine Employee - Grade 4				
Shot Firer Skilled - Mobile Plant Operator Serviceman Production Driller	371.90	83.80	**108.00**	**563.70**
Mine Employee - Grade 5				
Multiskilled	385.40	83.80	**108.00**	**577.20**

(b) **Ore Processing**	Base Rate	Industry Allowance	Arbitrated Safety Net Adjustment	Total Weekly Minimum Rate (includes Industry Allowance)
	$	$	$	$
Process Operator - Grade 1	292.00	83.80	106.00	481.80
Process Operator - Grade 2	309.00	83.80	106.00	498.80
Process Operator - Grade 3	325.50	83.80	106.00	515.30
Process Operator - Grade 4	341.30	83.80	106.00	531.10
Process Operator - Grade 5	371.90	83.80	**108.00**	**563.70**

Ore Processing	Base Rate	Industry Allowance	Arbitrated Safety Net Adjustment	Total Weekly Minimum Rate (includes Industry Allowance)
Laboratory				
Laboratory Employee - Grade 1	292.00	83.80	106.00	481.80
Laboratory Employee - Grade 2	309.00	83.80	106.00	498.80
Laboratory Employee - Grade 3	325.50	83.80	106.00	515.30
Laboratory Employee - Grade 4	341.30	83.80	106.00	531.10
Laboratory Employee - Grade 5	371.90	83.80	**108.00**	**563.70**

(c) Mine Services Employees (MSE)	Base Rate	Industry Allowance	Arbitrated Safety Net Adjustment	Total Weekly Minimum Rate (includes Industry Allowance)
	$	$	$	$
MSE - Grade 1	299.70	83.80	106.00	489.50
MSE - Grade 2	316.30	83.80	106.00	506.10
MSE - Grade 3	332.50	83.80	106.00	522.30

13. Appendix - Resolution of Disputes Requirements: Delete this title and insert In lieu thereof the following new title—

APPENDIX 2 - RESOLUTION OF DISPUTES REQUIREMENT

14. Appendix - S.49B - Inspection of Records Requirements: Delete this title and insert In lieu thereof the following new title—

APPENDIX 3 - S.49B - INSPECTION OF RECORDS REQUIREMENTS

2003 WAIRC 07508

BAG, SACK AND TEXTILE AWARD

No. 3 of 1960

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	JOYCE BROS (WA) PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 993 OF 2002
CITATION NO.	2003 WAIRC 07508

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondent	Ms S Laferla

Order

HAVING heard Mr J Welch on behalf of the applicant and Ms S Laferla on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Bag, Sack & Textile Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

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

12. - MEAL MONEY

(1) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by his/her employer or paid $8.15 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employees concerned on the previous day or earlier, that such second or subsequent meal will also be required, provide such meals or pay an amount of $7.15 for each second or subsequent meal.

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

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

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

23. - EXTRA RATES

Any employee required to repair canvas goods of all descriptions which are of an unusually dirty or offensive nature shall be paid 30 cents per hour in addition to the ordinary rate.

3. Clause 25. – Wages: Delete subclause (5) and insert the following in lieu thereof—

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

	Per Week $
In charge of 1 - 5 employees	20.90
In charge of 6 - 10 employees	32.10
In charge of 11 or more employees	41.20

4. Clause 25. –Wages: Delete subclause (6) and insert the following in lieu thereof—

(6) Tool Allowance—

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

(i) $9.75 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $10.20 being the percentage which appears against his/her year of apprenticeship in subclause (4) of this clause.

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

5. Clause 34. – Superannuation: Delete subclause (1)(a) of this clause and insert the following in lieu thereof—

(1) Employer Contributions—

(a) An employer shall contribute 9% of ordinary time earnings per eligible employee into one of the following Approved Superannuation Funds—

(i) Westscheme; or

(ii) an exempted Fund allowed by subclause (4) of this clause.

And further, with the consent of the parties, the Commissioner records the following basis for variations—

1. The agreed Key Minimum Classification in this Award is Canvas and Vinyl Fabricator.

2. For Work Related Allowances – the percentage increase in—

- Clause 23. – Extra Rates
- Clause 25. - Wages

is 3.7% derived from $18 divided by $485.60 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances—

- Clause 12. – Meal Money has been varied for the CPI Take Away Food for the period March 2001 to September 2002 giving the percentage of 5.30%.

4. Clause 34 – Superannuation has been amended in accordance with Principle 2(i).

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – CANVAS AND VINYL FABRICATOR

Clause		A	B	C
Clause 23. – Extra Rates		$0.29	$0.30	$41.20
Clause 25. – Wages	(5)	$20.15	$20.90	$10.20
	(6)	$30.95	$32.10	
		$39.75	$41.22	
		$9.40	$9.75	
		$9.85	$10.21	

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 12. Meal Money	$7.75	$8.16	$8.15
	$6.80	$7.16	$7.15

2003 WAIRC 07505

BAKERS' (COUNTRY) AWARD

No. R18 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ACME BAKERY & OTHERS., RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 992 OF 2002
CITATION NO.	2003 WAIRC 07505

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondents	Ms S Laferla

Order

HAVING heard Mr J Welch on behalf of the applicant and Ms S Laferla on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Bakers' (Country) Award No. 18 of 1977 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

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

(d) Foreman—

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

		Rate Per Week $
(i)	if placed in charge of less than four other employees	13.20
(ii)	if placed in charge of more than four but less than ten other employees	20.90
(iii)	if placed in charge of more than ten and not more than 20 other employees	32.00
(iv)	if placed in charge of more than 20 other employees	43.60

(e) Disability Allowance—

In addition to the total wage prescribed in this subclause, a disability allowance of $5.60 per week shall be paid to doughmakers and single hand bakers.

2. Clause 24. – Superannuation: Delete subclause (2)(a) of this clause and insert the following in lieu thereof—

(2) Employer Contributions—

(a) An employer shall contribute 9% of ordinary time earnings per week per eligible employee either into the Preferred Occupational Superannuation Scheme or into any exempted Fund allowed by subclause (4) of this Clause.

And further, with the consent of the parties, the Commission records the following basis for variations—

1. The agreed Key Minimum Classification in this Award is Baker.
2. For Work Related Allowances – the percentage increase in:
   - Clause 8 – Wages

is 3.65% derived from $18 divided by $492.85 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

3. Clause 24 – Superannuation has been amended in accordance with Principle 2(i).

BAKERS (COUNTRY) AWARD NO. 18 OF 1977

Key Minimum Classification - Baker

Clause 8 - Wages

	COLUMN A		**COLUMN B**	**COLUMN C**
	102.70%		103.65%	
	2001	Rounding Used	2002	Rounding Used
1(d)(I)	$ 12.73	12.75	13.215375	13.20
1(d)(ii)	$ 20.13	20.15	20.885475	20.90
1(d)(iii)	$ 30.91	30.90	32.02785	32.00
1(d)(iv)	$ 42.11	42.10	43.63665	43.60
1(e)	$ 5.39	5.40	5.5971	5.60

The 2000 formula equals $15.00 divided by 464.85 equals 3.2%

The 2001 formula equals $13.00 divided by 479.85 equals 2.7%

The 2002 formula equals $18.00 divided by 492.85 equals 3.65%

2003 WAIRC 07503

BAKERS' (METROPOLITAN) AWARD

No. 13 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* BAKERS INDUSTRY EMPLOYERS ASSOCIATION OF WESTERN AUSTRALIA, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 991 OF 2002
CITATION NO.	2003 WAIRC 07503

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondent	Ms S Laferla

Order

HAVING heard Mr J Welch on behalf of the applicant and Ms S Laferla on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Bakers' (Metropolitan) Award No 13 of 1987 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 28th day of January, 2003.

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

SCHEDULE

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

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

		$
(i)	if placed in charge of less than four other employees (per week)	13.00
(ii)	if placed in charge of four but less than ten other employees (per week)	20.80
(iii)	if placed in charge of ten and not more than 20 other employees (per week)	31.90
(iv)	if placed in charge of 20 or more other employees (per week)	41.10

(e) Disability Allowance—

In addition to the total wage prescribed in this subclause a disability allowance of $5.45 per week shall be paid to doughmakers and single hand bakers.

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

(5) (a) An employee required to work overtime for two hours or more shall be supplied with a meal by his/her employer or paid $8.45 for a meal.

(b) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall provide such meal or pay an amount of $5.75 for each such meal.

3. Clause 26 – Superannuation: Delete subclause (1)(b) and insert the following in lieu thereof—

(b) In the case of employers who are known as Independent Bakeries and Hot-Bread-Shops (as defined in the Registered Rules of the Bread Manufacturers' Association of Western Australia Rule 3 and 5) nine (9) percent of an amount equal to the base wage rate paid by the employer to the employee each week plus any supplementary payment plus an amount equivalent to the average of weekly penalty payments, provided this average of weekly penalty payments shall not exceed twenty five (25) per cent. The average of weekly penalty payments shall be calculated in each week for each employee in accordance with Clause 19. – Allowances; or

And further, with the consent of the parties, the Commission records the following basis for variations—

1. The agreed Key Minimum Classification in this Award is Baker

2. For Work Related Allowances - the percentage increase in—

- Clause 8 – Wages

is 3.6% derived from $18 divided by $498.20 40 as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

"allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances—

- Clause 9 – Overtime has been varied for the CPI for the period March 2001 to September 2002 giving the percentage of 5.30%.

For all allowances previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

4. Clause 26 – Superannuation has been amended in accordance with Principle 2(i).

BAKERS (METROPOLITAN) AWARD NO. 13 OF 1987

Key Minimum Classification - Baker

Clause 8 - Wages

	COLUMN A		COLUMN B	COLUMN C
	102.67%		103.60%	
	2001	Rounding Used	2002	Rounding Use
(d)(I)	$ 12.53	12.55	13.0018	13.00
(d(ii)	$ 20.07	20.05	20.7718	20.80
(d)(iii)	$ 30.80	30.80	31.9088	31.90
(d)(iv)	$ 39.68	39.70	41.1292	41.10
(e)	$ 5.24	5.25	5.439	5.45

The 2000 formula equals $15.00 divided by 470.20 equals 3.2%

The 2001 formula equals $13 divided by 485.20 equals 2.67%

The 2002 formula equals $18 divided by 498.20 equals 3.6%

Clause 9 - Overtime

	COLUMN A		COLUMN B	COLUMN C
	110.24%		105.30%	
	2001	Rounding Use	2002	Rounding Use
(5)(a)	8.04752	8.05	8.47665	8.45
(5)(b)	5.45688	5.45	5.73885	5.75

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A3 of 2003

APPLICATION FOR REGISTRATION OF AN AWARD

ENTITLED "METAL TRADES (LABOUR HIRE) AWARD 2002"

NOTICE is given that an application has been made to the Commission by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Workers' Union of Workers – Western Australian Branch under the Industrial Relations Act 1979 for the above Award.

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

3. - AREA AND SCOPE

This award shall regulate the rates of pay and define the conditions of employment of employees who are on--hired to clients and work under the clients direction under the terms and conditions of this award, on straight forward Labour Hire on an hourly hire basis for maintenance, installation, modification, production and shutdown work in the Metal and Engineering, Food, Automotive and Printing Industries within the State of Western Australia.

36. - WAGES

(1) (a) The wages payable are as follows:

Classification	Relative Percentage	All-Purpose Wage
C-14		431.40
C-13		448.10
C-12		470.60
C-11		491.50
C-10	100	525.20
C-9	105	
C-8	110	
C-7	115	
C-6	125	

(b) The amount shown shall be payable from the beginning of the first pay period to commence on or after the date of registration of this Award.

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

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

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

(2) (a) Leading Hands

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week -

		$
(i)	if placed in charge of not less than three and not more than ten other workers	20.25
(ii)	if placed in charge of more than ten and not more than twenty other workers	31.00
(iii)	if placed in charge of more than twenty other workers	40.10

(b) Any tradesman moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten other workers.

(3) Apprentices:

Wage per week expressed as apercentage of the Level C10 Engineering Tradesperson's rate.

Four Year Term	%
First year	42
Second year	55
Three year	75
Fourth year	88

Three and a Half Year Term	%
First six months	42
Next year	55
Next year	75
Final year	88
Three Year Term	
First year	55
Second year	75
Third year	88

(5) A casual employee shall be paid 20 per cent of the ordinary rate in addition to the ordinary rate for the calling in which he/she is employed.

(6) Minimum Wage

(a) No adult employee shall be paid less than the Minimum Adult Wage unless otherwise provided by this clause.

(b) The Minimum Adult Award Wage for full time adult employees is $431.40 per week payable from the beginning of the first pay period on or after 1st August 2002.

(c) The Minimum Adult Award Wage of $431.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(d) Unless otherwise provided in this clause adults employed as casual or part time employees shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(e) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision of the Minimum Adult Award Wage of $431.40.

(f) (i) Subject to subparagraph (f)(iii) the Minimum Adult Award Wage shall not apply to apprentices, employees engaged on Traineeships or Jobskills placements, or to other categories of employees who by prescription are paid less than the minimum award rate.

(ii) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(iii) The Minimum Adult Wage in respect of ordinary hours of work prescribed by this Award, to be paid to an adult employee (21 years of age and over) engaged as an apprentice shall be equivalent to the rate prescribed for a third year apprentice on a four year term for the first three years of an apprenticeship. The rate applicable to a fourth year apprentice shall apply in the final year. In the case of a three and a half year term the rate shall be that applicable to two and a half years service for the entirety of the first two and a half years and then the rate applicable to a final year apprentice for the final year. In the case of a three year term the rate shall be that applicable to a second year apprentice for the first two years and then the rate applicable to a third year apprentice in the final year.

Where the said minimum rate of pay is applicable, the same rate shall be payable on holidays, during annual leave, sick leave, long service leave and any other leave prescribed by this Award. Where in this Award an additional rate is prescribed for any work as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of apprenticeship.

(g) Subject to this clause the Minimum Adult Award Wage shall –

(i) apply to all work in ordinary hours

(ii) apply to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave and for all other purposes of this award.

(h) (i) The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2002 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award agreements. Absorption which is contrary to the terms of an agreement is not required.

(ii) Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

(7) Tool Allowance:

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

(i) $11.25 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $11.25 being the percentage which appears against the year of apprenticeship in subclause (3) of this clause;

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

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

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

(d) A tradesman or apprentice shall replace or pay for any tool supplied by the employer if lost through the employee's negligence.

(9) Structural Efficiency:

(a) Arising out of the decision of 8 September 1989 in the State Wage Case and in consideration of the wage increases resulting from structural efficiency adjustments, employees are to perform a wider range of duties which is incidental or peripheral to their main tasks or functions.

(b) The parties to this award are committed to co-operating positively to increase the efficiency, productivity and international competitiveness of the metal and engineering industry including employees performing a wider range of duties which are incidental or peripheral to their main tasks or functions to enhance the career opportunities and job security of employees in the industry.

(c) At each plant or enterprise a consultative mechanism may be established by the employer, or shall be established upon request by the employees or their relevant union or unions. The consultative mechanism and procedure shall be appropriate to the size, structure and needs of that plant or enterprise. Measures raised by the employer, employees or union or unions for consideration consistent with the objectives of paragraph (b) hereof shall be processed through that consultative mechanism and procedures.

(d) Measures raised for consideration consistent with subclause (b) hereof shall be related to the classification structure, the facilitative provisions contained in this Award and, subject to Clause 35. - Training, matters concerning training and, subject to paragraph (e) hereof, any other measures consistent with the objectives of paragraph (b) of this subclause.

(e) Without limiting the rights of either an employer or a union to arbitration, any other measure designed to increase flexibility at the plant or enterprise and sought by any party shall be notified to the Commission if the initiative varies an Award provision and by agreement of the parties involved shall be subject to the following requirements:-

(i) the changes shall not affect provisions reflecting national standards recognised by the Western Australian Industrial Relations Commission;

(ii) the majority of employees affected by the change at the plant or enterprise must genuinely agree to the change;

(iii) no employee shall lose income as a result of the change;

(iv) the relevant union or unions must be a party to the agreement;

(v) the relevant union or unions shall not unreasonably oppose any agreement;

(vi) any agreement shall be subject to approval by the Western Australian Industrial Relations Commission and, if approved, shall operate as a schedule to this Award or a Section 41 Industrial Agreement and take precedence over any provision of this Award to the extent of the inconsistency.

(f) Any disputes arising in relation to the implementation of paragraphs (c) and (d) hereof shall be subject to the provisions of Clause 38. - Avoidance of Industrial Disputes, of this award.

(Sgd) J. A. SPURLING,
Registrar.

12 March 2003.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. A 2 OF 2003

APPLICATION FOR NEW AWARD

ENTITLED

"SHEARING CONTRACTORS AWARD OF WESTERN AUSTRALIA 2003"

NOTICE is given that an application has been made to the Commission by The Western Australian Shearing Contractors Association Inc. under the *Industrial Relations Act 1979* for a new Award.

As far as relevant, those parts of the variation which relate to area of operation or scope are published hereunder:-

CLAUSE 5. – AREA AND SCOPE

5.1 This Award shall apply to all employees employed in the classifications contained in Clause 15 of this Award, who are employed by employers in the industry engaged in by the Respondents to this Award.

5.2 This Award shall apply throughout the State of Western Australia.

CLAUSE 15. - RATES OF PAY

The rates of pay for employees covered by this Agreement are as follows:

15.1. Rates for shearers

15.1.1	(a)			If not found:
15 .1 .1	(a)	(i)		For flock sheep (wethers, ewes and lambs), by machine - $184.69 per 100.
15 .1 .1	(a)	(ii)		For rams (other than special stud rams) and ram stags, double the rate for flock sheep.
15.1 .1	(a)	(iii)		For stud ewes and their lambs - one and a quarter times the rate for flock sheep .
15.1 .1	(a)	(iv)		For double-fleeced sheep - one and one-third times the rate prescribed appropriate to the class of sheep.
15.1 .1	(a)	(v)		For hand shearing - 7-1/2 per cent additional to the rate for each class of sheep.
15.1.1	(a)	(vi)		If a shearer is required to provide his own stud combs he shall be paid 25 per cent additional to the rate for each class of sheep .
15 .1 .1	(a)	(vii)		For special studs - as agreed.

15 .1 .1. (a) (viii) If the employer supplies a hand piece, the employer may deduct from the rate per 100 paid to the shearer the sum of $2.50 per 100 sheep shorn.

15 .1 .1 (b) If found, the rates prescribed above less:

15 .1 .1 (b) (i) expeditionary shearing (i .e three meals and two smokos per day) -$19.11 per day;

15.1.1 (b) (ii) suburban (i.e one meal plus smokos) - $9.56 per day .

15.1.1 (c) Engagement by the day

15.1 .1 (c) (i) Not found - handpiece provided by employee - $138.00.

15.1 .1 (c) (ii) If the employer provides keep the employer may deduct the amount of $19.11 per day when three meals and two smokes areprovided each day or $9.56 per day when one meal and two smokes are provided each day.

15 .1 .1 (c) (iii) If the employer supplies a hand piece, the employer may deduct from the daily rate the sum of $2.50 per 100 sheep shorn.

15.1 .1 (d) For the purposes of this clause:

15 .1 .1 (d) (i) A ram means a male sheep with at least two permanent teeth.

15.1 .1 (d) (ii) Ram stags means rams that have been castrated after they have attained eighteen months.

15.1 .1 (d) (iii) Stud ewes means ewes with tags in their ears from which rams are bred for sale or station use but the term does not include ewes of the flock which have tags in their ears for the purpose of identification other than for stud purposes.

15.1 .1 (d) (iv) Double fleeced means a sheep carrying two years' fleece .

15.2 Rates for crutching

	15.2.1 Piecework rates - if not found	$ Per 100
(1)	For full crutching, that is, shearing between the legs, the inside and back parts of the leg, the tail, given two blows around and below the tail, and in addition, when required, removing wool which has been struck by blowfly If the employer provides a shearer with a handpiece the employer may deduct from the rate per 100 paid to the crutcher the sum of 84 cents per 100 sheep shorn.	53.56
(2)	For crutching between the legs, that is shearing on those parts of the legs which face each other and on the inner half of the backs of the legs, with one blow on the end of the tail if requires If the employer provides a shearer with a handpiece the employer may deduct from the rate per 100 paid to the crutcher the sum of 84 cents per 100 sheep shorn.	42.48
(3)	For wigging or ringing If the employer provides a shearer with a handpiece the employer may deduct from the rate per 100 paid to the crutcher the sum of 84 cents per 100 sheep shorn.	20.32
(4)	For either wigging or ringing in addition to crutching – crutching rates plus	5.54
(5)	For wigging and ringing If the employer provides a shearer with a handpiece the employer may deduct from the rate per 100 paid to the crutcher the sum of 84 cents per 100 sheep shorn .	32.24
(6)	For wigging and ringing in addition to crutching - crutching rates plus	9.23
(7)	For cleaning the belly of any ewe above the teats (not more than two blows of the machine or shears) in addition to crutching - crunching	4.62
(8)	For rams - double the rates prescribed in paragraphs (1) to (6) hereof.	

15 .2.2 Piecework rates - if found

The rates prescribed above less:

15.2.2 (a) expeditionary shearing (i.e three meals and two smokos per day) - $19.11 per day:

15.2.2 (b) suburban (i.e one meal plus two smokos) - $9.56 per day.

15.2.3 Engagement by the day

15.2.3 (a) Not found - handpiece provided by employee - $138.00.

15 .2.3 (b) If the employer provides keep the employer may deduct the amount of $19.11 per day when three meals and two smokos are provided each day or $9.56 per day when one meal and two smokes are provided each day.

15 .2.3 (c) If the employer supplies a hand piece, the employer may deduct from the daily rate the sum of $2.50 per 100 sheep shorn.

15.3 Rates for shed hands

15.3.1 If not found :

	Over 65 days experience $ per run	Under 65 days experience $ per run
For adults	34.18	32.56
For juniors under 18 years	23.93	22.79
18-20 years	30.76	29 .30

15 .3 .1 (a) Provided that if after the commencement of any day's work, work ceases prior to the expiration of the second run for that day then the employee shall be paid for two runs;

15 .3 .1 (b) And further, if work ceases for the day during the third or fourth run then the employee shall be paid to the end of the run in which work ceased for the day .

15 .3 .1 (c) However, the minimum payment of two runs per day prescribed herein shall not apply where an employee is not required to attend for work and is advised accordingly on the preceding day .

15 .3.2 If found - the rates prescribed above less:

15.3.2 (a) expeditionary shearing (i.e three meals and two smokos per day) - $19 .11 per day;

15.3.2 (b) suburban (i .e one meal plus two smokos) - $9.56 per day .

15.4 Rates for Woolpressers

15 .4.1 If not found:

15 .4.1 (a) For pressing – piecework

By hand	By hand
$ per bale	Cents per kg
10.62	7.00
By power	By power
$ per bale	Cents per kg
7.08	5.00
(power= 190kgX4.44cents)	

15.4.1 (b) Weighing and branding - an extra 26 cents per bale.

15.4.1 (c) For stacking bales, that is placing one bale on top of another – an additional rate to be agreed mutually .

15.4.1 (d) Unless otherwise agreed, when the total sum which a woolpresser would receive under the piecework rates amounts to less than an average of $35 .85 per run for the shed, the employer shall pay the deficiency to the employee.

15 .4.2 If found - The above mentioned rates less:

15 .4.2 (a) expeditionary shearing (i .c three meals and two smokos per day) - $19.11 per day;

15.4.2 (b) suburban (i .e one meal plus two smokos per day) - $9.56 per day.

15.4.3 Woolpressers engaged at piecework rates shall for all wool pressed by them be paid wholly per bale or wholly per kg.

15 .4 .4 Where the presser is carrying out the combined duties of pressing and penning up the presser shall be paid an additional rate of $1.00 per bale when the number of bales pressed in a day exceeds 18 bales, the amount of $1 .00 per bale to be paid for every bale pressed that day.

For penning up a rate of 0.5 cents per kilo over and above the contract bale rate is to be paid.

15 .5 Rates for shearing cooks

15 .5 .1 The minimum rate to be paid to employees for acting as cook in connection with expeditionary shearing or crutching operations (i.e three meals and two smokos per day) shall be $11.75 per day "found" for every man excepting himself for whom the employee cooks, but if the total amount which the cook would receive under this subclause for the term of his employment amounts to less than $152.79 per day "found" for himself after paying the necessary offsiders the employer shall pay the deficiency to the employee.

15 .5 .2 The minimum rate to be paid to employees for acting as cook in connection with suburban shearing or crutching operations (i .e one meal and two smokos per day)shall be $5.88 per day "found" for every man excepting himself for whom the employee cooks, but if the total amount which the cook would receive under this subclause for the term of his employment amounts to less than $76.40 per day "found" for himself after paying the necessary offsiders the employer shall pay the deficiency to the employee.

SCHEDULE – RESPONDENTS

Peter Letch, 6 Neaves Road Wanneroo WA 6065

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

(Sgd) J. A. SPURLING,
Registrar.

4 March 2003.

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2003 WAIRC 07881

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE , RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 7 MARCH 2003
FILE NO.	PSACR 20 OF 2002
CITATION NO.	2003 WAIRC 07881

Result	Leave for counsel to appear generally refused.
Representation	
Applicant	Mr B. Cusack (by way of written submissions)
Respondent	Mr N. Cinquina (by way of written submissions)

Reasons for Decision - Appearance by counsel

1 The hearing in the substantive matter before the Commission is listed to commence on 13 March 2003. The respondent has indicated it wishes to be represented by counsel. The applicant union has objected to the appearance of counsel. This decision refers to the application by the respondent to be represented by counsel.

2 Section 31(4) of the *Industrial Relations Act 1979* provides as follows—

> "(4) Where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard."

3 The Commission must firstly decide whether a question of law is raised or argued, or is likely in the opinion of the Commission to be raised or argued, in the substantive proceedings. If it is not, counsel will not be allowed to appear and be heard. The word "likely" means generally speaking "probable" (*Western Mining Corporation v. Australian Workers' Union* (1990) 70 WAIG 3525). If a question of law is raised or argued, or is likely in the opinion of the Commission to be raised or argued, then the Commission is to exercise a discretion whether or not to grant leave.

4 The discretion to permit counsel to appear is to be exercised within the parameters of the Act, including those established by the objects of the Act, and, in particular s.6(c) which states—

> "(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality."

5 The right of a party to be represented by counsel is therefore limited.

6 The substantive matter before the Commission is a claim by the union that Ms Westlund has been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying. The applicant union seeks the following declaration and orders.

7 "(1) A declaration that the Public Advocate has breached the requirements of the *Public Sector Management Act 1994*, sections 8 & 9.

8 (2) An order that the Public Advocate cease and desist workplace bullying.

9 (3) An order that the Public Advocate provide the necessary assistance to relocate Ms Westlund to a suitable alternative position within the public sector.

10 (4) An order that the Public Advocate place Ms Westlund on paid leave from the date she last worked until the date she is permanently placed in a suitable alternative position within the public service.

11 (5) An order that all leave entitlements utilised during the period referred to in order (4) be fully reinstated.

12 (6) An order that the period referred to in order (4) above shall be regarded as service for all purposes of Ms Westlund's employment."

13 The Commission convened proceedings on 17 February 2003 in order to deal with preliminary matters. On that occasion, the respondent was represented by counsel in order to argue that leave ought be granted for counsel to appear in the substantive proceedings. On that occasion, counsel stated that issues of law arose out of the circumstances whereby Ms Westlund may be certified as unfit to attend work yet remain "on the books", and whether the arbitrator can require the respondent to provide the necessary assistance to relocate Ms Westlund to a suitable alternative position within the public sector as the union seeks in order (3) above.

14 The Commission indicated that an issue of law is raised in order (3) and leave was granted to the respondent to be represented by counsel in relation to the order sought in order (3). If it became apparent that the issues relating to the order are indivisible from the balance of the substantive proceedings, the respondent may ask for the ruling to be revisited.

15 In correspondence to the Commission dated 21 February 2003 the respondent advised that the declaration and orders sought cannot be separated from the substantive proceedings because—

16 (a) Essentially the applicant is seeking for the Commission to interfere in the management of staff of the Department;

17 (b) The declaration and orders being sought impact on the Department's ability to manage staff;

18 (c) They seek to create new employee paid leave entitlements, and reinstate accrued or pro-rata leave entitlements previously exhausted;

19 (d) They seek to place employees on paid leave until alternative employment is found;

20 (e) They seek to require the respondent to provide the necessary assistance to relocate Ms Westlund to a suitable position within the public sector.

21 The respondent submitted that the declaration and orders sought by the applicant "relate or touch upon questions of law, which will be raised or argued or are likely to be raised or argued in the proceedings". The respondent stated "questions of law to be raised may include the powers of the Public Service Arbitrator to make such orders and the impact on award entitlements".

22 In e-mails which have passed between the respondent and the applicant, copies of which have been provided to the Commission, the respondent indicated that the legal issues it intends to raise include but are not limited to—

23 (1) The power and or jurisdiction of the arbitrator to make an order requiring the respondent to provide Ms Westlund the necessary assistance to relocate to another position in the public sector;

24 (2) Legal principles applicable to the granting of the declaration and/or order against the Public Advocate;

25 (3) Managerial prerogative that relates or touches upon the management of staff and the work they perform;

26 (4) Public Sector Standards, transfer, redeployment;

27 (5) The power and or jurisdiction of the arbitrator to order the respondent to place Ms Westlund on paid leave;

28 (6) The power and or jurisdiction of the arbitrator to grant or make orders sought given the resolution of the workers' compensation matter;

29 (7) The power and or jurisdiction of the arbitrator to make an order reinstating exhausted accrued award entitlements and/or reinstating service;

30 (8) Power and or jurisdiction of the arbitrator to make an order reinstating exhausted accrued award entitlements and/or reinstating service;

31 (9) Power and or jurisdiction of the arbitrator to make an order which has the effect of creating a new form of paid leave;

32 (10) Public interest.

33 The applicant union maintains its objection to leave being granted. In doing so it notes that the questions of law now referred to by the respondent "would seem to cover a wider ground" than order (3) sought by the union. The applicant union maintains its objection on the basis that the Commission has already considered the issue of leave for counsel to appear and the issues now raised by the respondent fall outside the scope of the conditions set.

34 I make the following comments by way of observation. In the proceedings before the Commission on 17 February 2003 the only issues of law to be raised by the respondent were whether Ms Westlund may be certified as unfit to attend work yet remain "on the books" and whether the arbitrator can issue the order (3) as sought. The matters referred to by the respondent in the correspondence and the e-mails between the parties go much further than those issues. That is surprising given that the proceedings on 17 February 2003 had been set down since 6 December 2002 on the basis that the respondent's request for leave to be represented by counsel would be dealt with on 17 February 2003. I would have expected on 17 February 2003 that the respondent would have raised all the questions of law it intended to raise in the substantive hearing.

35 While I acknowledge that circumstances may change as the preparation for a hearing proceeds and issues which may not have been anticipated may arise, the quite wide ranging questions of law now raised to by the respondent do not appear to be matters which have arisen only recently.

36 It may be able to be said that most, if not all, proceedings before the Commission may involve some question of law. This is because the Commission is a creature of a statute which operates in accordance with that statute and arguments may arise regarding the interpretation of the statute. Further, matters of employment law are frequently central to the issues which are brought to the Commission. The point to be made is that s.31 of the *Industrial Relations Act 1979* does not give a right to parties to be represented by counsel merely because a question of law is raised or argued or likely to be raised or argued. Therefore, the fact that a question of law may be raised of itself may not be sufficient justification for the Commission to exercise its discretion to permit counsel to appear. In other words, merely because the declaration and orders sought "relate or touch upon questions of law" (to quote from the respondent's letter of 21 February 2003) does not mean that counsel is to be given leave to appear.

37 Rather, the question of law raised or argued, or likely to be raised or argued, should be a question of substance and not mere technicality. I say this because the Act provides means for settling disputes with the maximum of expedition and the minimum of legal form and technicality. The prospect of there being raised unnecessary legal form and technicality, particularly, but not solely, where it inhibits the settling of industrial disputes may well not be the sort of consideration which would justify the exercise of discretion in favour of a legal practitioner appearing in a matter (*Western Mining Corporation v. AWU,* op.cit).

38 The substantive matter before the Commission is the claim that Ms Westlund has been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying. Section 29 requires the applicant union to specify the relief it seeks once the substantive matter has been made out. However, it follows that the relief that is sought by the applicant union is not of itself the substantive matter before the Commission. In granting relief under the Act the Commission is not restricted to the specific claim made or to the subject matter of the claim: s.26(2). It is apparent in what follows that the concern of the respondent has principally been directed to the relief that is sought. However, it does not automatically follow that the relief that is sought is indivisible from the substantive matter before the Commission such that leave is to be granted to counsel to appear and be heard also for the substantive matter.

39 The questions of law referred to in the correspondence and the e-mails now relied upon by the respondent to support its application to be represented by counsel can be grouped as follows—

40 (1) Items (3), (9) of the correspondence, (a) and (b) of the e-mail raise managerial prerogative and public interest respectively. Matters of managerial prerogative do not stand outside the area of industrial disputes (re: *Cram and Others; ex parte NSW Collery Proprietors Association Limited* (1987) 72 ALR 161). In any event, s.80E(5) provides that the jurisdiction of the arbitrator to enquire into and deal with any industrial matter relating to a government officer cannot affect or interfere with the exercise by an employer of any power in relation to any matter within the jurisdiction of the arbitrator.

41 Therefore the fact that managerial prerogative may be touched upon would be insufficient for the Commission to exercise its discretion to grant leave for counsel to appear. It is beyond question that the mere exercise of managerial prerogative does not prevent the Commission from enquiring into the fairness or otherwise of the exercise of that prerogative where it affects the employment relationship with employees (*City of Canning v. Operative Painters and Decorators Union* (1994) 74 WAIG 2321 at 2322). Nor am I aware of any authority which says that the public interest is a reason for granting counsel leave to appear.

42 Finally these items may arise in relation to the substantive matter before the Arbitrator, however, the legal principles relating to them are well settled and these items do not warrant the exercise of discretion to allow counsel to appear.

43 (2) Item (2) merely states "legal principles applicable to the granting of a declaration and or order against the Public Advocate". There is an issue about whether or not the Commission is able to issue a mere declaration in the absence of an order: *Hon Minister for Police v. WA Police Union* (2000) 81 WAIG 356. That issue does not arise in this case. The mere statement that there is a legal principle applicable is unhelpful and without more does not identify a question of law which is likely to arise in this matter.

44 (3) Item (4) merely states "Public Sector Standards, transfer, redeployment". It is not clear what is being referred to here. However, it may be convenient to link this point with items (1) and (e) which respectively raise the power or jurisdiction of the arbitrator to make an order requiring the respondent to provide Ms Westlund the necessary assistance to relocate to another position in the public sector. In the proceedings of 17 February 2003 those questions of law formed the basis for the Commission granting leave for counsel to appear in relation to order (3) as sought.

45 The issue becomes whether or not those questions of law are indivisible from the substantive matter. For the reasons given earlier, the relief sought is separable from the substantive matter. To put it another way, the appearance of counsel in relation to the questions of law relating to such an order, if the evidence shows that the union's claim is made out and that order is pursued, may be able to be dealt with by written submissions or by a brief appearance by counsel at the commencement or the conclusion of the hearing.

46 (4) Items (5) and (d), and items (7), (8) and (c) respectively refer to the power and or jurisdiction of the arbitrator to order the respondent to place Ms Westlund on paid leave or to reinstate accrued leave or "create a new form of paid leave".

47 It is not easy to see what questions of law are raised in this regard. The Public Service Arbitrator has the power to enquire into and deal with the claim that Ms Westlund has been subject to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying. If in dealing with that claim it was apparent that some annual leave had been utilised by Ms Westlund which ought be re-credited, it is difficult to see what substantive question of law arises. The arbitrator is not being asked to create a new form of paid leave nor create new employee paid leave entitlements. The items do not at this point appear to be of sufficient moment to warrant the exercise of the arbitrator's discretion to allow counsel to appear in relation to the substantive matter or in relation to orders (4) and (5) as sought.

48 (5) Item (6) raises the power and or jurisdiction of the arbitrator to grant or make the orders sought given the resolution of the workers' compensation matter. The Commission is aware of workers' compensation matters from earlier proceedings in relation to the production of documents [2002 WAIRC 06875]. The status of those workers' compensation proceedings, whether current or past, is a matter of fact and it is not clear what question of law may be raised regarding the jurisdiction of the arbitrator.

49 It follows that I am not persuaded that any of the broader questions of law now described in the correspondence and e-mail submitted by the respondent either arises or is indivisible from the substantive matter before the Commission so that the Commission ought revisit its decision of 17 February 2003.

50 Accordingly, the decision of the Commission is that counsel may appear and be heard in relation to the claim for an order that the Public Advocate provide the necessary assistance to relocate Ms Westlund to a suitable alternative position within the public sector. As a matter of convenience, the Commission will accommodate the appearance of counsel on that issue either orally or in writing. In all other respects, leave for counsel to appear is not granted.

51 In reaching this conclusion I feel bound to observe that in the past the Commission as presently constituted has found the appearance of counsel, whether for the applicant or the respondent, generally to have been of assistance to the Commission.

2003 WAIRC 07819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 28 FEBRUARY 2003
FILE NO.	P 62 OF 2000
CITATION NO.	2003 WAIRC 07819

Result Application dismissed

Order

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

WHEREAS on the 8th day of May 2001 the Arbitrator convened a conference for the purpose of conciliating between the parties: and

WHEREAS at the conclusion of that conference the Applicant sought time to consider its position; and

WHEREAS the application was set down for a For Mention hearing on the 25th day of July 2002 and at the conclusion of the hearing the parties were to have further discussions and advise the Commission of the status; and

WHEREAS on the 9th day of September 2002 the Arbitrator convened a further conference for the purpose of conciliating between the parties: and

WHEREAS at the conclusion of that conference the parties had reached an agreement in respect of the application; and

WHEREAS on the 25th day of February 2003 the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

[L.S.]

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

2003 WAIRC 07729

ON CALL ALLOWANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS, APPLICANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 14 FEBRUARY 2003
FILE NO.	PSACR 34 OF 2002
CITATION NO.	2003 WAIRC 07729

Result	Jurisdiction not found
Representation	
Applicant	Mr P Momber of Counsel and with him Ms M Fransen
Respondent	Mr R Bathurst of Counsel and with him Ms C Brown

Reasons for Decision

1 This is a matter referred for hearing and determination pursuant to s.44 of the Industrial Relations Act 1979 ("the Act"). The Schedule to the Amended Memorandum of Matters Referred for Hearing and Determination under s.44 (the Referral) is as follows—

"AMENDED SCHEDULE

1. The WA Police Union of Workers ("the WAPU") says that—
   a) its member, Senior Sergeant Nicole Hill, is entitled to be paid an on-call allowance pursuant to clause 19 of Western Australian Police Service Enterprise Agreement for Police Act Employees 2001 PSA AG 8 of 2001 ("the Agreement");
   b) when Senior Sergeant Hill commenced duty as the Officer in Charge of Property Receival (and Exhibit) Storage Section ("PRESS") on 22 June 1998, she sought instruction from her then Officer in Charge Superintendent Bowers (retired), to clarify the 'after hours' call outs the section was required to attend to. She was advised that as the only sworn officer at PRESS she would be required to respond forthwith for duty outside her rostered ordinary working hours to attend incidents and alarms on site;
   c) apart from the periods of approved leave, Senior Sergeant Hill has been on call and responded to and attended to all incidents and alarms outside of her normal rostered hours of duty since commencing as OIC of PRESS. Outside of her normal working hours Senior Sergeant Hill has remained contactable at all times by telephone and mobile phone as was required of her as the OIC of PRESS; and
   d) Senior Sergeant Hill was provided by the WA Police Service with a vehicle for commuting purposes and to attend to after hours alarms and incidents. Senior Sergeant Hill was also provided with a mobile phone and required to provide the central police Communications Centre with her home and mobile phone contact details.
2. Alternatively, the WAPU says that if there is no entitlement arising from the Agreement, Senior Sergeant Hill ought be granted an on-call allowance due to the merits of her situation.

The WAPU seeks—

1. a Declaration that Senior Sergeant Hill be entitled to an on-call allowance pursuant to clause 19 of the Agreement ; and
2. an Order that the Commissioner of Police pay Senior Sergeant Hill an on-call allowance from 22 June 1998 to the date from which she transferred from the position of Officer in Charge at PRESS.

The Commissioner of Police refutes the claim of the WAPU and opposes the Order and declaration as sought and says that—

1. Senior Sergeant Hill was not "rostered" nor has she been "directed by a duly authorised Senior Officer" to "be available to respond forthwith for duty" outside of her ordinary working hours or shift. Accordingly, she has not been "on-call" within the meaning of clause 19 of the Agreement and therefore is not entitled to be paid the allowance;
2. the after hours contacts made to Senior Sergeant Hill which have requested her attendance on-site constitute emergency returns to duty were in accordance with clause 18(3) of the Agreement;

3. for after hours attendances Senior Sergeant Hill is entitled to be paid in accordance with the emergency return to work rates provided in clause 18 of the Agreement;

4. There is no entitlement pursuant to the Agreement to an on-call allowance.

5. Further the merits of the matter do not warrant Senior Sergeant Hill being paid an on-call allowance."

2 The respondent challenges the Commission's jurisdiction to deal with the matter on the grounds that the first leg of the matter seeks the enforcement of an entitlement pursuant to an industrial agreement, which is the exclusive province of the Industrial Magistrate's Court. It says that the second leg of the matter seeks that the Commission effectively vary the Agreement, to create a new aspect of on-call, when clause 19 covers the intentions of the parties as to entitlements to on-call allowances.

3 For the purposes of dealing with the issue of jurisdiction, the applicant submitted a Proof of Evidence of Nicole Morag Hill (Exhibit 1) and refers only to paragraphs 81 and 85 of that document. Those paragraphs state—

"81. To date my senior management has never adequately addressed these concerns. In not addressing these concerns I have been either denied a rightful entitlement under the agreement or a reasonable wage for work done.

…

85. I am concerned at the way management instruct their staff to undertake duties outside of their normal working hours and/or job descriptions and then avoid paying entitlements under the industrial agreement or to pay me a reasonable wage for the work that I did by relying on technicalities such as I did not receive a specific directive to be "on-call"."

4 The applicant also says that its claim is related to Ms Hill being permanently on-call for the period 22 June 1998 to 13 October 2002.

5 The applicant characterises the claim in these ways—

(1) Ms Hill has an entitlement pursuant to the Agreement; or

(2) Ms Hill is entitled to a reasonable sum for standing and waiting, i.e. working.

6 The applicant also says that the respondent's conduct in refusing the claim and not acknowledging it is unconscionable, and that this requires the use of the Commission's arbitral powers.

7 The applicant's final characterisation of the claim is that it seeks the Commission to use its arbitral powers to decide whether Ms Hill entered into an agreement to carry out certain duties. If so, is she entitled to payment? If yes, what payment is she entitled to?

8 The applicant argues that the Commission is not bound by the words contained in the Referral, that the Commission is obliged to deal with the matter to resolve the dispute between the parties, and is obliged to heed the requirements of s.26(1)(a) thereby overcoming any impediments which might arise in the shape of technicalities and legal forms.

9 The first matter I note is that the requirements on the Commission to act according to "the substantial merits of the case without regard to technicalities and legal form" (s.26(1)(a)) is that this can only be done "in the exercise of its jurisdiction" (s.26). Section 26 prescribes that approach only in relation to matters which are within jurisdiction. It does not provide that in dealing with matters on the basis of equity, good conscience and the substantial merits, the Commission is to ignore technicalities and legal forms such as to enable it to go beyond its jurisdiction. It is only when the Commission is acting within jurisdiction that the approach specified in s.26(1)(a) is to apply.

10 As to the applicant's characterisation of the claim as relating to unconscionable conduct by the respondent in refusing the claim and not acknowledging it, I note that the claim as set out in the Referral makes no reference to any alleged unconscionable conduct on the part of the employer. The only reference to any issue of equity or merit is in the alternative statement of claim set out in paragraph 2 where the applicant seeks the creation of an entitlement if none exists, on the ground of the merits of the situation. The issue of the respondent's conduct has arisen only during the argument regarding jurisdiction, by reference to paragraphs 81 and 85 of Exhibit 1. The Referral does not seek any findings, declarations or orders as to the respondent's conduct either in the past or in the future.

11 As to the first aspect of the claim, I am of the view that this clearly asserts that Ms Hill has an entitlement. Paragraph 1(a) of the Referral sets out that the Union "says that (Ms Hill) is entitled to be paid an on-call allowance pursuant to clause 19 of (the Agreement)". Paragraphs 1(b) to (d) then set out the circumstances said to support that assertion.

12 The declaration and order sought are specified widely enough to deal with the applicant's two alternative arguments. The declaration sought in so far as it relates to the first argument seeks a finding of an entitlement in this case it can be an entitlement pursuant to the Agreement. The order sought is for payment – i.e. enforcement of that entitlement. (See *St Michael's School v Independent Schools Salaried officers' Association of Western Australia* (FB) (2000) 80 WAIG 2839 at 2840)

13 Paragraphs 81 and 85 of Exhibit 1 also assert either an entitlement under the Agreement or an entitlement to a reasonable payment.

14 Section 83 provides for the enforcement of certain instruments, including industrial agreements, by the Industrial Magistrates Court. Subsection (3) of s.83 says that applications for such enforcement shall not be made otherwise than under subsection (1) of that section. The Agreement is an industrial agreement within the meaning prescribed in s.7 of the Act, having been registered by the Commission on 20 October 2001.

15 Accordingly, in so far as the matter before me seeks the enforcement of the Agreement, it is not a matter within the Commission's jurisdiction. (See *Cliffs Robe River Iron Associates v Electrical Trades Union of Workers of Australia (Western Australian Branch)* (FB) (1982) 62 WAIG 2679, and *Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (FB) (1989) 69 WAIG 2623 at 2628) (See also *Civil Service Association of Western Australia Incorporated v Director General, Department of Justice* (2002) 82 WAIG 2679 and *AMIEU v The Preston River Abattoir* (1992) 72 WAIG 2602).

16 As to the second aspect of the claim by which the applicant seeks that an entitlement be created on the merits of the situation if no entitlement exists, I note the terms of the Agreement in respect of on-call provisions. Clause 19 – On-Call – Close Call – Standby Allowances sets out definitions for each of those categories, as well as the amount per hour of each allowance. Other conditions for payment are also prescribed.

17 Having considered the nature of the alternative claim as set out in the Referral, I conclude that the effect of what is sought is the creation of a new category of on-call allowance, or additional criteria relating to it, for the purpose of dealing with the merits of the circumstances applying to Ms Hill for the period 22 June 1998 to 13 October 2002. That would have the effect of varying the Agreement, and doing so retrospectively.

18 In accordance with *The Chief Executive Officer of the Western Australian Tourism Commission v The Civil Service Association of Western Australia Incorporated* (FB) (2000) 80 WAIG 1370 and *Director General of the Ministry For Culture and The Arts v The Civil Service Association of Western Australia Incorporated* (IAC) (1999) 80 WAIG 453, there is no power in the Commission to issue an order which would have the effect of varying an industrial agreement.

19 Accordingly, I conclude that the Commission has no jurisdiction to deal with the matter as set out in the Referral.

2003 WAIRC 07780

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS, APPELLANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	PSACR 34 OF 2002
CITATION NO.	2003 WAIRC 07780

Result Application dismissed.

Order

HAVING heard Mr P Momber (of counsel) and with him Ms M Fransen on behalf of the Applicant and Mr R Bathurst (of counsel) and with him Ms C Brown on behalf of the Respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

[L.S.]

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

INDUSTRIAL MAGISTRATE—Complaints before—

2003 WAIRC 07861

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH, COMPLAINANT
	v.
	SILVER CHAIN NURSING ASSOCIATION INC, DEFENDANT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 23 NOVEMBER 2000
COMPLAINT NO.	CP 61 OF 2000, CP 62 OF 2000
CITATION NO.	2003 WAIRC 07861

Representation

Complainant	Mr A Dzieciol instructed by Messrs. Hammond Worthington, Barristers and Solicitors appeared for the Complainant.
Defendant	Ms M Kuhne from the Chamber of Commerce and Industry of Western Australia appeared for the Defendant

Reasons for Decision

The Allegations

1 By its complaints made 25 February 2000 the complainant alleges that the defendant breached the *Silver Chain Registered Nurses Agreement 1997 (the Agreement)* to which it was a party by—

- Failing on 29 December 1999 to pay its employee Patricia Davies public holiday penalties for working on a day observed in lieu of the Christmas Day and Boxing Day holidays being Monday 27 December and Tuesday 28 December 1999 for the pay period ending 28 December 1999.
- Failing on 29 December 1999 to pay its employee Juliette Heaton public holiday penalties for working on a day observed in lieu of the Christmas Day and Boxing Day holidays being Monday 27 December and Tuesday 28 December 1999 for the pay period ending 28 December 1999, and

- Failing on 12 January 2000 to pay its employee Patricia Davies public holiday penalties for working on a day observed in lieu of the New Year's Day holiday being Monday 3 January 2000 for the pay period ending 11 January 2000, and
- Failing on 12 January 2000 to pay its employee Juliette Keaton public holiday penalties for working on the day observed in lieu of the New Year's Day holiday being Monday 3 January, 2000 for the pay period ending 11 January 2000.

Jurisdiction

2 By virtue of the provisions in sections 177A, 178(1), 178(5A) and 178(6) of the *Workplace Relations Act 1996* (Commonwealth) and Section 81 of the *Industrial Relations Act 1979* as amended (Western Australia), I have jurisdiction to hear and determine the said complaints.

The Issues

3 By its particulars of claim the complainant contends that the defendant breached clause 22(b) of *the Agreement*. The particulars of the alleged breaches are set out at sub-paragraphs (a) to (e) of paragraph 4 of the particulars of claim. I repeat the relevant particulars—

(a) Each of the employees concerned worked a seven (7) hour shift on 27 and 28 December 1999 and 3 January 2000 respectively.

(b) For the work performed on each of the days in question, the employees were each paid at ordinary time for the hours that they worked on those days.

(c) Clause 22(a) of the Agreement provides that the days specified therein "or *the days observed in lieu of those days shall be observed as public holidays"*. The days specified included *"New Years Day… Christmas Day and Boxing Day."*

(d) The ANF contends that for the purposes of clause 22(a) of the Agreement—

i) Monday 28 December 1999 was a day observed in lieu of the Christmas Day public holiday; and,

ii) Tuesday 29 December 1999 was a day observed in lieu of the Boxing Day public holiday; and,

iii) Monday 3 January 2000 was a day observed in lieu of the New Year's Day public holiday.

(e) Accordingly the two nurses concerned should have been paid at the rate of double time and a half for all time worked on each of these days, however they were only paid at the ordinary time rates for that time. The nurses were therefore underpaid for the hours that they worked on 27 and 28 December 1999 and on 3 January 2000 respectively.

4 The defendant denies breaching *the Agreement*. It says that clause 22 of *the Agreement* is clear and unambiguous. It says that it has applied clause 22 with the effect that a nurse rostered to work on the public holiday which fell over the

5 Christmas – New Year period 1999/2000 was paid public holiday penalty payments for all work performed on—

(a) Christmas Day Saturday 25 December 1999,

(b) Boxing Day Sunday 26 December 1999

(c) New Year's Day Saturday 1 January 2000

6 The defendant says that nurses who worked on those public holidays were paid for the hours worked pursuant to clause 22(b). Ms Davies and Ms Keaton were not asked to work on Christmas Day, Boxing Day and New Year's Day.

7 The defendant's argument inter alia is set out at paragraphs 12 to 17 of the particulars of defence. I set out those particulars—

12. The ANF contends in its particulars of claim that for the purposes of clause 22(a) of the Agreement the public holidays should have been observed as follows—

"(a) Monday 28 December 1999 was a day observed in lieu of the Christmas Day public holiday; and

(b) Tuesday 29 December 1999 was a day observed in lieu of the Boxing Day public holiday; and

(c) Monday 3 January 2000 was a day observed in lieu of the New Year's Day public holiday."

13. The Complainant makes this contention in spite of the fact that there is no provision within the Agreement allowing for the substitution of another day for a public holiday prescribed by the Agreement and provides no reasons for asserting that the day referred to in paragraph 12 are days observed in lieu of the respective public holidays.

14. The Silver Chain Registered Nurses Agreement simply provides for the observance of specified public holidays or days observed in lieu of those days.

15. The effect of the Complainant's interpretation of the agreement would have resulted in a nurse who worked on Christmas Day, for example, being paid the ordinary weekend rate for the hours worked on that day pursuant to Clause 12 – Shift Work (a loading of 50%). This compares with a loading of 150% for work performed on a public holiday.

16. Accordingly the nurse who worked on Christmas Day, for example and not on Monday 28 December 1999 would have been disadvantaged compared with the nurse who worked on the latter day and not on the actual Christmas Day.

17. Hence the Defendant has applied the Agreement strictly and in doing so believes it has been applied in the fairest way for all registered nurses.

The Agreement

8 It is pertinent at this point to set out the relevant provisions of clause 22 of *the Agreement.*

22. – PUBLIC HOLIDAYS

(a) For the purposes of this agreement the following days, or the days observed in lieu of those days, shall be observed as public holidays without deduction of pay—

New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.

(b) An employee who works on a public holiday named herein shall at the option of the employer be entitled to one of the following—

(i) double time and a half for the actual time worked on the holiday; or

(ii) time and a half for the actual time worked with an equivalent period of time off, paid at the ordinary rate.

Such time off shall be taken at a mutually convenient time and may be taken in conjunction with a period of annual leave.

(c) (i) where a public holiday falls on a day on which a continuous shift employee is rostered off duty the employee shall be entitled to an additional day's pay at ordinary rates.

(ii) Where a public holiday falls on a day on which a full time employee is rostered off duty the employee shall be entitled to an additional day's pay at ordinary rates. This paragraph shall not apply to part-time employees.

(iii) Provided that by agreement between the employer and employee, the employee may observe that public holiday, paid at the ordinary rate, on a day mutually acceptable to the employer and employee.

9 It is axiomatic that neither of the nurses the subject of the complaints before me were at the relevant time continuous shift employees nor were they full time employees. Indeed it is common ground that they were part-time employees. Accordingly clause 22(c) does not apply to them.

10 A consideration of clause 12 of *the Agreement* is also appropriate given that the Complainant argues that the nurses who worked on Christmas, Boxing and New Year's days should be paid penalty rates for shift work. It provides—

12. – SHIFT WORK

(a) Ordinary hours worked before 6 am or after 7 pm on any weekday shall attract a loading of 15%.

(b) Ordinary hours worked between midnight Friday and midnight on the following Saturday shall attract a loading of 50%.

(c) Ordinary hours worked between midnight Saturday and midnight on the following Sunday shall attract a loading of 75%.

11 Accordingly it is argued that if 25 and 26 December 1999 and 1 January 2000 are not observed as public holidays by virtue of clause 22(a) then any work done on those days would attract the shift work penalties in clause 12 rather than the public holiday penalties provided for in clause 22(b) of *the Agreement.*

The Facts

12 The parties have agreed certain facts. The agreed facts are as follows—

1. At all relevant times—
   (a) Ms PATRICIA DAVIES was employed by the Respondent as a Registered Nurse Level 2.2;
   (b) Ms JULIETTE KEATON was employed by the Respondant (sic) as a Registered Nurse, Level 2.3 ("the employees").
2. Each of the employees was at all relevant times employed on a part time basis of up to 150 hours in a four week cycle.
3. *The Silver Chain Registered Nurses Agreement 1997* (the Agreement to which the Respondant (sic) was a party and by which it was bound at the time of the alleged breaches), applied to the employment of the employees.
4. Prior to the Agreement coming into effect, the conditions of employment of Registered Nurses employed by the Respondant (sic) were governed by the Nurses (Silver Chain Nursing Association Award) 1991 ("the Award"). The Public Holidays clause in the Award, clause 18 is in similar terms to the Public Holiday clause in the agreement, namely clause 22.
5. Each of the employees worked a 7 hour shift on each of the following days—
   (a) 27 December 1999;
   (b) 28 December 1999; and
   (c) 3 January 2000("the days in question").
6. For working on the days in question each of the employees were paid at an ordinary hourly rate applicable to her classification.
7. The payment received by the employee PATRICIA DAVIES for working on each of the days in question was the amount of $140.20. The payment received by the employee JULIETTE KEATON for working on each of the days in question was $143.39.
8. Each of the employees was also employed by the Respondant (sic) in December 1998 and each of them worked a 7 hour shift on Monday 28 December 1998. For the work performed by them on that day the employees were paid at the rate of time and a half and in addition received a day off in lieu for working on 28 December 1998.
9. If the complaints were to be upheld and the Complainant's interpretation of the Agreement was accepted, the employees would have been paid as follows—
   (a) Patricia Davies - $350.50 for each of the days in question; and
   (b) Juliette Keaton - $358.47 for each of the days in question.
10. If the position outlined in paragraph 10 is correct then the employees were underpaid as follows—
   (a) Patricia Davies: $210.30 per day for 3 days, a total of $630.90; and
   (b) Juliette Keaton: $215.08 per day for 3 days, a total of $645.25.
11. All direct care services operated by the Respondant (sic) which provide a service on the basis of 7 days a week 24 hours per day continued to operate between 25 to 28 December 1999. Clerical and administrative services which operate on the basis of a Monday to Friday service did not operate on those days.

13 The complainant did not call any evidence and simply relies on the agreed facts. The defendant on the other hand called one witness namely Patricia Jene, the defendant's *Manager of Employee Relations*. Ms Jene testified that in November 1999 she, as a result of a number of queries raised by employees, considered the appropriate rates to be paid over the then forthcoming Christmas / New Year period. She issued advice to employees through their managers that nurses employed under the agreement would be paid public holiday rates for Saturday 25 December and Sunday 26 December 1999 and January 1, 2000. She informed employees that ordinary rates would be paid for work carried out on Monday 27 December, Tuesday 28 December 1999 and Monday 3 January 2000. (See Exhibit 9). Ms Jene took the view that clause 22(b) had no application given that the defendant's operations were conducted on a twenty-four hours a day seven days a week basis. Ms Jene

considered that clause 22(a) was not a substitution clause in the vein of that found in the *Hospital Salaried Officers (Silver Chain) Award No 38 of 1978.* Relevantly clause 14(1)(b) of that award provides—

> "(b) Where any of the days mentioned in paragraph (a) hereof falls on a Saturday or Sunday, such holiday shall be observed on the next succeeding Monday and where Boxing Day falls on a Sunday or a Monday, such holiday shall be observed on the next succeeding Tuesday; in each case the substituted day shall be deemed a holiday without deduction of pay in lieu of the day for which it is substituted".

14 Ms Jene distinguished the provision in clause 22(a) of *the Agreement* from the type of substitution clause referred to above by concluding that the reference in clause 22(a) of *the Agreement* to *"or the days observed in lieu of those days, shall be observed as public holidays…"* related to circumstances such as to the Sovereign's Birthday which is actually on 21 April and is celebrated in Western Australia on a day other than that day.

15 Ms Jene told the Court that she had not received any complaints about having been incorrectly paid from those said workers who worked on 25 and 26 December 1999, and 1 January 2000.

Submissions

16 The defendant contends that clause 22(a) of *the Agreement* is not a substitution clause like that found in the *Hospital Salaried Officers (Silver Chain) Award 1978*. If it were intended to be so it would have been expressed in similar terms as that found in that award. Ms Kuhne for the defendant submits that clause 22(a) cannot be considered as a less sophisticated way of expressing substitution as found in other awards. She contends that, as *the Agreement* is of relatively recent origin, there was an opportunity to clearly express substitution in the light of older award provisions if that was the intention of the parties. Given that clause 22(a) is not clearly expressed in terms of substitution it cannot be read in those terms as suggested by the complainant.

17 Ms Kuhne also argues that the defendant has acted fairly by appropriately compensating those persons who actually worked on Christmas, Boxing and New Year's Days particularly taking into account the significance of those days. It is submitted that it would be quite inappropriate for those nurses who worked on those days to be paid less than nurses who worked on Monday 27, Tuesday 28 December 1999 and Monday 3 January 2000.

18 The complainant submits that given that there is common ground in the fact that the wider community observed the Christmas Day holiday on 27 January 1999, the Boxing Day holiday on 28 December 1999 and the New Year's Day holiday on 3 January 2000 that the words of clause 22(a) operated to substitute those days as public holidays for the actual feast days which fell on the weekend. It is suggested that the words *"or the days observed in lieu of those days"* when given their ordinary and natural meaning must be taken to mean "or the days observed instead of or in place of those days (see the definition of "lieu" *The Oxford Dictionary of Current English Oxford University Press 1992 reprint*. See also *The Macquarie Dictionary revised edition*). Mr Dzieciol argues that Monday 27 December 1999 was observed as Christmas day instead of 25 December, that Tuesday 28 December 1999 was observed as Boxing Day instead of 26 December and that 3 January 2000 was observed as New Year's Day instead of 1 January 2000. He argues that clause 22(a) is a substitution clause in that regard. If it were not to be read in that fashion the words *"or the days observed in lieu of those days"* would have no effect. It is suggested that the Court construe the provision to give its intended meaning being that when public holidays are observed on the day other than the feast day, any person who works on the public holiday occasioned by the feast day is entitled to be paid penalty rates.

Conclusion

19 In determining this matter it is important to consider the historical context in which *the Agreement* was made. *The Agreement's* predecessors namely the *Nurses (Silver Chain Association) Award No 14 of 1965* (State Award) and the *Nurses (ANF-WA Silver Chain Association) Award 1991* (Federal Award) contain provisions, which are in very similar terms to that contained within *the Agreement*. *The Agreement* in effect maintains the status quo in relation to the situation that existed in relation to public holidays. Accordingly I find it surprising that this matter has not been addressed and resolved previously.

20 Clause 22(a) of *the Agreement* provides that certain days shall be observed as public holidays. Those days include Christmas Day, Boxing Day and New Year's Day. The days fixed as public holidays in Western Australia is governed by Section 5 of the *Public and Bank Holidays Act 1972 (the Act)*. *The Act* provides—

> 5. **Days fixed as public and bank holidays**
>
> Subject to this Act, the several days specified, or appointed under the power, in the Second Schedule to this Act shall be public holidays and bank holidays throughout the State.

21 I set out the *Second Schedule* to *the Act*—

Second Schedule

New Year's Day (1st January).

Australia Day (26th January or, when that day falls on a Saturday or Sunday, the first Monday following the 26th January).

Labour Day (Monday on or first Monday following the 1st March).

Good Friday

Easter Monday

Anzac Day (25th April).

Foundation Day (Monday on or first Monday following 1st June).

Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign (day to be appointed annually by proclamation published in the *Government Gazette* at least 3 weeks before the day so appointed).

Christmas Day (25th December).

Boxing Day (26th December).

When New Year's Day, Anzac Day, or Christmas Day falls on a Saturday or Sunday the next following Monday is also a public holiday and bank holiday.

When Boxing Day falls on a Saturday the next following Monday is also a public holiday and bank holiday.

When Boxing Day falls on a Sunday or Monday the next following Tuesday is also a public holiday and bank holiday.

22 It will be seen from the *Second Schedule* that when Christmas Day and New Year's Day fall on a Saturday as was the case in 1999 then the next following Monday is ***also*** a public holiday. When Boxing Day falls on a Sunday as was the case in 1999 the next following Tuesday is ***also*** a public holiday. The word ***also*** is defined in the *Macquarie Dictionary Revised Edition* to mean *"in addition; too; further"*. It is therefore in my view possible to conclude that there were two Christmas Day public holidays in 1999, there were two Boxing Day holidays in 1999 and two New Year's

23 Day holidays in 2000. The defendant argues against such an interpretation on the basis that Parliament did not intend for extra public holidays to be created but rather intended that there be preservation of the standard ten public holidays for those workers not covered by awards. It is suggested that is so notwithstanding the use of the word ***"also"*** in the *Second Schedule*. To support that argument I have been referred to the *Second Reading Speech* of the Minister for Labour Mr Taylor on 8 August 1972. The Honourable Minister said inter alia at page 2308 of *Hansard*—

> "The proposed Act will enable the determinations of the arbitral authority – which heard evidence from unions of employees and employers – to be placed into legislation and thus cause other wage and salary workers, not included in industrial awards of the commission, to have the standard 10 public holidays applied to them".

24 With all due respect to the proponent of the argument I take the view that resort to *Hansard* should only be considered when there is some difficulty in construing the particular provision. There is no such difficulty in this instance. The wording and the effect of the provision is clear on the plain reading of the same. It expressly and minatorily provides for additional public holidays in circumstances such as those, which occurred during the 1999/2000 festive season. Obviously *the Act* also has the effect of preserving public holiday entitlements for workers not included in awards. I find myself unable to agree with the defendant's argument on the interpretation of the provision.

25 However for the purposes of these proceedings the matter does not end there. I say that because the parties agree that *the Act* has no application so far as it is inconsistent with *the Agreement*, which is an agreement, made under Commonwealth legislation.

26 Section 152 (1) of the *Workplace Relations Act 1996* states—

> Subject to this section, if a State Law or a State award is inconsistent with, or deals with a matter dealt with in, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid.

27 Section 170LZ (1) of the *Workplace Relations Act 1996* provides—

> Subject to this section, a certified agreement prevails over terms and conditions of employment specified in a State law, State award or State employment agreement, to the extent of any inconsistency.

28 It is agreed by the parties that the certified agreement, which prevails over *the Act*, specifies only ten public holidays. It is further agreed by the parties that any inconsistency between *the Agreement* and *the Act* should result in *the Agreement* prevailing to the extent that only ten public holidays are provided for. Both parties agree that *the Act* must be construed subject to *the Agreement*. Furthermore both parties contend that such an approach is consistent with the intent of Parliament in making *the Act* subject to industrial instruments. In that regard Section 3 of *the Act* provides—

> **3 Construction of this Act to be subject to awards, orders, or agreements, made under Industrial Relations Act 1979**
>
> Unless it is otherwise expressly provided in this Act, any provision of an award, order, or industrial agreement made under the *Industrial Relations Act 1979*, or of a workplace agreement under the *Workplace Agreements Act 1993*, prevails over any provision of or under this Act, to the extent of any inconsistency therewith.

29 Given that the parties concur that by virtue of the dominance of *the Agreement* employees bound by it are only entitled to the ten nominated public holidays, it remains that I construe the meaning and effect of the words "*or the days observed in lieu of those days shall be observed as public holidays"* as contained in clause 22(a) of *the Agreement*.

30 Substitution clauses such as that found in the *Hospital Salaried Offices (Silver Chain) Award No. 38 of 1978* are clearly formulated to protect the benefits of those employees who work on a Monday to Friday basis and who would otherwise lose a public holiday benefit when the public holiday falls on a Saturday or Sunday. Is clause 22(a) aimed at achieving the same end? If not what does the clause seek to do?

31 I take the view that the clause is aimed at protecting the entitlement of nurses to ensure that when the feast day falls on the weekend that there be a public holiday substituted in its place to be observed on a weekday. The clause cannot, in my view, be construed in any other manner including the manner in which Ms Jene construed it. I am fortified in that view because the only possible application of Ms Jene's argument as to clause 22(a) can only relate to Sovereign's Birthday. It can have no other application to any other nominated holiday within the clause. If the intent of the clause were to address that situation then I would have thought that any reference in the clause to holidays other than the Sovereigns Birthday to be superfluous. If the defendant's argument is correct it draws the question why is there a need for *the Agreement* to specifically refer to other holidays, which are not routinely observed on days other than the actual feast day?

32 Another possible construction that clause 22(a) invites is that if the specific public holiday mentioned in the clause be abolished and another public holiday be proclaimed in its place that the replacement public holiday be observed in lieu of the nominated holiday. An example being that if Good Friday, Easter Monday or Christmas Day public holidays be abolished on account of non-Christian workers preferring to take religious holidays on days other than those days, then the substituted religious public holidays would stand in lieu of the nominated holiday in clause 22 (a) of *the Agreement*. Given the historical context in which *the Agreement* was made it is unlikely that the clause could be construed in such a manner.

33 The only other possible rational construction of the clause is that propounded by the complainant. It is not in issue that the community observed the public holidays for Christmas, Boxing and New Year's Days in the 1999/2000 festive season not on the actual feast day, which in each instance occurred on the weekend but rather were observed on weekdays following the feast day. Given that was the case I cannot comprehend how the defendant can successfully maintain its argument that it had a choice to elect the day, which would be observed as the public holiday. That is whether it be the feast day itself or the public holiday for that feast day as generally observed by the community. In my view neither the employer nor the employees had a right of election as to which day would be observed as the public holiday. If there was such a right how did the right of election arise? Certainly there is no provision to be found within *the Agreement*, which confers such a right of election. It is also clear that the defendant did not have the right to choose on a unilateral basis whether penalty rates should apply to the feast day or alternatively the public holiday celebrated by the community as a whole for that feast day. In my view regard must be had for the way in which the general community observed holidays for the nominated feast days in the 1999/2000 festive season. It is obvious to me that Christmas Day, Boxing Day and New Year's Day were generally observed on days other than their actual feast day and in fact in place of the actual feast day.

34 In my view clause 22(a) of *the Agreement* is aimed specifically to the occurrence of the type experienced in the 1999/2000 festive season. If the clause is not to be given such a meaning what else could it be aimed at? I cannot think of any other rational alternative, which would otherwise give clause 22(a) meaning and effect. It is obvious that the clause is intended to enable employees to celebrate a public holiday on a weekday for any Christmas, Boxing and New Year's feast day occurring on a Saturday or Sunday. Such an approach will give meaning and effect to clause 22(a). The clause in my view is demonstrably a substitution clause albeit inelegantly structured.

35 It cannot be denied that the application of the clause in this instance has the effect of producing an inequitable result for those employees who actually worked on Christmas Day, Boxing Day and New Year's Day. It is obvious that as a result of the defendant's experience from the previous year relating to nurses working on the feast day and not being paid penalty rates it embarked upon its construction of *the Agreement* in order to appropriately compensate those nurses who worked on the actual feast day. Notwithstanding its altruistic intent it is obvious that such a stance is against the obvious wording and intent of *the Agreement*. It is this very unsatisfactory situation, which in my view *the Act* caters for in relation to employees working under state provisions, which have not been modified by an award or agreement. In those circumstances all employees are adequately compensated whether they work on the feast day or the public holiday for that feast day.

36 I find therefore that Patricia Davies was underpaid a total of $630.99 and Juliette Keaton was underpaid a total of $645.25.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07841

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	JULIE BOND, CLAIMANT
	v.
	PAUL VELLA, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 26 FEBRUARY 2003
CLAIM NO/S	M 277 OF 2002
CITATION NO.	2003 WAIRC 07841

Representation	
Claimant	Mr P Mullally as agent
Respondent	Mr D F Johnson as agent

Reasons for Decision

Background

1 The Respondent is a chartered accountant and registered tax agent who, at the material times, carried on business from premises situated at 1 Irwin Road, Wangara. The Claimant is a former employee of the Respondent. She worked for the Respondent in the capacity of secretary/relief receptionist from on or about 3 February 2000 to and including 8 March 2002.

Issues

2 It is not in dispute that the employment of the Claimant was at all material times subject to the terms and conditions of the ***Clerks (Accountants Employees) Award No A8 of 1982*** (the Award).

3 The Claimant alleges that from 3 February 2000 to 3 February 2001 she worked on a part-time basis with the Respondent and that thereafter until her termination, which occurred on 8 March 2002 that she worked on a full-time basis. The Claimant argues that, given that her employment status was in reality permanent, then she was, upon termination, entitled to payment in lieu of annual leave not taken. The Claimant alleges that the Respondent has breached clauses 7B(3) and 12(1) of the Award by virtue of his failure to pay her entitlements pursuant to those provisions. She says that she is entitled to recover $3,329.20 in that regard. The Claimant also alleges a breach of clause 10(1) of the Award constituted by the Respondent's failure to pay her for public holidays that occurred during the material period. The Claimant seeks to recover the total amount of $1,587.30 in that regard. Further, the Claimant contends that the Respondent has failed to comply with clause 14(2) of the Award by failing to pay her one week's pay in lieu of notice.

4 The total underpayment alleged, as is expressed in the Particulars of Claim, is said to be $4,916.50. That figure is clearly wrong as it fails to take into account $483.70 for payment in lieu of notice. The correct amount should be $5,400.20. The Claimant seeks to recover that sum together with interest on that amount. The imposition of penalties and an order for costs are also sought.

5 The Respondent contends that the Claimant was at all material times a casual employee, a fact well known by her. He says that she was offered casual employment on 1 February 2000 and accepted the same on 3 February 2000. She has since that time been engaged on a number of other occasions until 8 March 2002. By virtue of her position being casual in nature she was never entitled to annual leave or public holiday pay. Further, the Respondent contends she was not entitled to a week's pay in lieu of notice but rather that he could terminate her in accordance with the terms of their written agreement, which he did.

6 The pivotal issue to be determined in this matter is whether the Claimant was at all material times a "casual employee" within the meaning of clause 7A of the Award or whether she was at all material times a permanent employee working either in a part-time or full-time capacity.

The Facts

7 A short time prior to the Claimant gaining employment with the Respondent she had moved to Perth from Mandurah following the break-up of her marriage. At the time she brought with her her two children then aged 7 and 9 respectively. Intent on making a new start the Claimant sought part-time employment and wrote to several accountants seeking employment. She advised them that she had experience working for an accountant in Mandurah and sought a similar position. She in fact sought a part-time position so as to accommodate the needs of her children. She wanted to ensure that her children were emotionally settled and settled in at school before committing herself to full-time employment. One of the firms to whom she wrote was that of the Respondent. The Respondent expressed an interest and an interview was arranged. The week following the interview Mr Vella offered the Claimant employment.

8 On her first day at work (3 February 2000) the Claimant accepted as the terms and conditions of her employment those as set out in a letter prepared by the Respondent and handed to the Claimant entitled "Offer of Casual Employment and Terms" (see exhibit 1). The letter, which is dated 1 February 2000, contains inter alia the following terms—

"1. REMUNERATION

Your starting wage will be $15.00 per hour, on a casual basis, which will be paid fortnightly in arrears.

Your remuneration will be reviewed between 6 – 12 months. These reviews shall encompass performance and conditions of employment.

2. PROBATION

The first four (4) months of your employment will be a probationary period during which time the contract may be terminated by either party giving to the other, one weeks notice or paying or forfeiting, as the case may be, one weeks wages in lieu of notice.

3. TERMINATION OF CONTRACT

(a) Except in the case of Gross Misconduct, which includes but is not limited to theft, use of, or being under the influence of drugs or alcohol, the parties agree that the notice periods set out in the table below shall be given in writing by one party to the other—

Employee' period of continuous service with The Employer	***Period of notice***
Not more than 1 year	*At least 1 week*
More than 1 year but not more than 3 years	*At least 2 weeks*
More than 3 years but not more than 5 years	*At least 3 weeks*
More than 5 years	*At least 4 weeks*

(b) Where this notice or part of notice is not given by one of the parties, wages shall be forfeited by the employee or paid in lieu of notice nor payment of pro rata annual leave nor payment of leave loading being required to be made.

(c) In the case of Gross Misconduct the employee may be terminated immediately and paid up to the time of termination only with no pay in lieu of notice.

5. HOURS OF WORK

The hours of work shall be 9.00 am to 3.00 pm, 2 – 3 days per week during Feb – April. Then 9.00 am – 3.00 pm, 3 – 5 days per week from May through to January. You will also have an option to extend your daily hours during May through to January. These hours are dependant upon the work available and your availability. The hours of casual employment will totally be at the discretion of the employer.

11. SIGNIFICANT CHANGE

The employer undertakes to keep the employee informed as to any structural changes which may have a significant effect on their future career prospects. This shall include discussions on re-training, re-deployment and job security."

9 Other provisions made it clear that the Claimant would not be entitled to payment with respect to public holidays, sick leave or annual leave. The offer of employment was also subject to the Claimant entering into a confidentiality agreement.

10 It is noted that the Claimant readily concedes that she knew from the outset that she was employed as a casual employee and was to be paid as such. Furthermore, it is clear that what the Respondent required of her suited her particular circumstances.

11 It is self evident from the time sheets kept with respect to the Claimant's employment (exhibit 4) that in the very early part of her employment she worked in the order of 4 to 7 days per fortnight usually working about a six and a half hour day. By early June 2000 she increased the number of days worked and also the number of hours worked. From that time onwards until the Respondent's firm closed for the Christmas break in 2000 she in fact worked between 7 and 10 days per fortnight. Of the days not worked some are attributable to public holidays occurring during the relevant fortnightly periods. She did not work between just before Christmas 2000 and New Year's Day 2001 inclusive. In the first year of her employment from about early June 2000 to about mid January 2001 she worked in the order of about 8 hours per day. Such is self-evident when exhibit 4 is considered. It is to be noted that the time sheets (exhibit 4) reflect some pay periods to be fortnightly whilst others are weekly. Accordingly, regard must be had to that fact when analysing the table annexed to the Claimant's Particulars of Claim. It is also noted that there is some difficulty in the calculation of hours in the table in that for some of the pay periods the minutes worked are expressed in a decimal configuration whereas in other instances the minutes worked are expressed as raw minutes. The effect of that is that the total hours worked has been incorrectly calculated. Having made that observation, it suffices to say, for my purposes, that it is readily apparent that during the first year of the Claimant's employment commencing early June 2000 that she worked relatively regular hours usually commencing about 8:45 am and finishing any time between 4:45 pm and 5:00 pm. I recognise however that her start and finish time were flexible and were not necessarily the same each day.

12 The extent to which the Claimant worked for the Respondent during the latter part of her first year of employment is exemplified by a consideration of the time sheets for the week ending 27 July 2000. It is noted that in that week she worked in excess of 41 hours. A consideration of the time sheets for the week ending 2 December 2000 indicates that she worked 39 hours. She often worked in excess of 32 hours per week. Exhibit 4 also reflects a reduction of days and hours worked from mid January 2001 through to mid April of that year. By the start of May 2001 she commenced working almost every day. The failure to work on a given day is usually explained by the occurrence of a public holiday or, alternatively, by reason of the Christmas period shutdown. On many occasions during the second year of the Claimant's employment she worked in excess of 40 hours per week and almost invariably worked in excess of 32 hours per week. That occurred from early May 2001 and onwards. It is self evident from the documentary evidence available that the Claimant's work hours during that period were both regular and significant.

13 Mr Vella in his testimony said that when he interviewed the Claimant he made it clear to her that the position offered was a casual one and that her rate was a casual one inclusive of holiday pay, sick leave and annual leave. She was told that work would be available according to the needs of the business and completely at his discretion. He said that Ms Bond was quite happy with that because it suited her personal and domestic situations. Mr Vella told the Court that Ms Bond could refuse to work if she wanted to. The fact that she did not have to go into work was something that Mr Vella accepted as part of the casual arrangement that existed. Mr Vella was challenged when cross-examined as to his contention that the Claimant was

during the material period engaged on a number of separate occasions. His response in that regard was unconvincing. He was not able, in my view, to point out separate engagements. I am therefore able to conclude in that regard that there was only ever one engagement, which was the one that occurred on 3 February 2000.

14 On 5 March 2002 the Claimant prepared and signed a letter to be given to the Respondent the next day. In that letter Ms Bond said—

> *"I hereby wish to tender my resignation as a Receptionist with your firm.*
>
> *I have been looking for alternative employment for a period of time now and have recently secured a permanent full time position.*
>
> *In line with our Workplace Agreement, I give you the required notice to finish on Thursday 28 March 2002."*

15 The letter was handed to Mr Vella on 6 March 2002. On Friday afternoon of 8 March 2002, Mr Vella called the Claimant into his office, handed her a cheque and asked her to leave immediately. Mr Vella later posted a letter to the Claimant dated 8 March 2002 (exhibit 3) in which he said—

> *"Dear Julie*
>
> *Please find enclosed cheque, which you may have inadvertently left behind.*
>
> *Please note that the cheque included the following—*
>
> *35.33 Hours worked (Friday 1/3/02 – Friday 8/3/02)*
> *12.00 Hours to cover two days (11/3/02 & 12/3/02)*
>
Gross Wages	*$757.28*
Tax	*$142.00*

Net	*$615.28*
>
> *As you were employed casually on the basis of 2-3 days per week, during February to May, I have taken the first weeks notice of termination to include Thursday 7th & Friday 8th March. The second weeks notice being 11th & 12th March.*
>
> *We wish you all the best for the future."*

16 The method of her termination shocked the Claimant. As a result she took advice and consequently was advised with respect to her rights as against the Respondent.

Casual, Part-Time or Full-Time?

17 The Claimant contends that notwithstanding that she was labelled a "casual employee", the reality was that she, at all material times, was in fact a permanent employee working in either a part-time or full-time capacity. Accordingly I am called upon to determine whether or not the Claimant was a permanent employee as alleged and if so whether she is entitled to recover unpaid award entitlements in that regard. That process necessarily requires the consideration of the Award definition of "casual employees" found at clause 7A, which provides—

7A. - CASUAL EMPLOYEES

> *(1) A casual employee shall mean an employee engaged and paid as such, and whose employment may be terminated by the giving of one hour's notice on either side, or by the payment or forfeiture, as the case may be, of one hour's pay.*
>
> *(2) A casual employee shall be paid in accordance with the provisions of subclause (4) of Clause 11. - Rates of Pay.*
>
> *Notwithstanding anything contained in this clause the basis and terms of employment of casual clerks may be varied in any particular case by agreement in writing between the employer and the Union.*

18 There can be no doubt that the Respondent purportedly engaged the Claimant as a "casual employee" and paid her as such, but can it be said that her employment could be terminated by either party giving one hour's notice or by the payment or forfeiture of one hour's pay? The answer is clearly no. I say that because the terms of the agreement entered into between the parties on 8 February 2000 militates against such a construction. Although the Respondent purported to engage the Claimant on a casual basis, it is readily apparent from the written agreement between them that her engagement was both permanent and long-term. A number of the clauses within the written agreement reflect that to be the true position. The remuneration clause (clause 1) of the agreement indicates a review of remuneration between six to twelve months. That is hardly the sort of clause to be found in a contract of employment that evidences a number of separate engagements. Furthermore, the four-month probation period, as provided for in clause 2, does not fit with casual employment. If the contract of employment were truly casual, the employer would have been within his rights to terminate at any time and not to re-engage the Claimant. The position is perhaps best demonstrated by the "Termination of Contract" clause, which makes reference to the periods of notice to be given. The periods referred to within that clause are clearly inconsistent with what is contained in clause 7A(1) of the Award. It is the type of clause that would relate to an employee who is regarded as being permanent. The clause itself refers to the employee's period of continuous service with the employer and envisages employment for continuous periods of years, consistent with that of a permanent employee. Further, clause 11 of the agreement entitled "Significant Change" is also inconsistent with casual employment. That clause addresses, inter alia, job security. Put bluntly there is no job security as a casual. It is clear that the clause was aimed at the Claimant continuing to work for the Respondent on a permanent and long-term basis. It is apparent that neither party was of the view that the contract of employment was determinable by the giving of one hour's notice. Indeed, the dealings between the parties evidence the true nature of the relationship, as does the written agreement between them (see ***Squirrell v Bibra Lakes Adventure World Pty Ltd 64 WAIG 1834 per Fielding C at page 1835***). On a construction of the written agreement alone, it is obvious that the relationship falls outside of what is envisaged and defined by clause 7A of the Award. Further, on the evidence, it is possible to conclude, and I do conclude, that there were not separate engagements of the Claimant. Rather, there was one single engagement of her on 3 February 2000 with the expectation that the relationship would be ongoing and that the Claimant would work for the Respondent as required. Having said that, I recognise that there was considerable flexibility permitted by the Respondent as to start and finish times and as to the totality of hours worked. Such flexibility, of itself, does not render a permanent relationship a casual one. The fact that the Claimant considered herself to be a casual and that she was paid as such is not determinative of the issue. As the Full Bench of the Western Australian Industrial Relations Commission said in ***Serco (Australia)Pty Ltd v John Joseph Moreno 76 WAIG 937 at 939*** in respect of the definition of "casual employee", (the parties)—

> *"…cannot by the use of a label render the nature of a contractual relationship something different to what it is (see **Stewart v Port Noarlunga Hotel Ltd** (op cit) per Haese DPP at pages 5-6).*

Certain indicia may be indicative of the nature of the contract, but they are not determinative, taken alone. These may include the classifying name given to a worker and initially accepted by the parties, the provisions of the relevant award, the reasonable expectation that work would be available to him, the number of hours worked per week, whether his employment was regular, whether the employee worked in accordance with a roster published in advance, whether there was a reasonable mutual expectation of continuity of employment, whether the notice is required by an employee prior to the employee being absent on leave, whether the employer reasonably expected that work would be available, whether the employee had a consistent starting time and finishing time, and there may be other indicia".

19 In this case there was a reasonable and mutual expectation of continuity of employment. The agreement between the parties evidences that. Indeed the conduct of the parties evidences formality, certainty and reasonable regularity in keeping with the situation of a permanent employee. The way in which the parties conducted themselves, other than with respect to the rate of pay, was demonstrative of an on-going relationship. There is no way, in those circumstances, that one could conclude that the relationship was terminable on one hour's notice, payment or forfeiture as the case may be. The Claimant does not fall within the definition of casual employees as provided by the Award. For the sake of completeness I mention that what His Honour said in ***CPSU v State of Victoria (2000) FCA 14*** has no application here. In that case His Honour was dealing with the common law situation in the absence of award proscription as to the meaning of "casual" and "part-time employees." In this case the Award specifically proscribes meanings to those terms.

20 I take the view that what the Respondent has done in this instance is to have attempted to contract out of the Award by labelling the Claimant as a casual. In that way he did not have to worry about all the relevant award provisions, which attach to permanent employees, including holidays. That suited his purpose. He nevertheless expected the Claimant to work on a continuing basis. The relationship was not terminable at short notice as is evidenced by the agreement. Indeed the agreement reflects an expectation on the Respondent's part that the Claimant would work on a regular and continuing basis albeit with some flexibility. What he attempted to do, however, is prohibited by section 114 of the ***Industrial Relations Act 1979*** which provides—

> *"***114. Prohibition of contracting out**
>
> *(1) Subject to this Act, a person shall not be freed or discharged from any liability or penalty or from the obligation of any award, industrial agreement or order of the Commission by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award, industrial agreement or order of the Commission, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled.*
>
> *(2) Each employee shall be entitled to be paid by his employer in accordance with any award, industrial agreement or order of the Commission binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and the employee may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount shall be commenced within 6 years from the time when the cause of action arose, and the employee is not entitled to recovery of wages under this subsection and otherwise, in respect of the same period.*
>
> *(3) This section has effect subject to section 7E."*

21 If the Claimant was not a casual employee within the meaning of clause 7A(1) of the Award, it follows that she was a permanent employee, either full-time or part-time.

22 Part-time employees are defined in clause 7B of the Award, which states—

7B. - PART-TIME EMPLOYEES

> *(1) A part-time employee shall mean an employee who, subject to the provisions of Clause 7. - Hours, works no more than 32 ordinary hours per week except where a part-time employee at the date of this Award is employed for more than 32 hours a week, that arrangement with respect to that employee may continue.*
>
> *(2) (a) At the time of engagement the employer and the employee shall agree to the number of ordinary hours to be worked by the employee in each week.*
>
> *(b) Such number of ordinary hours, once agreed, may be varied by either side giving the amount of notice required by Clause 14. - Contract of Service.*
>
> *(3) A part-time employee shall receive payment for wages, annual leave, holidays and sick leave on a pro-rata basis in the same proportion as the number of hours regularly worked each week bears to 38 hours.*

23 Full-time employee is not defined. For that matter the *"Hours"* clause (clause 7) of the Award is vacant. A consideration of clause 7B(3), however, permits a construction that the ordinary hours to be worked by a full-time employee are 38 hours. A proper construction of the relevant award provisions results in the conclusion that a part-time employee is one who is not a casual employee and who works no more than 32 hours per week. A full-time employee is one who is not a casual employee and who is not a part-time employee as defined.

24 "Was the Claimant a part-time or full-time employee?" The answer to that question is not easily achieved given the nature of the hours worked by the Claimant. The hours worked by her between 3 February 2000 and the pay period ending 23 May 2000 are indicative of the Claimant being a part-time employee. Thereafter, with the exception of three pay periods until the pay period ending 10 January 2001, her hours of work were indicative of those of a full-time employee. From mid January 2001 until the pay period ending 24 April 2001, the Claimant's hours of work were more in keeping with those of a part-time employee. From the pay period following that of 24 April 2001 onwards until termination occurred, with the exception of a few fortnightly periods, she worked the number of hours that a full-time employee would.

25 The Claimant says that the proper way to deal with the factual circumstances relating to hours worked is to treat the Claimant as a part-time employee for the first year of her employment and as a full-time employee thereafter. The Respondent disagrees with that approach because in some pay periods during the first year of her employment the Claimant worked in excess of 32 hours per week. Further, it is argued that there was no agreement as to the hours as required by clause 7B(2)(a) of the Award. Additionally any variation as to hours worked did not comply with clause 7B(2)(b) of the Award. Those arguments were put forward in support of the submission that the Claimant ought to be treated as a casual rather than a part-time employee. Recognising that and although I have found against the Respondent in that regard, a consideration of the issue is nevertheless warranted in the determination of whether the Claimant was a part-time or full-time employee.

26 In my view, the times to be worked were agreed by the parties by virtue of the written agreement entered into on 3 February 2000. It is obvious that the agreed hours changed. I infer that the hours changed without regard for compliance with clause 7B(2)(b) of the Award. It seems that the Respondent waived the requirement of notice and worked the increased hours from time to time. Although there were occasions when the Claimant worked more than 32 hours per week from commencement to

24 April 2001, the nature of her employment was essentially part-time in nature. The majority of her work during that period was conducted for 32 hours or less per week. Accordingly, I take the view that clause 7B(1) of the Award should be read to mean that a part-time employee is an employee who "*regularly*" works no more than 32 ordinary hours per week. I say that because it is inconceivable that if for some reason a part-time employee, on the odd occasion, is asked to work for more than 32 hours and does in fact work more than 32 hours a week that he or she would, in consequence, axiomatically become a full-time employee. In my view that is not what could have been intended. Accordingly, the fact that the Claimant may have worked in excess of 32 hours on occasions leading up to the end of April 2001 does not of itself change the character of her employment status from that of a part-time employee to that of a full-time employee. Given the number of hours worked by the Claimant I find that she was substantially a part-time employee from commencement until 24 April 2001. Thereafter she became a full-time employee as she "*regularly*" worked more than 32 hours per week. It follows that the Claimant is entitled to Award benefits payable to a part-time employee from commencement to 24 April 2001 and thereafter to the benefits payable to a full-time employee.

Calculation of Entitlements

Annual Leave

27 During the course of submissions the parties agreed that if I found the Claimant to be a part-time employee, the method to be adopted for the calculation with respect to annual leave entitlements accrued as a part-time employee, given that the number of hours worked were irregular, is that found in section 18(2) of the ***Minimum Conditions of Employment Act 1993*** which provides—

> "*If the number of hours for which an employee is entitled to be paid for a period of leave cannot be determined"* – under the first subsection, which is the hours which normally have been worked during that period of leave – *"the total number of hours worked under the workplace agreement, award or contract of employment in the 52 weeks immediately before the time the leave is taken are to be averaged as hours worked each week for the purpose of payment for the leave."*

28 In following the suggested method, which I agree is appropriate; it is possible to find that between 3 February 2000 and 24 April 2001 the Claimant worked an average of 26.79179 hours per week. During that time she accrued an entitlement of 4.7692 weeks wages. Accordingly, when regard is had for what is stated in clause 7B(3) of the Award, the following calculation results—

26.79179 hours × 4.7692 weeks × $12.26 (rate at termination) = $1,566.53

29 The average hours worked per fortnight by the Claimant as a full-time employee from

25 April 2001 onwards was, in fact, 35.60 hours. That has little relevance, however, because the Claimant's entitlement is equivalent to that of a full-time employee working 38 hours per week irrespective of the actual hours worked. The Claimant worked for 44 weeks as a full-time employee. She accordingly accrued an entitlement to 3.38 weeks annual leave. In that regard the following calculation is applicable—

38 hours × 3.38 weeks × $12.26 = $1,574.67

30 Accordingly, the total recoverable with respect to annual leave is $3,141.20.

Holiday Pay

31 Turning to consider public holidays, it is the case that the Claimant, during the period of her full-time employment, was not paid for the following—

- Anzac Day 2001
- Foundation Day 2001
- Queens Birthday 2001
- Christmas Day 2001
- Boxing Day 2001
- New Year's Day 2002
- Australia Day 2002
- Labour Day 2002

32 Accordingly, the Claimant is entitlement in that regard can be calculated as follows—

8 holidays × $93.14 per day = $745.12

33 During the course of her part-time employment the Claimant was not paid for the following 13 public holidays—

- Labour Day 2000
- Good Friday 2000
- Easter Monday 2000
- Anzac Day 2000
- Foundation Day 2000
- Queens Birthday 2000
- Christmas Day 2000
- Boxing Day 2000
- New Year's Day 2001
- Australia Day 2001
- Labour Day 2001
- Good Friday 2001
- Easter Monday 2001

34 During the course of argument, Mr Mullally, on behalf of the Claimant, abandoned the claim for two public holidays, which occurred during the period of the Claimant's part-time employment (see transcript page 107). Had he not done so, I would have allowed the claim in that regard. In my view the approach suggested by Mr Johnson, which seems to have been accepted by Mr Mullally, fundamentally disregards clause 7B(3) of the Award. The Claimant's entitlements can accordingly be calculated as follows—

11 public holidays × $65.69 (26.79179 hours ÷ 5 = 5.35836 × $12.26) = $722.59

35 The total recoverable with respect to holiday pay is $1,467.71.

Pay in Lieu of Notice

36 I move now to consider the claim for a week's pay in lieu of notice. Clearly the amount claimed is appropriate. The Respondent failed to give adequate notice of termination and is in breach of the Award in that regard. The Claimant is accordingly entitled to $483.70 as claimed less the payment of $192.00 (12 hours × $16.00) already received in that regard. The amount recoverable is, therefore, $291.70.

Result of Calculations

37 The Claimant is accordingly entitled to recover the following—

• Payment in lieu of annual leave	$3,141.20
• Holiday pay	$1,467.71
• Pay in lieu of notice	$ 291.70
Total	**$4,900.61**

Set-Off

38 In so far as the Respondent seeks to set off the overaward payment made by virtue of the payment of a casual rate, it is clear, on the authorities, that that cannot be allowed.

39 It is obvious, when the Award is read as a whole that on its proper construction the loading paid to casual employees must necessarily take into account unspecified benefits foregone by virtue of the casual nature of the employment. In this case, the Claimant was consistently paid, on a weekly basis, a much higher hourly rate of pay than she would have been if she were correctly classified as a part-time or full-time employee. Having said that, I recognise that the payments received by the Claimant were not specially paid for the purposes of annual leave or for public holiday pay. The payment in each instance was made for one purpose only that being in consideration of the hours worked by the Claimant as a casual employee. The payment had no other purpose.

40 Having said that, is the Claimant entitled to payment of annual leave and holidays as claimed? In my view the answer is yes. I say that notwithstanding that the effect of that might be seen as double dipping given that she has already received regular weekly payments, which comprised a loading. Although seemingly harsh on the employer that approach is supported by the authorities. In particular I have regard to what the Full Bench of the Western Australian Industrial Relations Commission had to say in ***AFMEPKIU v Centurion Industries Ltd 77 WAIG 319***. In that case, the employer paid a casual rate of pay to an employee who was not a casual but rather a permanent employee. Such an amount was in excess of the prescribed amount under the relevant award in that case. However, the respondent employer did not pay to its employee his specific award entitlements for public holiday pay, annual leave and notice upon termination. To some extent it can be seen that the factual circumstances in that case are not dissimilar to this. At first instance, the Learned Magistrate allowed the employer to say that the payments made at a casual rate could be treated in satisfaction of specific award entitlements. On appeal, the Full Bench held, however, that that could not be done because the payments were not made for the purpose of compliance with the relevant award provision but rather as a wage payable to a casual employee. His Honour President Sharkey said at page 319—

> *Further, the contract of employment did not contemplate any liability for the proper award entitlements, and payments made under it for other agreed purposes could not be retrospectively applied in satisfaction of liability under the award (**see Jose v Geraldton Resource Centre Inc (**op cit) (FB)). Put another way, the employer cannot now claim to have applied the monies paid to Mr Coci to satisfy award obligations when the monies were specifically paid for other purposes. Further, the respondent could not be freed from or discharged from its liability or from its obligation to pay amounts for annual leave , notice and public holidays by reason of a contract which it entered into whereby it purported to undertake obligations other than its award obligations (see **Jose v Geraldton Resource Centre Inc** (op cit) (FB) and **s.114 of the Industrial Relations Act 1979 (as amended)**).*

41 Payments made for a particular purpose cannot be logically ex post facto attributed to another cause or purpose. Thus the payment of a wage in excess of the Award does not relieve an employer from the obligation to make a further different payment of a different kind under the Award (see ***Pacific Publications Pty Ltd v Cantlon (1983) 4 IR 415*** and also ***Bradmill Industries Ltd v Shadbolt (1984) AILR 416; cf. Ray v Rodano (1967) AR 471***). In this case, however, the payment of loading was impliedly made in contemplation of the payment of a "casual rate" of pay and no more. In my view, given the factual circumstances of this case, the situation contemplated by His Honour Olney J in ***Silberschneider v MRSA Earthmoving Pty Ltd 68 WAIG 1004*** does not arise.

42 Accordingly, I find that the totality of the loading received by the Claimant cannot operate to set-off and thereby extinguish the totality of the amounts claimed.

Result

43 The Claimant has proved that the Respondent has 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.

44 I will now hear from the parties as to the consequential orders to be made.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07852

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, COMPLAINANT
	v.
	SNOWDEN NOMINEES PTY LTD T/A SNOWDEN PLANT HIRE, DEFENDANT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 28 AUGUST 2002
COMPLAINT NO.	CP 259 OF 2000
CITATION NO.	2003 WAIRC 07852

Representation

Complainant	Ms L Peak (of Counsel) appeared on behalf of the Complainant
Defendant	Mr O Moon of *Oliver Moon & Associates* appeared as agent on behalf of the Defendant

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Reasons for Decision

The Complaint

1 During the period 20 February 1998 to 16 July 1999, Jeremy Allard was an employee of Snowden Nominees Pty Ltd trading as Snowden Plant Hire. It is alleged that the Defendant employed Mr Allard as a drainer being a calling included within clause 8(2)(b)(i) of the ***Building Trades (Construction) Award 1987*** (the Award). It is further alleged that Mr Allard was engaged on construction work as defined within clause 7(3) of the Award. The Complainant maintains that at all material times the Defendant was operating within the building and construction industry and was therefore bound by the Award. The Complainant alleges that the Defendant has committed 419 breaches of the Award as set out in the complaint. It says that its member was underpaid a total of $23,000.01.

The Defence

2 The Defendant admits that Mr Allard was its employee during the material period. It however denies that he was employed as a drainer or in any other calling contained within the Award. The Defendant says that in any event it was not engaged in work that was substantially or wholly covered by the scope and terms of the Award. It therefore maintains that the claims relating to the underpayment of wages and other alleged breaches are without basis in fact or in law.

Issues

3 The pivotal issues in this matter that require determination are—

1. Whether Mr Allard worked in the calling of drainer as provided in clause 8 of the Award.
2. Whether Mr Allard was engaged on construction work as defined in clause 7(3) of the Award.
3. Whether the Defendant was, at all material times, operating in the building construction industry.

Evidence

4 The Complainant called three witnesses. They were Mr Campbell McCullough, an organiser with The Construction, Forestry, Mining and Energy Union of Workers, Mr Jeremy Allard a member of the complainant with respect to whom this complaint relates and Mr Michael Dunstan a qualified drainer. The Defendant called its director Mr Robert Snowden. It also called Mr Patrick Marsh a drainer who at the material time worked for the Defendant. Mr Marsh has also worked with Mr Allard.

Campbell McCullough

5 Mr McCullough testified that he has been involved in the building construction industry for most of his working life. He has performed the functions of a concreter and that of a brickie's labourer. He worked in those callings for about fourteen or fifteen years. He is familiar with the Award as a result of his experience within the industry. He is also familiar with the work carried out by other workers with whom he had regularly come into contact with including drainers.

6 Mr McCullough testified that a drainer's work on construction sites consisted of digging trenches and laying pipes, whether they are sewerage or stormwater. They worked on buildings and associated car parks usually linking into plumbing lines outside the site. He said that a fence line usually delineates the boundary of a construction site although that is not always the case.

7 By reference to exhibit 9, which inter alia contained a list of the Defendant's clients during the material period, Mr McCullough was able to identify certain firms as being those that engaged in the building construction industry. He particularly identified Brown and Joy Industries, Esslemont and Charter Plumbing as being such firms.

8 Mr McCullough also produced calendars showing the public holidays and rostered days off for the relevant period.

9 When cross-examined, Mr McCullough was asked whether he had ever seen Mr Allard on the job. He replied that he had only seen him once working on the BMW Auto Classic site shovelling mud. He could not say whether on that occasion Mr Allard was performing the work of a drainer

10 Mr McCullough explained under cross-examination that drainers did not require formal training and that they picked up their skills by experience.

11 He was also cross-examined concerning the issue of whether work carried out on car parks fell within the building construction industry. In response Mr McCullough said that a car park, depending on its location, could be considered to be either within the building site or, alternatively, outside the same.

12 Finally Mr McCullough could not say under cross-examination whether Brown and Joy Industries, Esslemont and Charter Plumbing performed civil as well as building construction work.

Michael Dunstan

13 Mr Dunstan testified that he is a drainer. He has been working in such capacity for seven years. Prior to that he had no experience in the calling within which he now works.

14 He said that the functions of a drainer include—

- *Location of existing services*
- *Excavation of trenches*
- *Working out of levels*
- *Preparation of beds*
- *Laying of drains or pipes*
- *Back filling*

15 He said that digging involved in the job was achieved, in the main, by the use of an excavator, loader or bobcat. The types of piping installed consisted of various types of materials, including PVC, concrete and "*blue brute*". In the case of concrete and blue brute, the pipes were joined by the use of rubber rings while PVC pipes were glued. Mr Dunstan said that his work also included compacting and putting right any dislocation caused by the laying of pipes.

16 Mr Dunstan testified that he has obtained a drainer's licence. He achieved his qualification about one and a half years ago. Prior to that no licence was actually required with the drainer picking up his skills on the job.

17 He told the Court that he has worked on new sites and on sites where there were existing buildings, such as when he was involved in extensions to the Belmont Forum and Garden City Shopping Centres.

18 When cross-examined, Mr Dunstan said that he has never seen Mr Allard work.

19 He also informed the Court under cross-examination that he achieved his qualification following examination. That entailed an on-site observation of him at work together with the sitting and passing of a three-hour examination.

20 Under cross-examination he explained that his duties included arranging for the scanning of existing services. He would check levels on plans and then engage in the process that led to the laying of pipes. He actually operated excavators and bobcats in backfilling.

21 When re-examined, Mr Dunstan confirmed that he was initially employed as a labourer. He became a drainer after a year on the job working with a drainer.

Jeremy Allard

22 Mr Allard testified that he responded to an advertisement in a newspaper placed by the Defendant seeking a labourer with drainage and pipe laying experience. Mr Allard said that he initially spoke to Mr Snowden's partner, namely Mr Anthony Williams. He was asked about his experience and was invited to attend the site the next day.

23 Mr Allard said that his first job for the Defendant was at a factory being built at Kewdale. The Defendant was doing the drainage and car park for that factory. Mr Snowden was not present on that job when he commenced. The next day Mr Snowden spoke to Mr Allard and told him he would be paid a flat rate of $10.00 per hour, which would increase as Mr Allard got better. Mr Allard testified that his initial tasks at Kewdale included compacting sand, laying pipe, putting in gullies and grouting up manholes. His main task, however, was that of compacting. He was on that Kewdale job intermittently over a few months.

24 Mr Allard was then taken to exhibit 9, being a schedule of dates on which certain jobs were carried out, the location of the particular jobs and the name of the client for whom the job was done by the Defendant. The document is one clearly created by the Defendant for its purposes and discovered. It was with reference to that document that Mr Allard and indeed, Mr Snowden, gave their evidence. The schedule was utilised as a useful guide for the giving of evidence in respect to work carried out by Mr Allard.

25 Mr Allard, with reference to exhibit 9, testified that he did not work on the jobs outlined therein for the periods set out. His work on those respective jobs was generally intermittent. He often left jobs part way through and returned to them later. He conceded however that in some instances he did remain continuously on the job for significant periods of up to four months. Some jobs lasted for periods of between one and two months. Other jobs lasted just for weeks. With respect to the Kenwick Squash Courts he said that he only ever attended that job for one night. Although agreeing that the time frames set out within the schedule (exhibit 9) are generally accurate, he nevertheless did take issue with some aspects. He wanted to impress that there was considerable movement from site to site and there was not necessarily a constant attendance at any particular site.

26 By reference to exhibit 9, Mr Allard described the work that he carried out at the various sites. Firstly he testified about his work on the car park of Midland Retravision. He said in that regard that he laid a couple of pipes with Anthony, that he compacted the pad and did a bit of surveying. He said that he "*did the ditch*" on the job and "*covered in the trench*". He assisted in slinging the pipes into the trench. However his main task on site was that of compacting.

27 Mr Allard next testified about his work at the Clarkson High School. He said that he was engaged in putting in the sewers, doing some stormwater work and levelling sand for pavers.

28 He then moved on to describe what he did at the Warnbro High School. He said that he worked almost exclusively on stormwater and sewerage at that place. Much of the work carried out at that place was the same as the work he had carried out at the Clarkson High School.

29 With respect to the Kenwick Squash Courts, Mr Allard explained that all he did was to help out by putting "geocloth" around the gullies and compacting the same.

30 He was then taken to describe what he did at the Lansdale Primary School. He said that on that job he was involved in laying the water main for the school. He was also involved in the laying of stormwater "*downpipes*". He compacted the trenches following the backfill operations.

31 Mr Allard next described what he did at the Ellenbrook Primary School. He said that he worked on the sewer and stormwater at that place. He did not go into detail as to what he actually did.

32 The Prosser Toyota site was next addressed. In respect of that job he said that he laid stormwater pipes in preparation of the car park being laid.

33 Mr Allard moved on to outline what he did at the BMW Auto Classic site. He said his main function at that site was cleaning up clay that had fallen to the road surface. Eventually he did do some drainage work on that site. He conceded however that the amount of drainage work carried out at that site was very little.

34 He was then taken to describe what he did at the Churchlands High School site. He said that the work that he carried out with respect to the extensions at that school was the same as the work he had carried out at other schools.

35 The final significant issue addressed in chief was Mr Allard's use of the Defendant's fuel card. Such evidence goes to the issue of the alleged breach of the fares and travel clauses of the Award. In that regard he testified that he mainly used the employer supplied fuel card to purchase fuel for the Defendant's business purposes.

36 Mr Allard testified that he did not receive annual leave or payment in lieu thereof. He was not paid sick leave or for public holidays. He did not receive any rostered days off (RDO's) unless working on a union site. He was not paid long service leave or redundancy payments.

37 When cross-examined, Mr Allard said that, although he had some experience before starting with the Defendant he nevertheless was on "*a bit of a learning curve*" early on. In fact he relied on Anthony Williams to teach him what to do. He conceded that whilst he worked for his previous employer namely Triad Contractors his duties consisted of those of an offsider. He also conceded that whilst working for the Defendant he usually worked alongside a skilled and experienced drainer who generally operated the backhoe. Mr Allard assisted him in carrying out drainage work.

38 Mr Allard said that on some occasions he was "*directly responsible*" for the laying of sewerage and drainage pipes. He said one such instance was when he worked at Lansdale Primary School. He said that he engaged in putting in soak wells and manholes and ensuring that the levels were correct. He was also involved in the process of locating existing services. Mr Allard conceded however that he had never achieved recognition by his employer that he was a drainer.

39 Mr Allard was cross-examined with respect to the various jobs set out in exhibit 9. In relation to the Kewdale factory job he conceded that the drainage work he carried out thereat related to road works. In any event the percentage of his drainage work on that job was in the order of fifteen percent.

40 Mr Allard was next taken to consider the Midland Retravision job. On that job he worked on two gullies and levelled and compacted the car park. He said ten percent of that work related to drainage.

41 With respect to the Clarkson High School, Mr Allard said that he was involved in laying the sewer, doing the stormwater and levelling sand for pavers. He said there was a fair bit of drainage work involved in that job. He estimated it to comprise about forty percent of the work.

42 Turning to the Warnbro High School job, Mr Allard said that his involvement included assisting a plumber laying sewer and doing the drainage gutters and down pipes. He also put in a lot of soak wells on that job. He estimated that forty percent of his work at that place related to drainage.

43 Mr Allard was then taken to describe what he did at the Lansdale Primary School. He told the Court that he put in manholes, soak wells and that he did a sewer. He also performed compacting.

44 At Ellenbrook Primary School he was involved in laying the sewer. He thereafter compacted trenches.

45 Mr Allard was again taken to consider the Clarkson High School work. He told the Court that about one third of his work on site on his second stint there comprised drainage work.

46 Following the structure set out in exhibit 9, Mr Allard was next taken to describe what he did during his second stint at the Ellenbrook Primary School. On that job he did some sewage work and put in a few soak wells. He also connected pipes into the soak wells. He said all the work at that place consisted of drainage.

47 Mr Allard was then asked to describe the work he did on his third stint at the Clarkson High School. He told the Court that about one third of his work at that place at that time consisted of drainage.

48 Next considered was the Prosser Toyota job. Only ten percent of that job involved drainage. Most of the job comprised of rolling limestone for the car park.

49 When taken to comment about the footpath at Cannington, Mr Allard conceded that there was no drainage work associated with that job.

50 As to the Mosman Park job that followed, only five percent of that work consisted of drainage work.

51 Moving to the BMW Auto Classic site, Mr Allard confirmed that his duties were to clean the road. He was also engaged to assist a plumber from Charter Plumbing do his work. He said that about twenty percent of his work there comprised drainage work.

52 He was next taken to describe what he did at Northbridge. He said that none of his work there related to drainage.

53 Finally Mr Allard was cross-examined as to the work he did at Churchlands. He said that there was a *"lot of drainage on that one"*. About half his work on that site involved drainage.

54 Mr Allard was also cross-examined about the use of the fuel card and on how he got to and from work. The cross-examination of him in that regard was uneventful.

55 When re-examined Mr Allard explained that the percentages expressed during cross-examination represented the percentage of drainage work carried out by the Defendant on the job. It did not represent the percentage of work he did in respect to drainage on those jobs. By way of example, he said that fifty percent of the Churchlands job comprised drainage work and that sixty percent of his time at that job was spent doing drainage work. In revisiting his percentage estimates, Mr Allard said that at the Clarkson High School he spent about sixty percent of his time doing drainage work. At the Warnbro High School, seventy percent of his work was on drainage. If one included being a surveyor's offsider in setting levels, then his drainage work would be close to one hundred percent. At Lansdale, ninety percent of his work consisted of drainage.

Patrick Marsh

56 Patrick Marsh the first witness called by the Defendant has worked as a drainer for most of his working life. He currently is a plant operator. The Defendant formerly employed him. He worked with Mr Allard and is familiar with the work that Mr Allard performed.

57 Mr Marsh testified that whilst he operated a backhoe digging up the drains, Mr Allard would work around him as the drainer helping him to lay his drains and do the normal labouring work such as mixing the cement and the like. He cemented up pipes for the sumps, ran around helping everybody, shovelling and filling.

58 Mr Marsh testified that the work of a drainer entails understanding and setting appropriate invert levels from manhole to manhole. He actually lays the drains. He is fully responsible for the whole job. To do that, the drainer must be able to read the plans and understand the falls of the drain.

59 Mr Marsh said that Mr Allard was involved in labouring. He never saw him physically in charge of laying drains. His impression was that Mr Allard was a labourer not a drainer.

60 When cross-examined, Mr Marsh testified that the job of a drainer is a specialised job. A labourer can give a drainer a hand to do the job but the drainer needs the experience to do the job. He said that although a lot of the time drainers worked on their own, they would nevertheless usually have an offsider. Mr Marsh testified that in order to be a drainer, the person doing the job had to be able work out the levels. He said that if it was the case that Mr Allard was *"doing the levels"* he would have to be considered to be a drainer.

61 Mr Marsh conceded that he only worked with Mr Allard on an intermittent basis. He was unaware of whether or not Mr Allard had in fact worked alone. He testified that he worked with him on the Kewdale job. After that he only worked with him on and off.

62 When re-examined, Mr Marsh said he never saw Mr Allard operate the laser light level. He saw Mr Allard use the theodolite in circumstances in which certain levels had already been worked out. In other words, that Mr Allard did not work out the levels but rather attended to simple tasks of applying levels already calculated by someone else. Mr Marsh said the drainer is the person who is "*in charge of that job*".

Robert Snowden

63 Robert Snowden gave evidence that at the material time he was a director of the Defendant. He no longer operates the Defendant's business. He currently works as a line haul truck driver.

64 Mr Snowden testified that whilst it operated, the Defendant engaged mainly in civil contracting, working on roads, the construction of car parks, footpaths and the like. He said that the drainage work was a minimal component of the work.

65 He told the Court that Mr Allard was employed as a labourer. His duties consisted mainly of compacting and driving the roller. He described Mr Allard to be a "*gopher*". A "*gopher*" he said is a worker who works alongside someone. He assists in doing things like running back to the shed to get a spirit level or something else that might be needed by a drainer or other tradesman.

66 Mr Snowden was taken to testify about Mr Allard's work on the jobs set out in exhibit 9. In relation to the Kewdale job, he said that Mr Allard carried out only basic labouring tasks such as shovelling or compacting. Mr Allard's involvement with drainage at that site consisted of probably less than ten percent of his work.

67 Mr Snowden was asked to consider Mr Allard's work at the Retravision Midland car park. He said three soak wells were put in at that place. Although Mr Allard was involved in the work there, he was not the responsible drainer. Either Tony Williams or Trevor McLaughlin would have been the drainer on that job. Mr Snowden said that most of the work that Mr Allard did on that site was labouring work on the car park. His work on drainage was five percent of that.

68 Moving to consider the Clarkson High School job, Mr Snowden said that the Defendant prepared several site pads for classrooms. It also built a range of tennis and basketball courts. Also constructed were two large car parks and an access road. He said that Charter Plumbing did the drainage work on that site. In any event that constituted a very small portion of the total works. Mr Snowden said that with respect to that job that Mr Allard would not have been involved in setting up and laying pipes. He would, however, have been involved in backfilling and compacting. Pat Marsh, Tony Williams, Mark Burgle and Mr Snowden himself did the drainage work on site. According to Mr Snowden, Mr Allard's involvement in drainage works on that site comprised less than ten percent of his total work.

69 The Kenwick Squash Courts job was next referred to. Mr Snowden testified that Mr Allard worked there for almost two weeks. Having said that, he accepted that Mr Allard might have been required to leave that place from time to time in order to carry out work on other jobs. He described the amount of drainage work that Mr Allard was involved in on that job to be very little, possibly up to five percent.

70 He was next taken to address the Lansdale Primary School project. That job was mainly drainage work consisting of the laying of a large water main around the outside of the perimeter of the new school. He said that Mr Allard's function was to labour for the drainer, namely Tony Williams.

71 With respect to Ellenbrook Primary School, that too consisted mainly of drainage. According to Mr Snowden, Mr Allard only performed basic labouring tasks offsiding with the drainer.

72 Mr Snowden was next asked to comment on the second stint at the Clarkson High School. In that regard he said that there was no drainage conducted on the second occasion. All the drainage had been done at the beginning of the contract. He said that there was no chance that Mr Allard did thirty percent of drainage work on that job.

73 Moving to consider the second stint at Ellenbrook Primary School, Mr Snowden acknowledged that most of the work carried out on that occasion related to drainage. He testified, however, that Mr Allard would have been working with Mark Burgle who was the drainer on the job.

74 Mr Snowden next testified about the Defendant's third stint at the Clarkson High School. He described that work to be a clean up operation, preparing for the application of hot mix. He said there was no drainage work associated with that job.

75 Next addressed was the Prosser Toyota job. That comprised of the construction of two car parks. He estimated that Mr Allard's work associated with drainage on that site as being possibly between five and ten percent. Again on that job as with others he would have been working under a drainer. The drainers on that job were Mr Snowden himself, Mark Burgle, Brett Ball and Pat Marsh.

76 Mr Snowden moved to consider the Bayswater sewer extension to the new weir course. That work was entirely drainage and Mr Allard worked as a labourer only on that job. Tony Williams was the drainer and Mr Allard was the *"gopher"*.

77 Commenting upon the Cannington footpath job he said there was no drainage work associated with that job. There was, however, a small amount of drainage work performed on the Mosman Park laneway job. The work that Mr Allard did associated with drainage on that job was in the order of ten percent.

78 In relation to the BMW Auto Classic site, Mr Snowden said that the job consisted of a big excavation. Three thousand five hundred cubic metres of clay was excavated and dumped. Mr Allard was not involved in any drainage work on that job. Charter Plumbing did all of the drainage work. Mr Allard was hired out to Charter Plumbing as a labourer, not a drainer. Mr Snowden estimates that Mr Allard was involvement with drainage work on that job was in the order of only five percent of the total amount of work.

79 As to the footpath at Northbridge, Mr Snowden said there was no drainage works associated with that.

80 Finally, in relation to the Churchlands High School job he said that the work entailed preparation of areas for brick paving. There was no drainage work conducted on that site.

81 Generally, in reference to exhibit 9, Mr Snowden said that about eighty percent of the work carried out and referred to within that schedule was civil work consisting of earth works including associated drainage, construction of car parks and preparation of surfaces. There was also some associated civil stormwater work.

82 He said some of the places at which the Defendant carried out its work were fenced whilst others were not. It really depended upon the circumstances of the site and the job.

83 Mr Snowden also testified as to the use of fuel cards supplied by the Defendant. He said in that regard that Mr Allard, at various times, had the company vehicle, which he utilised to drive himself to and from work. The Defendant's fuel card was utilised by Mr Allard for the purpose of fuelling the vehicle to get to and from work.

84 Mr Snowden conceded under cross-examination that Mr Allard was always paid a flat hourly rate and that he was not paid allowances. He was, however, paid superannuation. Payment was also made with respect to long service leave. He was not however paid accrued annual leave upon termination. That was because Mr Allard "*ran away*". On Mr Snowden's evidence Mr Allard abandoned his job. He said that Mr Allard was not paid redundancy payments because he had not been made redundant. Mr Snowden conceded that he did not pay Mr Allard accumulated sick leave. If Mr Allard did not work on public holidays he was not paid. Further, RDOs were given only on "union sites". Mr Allard was not paid penalty rates for working overtime or working on weekends.

85 With respect to the issue of getting to and from work, Mr Snowden maintained that Mr Allard was always catered for either one way or the other by either being picked up and dropped off or, alternatively, by using a vehicle and fuel supplied by his employer.

86 When cross-examined about the advertisement placed in the West Australian newspaper inviting applications for Mr Allard's job Mr Snowden said that his recollection of it was that it sought a labourer with his own transport. He attempted to obtain a copy of the advertisement prior to the hearing but was unable to do so.

87 It was put to Mr Snowden that a drainer is a labourer. He rejected that contention. He said, "*A drainer is a labourer but it doesn't mean a labourer is a drainer*". Mr Snowden emphasised that a drainer undertakes the project on behalf of his or her employer and is directly responsible for that work.

88 Mr Snowden said that he never left Mr Allard alone on a job in charge of laying, setting out or organising levels due to the blunders that he was prone to making, even when under supervision. He said he would not have done that to himself, his company or his clients. Mr Snowden maintained that Mr Allard's involvement amounted to no more than giving someone a hand. In that regard he said,

> "*He would never have been given a set of plans and given a theodolite and given a pipe laser and given a dumpy level and given a labourer and a machine and a machine operator and asked to execute that drain*".

89 Mr Snowden's view of Mr Allard's function is well reflected at page 96 of the transcript when, under cross-examination he said—

> *MS PEAK: But he did, on a number of occasions, do the levelling work, didn't he? ---What he's saying what he done levelling work is somebody set up a laser for him. They gave him a staff and on the staff it's got a thing that bleeps. When the bottom of the staff is at the right level, he picks up the transceiver and it bleeps. Someone would've set it up for him and he would stand there and go, "bleep, bleep, bleep, bleep, bleep, bleep, bleep, bleep", which isn't very skilful at all.*
>
> *You're saying he would have done that?---Yeah.*
>
> *You don't know whether he did any greater levelling than that or not, do you?---Yeah, I do.*
>
> *How do you know that?---Because he worked for me.*

90 Mr Snowden was at pains to point out that Mr Allard could not be a drainer because he did not work off plans. Had he done so he would have had a field book recording pertinent calculations and details. He had no such field book. Nor did he sign off on "*as constructed drawings*" for the Water Authority, which was part and parcel of the job of a drainer.

91 At page 99 of the transcript, Mr Snowden, still under cross-examination, said—

> *MS PEAK: --and did the work of a drainer?---Where's his evidence? Did he bring any of his plans in? Did he bring his--his field book where he would've recorded all the--*
>
> *MS PEAK: Do you think a drainer needs to bring plant to be a drainer?---Well, he's got to be able to read plans. He'd be issued with a set of plans.*
>
> *Oh, sorry, you said, "plans". You do. Sorry, I just said, "plant"?---No. He would also have a field book—*
>
> *Wouldn't you, as the boss, be issued with the plans? Didn't you actually contract to do the drainage work?---Yeah, but I'd then receive maybe up to four or five sets of plans, one of which stays at home in my office, two or three cites--sets do down to each cite (sic) so that they're in the shed ready to go and one stays clean in the shed and is recorded as an "as constructed drawing". Did--did Jeremy tell you how many "as constructed drawings" he signed off for the Water Authority which would be the job of a drainer?*
>
> *That's what you say that the job of a drainer is?---That is part of the job. The guy who lays the drains has to record all levels, inverts, degrees, positions from buildings and then record them back onto a plan and then they have to be signed off and issued back to the Water Authority to be put on record for--if someone goes there in 10 or 15 years time and need to find a drain, they can then go to the Water Authority down at Tonkin Park--Tonkin House. They get issued the plans. Sometimes it'll take a couple of days to find them. They go there. They can get photocopies, dah, dah, dah. I'll give it to you that Jeremy Allard never ever signed off one set of plans.*

92 It was Mr Snowden's evidence that Mr Allard never signed off on any plans submitted to the Water Authority or otherwise held any responsibility to his employer in that regard.

93 Mr Snowden explained that civil works is that carried out on roads, car parks and drain works. He said that stormwater work carried out within car parks is considered to be civil stormwater. Mr Snowden also explained that most of the work carried out by the Defendant was unconnected with building construction. Some of the firms that the Defendant worked for were for firms with a civil construction arm to their business. Other work was carried out directly for the owners.

Assessment of Witnesses

94 The evidence of Mr McCullough, Mr Dunstan and Mr Marsh was in each instance straightforward and acceptable. Mr Marsh's evidence was of significance because he actually worked with Mr Allard. The evidence that he gave relating to what he saw Mr Allard do is obviously very important. The evidence of Mr Allard generally stands in conflict with that of Mr Snowden. The conflict particularly concerns the nature of the work carried out by the Defendant over the relevant period. There is also conflict concerning the level of Mr Allard's responsibility with respect to the same.

95 It suffices to say at this time that I far preferred the evidence of Mr Snowden to that of Mr Allard. Mr Snowden impressed in his evidence as having a clear recall of the particular jobs and the nature of duties performed on each job. Mr Allard, on the other hand, gave evidence, which was, in my view, confused. For example his estimates as to how much work he carried out in relation to drainage varied significantly. Indeed he wavered significantly in that regard. In my view, the answers he gave under cross-examination as to the amount of work he did on drainage, was reflective of the true position. His attempt to revise his earlier estimates during the course of re-examination was unimpressive. Further, his description of the work he carried out at the Clarkson and Ellenbrook schools, for example, was quite nebulous. He appears to have merged the work in one stint with the work carried out in another. Mr Snowden, on the other hand, had no such difficulty. He was able to recite with a degree of particularity exactly what was done, where it was done, when it was done and who did it.

Findings

96 The burden of proof falls upon the Complainant to prove its case on the balance of probabilities.

97 There is no dispute that the Defendant employed Mr Allard. The question is whether he was engaged in work, which is substantially or wholly covered by the scope and terms of the Award.

98 Clause 3 of the Award, so far as is relevant, provides—

3. - SCOPE

> *This award shall apply—*
>
> *(1) to all employees usually employed on or employed as casual employees on construction work as defined in Clause 7. - Definitions of this award in any of the callings set out in Clause 8. - Rates of Pay of this award and who are employed in the building construction industry; and*
>
> *(2) ...*

(3) ...

(4) to all employers employing those employees and/or apprentices; and

(5) ...

99 The three elements, which need to be established for the Award to apply to Mr Allard's employment, are—

1. That he was engaged on construction work;
2. That he was engaged in a calling set out in the Award; and
3. That he through his employer was engaged in the building construction industry.

100 Construction work is defined in clause 7(3) of the Award as follows—

"Construction Work" means—

(a) all work "on-site" in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or other structures of any kind whatsoever; or

(b) all work which the union and the employer concerned agree is construction work but only if the agreement is approved by the Board of Reference; or

(c) all work which, in default of an agreement as aforesaid, is declared by the Board of Reference to be construction work.

101 The Complainant contends that the work carried out by Mr Allard was construction work on-site in connection with the erection, repair, renovation, maintenance or ornamentation of buildings or other structures. I disagree. In my view the work carried out by Mr Allard was not of the type falling within such definition. The evidence dictates that most of the work carried out by Mr Allard for the Defendant was totally disassociated with construction work, as defined. Such examples include—

- Kewdale road works
- Sewer extensions in Bayswater
- Car park for Prosser Toyota
- Footpath at Cannington
- Laneway at Mosman Park
- Footpath at Roe Street

102 Even when work was carried out at the schools, that part of the work going to the construction of car parks, tennis courts and basketball courts was quite discrete in nature. It simply had no nexus to construction work as defined in the Award. The connection that Ms Peak sought to make during submissions is, in my view, entirely tenuous. It appears to me that the work carried out by the Defendant, and in turn by Mr Allard, was substantially civil construction. I accept Mr Snowden's evidence in that regard. In my view the evidence overwhelmingly dictates that that is so. The fact that the Defendant may have performed work for entities, which from time to time carried out building construction work, is not, of itself, indicative of the nature of work carried out by the Defendant. Indeed there is no reason to reject Mr Snowden's contention, for example, that Esslemont engages itself in civil construction work as well as building construction work. The fact that there is some fleeting spatial connection with a building site does not change the nature of the work performed. Although it is undeniable that in some circumstances the Defendant, in preparing pads and doing drainage work at some schools, did engage in construction work, it nevertheless remains the case, on Mr Snowden's evidence, which I accept, that such work constituted only a very small part of his company's business. Generally speaking, the mainstay of the Defendant's work was carried out on car parks, roads, footpaths, tennis and basketball courts and the like. Such work was civil construction work. It was discrete work and did not form part of any building construction work. It could not be considered to be work carried out in connection with the erection, repair, renovation, maintenance or ornamentation of any building. Indeed it had nothing to do with the buildings per se be they existing or under construction. As stated previously any connection between the two is fleeting. Attempts made to link them are tenuous. The work carried out by the Defendant, was not usually carried out within defined building construction sites as delineated by fences or otherwise.

103 I am cognisant of what the Full Bench of the Western Australian Industrial Relations Commission said in ***Western Australian Builders Labourers, Painters and Plasterers Union of Workers v MM Clark and AJ Clark trading as Mike Clark Contracting*** **75 WAIG 1820 at 1821**. I accept that the words "*in connection with*" found within the definition of *"construction work"* within the Award are very wide indeed. Notwithstanding that, the evidence before me dictates that the Defendant's work was substantially unconnected with building construction and was in fact predominantly civil construction.

104 Even if I am wrong in that view, it remains the case that for the Complainant to succeed, its member Mr Allard must be found to have worked for the Defendant in the calling of drainer as referred to in clause 8 of the Award.

105 Drainer is defined in clause 7(1)(g) of the Award under the general heading of "*Builders' Labouring*" as follows—

"Drainer means a builder's labourer directly responsible to his/her employer for the correct and proper laying of sewerage and drainage pipes".

106 The definition of builders' labourers set out in clause 7(1)(a)(iii) of the Award includes, inter alia the following—

"...in the setting and jointing of pipes for sewerage or storm water drainage, ...in clearing, excavating or levelling off sites for buildings, or in road construction work and in connection with approaches to buildings inside the building line ..."

107 It is obvious from the definitions referred to that a drainer is a builder's labourer. However, a builder's labourer is not necessarily a drainer. The distinction lies in the fact that a drainer is directly responsible to his employer for the correct and proper laying of sewage and drainage pipes. Responsibility is the demarking factor.

108 The evidence given by each of Mr Allard, Mr Marsh and Mr Snowden for that matter was suggestive of the fact that Mr Allard was involved in the setting and jointing of pipes for sewerage or stormwater drainage. It is also possible to find that he worked on levelling sites and engaged in road construction. Such findings, subject to the other elements to be proved, might bring Mr Allard within the definition of a builder's labourer. However in order for the Complainant to prove that Mr Allard was a drainer it must establish that Mr Allard was directly responsible to the Defendant for the correct and proper laying of pipes.

109 Mr Allard contends that he performed the tasks of a drainer in locating existing services, excavating trenches, working out levels, preparing beds, laying drains or pipes and backfilling. There can be no doubt that he was involved in all such work. However, the question to be resolved is one of whether his involvement was that of being an offsider assisting in those tasks or whether he conducted those tasks in his own right as a drainer responsible to his employer in that regard.

110 Mr Allard's evidence is generally at odds with that of Mr Snowden going to the issue of the exact nature of his involvement and responsibility. In that regard Mr Allard says that he was left to work alone and responsible for the drainage works that he

carried out. I reject his evidence. The evidence of Mr Marsh and, and more particularly, that of Mr Snowden contra-indicate that. Mr Snowden's evidence was that Mr Allard was no more than a gopher. Gopher is not used in a pejorative sense but rather it is descriptive of the fact that his duties were no more than that of being an offsider.

111 I accept Mr Snowden's evidence that, given the lack of competency on the part of Mr Allard, he would never have entrusted Mr Allard in working alone in carrying out his work. I accept Mr Snowden's evidence in chief and under cross-examination that the level of responsibility to the employer is reflected in the ability to make calculations as to levels and to sign off on such calculations. There is no acceptable evidence before me to establish that that ever occurred in Mr Allard's case.

112 The fact that Mr Allard worked alongside other drainers and assisted them does not make him a drainer. To become a drainer requires a certain level of recognition by an employer that the person is capable of fulfilling the necessary tasks. The recognition is to be found in the handing down of responsibility in respect to certain works. That never happened to Mr Allard. He was never recognised by his employer as a drainer. He was never responsible for the works. He was no more than a gopher, an offsider, and a labourer assisting a drainer.

Conclusion

113 The Complainant has failed to prove that Mr Allard was employed in a classification covered by the Award; that he was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations.

114 Given my findings, it is unnecessary to rule on Mr Moon's submission that the Complainant failed to prove the existence of the Defendant.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07851

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	SILENT VECTOR PTY LTD T/A SIZER BUILDERS, CLAIMANT
	v.
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 4 SEPTEMBER 2002
CLAIM NO/S	M 263 OF 2002
CITATION NO.	2003 WAIRC 07851

Representation	
Claimant	Mr G McCorry of *Labourline – The Employment Law Specialists* appeared as agent for the Claimant
Respondent	Mr T Dixon (of Counsel) appeared for the Respondent

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Reasons for Decision

(Given orally during and at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

Jurisdiction

1 The Claimant has brought a substantive action pursuant to section 96J of the *Industrial Relations Act 1979* (the Act). That provision enables this Court to order that a person—

(a) do any specified thing, or

(b) cease any specified activity

for the purpose of preventing any further breach of section 96C, 96D or 96E of the Act.

2 Sections 96C, 96D, and 96E are found within Part VIA of the Act which deals with freedom of association. Those sections make it a criminal offence in the relevant circumstances to discriminate and to do injurious acts by reason of membership or non-membership of an organisation. A person who claims to be affected by non-compliance with those sections may bring an action under section 96J to prevent further breach. The remedy provided is in the form of injunctive relief, albeit by force of statute.

3 This application under section 96J is in the form of a *quia timet* injunction based on the fear by the Claimant that there will be interference with its rights. Accordingly, the Claimant seeks interlocutory relief in substantially the same form as the permanent relief, which it seeks by virtue of the substantive action.

4 The question, of course, is one as to whether I have power to deal with the matter on an interlocutory basis. It is suggested by Mr McCorry that by virtue of the application of section 33 of the *Local Courts Act 1904* through section 81CA of the Act that I have power to deal with the application. Mr Dixon suggests otherwise in saying that the powers provided in section 33 of the *Local Courts Act 1904* relate only to ancillary equitable relief in the making of orders in respective of substantive matters before the Local Courts.

5 In my view the powers contained in section 81CA(2) of the Act enables this Court to exercise the powers of the Local Court as if these proceedings were an action within the Local Court. It is axiomatic that the Local Court has power to grant injunctive relief on an interlocutory and interim basis. That power is given to preserve the subject matter of the action. In my view, if section 33 of the *Local Courts Act 1904* applies to this jurisdiction, which I find it does, it follows then that this Court has jurisdiction to deal with this application and to consider whether or not it should grant the interlocutory orders in the terms that are sought.

6 I find that I have jurisdiction to deal with this application.

Form of the Interlocutory Application

7 There is complaint made by the Respondent that the affidavits of Mr McCorry and Mr Deen are objectionable. It says that the affidavits contain various paragraphs that offend on the basis that they are based on hearsay, unqualified opinion and unsubstantiated belief. Having heard his submissions and having reviewed the affidavits in question, I find myself in complete agreement with Mr Dixon in his view of the affidavits. There are parts of those affidavits that are entirely objectionable and embarrassing.

8 Mr McCorry submits that by virtue of regulation 49(5) of the *Industrial Magistrates' Courts (General Jurisdiction) Regulations 2000* (the regulations) this Court, in relation to all matters before it falling within general jurisdiction, is not bound by the rules of evidence and may inform itself as it thinks fit. I disagree. That regulation is clearly qualified in that it relates only to the trial situation. Such is clearly provided for by the regulations. Given that that is so, it cannot therefore apply to interlocutory proceedings such as these. Absent any express provision to the contrary, I cannot see why the parties should not be bound by the normal rules of evidence in this interlocutory matter. Further, given the nature of the application that is made, the effect of the successful outcome of the same would result in the limitation of what is otherwise a legal right of the Respondent. In the circumstances it is all the more important that there be strict compliance with the rules of evidence. That is so to avoid any possible injustice. At the end of the day fairness and the avoidance of injustice is what all courts must desire, and the situation in this circumstance is no different.

9 I accordingly accede to Mr Dixon's application in striking out certain parts of the affidavit. I will now move to specify those parts of the affidavits that will be struck out. In doing so I adopt his views, which I find to be correct, in relation to the affidavits.

10 Moving to the affidavit of Paul Deen sworn on 2 September 2002, I strike out paragraph 4. I also strike out paragraph 5, 6, 7, 9, 10, 11, 12 and 13. Paragraphs 23 and 24 are also struck out.

11 Moving to Mr McCorry's affidavit, I strike out paragraph 5. There was a suggestion made by Mr Dixon that paragraph 14 was objectionable, but having reviewed it, it does not seem to me to be objectionable. I do not propose to strike that out. I do, however, propose to strike out paragraphs 21, 22 and 23 upon the basis put to me by Mr Dixon with which I agree.

12 Mr Dixon was of the view that not only should those paragraphs be struck out, but indeed the whole of the affidavits be removed from the court file because they present as being objectionable in their state. I disagree, with all due respect to him. The reason why I disagree is that there are certain aspects of the affidavits in their form, with the paragraphs struck out, that provide material evidence in relation to the matter and are pertinent. They ought to be considered by the Court, and for those reasons the affidavits should remain on the file with the offending paragraphs struck out.

13 Those are the orders that I make.

Application for Interlocutory Injunction

14 The Claimant seeks—

1) That until the hearing and determination of this matter further order, the Respondent be restrained ... from-

(a) without prior leave of the court and under such terms as to supervision as the court considers appropriate, entering any of the premises occupied by the claimant wherein employees of Ahayca Holdings Pty Ltd t/a Bulls Bricklaying Services are working or are contracted to work for the claimant; and

(b) directing, procuring, advising, inciting, encouraging and/or authorising its members to stop performing the work which their contracts of employment require on or in respect of any premises occupied by the claimant and wherein the employees of Ahayca Holdings Pty Ltd t/a Bull's Bricklaying Services are working or are contracted to work for the claimant.

2) Liberty to apply be reserved

15 The interlocutory application is substantially in the same form as the relief sought in paragraph 1 of the substantive claim, by which the Claimant seeks to permanently restrain the Respondent from doing those things to which I have referred. The claim and indeed the interlocutory application are predicated on the Respondent's alleged failure to comply with sections 96C, 96D and 96E of the Act.

16 In that regard and with all due respect to the Claimant's agent, I fail to see how given the factual matrix of this case as it is before me it can be said that there has been a failure or could have been a failure to comply with sections 96C or 96D of the Act. In that regard I concur with Mr Dixon's summation of the law in relation to the relevant provisions. In my view section 96C does not apply because it relates solely to those who are privy to the contract of employment or, alternatively, any officer or agent of such persons. It does not relate to a third party such as the Claimant in this matter. Similarly section 96D has no application either because it relates to the consequences that flow to an employee within a contract of employment. It relates to a contract between employee and employer and not to third parties such as the Claimant, as is in this case. In my view at this stage the only possible basis for the claim and accordingly this interlocutory application is an alleged breach of section 96E of the Act.

17 To make out its claim the Claimant must establish that the Respondent union discriminated against Silent Vector Pty Ltd t/a Sizer Builders because employees of Bulls Bricklaying are not members of the union. For the injunction application to succeed the Claimant must establish a reasonable apprehension in the mind of the applicant of further conduct of that type occurring.

18 Going to the merits of the case it is apparent that it is incumbent upon the Claimant to demonstrate a prima facie breach of section 96E of the Act. In that regard the Claimant must put before the Court acceptable evidence going to the proof of various material facts including that Bulls Bricklaying has employees and that they are not members of the Respondent union. The evidence from the Claimant is lacking in that regard. There is no evidentiary material from officers of the corporate entity that trades as Bulls Bricklaying to that effect. There is no evidence from those persons said to be employees that they are in fact employees. The only evidence on the issue comes from the affidavit of Mr McCullough who testifies to the contrary. Indeed his evidence suggests that, as at early August of this year, Bulls Bricklaying did not have any employees. Clearly an inability to establish such a fact impacts upon the prima facie case that the Claimant presents to the Court. In my view it presents the Claimant with insurmountable difficulty.

19 It is quite apparent to me that the evidentiary material in support of the Claimant's interlocutory application substantially supports the types of matters referred to in sections 96C and 96D of the Act. However such evidence has little bearing on the matters to be considered with respect to section 96E of the Act. I am not saying that the whole of the evidence is not applicable, but there are substantial portions of it that do not apply.

20 Further there is a dispute on the evidentiary material before me as to the dispute that arose in July of this year. The Claimant asserts that officers of the Respondent made threats and that they were made for discriminatory purposes aimed at injuring the Claimant's interests. The Respondent on the other hand maintains that the dispute arose out of a legitimate safety issue with

which it was concerned. In that regard it is clear from the affidavit of Mr McCorry that he took the view that what happened on Saturday 6 July 2002 related to discrimination and that the alleged safety issue was used to disguise the dispute. It was, on his evidence, the dispute with Bulls Bricklaying that gave rise to the threats being made. That was his perception of the events. Indeed that is clear from his affidavit. Mr Deen took the same view.

21 Of course, the Respondent disputes that evidence. The affidavit of Mr McDonald in that regard reflects the Respondent's position. Mr McCullough was not there on the material date but in his affidavit he gives evidence of a legitimate dispute pertaining to safety. Obviously such issues when they are in contradiction with each other cannot be easily resolved on affidavit. It is just simply almost impossible to resolve such matters on affidavit. Also the weight of the evidence on the issues in contest is even. The Claimant may have well benefited from calling other witnesses or indeed presenting other evidentiary material. I would have thought, for example, that the evidence of Mulligan and someone from Bulls Bricklaying may well have benefited the Claimant in respect of this particular application, but without such evidence it really causes the Claimant to have some difficulty. The case is nowhere near as strong as it could have been if such evidence had been called. In the circumstances, given that much of the evidence is oath on oath not subject to cross-examination with the weight evenly proportioned it is difficult for the Claimant to establish a prima facie case. Even if it could be said that it could establish a prima facie case, the question remains whether, on the balance of convenience, my discretion ought to be exercised in favour of the Claimant. In that regard there is no evidence going to the quantification of the Claimant's loss. In my view such evidence is essentially considered in a proper exercise of my discretion in relation to this matter. I need to know what real impact will be upon the applicant in monetary terms and other identifiable terms. Quite frankly there is no evidence going to that issue.

22 Further, it is apparent that the alleged threats of action to follow the closure of the Perth sittings of the Royal Commission have not eventuated notwithstanding the Claimant's contention. Had there been such a vehement threat one would have expected on the face of it that there would have been some immediate action, but the evidentiary material before me indicates that that has not occurred. To that extent I agree with Mr Dixon that the history militates against the Claimant's contention in that regard.

23 It is important for the Respondent to be able to carry out its legal duties to give effect to its objects and the objects of the Act. The Court should only impede such rights when there is a clear potentiality of harm to the Claimant. In that regard the basis for the Claimant's fear, given the state of the evidence, is based on conclusions that it has reached based on statements made. To some extent the conclusions are reached on the basis of distrust of the Respondent and as result of supposition and conjecture. It would be inappropriate therefore to accede to the Claimant's application for an interlocutory injunction.

24 The fact that I have reached such conclusions should not be taken by either party as an indication that I have finally determined the issues in dispute between the parties. Clearly there remain substantive issues in dispute. Only when the Court is cognisant of all of the material evidence tested under cross-examination, will it be able to properly determine the matter. The evidence must be fully tested.

25 Additionally, I am of the view that, even if the circumstances were such that there was sufficient prima facie evidence to establish the application, the effect of that would be to pre-empt the trial. The Court should consider the practical impact of a grant of relief in such circumstances. In that regard I refer to the decision in ***Carlton & United (NSW) Breweries v Bond Brewing New South Wales (1987) 76 ALR 633 at 639***. The degree of likelihood that the applicant will succeed becomes a significant factor when the practical impact of the grant of the interlocutory injunction is that the litigation is effectively determining the issue and should be brought into the balance in weighing the risk that injustice may be done in deciding the application one way rather than another. It may well lead to injustice in those circumstances. In that regard I refer to the decision of ***NWL Ltd v Woods [1979] 3 All ER 614 at 626***. It is therefore desirable to evaluate the strength of the Claimant's case for final relief. Unless the case is so strong that it would be a waste of time and expense to let the action go to trial an injunction should be refused because to deprive the Respondent of a trial in general terms is an injustice (see ***Cayne v Global Natural Resources Plc [1984] 1 All ER 225 at 238***.). Effectively by determining this matter on an interlocutory basis on the terms sought by the applicant it would have the effect of pre-empting the trial.

26 Another factor to be taken into account in relation to this matter is this, that any risk that the Claimant faces in the lead up to trial in respect of this claim can be ameliorated by a claim for damages that might arise against the Respondent for any illegal conduct. Clearly the Respondent is now on notice in respect of the claim. The Claimant has recourse to its legal remedies in that regard.

27 For the reasons that I have stated, I refuse the application for interlocutory injunction.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07858

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	KERYN FRANCES FRANZ, KATHLEEN BERNICE MILLSTEED, CLAIMANTS
	v.
	R.D. MILES & CO. PTY LTD, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 8 AUGUST 2002
CLAIM NO/S	M 292 OF 2001, M 405 OF 2001
CITATION NO.	2003 WAIRC 07858

Representation	
Claimants	Ms KF Franz appeared in person
	Ms KB Millsteed appeared in person
Respondent	Mr E Rea of *Workplace Relations & Management Consultants* appeared as agent on behalf of the Respondent

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Reasons for Decision

Background

1 The Claimants, Keryn Frances Franz and Kathleen Bernice Millsteed, are registered nurses, a classification within the ***Nurses' (ANF – WA Private Hospitals and Nursing Homes) Award 1999*** (the Award). The Respondent, which traded as the Undercliffe Hospital Complex, is a named party to the Award. As at about September/October 2000 the Respondent's complex consisted of a 28-bed maternity ward, a 42-bed general ward and a 42-bed nursing home. At the material time each of the Claimants, who possess midwifery qualifications, worked on a part-time basis within the maternity section of the hospital.

2 Sometime prior to September 2000 the Respondent decided, as a result of low occupancy rates within its maternity and general wards, to close those wards. A decision was made to convert the whole complex into a state of the art aged care facility. In early September 2000 all staff were informed of the decision and the wards closed in early October 2000.

3 Keryn Franz had worked for the Respondent as a part-time midwife from 14 September 1989. Kathleen Millsteed had worked for the Respondent continuously in various capacities since 3 March 1991. Ms Millsteed had been appointed to the position of Area Manager – Maternity Level 2/4 with effect from 19 January 2000. Each claimant worked in her respective position until the wards closed. Neither Claimant ever worked in the Respondent's nursing home, except in incidental circumstances. Neither Claimant has any qualification or experience in gerontology.

4 Each Claimant was offered continued employment in the Respondent's aged care facility. Ms Franz was offered the same shifts with the same pay. Ms Millsteed was offered the position of Director of Nursing. However neither Claimant found their respective offer to be acceptable. Each rejected the Respondent's offers on various grounds. The grounds included their lack of necessary skills and experience in gerontology. They were, in their view qualified midwives, employed specifically for that purpose. They considered their job to be that of a midwife rather than a registered nurse. Also and quite significantly, each of them took the view that their respective offers of employment were not genuine. Each believed that the offers were orchestrated at achieving resignations.

5 Neither Claimant has resigned her position, however, neither of them has returned to work for the Respondent. They have not gone back to work because they believe in each instance that there is no job to go back to. Accordingly, each says that there has been a redundancy. The Respondent, on the other hand, contends that the Claimants could have been accommodated under the restructure. They were offered alternative placement without loss of award entitlements. The Respondent says that they were employed as nurses and were not supernumerary to the Respondent's nursing requirements.

The Claims

6 Ms Franz alleges that she was made redundant and is accordingly entitled, pursuant to clause 31.2.1 of the Award, to a redundancy payment comprising eight weeks pay, amounting to $4230.69. Interest is claimed thereon. She also seeks to recover costs and asks this Court to impose a penalty upon the Respondent for its breach of the Award.

7 Similarly, Ms Millsteed also alleges that she was made redundant. She too claims to be entitled to a redundancy payment comprising eight weeks pay amounting to $4369.06. Interest is claimed thereon. She also seeks to recover costs. Additionally, she seeks the imposition of a penalty.

Conduct of Cases

8 The Claimants have represented themselves at the hearing. It is quite apparent, however, that they have been assisted pre-trial by Mr Logan-Scales of the Department of Consumer and Employment Protection. Ms Franz made her claim first in time on 29 August 2001. Ms Millsteed made her claim on 11 December 2001. Although their claims are separate, many of the factual circumstances relating to their respective cases, together with the legal principles involved are identical in nature. It was for those reasons that this Court made orders on the application of the Claimants that the hearing of the matters be held together.

9 Although there has been a joint hearing of the claims, it is important to recognise that the claims are quite distinct and that the factual circumstances are not entirely identical. Indeed there are a number of factual circumstances relating to the Claimants' appointments and duties that differ. Accordingly, each claim is to be considered quite separately and distinctly notwithstanding the one hearing. It is important, therefore, that the evidence be reviewed to take account of the same.

Evidence

Keryn Frances Franz

10 Ms Franz has been a registered nurse for nineteen years and a qualified midwife for sixteen years.

11 Her involvement with the Respondent commenced when she responded to an advertisement contained in "*The West Australian*" newspaper on 9 September 1989. The Respondent had advertised for a Level 1 Registered Midwife to work on night duty (see exhibit 3). Mr Lee Miles who was the Director of Nursing at the time interviewed her. She was successful in her application and remained employed in that capacity for over eleven years. She worked approximately thirty hours per week and sometimes more if needed. Ms Franz worked on night duty as a midwife in charge of obstetrics. She has also worked in theatre. She worked at the nursing home on two separate occasions over eleven years. On each occasion she worked there for no more than half an hour at a time.

12 About two months prior to the closing of the general and maternity wards, Ms Franz became aware that the Respondent was contemplating the closure of the maternity ward. She and other staff were officially notified of the closure about six weeks prior to its closing. Ms Franz was devastated by the announcement. She had worked at the place for a long time, was happy working there and was happy to remain there until her retirement.

13 By letter from the Respondent dated 2 September 2000 (see exhibit 7) Ms Franz was offered a position within the Respondent's aged care facility. She did not accept that position. On 13 September 2000 the Respondent, through Mrs Norma Miles provided her with a reference (see exhibit 8). The reference indicated that Ms Franz chose to resign her employment. Ms Franz however was at pains to point out that she did not at any stage, either verbally or in writing, say that she was resigning.

14 On or about 9 November 2000 Ms Franz received a letter from Mercy Hospital inviting those affected by the closure to apply for positions at Mercy Hospital (see exhibit 15). Given the shortage of nurses at the time, Mercy Hospital was prepared to offer inducements to suitable applicants to attract them. Mercy Hospital offered successful applicants the opportunity to transfer part of their sick leave and long service leave credits. The offer was subject to the applicant's particular circumstances. It was not indicated that Mercy Hospital would honour all of the entitlements of the Respondent's former staff.

15 Ms Franz chose not to apply for the Mercy Hospital positions.

16 Ms Franz was aware that Gail Goodall already occupied the job that she had been offered in the nursing home. In fact, Ms Goodall remained doing that job following the restructure. That led Ms Franz to believe that the offer of employment in the nursing home was not genuine.

17 On 7 November 2000, Ms Franz met with Mrs Miles concerning a redundancy payment. She was told by Mrs Miles that she would not be paid redundancy given that Mercy Hospital had offered to her a position which would carry over entitlements.

18 When cross-examined Ms Franz explained that the job she applied for was that of a midwife and not that of a registered nurse. She denied being told at interview that she would be required to work in other areas of the complex. Ms Franz conceded that she did, in fact, from time to time work in other areas of the hospital performing the duties of a registered nurse. Particularly she worked in the acute section of the hospital. She accepted that her employment had evolved into something different to that which it was upon appointment.

19 Ms Franz maintained that she is not skilled in age care and was being offered a job not in keeping with ability and experience. Her skills are current to midwifery and operating theatre. She said (at page 22 of the transcript)—

"You wouldn't put a gerontology nurse in a midwifery unit, and it's vice versa".

20 On the issue of being offered a job that was already held by someone else, Ms Franz conceded that was probably the employer's problem.

Kathleen Millsteed

21 Ms Millsteed testified that she has been a registered nurse for thirty-one years and a registered midwife for thirty years.

22 She first started working for the Respondent or its predecessor in 1984. She left and returned later to work for the Respondent for a second stint. She has worked for the hospital for a total of fourteen years with the last stint being for nine years. She was the area manager of the maternity unit. She attained that position in January 2000. She usually worked an average of thirty to thirty-two hours per week. She too, was devastated by the announcement of closure. She had planned staying there. It was a good place to work. It was convenient. She thought, *"it was one of those places where you might end up getting long service leave".*

23 She told the Court that she had only worked in the aged care unit one night in the entire time she worked for the Respondent. She had been called to fill in one night. She said that had she known that the work was in the nursing home she would not have gone in.

24 When cross-examined, Ms Millsteed conceded that she was employed as a part-time midwife and registered nurse. She also conceded that she had been offered the position of Director of Nursing of the nursing home. She told the Court she knew nothing about gerontology or the associated paperwork. She surmised that Mrs Miles offered her the job knowing that she would refuse it. *"You don't accept a job that you know you can't do."*(Transcript page 28)

25 Further, because of the impending sale of the complex to Morant it could have possibly meant that she would have to re-apply for her position in any event.

26 Ms Millsteed was questioned about a letter she wrote to the Respondent in about August 1995. In that letter (exhibit 14) she set out her preferred area of work. It was put to her that the letter reflected her view that the employer had the right to place her anywhere within the hospital including aged care if it so wanted. She rejected that contention. Later, however, Ms Millsteed said, at page 30 of the transcript, with respect to exhibit 14—

"MR REA: … The point I'm making is that the employer had the right to put you there, and what you're expressing here is just simply a desire not to work there? --- I suppose so."

Sally Cowan

27 Ms Cowan is the Director of Nursing at Mercy Hospital, Mt Lawley.

28 She told the Court that upon finding out that the maternity, surgical and operating suites of the Undercliffe Hospital were to close, she rang Mrs Miles in order to approach the Respondent's staff to offer employment. Nurses were in short supply and the closure was seen as an avenue to attract nursing staff. She said that it was never the intention that there be a direct transfer of staff.

29 When cross-examined, Ms Cowan said that the shortage of nurses was across all fields including aged care.

Alicia Christie

30 Ms Christie is a registered nurse currently employed at Royal Perth Hospital.

31 She was Director of Nursing of the nursing home at the Undercliffe Hospital Complex from about October 1999 until about October 2000. She has worked in aged care from 1985. Ms Christie's evidence was that the nursing home within the Undercliffe complex was essentially a discreet operation. She testified that she had never been informed by management of the likely impact upon the nursing home resulting from the closure of the other hospital wards. She was not made aware that staff members from those areas were to be transferred. Indeed, Mrs Miles had advised her that all staff from the maternity wing would be offered positions at Mercy Hospital

32 Ms Christie testified of the difficult conditions under which she worked. She gave an account of how the Respondent, through its tight fisted approach, was reluctant to engage necessary staff resulting in an almost intolerable rostering situation. She said that patients were consequently under-serviced. She also complained that the Respondent had failed to provide her with the necessary administrative requirements to enable her to do her job. That, in her view, led to the loss of accreditation of the nursing home. She testified that the Respondent did not accept responsibility in that regard and ultimately made her the scapegoat for the loss of accreditation. Clearly Ms Christie and Mrs Miles have been in considerable conflict. It is important to have regard to that when evaluating their evidence.

33 Ms Christie testified that nursing home nurses Gail Goodall and Carolyn Stoffelen worked the weekly night shifts in tandem. Their shifts were permanent. Essentially her evidence was that there was no position for Ms Franz on night duty.

34 Ms Christie also testified that it would be necessary for any nurse specializing in midwifery to undertake specialist training in order to enable them to work in gerontology. She said that special training is required for dementia care and behavioural management.

35 When cross-examined, Ms Christie maintained that she had never been informed of proposed staffing changes even though it was her responsibility.

36 Under re-examination, Ms Christie said that *"the complexity of running a nursing home at any time is substantive, requires specialised training in both aged care, in nursing and clinical aspects of aged care as well as the administrative aspects".* Ms Christie was of the view that the Respondent, given its track record, would not have given the Claimants training and administrative supports. In those circumstances it would have been impossible for the Claimants to work effectively within the nursing home.

Norma Miles

37 Mrs Miles is a director of the Respondent and administrator of the Undercliffe Hospital complex. She has been a nurse since 1955. She said that the complex leading up to its restructure comprised of 72 acute/maternity beds and 42 aged care beds. The hospital, a family concern, has been in operation since 1979. It initially was a general hospital and nursing home, which has from time to time been further developed.

38 She testified that following the completion of the maternity section in 1987 the Respondent needed to employ registered general nurses with a midwifery certificate. She said that when the midwifery positions were advertised they were in fact advertised as such. It was however the policy of the Respondent at interview to explain to prospective employees that they might, if the need arose, be required to work in any other area of the hospital.

39 Mrs Miles also testified about the decision to restructure. She said in that regard that there was a need to retain registered nurses. There had been great difficulty within the industry in attracting nurses to positions particularly within aged care. She believed Ms Franz to be a very good registered nurse and she wanted her to remain working at the nursing home. Mrs Miles said that Ms Franz told her that she was unwilling to work saying that—

"… she felt it was going to be demeaning and that she would lose some of her skills that she had acquired over the years."

(Transcript page 59)

40 As to Ms Millsteed, Mrs Miles testified that she had asked her to take up the position of Director of Nursing at the nursing home. Ms Millsteed had previously been Relief Director of Nursing of the hospital, a more senior position to that of Director of Nursing at the nursing home. It was her intention to replace Ms Christie with Ms Millsteed however she declined the offer choosing to do some remote country nursing instead.

41 Mrs Miles testified that geriatric nursing is basically medical nursing. The fact that the patients are frail and aged makes nursing a little more specialised, but carers do all the hands on nursing, such as showering, dressing and so forth. The nurse's role was that of drug administrator, supervision of carers and completion of documentation. Training was offered in order to comply with the **"*Aged Care Act*".**

42 Mrs Miles also testified concerning the issue of accreditation. She took issue with Ms Christie's evidence in that regard.

43 Mrs Miles was cross-examined by both Ms Franz and Ms Millsteed.

44 When cross-examined by Ms Franz she denied that there was no position for the Claimant and explained that there was a vacancy for a night duty nurse at the nursing home. She said that it was the preference of both Ms Goodall and Carolyn Stoffelen to only work two nights a week. They were working extra hours just to help out. It had been envisaged that the incumbents would work a total of four nights between them and Ms Franz three nights.

45 When cross-examined by Ms Franz about their conversation held on 7 November 2000, Mrs Miles said that the conversation was as she had subsequently recorded it (see exhibit 17). She said her record was accurate because she knew at the time that the meeting was important and that redundancy was an issue for Ms Franz.

46 When cross-examined by Ms Millsteed, Mrs Miles conceded that midwifery is a specialised qualification.

47 The Court intervened and asked questions relating to the appointment of each of the Claimants. In that regard Mrs Miles said that Ms Millsteed was not employed because of her particular midwifery qualifications. In Ms Franz's case although she had been employed as a midwife she had been told that she was expected to work elsewhere within the complex. Mrs Miles testified of being at the interview when that was said.

48 Ms Franz further cross-examined Mrs Miles on the issues and put it to Mrs Miles that she was not even present during the interview. It was put to her that in fact, they had first met several weeks after she started work. Mrs Miles did not respond directly to that proposition. She maintained that her recollection was that she was at the interview.

49 The further cross-examination of Mrs Miles by Ms Millsteed was uneventful.

Findings

50 Many of the factual issues in this case are not in dispute. The pleadings and the evidence reflect that generally.

51 The pivotal evidentiary matters, some of which are interrelated, that remain in dispute are—

- *Whether or not Ms Franz was told during interview that she was expected, if required to do so, to work within other parts of the complex (including the nursing home).*
- *Whether Ms Millsteed, if directed, was similarly required to work in the nursing home.*
- *Whether the offer of a job in the nursing home in each instance was a genuine offer.*
- *Whether the Claimants, given their skills and experience were capable of working within aged care. This issue is really a subset of the previous issue.*

52 There are also other issues that remain in dispute but they are not critical to the outcome of the matter. Each of the pivotal evidentiary matters which remain in dispute go to the ultimate issue of whether there was a redundancy within the meaning of clause 31 of the Award.

53 I will deal firstly with the issue of whether or not the offer of a job in the nursing home was genuine. The issue, in my view, is easily resolved. Mrs Miles' evidence on point is both acceptable and clear. In relation to Ms Franz, she said that what had been proposed was that she would be added to the pool of night shift nurses working in the aged care facility. I have no reason to reject her testimony in that regard. Indeed there is no reason to reject her evidence that the other two employees were desirous of working fewer nights. Her explanation in that regard is entirely plausible. Mrs Miles' conduct towards Ms Franz was entirely consistent with each of Ms Goodall and Carolyn Stoffelen working two nights and Ms Franz working three nights. The fact that Ms Christie was not privy to the same is not surprising. It is obvious from the evidence of Mrs Miles that at the material time Ms Christie's days were numbered. There had been a breakdown in the relationship between Mrs Miles and Ms Christie to the extent that Mrs Miles planning did not include Ms Christie. Further, it is obvious that the potential appointment of Ms Franz would have increased the pool of registered nurses, which would have been useful if difficulties arose with respect to availability. Indeed, that would have gone a long way to fixing the rostering and availability problems that Ms Christie testified about.

54 Turning to consider Ms Millsteed's situation, it is apparent that Mrs Miles considered her to be the perfect candidate to replace Ms Christie. It is obvious that management considered Ms Millsteed very highly. She was clearly very skilled and capable. She had held the position of Relief Director of Nursing. She was familiar with the complex. She stood out as being the perfect candidate for the replacement of Ms Christie, whose position, on Mrs Miles evidence, was untenable.

55 It is clear that each of the Claimants surmised that their offers from the Respondents were not genuine. However, there is no evidence before me, which would enable me to positively conclude that the offers were not genuine. Indeed, as stated, the

evidence supports genuineness, not the contrary. In any event whether or not a position was in fact available, was a matter for the employer. Indeed each Claimant conceded that. Each of them had an opportunity to test the genuineness of the offer by accepting the offer but declined to do so.

56 The question that remains, of course, is whether or not, given their particular skills and training, it was realistically possible for the Claimants to have worked in the aged care area. The Claimants say that they could not have worked in aged care because they lacked the necessary skills. Ms Christie supports them in that view. Of course, Mrs Miles takes a different view. Regrettably I have not heard from any independent witnesses in that regard. I do not regard Ms Christie as independent. Given the circumstances of her relationship with the Respondent, she hardly would give an opinion that is favourable to the Respondent.

57 The evidence of Ms Cowan, and of Ms Christie herself to some extent, indicates, in my view, that although nursing, like other professions, benefits from specialisation, there are certain basic skills common to all nurses which give rise to the foundation upon which specialisation occurs. Indeed there is an element of portability of those basic skills from one area to another rendering a registered nurse capable of working in any number of specialised areas. Ms Cowan's evidence as to the areas within which she has worked is indicative of that fact. The fact that Ms Christie has left aged care to now work at Royal Perth Hospital as a registered nurse is illustrative of the point. The fact that a nurse becomes specialised in one area, of itself, does not render the nurse incapable of moving to a different field. Obviously such a move will necessarily import difficulties. There would no doubt be extra work in coming up to speed in a particular area. I accept that not everyone would be willing to put in the extra effort associated with a change. It is obvious to me that both Claimants were happy with their situations whilst working for the Respondent. They were skilled in what they were doing and obviously adept at it. In such circumstances they were in a groove dealing in what they were comfortable with. The prospect of coming out of the groove and having to learn new skills outside their areas of expertise was certainly not appealing. Although obviously not appealing, I cannot see any reason why they could not work in aged care. The rudimentary aspects of their job remained the same. I accept Mrs Miles evidence in that regard.

58 The issue of being required to work in different sections of the hospital was a matter in forethought for Ms Millsteed. I say that because exhibit 14 is illustrative of the fact. In my view, that exhibit permits a finding to be made by implication that the Respondent was at liberty to place her anywhere within the complex, including the nursing home. Indeed her own evidence dictates and, for that matter so does the evidence of Mrs Miles that when Ms Millsteed was employed, she was not employed to work solely within a particular specialised area.

59 So far as Ms Franz is concerned, it is obvious that she responded to an advertisement for a midwife. She was employed to work as a midwife and has constantly worked as a midwife. However, she has, from time to time, performed theatre work.

60 There is a contest in the evidence as to whether Ms Franz was told during interview that she was expected to work anywhere within the complex as required. Ms Franz says that she was not so informed. Mrs Miles says that she was. She says that it was policy at that time to inform interviewees of that fact and that she has a recollection of her son so doing with Ms Franz. Ms Franz's stance is that Mrs Miles was not even present during interview.

61 On this issue, I reject the evidence of Mrs Miles. I find it difficult to accept that she now has an accurate recollection of events that occurred eleven years ago. When cross-examined about having met Ms Franz for the first time several weeks after Ms Franz started, she chose not to respond (see page 73 of the transcript). In my view, that evasiveness was indicative of her lack of memory. She inappropriately purports to rely on her son's statement and notes to refresh her memory. The statement and notes are not before the Court. Their accuracy could not be tested in any event. I found her evidence going to the issue to be quite unsatisfactory. I conclude, having accepted Ms Franz's evidence in preference to that of Mrs Miles, that Ms Franz was employed as a midwife and that she was not told that she was required to work at other places within the complex as directed. That finding, however, is not determinative of whether or not there has been a redundancy.

Redundancy

62 In my view, the claim brought by Ms Millsteed for redundancy payment lacks merit. I say that because it is quite apparent that she was not employed to perform work in one specialised area, but rather was employed on the basis that she work within the complex as required. I have already addressed the issue previously. It suffices to say that in those circumstances she elected to not work within the area directed by her employer and consequently her employment relationship came to an end at her initiative. There was no redundancy in her case. She simply elected not to work in the nursing home.

63 The situation in relation to Ms Franz is somewhat different in view of my finding that she was employed as a midwife without the requirement that she work elsewhere within the complex as required. Has there in her situation been a redundancy within the meaning of clause 31.1 of the Award?

64 That clause provides—

> *"**31.1 Definition***
>
> *A redundancy occurs when an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour."*

65 Of course, the definition begs the question – What was Ms Franz's job? Was she a midwife or was she a registered nurse?

66 The evidence, which is not in dispute, reveals that Ms Franz's job evolved to one where she not only worked as a midwife but also as a theatre nurse. Each of those jobs, however, was predicated on her being a registered nurse in the first place. As previously stated nursing skills are common to all nurses, whatever field they work in. Indeed, it is those very skills that give rise to their qualification. Clearly those skills are portable and common to all areas of specialty. Accordingly, it is the case that Ms Franz was, at the material time, a nurse capable and qualified to work within gerontology although not specialised in that area. It is obvious that Ms Franz had no desire to work within the nursing home and accordingly rejected the Respondent's offer.

67 Having regard to the decision in ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Nylex*** **(C No 36960 of 1999)** a decision of the Australian Industrial Relations Commission handed down by Hingley C in Melbourne on 22 May 2001, I agree with Mr Rea's submission that the issues which need to be determined with respect to Ms Franz's claim are—

> *1. Did the Respondent make a genuine effort to provide acceptable alternative employment? and*
>
> *2. Did Ms Franz reject acceptable alternative employment?*

68 I have earlier indicated that the Respondent made a genuine effort to provide alternative employment. It is the case that Ms Franz rejected such alternative employment. Accordingly the only issue remaining is whether the particular offer was acceptable. The test in that regard is an objective one. It is not one based on whether the employment was acceptable to Ms Franz on her terms. Ms Franz rejected the terms and conditions offered but that does not axiomatically make her eligible for a

redundancy payment. That is not the notion behind redundancy payments established by the ***Termination, Change and Redundancy Case Full Bench Test Case (1984)8 IR 34***. The reasons for the making of redundancy payments was also considered and discussed in the decision of the Full Bench of the Western Australian Industrial Relations Commission in ***Rogers v Leighton Contractors Pty Ltd* 79 *WAIG 3551.*** Beech C (as he then was) said at page 3554—

> *"... It can be said that at least since the well-known termination change and redundancy case in this country ((1984) 8 IR 34 at 73; 9 IR 115), it has been recognized that the redundancy of an employee inherently involves hardship. It involves in particular financial hardship or fear of it caused by an interruption to employment, the disruption to an employee's routine and society, social contact and the competitive disability of long term employees as a result of opportunities foregone in the continuous service of an employer (**Food Preservers' Union v Wattie Pict Ltd** (1975) 172 CAR 227; **CMETSWU and others v RGC Mineral Sands** (1998) 79 WAIG 27 at 30). Therefore, the dismissal of an employee for redundancy without the payment of a redundancy payment sufficient to compensate the employee for such matters as the employee's age, length of service, seniority, period of notice, availability of alternate employment, benefits foregone and the reasons for the retrenchment, may, depending in the circumstances, be harsh upon the employee."*

69 In the present case, had Ms Franz accepted the offer she would have remained in the Respondent's employment. There would have been continuity with no loss of benefits. She would have continued to provide nursing care, albeit to a different age group. However, her rudimentary duties would have remained the same. She was qualified to carry out such duties. Specialisation would have resulted from experience on the job as well as any training offered by her employer. Her employer wanted to retain her skills. With all due respect to Ms Franz, I fail to see how the decision in ***The Federated Miscellaneous Workers Union of Australia v Anglican Homes (Inc) 70 WAIG 3937*** supports her case given the factual matrix of this case.

70 I find therefore that it could not be said on an objective view that the job offered by the Respondent to Ms Franz was not acceptable. It may well not have been the job Ms Franz preferred but it could hardly be said to be unacceptable. Accordingly, there was no redundancy. The termination of the employment relationship came about at the initiative of Ms Franz.

Conclusion

71 Ms Franz and Ms Millsteed have failed in each instance to make out their respective claims.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07859

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	JAG GILL, CLAIMANT
	v.
	COMMISSIONER OF HEALTH, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	FRIDAY, 20 DECEMBER 2002
CLAIM NO/S	M 26 OF 2002
CITATION NO.	2003 WAIRC 07859

Representation	
Claimant	Mr R Hooker of counsel
Respondent	Mr F Furey as agent

Reasons for Decision

Background

1 Dr Jag Gill was at all material times a medical practitioner employed by the Respondent in the position of either acting or substantive Director, Disease Control within the Health Department of Western Australia. Dr Gill had worked for the Respondent in its various guises since 1976. During the period of his employment with the Respondent, Dr Gill worked in the public health field with special emphasis and training in communicable diseases, their control, as well as tropical medicine. He also acquired extensive training and experience in management and administration. Dr Gill ceased to be employed by the Respondent on 29 June 2001. His employment ceased upon his acceptance of a redundancy offer made to employees of the Respondent.

2 The terms and conditions of Dr Gill's employment was, until 1998, governed by various oral and written agreements, the ***Public Service Award 1992*** and the ***Public Sector Management Act of 1994***. In the latter part of 1998, Dr Gill agreed to be added as a party to the ***AMA Medical Practitioners Collective Workplace Agreement*** (the 1998 Workplace Agreement), which expired in 1999. That agreement was followed by another Workplace Agreement also entitled the ***AMA Medical Practitioners Collective Workplace Agreement*** (the 1999 Workplace Agreement).

3 It is Dr Gill's case that on or about 5 February1992, he was orally directed by the then Acting Commissioner of Health, Dr Peter Brennan—

> *"to remain contactable outside normal work hours and to be available, in a fit state, at such times for recall to duty."*

4 On 10 December 1993, Dr Gill received a memorandum (exhibit 6), from Andrew Penman the then General Manager, Public Health Services, concerning out of hours contact. In his letter Mr Penman said inter alia—

> *"Arrangements have been made to pay you an availability allowance in accordance with the Public Service Award 1992.*
>
> *The allowance recognises the requirement for you to remain contactable outside normal work hours of duty and to be available, in a fit state, at such times for recall to duty.*
>
> *The period for which you are expected to be contactable will be after hours on working days, on weekends and public holidays.*
>
> *The allowance will be backdated to the commencement date of your acting period in the position – 5 February 1992 but exclude any periods of annual leave taken. ..."*

5 In about late January 1997, Dr Gill received a letter from the Manager, Human Resource Services of the Respondent informing him that he had been overpaid his availability allowance totalling $17,660.40 calculated from the pay period ending 12 January 1995 up to and including the pay period ending 9 January 1997. Between June 1997 and February 1998 Dr Gill made payments to the Respondent that were accepted in full satisfaction of the debt.

6 On 17 August 1998, the then General Manager of Public Health, namely Prudence Ford, wrote a memorandum to Dr Gill (exhibit 10) in which she stated inter alia—

> *"As you are aware the Department's offer to hold open the opportunity for senior medical practitioners to join the Workplace Agreement (SPA) (sic) with backdating to 23 September 1996 further discussions lapsed on 31 May 1997(sic). However you were provided with advice, in error, in September 1997 to the effect that the offer was still open. In the light of that and as an act of good faith, the Department has agreed to backdate the provisions of the WPA to 23 September 1996. Recognition of your qualifications and years of experience result in your translation to Level 22 of the Agreement.*
>
> *In order to access the AMA WPA, you were required to relinquish your SES position. This has now been done and the position of Director, Disease Control (Position No HE 500457) was removed from the SES with effect from 20 May 1998. As a consequence you are no longer entitled to a privately plated vehicle under the Executive Vehicle Scheme. In view of the requirement to be on call and that you indicated to me that you were recalled almost every weekend, I am prepared to offer you the use of a government-plated vehicle for official business and for journeys between the office and your place of residence and home garaging. The vehicle would not be available for private mileage. This change could occur either by changing the plates on the vehicle you currently use or providing you with another government plated vehicle and returning your existing vehicle to the pool. Please advice Beren Clarke (9222 4329) of your decision so that he can assist with arrangements.*
>
> *We also discussed the availability allowance which you are currently receiving which recognises the requirement for you to remain contactable outside normal hours of duty and be available, in a fit state, at such times for recall to duty. The allowance is $8,880 per annum. The AMA WPA does not make express provision for such an allowance. However it does provide flexibility for other arrangements to be mutually agreed. I therefore suggest that we agree to an arrangement whereby the Department continues to pay an availability allowance of $8,880 per annum under the same conditions as currently apply."*

7 On 19 August 1998, Dr Gill responded to the General Manager, Public Health by memorandum (exhibit 11), stating inter alia—

> *"I am prepared to accept all the conditions that you have specified …"*

8 Clause 3.7(1)(b) of the 1998 Workplace Agreement (See exhibit 14) provided inter alia—

> *"A medical practitioner employed at or above salary point 13 as detailed in Schedule C, rostered on call shall be paid an hourly allowance equal to $7.81. …"*

9 Relevantly, clause 3.7(1)(c) of that agreement provided—

> *"For the purposes of this Agreement a medical practitioner is on call when the medical practitioner is directed by the Employer to remain readily contactable and available to return to work outside of the medical practitioner's normal hours of duty."*

10 Clause 30.1.c.(ii) of the 1999 Workplace Agreement in relation to on call allowance was in the same material terms as clause 3.7(1)(b) of the 1998 Workplace Agreement save for the applicable hourly on call allowance being $8.08 from 1 July 1999 to 31 December 1999 and $8.37 on and after 1 January 2000.

11 Clause 30.1.a of the 1999 Workplace Agreement provides the definition of "on call" which in all material respects is the same as that contained in clause 3.7(1)(c) of the 1998 Workplace Agreement. The only variation being the classification "medical practitioner" within the definition was replaced by the generic term "employee".

12 Both the 1998 and 1999 Workplace Agreements permitted further agreement for the annualisation of "on call" payments to be paid fortnightly. It is common ground that no such agreement was reached between the parties.

Issues

13 The Claimant contends that from 23 September 1998 until 30 April 2001 he, pursuant to the requirements of the Respondent which had been operative since 5 February 1992, remained contactable outside normal hours of duty and was available, in a fit state, for recall to duties. In consequence, the Claimant claims that he was on call 130.5 hours each week during the material period for which he was not paid in breach of the said Workplace Agreements. The Claimant accordingly seeks to recover $108,099.58 comprised as follows—

• Amount payable 23 September 1998 to 30 June 1999 @ $7.81	$39,749.00
Less paid (39 weeks)	6,660.00
Less 3 weeks pro-rata annual leave	3,057.62
Arrears	**$30,031.38**
• Amount payable 1 July 1999 to 31 December 1999@ $8.08	$27,415.44
Less paid (26 weeks)	4,440.00
Less 2 weeks annual leave	2,108.88
Arrears	**$20,866.56**
• Amount payable 1 November 2000 to 30 April 2001 @ $8.37	$74,275.38
Less paid (68 weeks)	11,612.31
Less 5 weeks pro-rata annual leave	5,461.43
Arrears	**$57,201.64**
• Total	**$108,099.58**

14 The Respondent does not admit Dr Gill's contention that he was contactable and available, in a fit state, for recall to duty for 130.5 hours each week and puts him to the proof in that regard.

15 The Respondent also argues that this Court lacks jurisdiction to deal with that part of Dr Gill's claim that pre-dates 2 November 1998 because the Respondent takes the view that the 1998 Workplace Agreement did not commence to have effect until 2 November 1998. Further, the Respondent contends that the 1999 Workplace Agreement only became effective on 9 September 1999 when the Commissioner for Health signed that agreement.

16 Another basis for the denial of the claim rests upon the fact that Dr Gill was paid, on account of his after-hours responsibilities, a salary in excess of that which would normally be paid to a practitioner of Dr Gill's standing. The greater salary was only paid in recognition of Dr Gill's after-hours responsibilities, a fact on the Respondent's view, well known to Dr Gill. The Respondent contends that Dr Gill had a good understanding of the Workplace Agreements and that he therefore knew that there was no provision for the payment of an availability allowance. The Respondent consequently argues that in the event of the Claimant being successful, any order for payment against the Respondent ought to be "offset" by the additional salary, in fact, paid to Dr Gill.

17 In bringing this claim, Dr Gill asserts that he has complied with the provisions of clause 49 of the 1999 Workplace Agreement but has been unsuccessful in his attempts to resolve the issues in dispute. He has accordingly certified his compliance with section 54 of the ***Workplace Agreements Act 1993*** (the Act). The Respondent, on the other hand, argues that the Claimant has failed to comply with the provisions of section 49(3) of the 1999 Workplace Agreement in that he has failed, inter alia, to have his claim arbitrated. Consequently he has not properly given the certificate, which results in this Court being devoid of the ability to make orders pursuant to section 57 of the Act.

Evidence

18 The Claimant's case is founded upon his own testimony and that of his wife, namely Faye Gill. The Respondent called one witness, namely Dr Anthony John Watson.

19 I will briefly review the evidence given by each of the witnesses.

Dr Jag Gill

20 Dr Gill obtained his qualifications in medicine in Singapore in 1964 and subsequently worked in Malaysia prior to moving to Western Australia in 1976. Between 1964 and 1974 Dr Gill obtained several postgraduate qualifications. Following his arrival in Australia he has worked for the Respondent in various guises. His initial appointment was that of regional medical officer for the Pilbara region based in Port Hedland. In 1980 Dr Gill transferred to Perth and was promoted to varying positions. In 1988 Dr Gill became responsible for communicable disease control in Western Australia and was designated Co-ordinator, Communicable Disease Control that was subsequently titled Principal Medical Officer, Disease Control. He became Acting Director of Disease Control on 3 February 1992 until 20 October 1994 when he became substantive Director. He held that position until November 1998 at which time he became Director, Communicable Disease Branch, a position that he held until June of 2001.

21 From about 1985 onward, Dr Gill assumed statewide control of tuberculosis and other communicable diseases. In 1990 he became responsible for the development and co-ordination of communicable disease control programs and outbreaks of diseases including policy formulation, surveillance, consultancy and evaluation. He was responsible for the administration of the Perth Chest Clinic and Central Immunisation Clinic. He also provided consultant clinical services in leprosy at Queen Elizabeth II Medical Centre. In 1992, Dr Gill became responsible for the management, policy development, planning co-ordination, implementation and evaluation of statewide disease control programs. From 1998 onward, Dr Gill assumed additional responsibilities including co-ordination, contact management, and supply of vaccines and evaluation of programs. He also carried out functions as the Chief Quarantine Officer and was a member of State and National expert committees.

22 During the period of his employment with the respondent Dr Gill gained further qualifications. In 1983 Dr Gill became a Fellow of the Royal Australian College of Medical Administrators (FRACMA) and in 1990 he became a Fellow of the Australasian Faculty of Public Health Medicine (FAFPHM).

23 By virtue of the responsibilities he had in various areas of quarantine and disease control, Dr Gill was expected to be in a position to deal urgently with any issue that might arise either during normal or indeed after-hours. Dr Gill testified that in 1992, Dr Peter Brennan, the then Commissioner of Health, expressly affirmed that to him. Dr Gill's statement was made in the context of HIV Aids outbreaks then being of major community concern. However his instruction did not just relate to HIV Aids, but also to all other outbreaks of communicable diseases such as influenza. Indeed on 10 February 1993, Andrew Penman, the then General Manager of Health Services, re-affirmed in writing (exhibit 6) the requirement that Dr Gill had been given by Dr Brennan that he be contactable out of hours and that he be available, in a fit state, for recall to duty.

24 Dr Gill testified that in consequence of the direction given he thereafter always remained contactable and in a fit state for recall to duty. He was contactable either via his home phone, by mobile phone or by pager. That necessitated him not travelling too far from Perth. Further his personal and family life was subject to disruption on account of his obligation to remain contactable and in a fit state. He regarded himself as contactable 24 hours per day, 7 days per week except for when he was on holidays or was attending a conference. However, even then he remained contactable and was in fact often contacted for advice or direction even whilst absent from the State. In that regard Dr Gill testified that up until mid 1998 he regularly attended conferences or meetings outside Western Australia. The frequency of the same was about twice a month and was in each instance usually completed within a day. The frequency of Dr Gill's attendances at such conferences reduced to about one per month by about mid 1998. However, he continued to attend other quarterly meetings. Dr Gill also testified that he remained contactable and indeed was contacted whilst on sick leave.

25 It is quite apparent from Dr Gill's testimony that contact made with him out of hours related solely to matters falling within his responsibilities. By way of example, he was contacted in cases of meningococcal manifestation. In such cases immediate steps were required to be taken to ascertain who had come into contact with the infected person. That included obtaining and administering appropriate antibiotics for prophylaxis and advising those exposed as to what they should do. Often that required Dr Gill physically attending households to achieve that end. He would also necessarily liaise with the medical practitioners of those persons affected. Other instances requiring his involvement included reports of the possible manifestation of viral haemorrhagic fever. In such circumstances he would co-ordinate the response of emergency doctors, clinical pathologists, virologists and all other necessary medical professionals. He was also responsible for opening the quarantine ward at Sir Charles Gairdner Hospital and ensuring that the same was appropriately staffed and functioning.

26 Dr Gill was also contacted after-hours for the purpose of giving advice to quarantine officers at Perth International Airport on issues concerning medical difficulties encountered with incoming or transit passengers. Further, up and until 1993 he was solely responsible for dealing with and answering out of hour's media enquiries with respect to infectious diseases and immunization.

27 The examples cited above are a few of those given by Dr Gill within his testimony relating to the nature of his duties and after-hours obligations.

28 Dr Gill also explained the history of his relationship with the Respondent and, in particular, his move from award based conditions of employment to those governed by Workplace Agreements. In doing so he referred to various documents that were exhibited. Those documents speak for themselves and I do not, at this stage, intend to recite them except to say that it is readily apparent from the 1998 Workplace Agreement that the same bound the parties upon completion of the transfer agreement on 2 November 1998 (see exhibit 12). Indeed it is quite apparent from Prudence Ford's letter that the same concluded the negotiations between the parties, which had been ongoing during the course of August 1998.

29 Dr Gill testified that in about late 1998 or early 1999 he first became aware that the 1998 and 1999 Workplace Agreement dealt with the issue of on call allowance. That occurred as a result of his attempt to have other medical officers assist him so that he could have respite from the after-hours contacts. When he raised the issue of assistance with the medical officers concerned within his section he found that they were only willing to assist if they were paid an "on call" allowance as per the Workplace Agreement. In reply Dr Gill told them that they were mistaken in their view as to the availability of an "on call allowance". One of the officers then took him specifically to the relevant provision in relation thereto. It was only then that Dr Gill came to the realisation of his entitlements in that regard.

30 Dr Gill testified that the whole issue of "on call" was subsequently raised on numerous occasions with Rowan Davidson, the then Acting General Manager, and later with his successor Paul Stephenson. He said that the issue of being available after-hours became more pressing following the findings made at a coronial inquiry relating to the death of a person from meningococcal disease.

31 In May 2001 agreement was reached that the medical officers in Dr Gill's section, including Dr Gill, would be rostered to attend after-hours duties and would be paid in accordance with the Workplace Agreement.

32 Relatively soon thereafter, Dr Gill decided to accept a voluntary redundancy with effect on 29 June 2001. At that time Dr Gill made it known to Mr Boylan, who executed the Deed of Severance on behalf of the Respondent, that he intended to pursue his claim concerning on call allowance. The Deed of Severance (exhibit 5) did not purport to extinguish Dr Gill's rights with respect to the underpayment of wages, salaries or other entitlements. In fact, the Deed expressly preserved those rights.

33 In furtherance of his claim, Dr Gill, on 2 July 2001, wrote to Professor Bryant Stokes, the then Acting Commissioner of Health (see exhibit 18). He asked Professor Stokes to approve the payment of arrears owing with respect to the non-payment of "on call" allowance. Professor Bryant Stokes endorsed Dr Gill's letter by writing the word "approved" and dating the same 4 July 2001. Notwithstanding that, Professor Stokes' approval was never communicated to Dr Gill. It appears that departmental intervention resulted in Dr Stokes' approval not being implemented. On 7 September 2001, Dr Gill again wrote to Professor Stokes concerning the issue (exhibit 19). He informed Professor Stokes that if the matter could not be resolved to Dr Gill's satisfaction, action would be taken for the recovery of the arrears of on call allowance. It suffices to say that the parties did not reach agreement on the issue and Dr Gill subsequently issued proceedings.

34 Dr Gill was cross-examined on several issues including whether he was available during travel to and from national conferences or meetings and whilst attending the same. In that regard Dr Gill maintained that he always remained contactable at all times other than when on flights. When contacted in those circumstances he would direct what was to be done and delegate responsibilities. If necessary he would communicate directly with doctors. Accordingly, even whilst interstate he continued to remain contactable and was able, with the assistance of officers in Perth, to attend to his obligations. Dr Gill was asked about his attendances at overseas conferences. He conceded in that regard that during the course of 1998 and 2000 he in fact did attend overseas conferences in which case his on call obligations were delegated to the senior medical officer within his section. That did not prove to be entirely successful because upon return he discovered some of the arrangements and expectations concerning after-hours contact had not been strictly adhered to.

35 Dr Gill was challenged concerning his testimony as to the rather onerous functions, such as community contact and the arrangement and delivery of prophylaxis said to have been carried out by him. In that regard it was put to him that those functions were, in many instances, not in fact carried out by him but rather carried out by his subordinates. Dr Gill rejected that contention.

36 Dr Gill was also questioned about the reasons as to why he had failed to make a claim for "on call" payments during the currency of his employment. In response he said that he was not confident that if he made a claim that he would get a fair hearing within the department particularly given the conflict between himself and Mr John Kirwan, one of the senior managers.

37 When questioned about the frequency of after-hours contact, Dr Gill told the Court that he had received about 70 calls during the year 2000. He conceded also that the reporting of possible viral haemorrhagic fever was infrequent, occurring about once a year. He went on to say, however, that other acute conditions such as meningococcal disease, measles, and whooping cough together with reports of food poisoning took up the bulk of his time after hours. Dr Gill explained that in some instances his involvement with the particular reports was inevitably lengthy and involved. By way of example, Dr Gill cited his handling of the report of a suspected Ebola virus sufferer on an incoming Qantas international flight. That example highlighted the importance and extent of Dr Gill's involvement.

38 Dr Gill was questioned as to why his salary was paid pursuant to *"Arrangement A"* within the Workplace Agreement. *"Arrangement A"* provided a higher level of income compared to those doctors who were subject to *"Arrangement B"*. Doctors paid under *"Arrangement A"* were entitled to practice privately but any income derived from the same was payable to the Commissioner for Health. Those on *"Arrangement B"* could work privately and retain the proceeds of such private work. It was put to Dr Gill that, given that he did not conduct a private practice, the only reason why he was paid a higher rate on *"Arrangement A"* was in recognition of his after-hours responsibilities. Dr Gill rejected that contention. He said that there were numerous matters considered by the Commissioner of Health that caused the Commissioner to agree to him being paid in accordance with *"Arrangement A*". Dr Gill agreed that in negotiating with the Respondent he made the point that he was unable to earn private practice income because of the fact that he was contactable after hours and such was an impost on his capacity to earn a supplementary income.

39 Dr Gill was cross-examined also concerning his contention that he remained on call whilst on sick leave. He testified that whilst technically he might not be considered to be "on call" whilst on sick leave, the fact of the matter was that he continued to remain "on call". He said that most of the sick leave taken by him related to a chronic back problem. In those circumstances his mind remained active and therefore had the capacity to respond to calls made to him. He went on to explain that notwithstanding being on sick leave he would often be in at his office attending to the large volume of work that he had to handle. It was suggested to Dr Gill that on occasions when he was absent by reason of sick leave or other reasons this workload was transferred to his subordinates. That contention was rejected.

40 Dr Gill was unshaken during the course of cross-examination.

Mrs Faye Gill

41 The Claimant's wife, Faye Gill testified in these proceedings. She corroborated her husband's evidence concerning the amount of after-hours contact he had and the impact of that and the requirement that he be on call had upon him and their family. She gave specific examples of after-hours circumstances and the nature of duties carried out by her husband at those times.

42 Mrs Gill was not cross-examined and accordingly her evidence remains unchallenged.

Dr Anthony John Watson

43 The Respondent called Dr Anthony John Watson. Dr Watson graduated from the University of Western Australia in medicine in 1983. Dr Watson initially worked as an intern and resident at Sir Charles Gairdner Hospital. He subsequently worked as a locum and general practitioner. He left Western Australia in 1990 to gain a Master of Applied Epidemiology. He worked with the Tasmanian Public Health Branch until 1995 at which time he returned to Western Australia to take up a position as Senior Medical Officer with the Immunisation Clinic, which is part of the Communicable Disease Control Branch of the Health Department. In 1997 he moved into a Medical Officer's position as co-ordinator with the Communicable Disease Control Branch. He has been in that position ever since. Dr Gill has been Dr Watson's supervisor.

44 Dr Watson testified that from about May 2001 until Dr Gill's retirement he was involved in a three-person rotating roster, which involved Dr Gill, Dr Gary Dowse and himself. Dr Dowse and Dr Watson have shared the roster following Dr Gill's departure.

45 Dr Watson testified that whilst "on call" he is expected to be available 24 hours per day.

46 The after-hours notifications usually involve suspected cases of meningococcal disease. In such cases the on call duty officer, if he considers it appropriate, will page the doctor. The doctor will then return the call. At that stage the doctor is given preliminary information concerning the matter. He is also usually given contact details of the treating doctor so that the matter can be discussed. In such circumstances it may be necessary to respond to media enquiries relating to the case. That usually occurs where the case involves meningococcal disease. Further it may be necessary to respond to members of the public who have been exposed to meningococcal disease.

47 Dr Watson estimated that he would receive on average about four calls per week. The notifications usually do not require immediate follow up. Any follow up actions can usually be delegated to other staff members such as community nurses. Dr Watson conceded, however, that calls received between Friday night and Sunday morning required a lot more time and work. They usually involved communicating with doctors, visits to the hospital and contacting households in order to arrange for antibiotic prophylaxis for high risk contacts.

48 He testified that he would very occasionally receive quarantine queries from airport staff concerning a sick traveller. Most queries related to passengers from Africa who displayed symptoms consistent with viral haemorrhagic fever.

49 Dr Watson told the Court that the amount of times he was woken from his sleep to answer queries was infrequent. He estimated that such circumstance occurred less than five times a year.

50 He testified that prior to the roster being introduced, Dr Gill would, on weekends, contact either Dr Dowse or himself in order to delegate duties which included following up contacts and arranging antibiotic prophylaxis in cases of meningococcal disease notifications. Dr Watson took the view that such imposts on his time were part of the job akin to the expectation to attend after-hours meetings and further education courses.

51 Dr Watson also commented on the impact that being on call had upon his out of hour's time. He said that he had to necessarily restrict his travel so that he remained within the metropolitan area. He also had to restrict his consumption of alcohol. His pager had to be close at hand twenty-four hours a day.

52 He went on to describe the necessary functions he had to undertake when notified of a meningococcal disease case. He also described the nature of his duties when dealing with the notification of a probable case of viral haemorrhagic fever such as Ebola. The evidence he gave in that regard corroborated that of Dr Gill.

53 Dr Watson testified that he was surprised to discover that Dr Gill was paid an allowance for his after-hours work. It was only when that was discovered that he took a differing attitude about his own availability and accessibility after hours.

54 When cross-examined, Dr Watson confirmed that leading up to the establishment of the rostering arrangement which came into effect in about mid May 2001 Dr Gill was always the first port of call after hours.

55 Dr Watson conceded under cross-examination that, other than the requirement to comply with the rostering arrangements, he had not received any directive from management that he was to remain contactable and available to return to work outside of normal working hours. He said that upon the introduction of the roster he concluded, by implication, that during that period of the roster that he was on call, and was to remain contactable and available to return to work in the same way as Dr Gill had been.

Submissions

56 I will deal with the Respondent's submissions followed by the Claimant's submissions.

The Respondent

57 The Respondent accepts that a certificate has been given in accordance with section 54 of the Act but says that the certificate has not been correctly given. It is submitted therefore that this Court lacks the jurisdiction to make an order under section 57 of that Act.

58 The Respondent argues that this matter is and has always been capable of resolution in accordance with the dispute settling procedures set out in clause 49 of the 1999 Workplace Agreement and says that the Claimant did not, prior to instituting these proceedings, exhaust all of the processes available under that clause including the relevant private arbitration provision found in clause 49(3) of the agreement. Further, the Respondent argues that given that the agreement is a collective Workplace Agreement the Respondent should be allowed to involve the Australian Medical Association as a third party to the agreement particularly in view of the potential impact of his claim on other employees. It is argued that private arbitration could appropriately consider issues such as set-off and the delay in prosecution

59 Moving to the "on call" provisions within the agreement, the Respondent submits that when considering the same, it is not appropriate to simply determine whether or not the Claimant was contactable and available to return to work. The Respondent argues that the essential elements to be proved are—

1. The Claimant had to be rostered;

2. That the rostering had to be in accordance with medical need; and

3. That he had to be rostered by the Medical Superintendent or appointed Senior Medical Practitioner in consultation with the Head of Department or where there is no Head of Department with the Chairman of the Medical Advisory Committee (see clause 3.7(1)(a) of the 1998 Workplace Agreement).

60 In regard to the third element the Respondent contends that neither Prudence Ford, who directed Dr Gill to be available (see exhibit 12) nor Andrew Penman, who had given the direction on 10 December 1993, fall within the class of persons who pursuant to clause 3.7(1)(a) of the 1998 Workplace Agreement were able to make the requirement that he be on call roster.

61 With respect to the second element the Respondent argues that for on call entitlements to arise under the 1998 or 1999 Workplace Agreements the officer concerned must be rostered in accordance with clinical need and in any event by the Medical Superintendent or appointed Senior Medical Practitioner in consultation with the head of department or, where there is no head of department, with the Chairman of the Medical Advisory Committee. It is submitted therefore that given that neither Prudence Ford nor Andrew Penman were medical practitioners they were incapable of rostering Dr Gill. Accordingly, the Respondent maintains that Dr Gill was not rostered.

62 The central submission is that Dr Gill was not rostered to be on call until May 2001. The Respondent maintains that the written and verbal directions relied upon by Dr Gill in his claim were not rosters, nor could it be said that such directions given come within the operative terms of both Workplace Agreements. In any event, the instructions were given prior to the 1998 Workplace Agreement coming into effect.

63 Further, the Respondent contends that the dates of operation of the Workplace Agreements are not as alleged by the Claimant but rather operate between 2 November 1998 and 8 September 1999 and between 9 September 1999 and 29 June 2001 respectively.

64 Another ground raised by the Respondent is that of "set-off", sometimes referred to as "offset" by Mr Furey for the Respondent. The Respondent argues that Dr Gill was paid a higher than normal salary to take into account his out of hours work. Accordingly if it is found that he has an entitlement to "on call allowances" then the additional salary paid to him should offset such entitlements. Dr Gill cannot have it both ways. The Respondent suggests that the Claimant's conduct in achieving a higher income on account of his on call responsibilities does not sit with the claim on foot. As I understand it, the Respondent argues that Dr Gill has orchestrated events so as to cause detriment to the Respondent.

65 On the issue of whether or not Dr Gill was in fact contactable and in a fit state to return to work, the Respondent points out that the evidence dictates that Dr Gill was entirely non-contactable whilst on flights interstate or overseas. Further, it is submitted, that there was no way he could ever return to duties whilst interstate or overseas. In those circumstances other doctors addressed the out of hour's needs of the Respondent.

66 Additionally and finally, the Respondent contends that the Claimant has not, on the strength of his evidence and that of his wife, been able to establish on the balance of probabilities that he was contactable and available to return to duty during the period of the claim. The Respondent contends that the blanket assertions made by the Dr Gill that he was contactable and available for return to duty at all times during the period of claim is insufficient. The Respondent contends that Dr Gill should have provided details of his location, travel, personal expenditure (including bank statements), and fitness for duty (including the consumption of alcohol or any other substance or medication which may have impaired fitness) for each week within the period claimed. The Respondent suggests that the evidence of Dr Gill was tested in cross-examination and found wanting and further that the evidence of Mrs Gill ought to be given little weight.

67 In conclusion the Respondent submits that this is not a claim of an employee who has been deceived or shortchanged by his employer but rather it *"is a claim supported by self serving evidence and convenient inattention to detail by a very senior medical practitioner who otherwise prides himself on his professionalism"*. The Respondent says that there is an absence of any evidence that Dr Gill was on call for 6200 hours a year. Further Dr Gill was substantially compensated for his out of hours contact by the continuing payment of an availability allowance and in particular the sixteen percent salary premium achieved in negotiations.

The Claimant

68 The Claimant submits that its claim is a simple one. The elements of the claim are—

(a) The existence of an applicable direction given to Dr Gill on his former employer's behalf;

(b) Such a direction satisfied clauses 3.7 and 30 of the 1998 and 1999 Workplace Agreements respectively; and

(c) Dr Gill complied with those conditions.

69 The Claimant contends that the matters raised by the Respondent consist of *"false issues, irrelevancies and red herrings"* that depart from the text of the applicable provisions of the Workplace Agreements. The Claimant also points out that the Respondent asserts the jurisdiction of this Court in dealing with a set-off when in fact no such jurisdiction exists.

70 As to the jurisdictional issue of whether or not the section 54 certificate was properly given, Dr Gill says that there is ample evidence to support a finding that he attempted, so far as was possible, to resolve the dispute. It is said that section 54(2) of the Act is not intended to impose any kind of unrealistic, technical or inordinately time consuming requirement on a party who seeks relief. That is all that is required for proper compliance with clause 49 and accordingly the legitimate certification under section 54. The Claimant says that the Court should not go behind the certificate and analyse the machinations of any attempted compliance with the dispute resolution procedure. The Court ought to be satisfied with the certificate given.

71 Dr Gill argues that the applicable provisions of each of the Workplace Agreements are clear in their terms and do not admit ambiguity. The relevant provisions in each instance are effective in accordance with their respective terms. Further, section 6(2) of the Act makes it clear that no award provisions can be implied into or in any way read as part of a Workplace Agreement.

72 It is submitted that since late 1993 Dr Gill was under a requirement to remain contactable outside of normal work hours of duty and to be available in a fit state at such times for recall to duty. The memorandum to him by Mr Penman dated 10 December 1993 evidences that such was the case (see exhibit 6). The fact that the requirement was viewed against an availability allowance does not derogate from the fact that such a requirement, synonymous with a direction, was in fact made.

73 In dealing with the issue of whether the direction satisfied the definitions in the applicable provisions, it is submitted on Dr Gill's behalf that it is self evident that until May 2001 there was a single unwritten roster and that Dr Gill was the sole person on the roster. It is said that the Respondent's arguments concerning the need for a written roster is misconceived because—

(a) It requires the concept of "roster" in those provisions to be constructed with the implied qualification "written roster";

(b) It sits at odds with the overwhelming weight of evidence which establishes that until May 2001 Dr Gill was the only medical employee of the Respondent subject to a direction to remain contactable outside orthodox working hours; and

(c) It side steps the obvious intent of the provisions to compensate those who have, in meeting the need of the employer, received an applicable direction and complied with it.

74 With respect to the Respondent's submission relating to clause 3.7(1)(a) of the 1998 Workplace Agreement it is submitted that the same simply facilitates rostering. It cannot be construed as a necessary element of a claim for or entitlement to an "on call" allowance. In that regard the Claimant says—

(a) The apparent primary purpose and policy of the relevant clauses is to create an entitlement for medical practitioners who make themselves available pursuant to a direction. It is merely peripheral to provide specific clauses going to the way in which the employer may go about rostering people who are on call.

(b) The language of clause 3.7(1)(a) of the 1998 Workplace Agreement and, to a lesser extent, clause 30.1.b of the 1999 Workplace Agreement simply facilitates the internal management of the Respondent.

(c) The Workplace Agreements themselves are generally concerned with aspects of the work duties and remuneration of medical practitioners. They provide for the terms and conditions of employment.

(d) In the circumstances it would be patently unfair for a doctor, in any given situation, who has complied with a direction to be on call, to be denied his or her lawful entitlements because an "i" was not dotted or a "t" crossed in the consultative process.

75 The Claimant says that the Respondent's contention that having regard for the fact that the direction given to Dr Gill was given prior to the Workplace Agreements coming into force renders the same inoperative is without foundation. It is submitted that the requirement was operative at the commencement of the 1998 Workplace Agreement and remained operative, both legally and functionally.

76 Moving to the question of whether Dr Gill complied with the direction, it is argued that the evidence of Dr Gill and the unchallenged corroborative evidence of Mrs Gill establish the fact of compliance.

77 It is contended on behalf of Dr Gill that if the Court were to find, by reason of absence, an incapacity to comply with the direction, then it remains the evidentiary burden of the Respondent to demonstrate, with clarity, the extent of any absences or incapacity which caused Dr Gill to be in a state of non-compliance with the direction or, alternatively, the Court should adopt a discounting factor to achieve a sensible result in the light of the evidence. Such discount, on the Claimant's view, should be a single figure percentage.

78 Further, it is submitted that the engagement of Dr Gill under "Arrangement A" is a false issue and of no significance as to the satisfaction of the applicable definition and compliance required.

79 The Claimant maintains also that Dr Gill's levels of knowledge and understanding do not bear on the elements of the causes of action. That satisfaction gives rise to a liability in the nature of a debt irrespective of Dr Gill's mental state and/or degree of diligence in pursuing his entitlements. There is no residual discretion in the Court, unlike the Western Australian Industrial Relations Commission which, pursuant to section 26(1)(a) of the ***Industrial Relations Act 1979*** is required to—

"… act according to equity, good conscience, and the substantial merits of the case without regard to technicalities and legal forms;"

80 With respect to the issue of certification pursuant to section 54(2) of the ***Workplace Agreements Act 1993*** the Claimant submits that the same is not intended to impose any kind of unrealistic, technical or inordinately time consuming requirement on a party who seeks relief. Once the certificate is given the Court should not go behind it.

Evaluation of Witnesses

81 The Respondent, in submissions, asks that I not accept the testimony of Dr Gill. It is said that he was found wanting when subjected to cross-examination. Further, it is submitted that his evidence concerning being contactable and available to return to duty during the relevant period is insufficient for the purposes of establishing his case. I reject those submissions. I found Dr Gill to be an extremely impressive witness upon whose testimony I could rely. I have had no hesitation in accepting his evidence. His credibility was not impugned in any way. I did not form the view that he was found wanting when subjected to cross-examination. In any event, his evidence remains generally unchallenged. It was suggested by the Respondent that it is inconceivable that a person of Dr Gill's professionalism, who is meticulous in his conduct would remain unaware of the relevant provisions in the Workplace Agreements as he suggested. There can be no doubt that Dr Gill is an intelligent and articulate person who acts with precision and meticulousness. Having said that, however, even the best-credentialed people do not always appreciate the effect of legal documents. Often it is only when the meaning of a particular provision is pointed out by a legal professional, or some other person, that the proper meaning of the provision is understood. I accept that Dr Gill did not appreciate the legal effect of the relevant provisions until very late in his employment. By the time that he realised he had an entitlement his relationship with the Department was so poor that he decided not to pursue his claim until after his termination on the grounds of redundancy. It is inferred that Dr Gill was fearful of repercussions that might flow if he pressed the issue.

82 I have no hesitation in finding that he remained on call at all times. It was not necessary for him to provide full details of his location, travel, personal expenditure and fitness for duty for each week within the pay period as the Respondent suggests. In my view, that approach would create a very difficult, if not impossible, evidentiary burden. That extremely onerous process is unwarranted. The evidence given by Dr Gill in the form it was given satisfies the evidentiary burden that he carried. It suffices to say that Dr Gill's evidence enables me to find that he remained contactable and in a fit state to return to work at all times except when outside of Western Australia. His wife, Faye Gill, corroborated his evidence in that regard in every material particular. Mrs Gill's evidence remained unchallenged. There is absolutely no reason why I should give Mrs Gill's evidence little weight, as is suggested by the Respondent. Mrs Gill also impressed as a witness and I have no difficulty in accepting her evidence.

83 Dr Watson's evidence also supports the evidence of Dr Gill and his wife to some extent. Although I appreciate that Dr Watson could not, and did not, testify as to whether or not Dr Gill was, in fact, available on call, it is nevertheless the case that his evidence relating to the types of duties and obligations described by him as being those required to be undertaken whilst on call was entirely consistent with that given by Dr Gill and his wife. I found Dr Watson's evidence to be generally corroborative of Dr Gill's evidence going to the issues of that nature. Indeed there was little or no effective contest between the evidence of Dr Watson on the one hand and the evidence of Dr Gill on the other.

Conclusions

Operative Dates of the Workplace Agreements

84 The Respondent at all material times employed Dr Gill as Director of Disease Control. His terms and conditions of employment from 1976 to 1998 had been governed by various oral and written agreements, the ***Public Service Award 1997*** and the ***Public Sector Management Act 1994***. I find that commencing on 2 November 1998 Dr Gill's employment became subject to two successive Workplace Agreements registered pursuant to the provisions of the ***Workplace Agreements Act 1993***. I find from the documentary evidence before me that the first Workplace Agreement came into force on 2 November 1998. A perusal of exhibits 10, 11 and 12 clearly establishes that. Indeed Dr Gill's contention that the first Workplace

Agreement came into force on 23 September 1998 is unsupported by the evidence. I find that the 1998 Workplace Agreement came into force only when Ms Ford, on behalf of the Respondent, wrote to Dr Gill accepting the terms of Dr Gill's proposals. It was her letter that concluded the negotiations and constituted the agreement between the parties. As to the 1999 Workplace Agreement, I find that the same came into effect on 9 September 1999 when Mr Rowan Davidson, on behalf of the Respondent, agreed that Dr Gill was to be added as a party. Exhibit 26 clearly demonstrates that to be so. The 1999 Workplace Agreement thereafter continued to govern Dr Gill's employment until he ceased work on 29 June 2001. I reject Dr Gill's contention that the 1999 Workplace Agreement was operative from 1 July 1999.

On Call

85 It is uncontroverted that Dr Gill was given a directive that he was to remain contactable outside of normal work hours and to be available in a fit state, at such times, for recall to duty. I accept that Dr Peter Brennan, the then Acting Commissioner of Health, on or about 5 February 1992 gave him such an oral directive. Mr Andrew Penman, the General Manager of Public Health, by memorandum dated 10 December 1993 reaffirmed that directive.

86 I find that the direction given to Dr Gill by Dr Brennan and Mr Penman constituted a direction that Dr Gill was to remain "on call". The "on call" directive remained binding and operational until varied by the formulation of the written roster in May of 2001. The fact that Dr Gill was required to remain contactable outside of normal hours of duty and be available, in a fit state at such times, for recall to duty was well known to officers of the Respondent. A perusal of exhibit 10 reflects that. Indeed the Respondent sought because of that to compensate Dr Gill by the payment of $8,800.00 per annum as a supplementary payment outside the terms of the Workplace Agreements.

87 It is self evident from what I have said earlier that I find that Dr Gill complied with the directive given to him and that he remained "on call" for the entire period of his employment, save for periods that he was absent from the State or unable to do so because of medical unfitness. The fact that Dr Gill was contactable outside of normal hours of duty and was available, in a fit state, for recall to duty is simply undeniable given the state of the evidence. I accept that Dr Gill was on call 130.5 hours per week. I accept Dr Gill's evidence concerning the nature of after-hour's contacts and duties carried out.

Is Dr Gill Entitled to "On Call" Allowance?

88 The pivotal issue to be decided in this matter is whether the directions given by the Respondent to Dr Gill satisfied clauses 3.7 and 30 of the 1998 and 1999 Workplace Agreements respectively.

89 The Respondent contends that the directions given to Dr Gill were not ones that satisfied the relevant clauses of the Workplace Agreements. The Respondent says that because Dr Gill was not rostered by the relevant authorised officer in accordance with clinical need, he cannot fall within the relevant provisions. On the Respondent's view, rostering in accordance with the provisions of the 1998 Workplace Agreement is a necessary and fundamental pre-requisite to any entitlement.

90 I reject the Respondent's argument in that regard. The terms and provisions of the relevant clauses of the Workplace Agreements are clear and do not admit ambiguity. Clauses 3.7(1)(b) of the 1998 Workplace Agreement and 30.1.c(ii) of the 1999 Workplace Agreement apply so long as the medical practitioner fulfils the definitions found in clauses 3.7(1)(c) and 30.1.a respectively. It is obvious that Dr Gill fulfilled those definitions. Those provisions are not in any way subject to the rostering provisions.

91 The Respondent's argument centres on the contention that the rostering of Dr Gill was a necessary and fundamental pre-requisite to any entitlement. Given that he was not rostered until May 2001, he has no entitlement. Further, it is said that the written and verbal directions upon which the claim relies were not rosters and were not given within the operative terms of the Workplace Agreements.

92 In my view the Respondent's argument contains a number of fundamental difficulties. The first is that the Respondent's contention necessarily requires the implication that the roster must be written. It is self-evident that clause 3.7(1)(a) of the 1998 Workplace Agreement does not expressly require a written roster and, nor for that matter, does clause 30.1.b of the 1999 Workplace Agreement. Further, it sits at odds with the obvious intent of the applicable provision to compensate those who have, in meeting the needs of the employer, received an applicable direction and complied with it.

93 It is inconceivable that an instrument, intended to provide a framework for the rights and entitlements of employees to be paid for work done, could be construed so narrowly that it would have the effect of denying an entitlement, which, on the evidence, is clearly available.

94 It is obvious that reference to rostering in clauses 3.7 and 30 respectively do not import the necessary requirement of a written roster. Furthermore, it is evident that clauses 3.7(1)(a) and 30.1.b merely facilitate the arrangements for rostering. They do not make rostering in accordance with their terms a pre-requisite to entitlements.

95 In this case there was a single unwritten roster and Dr Gill was the sole person on that roster until the rostering changed in May 2001. In any event, irrespective of whether there were one or more persons on the roster, the Respondent's liability was the same. It had to pay for "on call" services provided whether it be by one or more persons. In this case Dr Gill alone provided the service. His services were provided in accordance with the instructions given to him, which remained operative during the terms of the Workplace Agreements. Having complied with the direction and thereby having met the relevant definitions within those agreements, he became entitled to the "on call" allowance provided by those Workplace Agreements. In so far as the Respondent represented to the Claimant that there was no provision in the Workplace Agreements covering his "on call" responsibilities, the Respondent mislead him and caused him to acquiesce to the receipt of payments made outside the terms of the Workplace Agreements.

96 The evidence establishes that the Respondent gave Dr Gill a direction and that such direction satisfied clauses 3.7 and 30 of the 1998 and 1999 Workplace Agreements respectively. Dr Gill, to the extent that he complied with the direction, is entitled to recover pursuant to the terms of the Workplace Agreements.

Reduction Due to Absence and Non Contactability

97 The Respondent submits that the Claimant was totally uncontactable whilst interstate and overseas. In those circumstances it is axiomatic that he was not able to return to his duties. It follows, therefore, that the Claimant cannot be entitled when he was unavailable for such reasons. It is also the case that he was not available when on leave for various reasons, including medical unfitness to attend work. Accordingly, he cannot be paid for such times that he was unavailable. I accept the Respondent's submissions in that regard. As to medical unfitness Dr Gill cannot have it both ways. If he was unable to carry out his duties during normal hours of work because of medical incapacity it is most unlikely that he would have been fit to carry out such duties after hours during such incapacity. Obviously he would not have been in a fit state to return to duty. Having said that I am in no doubt that from time to time Dr Gill was called upon, even though medically unfit to respond to after-hours enquiries.

98 The documentary evidence in exhibits 24 and 30 has been extremely helpful in calculating Dr Gill's absences for various reasons. Using the available documentary evidence in form of exhibit 30 it is possible to discern, for example, that Dr Gill was

absent at interstate conferences for a total of 29 days in the 15 months between April 2000 and June 2001, constituting an average of about 2 days absence per month.

99 A consideration of exhibit 24 reveals that Dr Gill was absent on leave other than annual leave for a total period of 58 days during the material period of the claim, being between 2 November 1998 and 30 April 2001. Annual leave is not taken into account, given that it is accounted for in the Claimant's claim. Deductions ought to be made to reflect those absences.

100 I find that Dr Gill was absent on leave, other than annual leave, for 43 days during the first period from 2 November 1998 to 8 September 1999. He was absent on such leave for 4 days during the second period from 9 September 1999 to 31 December 1999 and he was absent on similar leave for 11 days during the third relevant period from 1 January 2000 to 30 April 2001.

101 In calculating the deductions I have proceeded on the basis that the leave other than annual leave and conference commitments almost invariably occurred during the course of a normal workday in each instance. Each workday for Dr Gill comprised 7.5 hours of normal hours with the remainder (16.5 hours) being "on call" after hours.

102 The calculations are as follows—

- **First Period: 2 November 1998 to 8 September 1999**

  22 days for conference attendances and 43 days for leave.

  Total of 65 days × 16.5 hours per day × $7.81 = $8,376.23

- **Second Period: 9 September 1999 to 31 December 1999**

  8 days for conference attendances and 4 days for leave.

  Total of 12 days × 16.5 hours per day × $8.08 = $1,599.84

- **Third Period: 1 January 2002 to 30 April 2001**

  32 days for conference attendance and 11 days for leave.

  Total of 43 days × 16.5 hours per day × $8.37 = $5,938.52

103 The total deduction to be made on account of absences is $15,914.59.

104 In my view the aforementioned process is the appropriate method of dealing with Dr Gill's unavailability. The process is reasonably precise. The discounting method suggested by Mr Hooker, for the Claimant, has no application in this situation.

Recalculation

105 The calculation made by the Claimant as found in his Statement of Claim needs to be adjusted in view of my findings relating to the commencement dates of the relevant Workplace Agreements and the applicable deductions.

106 I accordingly set out such recalculation—

Period 1: 2 November 1998 to 8 September 1999	
44 weeks × 130.5 hours per week × $7.81	$44,845.02
Less paid 44 weeks at $169.23 per week ($8800.00 per annum ÷ 52)	7,446.12
Less 3 weeks annual leave (3 × 130.5 × $7.81)	3,057.62
Less deduction for not being on call	8,376.23
Total deductions	$18,879.97
Balance	**$25,965.05**
Period 2: 9 September 1999 to 31 December 1999	
16.43 weeks × 130.5 hours per week × $8.08	$17,324.45
Less paid 16.43 weeks at $169.23 per week ($8800.00 per annum ÷ 52)	2,780.45
Less 2 weeks annual leave (2 × 130.5 × $8.08)	2,108.88
Less deduction for not being on call	1,599.84
Total deductions	$6,489.17
Balance	**$10,835.28**
Period 3: 1 January 2002 to 30 April 2001	
69.14 weeks × 130.5 hours per week × $8.37	$75,520.58
Less paid 69.14 weeks at $169.23 per week ($8800.00 per annum ÷ 52)	11,700.56
Less 5 weeks annual leave (2 × 130.5 × $8.37)	*5,461.43*
Less deduction for not being on call	5,938.52
Total deductions	$23,100.51
Balance	**$52,420.07**

Total Payable

Period 1:	$25,965.05
Period 2**:**	$10,835.28
Period 3**:**	$52,420.07
	$89,220.40

Set-Off

107 The Respondent argues that any entitlement that Dr Gill has ought to be "off set" by the additional salary paid. The Respondent suggests in submissions that,

> "*…there can be no doubt that Dr Gill would not have received both a salary of $144,988.00 (rather than $124,990.00) and an on call payment"*.

108 The submission made, however, lacks evidentiary foundation. There is no evidence on the issue. In any event I agree with Mr Hooker that there is no jurisdictional foundation found in the ***Workplace Agreements Act 1993*** for set-off to apply. Further, I accept Mr Hooker's submissions that Dr Gill's level of knowledge and understanding do not bear upon the satisfaction of the elements of the cause of action. That satisfaction gives rise to a liability in the nature of a debt, irrespective of the Claimant's mental state and/or degree of diligence in pursuing those claims. This Court cannot, unlike the Western Australian Industrial Relations Commission,

> "*act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms*"(see s 26(1)(a) of the ***Industrial Relations Act 1979***).

Compliance with Section 54 of the Act

109 The Respondent argues that although a certificate has been given in accordance with section 54 of the Act, it has not been properly given and accordingly this Court lacks jurisdiction to make an order pursuant to section 57 of the Act. The Respondent's pivotal argument is that Dr Gill did not exhaust the processes available under clause 49, and in particular clause 49(3), of the 1999 Workplace Agreement.

110 The Claimant says that he has unsuccessfully attempted to resolve the dispute by virtue of discussions and correspondence passing between himself and the Department. His failed attempts at resolving the matter took place between July and November 2001. Notwithstanding the fact that the Acting Commissioner of Health considered his claim at the highest level, the matter was incapable of resolution. In those circumstances he did all that he could in order to comply with clause 49.2 of the 1999 Workplace Agreement.

111 The Respondent contends that there has not been strict compliance with clause 49.2 in that there was no opportunity given to the Australian Medical Association to become involved in the process. It is obvious that the Australian Medical Association has had no part to play in this dispute. It seems that Dr Gill did not seek its involvement in the resolution of quite a discreet issue between the parties. Clearly the dispute arises from the particular circumstance, which related to Dr Gill alone. It is obvious that the resolution of the matter had no wide ranging implications for other employees. In those circumstances it appears that the involvement of the Australian Medical Association was both unnecessary and unwarranted.

112 Having exhausted all his avenues in respect to the dispute, Dr Gill has legitimately made his claim within this jurisdiction. He has done so without availing himself of the arbitration process available by virtue of clause 49.3 of the 1999 Workplace Agreement. That of itself causes no difficulty because it is quite apparent that the arbitration process is an entirely discretionary one. There was no obligation upon Dr Gill to engage in arbitration.

113 It could be argued, in any event, that the dispute resolution procedure may not necessarily apply in circumstances where the employment relationship has ended.

114 Accordingly, I find that the Claimant has in this matter, so far as is practical, complied with the dispute resolution processes provided for by the 1999 Workplace Agreement. It follows, therefore, that there is no jurisdictional impediment to this Court making orders pursuant to section 57 of the Act.

Result

115 I find that the Respondent has failed to comply with each of the Workplace Agreements in that it underpaid Dr Gill the amounts properly due to him by way of "on call allowance". The total amount underpaid to him was the sum of $89,220.40.

116 I will now hear the parties as to the orders to be made.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07850

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, CLAIMANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 12 DECEMBER 2002
CLAIM NO/S	M 175 OF 2001
CITATION NO.	2003 WAIRC 07850

Representation	
Claimant	Ms S Northcott of counsel
Respondent	Mr J Brits of counsel

Reasons for Decision

The Claim and Response

1 The Claimant is an organisation of employees registered under Division 4 of Part II of the ***Industrial Relations Act 1979***. The Respondent is and was at all material times a corporation carrying on business in Western Australia. At all material times, Derek Mitchell was a member of the Claimant and an employee of the Respondent.

2 On or about 13 December 2000 the Respondent advised Mr Mitchell that his services would be terminated on 10 January 2001 unless a suitable alternative position could be found. The Claimant took the matter to the Western Australian Industrial Relations Commission. Attempts made at conciliation failed and Commissioner S Wood subsequently heard the matter in January 2001. Commissioner Wood made the following orders—

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

2. *THAT the respondent engage in a full exploration, in consultation with Mr Mitchell, of options for his employment with the respondent, including any appropriate training relevant to available positions with the respondent, that are compatible with his capabilities and skills.*
3. *THAT in light of point 2 of the order, the respondent not terminate the employment of Mr Mitchell as an Environmental Services Attendant prior to 3 calendar months from the date of this order, for reasons to do with his inability for medical reasons to perform duties as an Environmental Services Attendant.*

3 It is common ground that Mr Mitchell's contract of employment was terminated on 23 March 2001.

4 The Claimant alleges that the termination contravened Commissioner Wood's order and, therefore, seeks a finding that there has been a breach of the order. It also seeks the imposition of a penalty for the breach.

5 The Respondent denies that the termination was in contravention of Commissioner Wood's order. It says that Mr Mitchell's contract of employment was not terminated for reasons to do with his inability, for medical reasons, to perform his duties as an Environmental Services Attendant but rather because of his refusal to obey a lawful and reasonable instruction.

6 The Respondent also pleads a Deed of Release and Settlement entered into by Mr Mitchell on the one hand and the Respondent on the other on 10 May 2001 as a bar to the claim made by the Claimant.

Earlier Proceedings

7 When this matter first came on for hearing before my brother on 12 December 2001, the Respondent successfully argued that the Claimant did not have standing and was bound by the terms of the Deed of Release and Settlement executed by Mr Mitchell.

8 That decision was quashed by the Full Bench of the Western Australian Industrial Relations Commission in ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd*** **2002 WAIRC 05396**. In short, the Full Bench held that the Claimant had standing and was entitled to pursue its claim. It follows, therefore, that the Respondent cannot now further rely on the Deed of Release and Settlement as being a bar to these proceedings.

Issue

9 Given the earlier proceedings, the remaining issue has become quite succinct. It is one of whether Mr Mitchell's contract of employment was terminated within the three calendar month period ordered by Commissioner Wood for reasons to do with his inability, for medical reasons, to perform duties as an Environmental Services Attendant or whether his contract of employment was terminated on the basis of his refusal to obey a lawful and reasonable instruction.

Onus and Standard of Proof

10 The Claimant bears the onus of proving, on the balance of probabilities, that the Respondent breached paragraph 3 of Commissioner Wood's order issued on 14 February 2001.

Evidence

11 The Claimant called two witnesses. They were Paul Justice, an organiser employed by the Claimant, and Mr Derek Mitchell. The Respondent called one witness being its Human Resources Co-ordinator, namely Kathleen Drimatis.

12 It is fair to say that much of the evidence before me is not in contention. I will now address the facts as I find them.

13 Mr Mitchell commenced working for the Respondent in about November 1994. His duties essentially consisted of cleaning duties. In 1995 Mr Mitchell sustained a work related knee injury. The exact nature of the injury was not disclosed, however, it appears that the injury was sufficiently serious to warrant surgery in 1996 and a number of arthroscopic interventions thereafter. Dr Tony Robinson has been Mr Mitchell's treating orthopaedic surgeon throughout.

14 Dr Peter Connaughton has at the request of the Respondent, reviewed Mr Mitchell. I do not know whether Dr Connaughton has any specialist qualifications.

15 Mr Mitchell testified that in the year 2000 he sustained another injury to the same knee. More recently the Respondent sent him to Dr Connaughton for review. Whilst in Dr Connaughton's surgery he sustained an injury when carrying out movements as directed by Dr Connaughton. He in fact sustained an injury as a result of squatting at the doctor's direction. The injury he sustained within Dr Connaughton's rooms required further medical intervention from his treating specialist, Dr Robinson.

16 It is obvious from the evidence given by Mr Mitchell that the episode within Dr Connaughton's surgery has left him with little confidence in Dr Connaughton. He does, however, retain a great deal of respect for Dr Robinson. Indeed Mr Mitchell quite understandably places a lot of faith in the advice given to him by Dr Robinson.

17 It was Dr Robinson's advice to Mr Mitchell that he could only work on restricted duties that did not involve cleaning. Mr Mitchell said that had Dr Robinson advised him that he was fit to carry out cleaning duties, he would have done them.

18 Mr Mitchell testified that leading up to the dispute he had been employed performing non-cleaning duties. Those duties, however, were no longer made available to him. He said that the duties once performed by him did not just disappear but rather were reallocated. Ms Drimatis, on the other hand, testified that due to a restructure the work performed by Mr Mitchell was no longer available. Commissioner Wood considered the matter with the result being that he made a finding that a termination of Mr Mitchell would at that time be unfair (see ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd*** **2001 WAIRC 01966**). It is clear from the learned Commissioner's reasons (paragraphs 39 and 40) that he took the view that the exploration of options for Mr Mitchell should take some months, including appropriate training. The inference to be drawn from such a finding is that Mr Mitchell would not be returning to his pre-accident duties.

19 Following the handing down of Commissioner Wood's order the Respondent wrote to the Claimant concerning Mr Mitchell indicating that it was preparing a plan for the full exploration of the options for Mr Mitchell's continued employment.

20 On 20 February 2001 the Respondent sent a facsimile request to both Dr Robinson and Dr Connaughton asking them to identify whether Mr Mitchell was able to perform certain Environmental Service Attendant duties as detailed in a list provided. Dr Connaughton replied on 21 February 2001 pointing out, quite legitimately, that it was difficult for him to make an assessment given his lack of knowledge of the detailed activities. He suggested the assistance of an ergonomic or occupational therapist. Dr Robinson quite understandably did not reply. Clearly a response was not achievable given the lack of information concerning the duties.

21 On 21 February 2001 the Respondent wrote to the Claimant advising that medical opinions were being sought concerning the duties identified as being compatible with Mr Mitchell's capabilities. Once such was to hand a decision would be made as to what duties to allocate for Mr Mitchell.

22 On or about 26 February 2001 the Respondent received an occupational therapist's report from Work Focus Australia. The report detailed the duties of an Environmental Services Attendant on the gaming floor at the casino and then made certain conclusions (the basis of which is unexplained) that certain physical activities attract occasional, frequent or constant demands. The writer of the report, Kirrily Manning concluded that the position was evaluated to be of a medium physical demand level.

23 On 1 March 2001 Dr Connaughton sent a facsimile message to the Respondent saying that he agreed with Ms Manning's letter dated the same day. What was within the letter remains a mystery because it was never exhibited.

24 On 6 March 2001 Ms Manning sent a letter to the Respondent enclosing a report dated 1 March 2001 arising out of her assessment of the duties of an Environmental Services Attendant who would be required to work at the Burswood Dome, the Convention Centre and the outside/ staff areas of the Burswood International Resort Casino. In her letter Ms Manning said—

> *"Our recommendation remains that given medical opinion suggests Mr Mitchell will be unable to resume the full components of his pre-injury job, and no real position is available consisting of modified duties, vocational redirection should be commenced as soon as possible."*

25 On 6 March 2001 the Respondent wrote to Dr Connaughton seeking his views concerning certain duties identified as suitable (subject to qualification) for Mr Mitchell to perform as identified in Ms Manning's report dated 1 March 2001.

26 That same day the Respondent wrote to Dr Robinson seeking his views as to the duties identified by Ms Manning and Dr Connaughton as being suitable. In its letter the Respondent asserted that Mr Mitchell played golf for four and a half hours twice weekly. The letter sought a response by 10.00 am the next day.

27 On 7 March 2001 Dr Connaughton sent a facsimile to the Respondent in which he stated—

> *"Thank you for your fax of 6 March 2000. I note the Job Analysis Reports for the Burswood Dome, Convention Centre and Outside/Staff Areas.*
>
> *I note the letter from Kirrily Manning, dated 6 March 2001, and I confirm that I agree with the recommendations and advice in that letter. In my view the duties suggested are appropriate. The duration of the standing and walking components of the jobs would need to be considered so that they are within Mr Mitchell's capability."*

28 Dr Connaughton's conclusion, in my view, appears to be somewhat inconsistent with Ms Manning's recommendation to which I have referred earlier.

29 It seems from the documentary evidence before me that when on 13 March 2001 the Respondent wrote to Mr Mitchell, a response had not yet been received from Dr Robinson. In its letter dated 13 March 2001 the Respondent said, inter alia—

> *"Given there has been no response from your Doctor within a reasonable time period it is our intention to now act on the available views from our doctor and the Workfocus Occupational Therapist that those duties are suitable for you to perform.*
>
> *We now direct that you report to Michael Carton for duty on Wednesday 14 March 2001 at 9:00am at which time you will be directed to perform the duties previously identified.*
>
> *If you fail to report for duty without good reason or fail to perform the duties as directed without good reason, we shall immediately cease paying your wages and appropriate disciplinary action will be taken. Such disciplinary action may include the termination of your employment contract.*
>
> ***You must understand that your doctor not endorsing you performing those duties will not be an acceptable reason for you to not attend work or perform the duties as directed.****"*(My emphasis added).

30 The Claimant was sent a copy of the letter sent to Mr Mitchell. It responded immediately pointing out that it was appropriate for the Respondent to await Mr Mitchell's treating doctor's report before any further action was taken. The Claimant pointed out that it would be most unwise for the Respondent to direct Mr Mitchell to perform duties, which he had previously been declared unfit to perform. It was indicated that Mr Justice would attend with Mr Mitchell at 9.00 am the following morning.

31 What transpired at the meeting is well reflected in the letter written by Mr Justice on behalf of the Claimant to the Respondent dated 14 March 2001. I set out the relevant portions of the letter—

> *"At the meeting Michael Carton directed Mr Mitchell to perform certain cleaning duties. Mr Mitchell indicated he was unable to perform the duties pending advice from Dr Robinson. Mr Carton stated that if Derek did not do the duties he would have his wages stopped and disciplinary action could be taken. I asked that the Disputes Procedure be used. Accordingly I asked that a meeting take place between yourself, as Human Resources Manager and senior Union officials before any further action is taken by Burswood. Mr Alison refused this request.*
>
> *I again requested that a meeting between yourself and senior Union officials be organised before any further action is taken by Burswood. No further action is justified pending advice from Dr Robinson. Finally, I request a written explanation of the actions Burswood intends to proceed with from today's meeting."*

32 On 14 March 2001 the Respondent received by facsimile a letter addressed to it from Dr Robinson dated 8 March 2001. It is quite apparent from the facsimile transaction record that the same was received after the meeting.

33 I set out the text of the letter—

> *"Dear Mr. Allison,*
>
> *Re: Derek Mitchell. DOB: 20/1/1942*
>
> *Thank you for your letter dated March 6, 2001, regarding Derek Mitchell. As the treating orthopaedic surgeon, I do not think the duties which you have outlined in the job analysis report are suitable for Mr. Mitchell.*
>
> *I am at a loss to explain why the abovementioned duties have been deemed as being 'occasional' (0-33%), 'frequent' (34-66%), and finally 'constant' (67-100%). I find these quantifications very difficult to apprehend when someone is describing work duties.*
>
> *Thus, I would recommend that the patient continues with his present form of work which I have repeated on a number of occasions. As the treating orthopaedic surgeon, I feel that I am in the best position to decide.*
>
> *Finally, with regard to Mr. Mitchell playing golf for four and a half hours twice a week. I have no knowledge of this. Furthermore, I would suggest that you contact Mr Mitchell as (sic) discuss that point with him.*
>
> *Yours faithfully,*
>
> *Tony Robinson, M.B., B.S.,F.R.A.C.S.*
>
> *Consultant Orthopaedic and Knee Surgeon.*
>
> *P.S. I find that a letter being dated March 6, 2001, and an expected reply by 10:00 a.m. the following day to be very difficult to comprehend."*

34 It appears from the relevant documentary material before me that a copy of Dr Robinson's report was sent to Dr Connaughton for his comments immediately upon receipt. I say that because at 2.30 pm that afternoon a facsimile message was received by the Respondent from Dr Connaughton in which he reaffirmed his previous advice.

35 A meeting was organised for the following day in order to resolve the dispute. The meeting was held but the dispute did not resolve. At that meeting, which was attended by Mr Mitchell and the Claimant's representative, Mr Mitchell was directed to attend work at 9.00 am on 16 March 2001 to undertake the duties of an Environmental Services Attendant with some modifications.

36 In response, Sharryn Jackson wrote to the Respondent on behalf of the Claimant. In her undated letter she stated, inter alia—

> *"Despite this advice, at the meeting Alison and Carton again directed Derek to attend for work tomorrow morning to perform the said duties. They further threatened that if Derek did not attend and perform the duties his wages would be stopped immediately and steps would be taken to commence the termination of his employment.*
>
> *Derek has previously advised the company (including these particular representatives) that he is unable to perform the duties specified. Further he believes that to perform these duties as directed would place him at serious and imminent risk of injury. Derek has repeatedly stated that he desires to return to work immediately and that he is ready and willing to perform duties of which he is capable and which do not place him at risk.*
>
> *This is a fair and reasonable position, particularly given:—*
>
> 1. *It is consistent with the advice of his treating Specialist; and,*
> 2. *his Specialist has provided consistent advice on this matter to the company; and,*
> 3. *your Dr Connaughton gave similar advice to the company late last year when he said that Derek could not perform the duties of an Environmental Services Attendant; and,*
> 4. *Alison and Carton admit that their direction concerning Derek's capabilities is based upon 'expert advice' from an unidentified Occupational Therapist (who has not even met Derek) and a recently acquired 'different opinion' from your Dr Connaughton; and,*
> 5. *Derek has not performed the duties of an Environmental Services Attendant since his injury at your workplace in June, 1995. Indeed on the basis of appropriate medical advice he has performed a range of alternative and modified duties.*
>
> *In all of the circumstances, particularly the immediate threat to Derek's earnings, we believe the company's actions are harsh and oppressive. This letter should serve to notify you formally of the existence of a dispute.*
>
> *In accordance with Dispute Resolution Procedure (Clause 39 of the Industrial Agreement) I request that the company forthwith find alternative duties to those proposed for Derek to perform and to continue to pay Derek's his (sic) wages.*
>
> *It is appropriate for a meeting to be arranged with you as the Human Resources Manager for further discussion of this matter. Please contact me or Dave Kelly at the Union Office to arrange a mutually convenient time.*
>
> *Yours faithfully,"*

37 On 19 March 2001 Mr Mitchell and Mr Justice attended another meeting concerning the dispute. Mr Carton and Ms Drimatis attended that meeting on behalf of the Respondent. The notes of the meeting contained in exhibit 7 reflect what occurred at that meeting. It suffices to say for my purposes that Mr Mitchell was advised that if he did not perform the cleaning duties identified by the Respondent as being within his capabilities he would be subject to disciplinary procedures which might include termination.

38 The following day another meeting was held. The same people as the previous day constituted this meeting. Various issues were discussed during the course of the meeting. During the meeting Mr Mitchell made it clear that he would not perform the allocated duties because if he did so it would be in contravention of his treating doctor's advice. He also reaffirmed the view that he felt he could not carry out the tasks that he was required to perform which were essentially cleaning tasks. That was in keeping with his doctor's advice. Mr Mitchell was warned that his continued refusal to perform duties would likely result in his termination.

39 On 23 March 2001 Mr Mitchell received a letter of termination. In that letter the Respondent advised Mr Mitchell, inter alia, that—

> *"... due to your continued and willful* (sic) *refusal to obey a lawful and reasonable instruction, I am terminating your employment contract with five weeks' payment in lieu of notice and the termination has immediate effect. ..."*

40 On 10 May 2001 Mr Mitchell and the Respondent entered into a Deed of Release and Settlement with respect to all claims that Mr Mitchell had against the Respondent. Mr Mitchell was paid an undisclosed sum in consideration of his entering into the Deed.

41 During the course of his testimony Mr Mitchell continued to reaffirm that the direction given to him by the Respondent was against the advice given to him by his treating doctor. In those circumstances ho could not comply with the requirement imposed by the Respondent because it potentially exposed him to risk of further injury.

42 Ms Drimatis testified that the Respondent believed it was entitled to invoke the requirement it made upon Mr Mitchell given the medical evidence obtained from Dr Connaughton. Accordingly, the refusal by Mr Mitchell to perform those duties left it with no option other than to terminate his contact of employment.

Conclusions

43 There is no dispute that Mr Mitchell's contract of employment was terminated within the three calendar month period referred to by Commissioner Wood in paragraph 3 of his order made on 14 February 2001. The question remains one of whether he was terminated by reason of his inability, due to medical reasons, to perform his duties as an Environmental Services Attendant.

44 Having reviewed the evidence, it is readily apparent to me that Mr Mitchell was terminated because of his inability, due to medical reasons, to perform his duties as an Environmental Services Attendant.

45 His refusal to carry out the duties that he was instructed to perform resulted from the medical advice that he had received from his treating specialist. His refusal to comply with the Respondent's direction related back to his medical disability, a fact well known by the Respondent. Mr Mitchell was quite entitled to rely on his treating doctor's advice. After all, his treating doctor was the medical professional in the best position to know about Mr Mitchell's injury. He had treated Mr Mitchell for a long time. He had reason to perform surgery on his knee. He had first hand experience at looking into Mr Mitchell's knee. As Dr Robinson said,

> "*I feel that I am in the best position to decide*" (see exhibit 6).

46 Dr Robinson's view, which was consistent with Mr Mitchell's own view, was that Mr Mitchell could not perform the duties that he was required to perform by the Respondent. Indeed at that time Mr Mitchell relied on the services of a cleaner in order to perform cleaning at his own residence. In those circumstances, it was self evident to him that he could not perform the tasks that the Respondent wanted him to perform.

47 The Respondent totally disregarded the advice of Mr Mitchell's treating doctor at its own peril. It merely accepted the advice of Dr Connaughton, who had reviewed Mr Mitchell on several occasions. Notwithstanding the conflict in the medical evidence it did not seek to have Mr Mitchell further reviewed by another orthopaedic surgeon. It could have done other thing such taking the matter back before the Commission in a compulsory conference. However it chose not to, knowing that, as matters stood Mr Mitchell would not accede to its requirement of him.

48 It is quite apparent that the Respondent set Mr Mitchell up to fail. It was well aware of the stance taken by Mr Mitchell, which in my view was quite justifiable, particularly given his experience of suffering further injury when directed by Dr Connaughton to squat. It is not surprising, therefore, that he was reluctant to accept the advice given by Dr Connaughton and relied on the advice of Dr Robinson. That was well known to the Respondent. It knew through its officers that Mr Mitchell could not realistically comply with its direction. To do so was to expose him to further risk of injury. His failure to comply with the Respondent's direction, therefore, had nothing to do with his wilful disobedience of the Respondent's direction and all to do with his medical inability to perform the duties that he had been instructed to perform. It was entirely referable back to that.

49 The whole process adopted by the Respondent in this matter not only clearly breaches the letter of Commissioner Wood's order, but is also against the spirit of his finding in which he recommended, inter alia, skills training to enable Mr Mitchell to remain gainfully employed with the Respondent. Further the whole process adopted by the respondent is against the recommendation made by the Occupational Therapist it engaged with respect to this matter. It will be remembered that Ms Manning recommended,

> *"…vocational redirection should be commenced as soon as possible"*.

50 It appears that the Respondent was not concerned with vocational redirection. It set about embarking upon a process, which it knew Mr Mitchell would not (and in reality could not) comply with. It thereby ostensibly set up the basis for termination on grounds by reason of Mr Mitchell's "*refusal to obey a lawful and reasonable instruction"*.

51 In the circumstances, although the instruction may have been lawful, it was clearly not reasonable. It was not reasonable because the Respondent knew full well that Mr Mitchell could not and would not agree to the instruction on account of medical grounds. Accordingly, the termination, in reality, occurred by reason of Mr Mitchell's inability, for medical reasons, to perform duties as an Environmental Services Attendant. The termination having occurred within three calendar months of Commissioner Wood's order, there has been a clear breach of the same. I take the view that the breach is a flagrant breach of the order.

52 I accordingly find that the claim has been made out.

53 I will now hear the parties with respect to the orders to be made in consequence of my findings.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07860

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, CLAIMANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 12 DECEMBER 2002
CLAIM NO/S	M 175 OF 2001
CITATION NO.	2003 WAIRC 07860

Representation	
Claimant	Ms S Northcott of counsel
Respondent	Mr J Brits of counsel

Supplementary Reasons for Decision

(Given extemporaneously at the conclusion of submissions, extracted from the transcript of proceedings and edited by His Worship)

1 Application is made by the Claimant for the imposition of a penalty and, further, the payment of costs by the Respondent. The Claimant seeks that the penalty be paid to it.

2 In determining this matter, I make the following observations. Firstly, I take the view that there has been a wilful disobedience of Commissioner Wood's order. The acts of the Respondent were designed to circumvent the order. It was a deliberate act, in my view. It is not surprising, therefore, that the Claimant has taken the action that it has in pursuing this matter to the end. In my view, it is important that the integrity of orders of the Commission be protected, and the orders of the Commission be upheld. By its actions the Respondent, in my view, simply disregarded the order of Commissioner Wood. The breach is flagrant and wilful and deserving of punishment to the extent that a deterrent penalty is required. Accordingly, a caution would be inappropriate.

3 Having said that, the Claimant calls for the imposition of the maximum penalty available to me in the sum of $1000. In my view that would be inappropriate. The maximum penalty is to be reserved for the worst of the cases, particularly in circumstances where there have been prior breaches. There is no evidence of prior breach in this case.

4 Accordingly, this matter is no different to other matters in which sentencing takes place, and that generally occurs, of course, within the criminal sphere. Those considerations are equally applicable here and ought to be taken into account.

5 Taking those matters into account, I take the view that a penalty of $500.00 is the appropriate penalty here, particularly having regard to the lack of record of the Respondent. The $500.00 penalty is more than would normally be imposed for a first offender, but in my view is warranted having regard to the wilful disobedience of the Commissioner's order and the lack of remorse displayed by the Respondent. The penalty should act as a deterrent not only to the Respondent, but others who might be like-minded to act in this way.

6 The Claimant also seeks costs in the sum of $800.00. Those costs have not been quantified, but are said to be nominal costs. Having regard to the hearing that took place in this matter before me and the matter generally, in my view, the amount sought is not inordinate. It is just a question of whether or not those costs ought to be awarded. For costs to be awarded, the Court must be of the view that the proceedings were either frivolously or vexatiously defended. Clearly the Respondent's action could not be said to be frivolous in this matter. However, the question becomes whether its conduct was vexatious, particularly following the Full Bench's determination of this matter. In my view, it was. It defended the matter when, in my view, in reality it had no defence or realistic prospect of success, particularly given the factual matrix of this case.

7 To my recollection I have never ordered costs or made a finding that proceedings have been defended vexatiously. However, the circumstances of this case, in my view, call out for the making of such an order. The costs are appropriate in this particular case in view of the Respondent's conduct and, therefore, I accede to the application made by the Claimant in this matter and, accordingly, I make a finding that the proceedings were vexatiously defended, and order that the Respondent pay to the Claimant costs in the sum of $800.00. The Respondent should also pay to the Claimant the penalty that I have imposed in the sum of $500.00.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07839

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, CLAIMANT
	v.
	CHUBB SECURITY AUSTRALIA PTY LTD, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 26 FEBRUARY 2003
CLAIM NO/S	M 309 OF 2002
CITATION NO.	2003 WAIRC 07839

Representation	
Claimant	Ms S Northcott of counsel
Respondent	Mr J Brits of counsel

Reasons for Decision

Claim

1 By its claim filed 21 November 2002 brought pursuant to the provisions of the ***Workplace Relations Act 1996*** the Claimant alleges that the Respondent has failed to comply with clause 9.1(b) of the ***Chubb-Westrail Enterprise Bargaining Agreement 2001*** (the EBA) and seeks the following—

(a) An order that the respondent comply with the EBA.

(b) An order that the respondent pay the employee in accordance with the EBA.

(c) An order that the respondent pay the employee monies due in the sum of $13,356.63 plus an additional $157.14 per day from 16 January 2003.

(d) An order that the respondent do pay a penalty of not more than $1000 for each and every breach of the EBA.

(e) An order that the respondent pay to the claimant union the costs and expenses of and incidental to these proceedings.

(f) Any other order that the Court deems fit.

2 The Respondent denies that it has breached clause 9.1(b) of the EBA. It argues that the clause had no application to the particular circumstances surrounding its dealing with its employee, namely Gregory Densley, on 29 August 2002.

Facts

3 The Respondent is, and was at all material times, a corporation carrying on business in the State of Western Australia. The Claimant alleges in its pleadings that it is a trade union as defined in section 7 of the ***Industrial Relations Act 1979***. Gregory Densley is a member of the union. He is, and was at all material times, the employee of the Respondent. Mr Densley's conditions of employment were, at the material time, governed by the EBA.

4 Mr Densley is a former police officer from Victoria who gained employment with the Respondent in Western Australia about 7 years ago. He was engaged as a Service and Security Officer to perform guard duties upon railway property, including metropolitan passenger trains. He was appointed a "special constable" pursuant to the provisions of the ***Government Railways Act 1904*** and the ***Police Act 1892*** for such purpose. Mr Densley has an unblemished record and his work performance for the Respondent has been exemplary.

5 On 15 August 2002 Mr Stephen Connell, the Respondent's Business Manager, Guard Services WA, received a complaint from a female work colleague of Mr Densley concerning an incident that was alleged to have occurred outside of work hours. In essence, the complainant alleged that Mr Densley had spiked her drink and attempted to rape her.

6 Upon receipt of the complaint Mr Densley was stood down immediately pending investigation. In effect the provisions of clause 9.1(b) of the EBA were implemented in that Mr Densley was stood down on full pay pending the outcome of the investigation. The Respondent investigated the matter by speaking to the complainant, Mr Densley and all nominated witnesses. Mr Densley was interviewed on 19 August 2002 during which he gave his account of what had occurred. The Respondent continued to investigate the matter until 22 August 2002 at which time the Respondent concluded that it could not determine the matter either one way or the other. Essentially, the Respondent took the view that, because it was one person's word against the other, it should not take any action as against Mr Densley. However, if Mr Densley were to be charged by the police over the matter, his position would be further reviewed. Mr Connell's evidence in that regard is that Mr Densley was told that, if he were to be charged by the police, then his position would be no longer tenable and that he would have to go.

7 In order to facilitate Mr Densley's return to work the Respondent liaised with the complainant. Following that, Mr Densley was instructed to work out of Joondalup whilst the complainant was to work out of the city. Essentially the move was aimed at keeping the complainant and Mr Densley apart. Mr Densley was reinstated with effect on 23 August 2002. He did not return to work immediately because he had a couple of rostered days off. Mr Densley eventually returned to work on 25 August 2002.

8 On 28 August 2002 the police interviewed Mr Densley about the complainant's allegations. As a consequence he was unable to attend his shift rostered for the same time as the interview. He informed his employer of that fact. Upon completion of his interview Mr Densley was charged with indecent dealing. Following being charged Mr Densley contacted Mr Geoff Braithwaite, his supervisor, who arranged for a work vehicle to pick him up from the police station and convey him home.

9 Mr Densley was not rostered to work on 29 August 2002. On that day Mr Connell contacted him and asked him to attend a meeting that afternoon. He was not informed as to reason for the meeting. Present at that meeting were the Respondent's representatives namely Mr Connell and Mr Gary Phillips.

10 Mr Densley testified that during the meeting Mr Connell informed him that, by reason of the fact that he had been charged, he could either go on leave, or alternatively, have his services terminated. Mr Densley protested maintaining that he had done nothing wrong. He initially refused to go on leave. As a result of that Mr Connell informed him that his employment was terminated and he should bring back all work issue equipment. He was also advised that he would be paid out all his entitlements. Mr Densley thereafter told Mr Connell that although he did not agree with the ultimatum that it might nevertheless be in his best interests to take leave. His termination was retracted. Mr Densley was told that he would remain on paid leave until his entitlements ran out and thereafter that he would be on unpaid leave. Mr Densley testified that he there and then signed a blank annual leave application form to facilitate the payment of his outstanding annual leave entitlements.

11 A discussion then took place between Mr Densley and Mr Connell concerning the amount of time required to resolve the matter. Mr Connell suggested an approach to the DPP to "*have it knocked on the head*". Mr Densley informed Mr Connell "*it doesn't work that way*". Mr Densley was told that the Respondent's actions with respect to him resulted from advice received from its HR Manager. In response, Mr Densley, made the point that other employees facing a similar predicament to himself had been stood down with pay. Mr Connell retorted that there had been a different HR Manager at the time that those decisions had been made.

12 The meeting concluded and Mr Densley sought advice from the Claimant union.

13 Mr Connell, on behalf of the Respondent, wrote to Mr Densley by letter dated 29 August 2002 outlining what had transpired at the meeting. I set out the text of that letter (exhibit 3)—

> *"Dear Greg*
>
> *Re: Outcome of Meeting*
>
> *I refer to the meeting that took place at the Chubb Office, between Stephen Connell, Gary Phillips and you on Thursday the 29th of August 2002. At this meeting we discussed—*
>
> - *You had been charged with a criminal offence, by the state police, over an incident that took place outside of work hours, but it involved a security officer who works on the same system.*
> - *You confirmed that this was in fact true and you could not attend your shift the previous day due to being with the police.*
>
> *Chubb have considered the fact that you have been only charged and not found guilty, but we can not continue to work you at any site in which we hold contracts and we offered you the following—*
>
> - *To take leave without pay, after your (sic) have used your entitled leave, until the matter is resolved, or*
> - *Terminate your services.*
>
> *You decided to take the leave without pay until the matter is resolved and will keep Chubb informed of any outcomes or changes in the process.*
>
> *Sincerely,"*

14 On 18 September 2002 Mr Densley was paid out some of his annual leave entitlements. The balance was eventually paid out on 22 January 2003. Mr Connell testified that the delay was caused by administrative error. Mr Densley was paid his "accrued rostered days off" entitlements in November of 2002. Other than those payments, he has received no other form of payment.

15 On 15 November 2002 Charles Sanders from "Chubb" telephoned Mr Densley to inform him that given that the Respondent had lost its Westrail contract his services would no longer be required. Mr Sanders informed Mr Densley that he would receive a letter in the mail confirming their discussion however that was never received.

16 In that regard Mr Connell testified that Chubb had been informed in late 2001 that their Westrail contract would be finishing and that the Western Australian Government Railways would be taking over the contract in-house. They were proposing to recruit and train their own guards. I infer that Mr Connell may have mistakenly said 2001 instead of 2002. In any event on 15 October 2002 a letter was sent out to all staff informing them of the situation (see exhibit 8). Three staff out of about fifty, one of which was Mr Densley, alleged that they did not receive that letter. On 15 November 2002, by order of the Australian Industrial Relations Commission, all employees were again notified. Mr Sanders contacted Mr Densley as a result.

17 In the intervening period Mr Andrew Lee, an organiser with the Claimant union, spoke to Mr Densley and thereafter established contact with Mr Connell with respect to the matter. Mr Lee testified of his discussions with Mr Connell. Mr Connell informed him that although the Respondent had investigated the incident and Mr Densley had been cleared to return to work Mr Densley knew that the situation would be completely different should he be charged by police. Mr Lee advised Mr Connell that in his view the EBA provided for paid leave in circumstances where an employee was under suspension as a consequence of being charged with a criminal offence. He also told Mr Connell that he disagreed with the action taken by the Respondent and asked him to point out the particular provision in the EBA that justified the Respondent's actions. Mr Lee took the view that Mr Connell evaded attempting to justify the Respondent's actions. Mr Connell for his part reiterated that Mr Densley knew all along that if he were charged he would have to go.

18 On 25 September 2002 Mr Lee, on behalf of the Claimant union, wrote to Mr Connell, as the representative of the Respondent (exhibit 11), indicating that the Claimant believed that the Respondent was in breach of clauses 9.1(b) and 9.2 of the EBA by virtue of its failure to pay Mr Densley during his suspension.

19 On 27 September 2002, by letter incorrectly dated 17 September 2002 (exhibit 12), Mr Connell responded to the Claimant by saying inter alia that the entitlement to be paid whilst stood down was operative only whilst an investigation was in progress. As the investigation had been finalised the provision was no longer relevant.

20 In response, by letter dated 2 October 2002 (exhibit 13), Mr Lee, on behalf of the Claimant, advised the Respondent that a failure to make payment by Friday, 4 October 2002 would result in prosecution.

21 By letter dated 10 October 2002 (exhibit 14) the Respondent indicated that its position remained the same as outlined in its letter dated 17 September 2002.

Assessment of Witnesses

22 Mr Densley's evidence, albeit straightforward, appeared to be lacking in detail. His memory of events was neither comprehensive nor entirely clear. Often he had to be prompted into remembering matters. As to Mr Lee's evidence, it must be said that the same was of little value. I say that because much of his evidence related to a subjective assessment of what Mr Connell had told him. When asked to be precise about what had actually been said between himself and Mr Connell during their discussion, the evidence previously given did not accord with what was actually said. Much of his evidence was subjective and consisted of his perceptions, inferences and conclusions. His evidence was not objective in my view. There was an attempt made by him to portray Mr Connell as a person who wilfully and defiantly disregarded the Respondent's EBA obligations. Mr Connell, in my view, was the most impressive of the witnesses. His evidence was straightforward. He was able to relate with precision the events that occurred. Where necessary he made admissions. I prefer his evidence where there is any inconsistency.

Findings

23 I find that the Claimant's member Mr Densley was stood down on 15 August 2002 pending investigation of serious allegations against him. I am satisfied that the Respondent complied with clause 9.1(b) of the EBA in that regard. I am satisfied that the Respondent completed its investigations of the allegations on or about 22 August 2002 and found that Mr Densley should be reinstated, given that the Respondent could not determine whether or not Mr Densley was guilty of serious misconduct. I accept that Mr Densley was told that if he were to be charged by the police then his position would no longer be tenable. When the police charged Mr Densley on 28 August 2002 the Respondent considered its position. It did not further investigate the matter as that had already been done and was complete. It decided on the strength of the police charge (be it rightly or wrongly) that Mr Densley was guilty of serious misconduct and that he should be terminated. However, on account of his prior good record the Respondent was prepared to retain him awaiting the outcome of the criminal proceedings brought against him.

Has the Respondent Breached the EBA?

24 Clause 9 of the EBA (exhibit 2) relevantly provides—

> *9. CODE OF CONDUCT*
>
> *9.1*
>
> *(a) ...*
>
> *(b) Where an employee is under any investigation for alleged (serious) misconduct and all other disciplinary or performance matters, he/she may be suspended from normal duties, so that an investigation in accordance with these or Westrail procedures can take place. Such suspension must be on full pay.*
>
> *(c) ...*

25 Clause 9.2 of the EBA provides inter alia—

> *Serious Misconduct*
>
> *Cases of serious misconduct, disobedience or serious neglect of duty will be liable to dismissal without notice. An employee who is charged with such behaviour shall be given the opportunity to respond to such allegation and to have a representative present at such time.*
>
> *In circumstances where it is determined that dismissal without notice is not appropriate, the employee may be given a final warning that any further case of misconduct, may result in dismissal without notice. As with the above, the employee shall retain the right to respond to the allegations and have a representative present.*

26 The issue to be determined is whether Mr Densley was, on 29 August 2002, suspended so that an investigation could take place. To support its position the Claimant, to some extent, relies on what Mr Connell said in the third paragraph of his letter dated 17 September 2002 (exhibit 12). Mr Connell said in that letter—

> *"Greg was fully aware that if the police were to take action against him in this matter (ie charge him) the Chubb would need to reopen its investigation and reconsider its position. This did happen, so Chubb have concluded that, because of the seriousness of the charges, we can not work Greg on any site whilst this matter is to be heard by a court."*

27 In my view such statement does no more that to reaffirm that on 29 August 2002 the decision had been made to terminate Mr Densley or, alternatively in view of his previous good work record, to allow him to take leave pending the resolution of the criminal proceedings brought against him. It is clear that he was not in those circumstances to be under suspension. The investigation was complete. The Respondent either rightly or wrongly formed the view that Mr Densley was guilty of serious misconduct. It reached that conclusion because the police had charged him. The investigative process was by that stage well and truly over.

28 It is apparent that the provision in clause 9.1(b) relates only to what transpired between 15 and 22 August 2002 inclusive. It has no application to that which resulted after a decision was made that Mr Densley was guilty of serious misconduct. By that stage the investigation was complete. Given that the investigation was complete and a decision had been reached, it cannot be said that Mr Densley was stood down pending investigation. There was nothing to investigate. The Respondent had previously investigated the matter and the police likewise had completed their investigation. They had made a decision that Mr Densley would be charged. Mr Densley was simply awaiting trial. In those circumstances it cannot be said that Mr Densley was stood down so that an investigation could take place.

29 The EBA is obviously silent on what is to happen to a person charged with a serious criminal offence awaiting trial. It is a matter that ought to be addressed by the parties for their mutual benefit. The situation is not governed by the EBA.

30 In this case the Respondent was put in an invidious position. Mr Densley was charged with a serious offence of a sexual nature. The employer could hardly permit him, in the circumstances, to continue in what he was doing. There were also risks

in allowing him to work elsewhere. Given the nature of the allegations and given that he had been charged, the Respondent decided to terminate Mr Densley's employment. That was a decision that it was entitled to make in all of the circumstances. However, on account of Mr Densley's excellent work record the Respondent gave him a lifeline pending the determination of the criminal matter. It kept his job open for him. I cannot see how the Respondent can be criticised for that.

Result

31 I find that the Claimant has failed to prove, on the balance of probabilities, that there has been a breach of clause 9.1(b) of the EBA. Given the state of the pleadings, I am not called upon to determine whether or not there has been any other breach of the EBA.

32 The claim ought to be dismissed.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07849

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH, COMPLAINANT
	v.
	OLTEN PTY LTD, DEFENDANT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 14 DECEMBER 2000
COMPLAINT NO	CP 235 OF 1999
CITATION NO.	2003 WAIRC 07849

Representation	
Complainant	Mr DH Schapper of counsel
Defendant	Mr D Clarke as agent and with him Mr CS Fayle as agent

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Reasons for Decision

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

1 HIS WORSHIP: I am dealing with one complaint which alleges 52 particularised breaches, that between 12 January 1997 and 27 December 1998 the defendant failed to keep proper time and wages records relating to the employment of Vincent Dautopulos for the weekly pay periods within the dates mentioned. If the court finds that the breaches occurred, then for the purposes of the imposition of any penalty the breaches are to be taken to constitute a single breach by virtue of the provisions of section 178(2) of the Workplace Relations Act, 1996 (the Act).

2 The complainant, of course, bears the onus of satisfying this Court on the balance of probabilities that the complaint alleging the 52 breaches is made out. The complainant relies on the documentary evidence tendered by it, without objection, together with admissions made by Mr John Dennison, the defendant's director, particularly when cross-examined. By it's pleadings the defendant denies that it is a respondent to the Security Officers (Western Australia) Interim Award 1996. It also says that clause 20(a) of the award, under which the complaint is made in respect of the particular breaches, does not require it, and did not require it at the material time, to record the start and finish times for the days worked. It says all the defendant was required to do was record the number of hours worked by the particular employee.

3 Furthermore, the defendant says the complainant has not established that it failed to keep a record, as required under clause 20(a), in that the defendant does have such a record and that the complainant, by its inaction, has failed to discover the existence of such a record. The last of the grounds of defence referred to was not one that was pleaded prior to the hearing but was raised during the course of the hearing.

4 There are three issues requiring determination, and they are, firstly, whether the defendant is a respondent to the award by virtue of the application of section 149(1)(d) of the Act; secondly, whether clause 20(a) of the award required the defendant to record start and finish times for the days worked by Mr Dautopulos during the period in question and thirdly, whether, as a matter of fact, such a record was kept.

5 I now turn to consider the first issue, being that of respondency. The Security Officers (Western Australia) Interim Award 1996 names as a respondent MSA Guards & Patrols. The award came into operation on 17 May 1996. At that time the business was owned and operated by Banbridge Holdings Pty Ltd. On 30 December 1996 Banbridge Holdings Pty Ltd transferred that business and others, including MSA Security, to Olten Pty Ltd, the defendant in these proceedings. The evidence supports a finding that from and after that date Olten Pty Ltd continued to operate the business MSA Guards & Patrols and also the business MSA Security. It is also clear that there are other businesses that it operates.

6 As from 30 December 1996 Olten Pty Ltd has been the proprietor and operator of those particular businesses. The evidence supports a finding that Mr Dautopulos worked for the defendant whilst it operated the businesses under those particular names. The question, of course, is whether Olten Pty Ltd is a respondent to the award by virtue of the provisions of section 149(1)(d) of the Act. In that regard it is clear to me that in naming the business MSA Guards & Patrols, the Australian Industrial Relations Commission was referring to the body which owned the business. It was, in effect, a reference to Banbridge Holdings Pty Ltd. If that were not so it would render the naming of any business as a respondent to the award as nugatory and inconsistent with the aims of the award.

7 Accordingly, it is quite clear to me that Banbridge Holdings Pty Ltd was a party to the award, and that fact is not open to challenge. Section 150 of the Act does in fact prohibit such a challenge, and I agree with Mr Schapper in that regard. The evidence, both documentary and from Mr Dennison clearly establishes that there was a transmission of the business to Olten

Pty Ltd. Accordingly, as from 30 December 1996 Olten Pty Ltd was bound by the award by virtue of the provisions of section 149(1)(d) of the Act. Clearly the defendant operated upon that basis, that is, that it was bound by that particular award. Indeed it conceded so in this jurisdiction in matter number CP261 of 1999 (Australian Liquor, Hospitality and Miscellaneous Worker's Union v. Olten Pty Ltd 80 WAIG 4383). There was no mistake on it's part in relation to that issue. The admission made in that matter reflects the true position, and in my view that is a position that it cannot now resile from. Clearly, on the evidence before me, the question of respondency is overwhelmingly proved.

8 Before I leave this issue I need to refer to the High Court decision to which I was referred which is the decision of PP Consultants Pty Limited v Finance Sector Union (2000 HCA 59). Having read that decision, I find that there is simply no application of that particular decision to this case. It is clearly distinguishable on its facts, and I accept Mr Schapper's argument in that regard.

9 I now move to consider the proper construction of clause 20(a). It is true that at first blush the provision appears to be ambiguous. However, a closer and proper consideration of the provision makes it clear, in my view, that the provision can only be read in the manner suggested by the complainant. The provision must be read in conjunction with other provisions of the award, and must be construed in the light of the mischief at which it is aimed. In that regard it is obvious that what the clause is aimed at is a need to record the details, not the total hours worked on any given day, but rather the specific details of what hours were actually worked on any given day. Therefore there must be a delineation of start and finish times.

10 The aim of the clause is that which would enable an inspector, a union, or for that matter, the employee him or herself an opportunity to consider which hours were actually worked and calculate, based on the applicable rates, the amount of wages to be paid for the times actually worked and so on. To give it the meaning suggested by the defendant would render that provision next to useless. I have no doubt that the provision is to be interpreted in the manner suggested by the complainant, and I will simply leave it at that point.

11 Finally, I turn to consider whether, as a matter of fact, it can be established that on the evidence the defendant has failed to comply with clause 20(a) over the material period. In effect, I have already held that the record in the form of exhibit 11, which on it's second page contains the total of hours worked, does not constitute a record, or the type of record required to be kept. By virtue of the correspondence passing between the parties in July 1999 and I particularly refer to exhibits 8, 9, and 7: (I put them in that order because that is the order of the dates which appear on the face of the documents), it is clear that the complainant sought time and wages records relating to Mr Dautopulos. His records were indeed provided for the period 1996 through to April 1999.

12 Obviously if records existed that complied with clause 20(a) then there can be no doubt that such records would have been provided. I say that because of the fact that the records provided appear to be in a comprehensive form. However records that complied with clause 20(a) were not provided. By exhibit 7 the defendant purported to supply a compendious record hat maintained by the defendant relating to its employee, Mr Dautopulos. It appears that exhibit 7 was produced to constitute the defendant's entire record as required to be kept and made available to the complainant for inspection. Had there been a record of start and finish times then one would have thought that such would have been produced, and clearly it was not.

13 There was some suggestion made on the part of Mr Dennison, and I found that the suggestion was in quite a nebulous form, that there are other records that exist which may comply with the requirements of clause 20(a) of the award. Mr Dennison's evidence in that regard lacks specificity. If such records existed one wonders why they were simply not produced today. Indeed, they were not produced today and an inference can be drawn that they simply do not exist. Clearly any reference to rosters by Mr Dennison is also not useful. It is obvious that rosters do not constitute the type of records required to be kept for the purposes of clause 20(a). Again I accept Mr Schapper's argument on this issue.

14 On balance I find that the defendant has failed to keep proper time and wages records for each of the 52 periods particularised in the complaint for the material period as stated in the complaint. I find that the complaint is proved.

15 Before dealing with the imposition of a penalty I need to resolve the issue of what is the maximum penalty. In that regard the complainant says that the maximum penalty available to me is $10,000. The defendant says that it is $5000. The defendant reads section 178(4)(a) as providing for a penalty of $5000 where there is a breach taken to have been committed under a provision included in an award, but in my view, with all due respect, that is not the approach to be taken. The provision in 178(4)(a)(i) is to be read as a provision with reference to an award or order under paragraph 111(1)(e) of the Act. That is the way it must be read, and to that extent I agree and concur with Mr Schapper.

16 It follows that I find that the appropriate maximum penalty that I should consider is that of $10,000. Having arrived at that conclusion, the question becomes what is the appropriate penalty to be handed down in this particular situation. Mr Clarke says that the defendant committed the breach not by wilful intent or wilful act on its part, but rather by an omission. I accept that it occurred by omission. The situation, though, is that notwithstanding that the breach occurred by omission, it does not render the omission such that it would fail to attract a penalty. I say that because it is important that the provisions of the award be complied with, with respect to the keeping of records, so those who are employees of the defendant are able to check the records to ascertain that proper wages are being paid, and where the record is not properly kept that possibility is simply removed. To that extent the conduct, albeit not wilful, is serious.

17 Having said that, I recognise in this instance that the defendant, through Mr Dennison, was given certain advice or an indication by an inspector, and to that extent may have relied upon such advice or indication. That significantly mitigates the conduct of the defendant, and I accept that that is the case.

18 The position with respect to the imposition of civil penalties is akin to the imposition of penalties generally in criminal proceedings. The same sorts of considerations are apposite. Having regard to those factors, it has been long held that the appropriate penalty for a first offence, without significant mitigation, is that of one-fifth of the maximum penalty available. However, having said that, I note the influence upon the defendant derived from the inspector, and accept that as a significant mitigatory factor in respect of the conduct of the defendant, particularly in the recent past. The extent that the defendant's conduct was affected by such advice is a significant mitigatory factor, and accordingly I conclude that the appropriate disposition of this matter is to impose a penalty of $1000, which equates to one-tenth of the maximum penalty which is available.

19 I impose upon the defendant a penalty, which is in effect a civil penalty, in the sum of $1000. It is appropriate also that the defendant pay to the complainant the disbursements incurred, which total $72.20. Both the fines and the costs are to be paid by the defendant to the complainant.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07863

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	PETER MAINDOK, CLAIMANT
	v.
	CABLETECH ELECTRICAL PTY LTD, RESPONDENT
CORAM	MAGISTRATE WG TARR IM
DATE	THURSDAY, 22 NOVEMBER 2001
CLAIM NO/S	M 124 OF 2001
CITATION NO.	2003 WAIRC 07863

Representation	
Claimant	Mr C Young as agent
Respondent	Mr E Rea as agent

Reasons for Decision

HIS WORSHIP: These are the reasons for my decision.

1 The action before me is one brought by the Claimant pursuant to the provisions of section 50 of the *Workplace Agreements Act 1993*. Section 50 provides for a party to a workplace agreement, where there is a claim that there has been a breach of such agreement, to bring an action before an Industrial Magistrate's Court.

2 There is no issue with the facts that the Claimant was employed by the Respondent and was a party to a workplace agreement (tendered as exhibit B). There is also no dispute that the Claimant's employment was terminated on 3 March 2001 during a telephone conversation with Mr Lawrence Bensusan, a director of the Respondent company. It was the Claimant's case that he was dismissed and he has not been paid his entitlements pursuant to the workplace agreement. His statement of claim particularises those entitlements as:—

- $695.00 owing for normal working hours;
- $363.00 owing for holiday pay; and
- $800.00 owing for one week's pay in lieu of notice.

comprising a total amount of $1858.00. The particulars also include claims for pre-judgment interest, penalties pursuant to section 83(6) of the *Industrial Relations Act 1979* and costs.

3 The Respondent concedes that the Claimant is entitled to the sums of $695.00 and $363.00, but denies liability for the amount of $800.00, maintaining that the Claimant resigned, and in such circumstances is not entitled under the workplace agreement to pay in lieu of notice.

4 The Claimant was employed by the Respondent as an electrical mechanic from August 2000 until termination on 3 March 2001. In that capacity he was provided with a van, uniform and other equipment. He was required to carry out electrical work assigned to him. A percentage of that work was assigned by way of a 2-way radio fitted to the van.

5 As I understand the evidence he was required to respond to work requests as allocated, and report each morning when he arrived at his first job. I have heard evidence of the circumstances which led to a telephone discussion between the Claimant and Mr Bensusan. It is the Claimant's evidence that he did not want to work after 6 pm on any Friday, as he had an obligation to his daughter on that day. He claimed to have had an understanding with the respondent in that regard.

6 On Friday, 2 March 2001, at some time before 6 pm, the Claimant had finished his last job, which was south of the river, and was driving home to Duncraig on the Freeway. His evidence is that at about 5.50 pm he received a request to do another job. He refused that request, and two further requests made over the radio. His evidence was that he said "No" each time. His claim is that there was an agreement that he knocks off at 6 pm on Fridays. He arrived home about 1 hour later.

7 The Claimant further claims that he was stung by a wasp and was in terrible pain. It is his evidence that at about 2 am on Saturday, 3 March 2001 he took a painkiller and slept until 12 noon on the Saturday.

8 He obviously did not go to work that day as he was required to do, and made no contact with his employer. It was his evidence that he knew Mr Bensusan would telephone him some time. That telephone call was answered by the Claimant some time late in the afternoon on Saturday, 3 March 2001.

9 It is the Claimant's evidence that in response to Mr Bensusan's request for a reason for not contacting the employer to let them know he would not be at work on Saturday, he responded by saying: "You know I don't like working Saturdays". It is then that the Claimant says that

Mr Bensusan told him he was sacked for gross misconduct. It is not in dispute that the Claimant responded some time later by telling Mr Bensusan what he could do with his job in the manner given in evidence.

10 Mr Bensusan denies that he sacked the Claimant. He said he was concerned that the Claimant did not turn up for work on that day and had not telephoned with any reason. Until then he had considered the Claimant to be a valuable employee, and there had been no problems in the past. In fact he described him as a model employee.

11 I must find the attitude and behaviour of the Claimant at the time quite remarkable, and it seems consistent with him being, as he said, fed up with the job because of the hours he was required to work, and in particular, the incident where he was requested to work after 6 pm on Friday 2 March 2001.

12 It is my view that he certainly did not behave as one would expect a responsible employee should. There was no mention of the wasp sting when Mr Bensusan asked why he had not gone to work or contacted the employer. There has been no medical evidence or other evidence supporting the claim. I am left wondering why he did not offer that reason at the time, instead of responding in the way he did.

13 I accept as credible the evidence of Mr Bensusan that he wanted to pick up the van, money, EFTPOS machine and other company equipment the following day, but accepted the time dictated by the Claimant.

14 As I have mentioned, the fundamental issue in this action is whether the termination was a dismissal by the employer, or a resignation by the Claimant, and I must say that that is not conclusive on the evidence before me. The evidence of both Mr Waltham and Mr Low does not assist me. Their admission that they did not hear all the conversation between Mr Bensusan

and the Claimant, and that therefore Mr Bensusan could have told the Claimant he was sacked, adds absolutely nothing. Their evidence is that they did not hear it said.

15 In actions like the one before me, the Claimant has the onus of proof to satisfy me, on the balance of probabilities, as to each and every element of his claim. I am left with two versions of events, the Claimant's word against that of Mr Bensusan. I have been asked to consider the arrow put on clause 12 of the copy of the workplace agreement (see exhibit F). Mr Waltham strongly denied that it was he who did that, and I am not able to determine how it was done, or by whom.

16 When I take into account the reaction of the Claimant in refusing work on the Friday night, and the effect that request had on him; the disregard he had for what I would have thought was a reasonable obligation to contact his employer when he was not going to work on the Saturday; his response to a reasonable request from his employer for an explanation on Saturday afternoon, and the evidence in relation to the return of, and damage to, the Respondent's van, I have difficulty concluding that I should accept the Claimant's evidence in preference to that of the Respondent. That difficulty is compounded when the Claimant admits that he was fed up with the job, in particular the hours he was required to work.

17 I therefore find that the Claimant has not satisfied me to the required standard that he was dismissed from his employment with the Respondent, and his claim for one week's pay in lieu of notice must fail.

18 It seems to me that I should make orders by consent in relation to the payment by the Respondent of the $695.00 relating to normal hours worked and $363.00 for holiday pay due. I would be prepared to make an order in relation to interest on those sums.

19 The issue of costs has been raised and, pursuant to section 83(3) of the *Industrial Relations Act 1979*, the Court can only make an order for costs where a defence is frivolous or vexatious. I could not find in this case that there was no merit in the defence. Accordingly I am not able, under the legislation, to make any order for costs.

20 As to the issues in relation to the damage to the van and the return of the uniform being part and parcel of the application for costs, I make no finding in relation to the evidence regarding those two matters.

21 My orders will be that the claim in relation to pay in lieu of notice is dismissed and that, by consent, the Respondent shall pay the Claimant $1058.00 plus interest fixed at $40.00, and reimburse the Claimant the amount of $40.00 being the cost of making the claim.

22 It is the intention of every workplace agreement, and in my view there is a moral obligation, that an employee should be paid his or her entitlement at the conclusion of their employment. It is a fundamental right that an employee has. There are all sorts of reasons why that should be the case. Employees have families and commitments, and in my view it is not for an employer to arbitrarily withhold money of that nature which is due.

23 Having said that, in this case there were complications and the complications came about by the actions of the Claimant. For whatever reason, there was damage done to a vehicle, and although legally under the workplace agreement the provisions of the schedule thereto did not apply, there was, as I said, action taken by the employer, which was contributed to by the employee, in my view. Having said that, it is my view that it is still appropriate that I impose a penalty. That is the intention of the legislation.

24 I am aware that there is an outstanding matter, and that is the damage to the vehicle. I would like to put an end to the matter now so that the parties have nothing further to do with each other. I had in mind a fine of $500.00, which I think is reasonable. What I am prepared to do is discount that fine by $150.00, which would be the Claimant's share of the cost of repairing the damaged window. I think if I do that, it would be fair and equitable, and that should put an end to any further court action for recovery of the amount outstanding or claimed in relation to the damage to the vehicle.

25 By way of penalty, for the reasons I have given, there will be an order that the Respondent pay $350.00, and that penalty is to be paid to the Claimant.

W. G. TARR,
Industrial Magistrate.

2003 WAIRC 07726

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	RICHARD JOHN POWERS, RICHARD JAMES QUINLIVAN, ALLAN WAYNE SMITH, SHANE MARK WATSON, ANTHONY JOHN BLUETT, ELIO GHILARDI, DANNY DAVY, RAFAEL ANTONIA SOSA, CLAIMANTS *v.* AUSTAL SHIPS PTY LTD, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 13 FEBRUARY 2003
CLAIM NO/S	M 313 OF 2002, M 314 OF 2002, M 315 OF 2002, M 316 OF 2002, M 317 OF 2002, M 318 OF 2002, M 319 OF 2002, M 320 OF 2002
CITATION NO.	2003 WAIRC 07726

Representation

Claimant	Mr KJ Martin QC and with him Mr S Heathcote (of counsel) instructed by *Messrs Clayton Utz, Lawyers* appeared for the respondent (the applicant in this interlocutory application)
Respondent	Mr L Edmonds (of counsel) appeared for the claimants (the respondents in this interlocutory application)

Reasons for Decision

The Application

1 On 8 January 2003 Austal Ships Pty Ltd, which is respondent to claims made by the aforementioned claimants, filed interlocutory applications with respect to the matters, seeking the following orders—

1. *(That) All the Claims the subject of this application be struck out for want of jurisdiction; or*
2. *Further, or in the alternative, to the extent that such Claims are concerned with alleged breaches of clause 23 of the Metal Trades (General) Award 1965, that they be dismissed as untenable.*

2 The interlocutory applications are supported by the affidavit of Steven Heathcote sworn 30 December 2002, which was filed on 8 January 2003. In his affidavit, Mr Heathcote sets out the grounds upon which the Respondent relies in relation to these applications. They include jurisdictional issues and matters going to the substantive merits of the case.

3 The jurisdictional issues raised are that—

1. *The Claimant in each instance has failed to comply with section 54(1) of the **Workplace Agreements Act 1993** in that he has failed to include in the claim a certificate under subsection (2) and, further, that the certificate filed on 3 December 2002 following the filing of the claim on 25 November 2002 in purported compliance with the provisions cannot cure that which is fundamentally flawed; and*
2. *Even if the Court were to accept that the said certificate in each instance complies with section 54(1) of the Act, such certificate cannot, on its face, be said to have been correctly given.*

4 The matters going to the substantive merits of the case are as follows—

1. *In relation to the claim for pay in lieu of notice and redundancy that the explicit definition in each of the workplace agreements to which the Claimants were party precludes any claim which relates to any period served by an employee prior to the workplace agreement coming into force; and*
2. *That the claims for payment of annual leave not taken, together with the claim for payment of a 17.5% loading thereon said to have been accrued (which is denied) pursuant to the provisions of the **Metal Trades (General) Award 1965** prior to the workplace agreements coming into force cannot be recovered by the purported enforcement of the workplace agreements.*

Issue

5 The issue to be determined with respect to these interlocutory applications is whether or not there is some jurisdictional impediment to the consideration of the claims and, if not, whether the substantive claims, on their face, are so untenable that the claims ought to be dismissed without the necessity for the matters to be dealt with on their merits.

Determination

6 I will deal firstly with issues going to the substantive merits of the case. In that regard it is self evident that if there is an arguable case demonstrated then the Claimants should be permitted to proceed with their claims to be dealt with on their merits. I am not called upon to finally determine any issue unless it can be shown that the same is so inherently untenable that it is not worthy of argument.

7 The Claimants' claim that Austal Ships Pty Ltd has breached clause 23 of the ***Metal Trades (General) Award 1965*** (the Award) in each instance by failing to pay them monies in lieu of annual leave not taken together with a leave loading of 17.5% on those monies. The claims in that regard relate to periods of alleged employment pre-dating their respective workplace agreements. For the purposes of my considerations in this matter I proceed on the basis that the Claimants were "employees" as defined in section 7 of the ***Industrial Relations Act 1979.*** I appreciate however that the issue as to whether the Claimants were at the material times employees or independent contractors remains very much a live issue.

8 Each claim for the payment of unpaid annual leave plus loading is founded upon an alleged breach of clause 23(6) of the Award. The Applicant submits, however, that the provision relates only to entitlements that become payable at the time an employee's employment is terminated. In other words, that no entitlement accrues until such time as a termination occurs. Further it is argued that the provision can only be enforced when termination occurs whilst the parties are subject to the Award provisions.

9 It is common ground that when each Claimant was terminated from his employment with Austal Ships Pty Ltd that his employment relationship was, in each instance subject to and governed by the terms of his workplace agreement. The workplace agreement in each instance expressly excluded the operation of any award. That is consistent with section 6 of the Act which precludes the application of an award whilst a workplace agreement or its terms remain in force. Accordingly, it is argued that Austal Ships Pty Ltd could never be in breach of clause 23(6) of the Award because at the time that each of the Claimants was terminated from their employment, their respective relationship of employment was solely governed by the terms of their workplace agreement. The employment relationship was not, at the time of each relevant employment termination, the subject of the Award. Accordingly, it is said, the Award is irrelevant and each claim thereunder is untenable.

10 In response, the Claimants say that entitlements accrued by employees are "dragged into the workplace agreements". Any annual leave entitlements which have accrued are preserved and are payable upon termination. The Claimants say that their argument applies equally to their claims with respect to notice and redundancy.

11 In considering the matter it is important to note that although section 6(1) of the ***Workplace Agreements Act 1993*** (the Act) expressly excludes the operation of any award, the relationship between the parties to an employment contract remains constant (see section 6(4) of the Act). The relationship continues, albeit subject to differing terms. Notwithstanding the coming into force of differing terms from the commencement of the workplace agreement, the entitlements accrued prior to the workplace agreement coming into force are not lost. Section 7 of the Act provides—

Effect of workplace agreement on accrued entitlements

7. Any entitlement accrued to an employee under the relevant award before the workplace agreement entered into by the employee comes into effect shall be preserved and paid to the employee by the employer at either-

(a) the award rate; or

(b) the rate the employee was paid

whichever was the higher at the time immediately prior to the workplace agreement coming into effect.

12 In these matters the Applicant argues that the Claimants' rights with respect to payment of annual leave and loading had not accrued at the time that the workplace agreements came into force. Accordingly there was nothing to preserve. It is argued that, even if it could be said that their entitlements accrued prior to termination, the same could only be enforced if the

termination occurred whilst the Award was operative. However, in each instance the termination of the Claimants occurred during the currency of their workplace agreements and therefore not enforceable under the Award.

13 By virtue of section 23 of the ***Minimum Conditions of Employment Act 1993*** (the MCE Act), as it was at the material time, it is clear that annual leave accrued pro rata on a weekly basis. Section 23 provides—

Entitlement to annual leave

23. (1) An employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 160 hours.

(2) An entitlement under subsection (1) accrues pro rata on a weekly basis.

*(3) In subsection (1), "**Year**" does not include any period of unpaid leave.*

(4) Subsection (1) does not apply to an employee of a class prescribed by the regulations.

14 The Claimants, if the evidence supports the same, could claim annual leave accrued prior to entering into their workplace agreements. Section 24 of the MCE Act governs the payment for annual leave. It provides—

Payment for annual leave

24 (1) An employee is to be paid for a period of annual leave at the time payment is made in the normal course of the employment, unless the employee requests in writing that he or she be paid before the period of leave commences in which case the employee is to be paid.

(2) If-

(a) an employee lawfully leaves his or her employment; or

(b) an employee's employment is terminated by the employer through no fault of the employee,

before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for all of that annual leave.

(3) If-

(a) an employee leaves his or her employment; or

(b) that employment is terminated by the employer,

in circumstances other than those referred to in subsection (2) before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for any untaken leave that relates to a completed year of service, except that if the employee is dismissed for misconduct, the employee is not entitled to be paid for any untaken leave that relates to a year of service that was completed after the misconduct occurred.

(4) In this section-

*"**year**" does not include any period of unpaid leave.*

15 The provisions of the MCE Act referred to above have application by virtue of section 5 of that Act which states—

PART 2 – APPLICATION OF MINIMUM CONDITIONS

Generally, minimum conditions apply unless conditions more favourable

5. (1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied-

(a) in any workplace agreement;

(b) in any award; or

(c) if a contract of employment is not governed by a workplace agreement or an award, in that contract.

(2) A provision in, or condition of, a workplace agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.

(3) A provision in, or condition of, an agreement or arrangement that purports to exclude the operation of this Act has no effect, but without prejudice to other provisions or conditions of the agreement or arrangement.

(4) A purported waiver of a right under this Act has no effect.

(5) This section has effect subject to sections 8 and 9(1).

16 Although the provisions of sections 23 and 24 of the MCE Act are implied into the Award, it seems that recovery of annual leave might not be achieved through the enforcement of the Award because the terminations that give rise to the payments did not occur during the operation of the Award but rather during the currency of workplace agreements. It appears, therefore, that any entitlement that might arise for payment of annual leave not taken may upon termination be enforced pursuant to the provisions of section 7 of the MCE Act. Section 7 provides—

Enforcement of minimum conditions

7. A minimum condition of employment may be enforced-

*(a) where the condition is implied in a workplace agreement, under Division 1 of Part 5 of the **Workplace Agreements Act 1993**;*

*(b) where the condition is implied in an award, under Part III of the **Industrial Relations Act 1979**; or*

*(c) where the condition is implied in a contract of employment, under section 83 of the **Industrial Relations Act 1979** as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.*

17 The argument, however, does not flow for annual leave loading which is not the subject of any statutory provisions found in the MCE Act.

18 Accordingly, to the extent that the Claimants allege a breach of the Award which flows from the terminations which occurred during the currency of the workplace agreements, they cannot succeed. In my view, if the Claimants have any claim in that regard, it may be by virtue of the MCE Act and enforceable thereunder.

19 Paragraph 9 of the particulars of claim in each instance provides—

9. The Claimant applies for an enforcement order and an order for recovery of Award wages pursuant to sections 83(1) and 83(4) of the Industrial Relations Act 1979 respectively.

20 If the first limb of that paragraph is aimed at the enforcement of the entitlements pursuant to the provisions of the MCE Act then the same appears to have some validity. Clearly the second limb of that paragraph with respect to the recovery of award wages has no application. Nor for that matter does any claim for the recovery of entitlements pursuant to clause 23 of the Award. I accept the arguments of Mr Martin in that regard.

21 I now turn to the claims with respect to pay in lieu of notice and redundancy. It is noted that such claims are made pursuant to the provisions of the Act. The Claimants allege that as a consequence of Austal Ships Pty Ltd's alleged failure to correctly calculate their respective periods of continuous service that Austal Ships Pty Ltd failed to pay them—

(a) pay in lieu of notice to which they claim to be entitled pursuant to clause 10.1 of their respective workplace agreements; and

(b) except for Mr Ghilardi, redundancy pay to which they claim to be entitled pursuant to clause 10.4 of their respective workplace agreements.

22 Clause 10.1 of the workplace agreements, in each instance, provides—

10. TERMINATION

10.1 (a) Employees may be terminated by the employer giving them the following notice, or compensation in lieu of the employee working out the notice period—

EMPLOYEES PERIOD OF CONTINUOUS SERVICE WITH EMPLOYER	*PERIOD OF NOTICE*	*PERIOD OF NOTICE IF EMPLOYEE IS OVER 45 YEARS OF AGE*
Not more than (1) year	*At least 1 week*	*At least 1 week*
More than 1 year but not more than 2 years	*At least 2 weeks*	*At least 2 weeks*
More than 2 years but not more than 3 years	*At least 2 weeks*	*At least 3 weeks*
More than 3 years but not more than 5 years	*At least 3 weeks*	*At least 4 weeks*
More than 5 years	*At least 4 weeks*	*At least 5 weeks*

(b) The employee will give the employer at least one (1) week's notice regardless of length of service.

(c) Failure to work the required notice period will result in the equivalent sum of wages being deducted from the final pay.

23 Clause 10.4 provides—

10.4 Redundancy

(a) In the event that the employer cannot provide continued work for the employee the following redundancy pay will apply—

Employees Period of Continuous Service With Employer	*Redundancy Pay*
Less than 1 year	*$ nil*
1 year but less than 2 years	*2 weeks*
2 years but less than 3 years	*4 weeks*
3 years but less than 4 years	*6 weeks*
4 years and over	*8 weeks*

(b) The employee is to be given eight (8) hours leave with pay for the purpose of finding future employment.

24 Clause 2.1 of each of the Claimants' respective workplace agreements defines the expression "Employees Period of Continuous Service With Employer" as either—

- *"the period of continued service since signing the first Workplace Agreement", or*
- *"the period of service since signing this agreement".*

25 It is obvious that the explicit definition precludes the taking into account of any other periods prior to the commencements of the first workplace agreements or the workplace agreements that applied at the time that each Claimant was terminated. Accordingly Austal Ships Pty Ltd says that it has met the full extent of its contractual obligations under clause 10.1 and/or 10.4 of the respective workplace agreements.

26 In my view it appears, based on what is before me and without finally determining the same that the claims made with respect to "pay in lieu" and "redundancy" are inconsistent with the clear words of the respective workplace agreements. Having said that I need not determine the issue because it is quite apparent that, in so far as the Claimants seek to enforce the provisions of the workplace agreements, the claims are fundamentally flawed by virtue of the fact that the certificate was not included in the claims as is required pursuant to section 54(1) of the Act. I adopt my reasons in ***Halpin v Western Australian Mint 82 WAIG 611*** in that regard. In my view the failure to include the certificate strikes at the validity of the claims. The proceedings in so far as they relate to enforcement of the workplace agreements are fundamentally flawed and ought to be struck out.

27 Given my determination in that regard I find it unnecessary to address the issue of whether the certificate, in each instance, was correctly given. Notwithstanding that, and for the sake of completeness, I say that that issue, in any event, cannot be properly determined without evidence. The issue can only be determined based on evidence and not within the current evidentiary vacuum. The hearsay evidence contained in Mr Heathcote's affidavit with respect to the issue would not permit any finding.

Result

28 The claims, in so far as they relate to the enforcement of the workplace agreements, are struck out. The balance of the claims which may relate to entitlements pursuant to the MCE Act remain live.

29 Any claim for the enforcement of the Award is untenable and ought to be dismissed.

30 In consequence it will be necessary for fresh pleadings to be filed with respect to each of the claims. It will also be necessary for the claims to be appropriately particularised to have regard for section 83A(2)(a) of the ***Industrial Relations Act 1979***.

31 I will hear from the parties in that regard.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07864

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	IAN DERWENT RILEY, COMPLAINANT
	v.
	HEALY AIRCONDITIONING PTY LTD, DEFENDANT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 15 AUGUST 2001
COMPLAINT NO/S	CP 1 OF 2001
CITATION NO.	2003 WAIRC 07864

Representation	
Complainant	Mr ID Riley appeared in person
Defendant	Mr AR Healy being a Director of the Defendant appeared for the Defendant.

Reasons for Decision

1 On 3 January 2001 the Complainant made a complaint that on 15 December 2000 the Defendant unfairly, harshly or oppressively dismissed him. The Complainant seeks reinstatement, or alternatively, damages. Additionally he alleges that the Defendant has breached their workplace agreement by failing to pay him his entitlements under the agreement. He accordingly seeks to recover amounts which he says are payable under the agreement.

Background

2 Mr Riley responded to "an employment advertisement" in the *West Australian Newspaper* in or about October of 1999. The advertisement sought a sales representative to sell air conditioning products on behalf of the Defendant. In responding to the advertisement Mr Riley spoke to Mike Martino the Defendant's General Manager. Mr Martino interviewed the Complainant and subsequently employed him to be a *"Commission Sales Executive"*. Consequently Mr Riley commenced working for the Defendant on 7 October 1999.

3 The terms of the oral agreement between the Complainant and Defendant provided, inter alia, that the Complainant would be paid commission on sales. The rate of commission would depend on the nature of product sold. Additionally the Complainant was paid a "manager's fee" of $10,000 per annum. That fee was paid progressively on a regular basis, which assisted in the equalization of income over time. When commenting on the conditions of his "employment" Mr Riley said that he believed that he was to receive holiday pay. He conceded however that he knew that the Defendant would not be making payments of superannuation in relation to him. Furthermore he knew he was not covered by workers' compensation.

4 Mr Riley testified that just prior to 30 June 2000 he was told that he had to sign a workplace agreement. At about that time he was handed a copy of a workplace agreement to sign. However Mr Riley did not immediately sign the agreement. He eventually executed it on 25 September 2000. The *Commissioner of Workplace Agreements*, on 30 October 2000, subsequently registered the agreement.

5 The workplace agreement set out the terms of remuneration, which included—

- An annual retainer of $26,000 paid in twenty-six fortnightly payments;
- A vehicle allowance of $6,000 per annum paid monthly in arrears; and
- A telephone allowance of $500 per annum paid monthly in arrears.

6 The agreement does not specifically set out the details in relation to commissions payable. I accept however that the Complainant's remuneration includes the payment of commission. The terms of the Complainant's remuneration are those as set out and highlighted at page 10 of the Defendant's *Sales and Marketing Document 2000/2001* dated June 2000. That document outlines part of the terms and conditions of employment under which the Complainant was engaged as from 1 July 2000.

7 The workplace agreement itself addresses other conditions including, inter alia—

- Annual leave
- Notice, and
- Sick leave

8 The annual leave provision in the workplace agreement provides that the Complainant was entitled to 160 hours of annual leave per annum which accrued at the rate of 3.077 hours per week. The calculation of annual leave is based on the retainer only. The sick leave provision provides that the Complainant was entitled to eighty hours of sick leave per year, which accrued at the rate of 1.538 hours per week. The notice provisions required the Defendant to give one week's notice in the first year of employment or two weeks notice in the case of one to three years of employment.

9 Notwithstanding the terms of the workplace agreement the Complainant's remuneration was varied by oral agreement in that his retainer was paid on a weekly basis rather than a fortnightly basis. The documentary evidence clearly establishes that fact.

10 In about mid November 2000 Mr Martino, on behalf of the Defendant, approached the Complainant concerning his alleged poor performance. It was put to the Complainant that he had a poor contact to sales conversion rate. The Complainant took a differing view and accordingly spoke to the Defendant's director, Mr Alwyn Healy, concerning the matter. The discussions did not achieve a change in perceptions.

11 On 23 November 2000 Mr Healy faxed a letter (exhibit 5) to the Complainant concerning his sales performance and other matters. The letter indicated, inter alia, that the Defendant was looking at the possibility of replacing the Complainant as manager at Rockingham.

12 On 25 November 2000 Mr Riley attended his medical practitioner. He was certified on that day to be unfit for work for one week. On 1 December 2000 he was again certified as being unfit for work for a further week. The Complainant sent those medical certificates to the Defendant.

13 On 30 November 2000 Mr Healy wrote to the Complainant and advised that the Defendant had withdrawn payment of his management fee with immediate effect. Furthermore he indicated that certain cash deposits paid over by customers had not been accounted for. The letter indicated that the failure to pay such funds into the Defendant's office by the morning of 4 December 2000 would result in immediate termination.

14 The Complainant testified that all monies received by him had in fact been handed over to the Defendant. He said in effect that by reason of the Defendant's poor accounting systems the money, which he had previously handed over, had not been appropriately accounted for. All monies referred to in Mr Healy's letter of 30 November 2000 had in fact been handed in prior to the date of the letter. He said that he made numerous calls to Mr Healy in order to discuss the matter raised in his letter but was unable to reach him. On 4 December 2000 he faxed a letter to the Defendant querying the matters contained in the letter.

15 The Complainant testified that he concluded that he had been terminated with effect from 4 December. He said that it was impossible for him to comply with the

16 Defendant's demands contained within its letter dated 30 November 2000, as there was no money outstanding.

17 The Complainant testified that he has not been paid following his termination and accordingly seeks payment of a total of $7647.28 being the sum of outstanding entitlements (see exhibit 8).

18 In about March of 2001 the Complainant obtained alternate full time employment. He accordingly suffered unemployment for a total of seven weeks in consequence of the Defendant's termination of his employment. He told the Court that notwithstanding that he no longer wishes to pursue his unfair dismissal claim but rather seeks only to recover his contractual entitlements under the workplace agreement. The Complainant has effectively abandoned his claim made under section 51 of the *Workplace Agreements Act 1993* (the Act).

19 Finally it is important to note that the Complainant's alleged failure to account for cash was referred to the Rockingham detectives by Mr Healy on behalf of the Defendant. It suffices to say that the police have taken no action in respect of the matter, as there is insufficient evidence to support a criminal charge against the Complainant.

20 The Complainant was cross- examined. Under cross-examination, he agreed that the workplace agreement under which his claim is brought commenced on 29 September 2000. The Complainant was also asked questions concerning the Defendant's accounting procedures. In that regard he said that the procedures were such that cash money was left with the Defendant's employees and that no receipts were issued. It was company policy not to issue receipts. He said that the Defendant's accounting procedures were defective. He gave an example of Sandra Healy finding a record of "moneys" previously thought to have gone missing which had in reality not been properly accounted for. They included the amounts to which Mr Healy referred in his letter dated 30 November 2000.

21 Mr Alwyn Healy gave evidence for the Defendant. He told the Court that he was not directly involved in the initial engagement of Mr Riley. However he was able to say that Mr Riley was initially engaged as an independent contractor remunerated on a commission basis.

22 Mr Healy testified that as from 1 July 2000 the Complainant was employed in conformity with the terms of the workplace agreement, which was subsequently entered into formally by the Complainant on 25 September 2000. He told the Court that the Complainant was paid in accordance with the terms of the workplace agreement. He said that the agreement did not provide for the payment of management fees. Although conceding that management fees were paid he said that they were only paid at the discretion of the employer.

23 Mr Healy told the Court that the Defendant had not received any of the cash deposits referred to in his letter to the Complainant dated 30 November 2000 (exhibit 3). He said that the company's systems were such that the deposits of cash required the issue of receipts. He said there is no dispute in respect of the fact that the money was paid over by the customers to the Complainant but maintains that the money was never handed over by the Complainant to the Defendant. He maintains that the Complainant has misappropriated money. As a result of Rockingham detectives' unwillingness to pursue the matter he has instructed his solicitors to issue a summons in the *Local Court* seeking to recover money, which he alleges has been misappropriated by the Complainant.

24 In relation to the issue of termination, he said that he attempted on numerous occasions to contact the Complainant but was unsuccessful. He was accordingly compelled to write the letter that he did.

25 Mr Healy also maintains that the Complainant had been overpaid $3431. He accordingly, on behalf of the Defendant, seeks to recover that amount as may be set-off by any sum which may be payable to the Complainant in respect to outstanding entitlements. He therefore estimates that the Complainant owes the Defendant $2000.

26 Finally Mr Healy said he was quite entitled to dismiss the Complainant as he did, as his suspicion that the Complainant had misappropriated the money was sufficient in all the circumstances.

27 When cross-examined Mr Healy confirmed that his company had failed to keep accurate records of sick leave taken. Furthermore he confirmed that a management fee had been paid to the Complainant throughout his engagement. He denied however that he had told the Complainant that the Defendant was suing another organization on account of the delivery of an inefficient accounts software program.

Findings on the Facts

28 The evidence as to the terms of the Complainant's engagement in October 1999 is somewhat incomplete. The evidence before me in that regard is very sketchy indeed. The Defendant contends that the Complainant operated as an independent contractor. The Complainant contends that he was an employee. However he concedes that no superannuation was payable and that he was not covered by workers' compensation. Notwithstanding that, he says that annual leave accrued throughout. It is obvious that there are some aspects of the relationship that indicate that the Complainant may have been engaged as an employee. However there are other indicia that go to show that he may have been an independent contractor. The evidence on the issue is so sketchy that it is impossible for me to conclude, on the balance of probabilities, either one way or the other.

29 It is not in issue however that as from 1 July 2000 the Complainant was the defendant's employee. I find that the terms of his employment were those as contained within the workplace agreement read in conjunction with the *Sales and Marketing Document 2000/2001* as varied by an oral agreement. I accept the Complainant's evidence as to the terms of the oral agreement to which I referred earlier. It is clear that both parties were bound by the terms of the said agreement as from 1 July 2000. On 25 September 2000 the Complainant formally executed the workplace agreement. Accordingly on that day the agreement became binding and effective within the terms of the Act

30 The Complainant is therefore entitled to bring the action that he has pursuant to the provisions of section 50 of the Act. In that regard he is also entitled to recover any entitlements payable under the *Minimum Conditions of Employment Act 1993* (the MCE Act - see Section 7 thereof).

31 There is no issue in the fact that the Complainant took sick leave as from 25 November 2000. I accept his evidence that he was ill and procured medical certificates that were sent on to the Defendant. It is clear that he is entitled to recover sick leave payments in respect to that period.

32 Furthermore it is apparent from the evidence that the Complainant was dismissed from his employment with effect from 4 December 2000. The evidence dictates, and overwhelmingly so, that the dismissal of the Complainant was unfair. There is absolutely no evidence before the Court to establish the Defendant's contention that the Complainant misappropriated money. All I have is bare assertions made by Mr Healy unsupported by evidence. The Complainant, on the other hand, gave credible evidence on the issue. From his evidence it appears that the Defendant's procedures are so defective that it permits money to go missing. It appears that there is no proper form of receipting and/or accounting adopted by the Defendant with respect to the receipt of cash money. Therefore it is possible to conclude that Mr Healy's suspicions may well have been erroneously based. In any event the letter dated 30 November 2000 demonstrates procedural unfairness in that it pre-supposes that the Complainant had failed to pay the money. It does not give the Complainant an opportunity to be heard on the issue. Mr Healy's acts were, in the circumstances, precipitous and unfair. The Complainant was clearly denied both procedural and substantive fairness in not being afforded the opportunity of putting his position. I fear that Mr Healy may have used the issue to deny the Complainant his contractual entitlements and benefits under the MCE Act. There can be no doubt that the Complainant is entitled to his accrued benefits.

33 Had the Complainant not abandoned his unfair dismissal claim he may well have been able to recover in that regard.

Conclusions

34 Having determined that the Complainant is entitled to recover his contractual entitlements under the workplace agreement it becomes obvious that his recovery by this action is limited to the period 25 September 2000 to termination. It may very well be that the Complainant is entitled to recover with respect to entitlements accrued prior to 25 September 2000, however he cannot do so by virtue of these proceedings. He would necessarily have to take action in the Industrial Relations Commission and/or this Court under a different cause of action in order to recover.

35 In my view his entitlements under the workplace agreement with respect to this action are those that accrued between 25 September 2000 and 4 December 2000, being a total period of 10 weeks precisely.

Annual Leave

36 The Complainant is entitled to annual leave pursuant to the workplace agreement as accrued between 25 September and 4 December calculated as follows—

10 weeks @ 3.077 hours x $12.50 per hour = $384.63.

37 It is apparent from the workplace agreement that the rate is that based on the retainer set out within the agreement. The hourly rate provided for by the retainer is $12.50 per hour. In my view any other calculation that may imports allowances such as the management or any other allowance is inappropriate.

Sick Leave

38 The Complainant's entitlement to sick leave accrued under the workplace agreement between 25 September 2000 and 4 December 2000.

39 Accordingly the Complainant's entitlement is calculated as follows—

10 weeks @ 1.538 hours x $12.50 per hour = $192.25.

40 I am satisfied that the rate must be based on the retainer only and not any other allowances paid.

Notice

41 In view of the fact that the Complainant was dismissed without notice, he is entitled in accordance with the terms of the workplace agreement to one week's pay in lieu of notice calculated as follows—

$26.000 ÷ 52 weeks = $500.

Payment of Remuneration

42 I accept the Complainant's evidence that he is entitled to his November 2000 monthly remuneration which has thus far not been paid. In that regard he is entitled to his retainer ($1000), the management fee ($833), his kilometre allowance ($500) and his telephone allowance ($41.65). They amount to $2374.65. A sum of $411 representing a payment advanced is to be deducted from that figure (see exhibit 8). Accordingly the Complainant's entitlement in this regard may be calculated as follows—

Retainer	$1000.00
Management fee	833.00
Kilometrage	500.00
Telephone allowance	41.65
	2374.65
Less payment advanced	411.00
	$1963.65

Total of Entitlements Recoverable by the Complainant

43 Accordingly it follows that the Complainant is entitled to the amount of $3040.53 being the sum of all the entitlements referred to above which is owed by the Defendant to the Complainant under the terms of the workplace agreement.

Counterclaim

44 Finally the Defendant, through Mr Healy, contends that it is owed money by the Complainant. The fact that a counterclaim was being made was never raised with the Complainant in any formal sense until Mr Healy gave his evidence. In any event Mr Healy's contention in his evidence that the Complainant owes the Defendant money amounted to a bare assertion unsupported by the evidence. Given that the Complainant was not formally given notice of any counterclaim prior to the Defendant's case being heard, it is inappropriate that I deal with such a claim. If the Defendant has a claim in that regard there is nothing stopping it from taking separate action in that regard.

G. CICCHINI,
Industrial Magistrate.

2003 WAIRC 07761

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	JILLIAN MICHELE VILLANOVA, CLAIMANT
	v.
	BALWA PTY LTD T/AS 7 MILE INN, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 19 FEBRUARY 2003
CLAIM NO	M 206 OF 2002
CITATION NO.	2003 WAIRC 07761

Representation	
Claimant	Mr P Mullally as agent
Respondent	Ms J Auerbach of counsel

Reasons for Decision

Background

1 The Claimant was at all material times an employee of the Respondent. She was employed by the Respondent as a bar attendant working for it at its tavern known as the 7 Mile Inn. The Claimant commenced working for the Respondent on 3 August 1998. Her employment ceased on 27 May 2002. The employment relationship for part of that period (3 August 1998 to 30 April 2001) was subject to the ***Hotel and Tavern Workers Award 1978*** (the Award). The balance was subject to a workplace agreement.

The Claim

2 The claim relates to the period 3 August 1998 to 27 May 2001 and is brought pursuant to the Award. The applicability of the Award to the employment relationship during that period is not in issue. What is in issue is whether the relationship was one of casual employment or, alternatively, part-time employment.

3 The Claimant contends that she was at all material times a part-time employee as defined in the Award. The Respondent, on the other hand, contends that the Claimant was at all material times a casual employee as defined in the Award.

4 The Claimant alleges that she was not paid for annual leave not taken or for public holidays that occurred during the relevant period. Accordingly, she seeks to recover $3,672.24 with respect to unpaid annual leave and $1,626.40 with respect to unpaid public holidays, totalling $5,298.64.

5 The Respondent contends that the Claimant is not entitled to the amounts claimed because the evidence dictates that the nature of the relationship was a casual one. In that regard the Respondent points to the fact that the Claimant worked varying hours each week depending on the Respondent's business needs and the Claimant's availability for work. Further, it is submitted that the Claimant was engaged as and paid as a casual. It was clear to her that her rate of pay included a loading to compensate for entitlements foregone by the nature of her engagement. That was not only well known by the Claimant but was accepted by her as exemplified by the fact that she did not seek payment of annual leave or holiday pay during the currency of her employment.

6 The Respondent argues that if it is found that the Claimant was a part-time employee then any amount paid to the Claimant in excess of the Award entitlement should be set-off against the Award entitlements.

The Facts

7 The factual issues in this matter are, in the main, not in contention.

8 The Respondent took over the business (7 Mile Inn) from Tony Villanova, a cousin of the Claimant's father. Prior to the Respondent's acquisition of the business the Claimant had been working at the tavern as a bar attendant employed on a casual basis.

9 When the Respondent took over, nothing changed in that regard.

10 Sometime relatively soon after the Respondent acquired the business, the Claimant was offered a choice of shifts in order to entice her to remain working for the Respondent. That occurred in circumstances where she was threatening to leave her employment in sympathy with a work colleague who had had her employment terminated.

11 In consequence of the offer put to her, the Claimant agreed to work for the Respondent each day shift, Monday through to Saturday. Later she dropped Saturday work and worked only Mondays through to Fridays inclusive.

12 She worked throughout the material time within the Sports Bar of the establishment. Her work times were rostered by the Respondent's director, Ms Ellenson, taking into account the Claimant's requirements. Although the rosters were set, there was a fair degree of flexibility. Often the Claimant would swap shifts with other employees either on account of her own needs or alternatively on account of the other employees' needs. The Respondent was not averse to that arrangement. Indeed, that

conduct was accepted so long as the employees, between them, ensured that the bar was adequately staffed. Accordingly, the Claimant did not necessarily work in accordance with her roster, although in the main, she did.

13 If the Claimant wanted time off then, except in cases of sudden onset of illness, she would have to give the Respondent substantial notice in advance. The Respondent would not object to the Claimant taking such leave provided that sufficient time was given to organise a replacement. Any time taken off as agreed to or, alternatively, not worked on account of sickness was not paid. The Claimant testified that the bar was usually closed on a public holiday with the exception of the early part of her employment with the Respondent. When open on a public holiday she worked. When the bar was not open she did not work and did not receive any payment. The Claimant said that she was not paid for 19 public holidays that occurred during the material period of her employment.

14 The Claimant testified that she was engaged as a casual, paid as such and that she knew she was not entitled to paid leave. She said that as far as she knew there were no part-time or full-time positions available within the hospitality industry. That is why she proceeded on the basis that she did.

15 The documentary evidence before the Court together with the viva voce evidence given by the Claimant establishes that her hours of work were reasonably regular. She usually started work at 10.00 am or 11.00 am and finished work at 5.00 pm or 6.00 pm. She generally had a half hour lunch break between 2.00 pm and 2.30 pm. Having said that, I acknowledge that there was some variation to that regime.

16 A perusal of exhibit 10, being the summary of hours worked and payments made, illustrates that for the period the week ending 10 August 1998 through to the week ending 30 April 2001, the Claimant worked less than 20 hours per week only on 8 occasions and in a number of instances, only marginally less. In the main she worked in the region of about 30 hours per week.

17 It is obvious that this was the Claimants only job and that she expected to work in that job on an ongoing basis. Indeed, the Respondent expected her to continue working on an ongoing basis.

18 In that regard Ms Ellenson confirmed that the Claimant did more work than anyone else and it took a fair bit of organising to cover her each time she took leave. It was for that reason that she would normally receive at least two week's notice of the Claimant's intention to take leave.

19 It is clear that the Claimant was the mainstay of the Respondent's bar operations. She did more hours than other staff and the Respondent relied upon her. The Claimant was considered to be reliable and could do the job without supervision. There was an expectation on Ms Ellenson's part that the Claimant would present herself for work each week in accordance with the roster.

Determination

Casual or Part-time?

20 I am called upon to determine whether the Claimant was a part-time employee and, therefore, entitled to unpaid award entitlements, albeit that she was engaged as a casual and paid as such.

21 Clause 11(1) of the Award defines "casual employees" as follows—

> *(1) A casual employee shall mean an employee engaged and paid as such and whose employment may be terminated by either the employer or the employee giving not less than 1 hours notice or the payment or forfeiture, as the case requires, of 1 hours pay.*

22 "Part-time employees" are defined in Clause 12(1) of the Award. It provides—

> *(1) A part-time employee shall mean an employee who, subject to the provisions of clause 8.-Hours, regularly works no less than twenty ordinary hours per fortnight nor less than three hours per work period.*

23 There can be no doubt that, on the evidence, it has been clearly established that the Claimant regularly worked no less than twenty hours per fortnight nor less than three hours per work shift. The evidence clearly establishes that she falls within the definition of "Part-time employees" found in clause 12(1) of the Award. Can it, however, be said that she also falls within the definition of "casual employees" as defined in clause 11(1) of the Award? In that regard the evidence clearly dictates that she was engaged and paid as a casual, but was it the case that she could be terminated by the giving of 1 hour's notice or the payment or forfeiture of 1 hour's pay? The evidentiary material before the Court does not specifically address that issue. What it does do, however, is demonstrate the true nature of the relationship between the parties as is evidenced by the dealings between them. Such is necessarily considered to determine whether the claimant falls within the Award definition of "casual employees" (see ***Squirrell v Bibra Lakes Adventure World Pty Ltd 64 WAIG 1834 per Fielding C at page 1835***). The fact that the Claimant considered herself to be a casual and that she was paid as such is not determinative of the issue. As the Full Bench of the Western Australian Industrial relations Commission said in ***Serco (Australia)Pty Ltd v John Joseph Moreno 76 WAIG 937 at 939*** in respect of the definition of "casual employee", that (the parties)—

> *"...cannot by the use of a label render the nature of a contractual relationship something different to what it is (see **Stewart v Port Noarlunga Hotel Ltd** (op cit) per Haese DPP at pages 5-6).*
>
> *Certain indicia may be indicative of the nature of the contract, but they are not determinative, taken alone. These may include the classifying name given to a worker and initially accepted by the parties, the provisions of the relevant award, the reasonable expectation that work would be available to him, the number of hours worked per week, whether his employment was regular, whether the employee worked in accordance with a roster published in advance, whether there was a reasonable mutual expectation of continuity of employment, whether the notice is required by an employee prior to the employee being absent on leave, whether the employer reasonably expected that work would be available, whether the employee had a consistent starting time and finishing time, and there may be other indicia".*

24 In this case it is indisputable that there was a reasonable and mutual expectation of continuity of employment. The fact is that the Claimant was, it seems, the most senior and important member of the bar staff. She was a person upon whom the Respondent relied quite heavily. When she took leave, substantial notice was required so that the Respondent could adequately replace her. There is no way, in those circumstances, that one could conclude that the relationship was terminable on one hour's notice, payment or forfeiture as the case may be. That being the case, the Claimant does not fall within the definition of "casual employees" as provided by the Award. She does, however, clearly fit within the definition of "part-time employees". As stated previously, the evidence supports such a finding. For the sake of completeness I mention that what His Honour said in ***CPSU v State of Victoria (2000) FCA 14*** has no application here. In that case his Honour was dealing with the common law situation in the absence of award proscription as to the meaning of "casual" and "part-time employees." In this case the Award specifically proscribes meanings to those terms.

25 I find that the Claimant was a part-time employee as defined in clause 12(1) of the Award.

Is the Claimant Entitled to the Award Benefits Claimed? - Set-Off

26 The Claimant was at all material times paid a casual rate of pay. That rate included a loading which took into account benefits that would ordinarily be payable but which were not paid on account of the Claimant's perceived status as a casual employee. The fact that the Claimant was paid at the casual rate provided by the Award is reflected in the documentary evidence. An example of that is to be found when exhibit 2 is cross-referenced with exhibit 5. The Award (exhibit 5) indicates that the rate for a casual Bar Attendant Category 1 with effect from the first pay period commencing on or after 28 July 1998 was $12.85 per hour. The Claimant was in fact paid that rate at that time. The applicable hourly rate for non-casual employees falling under the same classification at that time was $10.38.

27 It is obvious, when the Award is read as a whole that on its proper construction the loading paid to casual employees must necessarily take into account unspecified benefits foregone by virtue of the casual nature of the employment. In this case, the Claimant was consistently paid, on a weekly basis, a much higher hourly rate of pay than she would have been if she were correctly classified as a part-time employee. Having said that, I recognise that the payments received by the Claimant were not specially paid for the purposes of annual leave or for public holiday pay. The payment in each instance was made for one purpose only that being in consideration of the hours worked by the Claimant as a casual employee. The payment had no other purpose.

28 Having said that, is the Claimant entitled to payment of annual leave and holidays as claimed? In my view the answer is yes. I say that notwithstanding that the effect of that might be seen as double dipping given that she has already received regular weekly payments which comprised a loading. Although seemingly harsh on the employer that approach is supported by the authorities. In particular I have regard to what the Full Bench of the Western Australian Industrial Relations Commission had to say in ***AFMEPKIU v Centurion Industries Ltd 77 WAIG 319***. In that case, the employer paid a casual rate of pay to an employee who was not a casual but rather a permanent employee. Such an amount was in excess of the prescribed amount under the relevant award in that case. However, the respondent employer did not pay to its employee his specific award entitlements for public holiday pay, annual leave and notice upon termination. To some extent it can be seen that the factual circumstances in that case are not dissimilar to this. At first instance, the Learned Magistrate allowed the employer to say that the payments made at a casual rate could be treated in satisfaction of specific award entitlements. On appeal, the Full Bench held, however, that that could not be done because the payments were not made for the purpose of compliance with the relevant award provision but rather as a wage payable to a casual employee. His Honour President Sharkey said at page 319—

> *Further, the contract of employment did not contemplate any liability for the proper award entitlements, and payments made under it for other agreed purposes could not be retrospectively applied in satisfaction of liability under the award (**see Jose v Geraldton Resource Centre Inc (**op cit) (FB)). Put another way, the employer cannot now claim to have applied the monies paid to Mr Coci to satisfy award obligations when the monies were specifically paid for other purposes. Further, the respondent could not be freed from or discharged from its liability or from its obligation to pay amounts for annual leave , notice and public holidays by reason of a contract which it entered into whereby it purported to undertake obligations other than its award obligations (see **Jose v Geraldton Resource Centre Inc** (op cit) (FB) and **s.114 of the Industrial Relations Act 1979 (as amended)**).*

29 Payments made for a particular purpose cannot logically ex post facto be attributed to another cause or purpose. Thus the payment of a wage in excess of the Award does not relieve an employer from the obligation to make a further different payment of a different kind under the Award (see ***Pacific Publications Pty Ltd v Cantlon (1983) 4 IR 415*** and also ***Bradmill Industries Ltd v Shadbolt (1984) AILR 416; cf. Ray v Rodano (1967) AR 471***). In this case, however, the payment of loading was impliedly made in contemplation of the payment of a "casual rate" of pay and no more. In my view, given the factual circumstances of this case, the situation contemplated by His Honour Olney J in ***Silberschneider v MRSA Earthmoving Pty Ltd 68 WAIG 1004*** does not arise.

30 Accordingly, I find that the totality of the loading received by the Claimant cannot operate to set-off and thereby extinguish the totality of the amounts claimed.

Result

31 The result is that there have been breaches of clauses 17 and 18 of the Award and that the Claimant is entitled to recoup her entitlements thereunder. I accept the proper calculation of the Claimant's entitlements is as reflected in the document entitled "Calculations of Claim" submitted by the Claimant during the course of the hearing. The Respondent, with respect to the accuracy of the same, took no issue. I accordingly adopt those calculations. The calculations are made on the basis that the applicable hourly rate as at 30 April 2001 was $11.26 equating to a daily rate of $85.60. That is taken from the then applicable fortnightly rate of $856.00. The Claimant's entitlement to proportionate annual leave may be calculated as follows—

- Total fortnights worked = 71.5
- Total hours worked = 4212.5
- Average hours per fortnight worked (4212.5 ÷ 71.5) = 58.92
- Proportion of fortnightly hours (58.92 ÷ 76) = 0.78
- Total period worked = 2.75 years
- Annual leave days due (0.78 x 20 x 2.75) = 42.9
- Amount payable (42.9 x $85.60) = $3672.24

32 With respect to public holidays the Claimant cannot recover with respect to those days worked, given that she was paid for the same. When she worked those days she was paid penalty rates for having done so. On the Claimant's own evidence (see exhibit 10) no claim can lay for the following public holidays—

- Queens Birthday 1999
- Labour Day 2000
- Anzac Day 2000
- Anzac Day 2001

33 Further, a perusal of exhibit 2 demonstrates that the Claimant also worked and was paid penalty rates for the following holidays—

- Labour Day 1999
- Anzac Day 1999
- Foundation Day 1999

34 Accordingly, there must be a deduction of 7 days from the total of 19 public holidays claimed. The total payable, therefore, with respect to public holidays is 12 days at $85.60 totalling $1027.20. It follows that the amount recoverable by the Claimant with respect to both heads of claim is $4699.44.

35 I will now hear from the parties as to the consequential orders to be made.

G. CICCHINI,
Industrial Magistrate.

BOARDS OF REFERENCE—Decisions of—

2003 WAIRC 07719

CONSTRUCTION INDUSTRY
PORTABLE PAID LONG SERVICE LEAVE ACT 1985
BOARD OF REFERENCE

PARTIES	CLIVE IGNATIUS ROGERS, APPLICANT	
	v.	
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD, RESPONDENT	
CORAM	J.A. Spurling	(Chair)
	J. Uphill	(Member)
	K. Peckham	(Member)
DATE	WEDNESDAY, 12 FEBRUARY 2003	
FILE NO/S.	BOR 1 OF 2002	
CITATION NO.	2003 WAIRC 07719	

Reasons for Decision

This is an appeal by Mr Clive Rogers, pursuant to section 50(e) of the *Construction Industry Portable Paid Long Service Leave Act 1985,* against a decision of the Construction Industry Long Service Leave Payments Board to refuse to recognise Mr Rogers' service with Australian Skills Training Pty Ltd for the purposes of service towards an entitlement to long service leave.

Mr Rogers, to a lesser extent, also questioned the amount of credits towards long service leave that the Construction Industry Long Service Leave Payments Board gave him, on commencement of the scheme in 1987.

Employment At Commencement of Act

Mr Rogers has had a long career, principally in the construction industry, and during the relevant times was a licensed rigger. He had already been in the industry a long time when the *Construction Industry Portable Paid Long Service Leave Act 1985,* came into effect providing a

scheme of permitting employees in the construction industry to earn long service leave notwithstanding broken periods of employment with different employers during the qualifying period. The transitional provisions enabled an employee to have the continuous service with the employer by whom they were employed at the time when that Act commenced, credited for the purposes of earning long service leave. In Mr Rogers' case, he was employed with John Holland Constructions Pty Ltd and the Construction Industry Long Service Leave Payments Board credited Mr Rogers with leave as required by the relevant Act. The Construction Industry Long Service Leave Payments Board has on more than one occasion rechecked and re-verified the entitlement and this Board of Reference is satisfied that Mr Rogers received his correct credit towards long service leave.

Employment with Australian Skills Training Pty Ltd

The principal area of Mr Rogers' appeal centred on his employment with an employer known as Australian Skills Training Pty Ltd. Mr Rogers had obviously done a lot of work in researching and preparing his case and produced a considerable amount of documentation. Mr Rogers described his work with Australian Skills Training Pty Ltd and emphasised his work as being in the nature of construction work. Mr Rogers referred us to provisions in other states and made reference to the Building Code of Australia. He took us through the work he did at Australian Skills Training and compared it to his son's experience as a builder in the building and construction industry. His contention was that the employer, Australian Skills Training Pty Ltd is in the construction industry and that the work he did with them was in the construction industry.

To be entitled to long service leave under this scheme, the general principle which has evolved is that the person must be employed in the construction industry (or alternatively expressed, the employer must employ employees in the construction industry) and, that the employer employing the person must itself also be in the construction industry. (Aust Amec decision 62 IR 412).

Notwithstanding the earnest efforts Mr Rogers went to, this Board of Reference is of the view that the employer Australian Skills Training Pty Ltd is not in the construction industry.On consideration of all of the evidence put forward the Board has concluded that Australian Skills Training Pty Ltd is a training organisation. Evidence from the Construction Industry Long Service Leave Payments Board was that the employer considered itself in the training industry and that the Construction Industry Long Service Leave Payments Board after careful consideration, believed the employer was not in the construction industry. Evidence from Mr Rogers as to the work done by Australian Skills Training was that it trained people for the construction industry but did not itself build or construct anything, other than for the purposes of training. That evidence from the Construction Industry Long Service Leave Payments Board also went to the nature of the work on which Mr Rogers was employed, such as to claim that Mr Rogers was employed as a general hand and not as a rigger, notwithstanding Mr Rogers' qualification as a rigger. The Board would be prepared to accept that the nature of Mr Rogers' work with Australian Skills Training may have been work which would fall within the definition of construction industry, but in the end this Board of Reference did not need to determine that issue as this Board of Reference concluded that the employer was not in the construction industry. Therefore Mr Rogers' period of service with that employer would not attract credits towards long service leave under the *Construction Industry Portable Paid Long Service Leave Act 1985.*

Decision

The Board's decision in this matter is that Mr Rogers is not entitled to credits towards long service leave for the period he was employed by Australian Skills Training Pty Ltd as that employer was not, and should not have required to be, registered under the scheme, as it is not in the construction industry.

J. SPURLING,
Chair.

J. SPURLING,
Registrar.

POWER OF ENTRY—Matters pertaining to—

2003 WAIRC 07803

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SILENT VECTOR PTY LTD T/A SIZER BUILDERS, APPLICANT
	v.
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 26 FEBRUARY 2003
FILE NO/S.	APPLICATIONS 1986 AND 1987 OF 2002; 92 AND 93 OF 2003
CITATION NO.	2003 WAIRC 07803

Result	Application for adjournment granted.
Representation	
Applicant	Mr G. McCorry (as agent) (in writing)
Respondent	Mr T. Dixon (of counsel) (in writing)

Reasons for Decision

1 These four applications are, generally speaking, applications to revoke right of entry authorities pursuant to s.49J(5) of the *Industrial Relations Act 1979*. Applications 1986 and 1987 of 2002 are listed for hearing and determination before the Commission as presently constituted on 4, 5 and 10 March 2003. On 26 February 2003 the applicant's representative requested by letter that the hearing dates be vacated and the matters be adjourned pending determination of criminal charges relating to Mr McDonald and Mr McCullough. Mr McDonald and Mr McCullough are the holders of the right of entry authorities the subject of applications 1986 and 1987 of 2002.

2 The respondent union was prepared to agree to the vacation of hearing dates given it had sought the adjournment of applications 42 and 63 of 2003 on the same grounds. However, the respondent union's consent is subject to the proceedings between the parties in applications 92 and 93 of 2003 been similarly adjourned; that the matters be listed for hearing to determine applications by the respondent pursuant to s.27(1)(a)(ii) and (iv) of the Act; that Mr McCorry discover the Notices to Produce referred to in his letter of 26 February 2003, or at least disclose the dates upon which they were served upon him or his clients; and finally that all s.49J(5) matters currently on foot between the parties be otherwise adjourned.

3 Mr McCorry replied with further correspondence to Mr Dixon's e-mail response. By that correspondence, the applicant agrees that applications 92 and 93 of 2003 be similarly adjourned. The applicant objected to any application by the respondent for the Commission to exercise its discretion under s.27(1)(a)(ii) and (iv). Mr McCorry further advised that the Notices to Produce were served on 18 and 21 February 2003.

4 Given that the qualifications to the respondent union's consent are not entirely met, the Commission decides the applications to vacate the hearing dates and adjourn as follows. The issue of applications in the Commission against Mr McDonald proceeding whilst criminal charges against him were pending were raised and dealt with during the proceedings in applications 42 and 63 of 2003. On that occasion, the Commission overruled the submission of the union that the applications against Mr McDonald not proceed because of the criminal charges. On this occasion, however, the applicant itself states that it does not believe it can properly present the evidence necessary to discharge the onus upon it in these remaining applications without referring to matters which may possibly also relate to the subject of the criminal charges. That was not the case in applications 42 and 63 of 2003. Indeed, the applicant gave an express undertaking that in those matters evidence would be restricted to the two days in January 2003 to which the applications relate.

5 I am satisfied that the hearing dates ought be vacated and the applications adjourned. The principle that civil proceedings should be adjourned to await the outcome of related criminal proceedings is well established: *Hammond v. The Commonwealth* (1982) 42 ALR 327; *Paulownia Saw Milling Timber Supplies v. Jones* (2001) 81 WAIG 2715. On this occasion, it appears that the evidence to be brought is sufficiently related to the criminal proceedings. Therefore, the Minute of a Proposed Order now issues which vacates the hearing dates and adjourns these applications sine die.

6 Presently, the Commission does not have any application before it from the respondent for the Commission to exercise its discretion pursuant to s.27(1)(a) of the Act in relation to these applications. The issuing of this order will not prevent a party from making such an application at any time, as s.27(1) itself provides. This decision embraces the only four such applications before the Commission as presently constituted.

7 Mr Dixon's reference to the respondent union remaining available to formally conciliate matters between the parties with the assistance of the Commission is noted. That is a matter that may be raised if, and when, these applications or any of them are sought to be listed for hearing and determination.

2003 WAIRC 07844

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SILENT VECTOR PTY LTD T/A SIZER BUILDERS, APPLICANT *v.* THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 4 MARCH 2003
FILE NO/S.	APPLICATIONS 1986 AND 1987 OF 2002; 92 AND 93 OF 2003
CITATION NO.	2003 WAIRC 07844

Result	Application for an adjournment granted.
Representation	
Applicant	Mr G. McCorry (as agent) (in writing)
Respondent	Mr T. Dixon (of counsel) (in writing)

Order

HAVING HEARD Mr G. McCorry (as agent) (by way of written submissions) on behalf of the applicant and Mr T. Dixon (of counsel) (by way of written submissions) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

(1) THAT the hearing dates of 4, 5 and 10 March 2003 in these matters be hereby vacated;

(2) THAT applications 1986 and 1987 of 2002 and 92 and 93 of 2003 be adjourned sine die.

[L.S.]

(Sgd.) A. R. BEECH,
Senior Commissioner.

2003 WAIRC 07705

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SILENT VECTOR PTY LTD T/A SIZER BUILDERS, APPLICANT *v.* THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 7 FEBRUARY 2003
FILE NO/S.	APPLICATION 42 AND 63 OF 2003
CITATION NO.	2003 WAIRC 07705

Result	Application for an adjournment dismissed.
Representation	
Applicant	Mr G. McCorry (as agent)
Respondent	Mr T. Dixon (of counsel) and Mr T. Kucera (of counsel)

Reasons for Decision

(Extemporaneous)

1 The test for an adjournment is where the refusal of an adjournment would result in a serious injustice to one party an adjournment should be granted unless in turn this would mean a serious injustice to the other party: *Myers v. Myers* [1969] WAR 19 at 21.

2 In considering the circumstances that the union puts forward in relation to Mr McDonald and the criminal charge that he faces, I am satisfied that the evidence to be brought in these two applications will be restricted only to two specific days in January 2003. I am not satisfied therefore that there can be any overlap between the evidence to be given regarding those two days and the criminal charge that relates to the same site in July 2002. I therefore do not see that the present circumstances fall within the circumstances described in *Hamilton v. Oades* (1989) 166 CLR 486 at 502-3 that is a public examination on oath or affirmation of a person charged with an indictable offence on matters with which the charge is concerned.

3 In relation to the issue of right to silence, I do accept that there may be a real and appreciable danger of prosecution not of an imaginary or insubstantial character, which may justify Mr McDonald exercising the right to silence (*Paulownia Saw Milling Timber Supplies v. Jones* (2001) 81 WAIG 2715) but I do not consider that can be assessed without knowing what the evidence is which is to be given. I do not believe that a proper assessment of that can be made before the case has been presented. I therefore do not presently see that there can be any serious injustice to Mr McDonald.

4 So far as the granting of the adjournment is concerned, I am not certain that the applicant would suffer a serious injustice if its concern is Mr McDonald "running amuck". I think that is the term used by Mr McCorry. That apparently will not happen because of Mr McDonald's bail conditions.

5 Correspondingly there is a public interest in applicants having their applications dealt with and it is a grave matter to interfere in the entitlement of an applicant to have his application dealt with in the ordinary course of the procedure and business of the Commission (*State of Western Australia v. Bond Corporation Holdings Ltd* (1992) 114 ALR 275 at 296).

6 On balance therefore, I am not satisfied that the refusal of the adjournment would result in a serious injustice to one party and therefore I refuse the adjournment.

7 It necessarily follows however, that the union is able to renew its request if it sees it necessary to do so as the evidence unfolds.

8 It also follows that I accept the undertaking from Mr McCorry that the evidence to be given before me is to be restricted to paragraphS (3)(a), (4) and (5) of application 42 of 2003, and (3)(a) and (4) of application 63 of 2003. I also give notice that it would be my intention to restrict the cross-examination of any witness called by the union to the evidence-in-chief of the witnesses for the applicant which will necessarily be restricted as Mr McCorry has undertaken. That has the effect of restricting the ability that otherwise would have existed for the applicant in these proceedings to cross-examine on any relevant matter even if it had not been the subject of the evidence-in-chief of its own witnesses.

9 I also make this observation. It is prompted by Mr McCorry's description of the possible prejudice to the applicant by Mr McDonald "running amuck". I would like to place on the record that if there was any initiative taken by either party today to have Mr McDonald undertake to notify the Registrar of the Commission prior to attending the site, informing him of the time and purpose of the visit such that it would then enable the Registrar to observe on the part of the Commission that visit, if that would sufficiently reassure the applicant and be consistent with the bail conditions that Mr McDonald is apparently to observe in any event, if that would at least allow these proceedings to be adjourned by consent. I would welcome that initiative and I would assist where possible to assist the parties to implement it. It is nevertheless an initiative that I cannot take. It is a matter that remains principally within the province of the parties.

10 The final matter is that to the extent that it was suggested that I order that the court be closed and that evidence be received in camera, I see no warrant on this occasion to take that step. So far as I am concerned no such order will issue and any proceedings that now follow will continue in the public arena, which I think is the proper forum for these proceedings.

2003 WAIRC 07796

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SILENT VECTOR PTY LTD T/A SIZER BUILDERS, APPLICANT *v.* THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 25 FEBRUARY 2003
FILE NO/S.	APPLICATIONS 42 AND 63 OF 2003
CITATION NO.	2003 WAIRC 07796

Result	Applications dismissed.
Representation	
Applicant	Mr G. McCorry (as agent)
Respondent	Mr T. Dixon and Mr T. Kucera (both of counsel)

Reasons for Decision

1 These are two applications pursuant to s.49(J)(5) of the *Industrial Relations Act 1979* to revoke the right of entry authority issued to Joseph McDonald. They are brought by one applicant who is the principal contractor on a building site at 12 Bellevue Terrace in Perth ("the site"). The two applications refer to events at the site on 13 and 18 January 2003 respectively. The applications were joined and heard together.

The applications

2 In summary, application 42 of 2003 alleges—

"On Monday, 13 January 2003 Mr McDonald—

(1) entered the site in purported exercise of a right of entry under section 49H of the Act;

(2) told the applicant's Project Manager that he was going to have a meeting with the persons working on the site about an EBA;

(3) conducted a meeting in the park opposite the site with the subcontractors' workforce during working hours, thus preventing or hindering work from being carried on by the subcontractors' workforce during such time;

(4) procured the subcontractors' workforce to cease performing the work they were contracted to perform and to leave the site for 48 hours;

(5) at the conclusion of the meeting told the applicant's Project Manager that "I've sent them home for 48 hours because of the EBA" and that "they're going home for 48 hours because of the scabby builder that Sizer is" and that the subcontractors' workforce had voted to cease work for two days;

(6) failed to comply with the respondent's rules in relation to any unresolved dispute the respondent had with the applicant or other person on the site."

3 The application states that by reason of the alleged conduct the applicant suffered loss and damage in that scheduled work could not be completed during the period the subcontractors' workforce ceased work and the applicant incurred the cost of inter alia, hiring the tower crane, the material hoist and the scaffolding for longer than would have been necessary if the cessation of work had not occurred and became exposed to the risk of liquidated damages for delay in completing the project.

4 In application 63 of 2003 the applicant claims that on Saturday, 18 January 2003 Mr McDonald—

"(1) entered that portion of the site constituting premises under the control of the applicant in purposed exercise of a right of entry under Division 2G of the Act;

(2) procured the employees of Tom's Crane and Plant Hire Pty Ltd to refuse to perform the work of dismantling the crane and for them to leave the 12BT site, thereby intentionally and unduly hindering Tom's Crane and Plant Hire Pty Ltd, the employees thereof and the applicant during their working time;

(3) informed the principal of Tom's Crane and Plant Hire Pty Ltd, Mr Tom Martinazzo, that the reasons for doing so were that the respondent's permission had not been sought for the work to be performed at that time and because of safety;

(4) acted improperly in failing to comply with the respondent's rules in relation to any unresolved dispute the respondent had with the applicant or other person on the site;

(5) acted improperly in failing to comply with the terms of the respondent's agreement with Tom's Crane and Plant Hire Pty Ltd in respect of unresolved disputes."

5 The applicant alleges that by reason of Mr McDonald's alleged conduct the applicant suffered loss and damage, in that scheduled work could not be completed during the period the employees of Tom's Crane and Plant Hire Pty Ltd failed to work, and became exposed to the risk of liquidated damages for delay in completing the project.

The evidence

6 The applicant called evidence from Mr Deen, General Manager of the applicant; Mr Mulligan, project manager of the applicant; Mr Phillips, a site superintendent of the applicant; Mr Collie, a Director and General Manager of Centre Ceilings; Mr Spindler, general manager of Com-Al Windows; Mr Helens, supervisor, Marble and Cement; Mr Tom Martinazzo, a principal of Tom's Crane and Plant Hire Pty Ltd; Craig Stevens, proprietor of CW Stevens; Mr Zannino, a rigger working for Tom's Cranes and Plant Hire Pty Ltd; Mr Gatorna, a partner in Dynasty Stone Pty Ltd; and from Mr McDonald himself, Assistant Secretary of the CFMEU.

7 The applicant also summonsed and called as witnesses Mr Byerley, a truck driver, and Mr Mulry, a rigger, but they failed to appear when called. Their non-attendance is the subject of an investigation by the Registrar.

8 The respondent called evidence from Mr Cavanagh, Occupational Health and Safety advisor for the union.

9 It is convenient to deal with the evidence as it related to each of the two days referred to in the applications.

13 January 2003

10 The evidence of Mr Mulligan was that at approximately 2:00pm Mr McDonald attend the site. Mr McDonald told him that he was there to call a meeting regarding the EBA. Mr Mulligan stated that he asked if it could be after 3:30pm and Mr McDonald stated that he wished to call it now. Mr McDonald then left his office. Some 5 or 10 minutes later he noticed Mr McDonald in the street talking to one of the dogmen. Mr Mulligan clarified this by saying that it was in the loading zone in front of the site which was an area the applicant had rented from the City of Perth to load and unload materials during construction.

11 Approximately 15 minutes later he asked Mr McDonald "what he had done" and he stated that Mr McDonald said he had "called a 48 hour" although Mr Mulligan stated that he did not recall Mr McDonald's exact words. Mr Mulligan subsequently approached Mr McDonald and asked for a specific reason why the men were going home. Mr Mulligan's evidence was that Mr McDonald's answer in general terms was that he was "tired of shonky builders, shabby builders" who were not paying the men enough and that he wanted his members to get the same type of site allowance that was being paid "down the road". He stated Mr McDonald stated that it was the members who voted to go home - "they want more money".

12 Mr Mulligan's evidence was that generally all trades other than the scaffolders left the site. Mr McDonald had discussed with the dogman that there needed some tidying up to be done before the site could safely be closed and the dogman and the crane driver continued to work for another half hour or so. When Mr Mulligan was asked to recall in particular who stayed on site, he stated the scaffolders stayed on site, as did the crane driver. The majority of trades went home but the plumber and electrician did not seem to disappear as quickly. Mr Mulligan noted that it was a Friday afternoon and employees do knock off early, although he then recalled that in fact it was a Monday "so they might have been on strike". Mr Mulligan then gave evidence about the consequence to the programme of the employees leaving site.

13 When cross-examined Mr Mulligan acknowledged that he had been approached a number of times by various officials, including Mr McDonald, with a request to fix various problems on the site and agreed that from the point of view of the union safety was an ongoing theme in the issues raised. He denied that he had been presented in the past with a number of site safety audit documents prepared by the union which contained issues he had been asked to rectify, although he recalled conversations with Mr Cavanagh in relation to site safety matters and recalled one occasion when Mr Cavanagh faxed documentation to him. Mr Mulligan stated that when Mr McDonald first approached him Mr McDonald said he wanted to talk about the EBA and site allowances. Mr Mulligan maintained that Mr McDonald used the words "shonky" and "shabby", "site allowance" and "John Holland". He did not recall Mr McDonald putting to him that the issue was the state of the job, or safety, or working in 40° heat.

14 In re-examination, Mr Mulligan stated that he recalled generally the words Mr McDonald used and prior to giving evidence in the Commission had re-read a statement he had made that afternoon.

15 The applicant called evidence from Mr Collie. He gave evidence that Centre Ceilings was doing work on site on 13 January 2003 and had work scheduled for 14 and 15 January 2003. Work was not done on those days. In cross-examination, Mr Collie was asked to describe the site in terms of general safety. Mr Collie stated that he visited the site about once per week and he described the site as a messy site, with a lot of materials on site and a lot of trades working over the top of each other. He described the site as "a bit pushy" in that it had to be kept up to programme so there was a rush on which would "always" give rise to certain issues such as safety. He maintained that the kinds of safety issues which occur, normal safety on a job, arise when there are just too many people working in one area, when accidents can happen. He stated the safety issues on the applicant's site were different from other sites. Mr Collie stated he had been in the industry for 30 years. He stated that his company did not have a good relationship with the applicant.

16 The applicant next called evidence from Mr Spindler and Mr Helens. Their evidence was that their respective businesses had work scheduled on the site for 14 and 15 January 2003 which was not done.

17 The respondent then called evidence from Mr Stevens. He confirmed that his employees were scheduled to work on 14 and 15 January 2003 and work was not done on those days. He did not know why, because he was not on-site. In cross-examination he stated his employees had told him that it was a safety issue, although they were not "100% sure". His evidence was that he would visit the site approximately three times per week and he stated in certain areas "it needs a little bit of help". In terms of safety, compared to other sites, there were areas that needed attention. He had received letters to get the job done on time, and although he did not bring safety into it, he stated "you're always pushed pretty hard …" in general.

18 The applicant next called evidence from Mr Gatorna. His firm had work scheduled to be done on site on 14 and 15 January 2003 but work was not done on site on those days. His evidence was that he was told by his employees that there was a dispute over safety on scaffolding.

19 The applicant then called evidence from Mr McDonald. He is the assistant secretary of The Construction, Forestry, Mining & Energy Union of Workers (CFMEU). He has been an official of the union for 17 years. Mr McDonald's evidence was that he went to the site on 13 January 2003 after having received a telephone call from a union member. He went to the office and spoke to Mr Mulligan. He told Mr Mulligan he was going to speak to some of the employees, that on the way to his office he had been approached by several employees, that he had had a phone call and a complaint and was going to have a walk around the job. The complaint was that "the job was an absolute disgrace, the union better get on there before someone gets killed… the job was a mess, there was problems with the scaffolding and there was problems with a wide range of issues". He stated that he had listened to the employees but did not wish to state what he had told the employees because he had a belief that if he repeated "who said what to me, they'll be sacked tomorrow". He stated he was requested to call a meeting and he did, the meeting taking place across the road under a tree in Kings Park.

20 Mr McDonald's evidence is that there were discussions in the meeting regarding edge protection, about people working under lifts and the crane, and some problems with the hoist. Mr McDonald stated that just about every aspect of the building site was raised as a problem and he listened to those complaints. Mr McDonald stated that he tried to get some kind of a joint position and a motion that the employees "go" for 48 hours was moved and seconded and the vote was taken. He did ask some to wait back because of the narrowness of the road, there was rubbish "all over the road" and he requested that the crane crew, as a matter of safety, stay back and clear the road.

21 He stated that Mr Mulligan approached him and he told Mr Mulligan that there had been a union meeting, there was a wide range of safety problems and he went through them. He raised issues to do with scaffolding and edge protection, problem with employees being "forced" to work under the crane and under the load of the crane. He stated Mr Mulligan walked away. He stated that Mr Mulligan returned and asked him whether the stoppage was regarding an EBA and Mr McDonald stated he replied "no".

22 Mr McDonald was cross-examined on his evidence. He stated he is responsible for delegating work to the organisers and for investigating breaches on-site. Most of his work is done on-the-job as opposed to in the office. Most of the remaining questions were leading questions to which Mr McDonald answered "yes" and although leading questions are allowed in cross-examination, the answers tended to carry less weight. He confirmed that he had received a telephone call from a member the night before 13 January 2003 who said he had been working in temperatures above 37½° and who also raised a number of other safety issues with him. He told Mr Mulligan he was going to inspect the site and did so. He identified a number of safety issues. He spoke to other union members who complained about "pressure" from the applicant to finish the job on time. Mr McDonald confirmed that he had instructed Mr Cavanagh to perform site safety audits on two occasions prior to 13 January 2003 and after the meeting on that day he instructed Mr Cavanagh to return to the site.

18 January 2003

23 Mr Phillips' evidence was that on 18 January 2003 he arrived at the site at approximately 6:40am. The contractors from Tom's Cranes had arrived. He saw Mr McDonald present on the footpath outside speaking to the crane contractor's people and Mr Tom Martinazzo together. He remembers hearing words from Mr McDonald like: "The crane's not coming down today. You need to go home". He overheard a conversation between Mr Martinazzo and Mr McDonald. He does not remember exactly when the conversations occurred but it was within the first hour, about 7:30am.

24 In cross-examination, he stated that he heard Mr McDonald talking to some people on the road, for probably about 30 minutes. He overheard certain parts of it, perhaps 50%. He was not aware whether other union organisers were present. He overheard an irate conversation between Mr Martinazzo and one of Tom's Cranes' employees, Mr Mulry. Mr McDonald and other union organisers were aside from that conversation but could hear it. He described it as being "two people but with another 10 stood behind". He stated that it was possible that the employee walked off, got into the truck and took the equipment away after that conversation, after being instructed to do so. In re-examination, Mr Phillips stated that the instruction was from Mr McDonald.

25 The applicant then called Mr Tom Martinazzo. He stated that he attended the site at about 7:00am or thereabouts. Mr McDonald was there, and also Jim Murphy. He tried to speak with Mr McDonald but it was like talking to "a brick wall". He says Mr McDonald stated "Send your fellows home, no work today, no arguing". He says he heard Mr McDonald state to the employees to go home. At this stage, the employees had already had a preliminary discussion but Mr Martinazzo had not been involved in that. In response to the question of whether Mr McDonald had said anything about the site, Mr Martinazzo replied that there were two or three workers on site, that there were employees on site but that he did not know if that was an issue of safety. He understood that safety was "the argument". Mr Martinazzo stated that he was told no vote had taken place.

26 After some further questioning, Mr Martinazzo was asked whether he was actually told anything by his employees. He stated they were not prepared to carry on working. A reference was made to an example in South Perth, which remains unexplained.

27 In cross-examination, Mr Martinazzo acknowledged that Mr Murphy and Mr McDonald might have said that the site was not safe, it was still in production and it was not safe with workers working under the crane. He stated that he did not have an argument with Mr Mulry on that day but that it could be called "a discussion".

28 The applicant next called Mr Zannino. Mr Zannino's evidence is that he attended the site on 18 January 2003 between 7:10am and 7:20am. Mr McDonald was there but he did not speak with Mr McDonald. His evidence was that the tower crane was not removed from the site because it was unsafe to do so because people were working underneath and it was unsafe to start to strip the crane down when people were working underneath. They were working just about everywhere.

29 Mr Zannino stated that he was waiting on the street on the footpath. He stated that "all the rest of the boys" decided the job was unsafe and they all went home. He was unable to remember exactly when the employees left, it may have been around 8:00pm or 8:30pm. His evidence is that "we had a bit of a meeting", Mr McDonald was not at that meeting. In cross-examination, Mr Zannino confirmed that the issue was one of safety, including that there was no spotter to clear traffic and there were still people working on-site under the crane, and if that had happened on another site he would not have commenced pulling down a tower crane.

30 Mr McDonald's evidence of 18 January 2003 is that he never set foot on the site. He was on the footpath however. He was there because he had received a phone call the night before regarding pulling down the tower crane yet everybody had been instructed to go to work and to continue to work. He and Mr Murphy sat at an adjacent construction site to see if the crane was going to be pulled down. This was at approximately 6:30am. The Tom's Cranes employees arrived after 7:00am. His evidence was that Mr Murphy approached the employees but that he, Mr McDonald, probably said nothing more than "Good morning" or "Hello".

31 Mr McDonald stated that he did not tell the employees to go home. As to any conversation with Mr Martinazzo, it was limited to perhaps "Good morning". Mr McDonald said he spoke to only one employee, Mr Mulry. He told Mr Mulry to "calm down and take it easy" because he was involved in a "screaming match" with Mr Martinazzo.

32 Mr McDonald was cross-examined on his evidence. Mr McDonald stated that in his experience people working on a site whilst the tower crane is being dismantled is a major safety issue. He agreed with the suggestion that he was there merely to oversee and make sure that the crane had been dismantled safely.

33 I also have had account for the evidence which was not directed particularly at the events of 13 and 18 January 2003. In this regard, I refer to the evidence of Mr Deen and also Mr Cavanagh.

34 Mr Deen gave evidence of the scheduled completion date and the contractual consequences of not meeting the date. In cross-examination he denied the applicant had made a concerted effort to keep the union off the site and stated that "certain organisers are always welcome". He confirmed the applicant had been approached by the respondent for a site allowance, had made an application to vary the *Building Trades (Construction) Award*, and had made a number of applications to revoke right of entry permits of union officials. Mr Deen had made an application to the Commission alleging the respondent had breached its registered rules and had provided statements to the police in relation to Mr McDonald's conduct. He had not been on the site on the 2 days to which these applications relate.

35 Mr Cavanagh gave evidence that he had worked in commercial construction for 13 years. On the occasions he inspected the site he did so with Mr Mulligan and he identified hazards which he reported to Mr Mulligan immediately. These had not been acted upon. He tendered copies of written safety audits. He confirmed that on 13 January 2003 Mr McDonald had asked him to return to the site. He stated that although there had been some improvement over time, the site was a poorly run, poorly safe-managed site. Mr Cavanagh was cross-examined regarding his qualifications, his rights to enter the site and his knowledge of the occupational health and safety legislation.

36 When cross-examined about Mr McDonald's telephone call on 13 January 2003 he recalled Mr McDonald speaking to him about the crane but not about scaffolding or the materials hoist or working in temperatures above 37½°.

Submissions

37 The union submitted that the nature of these proceedings is such that the balance of probabilities should be based upon the principle derived from the judgement of Dixon J in *Briginshaw v. Briginshaw* (1938) 60 CLR 336 at 362 that—

> "Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences."

38 For the union, Mr Dixon stressed the issues of safety and pressure on this particular site. It was submitted that Mr McDonald was on site on 13 January 2003 and at one stage exercising powers but did not act improperly in the exercise of those powers. Rather, Mr McDonald was policing an award, a function recognised by the Federal Court of Australia in *Meneling Station Pty Ltd v. The Australasian Meat Industry Employees' Union* (1987) 77 ALR 57. He stated that the Commission could conclude that the safety on this site was the worst that had been seen. The only evidence regarding site allowances being an issue was part of Mr Mulligan's evidence and no other witness referred to it. On the other hand there was evidence of people working under cranes, and problems with scaffolding and edge protection. These are legitimate safety issues and Mr McDonald attended the site in response to a request to do so. He inspected the site, held a meeting off-site and as a result labour was withdrawn for 48 hours. It is to be noted that, far from acting improperly, Mr McDonald encouraged some employees to stay behind to clear the site safely.

39 On 18 January 2003 Mr McDonald was merely in the vicinity. Nevertheless, there is evidence that people were working on site and under the crane and the evidence is that this was a concern for the workforce. Therefore there was a legitimate safety concern and this is shown by the fact that there was evidence that the crane was subsequently dismantled on a non-working day. The union stressed that no employees who were at the meeting of 18 January 2003 indicated that they had been directed to go home by Mr McDonald. As to 18 January 2003 there was no evidence of an intention on the part of Mr McDonald to hinder the employees on-site or the employer.

40 The union also made reference to international law and that Australia is signatory to treaties including international labour organisation covenants which recognise rights to organise and to strike. Reference was made to the decision of the High Court in *Victoria v. The Commonwealth* (1996) 187 CLR 416.

41 On behalf of the applicant, Mr McCorry stated that as the roadway was leased to the applicant it became part of the premises and therefore in the applicant's view Mr McDonald entered the premises when he was on the roadway on both 13 and 18 January 2003. Further, he entered the premises pursuant to the powers in s.49G and s.49H because do otherwise would be to trespass on those sites.

42 Mr McCorry submitted that the limits of "proper" behaviour can be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I. The licence is to hold discussions with employees or to investigate suspected breaches of legislation or employment instruments, to require production of relevant documents, to inspect any work material and machinery that were relevant. It does not, in the submission of Mr McCorry, mean to go on a fishing expedition to conduct safety audits.

43 Even if there was an inference that the employees had decided they were going to go home over safety issues, Mr McDonald was obliged under the rules of the union to refer the matter to the Commission. If these matters had not been resolved by discussion between the parties that is what needed to be done. As Mr McDonald took part in the meeting, indeed in the applicant's view he instigated the meeting, he is to be seen as having procured the industrial action. Further, there are dispute settlement procedures in the certified agreements for at least three of the employers involved. The applicant stated that the Commission can be satisfied even on the *Briginshaw* standard that Mr McDonald did what the applicant says he did and the Commission should find that he acted in an improper manner on 13 January 2003.

44 Further, the respondent said the evidence is irrefutable that on 18 January 2003 Mr McDonald directed that the crane was not coming down and that in doing so he intentionally and unduly hindered an employer. Even if there are genuine safety issues, there were appropriate measures that Mr McDonald could have taken to resolve them and he chose not to do so.

Findings

45 It states the obvious to say that the applicant bears the onus of proving the allegations it has made. It will need to do so on the balance of probabilities.

46 It has been held in this Commission that where there is some penalty provision the Commission should as a matter of prudence act with much care and caution. The standard required is for an applicant to prove its case on the balance of probabilities to the degree of satisfaction prescribed in *Briginshaw* (*Transport Workers' Union of Australia, Industrial Union of Workers v. Holm Pty Ltd* (2000) 80 WAIG 4600 at [110], [111]).

47 I shall subsequently turn to examine the legislation. It is sufficient to note at this stage that the power given to the Commission in s.49J(5) is to revoke a right of entry permit. While that does not impose a penalty, to revoke the right of entry permit of a person whose principal duties involve visiting sites is sufficiently similar to the imposition of a penalty that I conclude the union's submission is correct. It represents a standard which is appropriate for the gravity of the facts to be proven. Indeed, as

Gregor C observed in *David Moylan v. Chairman of Commissioners, City of Perth Council* (2001) WAIG 2925 the statement of principle in *Briginshaw* has been applied where findings may be made which may "put a career in jeopardy". I also note in reaching this conclusion that it is a serious matter to find that a person has intentionally and unduly hindered an employer or employees during their working time.

48 In making findings as follows, I take into account those minor matters which are agreed as facts between the parties.

49 I find that Mr McDonald is an authorised representative of the CFMEU for the purposes of Part II Division 2G of the Act. He is the Assistant Secretary of the union. I also find that Rule 34.1 of the respondent's rules currently provides—

> "All industrial disputes in which the union or any of its members may be concerned shall unless settled by mutual consent, be referred for settlement to any industrial relations tribunal, court or body of competent jurisdiction."

50 I find as follows in relation to 13 January 2003. I find that at approximately 2:00pm Mr McDonald attended the site. I accept Mr McDonald's evidence that he did so after receiving a telephone call and had received some complaints regarding the state of the job. I also find that it is likely that when he spoke to Mr Mulligan, Mr McDonald mentioned safety issues as well as enterprise bargaining agreements. I also find and accept that Mr McDonald spoke to various employees on-site and that they raised safety issues. I do so for the following reasons.

51 I have been impressed by the evidence of the witnesses, called by the applicant itself, who either in examination-in-chief or in cross-examination gave evidence that there were safety issues on-site. In particular, Mr Collie's 30 years' experience, as well as the evidence of Mr Stevens, supported by the evidence of Mr Cavanagh, was compelling. I find as a result of the evidence the site is, or was at the time the evidence was given, messy, pushy, with trades working over the top of each other and that certain areas of the site needed attention from a safety point of view. I also find that in this regard, the site was able to be seen as different from other sites.

52 This evidence is entirely consistent with Mr McDonald's and Mr Cavanagh's evidence and, in my view, it adds credibility to Mr McDonald's evidence that he went to the site because of complaints regarding the state of the job. Further, that finding is consistent with Mr Mulligan's own evidence that safety had been an ongoing theme from the union's point of view.

53 I also find that in response to the telephone call he had received and what else was said to him on-site, that a meeting was held off-site. Mr McDonald attended and chaired that meeting. I find that a motion was moved, seconded and passed for a 48 hour stoppage of work. I accept the evidence of Mr Collie and Mr Stevens, Mr Gatorna and also that of Mr Cavanagh, and conclude that it is more likely than not that the primary reason for the stoppage related to safety issues on the site. I also find that Mr McDonald asked the crane crew to remain behind in order to ensure that the site shut down safely.

54 I have paid particular attention to Mr Mulligan's recollection of Mr McDonald's words to him. In reaching a conclusion I have taken into account that Mr Mulligan concedes that he does not recall Mr McDonald's exact words. Mr Mulligan denies receiving site safety audits, other than perhaps one faxed by Mr Cavanagh, yet Mr Cavanagh's evidence is that three site safety audits were performed by the CFMEU and sent to the applicant. Copies were tendered in evidence in these proceedings. I therefore prefer the evidence of Mr Cavanagh on the point and therefore have reservations accepting all of Mr Mulligan's evidence. Mr Mulligan's own recollection required refreshing by reading a statement prior to giving evidence. He also at one stage stated that it was a Friday afternoon and "they often do knock off early" but when he remembered that it was a Monday, he stated "so they might have been on strike". Whilst these points are not raised to be critical at all of Mr Mulligan, and he was not alone in confusing the days of the week, they are reasons why, in the context of the broader evidence before me, I have not been convinced that Mr McDonald did not raise safety issues with Mr Mulligan. I find it more likely that he did.

55 Mr McDonald may well have also referred to "shonky" or "shabby" builders who do not pay enough. Regard is to be had to the context in which those words were used. In that regard, it is apparent from the cross-examination of Mr Deen and from my knowledge of other proceedings (they being the complaints lodged against Mr McDonald which have given rise to a criminal charge, and to four other applications by the applicant to revoke Mr McDonald's right of entry authority which are pending before me) that broader relations between the union (including Mr McDonald) and the applicant are very poor. Mr McDonald's use of those words may reflect that poor relationship. However, the use of disparaging or insulting language is unprofessional and may, in some circumstances, give rise to a finding of acting in an improper manner in the exercise of a power conferred by Division 2G.

56 Significantly, however in the light of the substantial evidence of safety issues on the site, and the reasons given for the stoppage by Mr Gatorna and Mr Stevens in particular, those words used by Mr McDonald cannot change the reason for the visit from that which the evidence shows it to be.

57 In relation to 18 January 2003 I find as follows. I accept Mr McDonald's evidence that he received a telephone call the night before and went to an adjacent building site first. I find that he did not enter the site proper, but rather remained on the footpath outside the site. In this finding, the evidence of Mr McDonald and Mr Phillips coincide.

58 I have not found it straightforward to estimate the timing of the events that followed. Mr Phillips' evidence was that he arrived at the site at approximately 6:40am and the contractors from Tom's Cranes had arrived. Mr Zannino's evidence was that he attended the site between 7:10am and 7:20am and Mr Martinazzo stated that when he attended the site at 7:00am or thereabouts the employees had already been there for perhaps between 10 and 20 minutes. The significance is that I am satisfied from the evidence of Mr Phillips, and of Mr Martinazzo, that Mr McDonald stated words to the effect that the crane is not coming down today and you need to go home. However, I have no hesitation in accepting the evidence of Mr Zannino that "we had a bit of a meeting" which did not involve Mr McDonald and he and the workforce left site because it was seen as being unsafe. Mr Zannino's evidence, too, is quite consistent with the concession from Mr Martinazzo, albeit given grudgingly, that "safety" might have been said by Mr McDonald or the other union officials.

59 Accordingly, the evidence is not that Mr McDonald "procured" the employees to leave site as alleged. In this regard, I have found no reason to prefer the evidence of Mr Phillips and Mr Martinazzo to that of Mr McDonald (whose evidence, as I have already noted, was presented as part of the applicant's case). Other evidence given by Mr McDonald, for example, that there was an altercation between Mr Mulry and Mr Martinazzo is entirely consistent with Mr Phillips' evidence. Even if Mr Phillips heard Mr McDonald state that people are to leave site, it cannot be seen from the evidence whether Mr McDonald was merely stating as fact the outcome of the meeting referred to by Mr Zannino.

60 I have not reached this conclusion without much anxious consideration. The wider issue of poor industrial relations on this site to which I have previously referred is not inconsistent with the allegation made by the applicant in this matter that Mr McDonald directed the employees to go home. Had the evidence before me been only that of Mr Phillips, and perhaps of Mr Martinazzo, then a different conclusion would have been open to me on the evidence.

61 However, the applicant called witnesses who gave much other evidence, which has not been contradicted, that there were employees on the site working under the crane and on the hoist, that it is unsafe to dismantle a tower crane whilst that is happening. That, together with the evidence of Mr Zannino, shows that there was far more occurring on that morning than just what Mr Phillips recollects hearing.

62 Critically, Mr McDonald's evidence is as credible as Mr Phillips' evidence. The evidence of Mr McDonald as to issues of safety is largely corroborated by the evidence of the applicant's own witnesses, both in relation to 13 January 2003 as well as 18 January 2003. The direct evidence of Mr McDonald cannot merely be disregarded as if he had not given it. The applicant having called him to give that evidence, it is not easy for it to show reason why I should disregard his evidence because it conflicted with other evidence in favour of the applicant's case.

The legislation

63 The application to the Commission is brought pursuant to s.49J(5) of the Act. That provides as follows—

> (5) The Commission constituted by a Commissioner may, by order, on application by any person, revoke, or suspend for a period determined by the Commission, the authority if satisfied that the person to whom it was issued has —
>
> (a) acted in an improper manner in the exercise of any power conferred on the person by this Division; or
>
> (b) intentionally and unduly hindered an employer or employees during their working time."

64 The Division referred to is Division 2G of the Act and contains ss.49G to 49O. Section 49J(5) is in two parts. The first part requires the applicant to satisfy the Commission that Mr McDonald acted in an improper manner in the exercise of the power—

> (i) to enter any premises during working hours where relevant employees work for the purpose of holding discussions at the premises with any of the relevant employees: s.49H(1); or
>
> (ii) during working hours enter any premises where relevant employees work for the purpose of investigating any suspected breach of certain legislation, or an award, order, industrial agreement or employer/employee agreement that applies to any such employee: s.49I(1).

65 The word "premises" is defined in the Act as including any land. The evidence before me from Mr Mulligan is that the loading zone in front of the site proper has been rented from the City of Perth for the purpose of loading or unloading materials. I find the loading zone is part of the "premises".

66 The second limb of s.49J(5) requires the applicant to satisfy the Commission that Mr McDonald intentionally and unduly hindered an employer or employees during their working time. It is conceded that the hindrance referred to must be both intentional and undue. Furthermore, it is conceded that the legislation recognises that there can be "due hindrance" of an employer or employees during their working time (see *Curran v. Thomas Borthwick* (1990) 33 IR 6 at 19 and following).

Conclusions

67 I can only decide the applications on the evidence and the submissions before me. In relation to the submissions my conclusions are as follows.

s.49J(5)(a): "Acted improperly"

68 The applicant submits that Mr McDonald acted in an improper manner in the exercise of the power in s.49H and s.49I on both 13 and 18 January 2003.

69 As to 13 January 2003 I find that the evidence shows that Mr McDonald entered the site for the purpose of holding discussions. Section 49H permits an authorised representative of an organisation to enter a site for the purpose of holding discussions at the premises. On the submissions before me I am not sure that a significant distinction can be drawn between holding discussions with employees and doing so in a meeting. A "meeting" is an assembly of a number of people for discussion: Shorter Oxford English Dictionary, 3rd ed. p.1302. I do not understand the applicant to have argued its case by drawing that distinction. In the context of this case, there is sufficient evidence of long-standing and valid concerns regarding safety which suggests it was not unreasonable for there to have been discussions. In other circumstances the calling of a meeting may well be to act in an improper manner. Indeed, in other circumstances, the calling of a meeting may intentionally cause undue hindrance to employers and employees during their working time. That is not the case on this occasion.

70 Rather, I have been invited to find that Mr McDonald acted in an improper manner by "procuring", as it was stated by Mr McCorry, the employees to take industrial action. The word "procure" is not used in s.49J(5) and I have found reference to it somewhat distracting from the point in issue. The applicant submits that Mr McDonald acted improperly because he procured the employees to take industrial action. However, that is not the evidence. The evidence before the Commission is that the 48 hour stoppage which occurred, occurred as a result of a decision of the employees. That is Mr McDonald's evidence and, on Mr Mulligan's evidence, that is part of what Mr McDonald said to him on 13 January 2003. The evidence does not show that Mr McDonald directed employees to go home on 13 January 2003. It does not show that the employees went home because Mr McDonald directed them to do so, even if Mr McDonald said as much on the day to Mr Mulligan.

71 I have considered the submission to the contrary and I reject it for the following reasons. The Act gives an entitlement to Mr McDonald to hold discussions with employees. If the evidence is that Mr McDonald did so in order to secure industrial action, he would have acted improperly in the exercise of a power conferred on him by Division 2G. The evidence, however, does not show that that was the case. Indeed, in the context of the evidence overall regarding issues of safety on the site, including the forwarding to the site of three site safety audits and the evidence that safety issues needed to be addressed, and had not been addressed, the decision taken by the employees is credible. In other words, the context reveals Mr McDonald did not act in an improper manner by calling a meeting regarding safety. The outcome of the meeting was, on the evidence, not a matter that he dictated. Nor on the evidence was the stoppage something that he "procured".

72 It is also argued that the union should, by virtue of its rules, refer any unsettled industrial disputes to the Commission and that Mr McDonald acted improperly in not doing so. I have difficulties with this submission. S.49J(5) speaks of a person "acting" in an improper manner in the exercise of a power conferred on him by Division 2G. The word "act" suggests something that is carried out in action (The Shorter Oxford Dictionary, 3rd ed. at p20). It is somewhat difficult to use the word to describe something that was not done but which ought to have been done.

73 Whilst I acknowledge, as I acknowledged during the hearing, that Mr McDonald is representing the union as its Assistant Secretary, the issue before the Commission is whether Mr McDonald acted in an improper manner in the exercise of the powers conferred by Division 2G. The registered rules of the respondent do not form part of Division 2G. I am unable to conclude that even if it could be said that Mr McDonald was in breach of a union rule, that means he acted in an improper manner whilst entering any premises where relevant employees work for the purpose of holding discussions at the premises or for the purpose of investigating suspected breaches.

74 Thus, even if it can be said that the union ought to have referred the unsettled industrial disputes to the Commission, and that it can be said that the taking of industrial action was wrong, that does not mean that Mr McDonald acted in an improper manner in the exercise of the powers conferred by Division 2G.

75 A similar conclusion applies to the related submission that the dispute settlement procedures of the EBA between Tom's Cranes and the respondent were not followed (exhibit C clauses 16, 17). If those procedures were not followed, that may have other consequences but it does not follow that Mr McDonald acted in an improper manner in the exercise of the powers conferred by Division 2G.

76 For those reasons, the applicant has not discharged the onus upon it in relation to its allegation that on 13 January 2003 Mr McDonald acted in an improper manner in the exercise of the powers conferred by Division 2G.

77 I note that allegation (3) of application 42 of 2003, that Mr McDonald "conducted a meeting in the park opposite the site with the subcontractors' workforce during working hours, thus preventing or hindering work from being carried on by the subcontractors' workforce during such time" was not pursued in submissions. As a matter of construction, it could not have been successfully pursued in that form because s.49J(5) requires a finding that the hindrance be both "intentional" and "undue", and that is not alleged. That allegation therefore lapses.

78 Finally, there is a danger in clothing industrial action in issues of safety and that danger is greater when the issues are blurred together. Mr McDonald blurred them when he mentioned to Mr Mulligan issues of both safety and enterprise bargaining and on the evidence he should not have done so.

79 In relation to the application that Mr McDonald acted improperly on 18 January 2003, a central issue is whether Mr McDonald was on the premises. This is because s.49J(5)(a) refers to a person acting in an improper manner in the exercise of the powers conferred by Division 2G. Those powers are the powers to enter premises.

80 The submission that Mr McDonald was on the premises relies upon the leasing of the loading zone by the applicant from the City of Perth. If Mr McDonald entered the loading zone, he entered the premises. The evidence, however, cannot allow the conclusion that Mr McDonald entered the loading zone. I note in this context the evidence given elsewhere, including by Mr Mulligan (at transcript page 39) of other locations: "footpath", "in the park", "on the verge of the road". While I accept without question that the loading zone is part of the "premises" as that word is used in s.49H and s.49I, the situation is not so clear in relation to the other locations mentioned.

81 There was no evidence of where the loading zone started or finished. Mr McDonald was present on the footpath on the evidence of Mr Phillips and himself. I am unable to conclude, however, that the footpath was, or was within, the loading zone. For that reason, the evidence does not establish that Mr McDonald entered the premises and thus it cannot be said that Mr McDonald acted in an improper manner in the exercise of the powers conferred by Division 2G.

82 I add that given the importance in s.49J(5) of the "premises" of an employer, the Commission ought be slow in holding that a person acted in an improper manner in the exercise of the powers conferred by Division 2G if the evidence is that the person was not aware that he or she was on the premises or if there was no intention to enter the premises. The boundary of the premises of an employer ought be publicly known especially where, as here, the evidence was that the premises included land which was otherwise publicly available as a loading zone.

83 The final allegation is that Mr McDonald intentionally and unduly hindered an employer or employees during their working time on 18 January 2003. In this regard, the second limb of s.49J(5) does not require the person to have entered the premises. In the context of Division 2G in which it occurs, there must be some connection between the hindrance to an employer or employees during their working time and the authority issued to the person pursuant to Division 2G. That may occur where there is at least a physical presence where an employer or employee works during their working time (*Curran v. Thomas Borthwick and Sons*, referred to earlier).

84 For the reasons I have already expressed, the evidence that Mr McDonald directed the employees to go home, that being evidence particularly of Mr Phillips, together with evidence of Mr Martinazzo, is counterbalanced by the evidence of Mr Zannino, who is one of the employees directly involved, that he went home because of reasons of safety and that Mr McDonald was not present at the meeting which occurred. That evidence is entirely consistent with Mr McDonald's own evidence, evidence to which I therefore attach some weight. I am not satisfied on the balance of probabilities that Mr McDonald acted as the applicant alleges that he did. I do not find that he intentionally and unduly hindered an employer or employees during their working time.

85 I conclude with the following comments. The evidence shows that on 13 January 2003 there was a 48 hour stoppage and on 18 January 2003 the crane was not dismantled as programmed. That has had serious consequences for the applicant. Dispute settlement procedures in enterprise bargaining agreements and the provisions of the appropriate Federal and State legislation are expressly designed to provide alternatives to the taking of industrial action. The right given to employees under s.26 of the *Occupational Health and Safety Act 1984* to refuse to work is not an unqualified right, as Mr Cavanagh conceded in cross-examination. Also the applicant has an obligation to maintain a safe workplace. I am left with the firm impression that there were avenues open to the applicant and the respondent to resolve their differences with the assistance of the appropriate authorities. Nothing in this decision in any way can endorse the industrial action which was taken.

86 Nevertheless, whilst industrial action has been taken that could have been avoided, the evidence does not show that Mr McDonald acted in an improper manner in the exercise of the powers conferred by Division 2G as alleged on 13 and 18 January 2003 nor that he intentionally or unduly hindered the performance of work as alleged on 18 January 2003. I am confident that s.49J(5) will properly prevent such events re-occurring when the evidence shows it has occurred.

87 For all of the above reasons, an order now issues dismissing both applications.

2003 WAIRC 07797

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SILENT VECTOR PTY LTD T/A SIZER BUILDERS, APPLICANT
	v.
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 25 FEBRUARY 2003
FILE NO/S.	APPLICATIONS 42 AND 63 OF 2003
CITATION NO.	2003 WAIRC 07797

Result	Applications dismissed.
Representation	
Applicant	Mr G. McCorry (as agent)
Respondent	Mr T. Dixon and Mr T. Kucera (both of counsel)

Order

HAVING HEARD Mr G. McCorry (as agent) on behalf of the applicant and Mr T. Dixon and Mr T. Kucera (both of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT applications 42 of 2003 and 63 of 2003 be, and are hereby, dismissed.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2003 WAIRC 07874

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLEY ALTHAM, APPLICANT
	v.
	CABLE SANDS (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 7 MARCH 2003
FILE NO/S.	APPLICATION 2192 OF 2001
CITATION NO.	2003 WAIRC 07874

Result	Application dismissed
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr R Gifford as agent

Reasons for Decision

1. This application is one pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") for alleged denied contractual benefits in the sum of $8,147.73. The applicant's claim arises from an alleged agreed redundancy package following the termination of her employment with the respondent.
2. The respondent denies that it is indebted to the applicant in the sum claimed or to any extent.

The Facts

3. The respondent is engaged in the mineral sands mining industry in the south west of the State. The applicant was employed by the respondent as a maintenance clerk commencing on or about 22 September 1998 with the employment coming to an end on or about 30 November 2001. The applicant's amended terms and conditions of employment were set out in a letter of appointment which although undated, was said by the applicant in her evidence to have been effective 15 January 2001. A copy of this written agreement was annexure A to the applicant's witness statement, tendered as exhibit A1.
4. The applicant gave evidence that in or about September 2001, the respondent engaged in what were described as "climate surveys", which followed a decision by it to reduce its workforce. The applicant testified that at the time of this survey, employees were advised by the respondent's representatives that it was not known what departments or how many employees might be affected by the workforce reductions. At about this same time staff were invited to make suggestions and to ask questions.
5. By letter dated 16 October 2001, contained at annexure B to the applicant's witness statement, the respondent invited employees in the engineering department, including the applicant, to express an interest in a voluntary redundancy package. Any expressions of interest were to be submitted to the respondent by close of business 31 October 2001.
6. The applicant testified that because of the degree of uncertainty about the future, she decided to express an interest in voluntary redundancy. She further testified that at some point indeterminate on the evidence, after lodging her expression of interest, the applicant had a conversation with the respondent's human resources superintendent, Ms Germon. The applicant testified she asked a question of Ms Germon in words to the effect "that in the light of what is happening would it be a good idea to start applying for other jobs". The applicant said that Ms Germon responded in words to the effect "it would probably be a good idea to do that".
7. In due course, the applicant commenced looking for alternative employment. The next event according to the applicant was that she received a letter dated 8 November 2001 from the respondent advising her that her expression of interest for voluntary redundancy had been accepted. Critically, the letter also indicated that the applicant's last day of employment would be 21 December 2001. The next day on 9 November 2001, the applicant was successful in obtaining alternative employment which would require her to travel overseas by 12 December 2001. The applicant spoke to Ms Germon about this matter and advised her that she could not work past 30 November 2001. Ms Germon told her that she would have to

work to 21 December 2001 in order to fulfil her obligations to receive the voluntary redundancy package. In the alternative, Ms Germon advised the applicant that if she wished to leave earlier, she would need to resign which she did apparently, on or about 21 November 2001.

8. Subsequently, by letter dated 23 November 2001, the respondent accepted the applicant's resignation, on the basis that she had given less than the required one months notice. Given the circumstances, the respondent elected not to exercise any of its rights in relation to forfeiture of monies, in accordance with the applicant's contract of employment. The letter further noted however, that the voluntary redundancy benefit was applicable for the redundancy being effective 21 December 2001. The letter provided that there was no ability to vary that date and terminate employment earlier, and retain the severance benefit. Accordingly, the applicant was not paid the severance benefit on the basis that the respondent had put in place all of the restructuring arrangements to be effective 21 December 2001.
9. The applicant denied that she ever agreed to make the redundancy benefit conditional upon remaining in employment to 21 December 2001.
10. Evidence was adduced on behalf of the respondent from Ms Germon. She testified that on or about 6 November 2001 the applicant came to see her after expressing an interest in voluntary redundancy. Ms Germon said that the applicant was querying when any acceptance of voluntary redundancy would be effective and also advised Ms Germon that she would be looking for other employment. It was Ms Germon's evidence that she told the applicant that if her request was accepted, then her last day of work would be 21 December 2001, as the new company structure would not be in place until after Christmas. A note from Ms Germon's diary, which she said was made contemporaneously with these events, was tendered as exhibit R2. Ms Germon denied telling the applicant that she should seek other employment, because she testified that it was too sensitive to suggest to either the applicant or other employees, whether they should seek other employment, as no decisions about the acceptance of voluntary redundancies had then been made. Ms Germon was quite emphatic about her recollection of advising the applicant of the date of 21 December 2001. This was said to be consistent with presentations by the respondent's general manager, that more than likely, fewer people would be needed at the beginning of the following year.

Consideration

11. This matter raises a narrow issue. The issue turns on the contest in the evidence between the applicant and Ms Germon as to whether the acceptance of voluntary redundancy was conditional upon the applicant remaining in employment to 21 December 2001.
12. For present purposes, the Commission is prepared to accept that the applicant's claim is one capable of being determined as a contractual benefit for the purposes of s 29(1)(b)(ii) of the Act, without necessarily determining the matter on this occasion.
13. Having regard to the overall factual matrix in this matter, and having heard and observed the witnesses give their evidence, in my opinion, the respondent's evidence on the termination date for the redundancy package is to be preferred. I accept the evidence that the situation at the respondent was outlined by its general manager in the staff meetings in the latter part of 2001. All indications were then given that changes were likely to be introduced from the beginning of the following year. I accept Ms Germon's evidence, to an extent corroborated by exhibit R2 that the date of 21 December 2001 was referred to by her in her discussions with the applicant, following the applicant's expression of interest for voluntary redundancy. This evidence is consistent with the respondent's general intention to implement the changes in its workforce in early 2002. Moreover, in my opinion, it accords with good sense that an employer, in making an offer of voluntary redundancy, may require employees to remain in employment to a specified date, in order to receive the severance benefits package.
14. In terms of the applicant's agent's submissions as to offer and acceptance, I do not regard that matter as relevant but even if it was, in my opinion, the applicant's case must fail. The applicant's agent suggested that the applicant's expression of interest for voluntary redundancy constituted an offer, which offer, was in accordance with the respondent's policies. The respondent, by letter dated 8 November 2001, was said to have accepted the applicant's offer, according to the applicant's agent's submissions. Attention was focused on the first sentence in the second paragraph of the letter of 8 November 2001. However, it is clear that the respondent, when the letter of 8 November 2001 is taken in its totality, was not accepting what the applicant was purporting to offer. That is, it is clear by the second paragraph of the letter of 8 November 2001, that the respondent had in mind something quite different from that advanced on behalf of the applicant by her agent.
15. If the matter is to be looked at in terms of offer and acceptance theory, then the offer and acceptance must strictly coincide. Manifestly, in this case, the respondent had in mind accepting something materially different to what was in the applicant's mind in terms of effective date. The parties were not *ad idem* in my opinion.
16. The application is dismissed.

2003 WAIRC 07875

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLY ALTHAM, APPLICANT
	v.
	CABLE SANDS (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 7 MARCH 2003
FILE NO/S.	APPLICATION 2192 OF 2001
CITATION NO.	2003 WAIRC 07875

Result	Order issued
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr R Gifford as agent

Order

HAVING heard Mr G McCorry as agent on behalf of the applicant and Mr R Gifford as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed.

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

2003 WAIRC 07743

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHERYL ANDERSON, APPLICANT
	v.
	E'CO AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 23 JANUARY 2003
FILE NO.	APPLICATION 1587 OF 2002
CITATION NO.	2003 WAIRC 07743

Result	Application out of time accepted.
Representation	
Applicant	Mr T Crossley – Solomon as agent
Respondent	Mr M Peterson

Reasons for Decision

(Given extemporaneously and subsequently edited by the Commissioner)

1 On 20 September 2002 the applicant, Cheryl Anderson, made application to the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") alleging that she had been harshly, oppressively and unfairly dismissed by the respondent, E'Co Australia. On the papers the application had been filed three days out of time.

2 Section 29 of the Act, in part, reads as follows—

> "(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.
>
> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so".

3 The introduction of section 29(3) provides for the discretion of the Commission to consider the matters and to accept applications that would otherwise be out of time.

4 The issues to be considered in exercising that discretion are well described in the reference provided by the Commission to both parties, i.e. *Anthony William Andrew v Metway Property Consultants and Auctioneers* 82 WAIG 3260, and the cases referred to therein.

5 The Commission must be satisfied that there are good reasons to accept the application outside the prescribed period. As to whether the applicant took steps to query or challenge the dismissal, there is nothing in the evidence, other than the application made out of time, to suggest that the applicant challenged the decision. That is one point that weighs against accepting the application.

6 The application is 3 days out of time and, whereas that is not a factor that is conclusive in any way, it is, in all the circumstances, a brief period of time. On the applicant's evidence, which I accept, the reason for the delay is essentially that she was waiting to get a telephone call from the respondent to be offered another job, effectively to be re-employed.

7 The applicant says she did not receive a positive response, having contacted the employer and being told, "No, there is not a job available currently". The applicant then drove past the premises and was advised by another employee that a fellow employee had been given a job. The applicant then felt aggrieved and activated matters. She sought professional advice, on the evidence around about the 28 day period, and an application was lodged about 3 days after. There was no undue delay at that point in time. The delay being that period within the 28 days, and the reason being, on the evidence, that the applicant was waiting for a job, or waiting for re-engagement.

8 The next issue is what prejudice is faced by the respondent. The respondent must now defend the substantive application. He thus incurs the time and expense in so doing. 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.

9 Prima facie there is some substance to the application. It is open to me on the evidence so far to find that there was a termination on 20 August 2002. I say "termination" because there has been some evidence, which is equivocal, about what happened on that day. However, the applicant exhibits a separation certificate, which she says she received on 27 August from Centrelink. She exhibits a document which refers to 3 weeks' payment in lieu of notice and 1 week's holiday pay. The applicant also says that she was terminated suddenly on that day and left the premises.

10 On that basis, the applicant appears to have been dismissed suddenly which can be an aspect of unfairness. I do not have sufficient to understand the reasons for termination and whether the company was in financial distress or otherwise. The applicant says that she was aware there were some financial concerns in the company. I do not know at this point in time whether there has been compliance with the *Minimum Conditions of Employment Act 1993*.

11 I should add that both parties have made submissions as to whether the trust has been broken down and whether the employment could in fact be reignited. That point is important and will need to be determined. The applicant was clearly for a time at least seeking to be re-employed. On her own evidence she was seeking a job and made calls to find out whether, in fact, a job was available.

12 For the reasons as expressed I will issue a declaration that it would be unfair not to accept the application pursuant to section 29(3). I believe that this matter deserves further discussion between the parties, and I would encourage the parties to do so.

2003 WAIRC 07795

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	CHERYL ANDERSON, APPLICANT
	v.
	E'CO AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 25 FEBRUARY 2003
FILE NO.	APPLICATION 1587 OF 2002
CITATION NO.	2003 WAIRC 07795

Result	Application out of time accepted
Representation	
Applicant	Mr T Crossley – Solomon as agent
Respondent	Mr M Peterson

Order

HAVING heard Mr T Crossley – Solomon on behalf of the applicant and Mr M Peterson on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby declares—

THAT it would be unfair not to accept Mrs Andersons' referral under s.29(1)(b)(i).

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

2003 WAIRC 07649

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	SATISH BALAGOPALAN, APPLICANT
	v.
	COMPETITIVE FOODS PTY LTD (TRADING AS HUNGRY JACK'S), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 10 FEBRUARY 2003
FILE NO.	APPLICATION 1513 OF 2002
CITATION NO.	2003 WAIRC 07649

Result	Dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Ms Z. Ludbrook (of Counsel) appeared on behalf of the Respondent

Reasons for Decision

(Given ex tempore as edited by the Commissioner)

1 On 3rd September 2002 Satish Balagopalan (the Applicant) applied to the Commission for orders pursuant to Section 23A of the *Industrial Relations Act, 1979* on the grounds that he had been unfairly dismissed from employment with Competitive Foods Pty Ltd trading as Hungry Jack's (the Respondent).

2 The Applicant had been employed in the Hungry Jack's organisation, in places other than the franchise operated by the Respondent prior to being picked up by it. During this time and while employed by the Respondent he had undergone various training programmes. From his evidence it is clear that he understood the Respondent's business is closely managed around the Burger King manual, which sets out in precise detail the policy and procedures that must be followed. Further training lead to the Applicant attaining the appointment of Assistant Manager. In this position he carried full responsibility for the operation of a shift.

3 It is clear that his relationships with the Respondent were not smooth. In particular he was at odds with the Respondent's policy concerning food safety and that is an issue which became fundamental to the viability of the relationship. There are other issues concerning his alleged role in a petition relating to the performance of another Assistant Manager and his management of customer relations.

4 The Applicant gave evidence on his own behalf. This evidence was not at all clear. In cross examination he repudiated much of what he said in chief. His approach to issues was changed not once but on a number of occasions, so much so that the Commission drew this to his attention. It seems to me that the Applicant had some difficulty appreciating what was required of him by the Respondent. It is fair to say that his employment relationship was characterised by a series of warnings and efforts by the Respondent to get him to comply with its policy. It is open to conclude that he never reached the stage where he accepted the obligations that the Respondent placed on him as an Assistant Manager.

5 The Applicant called evidence in his support from the Respondent's Restaurant Training Manager, Mr Keith Scott. That evidence is characterised by the demonstration by Mr Scott of a clear understanding of an employer's responsibilities when it needs to deal with an employee who is not performing to the required standards. It is obvious from Mr Scott's evidence that the Respondent tried to address his deficiencies with the Applicant over quite a long period of time. There is no reason why Mr Scott's evidence should not be accepted as credible and truthful evidence and I do.

6 The same can be said about the evidence of Mr David Villa who is employed by the Respondent as a Manager. His examination in-chief by the Applicant was cursory to say the least and most of his story was extracted from him by Ms Ludbrook, Counsel for the Respondent, in cross-examination. That story does not contain anything of substance that supports any of the contentions advanced by the Applicant in this matter.

7 What an employer has to do when it terminates the employment of an employee is ensure there has been fairness, not only to the employee but to the business as well. An employer has a right to bring a relationship to an end and that right will not be interfered with by the Commission unless there has been an unfairness. The measure of the unfairness is whether there was a fair go to all of the parties. This is a fundamental test to be applied in dealing with issues such as this (*Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385).

8 Having considered the evidence I find the Applicant, for some reason, formed the view that there essentially was nothing wrong with how he was discharging his duties. That is notwithstanding that continuously throughout his employment relationship the clear evidence is that issues were being raised with him about how he performed the work. He did not accept directions the employer was giving him and eventually things came to a head on around about 5th August 2002. There were some incidents then involving the recording of cook-out temperatures, and issues concerning customer complaints. Similar incidents and issues had been raised with him on previous occasions and the Respondent brought them to his attention in a meeting and in writing (Exhibit L3).

9 By this stage the Applicant already was in receipt of a number of warnings, one of them being a final warning (Exhibit L4). What Mr Scott, who conducted the meeting did, was expose the employer's complaints to the Applicant and allowed him to comment on them. He had, on my view of the evidence, more than adequate opportunity to comment, explain. I accept the evidence of Mr Villa, who was present at the meeting, that there was a two-way conversation between Mr Scott and the Applicant. Mr Scott, even at that stage, notwithstanding a considerable history of difficulties between the Respondent and the Applicant did not make a decision to terminate immediately. As a prudent employer should he took advice from someone else who was not directly involved and after considering that advice made a decision to terminate then advised the Applicant that he was dismissed.

10 It is clear that the dismissal took effect from the time that Mr Scott told the Applicant he was dismissed and not from some later date as the Applicant alleges. There is simply no evidence to the contrary. I do accept though that the Respondent allowed, in effect, an appeal from the termination proper. This involved the State Manager reviewing the decision. When the review was done, on the evidence before Commission, the State Manager decided that she would not interfere with the decision that had been made by Mr Scott and properly already communicated to the Applicant.

11 It could be that the Applicant has developed the opinion that the Respondent's conduct in this matter is unfair, but insofar as the law to be applied is concerned there has been nothing demonstrated at all before this Commission today which would indicate there has been any unfairness. The Applicant obviously has a different opinion to the Respondent about how some things in the operation were done and ought to be done, but that is not the point. The point is was there unfairness in the termination? On the rules to be applied there was none and the Commission will dismiss this application.

12 I need to note for the record that the Applicant had summoned five witnesses in all and opted after the first two of those, Mr Scott and Mr Villa, not to call any more witnesses. It is true that witnesses, who are present in court, do not have to be called, but it is open for the Commission to draw an inference from the failure to call those witnesses. The inference I draw in this case is the Applicant concluded they would not help his case at all. This reinforces the view I have expressed concerning the conduct of the employer.

13 This application will be determined by an order for dismissal.

2003 WAIRC 07650

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SATISH BALAGOPALAN, APPLICANT
	v.
	COMPETITIVE FOODS PTY LTD (TRADING AS HUNGRY JACK'S), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 10 FEBRUARY 2003
FILE NO.	APPLICATION 1513 OF 2002
CITATION NO.	2003 WAIRC 07650

Result Dismissed

Order

HAVING heard Mr S. Balagopalan on his own behalf and Ms Z. Ludbrook (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application be, and is hereby dismissed.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 07818

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANAND BALCHAND, APPLICANT
	v.
	MAYNE HEALTH, TRADING AS JOONDALUP HEALTH CAMPUS, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 28 FEBRUARY 2003
FILE NO.	APPLICATION 383 OF 2002
CITATION NO.	2003 WAIRC 07818

Result	Application dismissed
Representation	
Applicant	Mr S Newman
Respondent	Ms H Spencer

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Mr Danand Balchand was employed as a registered Mental Health Nurse at the Mental Health Unit at Joondalup Hospital from April 1998 to 7 February 2002. He alleges in his application as follows—

> "The dismissal was unfair because the complaints leading to dismissal were unfounded. Also previous complaints referred to were in part unfounded and thought to have been previously resolved."

He seeks reinstatement to his position and payment from the date of termination.

2 The respondent raised in their notice of answer and counterproposal a jurisdictional objection. This was not pursued at hearing. The respondent says as follows—

> "i. The applicant had been warned twice previously with respect to patient boundary violations, that failure to remedy his practice would be likely to result in termination of his employment.
>
> ii. At all stages of the disciplinary process followed, the respondent afforded the applicant procedural fairness.
>
> iii. He had received clinical supervision and other offers of support to attempt to achieve the appropriate alterations in his practice.
>
> iv. One of the incidents over which he was previously warned also resulted in a current good behaviour bond from the Nurses Board of WA.
>
> v. A subsequent complaint, the fifth regarding a patient boundary violation, resulted in management after due investigation and consideration, reaching the conclusion that the applicant was unable to discern the appropriate boundaries of behaviour required of a mental health nurse and was therefore not suitable for employment as a nurse."

The respondent says that the trust required in the employment relationship has broken down and hence the applicant's employment had to be terminated.

3 Evidence for the applicant was provided by the applicant, Mr Balchand and Ms Gail Pennington, a Clinical Nurse in the Mental Health Unit. Evidence for the respondent was given by Ms Debra Moen, Deputy Director of Nursing; Ms Robyn Sutherland, Hospital Director at Mount and Attadale Hospitals; Dr Paul Skerritt, Director of Mental Health and Ms Pamela Whittaker, Manager of the Mental Health Unit. I do not go to the qualifications of each of the witnesses other than to say that each of them had considerable qualifications and experience in dealing with mental health patients in the hospital and other settings. It is also the case in this matter that credibility is not largely an issue in assessing the evidence. It is trite to observe that it is not the role of the Commission to investigate whether all of the allegations can be proven. It is for the Commission to decipher whether the right of the employer to terminate Mr Balchand's services has been exercised in a manner that abuses that right so as to warrant the interference of the Commission.

4 The applicant's services were terminated on notice on 7 February 2002 and his accrued entitlements were paid. Much of the evidence in this matter is common and hence I do not seek to recite all the evidence. The matter concerns 5 separate allegations of inappropriate behaviour by the applicant towards patients. The patients are to be referred to as patients A, B, C, D and E to preserve medical confidentiality. The allegations are that the applicant in relation to patient B – hugged and kissed her (22 January 2001); patient C – got into bed with her (12 July 1999); patient A – contacted her at home on several occasions asking for a date (3 February 2001); patient D – raised his voice in an angry manner towards him (19 July 2001); and patient E – touched him whilst in the shower in a sexually inappropriate manner (31 December 2001). Each patient was in the care of the respondent's Mental Health Unit at Joondalup or was to be admitted into the care of that Unit and had a mental illness or had suffered an episode. The alleged incidents occurred over a 2½ year period, but action on these complaints was taken over approximately a twelve month period.

5 The applicant has at all times either denied each allegation or alternatively maintained that he had done nothing wrong in respect of what was alleged. Two of the allegations were via patients who on admission to the hospital, complained about incidents that happened some time previously. The matters were all investigated and the substance of the allegations put to the applicant with the exception of the allegation by patient E, who due to his medical condition could not be interviewed. There is also no access by the hospital to the interview notes of the clinical psychologist who first heard of the allegation; the complaint being made by the patient's mother. The patient was a minor at the time. The applicant challenges the investigation process of the respondent in respect to patient E, in that the applicant has never been advised properly of the true complaint made against him. The applicant complains also that old allegations, which had previously been resolved, were resurrected.

6 Disciplinary action on these allegations first arose in April 2001. Mr Balchand received a letter from Robyn Sutherland, the Director of Nursing dated 19 April 2001 [Exhibit R2], concerning patients B, C and A, which reads as follows—

> "Three serious issues have been brought to my attention, the most recent this morning. Given the nature of the allegations, I am now suspending you from rostered duties, on full pay until we fully investigate the issues and then formally meet with you.
>
> …….

I understand that the first issue was dealt with at the time, however, now that three complaints have been brought forward, I would like to meet with you so that you can have the opportunity to respond to me directly regarding these issues.

Depending on the outcome of our discussions at the meeting, we may need to look at steps that the hospital may need to take into consideration. This may include disciplinary action and possible termination of employment.

As these issues are of a serious nature, I suggest that you bring a support person or adviser to the meeting. Can you please let me know who this will be prior to the meeting."

7 The complaint in regard to patient B had earlier been investigated by Ms Moen. Statements had been taken from staff and her evidence is that at that time she did not believe the allegation to be founded. This allegation was brought into focus again when further unrelated allegations arose of previous patient boundary violations. It can be said that each incident alleged was not witnessed by any other person. A meeting was held on 24 April 2001 between the applicant, Mr Glen Tyrell from the Australian Nursing Federation, Ms Sutherland and Dr Skerritt. Exhibit R3 is a signed record of the interview. At that meeting there was discussion of each of the allegations. The applicant denied each allegation and gave his account of his interaction with the patient. Mr Balchand was challenged about the coincidence of three instances by three separate patients on three different occasions being brought forward. The applicant did not see this as significant. The Nurses Code of Practice [Exhibit R4] and the Guidelines for Professional Conduct by Nurses and Relationships with Clients [Exhibit R5] were discussed in terms of the boundaries between nurses and patients particularly in a mental health setting. It is not challenged that these codes/guidelines apply and that the applicant was made aware of them. Mr Balchand commented that at times he had maintained communications with patients after discharge and he did not see this as a problem. Mr Balchand was given an opportunity to respond to the allegations in writing and did so [Exhibit R6]. In his reply Mr Balchand denies any improper conduct on his behalf and notes the respective difficulties experienced with the patients.

8 Ms Sutherland's decision, following that meeting was to issue a warning to Mr Balchand and refer the matter to the Nurses Board. Mr Balchand was also put under professional supervision and as part of this had to have discussions on a weekly basis with Ms Moen concerning his professional standards. The Nurses Registration Board later put Mr Balchand on a good behaviour bond for 12 months in relation to the allegation by patient A (which was largely admitted by the applicant but who saw it in a different light). That good behaviour bond had not expired at the time of the dismissal of Mr Balchand.

9 On 10 August 2001 Ms Sutherland again wrote to Mr Balchand regarding the complaint by patient D that Mr Balchand had responded to patient D angrily and raised his voice towards him. The applicant was again written to on 3 January 2002 by Ms Sutherland regarding the allegation by patient E. That letter [Exhibit R8] says in part—

"I would like to meet with you to offer the opportunity to respond directly regarding this issue. This issue is of a very serious nature and I suggest you bring a support person or adviser to the meeting.

As you are currently on a second warning, disciplinary action or termination of employment may result, dependent on your response to the allegation. Given the serious nature of this allegation, you are suspended forthwith on full pay until the meeting is undertaken."

10 A meeting was arranged for 11 January 2002 at which the applicant denied the allegations and requested a full investigation be undertaken of the incident. A letter dated 29 January 2002 from Ms Prime, the Acting Director of Nursing to Mr Balchand [Exhibit R9] says as follows—

"Since our meeting on 11 January 2002 we have spoken to a number of staff on duty that evening. We have also reviewed your responses to the allegation as set out during our meeting on 11 January and in the letter from Robert Castiglione, Barrister and Solicitor, dated 23 January 2002.

Our principle concern at this stage is the fact that you have again been the subject of a complaint by a patient.

The main aspect which is so disturbing is that we now have had 5 separate complaints by 5 different complainants each alleging inappropriate boundary violations, whether by touch, word, gesture or tone of voice.

We are further concerned that two of those patients have refused to return to the Mental Health Unit.

Having regard to this latest complaint and the 4 previous complaints, we have serious doubts as to whether you are suitable for employment as a mental health nurse.

We would like you to respond in writing by Friday 1 February 2002 as to why in all the circumstances your employment should not be terminated in light of the continuing complaints against you. I would then like to meet you at 10am on Wednesday 6 February 2002 to discuss the matter in light of your response."

11 The applicant then received a letter of termination [Exhibit DB1] on 7 February 2002. The letter in part says as follows—

"Specifically, as I have discussed with you, you have been the subject of five separate complaints by five different complainants each alleging inappropriate boundary violations, whether by touch, word, gesture or tone of voice. The complaints have led me to conclude that you are unable to discern the appropriate boundaries of behaviour required of a mental health nurse in relation to patients. This is a fundamental requirement of a mental health nurse and my lack of trust and confidence in your ability to meet these requirements leaves me with no alternative but to terminate your employment."

12 The letter goes on to address whether any suitable alternative positions were available to which the applicant may be redeployed and concludes there were not. The available positions also involved patient contact. In relation to the last complaint by patient E, the applicant received a notification from the Nurses Board on 5 July 2002 [Exhibit DB2] that the Board had resolved that the investigation be withdrawn and no further action taken.

13 Dr Skerritt was involved in meetings with the applicant in April 2001, not in a decision making capacity but in an advisory capacity. There is a separation of clinical and management functions at Joondalup. Ms Sutherland was the decision maker. Dr Skerritt had not been involved in any of the investigations regarding the alleged incident. He also had not consulted with any of the patients albeit he had reviewed their case records. His evidence is that the decision to be made was a complicated one as each patient was mentally ill and no allegation could be proved, there being no witnesses to the incidents. However, he believes that the decision taken to be fair and in fact generous towards the applicant as it was the weight of the number of complaints which was important. It was also important that patients be protected. The applicant was placed under professional scrutiny which was appropriate and the matter was referred to the Nurses Board. Dr Skerritt says that in his professional opinion, false allegations are not necessarily part of a mental illness. Psychiatric patients are not more likely to make such allegations and such allegations are not a common experience. As I have said it is clear on the evidence that Mr Balchand was a good nurse, confident and skilful; but for these incidences there would have been no query about his performance. Dr Skerritt agrees that the reliability of patient E may be questionable.

14 Ms Whitaker took over the clinical supervision of the applicant from Ms Moen. As part of that clinical supervision she only had one meeting with the applicant during Christmas 2001. Ms Whitaker had heard from a doctor the day after the allegation by patient E's mother. The previous evening patient E had been upset and sought discharge. He had been discharged due to the emotional state he was in. The initial discussion had been with a clinical psychologist and patient E, which his mother had attended but she had been out of the room at the time that the allegation was made. This discussion was reported to a registrar who reported on to another doctor and so on to Ms Whitaker. Ms Whitaker attempted to investigate the matter with patient E's mother. Patient E could not be spoken to nor could Ms Whitaker obtain the report of the clinical psychologist, even though permission was granted on behalf of the patient.

15 Ms Pennington's evidence is that she says she had asked the applicant to persuade E to have a shower. The patient was refusing to shower at the time and she considered a male nurse may be better able to persuade him. She says that patient E was a little upset and did not want to have a shower. He did not wish to go home at that stage. Late in December 2001, patient E had suggested something adverse about Ms Pennington and she had confronted him about it. She says after his shower patient E appeared distressed and wanted to go home. Patient E did not explain himself. Ms Pennington was not present during the shower.

16 It is submitted on behalf of the applicant that the right to terminate his employment has been exercised unfairly and unlawfully because the allegations against him were unfounded and unproven. Additionally, the applicant was never apprised of the allegation in respect of patient E. Old allegations that had been investigated and answered were dredged up to support more recent allegations based on hearsay, and used to substantiate the decision to dismiss.

17 The applicant further submits that the credibility of patient E was in doubt and that such allegations are an occupational hazard in working in the mental health field.

18 The respondent submits that it is the number and similarity of otherwise unconnected allegations made against the applicant that led to the hospital having to take action against Mr Balchand. The employer had consequently lost trust in the applicant and the welfare of patients had to be protected.

19 The respondent says that the applicant is bound to abide by the Nurses Code of Practice 2000 whereby they are to ensure that no unfair advantage is taken of clients in their care. The applicant must also apply the Guidelines for Practice and Sexual Conduct by Nurses with Clients 1996 which stress the need to be aware of the boundaries that need to be maintained between nurses and patients in their care.

20 The decision to dismiss Mr Balchand was clearly based on the number of unrelated incidents in respect of patient boundary violations that had occurred or were alleged to have occurred. In other words in the respondent's mind there must have been something wrong given five different patients had complained. The patients had no association with each other and the link was simply the nature of the complaints, ie the inappropriate behaviour of the applicant. This was the conclusion drawn by Dr Skerritt having interviewed the applicant about the first three incidences. This was the conclusion that was finally drawn after the alleged episode with patient E.

21 The two prime difficulties for the respondent in defending their actions are that two of the allegations were, on Ms Moen's evidence, investigated by her or another supervisor and she did not perceive there to be a difficulty at the time. The other supervisor thought the patient had had a nightmare. It was only the coincidence of further allegations that the earlier incidents were resurrected. The other difficulty is that the allegation by patient E is not known fully and hence the applicant could not be expected to know or answer properly as to what he is alleged to have done (see *Beaumont and Heerey JJ in Byrne v Australian Airlines Ltd* (1994) 47 FCR 300 @332; *Reader v Wyndham Lodge Nursing Home Inc* 64 IR 83 @ 91).

22 In contrast, the respondent maintains that they could simply not ignore the fact that such allegations had been levelled against the applicant on five separate occasions. The applicant did not appear to fully understand the importance of being sensitive to patient boundaries and the incident with patient E appeared compelling in that, post the patient's shower he was very agitated and demanded to leave the Unit's care. In other words the strong suspicion is that something must have occurred. The applicant during his interview in relation to the first three allegations did not appear to fully appreciate the importance of the Code and the Guidelines. He was then placed under supervised practise and at the time of dismissal was still on a good behaviour bond. That is significant in my view, as are the warnings he received. The respondent did consider alternate placements for the applicant but there were none. That is also relevant in judging the fairness of the termination.

23 The respondent refers to the decision in *Blyth Chemicals Limited v Bushnell* 49 CLR 66 @ page 81 where Dixon and McTiernan JJ state—

> "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal (Boston Deep Sea Fishing and Ice Co. v. Ansell (1); English and Australian Copper Co. v. Johnson (1); Shepherd v. Felt and Textiles of Australia Ltd. (2)). But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence."

24 The respondent also references the decision of the House of Lords in *Malik v Bank of Credit and Commerce International S.A.* 3 W.L.R 95 at page 109 states—

> "It is expressed to impose an obligation that the employer shall not—
>
> > "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.""

25 Reference is also made to the Nurses Code of Practice 2000 which states at Clause 4 Nursing care for client's individual needs in part—

> "(3) A nurse who is caring for a client for a client who is in a vulnerable physical or emotional state should ensure, to the extent practicable, that no unfair advantage is taken of the client."

26 The respondent therefore maintains that given the weight of unrelated allegations against Mr Balchand, they could no longer trust him to perform his duties. They had sought to supervise and manage the issue, as well as make him aware of the practical impact of the Code, but this had not proved successful.

27 There can be no doubt that the alleged actions, if proven, would constitute a dismissible offence. The applicant does not argue otherwise. The applicant instead says they were not proven, old allegations were put to bed and resurrected and he did not do what was alleged. There is no doubt that actions of this nature would seriously damage the trust in the employment relationship.

28 On the evidence before me, I am satisfied that the respondent took appropriate steps to investigate each allegation and to properly put these matters to the applicant and consider his response. They also referred relevant matters to the Nurses Board.

In particular, having heard the evidence of Ms Moen, Ms Sutherland and Dr Skerritt, I am convinced that the work of the applicant was otherwise held in good regard and there was no "witch-hunt" as submitted on behalf of the applicant. It is not clear to me what else the respondent could have done to more fully investigate the allegation arising from patient E as the hospital did not have full access to the details, due to the patient's mental condition and the refusal by 'North Metro' to release the report, on Ms Whittaker's evidence. This does not mean that the hospital should have simply ignored the incident, and they did not (see the discussion of 'a fair hearing' in Macken, McCarry and Sappideen's. The Law of Employment 4th Edition, pp328-9).

29 The applicant complains that the respondent's approach is unfair in that, previously investigated incidences which were laid to rest, were later resurrected and held against the applicant. The evidence is that this occurred, however, as with all issues to do with this application it was a matter of whether the allegation was believed. Ms Moen chose at the time, having considered all information to believe Mr Balchand. That view clearly changed later as doubt crept in given the allegations which surfaced. Ms Moen's approach was very considered, however, she in effect no longer gave Mr Balchand the benefit of the doubt. The applicant does not seek to persuade me by reference to case law as to why the respondent was not able to adopt this approach. I see no reason as to why the respondent was not entitled to revisit the earlier allegations, based on further matters coming to their attention. In the circumstances I consider the respondent's approach to be appropriate. A reasonable person could not help doubt or at least review the earlier events in light of the later allegations. To simply ignore them would, in my view, not have represented a proper approach to the care of their patients.

30 It is the case that the specifics of the allegations by Patient E were not put to Mr Balchand. This would normally be a significant factor in determining that the dismissal was unfair. However, the nature of the complaint was put to Mr Balchand [Exhibit R8]. The complaint as described in the letter by Ms Sutherland is that the patient "was touched inappropriately during the shower by yourself. This was confirmed by the mother who also indicated that the touch was of a sexual nature. He was so distressed by this event that he was required to be discharged forthwith." Mr Balchand told colleagues that he had been accused of rape, but agreed that he was not accused of such an act (Transcript p.65). He says the nature of the allegation was not clear to him (Transcript p.66). However, the letter of 3 January 2002 is reasonably clear in its terms. The precise action that it alleged to have occurred may not be, but Mr Balchand denied any touching of the patient in a sexually inappropriate manner.

31 The task of the respondent in these circumstances was not to prove the allegations. The respondent had to properly investigate the complaint and afford the applicant a fair hearing. The respondent properly discharged this duty. The respondent had to satisfy itself that there were reasonable grounds upon which to sustain a view that the allegations could be believed. This requirement is stated succinctly by then Fielding C in the Full Bench decision in *"C" and Quality Pacific Management Pty Ltd* 73 WAIG 988 @ 997. He states—

> "The question in such cases is that stated by Arnold J. in **British Home Stores Ltd v. Burchell (1978) IRLR 379 at 380** as follows—
>
> > "What the Tribunal have to decide every time is broadly expressed whether the employer who has charged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of the misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.""

As stated, something apparently occurred during the period of showering to cause Patient E to be so upset as to demand discharge (see Ms Whittaker's evidence at transcript p.181-182). This explanation given by the patient to the clinical psychologist was that the applicant had touched him in an inappropriate sexual manner. The applicant was advised of the general nature of the complaint. Patient E had complained about another nurse and that nurse had resolved that issue with him. Dr Skerritt's evidence can raise some doubt about the veracity of Patient E's account. However, he was not there to witness Patient E on that occasion or indeed the other patients who made allegations, at the time of the alleged incidences. In that sense, the patient's distress at the time as witnessed, should carry greater weight and can support a reasonable suspicion that something had occurred. It should be remembered that the clear view of the respondent was that the weight of several unrelated incidences was too much to ignore. The episode with Patient E added greatly to and reinforced any suspicion that was held.

32 It is not for the Commission to interfere with the right of the respondent to terminate the services of an employee unless that right has been exercised in a manner which could be found to be unfair, harsh or oppressive. In weighing that right it is important to ensure that a fair go all round has been afforded (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). In weighing all the evidence I cannot realistically come to a different conclusion than that arrived at by the respondent. The number and context of the allegations gave legitimate cause in my view for something more than simple suspicion that the applicant did not fully comprehend the need to respect patient boundaries. In that sense I believe that it is both understandable and probable that the respondent would have and should have formed the view that they no longer had confidence in the applicant. The trust between employer and employee had understandably broken down and the duty to patients had to be put first. I cannot then having regard to my obligations under section 26 of the *Act* grant the application.

33 I will thus issue an order dismissing the application.

2003 WAIRC 07817

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANAND BALCHAND, APPLICANT
	v.
	MAYNE HEALTH, TRADING AS JOONDALUP HEALTH CAMPUS, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 28 FEBRUARY 2003
FILE NO.	APPLICATION 383 OF 2002
CITATION NO.	2003 WAIRC 07817

Result	Application dismissed
Representation	
Applicant	Mr S Newman
Respondent	Ms H Spencer

Order

HAVING heard Mr S Newman on behalf of the applicant and Ms H Spencer on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2003 WAIRC 07733

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	IGNAZIO ROMANO BIANCHI, APPLICANT
	v.
	BIANCHI CORPORATION T/AS ONYXBAR, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 14 FEBRUARY 2003
FILE NO.	APPLICATION 937 OF 2002
CITATION NO.	2003 WAIRC 07733

Result	Application dismissed
Representation	
Applicant	Mr H Sklarz of Counsel
Respondent	Mr A Smetana of Counsel

Reasons for Decision

1 This is an application made pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant, Mr Ignazio Romano Bianchi (known as Romano Bianchi), claims that he was denied certain contractual benefits arising from his employment contract as General Manager of the Onyx bar in West Perth. The respondent, Bianchi Corporation, operates the bar and the applicant's brother, Mr Davide Bianchi, is a director of that company. The respondent also operates the Savoia restaurant in West Perth. The sum being sought is $38,173.68 allegedly due under the contract for unpaid salary and superannuation for the period 20 September 2001 to 22 April 2002. The applicant says that he was not paid for work which he performed during this period and which involved the design and refurbishment of the premises, ready for opening, and then the management of the bar. The bar opened for trading on 10 April 2002. The applicant left his employment voluntarily on 22 April 2002 and took an amount of money from the respondent's safe on his departure.

2 The only written contract is [Exhibit IRB1] which reads as follows—

"Dear Romano

POSITION OF GENERAL MANAGER OF ONYX

I refer to the discussions that we have had concerning your position as General Manager of Onyx. In this regard in respect of the services rendered by you—

1. Bianchi Corporation Pty Ltd ("BCPL") will pay you a salary of $60,000 per annum.
2. In addition to your salary you will also be entitled to 15% of the net proceeds ("the 15% interest") of the business run by Onyx. ("the Business"). In this regard "net proceeds" is defined to mean the net operating profit made by BCPL arising out of the Business.
3. In addition to the foregoing, in the event that the Business is sold, you will be entitled to 15% of the net sale proceeds.

The 15% interest, as mentioned in Item 2, is to be paid to you on a quarterly basis; with the first payment due on 30 March 2002 and thereafter on the last day of each subsequent quarter. In the event that such a day does not fall on a business day then the 15% interest will be paid to you on the next business day.

I trust this accurately reflects our discussions.

Yours sincerely
DAVIDE BIANCHI
DIRECTOR
BIANCHI CORPORATION PTY LTD"

3 There was much evidence given about this contract which I will address later. The claim relates only to the $60,000 salary component in the contract. The contract is dated 22 January 2002 and an undated version of the contract was attached to the applicant's application. In addition the application says as follows—

"During September 2001 1 was approached by Bianchi Corporation trading as Onyx Bar to undertake the responsibility of the refurbishment of Onyx Bar, 72 Outram Street, West Perth.

We made a verbal and written agreement that I would be paid a sum of $60,000 per annum, plus 15% share of the net profit and 15% of the net proceeds should the business be so1d. I worked from September 2001 to April 2002. I was not paid the wages I was promised for the period of 8 months.

I stayed because I was made to believe that once the business was opened, this happened on the 10th March 2002, that I would begin to receive back payment for unpaid salary. I attempted to discuss the situation, but received an evasive response. The situation deteriorated when it was obvious I would not be paid.

Not having any money caused me grief and enormous stress. This situation had significant impact on my life, sleepless nights, depression and loss of appetite. In spite of all this Bianchi Corporation expected me to perform my duties. On the 22 April, 2002 at 11am I left the premises unpaid and to this day have been totally ignored."

4 This suggests that the contract was made in September 2001 and contained all the provisions as expressed above. The respondent does not challenge the provisions of the contract but says that these provisions were to operate from the time the bar opened for business, which eventually happened on 10 April 2002. At that time the respondent says the applicant assumed the position of General Manager and the contract commenced effectively. In addition, the respondent says that the monies payable under the contract from 10 to 22 April 2002 are not due to the applicant as he took money from the safe on departure. On the respondent's submission this covers the amount which otherwise would be payable. Therefore, the key issue is in the applicant's claim whether the employment contract commenced on 20 September 2001 or 10 April 2002.

5 Evidence for the applicant was given by the applicant (hereinafter referred to as Romano); Ms Masuri Bianchi, the applicant's wife; and Mr David Hetherington and Mr Hassan Hodgkinson who were contractors at the Onyx bar. Evidence for the respondent was given by Mr Davide Bianchi (hereinafter referred to as Davide); Ms Donna Cox, an investor in the bar; Ms Miriam Le Miller, the respondent's bookkeeper; and Mr Jason Bennetts, a cleaning contractor at the Onyx bar.

6 The evidence of the applicant is that his brother approached him in August 2001 and indicated that he was having financial problems with his current business, the Savoia restaurant. Davide proposed to urgently open another business to assist him financially with the restaurant. The applicant had previously had a bad experience with his brother over the opening of a business, Bar Bianchi, and as a result had left the State. The applicant was sceptical and nervous, but as his brother needed help he decided to "give it another go". The applicant made it clear to his brother that he wanted to be paid and Davide knew that the applicant did not have any money. The applicant understood that he was to be paid $60,000 per annum for helping his brother. The applicant's task was to design the premises and make arrangements with workers and contractors. The applicant also had to speak to the investors, which Davide had arranged, and to collect money from them.

7 Romano says that he started to get worried in September as he was not getting paid. He continued his work as his brother promised he would pay him. He worked daily from 7am to 7pm, and sometimes later. Davide would often not be at the site for weeks. The applicant says that four or five months into the contract he was still not getting paid and he was getting pretty nervous. He was also experiencing problems with not having funds to pay contractors. He kept approaching Davide who said that things were going to be alright, but as Davide always made excuses the applicant asked his brother to put something in writing. He says that, "It was my understanding that I was going to be a 15 percent partner with my brother, from the start. This is from August." (Transcript p.17).

8 The applicant says that he was never a contractor for his brother. He did not provide quotes or invoices as contractors were required to do and did not operate a business at the time. He had operated his own businesses previously. After the letter of 22 January 2002 the applicant continued to pursue his brother to get paid and he says that Davide would come to him and advise him that he would have to wait until the bar opened. The applicant says that he had no option but to wait (Transcript p.19). The reason given by Davide as to why Romano had to wait was because the Savoia restaurant was not doing well and the employees were complaining that they were not getting paid. The applicant started to become very sceptical that he was ever going to get paid.

9 The applicant says that he was the designer and architect of the premises. There was a shortfall in funds to do the work and the applicant was harassed daily by presumably contractors to get paid for their work. He was responsible for the workers; they only knew him as the manager. The applicant paid the printer $1,000 from his own funds for work towards the opening of the bar, as his brother begged him to do so, and he needed the bar to open to get paid. In total he made advances during his last month of $3,600 to the respondent to cover various costs. He had receipts for these advances and he took these to Ms Le Miller on 20 or 21 April and begged her to pay him a cheque for that amount. He says that Ms Le Miller went through all the receipts with him and calculated the amount. She felt sorry for him, said that she would do all she could to pay him and that she had to talk first to Davide.

10 The applicant complains that he approached Davide many times to discuss his payments but Davide was not interested. The applicant says he was the General Manager but was asked to leave the premises when staff meetings were held and not one staff member knew the applicant as the General Manager. The applicant went to his brother's office and found that his brother had thrown all the applicant's business cards in the bin. The applicant says he realised then that his brother had shafted him for 8 months. The applicant had the keys to the safe. He opened the safe and there was $45,000 in takings in the safe. He then enlisted Jason Bennetts who was a friend of both brothers. He counted out $3,600 before Jason as a witness, told him that that was all he was taking (it being money he had spent on the respondent's bills). He then gave the keys to Jason, told him he was not well and left.

11 The applicant says that he regularly paid 6 or 7 labourers in cash which was money given to him by his brother. He collected cheques from investors on Davide's instructions and gave them to Davide.

12 Under cross-examination, the applicant was asked, "And you felt that you and your brother, Davide Bianchi, were partners? The applicant replied, "That was my understanding" (Transcript p.32).

13 The applicant says he went to see Ryan Kelly at the Savoia restaurant to ask him for money because he had none. Mr Kelly gave him money every three weeks from about January 2002 onwards. The amounts were $200 or $150. During the refurbishment of the Onyx bar the applicant stayed with Davide in his apartment. He ate for no cost at the Savoia restaurant and drove Davide's personal vehicle, a Jeep Wrangler.

14 The applicant says that he never filled out a taxation declaration form, completed timesheets or received payslips. He received Social Security payments for three months (ie 11 January to 22 March 2002) of the eight months when, on his evidence, he was an employee of the respondent. He applied for this because he was not getting any money, could not feed himself and was trying to help his brother.

15 The applicant denies that he originally discussed with his brother receiving a salary of $40,000 when the bar opened for business. He denies also that Ms Cox, in January 2002, indicated that she would try to get him more money from his brother. He says that she said she would try and get money. On 22 January 2002 Davide gave Romano an original of the letter marked [Exhibit IRB1]. The applicant says he asked Ms Cox to prepare the letter. He did not ask that a reference to backpay to September 2002 be incorporated in the letter. He trusted his brother; but he needed something in writing as things were getting "pretty tight" (Transcript p. 37-38). The applicant denies asking Ms Cox to say for the purposes of the Commission hearing that Davide Bianchi signed the letter in September 2001.

16 The applicant says that he did the designs for the new venture and produced plans [Exhibit R1] with Chris Devaney. He was the project manager during the refurbishment and when the bar opened was to be the General Manager. He was not told what to do by Davide; he sat down with his brother and discussed what they needed to do. Financially he was under Davide's control. He says that Ms Cox was a legal adviser to Bianchi Corporation, to Davide Bianchi and to himself, however, he never went to her as a client. She loaned him $5,000 as she was infatuated with him and he was desperate for money. He has repaid her half of that loan. He was very good friends with her at one stage. He says he went to see Davide at the Savoia on several occasions as he was desperate. His brother was not interested in talking to him so he spoke to Mr Kelly, who was a friend to him and a companion to his brother. Mr Kelly gave him money regularly out of the kindness of his heart.

17 The applicant says that he went to see Ms Cox at the time he was about to depart the Onyx bar. He told her that he was about to leave and she asked him not to. He asked her why she had dated the letter as 22 January 2002 when she knew the agreement was made in August 2001. She replied that that was the only way she could get Davide to sign the letter.

18 Ms Masuri Bianchi, the wife of the applicant, gave evidence that from August to about December 2001 she was not living with her husband but spoke with him every day. He made an arrangement with his brother Davide to work at the Onyx bar and did so on a full-time basis from September 2001; for which he did not receive any payment. Her husband was concerned about the non-payment and she encouraged him to speak to his brother and get something in writing. She says that her husband designed various things at the Onyx bar, instructed labourers and oversaw everything that happened in the place. He was not paid for his work with Bianchi Corporation.

19 Mr David Hetherington, a cabinetmaker, gave evidence that he was contracted by the Onyx bar to do various jobs. His quotations were submitted to Davide and Romano and he was instructed by both of them. He was under the impression that they were partners. Both the brothers were on site and he co-ordinated work with them. He says, "Romano was giving us drawings. We were pricing, answering to Romano. My ...(indistinct)... were all going to Romano. And David was liaising with Romano on site" (Transcript p53). At different times either brother was on-site.

20 Mr Hassan Hodgkinson gave evidence that he installed a sound system for the Onyx bar and was employed by Davide to do this. He was paid in instalments and was instructed on-site by Romano and Davide. The authorisation for payment was made by Davide and paid by Ms Le Miller.

21 Ms Donna Cox gave evidence that she first met Davide in December 2000 when he was refurbishing the Savoia restaurant which is near her work. She met Romano in August 2001 through a third person at the Savoia. She says that in December 2001 the applicant advised her that he was assisting his brother in the refurbishment of the Onyx bar and that he was to be appointed as General Manager when it opened. He told her that his salary was to be $40,000 and he was to receive a "percentage in the interest". He asked her to draft a letter for him to confirm his position as General Manager when the bar opened. She drafted [Exhibit IRB1]. The applicant explained the terms to her and she checked these with Davide who agreed, but insisted that the percentage payment was tied to the applicant being General Manager so that he could not simply walk away with 15%. A salary of $40,000 was mentioned by both brothers.

22 Ms Cox showed the draft letter to the applicant and advised him that as she believed that Davide was extremely generous she might be able to get him to increase the salary to $60,000. She drafted two letters and on the applicant's request put them to Davide. She met with Davide on 22 January 2002, showed him the two letters. They discussed the salary and Davide signed the letter including $60,000 but wanted a job description from his brother. He was concerned that his brother's abilities in running the premises were untested. At that time the Onyx bar was due to open in February 2002.

23 Her evidence is that in drafting the letter, Romano's intent was to secure his salary and benefits as General Manager when the Onyx bar opened. Once the letter was signed she advised the applicant who she says was ecstatic. He asked if she had a copy of the letter and she told him to ask his brother. He rang her that day and told her that he had the original letter. In late April and early May 2002 she says that the applicant rang her to ask her to testify if necessary that the letter she prepared was dated September and she refused the request.

24 Under cross-examination Ms Cox says that she drafted the letter at the applicant's request and as a friend, not as a solicitor. They have since parted company. She has no connection to the respondent company other than as an investor and is not a friend of Davide. She knows that Davide has summonses against him for non-payment to contractors as she met him in the street one day, he had them in his hand and he mentioned that he was defending them on the basis of defective work.

25 Ms Cox says that the applicant did labouring and a few telephone calls whilst on-site at the Onyx bar; he was not the General Manager. She says that he did not work there from 7.30am to 6pm and she knows this because on a number of occasions she had early morning meetings with Davide, and Romano would not even be there at 8am. She says that the applicant was a contractor and Davide did most tasks.

26 Davide's evidence concerning his brother's engagement is—

> "There was no formal arrangement, either in written or verbal, and during the course of Romano's work of the refurbishment at Onyx I asked my brother to give me a hand, and - - to do with the refurbishment, and at the same time while that was happening I paid for his rent at the place where he was living, and 24 hour use of my car, and all his meals were paid, and cash payments." (Transcript p.81)

27 He says that the applicant came and went as he pleased. He was receiving Social Security payments at the time. The applicant was given weekly sums of $250 from the respondent from December 2001. During the refurbishment the applicant's duties were to keep the worksite clean and answer telephones. Davide would discuss ideas with his brother as to how the premises should look, but he (ie Davide) had the final say.

28 In December 2001 Davide advised the applicant that once the Onyx bar opened he would be made General Manager with a salary of $40,000, 15% of the profits and 15% of the goodwill if the business was sold, if he stayed as manager. He signed the letter on 22 January 2002 agreeing to pay the applicant $60,000 as General Manager. He says that on 22 April 2002 Jason Bennetts, the VIP Cleaning contractor gave him the keys to the premises after watching the applicant take $5,000 from the safe.

29 Davide says that the applicant was listed as a contractor in the respondent's files and only became an employee when he became General Manager on the opening of the restaurant [Exhibit DB1]. He says that he never discussed with his brother an issue to do with backpay during the refurbishment.

30 In respect of the contract between them Davide says—

> "I can only tell you what - - we had an informal arrangement. I asked my brother to come and give me a hand, and that he would be involved in the business. There were no discussions until - - it was put in writing and we discussed it in December that I would make Romano general manager and pay him a salary of 40, but then turned out to be 60, and I was giving him, you know - - you know, there was quite a lot - - 15 per cent" (transcript p.87)

31 Every Friday he says the applicant would collect $250 from Mr Kelly or himself. He says that basically the applicant kept the work-site clean. They spoke together about ideas for the bar, but Davide says that he was the person who made the decisions and had the financial control. Romano came and left as he wanted to. Davide says that his brother has "ripped me off plenty time" but that he helped him as he was his brother. He denies that the provision of food and a car to the applicant has anything to do with him being an employee. He says that the publicity references to them being partners or jointly initiating the project were to make his brother feel good.

32 Davide says that he asked Ms Cox to draft the letter of 22 January 2002, but that Romano wanted the letter. He instructed Ms Cox to attach to the 15% interest a condition that the applicant remain as General Manager.

33 He says that the applicant took $5,000 from the respondent's safe. He knows this because he counted the float; Ms Le Miller did not count the float.

34 Ms Le Miller gave evidence that she discussed the applicant's role with Davide and was advised that the applicant was just to help out with the refurbishments and was to receive about $250 per week, to be taken from the Savoia till. She recorded these payments. Davide had asked her to create this arrangement in the books for the applicant. She says the applicant was not an employee as he never filled out timesheets or a taxation declaration and was not on the payroll list. She says that she was advised by Davide that once the bar opened the applicant would receive $60,000 per annum. She never discussed backpay with either brother.

35 Ms Le Miller says that she reconciled the float of 22 April 2002 and the applicant's receipts. She says that $3,395.75 was taken from the safe. The final balance in the till was $2,346.60. She did not consider the applicant to be an employee when he left. She was told by Davide that the applicant had taken the money.

36 Mr Jason Bennetts' evidence is that he cleaned the Savoia restaurant and the Onyx bar under contract. On 22 April 2002 he was with the applicant in the Onyx bar. The applicant was upset and he went to the safe and grabbed some money and gave the keys to Mr Bennetts. Mr Bennetts did not see how much was taken.

37 He says that Davide was in charge of the Onyx bar and that the applicant did work for him which included cleaning and supervising contractors. The applicant complained to Mr Bennetts that he was not getting wages.

38 Counsel for the applicant submits in closing that Romano was, on his evidence, an employee from 20 September 2001. Added to the applicant's evidence is the evidence of the contractors, Mr Hetherington and Mr Hodgkinson, who saw Romano on-site and perceived him to be a manager or supervisor. Davide and Donna Cox, on the applicant's submission also say that Romano did work on site, albeit Davide restricts his brother's duties to yard cleaning. The cash payments [Exhibit MLM1] of $2,740 given to Romano between September 2001 and April 2002 are also suggestive of an employer/employee relationship. The applicant's evidence is that these were loans received from Davide's partner, Ryan Kelly, through the Savoia restaurant. They were not payments received from the Onyx bar. The press release suggests that the applicant made substantive contribution to the new venture and hence was more than a yard cleaner as described by Davide.

39 Further, on behalf of the applicant it is submitted that the original arrangement in September was informal. Romano asked his brother to pay him wages of $60,000 per annum and as he proved to be elusive then the applicant pressed Davide for it in writing. Additionally, the letter of 22 January 2002 refers to "services rendered" and "Discussions we have had" which are indicative of a past arrangement. The 15% profit sharing arrangement being peripheral to this application. The fact that the applicant left his employment about two weeks after the venture opened is indicative that he was not being paid and considered that it was unlikely that he was going to get paid; not that he was to be paid from the commencement of trading of the Onyx bar. The bookkeeper Ms Le Miller also gave evidence that the applicant was not employed on 10 April 2002, ie the opening date. This is contrary to Davide's evidence that he instructed her to put the applicant on the payroll at that time, as a general manager.

40 In terms of the control test, counsel for the applicant submits that Davide was at all times the financial controller and principal of the enterprise. He had full control over employees on his own evidence. There is no evidence that the applicant was a contractor who quoted and invoiced for jobs. This is simply said by the respondent to suggest that the applicant was not an employee. The fact that the applicant received Newstart allowance up until 12 September 2001 and then again from 11 January 2002 to 22 March 2002 is indicative that the applicant commenced employment with the respondent and then after receiving no payment had to access this allowance.

41 In relation to the monies which were taken by the applicant on his last day, counsel for the applicant says that these were for reimbursement of receipted expenses incurred by the applicant. The figure for drawings of $2,346.40 created by the bookkeeper was to accommodate a shortfall in funds. This cannot be seen as a wage, a loan or as theft on the part of the applicant.

42 Counsel for the respondent says that the applicant failed to discharge the onus upon him to prove that he was an employee for the period from September 2001 until the bar opened on 10 April 2002. There was confusion over the status of Romano during the refurbishment period, but the applicant had the capacity to make decisions independently of Davide, did not fill out a taxation declaration form or timesheets, and worked irregular hours. The respondent says that what existed was an informal arrangement that can best be categorised as that of independent contractor.

43 In the alternative, the respondent submits that if the Commission were to find that the applicant was an employee during the period of refurbishment then there was no agreement to backpay, on the evidence of Ms Cox, Ms Le Miller and Davide. Any payment was to commence when the bar opened. The applicant was compensated for the period when he was an employee by the money which he took from the safe. Hence there is no debt.

44 The credibility of witnesses is a central consideration in this matter. The only persons who are able to give evidence about the terms of the engagement at the time it commenced are Romano and Davide. Ms Donna Cox became involved in January 2002 in drafting a letter and presenting it to Davide to sign. Both parties rely on this letter as covering the terms of the employer-employee relationship. I have considerable doubts about the evidence of these three witnesses.

45 I do not have a difficulty with respect to the evidence of Mrs Masuri Bianchi, Mr Hetherington, Mr Hodgkinson, Ms Le Miller and Mr Bennetts. Mr Bennetts was cautious in giving his evidence but his evidence was undiminished in cross-examination and in my view may be relied upon. Mrs Bianchi's evidence only goes to support the view that the applicant sought his contract in writing and worked at the Onyx bar.

46 It is obvious to me from the hearing that I cannot rely on the evidence of Romano, Davide or Donna Cox. My impression of Romano's evidence is that it was inconsistent, vague, exaggerated and at times evasive. My impression of Donna Cox's evidence was that it was argumentative, inconsistent and completely preferential to Davide. I do not seek to infer as to why this may be so. My impression of Davide's evidence was that it was inconsistent, exaggerated and at times hesitant. His mostly emphatic demeanour and seeming clear understanding of the relationship and events became ponderous and cautious during difficult points in cross-examination.

47 It is important to go to some of the detail of the evidence in understanding the impressions I have formed from hearing. The date of the letter of contract is a key point. If there were any doubt about this being an issue the applicant was clearly put on notice by a series of letters prior to the hearing. The applicant attached to his application an undated letter. He says in evidence that the letter was drafted in January 2002. When asked direct questions in cross-examination as to why an undated letter was provided with the application Romano seemed to attribute it to his photocopying and in my view sought to avoid the issue. The relevant exchange is as follows—

> "All right. If I could just clarify one point. The application that you filed in these proceedings - - ?---Yes.
>
> - - which you did yourself, you attached the letter of the 22nd of January - - ?---Yes.
>
> - - to your application - - ?---Yes.
>
> - - but you didn't put the date - - the photocopy - - you didn't photocopy the date of the letter, as I understand it?---That's correct, sir.
>
> The - - ?---That's correct.
>
> The letter on the court file is undated?---That's correct.
>
> Well, why is that?---It was the wrong one. Yes, it was my fault. Yes.
>
> You photocopied the wrong letter?---No. I photocopied about six or seven copies.
>
> I see. And, what, you just - - there was a bad photocopy?---I'm sorry, if you mean that that's a problem, well I'll admit that I submitted the wrong one, yes.
>
> Isn't it the case that you asked Ms Cox several months ago if she would give evidence that the letter of the 22nd of January 2002 was, in fact, signed by David Bianchi in September 2001?---I'm sorry?" (transcript p.39)

48 The applicant during much of his evidence states in various ways that he often sought to discuss the payment of his wages with his brother and that Davide avoided the discussion, avoided meeting him or refused to discuss the issue. This occurred over a number of months and yet he admits in cross-examination that he was at that time living with his brother, having regular meals at his brother's restaurant, driving his brother's car and discussing and making decisions with his brother on the fit-out of the Onyx bar. It is difficult to accept that such regular contact and co-operation occurred, over several months and during a time when Romano, on his evidence, was desperate for money and yet his brother, Davide was simply avoiding him and refusing to honour his contractual obligations. In the face of all this Romano continued to work, on his evidence, because Davide was his brother and he sought to help him. Romano's evidence is that Davide was in financial difficulty and even though he, ie Romano, was desperate for money, in the final stages of refurbishment he contributed $3,600 of his own funds to pay the respondent's bills. This is against a backdrop where Romano had been burnt by his brother in a business arrangement on a previous occasion. It is difficult to reconcile all of this evidence and accept it as accurate.

49 Romano's evidence is that he was in fact suspicious of Davide from the beginning, due to previous business dealings with him, and yet only realised that he had been taken advantage of when, after the restaurant opened, he found his business cards in the rubbish bin. Romano says also that he had a job worth $60,000 and yet admits under cross-examination that he claimed social security benefits for part of that time. The applicant says he received reasonably regular payment as a loan from Ryan Kelly at the Savoia restaurant but this was only out of the kindness of his heart.

50 The applicant's evidence as to how he dealt carefully with the money and the receipts in the presence of Mr Bennetts and Ms Le Miller is inconsistent with their evidence and I would prefer their evidence to that of the applicant.

51 Ms Donna Cox says repeatedly and emphatically that she is not a friend of Davide Bianchi. Yet her evidence is very effusive about him, his qualities and character. In fact her evidence is completely preferential. She acts as an instructor for him in the claim his company defends in the Commission. Yet she was summonsed by the respondent to give evidence. She says that she knows Davide because she used to stop and talk to him at his restaurant. She has invested approximately $82,000 in his business and says that Davide is not rightly being pursued by creditors. These claims are being challenged due to incomplete work. How she knows this is because she met him in passing in St George's Terrace one day. This defence of Davide in my view is not believable. Her evidence in short is not convincing and must at the very least be treated with some caution. Her evidence regarding the applicant's work is different to that of Mr Hetherington and Mr Hodgkinson and I would prefer their evidence to that of Ms Cox.

52 Davide says that he was simply helping his brother out because Romano had no money. He says that Romano was just doing cleaning jobs and covering the telephone, and yet he made decisions with Romano about the fit-out of the restaurant and promoted his contribution in the media. His evidence on this issue is also different to that of Mr Hetherington and Mr Hodgkinson and I would prefer their evidence. Davide is emphatic that his brother took $5,000 from the safe at the Onyx bar and that he himself counted the monies; yet the respondent's case is that $3,395.75 was taken by Romano based on the reconciliation undertaken by Ms Le Miller. Her evidence is that she counted the money and her evidence in my view is much more reliable.

53 It is clear from the evidence of Mr Hetherington, Mr Hodgkinson and Mr Bennetts that both Davide and Romano together managed and made decisions about the refurbishment of the Onyx bar and assisted with its design. Davide says they discussed ideas for the design. Romano puts his creative involvement at a higher level, but [Exhibit R1] being the architect's plans for the bar, speaks against this evidence. It is clear that either Romano or Davide instructed and took quotes from contractors in orchestrating the refurbishment. Having regard also to the publicity about the new venture, Romano's role and work was more than Davide or Ms Cox attribute to him, ie answering telephones and keeping the site clean. It is difficult to ascertain the regular pattern of work from the evidence, but it can be inferred that Romano was on-site regularly and organising the project for the time in question. On Davide's own evidence, and that of Ms Le Miller and the applicant, Davide was the financial controller of the project.

54 It is not challenged that the applicant was not paid for the period in question other than the regular payments of $250. I accept Ms Le Miller's evidence about these payments and would also say that the applicant's evidence on this issue cannot be treated seriously. Mr Hetherington says that he saw the brothers as partners. Romano's own evidence suggests this in part. A press release dated February 2002 [Exhibit IRB2] describes the Onyx bar as "Davide Bianchi's newest project". It goes on to state, "Bianchi brothers, Davide and Romano, looked around Perth and decided they wanted to start a project together ….With that in mind they came up with "ONYX". Uniting Romano's long history in fashion and Davide's design and decorating talents …". The press release reads as if the venture was one of joint instigation and collaboration by the brothers.

55 Ms Le Miller says that she was never advised that Romano was an employee, except that Davide advised her that Romano would be General Manager of the bar when it opened. She refers to the arrangement which Davide established with Romano as "unique" and that the applicant was listed as a contractor. There is no evidence that Romano quoted and invoiced for jobs even though he was listed on the respondent's accounts as a contractor. The evidence is that the applicant received regular cash

payments of approximately $250 which totalled $2,740 [Exhibit MLM1]. The payments were taken from the till of the Savoia restaurant and I consider it implausible to suggest they were somehow loans and done out of the kindness of Ryan Kelly's heart. During part of this same period the applicant claimed an allowance from the Commonwealth as if he were not employed. Counsel for the applicant submits that the applicant had to access this allowance as he was employed but not getting paid. However, Romano was getting paid. He was getting regular amounts of $250. He had free accommodation for a period of time. He received free meals, as did his wife at the Savoia restaurant. Romano drove his brother's vehicle. Counsel for the respondent says that the applicant was a contractor. There is no evidence to support this proposition in my view, and I find that the applicant was not a contractor. I could understand if it were argued that the applicant had some form of business arrangement with the respondent, but this is not put by either party. I will deal with this more fully in dealing with [Exhibit IRB1]. There were several suggestions in the evidence, including by the applicant, that the brothers were partners.

56 In *Hotcopper Australia Ltd v David Saab* 81 WAIG 2704, the Hon President outlined the nature of a claim for denied contractual benefits under the Act. He states—

> "33. I observe that a claim made under s.29(1)(b)(ii) of the Act is not a claim for breach of contract of employment, in the common law sense, because the ability to make the claim, the nature of the claim and the remedies available are limited by and also stem from the wording of the sub-section. S.29(1)(b)(ii) prescribes and defines a particular statutory breach of contract within those limitations.
>
> 34. The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following:-
>
> (a) The claim must relate to an "industrial matter", as defined in s.7 of the Act.
>
> (b) The claim must be made by an "employee", as defined in s.7 of the Act.
>
> (c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.
>
> (d) The subject contract must be a contract of service.
>
> (e) The benefit must not arise under an award or order of the Commission.
>
> (f) The benefit must have been denied by the employer.
>
> (See also the discussion of the nature of s.29(1)(b)(ii) claims in *Ahern v AFTPI* 79 WAIG 1867 (FB).)"

57 It is common ground that [Exhibit IRB1] represents the contract and is a contract of service to engage the applicant as General Manager of the Onyx bar. It is the applicant's submission and evidence that the terms of this contract were made verbally in August/September 2001 and committed to writing through the pressure of Romano and Ms Cox on 22 January 2002. The respondent says that the contract when made was not to take effect until the bar opened on 10 April 2002. I do not have any other contract that I am dealing with on the application and submission of the applicant. On this simple issue I am not at all persuaded by the applicant as to the veracity of his case.

58 It is seemingly common ground that that contract would meet all the criteria outlined by the Hon. President save for the argument concerning the date of operation of the contract. I have found that the applicant was not a contractor for any of the period in question. This does not automatically mean that this contract operated for the whole of the time or that the applicant was an employee for the whole of the time. The applicant's case is that he was an employee for the whole of the time under this contract. It may be there existed an arrangement whereby the applicant would assist his brother to establish the bar and would receive some assistance in kind and the prospect of then managing the bar and having a beneficial interest in the bar. This is Davide's evidence. There is a suggestion in the evidence that they were somehow partners but neither party makes submission to that effect. However, the important issue is when did the contract commence, so that it can be determined when the benefit was denied, if at all.

59 The onus falls to the applicant to prove his case. He has not discharged that onus. The applicant has left me with no confidence that the contract, which he says operated at all times, was somehow not performed upon for many months, that he demanded and was very glad when it was translated into writing on 22 January 2002, but he still did not get paid and that he had to leave some three months later when he finally realised the contract would not be honoured. Whilst I also have difficulty with the evidence of the other two witnesses who can shed some light on the meaning of the contract, I am convinced that it is more plausible that the contract was to operate post project completion and on the opening of the bar.

60 It is hard to reconcile the applicant's evidence. He says he regularly paid monies in cash to labourers and on occasion received large cheques from investors. Yet he never received any money from the respondent himself. He knew the financial position and difficulty of his brother, lived with him, drove his car, and ate at his restaurant. Yet the applicant says he was suspicious of Davide, nervous that he was not getting paid, and still continued to work for a long period without pay. Against all of this background, when he was desperate for money, regularly avoided or turned away by his brother, under great stress and with a pregnant wife, he continued to work and pursue his brother for payment of his salary for 8 months. He did receive some regular monies by way of a loan from his brother's partner. He also received some Social Security payments at a time when he says he was employed. Then in a desperate state, he realised that his brother had shafted him when he saw his business cards in the bin and proceeded to take from the safe only the $3,600 which was owed to him by his brother for credit which the applicant had effectively given to his brother. The circumstances leading to and including this later event are said to have been witnessed by two persons, neither of which substantiate the applicant's version of events. Put bluntly it is simply hard to believe the applicant's evidence.

61 If I go to the contract, on a plain reading of the contract without, any other evidence, I would have assumed that the contract was to operate on signing, having culminated from recent discussions. Neither party submit that this is how the contract is to be read, so seemingly there is ambiguity in the contract. The contract is not a normal offer of engagement to a position or job in that it refers only to salary and to no other conditions of employment. It then refers to two other benefits being a 15% interest in the business on sale and 15% of the net operating profits to be paid quarterly. Both of these latter conditions could only operate prospectively. The respondent is adamant that he tied the 15% interest to the condition that the applicant remained in the General Manager position. This is not explicit other than perhaps the reference to "your position as General Manager of Onyx". The applicant is adamant that he chased his brother for months to be paid his salary, instructed Ms Cox to write the letter, checked the letter before it was presented to Davide, was happy when he received the signed original and yet there is no mention of backpay or an operative date for the contract. This is so even though these points were seemingly crucial and would have been very easy to express in writing. The contract does say that the respondent "<u>will</u> pay you a salary of $60,000 per annum" (my emphasis) and again suggestive of a prospective payment as with the other benefits. The applicant relies on the word "rendered" and the contract having been drafted to reflect the discussions between the two brothers. The contract refers to "in respect of the services rendered by you" as General Manger of Onyx. In other words services that were performed and that are to be performed. I consider that this interpretation places an incorrect weight on a literal interpretation of that word. Additionally, in the context of the contract as a whole and the evidence given it is more plausible to interpret the contract as

meaning that the applicant, for his efforts in establishing the bar and then managing it, was to receive certain considerations once the bar became operational and was generating funds.

62 There is an issue as to the salary payable for the period 10 to 22 April 2002 when the contract was in effect. The money taken by the applicant was, on Ms Le Miller's calculations, well in excess of what he was due for reimbursement based on the receipts. I accept this evidence. That amount, being the money taken less the reimbursement, was also, on my calculation, in excess of his net salary for the period in question. In accordance with my obligations under section 26 of the *Act* I would not award any amount for this period.

63 For the above reasons I would dismiss the application.

2003 WAIRC 07734

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IGNAZIO ROMANO BIANCHI, APPLICANT
	v.
	BIANCHI CORPORATION T/AS ONYXBAR, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 14 FEBRUARY 2003
FILE NO.	APPLICATION 937 OF 2002
CITATION NO.	2003 WAIRC 07734

Result	Application dismissed
Representation	
Applicant	Mr H Sklarz of Counsel
Respondent	Mr A Smetana of Counsel

Order

HAVING heard Mr H Sklarz of counsel on behalf of the applicant and Mr A Smetana of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S. WOOD,
Commissioner.

2003 WAIRC 07811

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBYN CLEMENTS, APPLICANT
	v.
	CALDERA NOMINEES PTY LTD ABN 96276831947 T/AS HARRINGTON BROKERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY 28 FEBRUARY 2003
FILE NO/S.	APPLICATION 1093 OF 2002
CITATION NO.	2003 WAIRC 07811

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement. Application for contractual benefits dismissed.
Representation	
Applicant	Mr T Lawrence (as agent)
Respondent	Mr G Sturman (as agent)

Reasons for Decision

1 This is an application by Robyn Clements ("the applicant") pursuant to S.29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that she was unfairly dismissed from her employment with Caldera Nominees Pty Ltd ABN 96 276 831 947 trading as Harrington Brokers ("the respondent") on 31 May 2002 and that she is due benefits under her contract of employment in relation to wage underpayments, annual leave and superannuation entitlements. The respondent denies that the applicant was unfairly terminated or that she is due any benefits under her contract of employment.

Applicant's Evidence

2 The applicant has worked as a sales person in the insurance industry for approximately 15 years and for the past 10 years the applicant has been selling classic car insurance. The applicant commenced employment with the respondent on 1 July 1998 selling classic car insurance. Exhibit A1 confirms the applicant's contractual arrangement with the respondent. She was paid a salary package of $40,000 per year plus superannuation and four weeks' annual leave based on working five days per week. A bonus of $5000 was to be paid in the first 12 months upon achieving certain targets. In May 2000 the applicant

requested that her working hours be reduced to four days per week (Exhibit A7). In October 2000 Mr Flamer, the respondent's Director, wrote to the applicant agreeing that the applicant could work four days per week on a reduced annual salary of $34,000 (Exhibit A8).

3 From 1998 until her termination the applicant worked continuously with the respondent and Mr Flamer, even though the respondent merged with other insurance brokers. At termination, the applicant was paid a wage of $653.90 per week, based on a working week of 30.4 hours.

4 The applicant gave evidence that on Wednesday 22 May 2002 she returned to work after taking three weeks annual leave. Mr Flamer approached the applicant late that afternoon and informed her that there was no longer work available for her to undertake, as the respondent was merging with another broker who was to undertake classic car insurance sales and her position had thus become redundant. Mr Flamer gave the applicant notice that she was to be terminated effective from Friday 31 May 2002. She requested that her termination be put in writing and Mr Flamer responded accordingly (Exhibit A4).

5 Subsequent to this discussion with Mr Flamer, Austnet Insurance Services ("Austnet"), the broker which was taking over the respondent's classic car insurance business, contacted the applicant and interviewed her for a position which involved similar duties to those she had been undertaking with the respondent. Austnet offered the applicant a salary between $30,000 and $31,000 to work a five day week. The applicant rejected this offer as she would be earning less than her current earnings and working longer hours. The applicant also rejected the position because a greater workload would have been expected of her in the new job than in her current position. The broker then re-offered the applicant the same position with a salary based on a percentage of commissions received from sales. The applicant stated that as the value of the second offer was effectively no different to the first, she refused this job offer.

6 The applicant stated that prior to 22 May 2002 she was unaware that the respondent was selling part of its business and that her job would no longer exist. The applicant gave evidence that even though she was given notice to finish on 31 May 2002 she was required to leave work on the Tuesday prior to 31 May 2002 because of the sensitive commercial nature of the business within which she worked.

7 Approximately five weeks after termination the applicant was paid outstanding annual leave entitlements. On 27 May 2002 the applicant requested that the respondent pay her at least three weeks' pay in lieu of notice, to which she believed she was entitled. The applicant stated that she did not receive all of the three weeks' pay in lieu of notice due to her until some time after proceedings were initiated in the Western Australian Industrial Relations Commission.

8 In relation to the applicant's claim for benefits under her contract of employment, the applicant is claiming an extra 20 minutes pay per day, at her ordinary rate of pay, for each day that she was employed by the respondent. The applicant stated that when she commenced employment with the respondent in 1998 she was advised by her Office Manager, Mr Roosendaal that the hours of work were 8.30am to 5.30pm with one hour off for lunch. Thus, the applicant worked 8 hours per day. After the applicant was terminated she reviewed her pay slips and found that each week that she worked for the respondent she was paid for working 7.6 hours per day instead of the 8 hours she worked each day. In addition to payment for the additional time she worked each day the applicant believes that she is entitled to increases in annual leave payments already received based on the extra hours that she worked, plus increases to superannuation contributions.

9 The applicant confirmed that apart from the entitlements set out in Exhibit A1, she did not have any other written contract of employment with the respondent.

10 Under cross examination the applicant conceded there was never any specific arrangement as to the number of hours that she was to work in any week. The applicant confirmed that the hours between 8.30am to 5.30pm constituted her standard working hours and that she worked alongside Mr Roosendaal who also worked those hours. The applicant confirmed that there was no agreement for her to be paid overtime after a particular number of hours were worked, however the applicant was paid for working her normal day off.

11 After termination the applicant sought jobs with other classic car insurance brokers. She applied for five jobs and was successful in obtaining employment selling classic car insurance in mid July 2002. The applicant is currently earning a similar salary to the amount she was earning with the respondent and her hours of work are 8.30am to 5.00pm.

Respondent's Evidence

12 Mr Flamer has worked for many years in the insurance industry. In July 1998 he sought to expand his business by taking on classic car insurance and on this basis the applicant was employed to work in this specific area. He confirmed that some time in the year 2000 the applicant asked to adjust her working hours to work four days per week. Mr Flamer agreed to this request and the applicant's salary was reduced accordingly.

13 Mr Flamer gave evidence that the applicant did not raise the issue of payment for extra hours worked at any stage throughout her employment with the respondent. He stated that the respondent's employees worked the hours that were necessary to get the work done and it was not unusual for some of the respondent's employees to commence work earlier than 8.30am or finish later that 5.30pm. Mr Flamer stated that there were no set hours that the applicant was required to work and that the applicant would normally be expected to work within the hours of 8.30am to 5.30pm. He gave evidence that the applicant never requested overtime payments for the additional hours that she worked. However, he confirmed that the applicant received payment for occasionally working on a Monday, which was normally the applicant's day off. He stated that the hourly rate stated on the applicant's pay slips ($21.51) was based on the applicant's annual salary and took into account an employee working 38 hours per week. The rate was generated by the computer software programme that he used. He understood that the applicant was happy with the rate of pay paid to her by the respondent.

14 In relation to the applicant's termination Mr Flamer stated that he advised the applicant on Thursday 23 May 2002 that she was to be terminated effective on 31 May 2002. He stated that he commenced discussions with Austnet in mid May 2002 with a view to merging part of his business with Austnet and the agreement was not agreed to and signed off until 23 May 2002. He informed the applicant about her termination as soon as the agreement with Austnet was finalised. He confirmed that he spoke to Austnet's Manager about the possibility of the applicant obtaining employment with them. Mr Flamer stated that the respondent still trades however, there is no longer any position available for the applicant as the respondent's operations had been restructured and there was no work available for an additional employee.

15 He stated that the applicant was required to leave the respondent's operations prior to 31 May 2002 because Austnet did not wish the applicant to remain at work because of confidentiality issues associated with the insurance industry. Mr Flamer stated that he was aware that employees are entitled to appropriate notice and he understood the applicant had received the required payment for notice. He conceded that there may have been some delay with the applicant being paid notice and annual leave entitlements because his bookkeeper was on leave at the time the applicant was terminated.

Submissions

16 The applicant stated that her termination was unfair because she was given insufficient notice. She was terminated two days after returning from annual leave, after four years of loyal service to the respondent and working additional hours when it suited the respondent. It was the applicant's view that the dismissal was harsh given the way in which it was effected. The applicant is not seeking reinstatement because she believes that trust between the parties has broken down. In relation to her application for denied contractual benefits the applicant is claiming payment of the additional 20 minutes that she worked each day for the duration of her employment, plus revised annual leave and superannuation entitlements based on the weekly pay that she should have received.

17 The respondent states that the applicant was not unfairly terminated. There was a proper reason to terminate the applicant's contract of employment due to a redundancy situation and the process of effecting the applicant's termination was not unfair. The respondent argued that it could only pay the applicant up to 31 May 2002 because there was no longer a position available for the applicant with the respondent after that date. In relation to the applicant's claim for contractual entitlements the respondent argued that as the applicant was receiving a set annual salary, she could not now claim payment for additional time worked each day. Further, there was never any agreement between the applicant and the respondent for the applicant to work a specific amount of hours each day. On this basis no monies are due to the applicant under her contract of employment.

Findings and Conclusions

Credibility

18 I carefully observed the applicant and Mr Flamer whilst they gave their evidence. I have no reason to doubt the evidence given by both witnesses. In my view they gave evidence to the best of their recollection.

19 I turn now to the relevant principles in relation to these matters and my findings and conclusions.

20 Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and the Operative Painters and Decorators Union of Australia, West Australian Branch, Union of Workers v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). If a decision is made to make an employee redundant based on the operational requirements of the company that can be a valid reason for the dismissal. In this case I am of the view that the applicant was terminated for a valid reason. It is clear from the evidence that as a result of the respondent merging part of its business with Austnet there was no longer a position available for the applicant within the respondent's organisation.

21 Having said that it is appropriate to consider any unfairness in relation to the process used in effecting a redundancy, as well as all of the circumstances surrounding the termination of the employment having regard to s.26 of the Act. The question to be determined by the Commission is whether the legal right of the respondent to dismiss the applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right *(Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

22 The provisions of Part 5 of the *Minimum Conditions of Employment Act 1993 (*"the MCE Act") are implied into the applicant's contract of employment. A failure to comply with the mandatory requirements under s.41 of the MCE Act is a factor to be taken into account in deciding whether a dismissal is unfair (*Gilmore v Cecil Bros.* (1996) 76 WAIG 4434, per the President at 4445. See also *WA Access Pty v Vaughan* (2000) 81 WAIG 373 at 378 and cases cited therein).

23 Section 41 of the MCE Act provides

> **"41. Employee to be informed**
>
> (1) Where an employer has decided to —
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are —
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires."

24 Section 43 of the MCE Act provides

> **"43. Paid leave for job interviews, entitlement to (sic)**
>
> (1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.
>
> (2) The 8 hours need not be consecutive.
>
> (3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.
>
> (4) Payment for leave under subsection (1) is to be made in accordance with section 18.
>
> *[Section 43 amended by No. 20 of 2002 s. 175.]"*

25 Section 41 provides that where an employer has decided to make an employee redundant the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made of the redundancy, and discussions are to be held with the employee about the likely effects of the redundancy and measures that may be taken to avoid or minimise its effect. In this case these requirements were not met. It is clear on the evidence that there was no discussion about the effect of the redundancy on the applicant and alternatives were not canvassed with the applicant once the decision was made by the respondent to make her redundant**.** Both Mr Flamer and the applicant gave evidence that when the applicant was informed she was to be terminated she was told that her termination was to be effective the next week. There

was no opportunity for the applicant to canvass alternatives and review other options. For this reason, in my view, I consider that to the extent the applicant was not consulted in relation to her dismissal, her termination was unfair. It is also clear on the evidence that s.43 of the MCE Act was not complied with, as the applicant was not given sufficient opportunity to avail herself of paid leave to attend for job interviews given that she was required to leave the respondent's premises so soon after being told she was terminated. Even though the applicant was interviewed by Austnet about the possibility of working with them, if the applicant was given more notice of her termination she could have arranged job interviews with other potential employers in the industry in which she worked. In my view the applicant's termination was effected in an unfair manner given that it was effected hastily with little, if any, opportunity to ensure that the requirements of s.41 and s.43 could be utilised by the applicant.

26 I also find that the applicant was not given adequate notice due to her on termination. There was no notice provision relating to the applicant being terminated in the applicant's contract of employment. In my view the actual notice given to the applicant was too short and unreasonable and did not give the applicant a proper opportunity to adjust to a change in her circumstances. The applicant was required to leave the respondent's premises less than one week after she was given notice of her termination, instead of being given the minimum of three weeks' notice to which she was entitled. Even though the balance of three weeks' pay in lieu of notice was paid to the applicant some time after the applicant was terminated this was not a lawful payment as there was no provision in the applicant's contract of employment for a payment to be made in lieu of notice (*Sanders v Snell* [1998] HCA 64 at [16]).

27 In all of the circumstances it is my view that the applicant has been terminated unfairly.

28 The applicant does not claim reinstatement and in my view, given the particulars of this case reinstatement is impracticable.

Compensation

29 As the respondent failed to comply with Part 5 of the MCE Act, the applicant was deprived of the opportunity to discuss alternatives with the respondent. This could have included whether she could have continued in employment in another capacity with the respondent. The applicant has also been deprived of the ability to avail herself of the statutory rights under s.41 and s.43 of the MCE Act given the manner of her dismissal. The applicant was also given inadequate notice of termination for the reasons already outlined. In all of the circumstances I consider that the applicant's loss in this case is represented by a period to compensate for the lack of adequate notice and to enable the matters in Part 5 of the MCE Act to be attended to, which I find to be in this case a period of three weeks. Based on the applicant's weekly earnings of $653.90 per week it is appropriate that a sum of $1961.70 be paid to the applicant. This amount is to be paid in addition to the three weeks' pay already given to the applicant in lieu of notice.

Was the applicant denied benefits under her contract of employment?

30 In an application for contractual benefits under s.29(1)(b)(ii) of the Act, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under her contract of employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).

31 The onus is on the applicant to prove that it was a condition of her employment that she was required to work 8 hours per day. The applicant gave evidence that she was advised by the Office Manager, Mr Roosendaal that the normal hours she was to work was from 8.30am to 5.30pm with one hour off for lunch. However, Mr Roosendaal was not called to give evidence in these proceedings to verify this arrangement and there was no other evidence given in relation to this arrangement, apart from the applicant's assertions that there was a requirement for her to work 8 hours per day. Even though there is a reference in Exhibit A7 to the applicant's working hours being between 8.30am and 5.30pm there is no specific reference to the applicant having to work 40 hours per week. Further, if the applicant's working week was based on 40 hours per week her hourly rate of pay would have been less, given that she was paid a set annual salary as agreed between the applicant and Mr Flamer as confirmed in Exhibit A8.

32 In the circumstances I am prepared to accept the evidence given by the respondent in relation to this issue. On the evidence given in these proceedings I have formed the view that there was no specific arrangement or agreement for the applicant to work 8 hours per day. The applicant was provided with payslips for each week worked over the four year period that she worked with the respondent, clearly identifying that her salary was based on her working 7.6 hours per day. I accept Mr Flamer's evidence that the respondent did not require employees to work set hours, and that some employees commenced work prior to 8.30am and left after 5.30pm. I also accept that the applicant was on a salary, as agreed between the applicant and Mr Flamer and that the applicant's weekly rate of pay was struck on the basis of this annual salary, based on the applicant working a 38 hour week.

33 Even though the applicant worked 8 hours per day she could not demonstrate that she was required by the respondent to work these hours. It should have been clear to the applicant from her payslips that she was paid a set weekly rate of pay. Further, no complaints were made by the applicant to Mr Flamer throughout her four years of employment in relation to this matter, even though the number of hours paid to the applicant was clearly stated in each pay slip.

34 In the circumstances it is my view that the applicant has not made out the claim that she is due payment for an additional 20 minutes per day for each day worked. It follows that no payment is due for annual leave and superannuation entitlements.

35 A Minute of Proposed Order will now issue.

2003 WAIRC 07885

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBYN CLEMENTS, APPLICANT
	v.
	CALDERA NOMINEES PTY LTD ABN 96276831947 T/AS HARRINGTON BROKERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 7 MARCH 2003
FILE NO/S.	APPLICATION 1093 OF 2002
CITATION NO.	2003 WAIRC 07885

Result Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement. Application for contractual benefits dismissed.

Order

HAVING HEARD Mr T Lawrence (as agent) on behalf of the applicant and Mr G Sturman (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby—

1 DECLARES THAT the dismissal of Robyn Clements by the respondent was unfair and that reinstatement is impracticable;

2 ORDERS the respondent to pay Robyn Clements compensation in the sum of $1961.70 gross within 7 days of the date of this order.

3 ORDERS that the application for contractual benefits be and is hereby dismissed.

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

2003 WAIRC 07724

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN JOSEPH EVANS, APPLICANT
	v.
	THIESS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 14 FEBRUARY 2003
FILE NO/S.	APPLICATION 707 OF 2002
CITATION NO.	2003 WAIRC 07724

Result	Application alleging unfair dismissal upheld and an order issued for compensation in lieu of reinstatement
Representation	
Applicant	Mr A Gill (of counsel)
Respondent	Mr D Jones (as agent)

Reasons for Decision

1 This is an application by Alan Joseph Evans ("the applicant") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that he was unfairly dismissed from his position as a Supervisor by Thiess Pty Ltd ("the respondent") on 27 March 2002. The respondent denies that the applicant was unfairly terminated. The respondent argues that the applicant was made redundant on 27 March 2002.

2 The applicant gave evidence. He is 53 years of age and has worked in the civil and building construction industries for many years. Prior to commencing work with the respondent, the applicant worked on the HBI Project at Nelson Point for two years.

3 On or about the 20 April 1998 the applicant was employed by the respondent to supervise concrete construction on the Worsley Expansion Project. After approximately 18 months the respondent asked the applicant to work as a supervisor on the Rugby Lime Project in Jamaica. He worked in this position for approximately six months. Later the applicant supervised the southern extension of the respondent's Kwinana Freeway Extension Project.

4 In August 2001 the applicant was approached by one of the respondent's senior managers, Mr Brian Pulham and asked if he would accept a job as the Health, Safety and Environmental Advisor ("the H and S Advisor") on the respondent's North West Shelf Phase IV Project ("the NWS Project") in Karratha. The applicant was concerned about undertaking this position because the only health and safety training he had undertaken had been a four day health and safety course which he undertook when he was working at the Worsley Expansion Project and it was not within the applicant's normal expertise to undertake this role. However, he stated to Mr Pulham that he would give the job a go. The applicant took up the H and S Advisor role on or about 1 September 2001. His duties included maintaining personal protective equipment, developing processes for working safely, dealing with hazardous chemicals and undertaking safety audits. He also attended regular meetings arranged by the NWS Project's head contractor, Kellogg Joint Venture ("KJV"). The terms of the applicant's contract of employment were outlined in documents contained in Exhibit R2. At the time the applicant was terminated he was on a remuneration package in excess of $80,000 per annum.

5 The applicant maintained there was only one complaint about his work on this site. This related to an altercation with the KJV safety department in relation to a big concrete pour and what was to be written into the job safety analysis. The applicant understood that this altercation was reported to his supervisor. The applicant continued as the respondent's H and S Advisor until mid December 2001 when he undertook extended Rest and Recreation leave ("R and R"). When he returned to Karratha from R and R on 2 January 2002 he met with Mr Pulham. Mr Pulham told the applicant that he was being transferred to a different role.

6 In the new position the applicant supervised the installation of pre-cast units, which involved installing panels to protect cables and lines. This particular phase of the NWS Project was critical as the job could not progress without these pre-cast concrete units in place. The applicant maintains there were no complaints about his performance or behaviour when he undertook this role and he stated that there was a sixty percent increase in productivity when he was in charge of this work. He initially worked 12 hour shifts six days per week, and later worked 12 hour shifts over seven days per week. He undertook this role for approximately seven weeks and then went on R and R. When he returned to site from R and R he was transferred to another position supervising paving. Again, the applicant claims that there were no complaints made whilst he undertook this role and no warnings were given to him about his performance. The applicant gave evidence that it was his view that productivity in this area increased whilst he was in charge.

7 In early March 2002 the applicant received a reward from KJV recognising his outstanding performance on the NWS Project.

8 After finishing work for the day on 27 March 2002 the applicant was called into a meeting with Mr Pulham. He was informed by Mr Pulham that work on the site was running out, and as there was only a couple of months of work left to be completed the applicant was to be made redundant. The applicant asked when his redundancy was to be effective and Mr Pulham informed him that it was effective immediately. The applicant maintains that the respondent had ongoing work on the site for approximately two to three months in the area that the applicant was supervising and that he could have remained as the supervisor of this work for those months. The applicant stated that he was unaware that he was to be made redundant prior to this meeting on 27 March 2002 and that at this meeting he was not given any opportunity to canvass the possibility of alternative work with the respondent. The applicant gave evidence that on previous occasions when work on a site was winding down, the respondent allowed the applicant to take annual leave whilst waiting for another job to eventuate.

9 The respondent has not offered the applicant any further work since he was terminated on 27 March 2002.

10 Since termination the applicant was unable to obtain work until recently. Six weeks prior to the hearing he was appointed as a supervisor of civil works with Barclay Mowlem Construction Limited on a salary of $120,000 per annum.

11 Under cross examination, it was put to the applicant that it was not unusual in the building and civil construction industries to be made redundant towards the finish of a job. The applicant replied that this would be the case if an employee was on wages however, as he was a manager he was normally treated differently and arrangements would be put in place for senior employees like the applicant to remain employed until suitable alternative work became available.

12 The applicant agreed that he had a general understanding of health and safety requirements prior to commencing employment as the H and S Advisor on the NWS Project.

13 It was put to the applicant that at the meeting with Mr Pulham on 2 January 2002 Mr Pulham stated that KJV and the respondent were not happy with the applicant's performance and that it was on that basis that the applicant agreed to be shifted to an alternative position. The applicant stated that even though he agreed to a transfer at this time he believed he was adequately fulfilling the requirements of the H and S Advisor role.

14 The applicant was asked whether he was told why he was transferred to a third position on the site. The applicant replied that no reason was given. It was put to the applicant that Mr Ruloff, the applicant's site Manager, had discussed performance issues with the applicant. The applicant said he may have but he couldn't recall a discussion of this nature. The applicant was asked if he could recall receiving a warning from Mr Ruloff whilst he was supervising paving. The applicant stated that he recalled one discussion with Mr Ruloff around this time but that was in relation to the applicant's annual review.

15 The applicant confirmed that it was his understanding that there were about seven supervisors on site in February 2002 prior to his termination.

16 The applicant confirmed that at the meeting with Mr Pulham on 27 March 2002 Mr Pulham stated that work was winding down. The applicant responded that as most of the work on the site would be completed within a matter of weeks the respondent would need to review the future of its employees. Mr Pulham then stated that the applicant's position was redundant. The applicant also stated that he was unaware if the respondent had any other work in progress at this time in Western Australia.

17 The applicant stated that when he was terminated it was just before the applicant was due to go on R and R and that in his final pay he received payment for the R and R, accrued annual leave, and one month's pay in lieu of notice. This was confirmed in a memorandum to the applicant by the respondent (Exhibit R1).

18 The applicant reiterated that at the meeting of 27 March 2002 with Mr Pulham no reason was given by Mr Pulham for the applicant being chosen for redundancy. The applicant stated that he assumed the respondent would look after him if work was no longer available on a particular site. The applicant agreed that when he was terminated there was a surplus of supervisors on the site. However, it was the applicant's view that seniority should have played a part in who should have been made redundant.

19 The applicant maintains that the termination has had a major impact on him. He has had to reassess his investment options and his self esteem has been affected.

20 Mr Pulham gave evidence for the respondent. He has been employed by the respondent for approximately 16 years and is currently the respondent's Civil Construction Manager. He was the Project Manager of the NWS Project when the applicant was employed on the site. Mr Pulham stated that the applicant was transferred from the H and S Advisor position because KJV was not happy with the way in which the applicant was undertaking his duties. Mr Pulham consulted other staff in relation to the applicant's performance and then met with the applicant and discussed criticisms that had been raised concerning the applicant. The applicant did not agree with the criticisms however Mr Pulham confirmed that he had made a decision prior to the meeting to transfer the applicant to a supervisory position looking after the installation of pre-cast units. One of the documents contained in Exhibit R2, a diary note, confirms Mr Pulham's account of this meeting.

21 Whilst the applicant worked supervising the installation of pre-cast units it was Mr Pulham's understanding that the applicant was not meeting the required targets, thus another supervisor was employed to assist the applicant. Mr Pulham confirmed that the applicant was later transferred to supervise paving work.

22 Mr Pulham maintained that there were several reasons why the applicant was terminated. Work on the NWS Project was declining and there were too many supervisors. There was no other civil work of significance that the respondent was undertaking in Western Australia at the time therefore there was no possibility of transferring the applicant to another site. Further, it was Mr Pulham's view that the applicant had a lower output than the other supervisors on the NWS Project and there were concerns about the applicant's performance. Mr Pulham stated that it is inevitable that when work winds down on a site that employees move on. Given that the respondent was finishing up on that site by the end of June 2002 the respondent decided to make the applicant redundant on 27 March 2002. It was decided that his was an appropriate date as the applicant was due to take R and R, thus the applicant could use this time to seek out alternative work.

23 Mr Pulham confirmed that in March 2002 the respondent had about seven supervisors on the site. He also confirmed that Mr Bilcich, who was on a short term employment contract with the respondent, and the applicant both left the site around the same time.

24 Mr Pulham confirmed that at the meeting with the applicant on 27 March 2002 he explained to the applicant that work was declining on the site thus the applicant was to be made redundant effective immediately. He went over the entitlements due to the applicant and informed him that he did not have to work out his notice. The applicant then left the meeting. Mr Pulham was not aware if the respondent had any other positions which the applicant could undertake on the respondent's other sites.

25 Under cross examination Mr Pulham confirmed the decision to transfer the applicant from the H and S Advisor position to other duties in January 2002 was made based on KJV's ultimatum that it was inappropriate for the applicant to continue undertaking his current role. He agreed that the decision to transfer the applicant was made without consulting the applicant.

26 Mr Pulham confirmed that the paving work that the applicant was supervising when he was terminated was completed on the site in June 2002. Mr Pulham stated that he did not give any warnings to the applicant whilst he undertook supervisory work in both the pre-cast and paving areas as other people were in charge of the applicant. Mr Pulham confirmed that the respondent had bridge maintenance work available when the applicant was made redundant however, this work was not suitable to be undertaken by the applicant. He confirmed that the respondent had work available in other States at the time but he did not investigate this as a possible option for the applicant.

27 Mr Pulham confirmed that there were no discussions held with the applicant prior to 27 March 2002 about his impending redundancy as he saw no value in telling the applicant that his job was in jeopardy. It was his view that it was appropriate to leave the notification of the applicant's termination until the last minute in case another position became available. Mr Pulham confirmed that it was not the respondent's position to adopt a last on first off policy when effecting redundancies.

28 In re-examination Mr Pulham confirmed that he was not aware of any vacancy interstate that would be appropriate for the applicant but in any event he had reservations recommending the applicant for such a position because of the performance issues which arose relating to the applicant.

29 Mr Ruloff gave evidence for the respondent. He has been employed by the respondent for ten years and is currently the Project Manager at the Nowergup construction site north of Wanneroo. At the time of the hearing this job was in the design phase and construction work had not commenced. Mr Ruloff worked on the NWS Project from September 2001 to late June 2002 when the NWS Project finished. As site Construction Manager Mr Ruloff was in charge of all of the site supervisors.

30 Mr Ruloff stated that he had concerns about the applicant's performance when he worked on the NWS Project. In February 2002 Mr Ruloff maintained that when the applicant was supervising paving he was not performing well enough. The applicant was not staying back to undertake overtime and this load was falling on to other supervisors. He conceded that he spoke about this issue with the applicant and as a result this was no longer an issue of concern. It was Mr Ruloff's view that when the applicant supervised the pre-cast work the applicant did not perform well enough in this job. It was because of this that the applicant was transferred to supervise paving. Mr Ruloff confirmed that in March 2002 the respondent had too many supervisors on the site given the work remaining to be completed. Mr Ruloff agreed that Mr Pulham consulted him about the excess of supervisors on the site and Mr Ruloff recommended that the applicant be made redundant on the basis that his performance was not as good as the other supervisors. Mr Ruloff was not aware if the respondent had any work on other sites that the applicant could have been transferred to in March 2002.

31 Under cross examination Mr Ruloff conceded that apart from the overtime issue there was no other performance issues involving the applicant whilst he was employed by the respondent on the NWS Project.

Submissions

32 The applicant maintained that his termination was both procedurally and substantively unfair. The applicant maintained that his termination was not a genuine redundancy as there was ongoing work on the site until June 2002 in the area that he was supervising. Further, the applicant had a reasonable expectation of ongoing work once work finished on the NWS Project given the respondent's operations both interstate and internationally and given his position as a senior manager. The applicant had demonstrated that he was prepared to accept work outside of Western Australia and he was not given an opportunity to canvass options of this nature when he was made redundant with no notice in March 2002.

33 The applicant was given no warnings about his impending redundancy. The meeting that he had with Mr Pulham on 27 March 2002 was perfunctory and there was no discussion about alternatives to redundancy. There was no opportunity for the applicant to discuss the respondent's view that the applicant's performance was not up to the standard of other supervisors as this issue was not raised with the applicant at the meeting. Further, the Minimum Conditions of Employment Act 1993 ("the MCE Act)") requirements in relation to redundancy were not adhered to. The applicant maintained that as he was out of work for a substantial period of time subsequent to his termination and as he had suffered injury as a result of the termination, then compensation should be awarded to the applicant.

34 The respondent submits that when the applicant was terminated on 27 March 2002 he was terminated on the basis of a genuine redundancy therefore there was no unfair termination. It was argued that it was appropriate to choose the applicant to be made redundant because he was not acceptable to KJV when he undertook the H and S Advisor job on site. Even though this position was not one that the applicant normally undertook, it was within his capabilities.

35 Even though the applicant received an award whilst he undertook his duties on site the respondent maintained that this award was based on the applicant's role as the H and S Advisor.

36 The evidence demonstrates that when the applicant was in charge of the pre-cast concrete area productivity in this section was not up to the required standards thus, another manager, Mr Bilcich had to be employed.

37 The respondent maintains that it was appropriate to terminate the applicant because there were too many supervisors and work on the site was coming to an end. The respondent had no other work available in Western Australia for the applicant. In choosing the applicant the respondent took into account his performance. Even though the respondent had some work on in New South Wales, Mr Pulham would not recommend the applicant for this work given the performance concerns about the applicant. Further, the applicant had not demonstrated that another supervisor should have been chosen for redundancy instead of him.

38 The respondent maintains there was no procedural unfairness. Mr Pulham terminated the applicant prior to the applicant commencing R and R which gave him sufficient paid time to seek out alternative employment. Even though alternative jobs were not canvassed at the meeting of 27 March 2002 the respondent maintains that it acted appropriately in all of the circumstances.

39 The respondent argued that the applicant's loss is limited given that it was inevitable at some stage that the applicant's employment would be terminated due to the fact that work was running out on the site. Further, the respondent argues that the requirements of the MCE Act have been complied with. Even if the requirements were not strictly adhered to they would have been satisfied in the notice period that the applicant was paid for on termination. In relation to injury the respondent maintains that the applicant has not made out a case to sustain compensation for injury over and above the normal impact of a termination.

Findings and Conclusions

Credibility

40 The evidence given in these proceedings was not in issue. In my view, each witness gave their evidence to the best of their recollection and honestly. On this basis I accept the evidence given by all of the witnesses. Although there was a dispute about the applicant's performance whilst working at the site, in my view these differences are not critical to this application as the applicant was terminated due to a redundancy situation not due to poor performance. Further, it was conceded by the respondent during the proceedings that no warnings were given to the applicant about his performance or behaviour whilst he was employed on the NWS Project.

41 I turn now to the principles in relation to these matters and my findings and conclusions.

42 Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and Or v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). If a decision is made to make an employee redundant based on the operational requirements of the company that can be a valid reason for the dismissal. In this case I am of the view that the applicant was terminated for a valid reason. It was not contested that work on the site was winding down and that in March 2002 there were too many supervisors on the site.

43 Even though it may have been appropriate to make an employee redundant it is appropriate to consider any unfairness in relation to the process used in effecting a redundancy, as well as all of the circumstances surrounding the termination of the employment having regard to s.26 of the Act. The question to be determined by the Commission is whether the legal right of the respondent to dismiss the applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right *(Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

44 The provisions of Part 5 of the MCE Act are implied into the applicant's contract of employment. A failure to comply with the mandatory requirements of the MCE Act is a factor to be taken into account in deciding whether a dismissal is unfair (*Gilmore v Cecil Bros.* (1996) 76 WAIG 4434 at 4445. Se also *WA Access Pty v Vaughan* (2000) 81 WAIG 373 at 378 and cases cited therein).

45 Section 41 of the MCE Act provides

> **"41. Employee to be informed**
>
> (1) Where an employer has decided to —
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are —
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires."

46 Section 43 of the MCE Act provides

> **"43. Paid leave for job interviews, entitlement to (sic)**
>
> (1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.
>
> (2) The 8 hours need not be consecutive.
>
> (3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.
>
> (4) Payment for leave under subsection (1) is to be made in accordance with section 18.
>
> *[Section 43 amended by No. 20 of 2002 s. 175.]"*

47 Section 41 provides that where an employer has decided to make an employee redundant the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made of the redundancy and discussions are to be held with the employee about the likely effects of the redundancy and measures that may be taken to avoid or minimise its effect. In this case these requirements were not met. It is clear on the evidence that when the applicant was told about his termination there was no discussion about the effect of the redundancy and alternatives were not canvassed with the applicant once the decision was made to make him redundant**.** For this reason, in my view, I consider that to the extent that the required discussions were not held with the applicant as required by the MCE Act, his dismissal was unfair. It is also clear on the evidence that s.43 of the MCE Act was not complied with as the applicant was deprived of any ability to avail himself of paid leave to attend for job interviews. Even though the respondent argued that this entitlement would have been covered by the applicant being paid for R and R, in my view this payment does not extinguish the applicant's entitlement to this paid leave which should have been made available to the applicant prior to termination.

48 An employee who has been made redundant must show that his or her selection was unfair in comparison to other workers (see *Amalgamated Metal Workers and Shipwrights Union of Western Australia and Or v Australian Shipbuilding Industries (WA) Pty Ltd* (op cit)). The applicant argued that another supervisor should have been selected for redundancy instead of the applicant, given the applicant's length of service. However, no evidence was presented by the applicant in support of his contention that another supervisor should have been made redundant instead of him. No evidence was given about the length of service of the other supervisors, nor was any evidence given as to why an alternative supervisor should have been chosen in preference to the applicant. Clearly the applicant has failed to establish that another supervisor should have been made redundant instead of him.

49 In my view the applicant's termination was effected in an unfair manner. The applicant's termination was sudden and unexpected. He was employed in an area on the site that was operational until the respondent finished work at the site, thus the applicant had no idea that he was to be made redundant. Further, the applicant gave evidence that he had been kept on by the respondent when his current job finished when working on other jobs. Arrangements were made to allow the applicant to remain employed continuously since 1998 notwithstanding a number of projects being completed. The applicant had demonstrated that he was prepared to be flexible in the jobs which he undertook, an example of this being the applicant working for the respondent in Jamaica. In my view the applicant should have been consulted about work winding down on the site. As the applicant had been employed by the respondent in a senior position for nearly four years, had been flexible about the duties and roles he undertook, and as he was prepared to travel as part of his employment with the respondent, he should have been given the opportunity to canvass alternative work within the respondent's operations, both interstate and overseas prior to being terminated. It is my view that given the applicant's senior position, his age and given that he had been kept on in the past by the respondent in between jobs the applicant should have received greater notice of his impending termination to seek out alternative work and to canvass internal options.

50 I also note that when the applicant was paid four weeks' pay in lieu of notice, this was done unlawfully. Under the applicant's contract of employment as detailed in Exhibit R2 there is no provision to make a payment in lieu of notice on termination. *Sanders v Snell* [1998] HCA 64 at [16]; 1998 196 CLR 329 at 337 Gleeson CJ, Gaudron, Kirby and Hayne JJ held that where there is no condition in a contract of employment for payment in lieu of notice on termination, the employer is in breach of the contract if the employer does not give the employee requisite notice of termination.

51 In all of the circumstances, taking into account the breaches of process outlined in the MCEA and given the summary way in which the applicant was terminated it is my view that the applicant has been dealt with unfairly.

52 The applicant does not claim reinstatement and in my view, given the particulars of this case reinstatement is impracticable. Further, I do not propose to order reinstatement as the applicant has not demonstrated that another employee should have been made redundant instead of him.

Compensation

53 In this instance, there is no basis to conclude that the applicant has suffered the loss of a reasonable severance payment, as there is no provision for any payment on redundancy to be paid to the applicant under his contract of employment (Exhibit R2). *Dellys v Elderslie Finance Corporation Ltd* [2002] 82 WAIG 1193 is authority for the proposition that a redundancy payment cannot be implied into a contract of employment where there is no express provision in the contract.

54 The applicant is seeking compensation for injury. On the evidence given in these proceedings I am not persuaded that the impact of the applicant's termination was any greater than that normally associated with a termination. Thus, it is my view that there is no basis for awarding the applicant compensation for injury.

55 I am of the view that as the applicant was terminated in an unfair manner he should be compensated by an amount equivalent to six weeks' pay. I believe payment of this amount is just as six weeks would have been an appropriate period for the applicant to avail himself of the provisions of the MCE Act and to allow the applicant to adequately canvass alternative employment options both with the respondent's operations and externally. This timeframe is in addition to the four weeks' notice to which the applicant is entitled under his contract of employment, which has already been paid to the applicant.

56 The applicant was paid $7,239.58 for four weeks' notice as outlined in Exhibit R1. Given this I determine the applicant is due $10,859.37 (six weeks' pay) as compensation for his unfair termination.

57 A Minute of Proposed Order will now issue.

2003 WAIRC 07786

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN JOSEPH EVANS, APPLICANT
	v.
	THIESS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	APPLICATION 707 OF 2002
CITATION NO.	2003 WAIRC 07786

Result	Application alleging unfair dismissal upheld and an order issued for compensation in lieu of reinstatement
Representation	
Applicant	Mr A Gill (of counsel)
Respondent	Mr D Jones (as agent)

Order

HAVING HEARD Mr A Gill (of counsel) on behalf of the applicant and Mr D Jones (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby—

1 DECLARES THAT the dismissal of Alan Joseph Evans by the respondent was unfair and that reinstatement is impracticable;

3 ORDERS the respondent to pay Alan Joseph Evans compensation in the sum of $10,859.37 within 14 days of the date of this Order.

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

2003 WAIRC 07759

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENDA FRANCES JOY GREAVES, APPLICANT *v.* THE SISTERS OF MERCY PERTH (AMALGAMATED) INC TRADING AS SANTA MARIA COLLEGE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 20 FEBRUARY 2003
FILE NO.	APPLICATION 691 OF 2002
CITATION NO.	2003 WAIRC 07759

Result	Application alleging unfair dismissal dismissed for want of jurisdiction and application for contractual benefits dismissed
Representation	
Applicant	Mr D Greaves (as agent)
Respondent	Ms K Wroughton (of counsel)

Reasons for Decision

1 This is an application by Glenda Frances Joy Greaves ("the applicant") pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant claims she was unfairly dismissed from her employment with the Sisters of Mercy Perth (Amalgamated) Inc trading as Santa Maria College ("the respondent") when she tendered her resignation on 25 March 2002. The applicant is also claiming that she was given insufficient notice of her termination and was paid insufficient annual leave entitlements. The respondent claims that there was no unfair dismissal as the applicant resigned of her own volition effective 25 March 2002 and that as the applicant resigned there is no entitlement to payment for notice or annual leave entitlements.

The Applicant's Evidence

2 The applicant is 73 years of age and was employed by the respondent as a housemother at Santa Maria College ("the College") on 29 January 1992. From 1992 until the end of 2001 the applicant was the housemother of Catherine House which catered for senior students. It was common ground that the applicant's contract of employment was regulated by the Roman Catholic Archbishop of Perth Inc Non Teaching Staff Enterprise Bargaining Agreement 1999 No. AG 46 of 1998 which is to be read in conjunction with the Independent Schools (Boarding House) Supervisory Staff Award No. A 9 of 1990 ("the Award").

3 The applicant maintained that a number of incidents occurred in 2001 and early 2002 which led her to tender her resignation effective from 25 March 2002. The applicant gave evidence about an incident in July 2001 when one of the students in Catherine House suffered a head injury. The applicant maintained that she exercised all due care in looking after the student. She contacted the nurse twice after the student suffered the head injury and checked her every hour during the night. The Head of Boarding, Ms Bahen made a complaint about the applicant in relation to this matter. The Principal of the College, Ms Anne Pitos, discussed the matter with the applicant on 31 July 2001 and the applicant put her position about the issue in writing to Ms Pitos (Exhibit A1).

4 In November 2001 the applicant attended a meeting called by Ms Bahen. Seven housemothers attended the meeting and the applicant was given notice that she was to be transferred to one of the junior boarding houses. Ms Bahen drew up a roster confirming that the applicant was to be transferred to Sylvester House (Exhibit A3). There was no discussion with the applicant prior to this move being made. The applicant was taken aback by this proposal as she had never worked in a junior house before nor was she warned that any changes of this nature would be occurring.

5 Subsequent to this meeting in November 2001 the applicant raised her concerns with Ms Pitos at a meeting the following Tuesday. The applicant requested that the decision to transfer her to a junior house be overturned. The applicant stated to Ms Pitos that it was her intention to leave her current employment at the end of 2002 and she wanted to remain a housemother in a senior house for her last year. The applicant maintained that Ms Pitos refused to intercede to overturn the decision to allocate her to a junior house.

6 The applicant maintained that working in a junior house was substantially different to working in a senior house. In the senior house where students ranged in ages from 15 to 18 years old, the applicant was allowed to have visitors when she worked weekend shifts. The applicant also had some flexibility to leave the premises if prearranged with another housemother. The applicant viewed her flat in Catherine House as her own home and she even planted her own garden at the flat. On the other hand, in the junior house the students were younger and required different care and attention and different duties had to be undertaken. For example when working in a junior house, housemothers had to lock the swimming pool and buses, unlike housemothers in senior houses. There was no capacity to leave the house when working a 48 hour weekend shift, nor were visitors allowed.

7 In mid December 2001 the applicant was summonsed to attend a meeting with Ms Pitos. The applicant was told that some of the College's senior boarders had made complaints about her and a number of allegations were put to the applicant. The applicant was not given a copy of the allegations nor was she required to formally respond to the allegations. One of the issues raised related to hindering a student who had been given weekend leave. The applicant stated that she was uncomfortable allowing the student to leave because several boys had arrived to pick her up. Before allowing the student to leave Catherine House the applicant checked with the girl's mother to ensure that it was appropriate for the student to leave. Another issue was raised about a student who had gone missing one evening. The applicant maintained that she looked for the student but could not locate her as she had left the College premises.

8 As a result of her transfer to Sylvester House the applicant raised a complaint with The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers ("the Union"). This led to a conciliation conference being held in the Western Australian Industrial Relations Commission ("the WAIRC") towards the end of January 2002. At the conference the applicant agreed to accept the transfer to Sylvester House and the respondent undertook to provide whatever assistance was necessary to help the applicant in this transition phase. The applicant understood that regular meetings would be held to monitor this transition. The Union confirmed the arrangements that were to operate with the College in a letter dated 4 February 2002 (Exhibit R2). In response to that letter Ms Pitos replied to the Union confirming the respondent's

understanding of the arrangement and a copy was sent to the applicant (Exhibit A7). This letter also stated that the College was unhappy that the applicant had not participated in a handover session, arranged to assist the applicant in her transition from a senior house to the junior house, on the afternoon of Thursday 31 January 2002 and that the applicant acted in an unprofessional manner by not attending this meeting.

9 The applicant stated that she attended the College to undertake professional development on 30, 31 January and 1 February 2002 and had been present at the handover meeting on the afternoon of Thursday 31 January 2002 and that she was not paid to attend on these days. The applicant maintained that at no stage had she behaved unprofessionally. The applicant received a copy of the letter from Ms Pitos (Exhibit A7) after she commenced her normal shifts for 2002 on Sunday 3 February. Subsequent to receiving the letter from Ms Pitos the applicant was distressed and visited her doctor. The applicant stated that the doctor was concerned that she could suffer a possible stroke and she was told to try and relax. She was prescribed medication for stress and remained off work for nearly two weeks.

10 The applicant returned from sick leave and re-commenced duties on 20 February 2002. On 25 February 2002 the applicant commenced work at her normal shift time of 3.00pm. At around 5.00pm that day she was summonsed to attend a meeting with Ms Pitos. She stated that meeting took approximately two hours. Ms Pitos put a number of concerns to the applicant. The issues related to concerns about students inappropriately filling out travel arrangement forms, and a concern by some of the students that the applicant was unfriendly and unapproachable. The applicant denied that she inappropriately dealt with the students' travel forms and she denied that she was unfriendly and unapproachable. Towards the end of the meeting she stated that Ms Pitos accused her of spreading gossip about Ms Bahen stealing fuel from the College.

11 Subsequent to this meeting she returned to Sylvester House and was then told by Ms Bahen that she was to have a further meeting with Ms Pitos. She waited fifteen minutes and then Ms Pitos arrived with another staff member, Ms Teresa Sparks, to discuss the allegation about Ms Bahen stealing fuel. The second meeting went on for some time and as the applicant became upset, Ms Pitos asked if she wanted the opportunity to go home. The applicant agreed and drove to her daughter-in-law's place and composed herself before driving home.

12 Subsequent to the meetings with Ms Pitos on 25 February 2002 the applicant took sick leave and did not return to work.

13 Whilst the applicant was on sick leave Ms Pitos rang the applicant about returning to work. Ms Pitos also stated that further concerns needed to be discussed with the applicant. The applicant was distressed by these calls and indicated to Ms Pitos that she was not ready to return to work at that stage.

14 Subsequently, the applicant agreed to meet with Ms Pitos on Friday, 22 March 2002 at 3.15pm. At the meeting the applicant advised Ms Pitos that she was ready to return to work, subject to clearing it with her doctor. In the event her doctor told her that it was necessary for her to remain on sick leave, so she did not return to work.

15 The applicant maintained that there were approximately 40 allegations raised by Ms Pitos since the beginning of 2002 about her work performance. The applicant maintained that at no stage was she allowed any opportunity to fully respond to the allegations.

16 After meeting with Ms Pitos on 22 March 2002 the applicant remained concerned about her treatment by Ms Pitos. Thus, she instructed her son, Mr David Greaves to put four options to the respondent in relation to her employment in a facsimile dated 22 March 2002. The fax reads as follows, formal parts omitted—

> "Dear Mrs Pitos,
>
> Without having been afforded the opportunity to confirm legal advice, I must stumble on in my own way.
>
> You have said this afternoon that you desire Mrs Greaves to return to work. As I have stated in my 2nd (sic) last fax, I do not hold the opinion that all the events and actions that started in August 2001 right through to now can be simply discarded.
>
> An extreme amount of damage has been done.
>
> Do you forget the HOB's last parting comment to Mrs Greaves was "slanderer"?
>
> There is also the case of Judy's harsh, oppressive and unfair termination. The allegation of fraudulently altering records and over medicating is absolutely false and can be demonstrated as such. This is something I am intending to do and is already under way.
>
> As I see it there are 4 solutions.
>
> 1. You can terminate Mrs Greaves
>
> 2. Mrs Greaves can terminate herself and claim constructed (sic) termination
>
> 3. All parties can reach an amicable settlement
>
> 4. Conciliation can be pursued either through the IRC or directly between all parties.
>
> Mrs Pitos, I am no longer prepared to let this drag on any further. Enough is enough.
>
> I require a response from you by 9 AM Monday as to which coarse (sic) of action you choose.
>
> In the absence of this response I will be continuing as I have planed (sic).
>
> You may contact me at any (reasonable) time on 040 402 5755
>
> Regards,
>
> [Signed]
>
> David Greaves"

(Exhibit A8)

17 As no response was received by the applicant by Monday 25 March 2002 the applicant sent Ms Pitos a facsimile dated 25 March 2002 confirming that she had tendered her resignation. The fax reads as follows, formal parts omitted—

> "Dear Mrs Pitos,
>
> It is obvious that you have no desire to improve the situation.
>
> On every occasion that I have attempted to return to work, there has been an "urgent meeting" convened at which further aspersions have been cast on my character and work performance.
>
> The solicitation of my colleagues has effectively declared me "persona non gratis".
>
> Where specific information has been available, I have been able to answer "issues". There has never been any retraction, apology or acknowledgment that the information contained in these "issues" was vexatious and wrong.

As an example I sight (sic) the "issue" of my failure to erect the "birthday banner". I responded to you that we had run out of stationary (sic) and that I had asked the HOB for more stationary (sic) prior to this date. I advised you that in my own time and using my own money, I purchased the stationary (sic), returned to work early and erected the banner prior to the girl returning from school. I was not asked or directed to do this. I did it out of genuine care for the girl. The birthday banners were not an instruction from the school. This was something that the housemothers had decided was a good idea, many years ago, which is why we all made our own at our expense.

Another "issue" was for taking a phone call and being late for a meeting on the 1st February. The 1st February was unpaid and voluntary as was the 30th and 31st January. Instead of getting a "thanks" for these 3 days, I got a letter that said I was "unprofessional".

Whenever I have responded to an allegation there has not been any acknowledgment but just a further issue raised.

My requests for more information have been ignored thus eliminating any opportunity for me to respond.

I hereby give notice. I can not work under the harsh, oppressive and unfair conditions that you have created.

[Signed]

Glenda Greaves"

(Exhibit A9)

18 Ms Pitos responded on 26 March 2002 stating that it was unclear to the respondent whether the applicant continued to be an employee of the respondent. Ms Pitos stated that, based on the meeting she had with the applicant on Friday, 22 March 2002 she understood that the applicant would be returning to work. The applicant was asked that if she was unable to return to work to advise Ms Pitos (Exhibit A10).

19 In response the applicant wrote to Ms Pitos on 28 March 2002 stating that in light of all the events so far she confirmed that she had given notice to terminate her employment with the respondent in her facsimile dated 25 March 2002. In response to Ms Pitos' further offer to discuss issues with the applicant, the applicant stated that despite numerous requests no specific information had been provided to date about the allegations concerning the applicant and questioned whether or not Ms Pitos was genuine in her offer. The letter finished with the comment "If this offer (to discuss) is not genuine then please desist. Otherwise, I await your call" (Exhibit A11).

20 Ms Pitos responded on 3 April 2002 confirming that she wished to meet with the applicant and a representative if so desired, to discuss the applicant's return to work (Exhibit A12). Accordingly Ms Pitos arranged a meeting for Friday, 5 April 2002 at 10.00am in her office. Ms Pitos asked the applicant to provide medical certificates if she was unfit for work up until this date.

21 The applicant met with Ms Pitos on 5 April 2002. The applicant was asked if the facsimile which she had sent to the respondent on Monday, 25 March 2002 was a letter of resignation and the applicant confirmed that it was. At the meeting the applicant stated that there was no discussion about the applicant returning to work and the applicant agreed to provide outstanding medical certificates to Ms Pitos. The meeting then ended.

22 Under cross examination the applicant re-iterated that when she met with Ms Pitos in early December 2001 about the transfer from Catherine House to Sylvester House, she told Ms Pitos that she intended to leave the College at the end of 2002.

23 It was put to the applicant that the only difference between working in a senior boarding house and a junior boarding house was the age of the girls. The applicant disputed this. She stated that age was only one of many differences. The applicant further stated that living in Catherine House was like living in her second home and working at Catherine House was like being part of a family.

24 The applicant stated that at the meeting with Ms Pitos in December 2001 she tried to give responses to the allegations that were put to her but she was unable to do so. The applicant confirmed that Ms Pitos asked the applicant to reflect on the concerns raised.

25 The applicant stated that as a result of the Commission proceedings in January 2002 in relation to her transfer from Catherine House to Sylvester House, she agreed to change houses on the basis that additional support would be given to her and that she would be provided with specific professional development. The applicant confirmed that she was offered the opportunity to attend a one and a half hour meeting on Thursday, 31 January 2002 for a handover and she was offered access to the School Psychologist which she found insulting. It was put to the applicant that at the meeting of 25 February 2002 with Ms Pitos that she initiated the discussion about the petrol stealing allegation in relation to Ms Bahen. The applicant denied this. The applicant confirmed that the issues put to her by Ms Pitos on 25 February 2002 were similar to those raised at the December 2001 meeting with Ms Pitos.

26 It was put to the applicant that subsequent to the meeting with Ms Pitos on 25 February 2002 Ms Pitos called her only once and that was on 4 March 2002. The applicant recalled that Ms Pitos contacted her a number of times during this period.

27 The applicant confirmed that she received a letter from Ms Pitos dated 8 March 2002 which reiterated a number of the concerns which were raised with the applicant by Ms Pitos in the meeting on 25 February 2002 (Exhibit R3). The applicant stated that she responded to this letter on 21 March 2002 (Exhibit R6).

28 The applicant agreed that she attended a meeting with Ms Pitos on 22 March 2002. It was put to the applicant that after discussing her response to the allegations with Ms Pitos at this meeting that she agreed to return to work the next day. The applicant stated that she did not. She stated that she was prepared to return to work but she needed to confirm with her doctor whether or not it was appropriate for her return to work.

29 Subsequent to this meeting the applicant confirmed that she authorised Mr Greaves to send four facsimiles to Ms Pitos late on Friday, 22 March 2002 (Exhibit R7).

30 The applicant was asked if she had applied for any other positions since finishing work with the respondent. The applicant stated that as she is a 73 year old war widow on a pension it was unlikely that she would obtain alternative employment. Thus, she had not applied for any positions.

31 The applicant confirmed that a farewell morning tea was arranged by the respondent but the applicant did not turn up. She agreed that the respondent sent her a farewell present and a card.

32 In re-examination the applicant confirmed that she was told by Ms Pitos that she was required to respond to the allegations put to her in February 2002 or else her contract of employment would be reviewed.

33 Ms Josephine Jones gave evidence. She is currently a housemother in one of the College's junior boarding houses. She has been a housemother for 12 years, 11 of those being spent in one of the senior boarding houses. Ms Jones confirmed that in November 2001 she was called to a meeting, along with other housemothers, where Ms Bahen distributed a document confirming a revised allocation of housemothers to the College's boarding houses. There was no discussion about the reallocation or the rationale for the changes. Ms Jones confirmed that she and the applicant attended a meeting with Ms Pitos

in December 2001 to discuss concerns raised by Ms Pitos. It was her understanding this meeting took place subsequent to the Year 12 students leaving the school. She confirmed that she was given no opportunity to reply to the issues raised by Ms Pitos and neither she nor the applicant was given a copy of the allegations raised by Ms Pitos.

34 Under cross examination Ms Jones stated that the roles between a senior housemother and junior housemother were different. There were not only varying physical demands but activities were different, the girls' demands on the housemothers were different and noise levels were different.

The Respondent's Evidence

35 Ms Pitos is the Principal of the College. She is in charge of the College and the attached boarding houses. The College's four boarding houses cater for approximately 150 boarders from Years 8 to 12. Ms Pitos commenced as the College Principal on 1 July 2000. She has worked for 25 years in the education industry, including 13 years as a teacher and five years lecturing in education.

36 Ms Pitos stated that it was her view there was no distinction between working as a housemother in a junior or a senior boarding house and that it was her understanding that housemothers could be allocated from one house to another. She confirmed that the respondent had specific policies and procedures in place for operating the College's boarding houses. These policies and procedures were outlined in the College's Boarding Community Staff Handbook (Exhibit R8).

37 The respondent operates two junior and two senior boarding houses and there are approximately 38 girls in each house. Ms Pitos stated that the duties and expectations of housemothers was the same for both junior and senior boarding houses however, there were some day to day differences given the ages and routines of the students.

38 Ms Pitos confirmed that she received a complaint in August 2001 in relation to how a student who had suffered a head injury was treated by the applicant. Ms Pitos took the matter up with the applicant and the applicant responded to the concerns raised. On the basis of the applicant's response Ms Pitos did not take any further action.

39 Ms Pitos stated that in November 2001 Ms Bahen decided to change the housemothers' house roster. It was her understanding that some of the housemothers wanted a change, with some junior housemothers wanting senior boarding house experience. On that basis, Ms Bahen and Ms Pitos made the decision to change the housemothers' roster.

40 Ms Pitos confirmed that as a result of a WAIRC conference in January 2002, it was agreed that the applicant was to accept her transfer to Sylvester House and assistance would be given to her to help with the transition from a senior to a junior boarding house. Ms Pitos stated that the applicant was scheduled to meet with the junior housemothers for a handover on 31 January 2002 but the applicant did not attend this handover meeting. Ms Pitos confirmed that an additional temporary housemother was appointed to assist the applicant for the first two weeks after she began working in Sylvester House.

41 Ms Pitos outlined the history of issues relating to the applicant's work performance. In September 2001 she was informed by Ms Bahen that a number of senior students had raised issues concerning the applicant. Ms Pitos asked that these concerns be put in writing and as the students had asked that the matters not be raised with the applicant until they had left the College, Ms Pitos did not take the matter up with the applicant until December 2001. Exhibit R9 is a summary of the students' concerns. As the concerns were serious Ms Pitos met with the applicant and Ms Jones, who was also the subject of the complaints, in December 2001. She discussed the issues with both the applicant and Ms Jones and asked them to think about the concerns and to look at making a fresh start in 2002. She did not regard the discussion as disciplinary in nature because the allegations were put to the applicant and Ms Jones some time after first being raised with Ms Pitos.

42 Ms Pitos stated that further complaints were made about the applicant in February and early March 2002 and that some of the complaints were similar to those raised the previous year.

43 In early February 2002 Ms Bahen had a meeting with Ms Pitos about the applicant's behaviour. Ms Bahen claimed that the applicant was not following proper procedures and routines, full supervision was not being properly undertaken, homesick children were not being dealt with appropriately, and the applicant had an abrupt demeanour and attitude towards the girls. This was confirmed in a memorandum from Ms Bahen to Ms Pitos (Exhibit R10). A further list of grievances was submitted to Ms Pitos on 22 February 2002 (Exhibit R11). The grievances included Year 10 boarders' concerns about being left to supervise Year 8 students who should have been supervised by the applicant. Some boarders accused the applicant of yelling at them and that the applicant was abrupt and unapproachable. At this time Ms Pitos also received complaints from some parents about the applicant's attitude and behaviour (Exhibit R12).

44 On 22 February 2002 some of the boarding house staff approached Ms Pitos seeking a meeting about the applicant's attitude and behaviour. Given these complaints Ms Pitos convened a meeting on the 25 February 2002 with five College staff to discuss the grievances. A number of concerns were raised about the applicant not undertaking her share of duties and responsibilities in the boarding house. There was a concern that the applicant was not adequately comforting homesick boarders nor following appropriate routines. Ms Pitos listened to their concerns and asked that they confirm them in writing. These concerns are outlined in Exhibit R13.

45 On 25 February 2002 Ms Pitos met with the applicant to discuss the concerns raised by parents, students and the applicant's work colleagues. Ms Pitos went through each complaint and identified the specifics of each item. Ms Pitos showed the applicant the letters that had been written confirming the complaints and the applicant was given the opportunity to respond to these concerns. During the meeting Ms Pitos formed the view that the applicant was not receptive to hearing these complaints. Ms Pitos told the applicant to improve her behaviour and performance. Ms Pitos also told the applicant that she would put the allegations in writing so that the applicant could formally respond to the issues that had been raised with her.

46 Ms Pitos stated that the applicant then raised an allegation in relation to Ms Bahen stealing fuel. Ms Pitos claimed that the allegation was serious and she commenced investigating the allegation as soon as her meeting with the applicant finished. Ms Pitos spoke to other staff members about the allegation, and then met again with the applicant later that evening. As a result of the meeting with the applicant to discuss the allegation about Ms Bahen, the applicant became distressed. Thus Ms Pitos allowed the applicant to go home without completing her shift.

47 On the 4 March 2002 Ms Pitos telephoned the applicant as she was uncertain whether or not the applicant would be returning to work**.** As the applicant was unhappy to speak to Ms Pitos over the telephone, Ms Pitos arranged for them to meet on 8 March 2002. The applicant did not attend this meeting, but Ms Pitos met with Mr David Greaves instead. At the end of the meeting Ms Pitos agreed to draw up a letter confirming the nature of the complaints against the applicant, so that the applicant could formally respond to the concerns (Exhibit R3). Ms Pitos confirmed she received a response from the applicant to this letter on 11 March 2002, whereby the applicant complained that she had been denied an opportunity to respond to the allegations. Ms Pitos was surprised by this as she had already been through the allegations with the applicant. However, on 18 March 2002 Ms Pitos responded to the applicant with further specifics of the concerns in relation to the applicant's performance (Exhibit R4).

48 On 21 March 2002 Ms Pitos received a facsimile from the applicant responding to the allegations raised (Exhibit R6). Ms Pitos then met with the applicant on 22 March 2002 and again discussed a range of concerns with the applicant. At the end of this meeting Ms Pitos asked the applicant whether she was ready to return to re-commence her shift the next day. The applicant stated that she had to pick up a prescription from her doctor and that she would return to work the next day. Ms Pitos made a file note to that effect (Exhibit R15).

49 Subsequent to this meeting, on the same day as her meeting with the applicant, Ms Pitos received a number of facsimiles from the applicant's son, Mr Greaves (Exhibit R7). These facsimiles did not accord with Ms Pitos' understanding of what had transpired at the meeting with the applicant that morning. Ms Pitos was surprised by these facsimiles as Ms Pitos understood that the applicant had agreed to return to work the next day. One of the facsimiles gave the respondent four options in relation to the applicant's employment. These options are detailed in this decision at paragraph 16. Ms Pitos stated that at that stage she had no intention of terminating the applicant's contract of employment and that it was her understanding that the applicant was happy to return to work the following day. In the event the applicant did not return to work the next day.

50 On 25 March 2002 Ms Pitos received a facsimile from the applicant giving notice that she was resigning. Given what had occurred at the meeting with the applicant on 22 March 2002 Ms Pitos was unsure whether or not the applicant was returning to work or had resigned. Thus on 26 March 2002 she wrote to the applicant requesting a meeting, and as a result, the applicant, Mr Greaves, Ms Pitos and Mr Boss (a senior member of the College's staff) met on 5 April 2002 to discuss the applicant's intentions. It was Ms Pitos' evidence that at this meeting Mr Greaves confirmed that the applicant had resigned and therefore that was the end of the meeting. On 5 April 2002 Ms Pitos wrote to the applicant confirming that she had resigned effective 25 March 2002 and thanking her for her years of service with the respondent (Exhibit R17).

51 The respondent organised a farewell morning tea for the applicant for the 19 April 2002 however the applicant did not attend. Subsequently the respondent sent the applicant a present and a farewell card.

52 Under cross examination Ms Pitos confirmed that the meeting with the applicant on 22 March 2002 was cordial and professional and that the applicant stated she was ready to return to work. Ms Pitos recommended at this meeting that the applicant apologise to Ms Bahen, but she refused to do so. Ms Pitos confirmed that at the meeting with the applicant on 25 February 2002 she told the applicant that she had no alternative but to review her contract of employment if the applicant's work performance did not improve. She also stated that the applicant was visibly upset after the first meeting on 25 February 2002.

53 In relation to the meeting held between Ms Pitos, the applicant, Mr Greaves and Mr Boss on 5 April 2002, Ms Pitos confirmed that she stated to the applicant that the meeting was to discuss the applicant's return to work. She recalled that it was then that Mr Greaves interrupted saying that the applicant has resigned. The applicant verbally confirmed her resignation when she was asked by Mr Boss if she had resigned.

54 Ms Pitos stated that she accepted the applicant's responses to the concerns and issues raised with her at various meetings in February and March 2002 because she wanted the applicant to remain working with the respondent.

Submissions

55 The applicant claims that she was constructively dismissed.

56 The applicant argued that she resigned from her employment because her contract of employment was significantly altered without reason or consultation when the applicant was allocated to Sylvester House. Also, the respondent presented a number of allegations to the applicant which lacked substance. Further, these allegations were presented in a procedurally unfair manner which caused stress to the applicant making it difficult for the applicant to properly respond. The applicant argues that the actions of the respondent in relation to these matters led to her being alienated from her work leading to the applicant having no alternative but to resign.

57 The applicant argues that she was not accorded natural justice when Ms Pitos confronted her with numerous allegations as she was not given a proper opportunity to respond to the allegations. The process was unfair because when she attempted to discuss her responses with Ms Pitos additional allegations were raised. The applicant argued that the actions of the respondent were premeditated and deliberate. Further, the respondent did not demonstrate impartiality, as the respondent did not act in the same way when similar concerns were raised about other employees.

58 The applicant had an unblemished work history with the respondent spanning ten years and the respondent was aware that the applicant intended to retire at the end of 2002. Further, it was unfair for the applicant to be terminated given her minimal prospects of re-employment at the age of 73.

59 Reinstatement is not being sought given what the applicant has been through thus the applicant is seeking compensation for unfair termination.

60 The applicant is seeking payment of 3 months' notice and that annual leave entitlements deducted from the applicant's final pay be reinstated.

61 The respondent submits that the applicant was not constructively dismissed. The respondent argues that the applicant was not put in a position where she was given no option but to resign.

62 The respondent argues that the applicant resigned of her own volition. The applicant was not terminated nor required to resign and the applicant was afforded an opportunity to reconsider her resignation after the applicant indicated to the respondent on 25 March 2002 that she had resigned.

63 The respondent stated that whilst a number of concerns were raised with the applicant in February and March 2002, Ms Pitos asked the applicant on 4 March 2002, when the applicant was on leave, whether or not she was returning to work as the respondent wanted the applicant to return to normal duties.

64 It was the respondent's understanding that as a result of a meeting between the applicant and Ms Pitos on 22 March 2002 that the applicant would be returning to work. However, shortly after this meeting a number of facsimiles were received from Mr Greaves contradicting this understanding. Subsequently on 25 March 2002 the applicant wrote to the respondent apparently stating that the applicant was tendering her resignation. As the respondent wished to clarify any possible confusion in relation to the applicant's employment status the respondent arranged a meeting with the applicant to take place on 5 April 2002. At this meeting the applicant confirmed she had resigned.

65 The respondent argues that nothing can be relied upon by the applicant that lends weight to the conclusion that the applicant was constructively dismissed by the respondent. Even though a number of issues and concerns were raised with the applicant in early 2002, it was appropriate that these matters be raised with the applicant so that they could be addressed and dealt with.

66 The respondent argues there is no evidence to demonstrate any conduct by the respondent that was calculated or likely to seriously damage the relationship of trust and confidence between the applicant and the respondent. The respondent argues that the transfer of the applicant from a senior house to a junior house did not constitute an unlawful variation to the applicant's

contract of employment. The respondent submits that the transfer of boarding house supervisors from one house to another was capable of being effected under the applicant's existing contract of employment. Further, the respondent argues that this action, which occurred in November 2001, could not have been significant in relation to the applicant's resignation as the transfer to a junior house happened much earlier than the date on which the applicant tendered her resignation. Also, this issue was extensively canvassed with the applicant and her representatives in January 2002 and the applicant formally accepted the transfer after conciliation proceedings in the WAIRC.

67 The respondent submits that the applicant made a conscious decision in her own interests to terminate the employment relationship. Further, the respondent argues that if there has been a dismissal then the respondent claims the dismissal was not harsh, unfair or oppressive. The applicant was fully aware of her shortcomings and it was appropriate for the respondent to raise issues and concerns with the applicant when the matters were brought to the respondent's attention. The applicant was counselled in an appropriate manner and a number of amicable and constructive discussions were held between the applicant and Ms Pitos to discuss the matters in issue.

68 The respondent argues that no evidence has been given by the applicant in support of her contention that reinstatement is impracticable. The respondent thus argues that if it is found that the applicant's dismissal is unfair, then reinstatement is the appropriate remedy.

69 The respondent maintains that the applicant is not due any monies for notice in accordance with the Award. The applicant did not work the period of notice required of her upon resignation nor did the applicant provide medical certificates for the period 25 March to 5 April 2002. As the applicant resigned it was appropriate for the respondent to deduct annual leave entitlements which were paid to the applicant in advance from the applicant's final pay.

Findings and Conclusions

Credibility

70 I am prepared to accept that events relevant to these proceedings occurred substantially as Ms Pitos testified they occurred. Ms Pitos gave her evidence in a clear and considered manner and much of her evidence was corroborated by written documentation. I do not have the same confidence in some of the evidence given by the applicant. Whilst I accept most of the evidence given by the applicant, much of which was corroborated by written documentation, it was clear to me during the proceedings that the applicant was not forthcoming on at least two critical issues. The applicant gave evidence that Ms Pitos raised fuel stealing allegations relating to Ms Bahen with her when Ms Pitos met with the applicant on 25 February 2002. However, I find that on the balance of probabilities that it was more likely that the applicant raised the allegation about Ms Bahen with Ms Pitos. I have come to this view because the applicant argued in these proceedings that other employees, about whom allegations had been made, had not been disciplined or dealt with the same way as the applicant. In my view the allegation in relation to Ms Bahen constituted one of the examples that the applicant was referring to and would have been likely to have been raised by the applicant when arguing that other employees had not been dealt with in the same way as the applicant and had not been investigated. Further, Ms Pitos arranged an urgent meeting concerning the allegation in relation to Ms Bahen late in the afternoon of 25 February 2002, after the issue was raised at a meeting with the applicant on that day. If Ms Pitos was aware of this issue prior to meeting with the applicant then an urgent meeting would not have been necessary. Therefore I conclude that it was the applicant who raised the allegation of fuel stealing in relation to Ms Bahen with Ms Pitos. I regard this issue as being important as it was subsequent to this urgently convened meeting about Ms Bahen on 25 February 2002 that the applicant became so stressed and unwell that she did not return to work again.

71 I formed the view that when the applicant was giving evidence about not knowing about the specifics of the concerns raised with her by Ms Pitos in February and March 2002, and thus not being able to adequately respond to them, that the applicant was more aware of the nature of the allegations than she was prepared to concede. In support of this view I am mindful that the meeting between the applicant and Ms Pitos on 25 February 2002 went for a lengthy period of time and there is substantial and detailed documentation that Ms Pitos provided to the applicant in relation to these concerns (Exhibits R3 and R4), and a further meeting was held between the applicant and Ms Pitos on 22 March 2002 to discuss the concerns. Thus, where the evidence of the applicant and Ms Pitos conflicts in relation to these two issues I prefer the evidence of Ms Pitos. I do not regard the evidence given by other witnesses in this matter as being critical to the issues in dispute.

Was the Applicant Constructively Dismissed?

72 In relation to an unfair dismissal claim brought pursuant to s.29(1)(b)(i) of the Act, it is incumbent upon an applicant, on the balance of probabilities, to demonstrate that he or she has been dismissed by the employer to attract the Commission's jurisdiction.

73 A resignation can constitute a dismissal for the purposes of the Act but whether or not a particular resignation will do so depends upon the circumstances of each case. The relevant law to be applied in this matter was recently set out by Beech, SC in *Grant Raymond Lukies v AlintaGas Networks Pty Ltd* (2002) 82 WAIG 2217 AT 2220—

> "The Industrial Relations Commission of South Australia in *Lucky "S" Fishing Pty Ltd v Jex* (1997) 75 IR 158 at 164 also considered the decision of the Court of Appeal of New Zealand [*Auckland Shop Employees' Union v Woolworth's (NZ) Ltd* (1985) 2 NZLR 372]. It noted that the Court of Appeal stated that there has been a modification of the test in the in the *Western Excavating (ECC) Ltd v Sharp* case (1978) ICR 221 at 226 which stated that if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The Court of Appeal suggested that in constructive dismissal cases the relevant test is whether the conduct complained of is calculated or likely to seriously damage the relationship of confidence and trust between the parties and is such that the employee cannot be expected to put up with it."

74 I find that when applying the test outlined above and taking into account my comments on witness credit, that the applicant was not constructively dismissed. In my view there was no action by the respondent which constituted conduct calculated or likely to seriously damage the relationship of confidence and trust between the parties which was such that the employee could not be expected to put up with it. The fundamental elements of a constructive dismissal do not apply in this case. I am of the view that the applicant brought her contract of employment to an end of her own volition.

75 I have reached this conclusion based on the following findings.

76 I find the applicant was successfully employed by the respondent for over ten years as a senior housemother. However, the applicant had difficulty in accepting the respondent's decision at the end of 2001 to reallocate the applicant to a junior boarding house. Even though the respondent did not handle this reallocation as well as it could have, and no discussions were held with the applicant prior to making the decision to transfer the applicant to a junior boarding house, I accept that the respondent had the right to transfer the applicant to a different house. The applicant's original contract of employment with the

respondent (Exhibit R1) does not refer to the applicant being employed as a senior housemother. Exhibit R1 states that the applicant was employed as a member of staff under the terms of the Award and this award does not distinguish between the employment of junior and senior housemothers.

77 However, the transfer to a junior house led to ongoing problems for the applicant. The move to Sylvester House required the applicant to make a number of adjustments to her normal work patterns. It is clear that the transfer had a big impact on the way in which the applicant was to undertake her normal duties. I accept that the applicant was upset by the transfer to a junior boarding house as she was unilaterally moved from her normal "work" home to a different environment. The applicant was unhappy about the shift and the applicant found it difficult making the transition to a junior boarding house.

78 As the applicant was unable to readily adjust to the move to the junior boarding house a number of complaints from students, parents and other staff were made to Ms Pitos about the applicant at the beginning of Term I 2002. These grievances are outlined in Exhibit R11. I accept that some of these complaints may have been avoided if the applicant's transfer had been handled in a more professional and sensitive manner and if more support had been given to the applicant in relation to this transfer. However, the applicant accepted her transfer subsequent to Commission conciliation proceedings concluding in early 2002. Further, as part of those proceedings, a settlement was agreed between the applicant and the respondent in relation to the transfer. The applicant did not seek any further assistance in relation to the transfer nor did she take the initiative to seek a further review of the decision to transfer her to a junior boarding house. Thus, even though I have concerns about the way the applicant's transfer was handled, I do not believe that the actions of the respondent in relation to this transfer were such that the applicant was given no alternative but to resign. The applicant could have sought further assistance in February 2002 with the transition to a junior boarding house and could have sought a review meeting, as agreed to at the Commission conference. The applicant did not avail herself of these options.

79 The applicant argued that her health was affected by the way in which the respondent handled the situation thus affecting her ability to deal with the accusations made against her. However, it is my view that the applicant must take some responsibility for her health problems. The accusation made by the applicant about Ms Bahen and the resultant meeting held late on 25 February 2002 caused so much stress to the applicant that she was no longer able to attend work. It is also clear that the role of the applicant's son in attempting to assist in resolving this dispute, given the way in which events unfolded, and upon reviewing some of the documents tabled in these proceedings, was counterproductive. This is evidenced by the respondent banning Mr Greaves from entering the College in early 2002 (Exhibit A16) and the confronting tone of some of Mr Greaves' correspondence to the respondent (Exhibit R7).

80 The applicant maintains that she was unable to properly respond to the allegations raised by Ms Pitos as the allegations were vague and lacked detail and that the applicant was denied procedural fairness given the way in which the allegations were put to the applicant. Certain allegations concerning the applicant's behaviour were raised by Ms Pitos with the applicant in December 2001 however, as these issues were raised some months after they were originally raised with Ms Pitos, I accept that it was appropriate for Ms Pitos not to regard the discussion with the applicant in December 2001 as disciplinary in nature. However, the applicant should have been aware at that time, even when she was working with senior boarders that the respondent had concerns about the way in which she was interacting with the students and undertaking work requirements.

81 In February and March 2002 a number of concerns relating to the applicant's behaviour were raised by students, parents and work colleagues with Ms Pitos. Even though the applicant had not worked many shifts in 2002 when these allegations were raised, in my view it was appropriate that Ms Pitos discuss these grievances with the applicant. It is clear that from early February 2002 the applicant felt stressed about her work and took substantial sick leave. It may well have been that the applicant formed the impression that the respondent was unfairly raising a number of matters at one time to put pressure on her, particularly as the applicant had not had much of an opportunity to adjust to working in Sylvester House. The applicant may have also formed the view that her responses to Ms Pitos were not being taken seriously. Even though this may have been how the applicant felt at this time and even though the applicant's health may have been suffering because concerns and issues about her performance were being raised by the respondent, I accept the respondent's argument that it was necessary to deal with the complaints relating to the applicant once they were raised.

82 In my view the allegations were specific enough for the applicant to be able to respond. The allegations and concerns were the subject of lengthy discussions between the applicant and Ms Pitos and they were confirmed in writing by the respondent (Exhibits R3 and R4). Further, the applicant was given the opportunity to respond in writing to the complaints. I do not accept that the applicant was not provided with sufficient information in order for her to respond to the allegations raised with her by Ms Pitos. It is clear that a number of specific examples were given to the applicant about the concerns raised and that the applicant was given a number of opportunities to respond to the allegations which were extensively documented and put verbally to the applicant. I conclude that the applicant was not open to accepting the criticisms and comments raised by Ms Pitos thus the applicant found it difficult to respond to the issues raised by Ms Pitos.

83 Whilst the respondent could have put concerns and allegations to the applicant in a less pressured way in February and March 2002 I accept Ms Pitos' evidence that Ms Pitos did not intend to terminate the applicant's contract of employment when she raised performance issues with the applicant. The respondent was acting on concerns that had been properly raised and in my view, it was appropriate for the respondent to address these concerns with the applicant. I do not believe that Ms Pitos' actions were a deliberate strategy on the part of the respondent which left the applicant with no choice but to resign.

84 I accept Ms Pitos's evidence that the respondent had no intention of terminating the applicant when she liaised with the applicant to resolve the complaints and to agree on the applicant returning to work. These efforts culminated in the meeting of 22 March 2002 whereby Ms Pitos understood that the applicant had agreed to return to work at the commencement of her next shift. Matters were brought to a head, however, when the applicant instructed Mr Greaves to write to the respondent on 22 March 2002 putting four options forward for the respondent to review and if no feedback was received in relation to a choice of option by 9.00am 25 March 2002, the applicant would resign. In the circumstances it is understandable why the respondent did not respond to the ultimatum particularly given that the applicant had agreed to return to work, subject to a medical clearance, at the meeting with Ms Pitos on 22 March 2002, and given the short time frame demanded by the applicant. As a result of the respondent not reacting to this ultimatum the applicant reached the conclusion that it was no longer appropriate for her to remain employed with the respondent and tendered her resignation effective 25 March 2002. The applicant was given an opportunity to review her resignation and discuss a return to work at the meeting arranged by Ms Pitos on 5 April 2002. However, Mr Greaves made it clear at the outset of this meeting that there was to be no discussion about the applicant returning to work and the applicant confirmed that she had resigned, effective 25 March 2002. In my view the applicant made this decision to resign of her own volition and not through any actions by the respondent calculated to seriously damage the relationship of confidence and trust between the applicant and the respondent. Having reached this view however, I believe that Ms Pitos could have been more supportive of the applicant once the allegations were brought to her attention particularly given the applicant's age, length of service and unblemished work record until 2001 and the short period of time that the applicant was working in a junior boarding house. In all of the circumstances, however, I conclude that the applicant

was not constructively dismissed and that she resigned of her own accord. Thus the Commission has no jurisdiction to deal with this matter and an order will issue accordingly.

85 It follows that as the applicant resigned the applicant is not due any entitlements under her contract of employment in relation to notice and annual leave entitlements.

2003 WAIRC 07760

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	GLENDA FRANCES JOY GREAVES, APPLICANT
	v.
	THE SISTERS OF MERCY PERTH (AMALGAMATED) INC TRADING AS SANTA MARIA COLLEGE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 20 FEBRUARY 2003
FILE NO/S.	APPLICATION 691 OF 2002
CITATION NO.	2003 WAIRC 07760

Result	Application alleging unfair dismissal dismissed for want of jurisdiction and application for contractual benefits dismissed
Representation	
Applicant	Mr D Greaves (as agent)
Respondent	Ms K Wroughton (of counsel)

Order

HAVING HEARD Mr D Greaves as agent on behalf of the applicant and Ms K Wroughton of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

1) THAT the application alleging unfair dismissal be, and is hereby dismissed for want of jurisdiction.

2) THAT the application for contractual benefits be, and is hereby dismissed.

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

2003 WAIRC 07773

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PETA TANIA HICKS, APPLICANT
	v.
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY 21 FEBRUARY 2003
FILE NO.	APPLICATION 1525 OF 2002
CITATION NO.	2003 WAIRC 07773

Result	Application to amend particulars of claim granted.
Representation	
Applicant	Ms K Everett (of counsel)
Respondent	Mr S White

Reasons for Decision

1 On 6 September 2002 Peta Tania Hicks ("the applicant") referred a claim to the Western Australian Industrial Relations Commission ("the Commission") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") that she was harshly, oppressively or unfairly dismissed by the Western Australian Local Government Association ("the respondent") on 22 July 2002.

2 On 6 November 2002 the applicant's representative wrote to the Commission seeking to amend the applicant's application. The applicant claimed that the correct date of termination was 26 August 2002 and not 22 July 2002 as originally stated in Item 14 of her application. It was claimed that the applicant had mistakenly believed that her employment was terminated on 22 July 2002, the date on which she was given notice of her termination. The applicant now understands that she was terminated effective 26 August 2002 in accordance with the termination letter dated 19 July 2002 which she received from the respondent on 22 July 2002.

3 The respondent opposes the amendment sought. The respondent is of the view that the applicant's termination should be the date stated in the applicant's original application. The respondent contends that the applicant's dismissal was effected on 22 July 2002, and the applicant was provided with a payment in lieu of notice on this day. Further, the respondent argued that on 22 July 2002 when the applicant accepted the payment in lieu of notice she agreed not to work out her notice period. On this basis the respondent considers that the date stated in the applicant's original application at Item 14 should stand. Thus, the

respondent argues that the applicant's application had been lodged in excess of 28 days after the applicant's date of termination contrary to s.29(2) of the Act.

4 The matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not the application was lodged within 28 days of the applicant's termination and if not, should the application be accepted under s.29(3) of the Act which reads as follows—

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

Was the application lodged within 28 days of the applicant's termination?

5 A notice of termination, once given, will operate to end the contract when the period specified expires unless the notice is withdrawn by mutual agreement (see the discussion in Macken, McCarry and Sappideen's *The Law of Employment* Fourth Edition at page 172). Given that there is no capacity for a notice of termination to be withdrawn except by mutual agreement, a period of notice cannot be waived by an employer unless the waiver of the period of notice is agreed to by the employee.

6 If a contract of employment does not provide for payment in lieu of notice it is unlawful to terminate an employee's contract of employment by making a payment in lieu of notice. In *Sanders v Snell* [1998] HCA 64 at [16]; 196 CLR 329 at 337 Gleeson CJ, Gaudron, Kirby and Hayne JJ held that where there is no condition in a contract of employment for payment in lieu of notice, the employer is in breach of the contract if the employer does not give the employee the requisite notice of termination. In that case there was a written contract of employment which specified a period of notice to be given, however there was no provision for making a payment in lieu of notice.

7 The applicant prepared an affidavit in relation to this matter (Exhibit A1). Attached to the affidavit is the letter of termination, dated 19 July 2002, which was given to the applicant by the respondent on 22 July 2002. The following are relevant paragraphs from the letter, formal parts omitted—

> "I am not satisfied with your explanations, nor am I satisfied that you are willing and/or capable of improving your work performance to the level required by the Association. In accordance with Clause 11.2 of your Contract of employment (sic) I am terminating your employment as the RoadWise Officer Wheatbelt South with effect from close of business 26 August 2002. I do not require you to attend for duty during this period. I have authorised the Executive Manager Transport and Roads and the RoadWise Manager to collect all items of Association property including but not limited to motor vehicle, mobile phone, credit/fuel cards, computers, files and all intellectual property. This allows you to vacate the premises and to leave your position immediately.
>
> I will arrange for payment of the period of notice in lieu of attendance, plus any other monies due and owing to you, payable on the next pay day. This will be your final pay. If required by you, I will also arrange for a statement of service, but will not be providing or authorising a reference for you.
>
> I regret that this course of action is necessary, but I do wish you well in your future endeavours."

8 Mr John Phillips, the respondent's Executive Manager Workplace Relations and Training Services, gave evidence. Attached to his affidavit (Exhibit R1) is a copy of the applicant's contract of employment. Clause 11. Termination, subclause 11.2 of this contract states—

> "WAMA or the Employee may, for any reason, terminate the Employee's employment in terms of this Deed by giving the other party one (1) month's notice in writing."

9 At paragraph 19 of Mr Phillip's witness statement (Exhibit R1) he stated that—

> "…… Ms Hicks was specifically advised by Ms Parsons that she would not be required to work out the period of notice and that the termination was thus effective from the date and time of the notice."

10 The applicant gave evidence that she did not work out her notice period because she was unable to undertake her normal duties given that her work vehicle, computer and telephone were taken from her. Further, she had annual leave approved to be taken during the notice period. On this basis she did not see any point in remaining at work for the duration of her notice period.

11 I find that when taking into account the law in relation to a matter of this nature that the applicant's contract of employment ended at the end of the expiry of her notice period, that date being 26 August 2002. I accept the applicant's evidence that she had no choice but to cease working with the respondent on 22 July 2002 as her "tools of trade" were withdrawn from her, she was told to leave the premises immediately and that she was not required to work out her notice period. Given this instruction and as the applicant had approved annual leave entitlements which fell due during her notice period the applicant left the premises and did not return. I find that there was no mutual agreement between the applicant and the respondent to waive the notice period. The applicant was not given a choice in this matter as she could not continue working beyond 22 July 2002 because of the actions and requirements of the respondent.

12 I also find that there is no provision in the applicant's contract of employment for a payment to be made in lieu of notice.

13 On this basis I will accept the applicant's amendment to Item 14 of her application to reflect the applicant's date of termination as 26 August 2002. Given that this application was lodged on 6 September 2002, it follows that this application was not lodged out of time.

14 An order to this effect will now issue.

2003 WAIRC 07775

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETA TANIA HICKS, APPLICANT
	v.
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	APPLICATION 1525 OF 2002
CITATION NO.	2003 WAIRC 07775

Result	Application to amend particulars of claim granted.

Order

HAVING heard Ms K Everett of counsel on behalf of the Applicant and Mr S White on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the date of termination in the application be amended by deleting 22 July 2002 and substituting therefore 26 August 2002.

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

2003 WAIRC 07745

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN GRANT KELLY, APPLICANT
	v.
	ITSP AUSTRALIA PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 14 FEBRUARY 2003
FILE NO.	APPLICATION 1711 OF 2002
CITATION NO.	2003 WAIRC 07745

Result	Application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Mr J.G. Kelly
Respondent	No appearance

Reasons for Decision

(Extemporaneously)

1 Section 27(1)(d) of the *Industrial Relations Act 1979* allows the Commission to proceed with a matter in the absence of a person who has been given due notice of the proceedings. For the purposes of the record I note as follows.

2 The application that has been lodged by Mr Kelly cites as the respondent ITSP Australia Pty Ltd. It has an address in 61 Hampden Road in Nedlands. I note from the papers that Mr Kelly attached to his Notice of Application that is the address on a document from ITSP Australia Pty Ltd. I also note that these proceedings were set down for hearing according to a Notice of Hearing dated 8 January 2003 posted to Mr Kelly and to ITSP Australia Pty Ltd at that address. I am satisfied that ITSP Australia Pty Ltd has been given due notice of these proceedings and it has elected not to attend. I add that I am assisted in reaching that conclusion by the following.

3 Mr Kelly's application was lodged in the Commission on 11 October 2002. The respondent has not filed any Notice of Answer and Counter Proposal, neither did it attend the conference in this matter that was held before the Commission on 4 December 2002. It appears to me therefore that ITSP Australia Pty Ltd is acting today entirely consistently with its attitude to this matter from the beginning, that is, it has treated it with ignore.

4 Accordingly, I am satisfied that these proceedings can go ahead in the absence of ITSP Australia Pty Ltd.

5 The claim that the Commission has before it from Mr Kelly is that he has not been paid a benefit to which he is entitled under his contract of employment. Mr Kelly has given brief evidence before me and his evidence, which I accept, is that at the time that his employment terminated in July last year, his salary according to his contract of employment was $120,000.

6 I am also satisfied that no award applied to his employment. I have asked Mr Kelly whether he believes an award applies and I am not satisfied from his answer that there is an award that does apply. My general knowledge, if I am allowed to draw upon that, tells me I am unaware of any award that would apply to a senior project manager (although there are some awards that cover technologists particularly in the electronics area). I am not confident that an award applies to ITSP Australia or to a senior project manager.

7 The issue that arises then is s.29AA of the Act. That is a section that has been only recently introduced. It was introduced by s.140 of the *Labour Relations Reform Act 2002* and the relevant part of that legislation came into force on 1 August 2002. Mr Kelly's claim was lodged after that date and therefore at the time he lodged his application, s.140 of the *Labour Relations Reform Act 2002* had come into force and thus s.29AA had come into force and his application is now caught by that section.

8 That section in subclause (4) states the Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if: (a) an industrial instrument does not apply to the employment of the employee (and I interrupt myself to say that on my finding an industrial instrument does not apply to the employment of Mr Kelly) and (b) the employee's contract of employment provides for a salary exceeding the prescribed amount. That prescribed amount by subsection (5) is $90,000 per annum. I am therefore satisfied that s.29AA does apply and by virtue of that section the Commission must not determine Mr Kelly's claim.

9 Mr Kelly has submitted that in discussions he had with persons he described as the Department of Industrial Relations, but which I suspect is a reference to Wageline, part of what is now the Department of Consumer and Employment Protection, prior to 1 August 2002 and they had not made him aware of the impending change to the law but rather they had advised him that he had up to six years to proceed with his claim.

10 There are three comments that I think apply to that submission. Firstly, the advice is correct in that under the *Limitation Act 1935 - 1978* Mr Kelly has six years from the date in July when the monies were owed to him, if I can put it in that way, or at least allegedly owed to him, to bring his claim. But that is a claim in the civil courts.

11 Secondly, although the staff of Wageline may not have made him aware of any impending industrial law change, I am not sure what obligation they had to do so; in any event that is not a substitute for proper legal advice.

12 The third comment is this. Even if I was to have the utmost sympathy for Mr Kelly, and I suspect that I do, even if after what he has said I was to find that Mr Kelly is entitled to everything that he is claimed, and indeed if I was to find that Mr Kelly has a just claim, I do not have the power to amend s.29AA or to override it. It is binding upon me. So even if I was to find in favour of Mr Kelly on merit, it makes no difference to the situation in which he now finds himself, and indeed this Commission now finds itself, as a result of s.29AA.

13 Accordingly, for those three reasons I am not able to move from the finding I have reached that Mr Kelly is caught by s.29AA and accordingly, according to that section I am not to determine his claim. It seems then that there is nothing other to do to it other than to dismiss it.

14 Order accordingly.

2003 WAIRC 07730

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN GRANT KELLY, APPLICANT
	v.
	ITSP AUSTRALIA PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 14 FEBRUARY 2003
FILE NO.	APPLICATION 1711 OF 2002
CITATION NO.	2003 WAIRC 07730

Result	Application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Mr J.G. Kelly
Respondent	No appearance

Order

HAVING HEARD Mr J.G. Kelly on his own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the application be dismissed.

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

2003 WAIRC 07862

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN WILLIAM ROGERS, APPLICANT
	v.
	DMW CONSTRUCTIONS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY 5 MARCH 2003
FILE NO.	APPLICATION 1833 OF 2002
CITATION NO.	2003 WAIRC 07862

Result	Application alleging unfair dismissal dismissed for want of jurisdiction
Representation	
Applicant	Mr I Gregory (of counsel)
Respondent	Mr S Kemp (of counsel)

Reasons for Decision

1 On 6 November 2002 Glenn William Rogers ("the applicant") referred a claim to the Western Australian Industrial Relations Commission ("the Commission") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") that he was harshly, oppressively or unfairly dismissed by DMW Constructions Pty Ltd ("the respondent") on 28 March 2002. As the application was lodged on 6 November 2002 this application is over seven months past the due date to lodge a claim of this nature. The matter was listed for hearing to allow the parties to put submissions and to give evidence as to whether or not the application should be accepted.

2 The first issue to be determined is whether the Commission has power to grant the application. Section 29(3) of the Act reads as follows—

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

3 Those provisions came into effect on 1 August 2002 some four months after the applicant was terminated by the respondent. It is clear for the reasons set out in the decision of Commissioner SJ Kenner in *Nicole Azzalini v Perth Inflight Catering* (2002)

82 WAIG 2992 (Azzalini's case) that there is no power for the Commission to extend time in accordance with s.29(3) of the Act in respect of an application filed subsequent to 1 August 2002 relating to a termination of employment in March 2002. As there is no power to accept this application which was lodged out of time, it is my view that there is no jurisdiction for the Commission to accept this application.

4 If I am wrong in finding that there is no power to extend time in accordance with s.29(3) of the Act for a termination effected on 28 March 2002 and that the Commission does have power to accept an application relating to a termination of employment which occurred prior to s.29(3) of the Act coming into operation, then I would need to consider the tests relating to the exercise of discretion for accepting this application.

5 In reaching a decision in a matter of this nature I take into account whether there was an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he was unhappy with his termination and would contest his termination, and prejudice to the respondent. These guidelines were recently discussed as being relevant to a matter of this nature by Beech S C in *Anthony William Andrew v Metway Property Consultants & Auctioneers* (2002) 82 WAIG 3260. In applying these guidelines I am mindful that there is a 28 day time frame to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless there is good reason to do so.

6 At the outset of the hearing of this matter the applicant's representative sought an adjournment to allow the applicant, who was unable to be present, to give evidence as to the merits of his claim. This adjournment was opposed by the respondent. Given the significant delays relating to the applicant's claim to date and given the applicant's late request for an adjournment, the Commission refused the applicant's request.

7 The applicant understood that he was employed pursuant to a registered workplace agreement when he was terminated on 28 March 2002. Thus, the applicant filed an unfair dismissal claim within the required time frame after termination, pursuant to s.51 of the Workplace Agreements Act 1993 in the Industrial Magistrate's Court on 26 April 2002. A jurisdictional argument was raised in the Industrial Magistrate's Court about whether or not the workplace agreement covering the applicant's contract of employment was in force when the applicant was terminated on 28 March 2002. The Industrial Magistrate found that as there was no registered workplace agreement relating to the applicant's employment in place on 28 March 2002 there was no jurisdiction for the Industrial Magistrate's Court to deal with the application. On 26 September 2002 the Industrial Magistrate issued a decision to this effect in relation to this finding.

8 As no workplace agreement applied to the applicant's contract of employment when he was terminated the applicant had until 26 April 2002 to file a claim in the Commission pursuant to s.29(1)(b)(i) of the Act. Clearly no application was filed in the Commission by this date.

9 In relation to the delay in making this application I am aware that in the Industrial Magistrate's Reasons for Decision, dated 26 September 2002, the Industrial Magistrate confirmed that on 3 April 2002 the applicant received notification from the Commissioner of Workplace Agreements that the registration of his workplace agreement had been refused and that from 28 March 2002 the applicant's workplace agreement was of no effect.

10 It should have been clear to the applicant at this stage that the issue of whether or not a registered workplace agreement covered the applicant's employment on 28 March 2002 was a live issue. Even though the applicant assumed that a registered workplace agreement covered his contract of employment on 28 March 2002 he should have been aware that there was doubt about this given the notification from the Commissioner of Workplace Agreements on 3 April 2002. Further, the decision of the Industrial Magistrate issued on 26 September 2002 and this application was not lodged until 6 November 2002. The applicant stated in his application that he was working away from Perth during the course of the two weeks prior to 6 November 2002 and therefore he was unable to sign the necessary documentation for this matter to be expeditiously lodged in the Commission. In the event the applicant's representative signed this application on the applicant's behalf. I do not accept this as a valid reason for the delay in lodging this application. The applicant lodged his application 41 days after the applicant was aware that his application before the Industrial Magistrate was unsuccessful. Given this unreasonable delay and given that there was no evidence before the Commission that the applicant has some prospect of success in relation to his claim, it is my view that even if the Commission had jurisdiction to deal with this application it should not be accepted. In reaching this decision I am also mindful that the respondent has already been subject to lengthy delays.

11 An Order dismissing the application will now issue.

2003 WAIRC 07856

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN WILLIAM ROGERS, APPLICANT
	v.
	DMW CONSTRUCTIONS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 5 MARCH 2003
FILE NO/S.	APPLICATION 1833 OF 2002
CITATION NO.	2003 WAIRC 07856

Result Application alleging unfair dismissal dismissed for want of jurisdiction

Order

HAVING HEARD Mr I Gregory of counsel on behalf of the applicant and Mr S Kemp of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the application be, and is hereby dismissed for want of jurisdiction.

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

[L.S.]

2003 WAIRC 07886

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREA VALERIE ROSS, APPLICANT
	v.
	DIAMOND OFFSHORE GENERAL COMPANY, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 7 MARCH 2003
FILE NO.	APPLICATION 1133 OF 2002
CITATION NO.	2003 WAIRC 07886

Result	Application dismissed
Representation	
Applicant	Mr M Kane as agent
Respondent	Mr R H Gifford as agent

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Ms Andrea Valerie Ross, in her application states that she was engaged as an Operations Assistant for the respondent, Diamond Offshore General Company. She was employed from 1 October 1999 until her termination on 31 May 2002. The applicant sought reinstatement or in the alternative 6 months compensation. At hearing the applicant amended her claim to seek $10,000 for injury for the manner of dismissal. It was submitted that the applicant had otherwise mitigated her loss.

2 The main contention of the applicant is that the employer breached section 41 of the *Minimum Conditions of Employment Act 1993* in that it did not properly discuss or inform the 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 the applicant.

3 Evidence for the applicant was given by Ms Ross and for the respondent by Mr Jerry Owens, the Area Manager. The evidence of Ms Ross is that she was first employed with the respondent on 1 October 1999 as an Operations Assistant reporting to 3 or 4 Operations Managers. In January 2001 Ms Ross commenced a period of maternity leave. On 26 September 2001 Ms Ross met with Mr Owens to discuss the possibility of her returning to work earlier. Exhibit AR 2 is Ms Ross' record of that discussion. During her absence on maternity leave Ms Natalie Lee had taken on the applicant's duties on the applicant's recommendation.

4 Whilst on maternity leave the respondent created two secretarial support positions due to an upturn in business. There was then an Executive Secretary working to Mr Owens and an Operations Assistant. Ms Ross in evidence says that she had concerns regarding there being two secretaries as she believed that there was not enough work for two full time secretaries. Ms Ross returned to work in the position of Operations Assistant, reporting only to the Operations Managers and not the Area Manager. Ms Lee worked for the Area Manager and held the title of Executive Secretary. The applicant says that Ms Lee performed the duties which Ms Ross used to perform. Ms Ross states that the role she was performing was the same as that prior to her commencing maternity leave with the exception of her being required to perform some reception work and not reporting to the Area Manager.

5 When she returned to work she complained that she was placed in the office in the front of the main office and a few weeks later moved to the compactus filing room.

6 The duties undertaken by Ms Ross consisted of booking flights, accommodation, car hire and taking minutes of meetings. When the Executive Secretary was away the receptionist would fill in for her, not Ms Ross. Ms Ross says that the workload on her return to work was not great but that it had increased in the week that she had received her letter of redundancy in that there were courses and conferences. She comments that she was not busy at all compared to the work load prior to her maternity leave.

7 On the day of the redundancy she was called into Mr Owens' office with Mr Tom O'Neill and Mr Jimmy Ray Moore, the Operations Managers. Mr Moore advised her that he "did not know this was coming" and handed her a redundancy letter [Exhibit AR 6]. Ms Ross says that both operations managers said to her that they could not understand why she had been given a redundancy letter. She says that prior to this meeting there was no indication that there was going to be a restructure, although she was aware that the Ocean Heritage was leaving but she was given no indication as to the impact that would have on her position.

8 She says that she was not advised why the Operations Assistant was made redundant or why she was chosen for redundancy. Ms Ross was aware that the work was decreasing as a number of rigs were leaving Australian waters. She says that when she returned in January this was not put to her.

9 Ms Ross says that the impact of the dismissal has left her humiliated and she believes that if she had not had a baby she would still have been employed—

> "I was humiliated and I felt very betrayed by the company. My worst fears came through. This is something that I'd felt all along was going to happen. I was very upset. I couldn't sleep, cried, couldn't eat. Felt it was very unfair." (Transcript pg 19)

10 Ms Ross says that she discussed with Mr Owens on several occasions her concern that there was insufficient work and was assured that there was plenty of work. She says that she felt like the company wanted to get rid of her. She says that she had felt insecure for the past 12 months.

11 Ms Ross worked out her five weeks notice, she wrote to Mr Owens regarding her redundancy [Exhibit AR 8] and received a response to this letter from Mr Owens [Exhibit AR 9]. Ms Ross says that she was not surprised that she was made redundant, but that it should have been someone else.

12 Ms Ross says that she undertook a performance appraisal on 28 September 2000 prior to her maternity leave [Exhibit AR 11] in which comments were made about her not being able to work harmoniously with others. Ms Ross says that during this time she did have problems with other staff, but it was as a result of her hormone problems and that those problems no longer existed.

13 There was no performance review carried out after she returned from maternity leave. There was a disciplinary letter written in March which she says stemmed from Ms Ross being unable to send off a report via email.

14 In mitigation Ms Ross says that she started her new position with SGS Australia on 29 July 2002 and the remuneration is roughly equivalent.

15 Under cross examination Ms Ross says that she originally provided secretarial support to Mr Owens and that this took up most of her time and that she also provided support to three Operations Managers and three engineers. In January of 2001 Ms Ross sought annual leave and maternity leave and wrote to Mr Owens to confirm this [Exhibit R1]. Ms Ross says that it was never her intention not to return to work.

16 Ms Ross had a discussion with Mr Owens on 26 September 2001 regarding a return to work, Ms Ross says that during that discussion Mr Owens advised her that there would be enough work for two secretaries, also discussed at that meeting were problems to do with her behaviour and attitude. Ms Ross says that she had problems with Ms Shannon O'Rourke an engineer and with Mr Mike Polack and Mr Hector Goss but that when she returned to work she had a good working relationship with them. She denies that in that meeting she raised with Mr Owens the possibility of a redundancy package. Ms Ross was advised by Mr Owens that she could not return to work until 9 February 2002.

17 Ms Ross says that a month's work was offered to her in December but she was unable to accept as she was not trained in the area and her husband's work had picked up and he would be away. Ms Ross denies that there was further communication with Mr Owens about Ms Ross resuming in November. Ms Ross says that there was a discussion and that she was to recommence on January 1 2002 (Transcript pg 43).

18 On 1 January 2002 there was a discussion between Ms Ross, Mr Owens and Ms Lee. Ms Ross says that discussion dealt with what the restructured Operations Assistant role would be and the fact that Ms Lee would be looking after Mr Owens. Ms Ross says there was no mention of an Executive Secretary.

19 Ms Ross says that she was looking after three Operations Managers with a salary consistent with that paid prior to her leave. She says that her status in the company diminished as she was not the Area Manager's secretary. Ms Ross denies that she had any problems with the Operations Managers upon her return.

20 Ms Ross agrees that the Ocean General departed for Vietnam in April and the Ocean Heritage to Singapore in May and that as a result the administration was reduced, and she was aware that the Ocean Bounty was heading to Melbourne and New Zealand.

21 Ms Ross says that she was shocked by her redundancy but that she had expected it. Ms Ross states that she had a few problems when she returned to work after her maternity leave as she was being asked to perform certain tasks without being consulted and that she was not happy about the way she was being treated. She put her concerns into a memorandum and forwarded it to Mr O'Neill and Mr Moore. As a result a meeting was called involving Ms Ross, Ms Lee, Ms Teenya Hoyne, Mr Moore and Mr O'Neill. At the meeting a number of issues were discussed and Ms Ross was on 14 March 2002 issued with a written conference record [Exhibit R4], which she disagrees with. She says that she had a good rapport with people she reported to and always contributed to the team. Ms Ross agrees that the task of sending reports to Houston were taken off her.

22 Ms Ross says that in regards to the reports being emailed through to Houston the following—

> "……if you read my comments and my emails it would show you why these things didn't go through or who did them. There is an explanation for every single one that came up. I had emails from Houston telling me, "Oh, yes, Andrea, we received it. I'm sorry." That doesn't get portrayed here, does it. It's just that my email didn't go through." (Transcript pg 70)

She also denies that she had problems with airline bookings and states that she had not heard of such an allegation prior to hearing.

23 Mr Owens is the Australasian Area Manager for Diamond Offshore and has been in that position for four years. He says that Ms Ross was employed as an Operations Assistant in 1999 and he says that she performed her duties in an above average fashion.

24 Ms Ross's position involved providing secretarial support to the Operations Managers and engineers, taking minutes, filing, answering telephones, making travel arrangements and providing morning reports. Mr Owens says that 90 per cent of her time was assigned to the operations group and the other 10 per cent to himself. Mr Owens travelled about 4 weeks every year when Ms Ross first came to the company.

25 Mr Owens conducted a performance appraisal in September 2000 [Exhibit AR 11]. Mr Owens states that Ms Ross had a high level of knowledge and job skills but she had problems getting along with workmates.

26 Mr Owens says that sometime in July/August 2000 Ms Ross advised him that she was pregnant. She asked him to sign a letter [Exhibit R1], and advised that she may not be able to return to work but that she would give six weeks written notice. Mr Owens next spoke to Ms Ross in July 2001 when she came into the office and requested to come back to work earlier, Mr Owens discussed a number of issues including how she did not get along with people there and advised Ms Ross to come and see him before September.

27 On 1 September 2001 Mr Owens requested from the company an Executive Secretary for himself along with other positions which were granted. Mr Owens says that the expectation of the company was that it was going to be very busy in Australia in the next few years. Mr Owens says he held a discussion with Ms Ross on 26 September 2001 and advised her that she would be in a smaller office as there was going to be an Executive Secretary and that she was returning to work as the Operations Assistant. They spoke about Ms Ross's problems with others and that she attributed this to her pregnancy. Mr Owens says that Ms Ross indicated that she wished to return to work in November 2001. Mr Owens says that another meeting was held and a start date of 2 January 2002 was agreed upon, further work was offered to Ms Ross in December 2001 which was declined.

28 Mr Owens says that as his role was expanding he needed someone that he could rely upon to make travel arrangements and handle incoming communication. He decided that the best person to fill this role was Ms Lee. In his view she demonstrated an ability to do the job whereas his opinion of Ms Ross was that she could not be trusted. He says that Ms Ross was advised of this in late September.

29 On 2 January 2002 a meeting was held between Ms Ross, Mr Owens, Ms Lee, Ms Wakefield and Mr Moore to discuss the position of Operations Assistant and Executive Secretary. Ms Ross during this meeting made a number of suggestions and two job descriptions were developed for each position. Ms Ross queried whether she would be fully employed and Mr Owens explained to her the rig market.

30 Mr Owens says that by April 2002 the company was out of the Australian market and he had a meeting with Ms Wakefield about reducing staff. It was decided that Ms Ross would be the person made redundant in the personnel department. Mr Owens says that there has been no Operations Managers in Perth since about July 2001.

31 In regards to the morning reports Mr Owens says that he would receive calls at 10 o'clock at night from the Houston office advising that the reports had not come through and he would drive into town and fax them off. He spoke to Ms Ross' supervisors and assumed that they had talked to her, the matter however became worse. He called the supervisors into his office and told them to fix the problem. He later advised them not to worry about it and his personal assistant performed the role. Mr Owens says that the reports provide information on work each rig is performing for each customer, which Mr Owens says relates to the contract that the company charges from and also gives the Houston office revenue projections.

32 Mr Owens says that Ms Lee dealt with the morning reports and that it took her 10–15 minutes to complete the task. Mr Owens says that the same morning reports were taking Ms Ross the better part of a day to perform and there were a few times that she simply forgot to do the reports. But that this issue had nothing to do with the applicant being made redundant. He says that he harbours no ill feeling towards the applicant and believes that the problems that were occurring could be worked through.

33 Mr Owens intended to advise Ms Ross as soon as the decision was made about the redundancy. Mr Owens wrote a letter to Ms Ross dated 19 April 2002 [Exhibit AR6] which he was unable to present due to being out of the country. As a result Mr Owens instructed Mr Moore to sit down with the applicant and run through the letter. Upon his return from Kuala Lumpur Mr Owens attempted unsuccessfully to speak to the applicant and later responded to correspondence from the applicant.

34 Mr Owens says that his difficulty with Ms Ross was that she was always angry and just could not get along with other people. He needed a Personal Assistant that he could communicate with and trust and that Ms Ross was not the appropriate person. Mr Owens complains that when Ms Ross was first employed she had the responsibility of booking all of his flights, which he says were forgotten and he would be at the airport without a ticket.

35 Under cross examination Mr Owens says that the redundancy payment made to Ms Ross was a standard one along with the provision of counselling. Ms Ross originally reported to the Area Manager and the Operations Managers. Mr Owens performed the performance appraisal and says that performance appraisals are conducted by whoever the person reports to or someone in the group that they report to.

36 Mr Owens says that he was looking forward to a long happy relationship with Ms Ross. He says that he never thought that the applicant was a bad employee but that she could not be trusted. In relation to the redundancy he denies that he put the option to Ms Ross but rather that she requested details of a redundancy. He says that Ms Ross came to see him around June/July 2001 inquiring about returning to work. Mr Owens provided to Ms Ross his travel schedule and advised her to come see him and talk about it. Mr Owens says that he advised Ms Ross that he needed to know as soon as possible whether she was coming back to work, and that it needed to be before September 1. He says that Ms Ross came into the office in the later part of September with a sob story about how she needed money. Mr Owens says that work was offered in November for the month of December and that Ms Ross commenced back with the company 45 days earlier than expected.

37 In regards to the reports being sent to Houston, Mr Owens says that the weekend managers were responsible for the reports being sent. He said that he had to go into the office on Saturdays, Sundays and Mondays to send reports. Mr Owens does not disagree with comments made by Ms Judy Turner in Exhibit A 4.

38 In the absence of Ms Lee Mr Owens says that he placed Jacinta in the position of Executive Secretary as his opinion of Ms Ross was that she did not get along with anybody there and that the position requires the person to get along with staff there and overseas.

39 In closing argument the respondent says that there was no breach of the *Minimum Conditions of Employment Act* and no unfairness in making Ms Ross redundant including not considering her for the role of Executive Secretary which was occupied by Ms Lee. In the respondent's view it became very clear over the course of March 2002 that there was going to be very little work for Ms Ross as rigs were to be moved from Australia and also the Operations Managers responsible for them. Her job was to provide direct support for these managers. The role of Executive Secretary had been created in the latter part of 2001 as Mr Owens had taken on an expanded role and was to be out of Australia more frequently. He then needed more assistance to handle confidential communications and liaise with the Operations Managers whilst he was overseas, and to make travel arrangements. He did not consider that he could rely on Ms Ross for these tasks, especially as there had been conflict between other staff and her in the past. The respondent says that the Executive Secretary's role was a much upgraded role to that previously undertaken by the Operations Assistant.

40 The Operations Assistant was not the only position affected; other jobs were made redundant. The respondent rejects the notion that both positions, ie Executive Assistant and Operations Assistant, should have been made redundant or that both positions should have been spilled and the occupants compete for the sole remaining job. The job requirements were different. The job descriptions are similar but the Executive Secretary's position is one where greater trust and confidentiality is required. The respondent says that the evidence is that Mr Owens had concerns as to how Ms Ross related to other staff and these concerns were made apparent to her prior to her maternity leave. He raised them again with her at their meeting in September 2001. These concerns arose again post Ms Ross' maternity leave. Ms Ross was not considered then for the Executive Secretary's position as the inherent requirements of the positions differ and Ms Ross was not suited to the latter role.

41 The respondent says also that there was no procedural unfairness in the redundancy as the applicant was advised soon after the decision was made, was offered outplacement assistance, Mr Owens tried unsuccessfully to discuss the matter with Ms Ross and Ms Ross worked out her notice and was paid a generous redundancy payment.

42 The respondent says that there is nothing in the manner of dismissal to warrant the awarding of monies for injury in any event. There is an element of distress in any termination (see *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144).

43 On behalf of the applicant Mr Kane says there were three aspects of the dismissal that were harsh, unfair or oppressive. He says firstly the employer breached section 41(1)(a) and 41(2)(a) and (b) of the *Minimum Conditions of Employment Act*. The employer simply abolished the applicant's position and made her redundant in the one action and did not consider whether Ms Lee, who was doing a similar role should have been made redundant instead based on well-founded selection criteria. There was no discussion about mitigation or ways to avoid the redundancy. The failure of the respondent to look at the comparative test and assess objectively Ms Lee and the applicant also led to the dismissal being unfair.

44 The applicant accepts that the Operations Assistant position had to be abolished due to a change in business. However, on behalf of the applicant it is said that she was dismissed as she had previously experienced hormone problems whilst pregnant. The applicant accepts that the remaining position was in the nature of a personal assistant to Mr Owens and that this should be taken into account. However, the company is still required to follow appropriate policies and procedures. Ms Lee did not meet the selection criteria for the position of Executive Secretary; Ms Ross did (she had 20 years experience in such a role). Ms Lee had only 6 or 7 months experience as an Executive Secretary; she was still learning the job. The issue of lack of trust in Ms Ross was based on previous hormone difficulties.

45 The applicant was humiliated and embarrassed due to the unfairness of the dismissal. She was surprised that she was made redundant because at that time she was busier than she had been. She was expecting ongoing employment when she returned from maternity leave. Mr Kane says that there was no evidence to suggest that Ms Ross had any difficulties with fellow

employees on her return from maternity leave. The issue of Ms Ross failing to send reports to Houston was minor and related to a technical difficulty. Ms Ross was also overlooked for acting opportunities and the receptionist was preferred instead, which the applicant says was unfair. The applicant's stress was made worse because she had raised concerns about her future security of employment and her worst case scenario had come true.

46 I am invited by both parties to prefer their evidence over the other. However, much of the evidence is common and I do not consider credibility of the evidence to be a significant factor. Albeit I do have some doubts about the consistency of Ms Ross' evidence. The greater difference between the parties is what they make of the events that occurred. Mr Owens and Ms Ross disagree as to whether redundancy was raised at their meeting in September 2001. This is not a significant point but [Exhibit R2] which is Mr Owens' record of that meeting would appear to support his view. Mr Owens says that he had difficulties with Ms Ross prior to her maternity leave other than her ability to get along with other staff. He refers to problems experienced with aeroplane bookings. The difficulties were not mentioned in Ms Ross's performance review of 28 September 2000 [Exhibit AR11].

47 The evidence that is common is that Ms Ross had performed well prior to her maternity leave in her position of secretarial support for Mr Owens and the Operations Managers. This is the case except for interpersonal difficulties she experienced with several staff which were due to hormone problems. She recommended Ms Lee to take on her position as Operations Assistant whilst she was away on maternity leave and Mr Owens agreed. Ms Lee performed well in that role albeit she was learning the job. Ms Ross attempted to return from maternity leave early and was not able to do so, firstly due to the company and then due to her own unavailability. The company experienced an upturn in business and required the assistance of two secretarial support staff. Ms Ross doubted the need for two secretarial staff but this is what occurred. Ms Lee fulfilled one of these jobs as Executive Secretary to Mr Owens, Ms Ross undertook the other job as an Operations Assistant and worked with the Operations Managers. Approximately six months later the company experienced a downturn in business in Australia and the Operations Managers had to relocate overseas. There was no longer a need for the Operations Assistant position and that job was made redundant and Ms Ross was made redundant as a consequence. There was no consideration given to retaining the services of Ms Ross and making Ms Lee redundant. There was no discussion about alternatives for Ms Ross. Other staff were made redundant at the same time. Ms Ross worked her period of notice and was paid an appropriate redundancy payment. Ms Ross gained employment shortly after her departure.

48 I consider that there can be little doubt, on the evidence, that Ms Ross was advised of her redundancy shortly after the decision was made. Mr Owens was overseas at that time but he instructed another manager to inform Ms Ross. Ms Ross says she was not told why she was made redundant. Mr Owens later sought to discuss the matter with Ms Ross but his approach was not taken up. I consider also that the evidence is clear that there was nothing harsh or oppressive about the manner of dismissal. Ms Ross worked out her notice and was offered outplacement assistance. Although Ms Ross' evidence is somewhat inconsistent on this point, on her evidence taken as a whole, she could not have been surprised about the need for redundancies. She was aware of the movement of rigs out of Australian waters and hence the need for cuts to administration. She says that she expected the redundancy and had complained that she was not sure on her return that there was enough work for two secretaries.

49 The real source of the applicant's complaint is that the respondent failed to consider and select Ms Lee for redundancy instead of Ms Ross. This is the alternative that in the applicant's mind should have been undertaken through a fair process and the failure to do so led to the dismissal being harsh, oppressive and unfair. Ms Lee had less than one year of experience as an Executive Secretary, did not fulfil the criteria in the position description, which required a greater period of experience, and certainly had less experience than Ms Ross.

50 The applicant was concerned at her treatment on return from maternity leave and this in her submission flowed through to the ultimate decision to make her redundant. There is evidence from the applicant to show that she was concerned about her treatment in terms of her office accommodation, not being consulted about work and not acting as Executive Secretary when Ms Lee was absent. She had queried whether there would be enough work for two secretarial support staff. There is no evidence to suggest that she otherwise disputed the decision to establish two separate jobs and to place her in the Operations Assistant position, where she worked for five months prior to her dismissal. It can be inferred that she was concerned about a perceived diminution of her status in the office, however, this cannot on the evidence be interpreted as some challenge at that time to not being placed in the Executive Secretary role.

51 I cover this issue because I do not consider the evidence could sustain a view that somehow the respondent had orchestrated the inevitable termination of Ms Ross' services from the time of her return from maternity leave, or perhaps somehow earlier arising from their meeting in September 2001. This point has not been argued but the submission on behalf of the applicant suggests that, in part, the source of the unfairness derived from the time Ms Ross returned to work. Clearly the respondent believed that an upturn in business would require more staff, and hence recruited these staff, and established two secretarial roles. That was the company's rightful decision. Ms Ross was placed in the Operations Assistant position seemingly without protest. It has not been argued that the respondent at that time somehow failed to comply with section 38 of the *Minimum Conditions of Employment Act* in terms of Ms Ross' placement on return from maternity leave. I do not consider such an argument could be sustained in any event. On behalf of the applicant it is submitted that there has somehow been a breach of the *Equal Employment Opportunity Act 1984*. I am absent more detail and in any event that is not for me to decide in this application. However, again I fail to see how that argument could be sustained.

52 In turn the main complaint of Mr Owens against Ms Ross is that she had difficulty getting along with other staff. He also complains that she failed to send important reports to Houston and that he did not have the required level of trust in her for what was a sensitive role as his Executive Secretary. Ms Lee performed that role prior to Ms Ross' return from maternity leave and continued in that role.

53 It is evident from that decision that Mr Owens was more comfortable at the very least with Ms Lee as his Executive Secretary than Ms Ross. I consider that it is clear on the evidence of both Ms Ross and Mr Owens that that decision related largely to the interpersonal difficulties Ms Ross had experienced with other staff. This point was specifically covered in their discussion in September 2001 concerning Ms Ross' return to work. Ms Ross had to improve in that area, notwithstanding that both Ms Ross and Mr Owens understood the difficulties to derive from hormone problems experienced by Ms Ross during her pregnancy. Mr Owens was concerned that the Executive Secretary had to take on more responsibility for sensitive communications within the office as the increase in work for the company meant that Mr Owens was overseas more frequently. Mr Owens was concerned that Ms Ross had exhibited behaviour and an attitude which would not allow her to successfully fulfil those responsibilities. That was Mr Owens' rational choice to make and the evidence supports that choice notwithstanding Ms Ross' skills and otherwise good performance as exhibited in her performance review.

54 Ms Ross on her return to work did experience further interpersonal difficulties with other staff. It was submitted that she did not experience any difficulties. Her evidence is equivocal on this point in that she denied that she experienced any difficulties with fellow staff but she does refer to some difficulties (see transcript pp 60-61). This led to a meeting to discuss the concerns

and to her receiving what was known in the company as a written conference record [Exhibits R4 and R5]. Ms Ross says that she did not agree with this assessment, but I am not convinced that she has in any way negated the assessment.

55 The respondent agrees that the position description of the two positions of Executive Secretary and Operations Assistant are similar, but says the requirements of the job differ and a higher level of trust is required of the Executive Secretary. The prime issue is the trust that Mr Owens must have in the Executive Secretary and that person's ability to deal with others in the office whilst Mr Owens is absent. On that score Mr Owens reinforced in May 2002 the decision he had taken earlier that year. He preferred Ms Lee to Ms Ross as his Executive Secretary because he believed that she could perform better on those two criteria. There is nothing in Ms Lee's performance review that suggests that she was not doing a good job; quite the contrary. She did not have the requisite years of experience but she was performing ably nevertheless, as was Ms Ross, with the exception of the doubts about her on those two criteria and the difficulty with the Houston reports. I cannot then see in all the circumstances that Mr Owens' decision to retain Ms Lee in preference to Ms Ross was somehow unjustified or so unfair as to warrant the intervention of the Commission (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). It is true that a formal assessment process was not undertaken, but this is a small office where the respondent was choosing one staff member over another. I do not find that there was a breach by the respondent of section 41 of the *Minimum Conditions of Employment Act* such as to warrant a finding of unfair dismissal. All the reasoning was not explained to Ms Ross at the time of her dismissal as Mr Owens was overseas. She rejected speaking to him on his return.

56 For these reasons I would dismiss the application.

57 Although it is not necessary to do so, I will deal with the question of injury. Both parties rightfully accept that there is distress experienced in most dismissals and that an award for injury would involve something more. The applicant maintains that but for her pregnancy she would not have been made redundant. But for the reasons expressed above I do not consider the dismissal of Ms Ross to be linked to her pregnancy. It is drawing a long bow to argue otherwise particularly as she worked for five months after her return and again experienced difficulties in the workplace. The applicant also argues that her situation was more stressful as she was stressed for a period of time and had her worst case scenario come true. Yet this was no more and no less than a case of genuine redundancy where one position was abolished and the person in that position was made redundant and correctly so. I would not be inclined to award injury in these circumstances for Ms Ross' distress and humiliation even if a case for a breach of the *Minimum Conditions of Employment Act* had been made out, which it has not (see *Nicholas Richard Lynam v Lataga* 81 WAIG 986).

2003 WAIRC 07887

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREA VALERIE ROSS, APPLICANT
	v.
	DIAMOND OFFSHORE GENERAL COMPANY, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 7 MARCH 2003
FILE NO.	APPLICATION 1133 OF 2002
CITATION NO.	2003 WAIRC 07887

Result	Application dismissed
Representation	
Applicant	Mr M Kane as agent
Respondent	Mr R H Gifford as agent

Order

HAVING heard Mr M Kane on behalf of the applicant and Mr R Gifford on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2003 WAIRC 07647

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TONY WILLIAM SCOTT, APPLICANT
	v.
	WOODSIES WINDSCREENS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 10 FEBRUARY 2003
FILE NO.	APPLICATION 1607 OF 2002
CITATION NO.	2003 WAIRC 07647

Result Dismissed
Representation
Applicant Appeared in person
Respondent Mr A'Pathy appeared on behalf of the Respondent

Reasons for Decision

(Given ex tempore as edited by the Commissioner)

1 Tony William Scott (the Applicant) applied to the Commission on 24th September 2002 for orders pursuant to Section 23A of the Industrial Relations Act 1979 (the Act) on the grounds that he ha been unfairly dismissed from employment with Woodsies Windscreens (the Respondent).

2 The Applicant had two periods of employment with the Respondent. The first came to an end in controversial circumstances. However there was a second period of employment which commenced on 5th June 2002. There also may have been another relationship categorised by the parties 'as not being on the books' before then.

3 If there was it makes no difference to the outcome of this application other than if it had been argued that a review period of 90 days, which was to commence from the 5th June 2002, was significant in the case. I do not think it is and therefore I do not need to make a finding when the relationship commenced as a matter of law. I am prepared to accept from the parties that the employment relationship I ought to examine commenced on or about the 5th June 2002.

4 The Applicant was employed as a windscreen fitter, a calling which is commonly used by the Respondent. The Respondent is a small business engaged in automotive glazing. It also restores vintage motor vehicles. This involves repairing and renovating body frames including some panel beating, replacement of electrical wiring looms and similar equipment. It employs an auto electrician for that work. That person gave evidence having been called by the Applicant in support of his case.

5 The Applicant submits that he had fallen out with the principal of the company, Mr A'Pathy, over his (the Applicant's) propensity to be argumentative about various matters. This was the source of a whole list of other problems which arose. It is claimed by the Applicant that he was treated unfairly through inappropriate allocation of work until eventually he was told that he was dismissed.

6 According to the Applicant there was no notice given. He understood that he was to leave the premises immediately and he did so. In all of the circumstances this was unfair to him. Concerning complaints about time keeping his personal circumstances, an illness of a son, had affected his ability to present for work on some occasions. He basically denied a whole litany of complaints which were made by the Respondent about him.

7 The Respondent says through the evidence of Mr A'Pathy that there was a previous employment relationship between the parties. That relationship broke down and became the subject of proceedings in this Commission. Those proceedings which were initiated by the Applicant were not successful. Ten years later when the Applicant approached Mr A'Pathy again for work Mr A'Pathy was prepared to give the relationship another go, having received assurances from the Applicant that he had changed his behaviour.

8 It seems as though Mr A'Pathy decided that in view of that past history, to have a review period. He was going to watch the Applicant's performance during that period. According to the Respondent the hope that there would be a change in the Applicant's behaviour did not transpire.

9 It is alleged by the Respondent that the Applicant was late on 41 days out of the 60 that he was employed. It was alleged that members of the public rang the Respondent and made complaints about the Applicant's driving habits. It was also alleged that he went missing on occasions and that he refused work which was offered to him late in the afternoon because it would extend his working day.

10 Eventually there was a culmination of a deteriorating relationship when the Applicant had been transferred to work in the workshop because the Respondent wanted him off the road. The Applicant approached Mr A'Pathy in the workshop and confronted him using obscene words. Mr A'Pathy did not respond in kind but acknowledged the implication of the Applicant's assertion to him in using those words.

11 Three days later Mr A'Pathy having thought about the matter decided to dismiss the Applicant. Mr A'Pathy took him aside and told him that he had a weeks notice. As far as Mr A'Pathy was concerned a weeks notice required the Applicant to attend work and perform his duties during the notice period. Notice was given on a Friday and the Respondent expected the applicant to return for work on the Monday but he did not. Of that assertion the Applicant claims he was told to leave the premises immediately.

12 There was a completely different version of events put by Mr A'Pathy about what happened at the time of dismissal. He says he gave a weeks notice and when the Applicant did not front on the Monday he rang the Applicant to check his whereabouts but could not make contact.

13 There are a number of other events that go into the mix of this relationship but for the purpose of these Reasons for Decision I do not need to recite them. There is enough material about the relationship on how it started, how it progressed and how it ended for the purpose of me reaching a decision on the matter.

14 This is a matter where it turns entirely upon the facts. The facts have been put to the Commission by the receipt of limited documentary evidence and preponderance of verbal evidence. I heard evidence from the Applicant in person and he called two witnesses on his behalf, Mr Glen James Ricketts and Mr Adam James Marmino.

15 Mr A'Pathy gave evidence on behalf of the Respondent.

16 Fundamental to determination of this application are the findings of the Commission on the credibility of witnesses. The Commission is to decide which of the two competing stories is, on the balance of probabilities, the one most likely to have occurred. The Commission cannot go behind the evidence if it accepts that the evidence given by a particular witness appears to be truthful.

17 The Applicant gave quite detailed evidence in chief and he was subject to cross examination from Mr A'Pathy on behalf of the Respondent. In terms of the assessment of evidence I think the Applicant can fairly be described as an obfuscator par excellence. It is plainly obvious the Applicant is a person who hears what he says, but does not hear what other people say. He admits to being an argumentative person and it is certainly the way he appears. In that context I conclude that this relationship began to fail.

18 The Applicant was prepared to range quite far and wide in the allegations he has made against the Respondent in an effort to support what he probably honestly believes happened to him. That does not make what he says to be true. All it says is that is a memory he has manufactured in support of the contentions that he advances in the Commission.

19 That sort of finding should not be made against someone in the absence of other evidence, but in this case there is such other evidence. The Applicant called two persons, Mr Ricketts and Mr Marmino to support his contentions. Neither of them did so in any shape or form whatsoever. In fact, their evidence was directly contrary to his in a number of critical areas to the assertions advanced by the Applicant about what happened.

20 Neither of these two men had any reason to come to the Commission and not tell the truth. I do take into account that they are still employed by the Respondent and it may be said that people in those situations might have an eye to their future, as it were, and I take that into account. Neither of these two witnesses who were quite positive about what they said gave the impression that, as the Applicant alleged in his submission, that their evidence had been choreographed. It is a serious allegation to make and I do not think what I saw and heard today would lead me to the same conclusion.

21 Their evidence is in a major sense at odds with the case of the Applicant that they were called to support. I can see no reason why I should dismiss their evidence as not being correct and have to take it into account with that rider I articulated above.

22 As for the evidence of Mr A'Pathy there is nothing in what he said or in the cross examination of him by the Applicant which would cause me to draw the conclusion that was adverse to the quality of his evidence. He seems to me to have, like many witnesses who appear in this Commission, told the story as he believed it. I accept he is credible on that basis.

23 What the Commission has to do in cases such as this is ensure that the right to terminate has not been abused on the authority of *Undercliff Nursing Home -v- Federated Miscellaneous Workers Union of Australia (1985)* 65 WAIG 385. An employer has the right to terminate and what the Commission must do in examining claims of unfair dismissal cases is ensure that there has been a fair go in the use of that right.

24 The test is a reasonably simple one. Applying the test by assessment of the evidence is not so simple. However, in this case the outcome is overwhelming that the Applicant who bears the onus of proof that he was unfairly dismissed has not discharged that onus. He has not been able to establish his contentions and the Commission can do nothing but dismiss the application.

25 In the alternative even if I am wrong about the fairness of the dismissal I find the Applicant failed to work out his notice and thereby abandoned the contract. That being the case the Commission has no jurisdiction to determine the application.

2003 WAIRC 07648

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TONY WILLIAM SCOTT, APPLICANT
	v.
	WOODSIES WINDSCREENS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 10 FEBRUARY 2003
FILE NO.	APPLICATION 1607 OF 2002
CITATION NO.	2003 WAIRC 07648

Result Dismissed

Order

HAVING heard Mr T.W. Scott on his own behalf and Mr A'Pathy on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application be, and is hereby dismissed.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2002 WAIRC 07164

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANNY SMITH, APPLICANT
	v.
	ZOULFIKAR RAHAL, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 3 DECEMBER 2002
FILE NO.	APPLICATION 1538 OF 2002
CITATION NO.	2002 WAIRC 07164

Result Application alleging denied contractual entitlements granted in part.

Representation

Applicant Mr D. Smith

Respondent Mr Z. Rahal

Reasons for Decision

(Extemporaneous)

1 On the evidence that I have before me I find as follows. I find it more likely than not that Mr Smith was employed by the partnership of Mr Rahal and another person until a date in October 2001. I then find as a fact (because Mr Rahal admits it) that Mr Rahal employed Mr Smith himself, without a partner, from that date in October 2001 until the end of Mr Smith's employment which occurred on 21 January 2002.

2 When Mr Smith was employed on 1 July 2001 all that was agreed between Mr Smith and Mr Rahal was that Mr Rahal would sign the apprenticeship paper and that Mr Smith would be paid at the rate of $316 per week, after tax, for working a 38 hour week, Monday to Friday. Nothing else was agreed. I cannot find on the evidence that there was any agreement regarding the payment of a tool allowance or a fuel allowance and nothing was said regarding annual leave or superannuation. All I have before me is some evidence from Mr Smith saying some things were discussed and the evidence of Mr Rahal that these things were not discussed. All Mr Smith is saying is once again, this is what he said happened, Mr Rahal says it did not happen. The only thing that is agreed on the evidence is what I have already indicated.

3 I then turn to the claims that are before me. The first claim is Mr Smith's claim which he says is reimbursement of underpayment of wages up to 1 January 2002. That is an amount of $878.88. In evidence, Mr Smith said that that was for working overtime. There are two issues in relation to this claim. The first is that Mr Smith says that he did work overtime, Mr Rahal says it did not occur. Even if I prefer Mr Smith's evidence, and I find it is more likely than not that he did work some additional hours, firstly, Mr Smith cannot remember what hours he worked. He cannot remember when he worked them. Secondly, there was no agreement that he would be paid anything additional in relation to working overtime. On the evidence before me, I could not with any confidence say that Mr Smith is owed $878.88. I can only conclude that that claim is not made out and accordingly it will be dismissed.

4 I turn to the second claim. The second claim is lost wages from 1 January 2002. I find on the evidence as follows. Mr Smith states that he is only claiming for the period from 1 January 2002 until 21 January 2002. Mr Smith's evidence is that he worked Monday to Friday, 38 hours per week either in the factory or on site between 1 January and 21 January 2002 excluding New Year's Day. That is his evidence. I do not believe any of the questions asked by Mr Rahal regarding him telephoning to see whether work was being done, as in any way breaking down Mr Smith's evidence. I say that because Mr Rahal, for example, said that he had called the factory many times, but when I questioned him, he mentioned a friend and when I asked him when that was, Mr Rahal said it was in February. I therefore do not take Mr Rahal's evidence as having any relevance to whether Mr Smith was working between 1 January 2002 and 21 January 2002.

5 I find on the evidence it is more likely than not that Mr Smith was working between 1 January 2002 and 21 January 2002 because to conclude otherwise would be for me to hold that Mr Smith did not attend work or did no work whatsoever between 1 January 2002 and 21 January 2002 at all and this was not suggested to him. It has not been suggested by Mr Rahal. On the evidence before me I find it more likely than not that Mr Smith did work between 1 January 2002 and 21 January 2002.

6 Mr Smith says that his claim is calculated on the basis of the fourth year apprentice rate. There is no evidence before me that there was any agreement that Mr Smith would get the fourth year rate. It may be that if the agreement was that Mr Smith would be paid whatever he was getting at his previous employer, perhaps if he had remained with his previous employer he would have got that higher rate but there is no evidence before me about that. Mr Smith has not made out his claim that he was entitled to the 4th year rate as a matter of entitlement. I do find that Mr Smith is entitled to be paid for the work between 1 January and 21 January 2002. It is also a fact as I find it that he has not been paid for that work. Mr Smith does say that he received $1,000 from a client; he kept $300 and gave $700 to Chris. On the evidence that is before me, I accept Mr Smith's evidence, so I would deduct from whatever is due that amount of $300.

7 The next claim that Mr Smith has is for payment of a tool allowance. There is no evidence before me that it was ever agreed that Mr Smith would be paid a tool allowance and that claim is not made out.

8 In relation to the fuel allowance, similarly, there is no evidence that there was any fuel allowance payable and to the extent that the claim relates to travel of 4,876 km, not only was there no evidence of an agreement in relation to that, there was no evidence from Mr Smith of any kilometres travelled and that claim is similarly not made out.

9 In relation to holiday pay, on the evidence there was nothing agreed between the parties. However, the *Minimum Conditions of Employment Act 1993* provides as a term of an employee's contract of employment an entitlement to four weeks' annual leave per year but no annual leave loading. I would find, and I do find, that it was part of the contract of employment between Mr Smith and Mr Rahal that he would get four weeks' annual leave year per year and at the time that his employment ended on 21 January 2002 he was entitled to the proportion of the year he had worked at $316 per week, nett. So that claim is made out to that extent.

10 The final matter is superannuation. Even if nothing was agreed between the paries regarding superannuation there is a Federal law that requires an employer (which in this case is the partnership to October 2001 and Mr Rahal from October to 21 January 2002) to pay superannuation. I do not have the power to enforce that. It is not part of Mr Smith's contract. His entitlement arises from the legislation. I would expect that it is due and it is to be paid, but I cannot enforce that legislation.

11 In summary therefore, I find as follows. Mr Smith has made out his claim to be paid the wages he would have earned between 1 January 2002 and 21 January 2002, not including New Year's Day, for the Monday to Friday less the $300 that he mentions at $316 per week, nett. I also find that Mr Smith is entitled to be paid the proportion of the holiday pay that was due as at 21 January 2002. That is the first part of this decision, and I think that I have explained my reasoning as to how I have come to those conclusions.

12 The second part of this decision goes to Mr Rahal's capacity to pay. Mr Rahal says, as I understand it, that when he left to go overseas on 21 December 2001, he left a factory, he left a business and he gave authority to the bank on behalf of Mr Smith for him to effectively collect money and to operate the bank account at the very least. However, when he returned he came back to nothing. He came back after 21 January 2002 and he no longer had the business and as I understand it, he says that he has none of the business' books or papers. He does not even have two houses. He was not cross-examined on that in any way that allows me to disbelieve his evidence. As to whether there are any books and papers at any accountants, that is not really a matter for me. I accept Mr Rahal's evidence so far as it goes in relation to the things that he has said.

13 The question then becomes, if, as I find, Mr Smith is entitled to be paid the wages and the annual leave, what then can be said regarding the payment of it? Mr Rahal says that he has no money. I am not prepared to make an order therefore that Mr Rahal forthwith pay Mr Smith the money that is due. I will however, make an order that firstly that the money is due. As to when Mr Rahal is to pay, I will give Mr Rahal time to pay. If I accept that Mr Rahal does not have any money, even if I was to issue an order that he pay the money straight away, quite frankly it would not be worth the paper it was written on. I propose to make an order that Mr Rahal pay Mr Smith those amounts of money but I will not make it enforceable for some period of time.

14 I am prepared to issue an order that declares Mr Smith is entitled to the money as I have found to be. I will also issue an order that adjourns Mr Smith's application.

15 If at some point in the future Mr Smith thinks circumstances have changed, then Mr Smith can ask for it to be re-listed for the order to be finalised.

2003 WAIRC 07758

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DANNY SMITH, APPLICANT
	v.
	ZOULFIKAR RAHAL, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 19 FEBRUARY 2003
FILE NO.	APPLICATION 1538 OF 2002
CITATION NO.	2003 WAIRC 07758

Result	Application alleging denied contractual entitlements granted in part.
Representation	
Applicant	Mr D. Smith
Respondent	Mr Z. Rahal

Order

HAVING HEARD Mr D. Smith on his own behalf as the applicant and Mr Z. Rahal on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

(1) DECLARES that Danny Smith has been denied the benefits under his contract of employment being wages and annual leave as set out in the schedule attached.

(2) ORDERS that the application be adjourned provided it can be re-listed at the request of Danny Smith to have the Commission issue an order that Zoulfikar Rahal pay the sums set out in this order.

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

2003 WAIRC 07666

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	JAMIE THOMSON, APPLICANT
	v.
	ST BARBARA MINES LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 11 FEBRUARY 2003
FILE NO.	APPLICATION 1655 OF 2002
CITATION NO.	2003 WAIRC 07666

Result	Dismissed
Representation	
Applicant	Ms D. Flint (of Counsel) appeared on behalf of the Applicant
Respondent	Mr R.H. Gifford appeared on behalf of the Respondent

Reasons for Decision

(Given ex tempore as edited by the Commissioner)

1 Mr Jamie Thomson the Applicant in these proceedings was employed by St Barbara Mines Limited (the Respondent). It is common ground that he was dismissed on or about 6th June 2002. It is also a fact it came to pass that an application relating to the fairness or otherwise of the Applicant's dismissal was filed before the Industrial Magistrate exercising jurisdiction under the *Workplace Agreements Act 1996*. The reason for that was the Applicant had concluded that his employment was the subject of a workplace agreement and the jurisdiction for enforcement of workplace agreements for unfair dismissal, if the workplace agreement does not include a reference to this Commission as arbitrator, is in that jurisdiction.

2 It is transpired that the putative agreement does contain such a provision hence the Applicant was on a course of action to obtain remedy where he thought, on advice, was the appropriate jurisdiction. It appears now that it was an application which should have been lodged in the Commission pursuant to Section 7G of the *Industrial Relations Act, 1979* (the Act), which section was repealed on 1st August 2002. The question before this Commission arises because after these events were discovered it was decided to file an application in this Commission. This was done on 10th October 2002.

3 The Respondent has objected to the Commission dealing with the matter because it says that Section 29(3) of the Act has application only in respect to dismissals effected subsequent to the enactment date of the enabling legislation; the *Labour Relations Reform Act 2002*, and that date was 1st August 2002. That date clearly is a date after the date of dismissal.

4 Similar matters have been before the Commission since the *Labour Relations Reform Act 2002* was proclaimed. Commissioner Kenner dealt with one of them in *Azzalini v Perth Inflight Catering (2002)* WAIRC 06766 issued on 16th October 2002. The learned Commissioner relies upon the common law presumption against retrospectivity. He notes that can be rebutted by express reference to a relevant statute or by necessary implication.

5 There is a further distinction against the presumption of retrospectivity between statutes which are procedural in character and those that confer substantive rights. Fundamentally this requires an assessment of the particular statutory provisions and the learned Commissioner did that.

6 His conclusion was that in the case where provisions are prima facie procedural in nature and have the effect of reviving the cause of action which would otherwise be barred the Courts construe such legislation as not only being procedural but affecting substantive rights and it should not be applied as being interpreted retrospectively in the absence of a clear intention that occur.

7 The learned Commissioner then analysed what had happened to the *Industrial Relations Act 1979* by the application of an *Industrial Relations Reform Act 2000.* He contended that the amendments to Section 29(2) and (3) would offend against the presumption against retrospectivity because they affect substantive rights, not merely matters of procedure. He then supported that finding by examining the effect of the *Interpretation Act 1984* and he concluded that any referral could be made within 28 days of a dismissal under Section 29(B)(1) as if the former section 29(2) had not been repealed.

8 The effect is the application then before him would be unable to be dealt with. There is another reason it could not have been dealt with and that is because there was a debate about whether there was a dismissal in any case however, I have no need to canvas that issue here. Clearly Commissioner Kenner's contention is that the *Labour Relations Reform Act 2002* should not be construed to act in a retrospective way.

9 The submissions that I have received on behalf of the Applicant argue that the *Labour Relations Reform Act 2002* should apply to all dismissals irrespective of whether they occurred before or after the date of proclamation. The centrepiece of the argument, postulated by Ms Flint, of Counsel who appeared for the Applicant, is that even if the *Labour Relations Reform Act 2002* did not apply to causes of action that had extinguished prior to proclamation, this matter is not such a case, the Applicant's cause of action has not been extinguished because he lodged a claim of unfair dismissal in the Industrial Magistrates Court prior to proclamation and therefore that preserves his right to remedy for unfair dismissal in this jurisdiction. That, I think, is the nub of the argument.

10 My views are these. I accept the expression of the law as articulated by Commissioner Kenner in *Azzalini's Case.* This does not allow that if a dismissal occurred prior to the proclamation date then somehow or other the discretion which is now vested in the Commission by the new amendment, operates.

11 The situation here is that the Commission has to decide whether the filing of the application before the Industrial Magistrate's Court gives life to the application now before me. The Commissioner has been invited to 'remit' the application now before the Industrial Magistrate to this Commission. This Commission has no discretion direct the Industrial Magistrates Court to remit this matter or any matter. The Commission can only exercise the powers in Section 27 of the Act in relation to matters which are properly before it. The matter about which I am asked to exercise a discretion to require it to be remitted to this Commission, is not before me. It is before the Industrial Magistrate pursuant to another Act of parliament. There is therefore no power for me to order the matter to be remitted.

12 The Commission only has cognisance of an application which is filed within time or such further time the Commission may grant in accordance with its Act. This is not such an application and I will have to find that the Commission has not the jurisdiction to deal with it.

13 I am nevertheless very concerned about this application. It seems to me that there is a potential injustice here to the Applicant in finding a venue to have his complaint ventilated. However, notwithstanding those deep concerns I have about that, I am unable to make any orders which would allow this Commission to deal with it.

14 There may be ways that the learned Magistrate could deal with it but that's a matter for him. An order concerning the application for an extension of time will be dismissed and the application proper will be discontinued.

2003 WAIRC 07665

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMIE THOMSON, APPLICANT
	v.
	ST BARBARA MINES LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 11 FEBRUARY 2003
FILE NO.	APPLICATION 1655 OF 2002
CITATION NO.	2003 WAIRC 07665

Result Dismissed

Order

HAVING heard Mr D. Flint (of Counsel) who appeared on behalf of the Applicant and Mr R.H. Gifford who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application for an extension of time will be dismissed and the application proper will be discontinued.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SECTION 29 (1)(b)—Notation of—

Parties		Number	Commissioner	Result
Armstrong MJ	National Fleet Services Pty Ltd (T'AS Melville Motors Subaru & Suzuki)	445/2002	HARRISON C	Discontinued
Ashworth TH	Desert Ore Contracting	1194/2002	COLEMAN CC	Dismissed
Baskeyfield IJ	Gary Clark Assured Smash Repairs	1737/2002	GREGOR C	Discontinued
Bell JL	Allerton Investments Pty Ltd	1773/2002	KENNER C	Discontinued
Black DE	Princess Margaret Hospital for Children Incorporated as trustee for Princess Margaret Hospital for Children Foundation	1265/2002	BEECH SC	Discontinued
Boase E	Biagino Lombardi Manager AVLA Pty Ltd	1738/2002	SCOTT C	Discontinued
Bogoevski A	BGC Concrete Products t/a BGC Blokpave	1463/2002	HARRISON C	Discontinued
Bower SF	Barrack Gold of Australia CEO Mr Greg Lang	1732/2002	GREGOR C	Discontinued
Boyle GM	Australian Plantation Timber Limited (ACN 054 653 057), APT Forestry Pty Ltd (ACN 008 927 731) , APT Nurseries Pty Ltd (ACN 067 553 762)	670/2002	COLEMAN CC	Discontinued
Boyle JB	Advanced CNC Machining	1420/2002	COLEMAN CC	Dismissed
Braby JR	Western Australian Cricket Association Inc	823/2002	HARRISON C	Discontinued
Brooker KL	Zest Health Club Pty Ltd	1751/2002	HARRISON C	Discontinued
Brown CW	Poly Tuff (W.A.) Pty Ltd	324/2002	BEECH SC	Discontinued
Brown SL	Jetline Holdings Pty Ltd T/As Premier Travel Centre	1858/2002	HARRISON C	Discontinued
Bujisic RJ	Dr Roy Sarmidi & Dr Tony Strangio ; Trading as "A.R 7 Day Dental Care"	454/2002	HARRISON C	Discontinued
Bulich L	Domenic Papaluca Telstra	1678/2002	HARRISON C	Order Issued
Clarke LV	R. McDonald Co. Pty Ltd	1543/2002	HARRISON C	Discontinued
Cumbers TM	City of Joondalup	1572/2002	HARRISON C	Discontinued
Dahl SM	Diadrill Mining Supplies	1877/2002	KENNER C	Discontinued
Dauwerse B	George Lullfitz T/a Lullfitz Nursery	1622/2002	KENNER C	Discontinued
Davies RJ	Volona Nominees Pty Ltd	255/2002	HARRISON C	Discontinued
Douglas ML	Hoylevans Pty Ltd t/as "Whitfords Tavern"	112/2002	HARRISON C	Discontinued
Draper G	Kiat Foo RRCM Pty Ltd Ravenswood Sanctuary	1641/2002	SCOTT C	Discontinued
Driver AJ	Jumbuck Pastoral	1611/2002	GREGOR C	Discontinued
Edhouse SK	Fresher Only	1581/2002	GREGOR C	Discontinued
Edgan S	Intercon (Interactive Concepts)	1638/2001	COLEMAN CC	Dismissed
Elliot MM	Galena Nominees Pty Ltd ABN	1319/2002	BEECH SC	Discontinued
Elsom TA	Robert Waters	1296/2002	HARRISON C	Discontinued
Erkut B	Havelock Enterprises T/A Zamia Cafe Peter Fuhrmann	1789/2002	HARRISON C	Discontinued
Fischer RE	Lesley Evans Ngnowar-Aerwah Aboriginal Corporation Administrator	494/2002	GREGOR C	Dismissed
Francis T	Nationwide Oil Pty Ltd	372/2002	HARRISON C	Discontinued
Goodlock A	J O'Shea Security	1665/2002	GREGOR C	Dismissed
Grant JW	Caslida Pty Ltd t/a Western Unit Trust t/a Archstone	1621/2002	BEECH SC	Discontinued
Harding PJ	Gosnells Metal Work Pty Ltd	1791/2002	GREGOR C	Discontinued
Halliday RW	Gemstone Exporation pty Ltd	1414/2001	COLEMAN CC	Dismissed
Harris T	Aquatic Leisure Technologies Pty Ltd	1457/2002	KENNER C	Discontinued
Haycroft GJ	First Line Petroleum	1764/2001	HARRISON C	Discontinued
Hebbard S	Mandurah Gates Resort	126/2002	HARRISON C	Discontinued

Parties		Number	Commissioner	Result
Hein SA	Takashima International Marketing Pty Ltd	1722/2002	HARRISON C	Discontinued
Hewitt KL	Boulder Kids Corner	1617/2002	KENNER C	Discontinued
Hoffman B	Alfon Pty Ltd T/as Paddington Ale House	1801/2002	KENNER C	Discontinued
Hopkins P	City of Canning	1345/2002	HARRISON C	Discontinued
Hyde P	Ingham Enterprises Pty Ltd	799/2002	HARRISON C	Discontinued
Keeley JAV	Contract Office Interiors	1697/2002	HARRISON C	Discontinued
Kelly VJ	Tangent Nominees Pty Ltd CAN 008 865 585 as Trustee for Summit Homes Group Unit Trust T/as Summit Homes	2277/2001	WOOD C	Order Issued
Lewis C	Pia Wadjari Aboriginal Corporation	1148/2002	GREGOR C	Dismissed
McDonald YE	Bywest Pty Ltd	1188/2002	KENNER C	Discontinued
McGinniskin K	Haines Norton Financial Services Pty Ltd Haines Norton Chartered Accountants	527/2002	HARRISON C	Discontinued
McLean TL	Foxtrail Pty Ltd T/as Price Attack Bunbury	595/2002	HARRISON C	Discontinued
Nelson MW	Corpheus Pty Ltd	2049/2002	GREGOR C	Order Issued
Newcomb PG	GRD Minproc	1436/2002	GREGOR C	Discontinued
Oliver LJ	Tabpoint Pty Ltd t/as Solutions IT	1666/2002	SCOTT C	Discontinued
Ooran GV	DJ Carmichael & Co Pty Ltd	1589/2002	KENNER C	Discontinued
Parker MR	Australian Plantation Timber Limited (ACN 054 653 057), APT Forestry Pty Ltd (ACN 008 927 731) , APT Nurseries Pty Ltd (ACN 067 553 762)	667/2002	COLEMAN CC	Discontinued
Pettersen SJ	Jim Catchpole	461/2002	HARRISON C	Discontinued
Pickett LS	Western Australian Aboriginal Community Controlled Health Organisation (Inc)	1567/2002	HARRISON C	Order Issued
Pishan S	Huntleigh Health Care Pty Ltd	1709/2002	GREGOR C	Discontinued
Portaro LC	Benedictione Community of New Norcia	2017/2001	HARRISON C	Discontinued
Prayad D	Gransmoor Pty Ltd T/As The Greek Taverna And Resturant	1599/2002	SCOTT C	Discontinued
Proffitt D	Ace Couriers	2110/2002	KENNER C	Discontinued
Purslow CJ	Signorina Donatelli Trading As Signorinas Beauty Clinic	1308/2002	HARRISON C	Discontinued
Rawling H	The Anglican Archbishop of Perth	719/2002	HARRISON C	Discontinued
Robertson EL	The Director of Pamerville Pty Ltd	1794/2002	KENNER C	Discontinued
Rumsley T	David Gould Forrestfield Amcal Chemist	1370/2002	HARRISON C	Discontinued
Rutherford KM	Kevin Thomas	1604/2002	BEECH SC	Discontinued
Sanders CG	Lower Great Southern Health Service	1290/2002	HARRISON C	Discontinued
Sheikh AR	Auz Hotels Pty Ltd ACN 097 361 512	1302/2002	KENNER C	Discontinued
Smith WJ	Deltam Pty Ltd Autonet Huntingdale	1407/2002	HARRISON C	Discontinued
Southam TG	Anaconda Operations Pty Ltd , Anaconda Nickel Limited	457/2002	HARRISON C	Discontinued
Stevens R	West Coast Spring Water	1852/2002	SCOTT C	Discontinued
Street TA	MacMahon Contractors Pty Ltd	1386/2002	HARRISON C	Discontinued
Takacs A	Tonic & Synergy T/A Jellybeans C.C.C. Mindarie	1873/2002	HARRISON C	Discontinued
Taylor SM	Liquorland	1787/2002	GREGOR C	Discontinued
Tetlow M	The Sports Car Garage	1448/2002	HARRISON C	Discontinued
Thomasen A	CPE Switchboards Pty Ltd	1788/2002	KENNER C	Discontinued
Thurley MJ	Wesley Music Megastore	1854/2002	COLEMAN CC	Dismissed
Turner P	Wes Operations Pty Ltd	1161/2002	KENNER C	Discontinued

Parties		Number	Commissioner	Result
Vincent J	John Wollaston & Other	1818/2002	KENNER C	Discontinued
Waldron PG	Celestial Assets Pty Ltd	1286/2002	WOOD C	Discontinued
Waugh KL	Marcon Nominees Pty Ltd ACN 008 841 558 ATF C&M Tsokos Family Trust T/A Tsokos Real Estate	1823/2002	GREGOR C	Discontinued
Winnett A	Thomas Shannon	1406/2002	GREGOR C	Discontinued
Woodard JD	Australian Plantation Timber Limited (ACN 054 653 057), APT Forestry Pty Ltd (ACN 008 927 731) , APT Nurseries Pty Ltd (ACN 067 553 762)	668/2002	COLEMAN CC	Discontinued
Wrensted PA	Brigan Pty Ltd	803/2002	BEECH SC	Discontinued

CONFERENCES—Matters arising out of—

2003 WAIRC 07668

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MIDLAND BRICK COMPANY PTY LTD, APPLICANT

v.

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, RESPONDENT

CORAM COMMISSIONER J F GREGOR

DATE MONDAY, 10 FEBRUARY 2003

FILE NO. C 228 OF 2002

CITATION NO. 2003 WAIRC 07668

Result Extension of Order

Order

WHEREAS with the consent of the parties, the Commission issued the Midland Brick (Maintenance) Order 2000 and subsequently extended the term of that Order; and

WHEREAS notwithstanding the expiry of the term of the Midland Brick (Maintenance) Order 2000, the Automotive Food Metals Engineering Printing and Kindred Industries Union of Workers Western Australian Branch and Midland Brick Company Pty Ltd have agreed to a further extension of the operation of such Order.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 with the consent of the parties, does hereby order—

THAT the Order be further extended in terms of the attached schedule to be known as the Midland Brick (Maintenance) Order 2003 with effect on and from 10 February 2003.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

1. TITLE

This Order shall be known as the Midland Brick Company (Maintenance) Order 2003.

2. ARRANGEMENT

12. Parental Leave
13. Remuneration
14. Dispute Settlement Procedure
15. Transfer to Lower Paid Duties
16. Visitation by Union Representatives
17. Not to be used as Precedent
18. Continuous Improvement
19. Notice to Employee of Significant Effect
20. No Further Claims

3. PARTIES TO THE ORDER

The parties to this Order are—

- Midland Brick Company ACN 008 674 244 of Bassett Road, Middle Swan WA 6056 ("the Company" or "the Employer");
- The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch.

4. AREA AND SCOPE

4.1 This Order relates only to the following areas/classifications of maintenance operations of Midland Brick Company Pty Ltd at Middle Swan, Western Australia—

4.1.1 Die and Core Workshop;

4.1.2 Main workshop

4.1.3 Shift and Non shift tradespersons and Trades Assistants

4.1 .4 Storepersons

4.2 This Order does not apply in respect of any employee(s) coming within the scope of the Order who;

4.2.1 is/are covered by any of the following instruments—

4.2.1.1 Workplace Agreements under the Workplace Agreement Act 1993 (WA);

4.2.1.2 Australian Workplace Agreements under the Workplace Relations Act 1996 (Commonwealth).

4.2.2 as at the date of this Order were covered by Staff Contracts

5. DATE/PERIOD AND AGREED PROCEDURE IN RELATION TO OPERATION

5.1 This Order shall come into effect on 6 February 2003 and shall continue in full force and effect, for a minimum period of 60 days, until its continued operation is brought to an end as a consequence of one of the following actions (and not otherwise)—

5.1.1 Upon one party providing 30 days written notice to the other party and the Commission of their intention for the continued operation of the Order to come to an end – provided that there shall be no ability for such notice to be provided during the first 30 days of operation of this Order (i.e. the Order is to operate for a minimum period of 60 days); or

5.1.2 In circumstances where the parties have concluded an agreement on terms and conditions to apply for the longer term future, the Commission may, with the consent of the parties, terminate the operation of the Order earlier than the expiry of the term referred to above.

5.2 Within 1 month of the expiry date of this Order the parties agree to meet to attempt to agree on the Terms and Conditions of employment to apply following the expiry of this Order.

5.3 In the event that the parties are unable to agree on the Terms and Conditions of employment to apply following the expiry of this Order, the Terms and Conditions of employees covered by this Order shall, upon the expiry of this Order, automatically and immediately revert to be in accordance with the prescription of the Metal Trades (General) Award 1966.

5.4 Notwithstanding subclause 5.1 above and any of the foregoing, it is an express term of this Order that the Terms and Conditions contained in the Order which provide employees covered by it with better rates of pay or conditions of employment than the provisions prescribed by the Metal Trades (General) Award 1966 shall immediately cease to have any effect in the event that—

5.4.1 The Company or the union party to this Order or any counterpart Federal Body (i.e. in accordance with the meaning of s.71 of the Industrial Relations Act 1979) of the union party to this order—

5.4.1.1 Initiates a bargaining period pursuant to the Workplace Relations Act (Federal), or attempts to rely on any earlier notice of initiation of bargaining period pursuant to that Act; or

5.4.1.2 Makes or causes to be made, or is a party to (whether by way of Applicant, Respondent or otherwise) any Application (to the WA Industrial Relations Commission, the Australian Industrial Relations Commission or any other Court or Tribunal), the effect of which attempts to seeks to vary any term of this Order or impose obligations upon the employer in excess of those contained in this Order.

5.4.2 Industrial Action or disputation, in any form (including but not limited to strikes or any unauthorised stoppage of work, limitations or bans, etc) occurs, save where there has been strict compliance with the Disputes Settlement Procedure.

5.5 In the event that the provisions outlined in subclause 5.4 of this Order are enacted for any reason outlined above the terms and conditions of employment applicable to any employee covered by this Order shall, where this Order prescribes a higher or better entitlement to the employee than the relevant prescription of the Metal Trades (General) Award 1966, immediately [in the case of any future entitlement(s) or from the perspective of deeming any prior entitlement(s)] revert to be strictly in accordance with the provisions of the Metal Trades (General) Award 1966 and not otherwise.

6. RELATIONSHIP TO AWARD

6.1 Provisions of Metal Trades (General) Award expressly excluded during the period of operation of this Order

6.1.1 Specific

Notwithstanding clause 6.2, below, the following provisions and/or clauses and/or subclauses of the Metal Trades (General) Award 1966 are expressly excluded from operating in conjunction with this Order, on the basis that such clauses shall have no operation or effect during the operation of this Order—

6.1.1.1 Clause 5 – Definitions and Classification Structure

6.1.1.2 Clause 7 - Higher Duties

6.1.1.3 Clause 9 - Apprentices

6.1.1.4 Clause 13 - Hours (except in relation to those subclauses specified as applying under clause 9 - Hours hereof)

6.1.1.5 Clause 14- Overtime

6.1.1.6 Clause 16 - Payment of Wages (except in relation to those subclauses specified as applying under clause 10 — Payment of Wages hereof)

6.1.1.7 Clause 17 - Time and Wages Record

6.1.1.8 Clause 18 - Special Rates and Provisions

6.1.1.9 Clause 19 - Car Allowance

6.1.1.10 Clause 20 - Fares and Travelling Time

6.1.1.11 Clause 2l - Distant Work

6.1.1.12 Clause 22 - Location Allowances

6.1.1.13 Clause 25 - Long Service Leave

6.1.1.14 Clause 26 - Representative Interviewing Employees

6.1.1.15 Clause 27- Posting of Award and Union Notices

6.1.1.16 Clause 28- Board of Reference

6.1.1.17 Clause 30 – Maternity Leave

6.1.1.18 Clause 31 - Wages and Supplementary Payments

6.1.1.19 Clause 32- Introduction of Change

6.1.1.20 Clause 32A - Redundancy

6.1.1.21 C1ause 34 - Avoidance of Industrial Disputes

6.1.1.22 All Schedules

6.1.1.23 Part 2 - Construction Work

6.1.2 General

Provided further that, any provision of the Metal Trades (General) Award relating to allowances (whether in relation to entitlement to payment, payment, or otherwise), work related or otherwise, shall be overridden by the remuneration approach outlined in this Order, and any provision requiring the employer to consult with and/or give notice(s) to the union(s), shall be overridden by a requirement for the employer to consult with and/or provide notice(s) to affected employees covered by this Order.

6.2 Subject to subclause 6.1 above, this Order shall be read in conjunction with the relevant parts of Part 1 of the Metal Trades (General) Award 1966 (‘The Award’) - that is, those parts of the Metal Trades (General) Award not excluded as a result of clause 6.1 above. Further provided that, where there is any inconsistency between a provision or provisions of this Order and a relevant (i.e. non excluded) provision or provisions of the Award (or the intent of provisions in this Order, compared to the intent of such provisions of the award), the Order shall prevail over the award to the extent of any inconsistency.

7. DEFINITIONS AND CLASSIFICATION STRUCTURE

“Automotive electrical fitter” means an employee engaged in the manufacture and repair of the starting, lighting and ignition equipment of motor vehicles (including motor cycles).

“Motor mechanic” means an employee engaged in assembling (except for the first time in Australia), making, repairing altering or testing the metal parts (including electric) of the engines or chassis of motor vehicles other than motorcycles.

8. OBLIGATION TO COMPANY

8.1 Each employee covered by this Order shall abide by the following;

8.1.1 perform all duties assigned to him or her by the Company from time to time within his or her skill, training or competence;

8.1.2 well and faithfully serve the Company and use his or her best endeavours at all times to promote the Company’s interests;

8.1.3 devote the whole of his or her time and attention during working hours to the Company’s business and the performance of the duties unless absent on leave, as provided for by this Order, or through illness or involuntary injury; comply with—

8.1.3.1 all lawful directions by the Company; and

8.1.3.2 the company’s policies and procedures as amended from time to time

8.1.4 ensure that his or her standard of conduct is at all times in accordance with good ethical standards with respect to all business dealings, involving the Company; and

8.1.5 not engage in or be concerned with any other business or occupation without the Company’s prior written consent.

8.1.6 to, at all times comply with the spirit and intent of this Order.

8.2 A breach on the part of an employee, of any of the provisions outlined in 8.1 above shall be grounds for termination of employment.

9. HOURS

(Note: Replaces clause 13 of the Award)

9.1 Day Workers

9.1.1 The hours of work pursuant to this Order shall be 38 ordinary hours per week to be worked in accordance with subclauses 13(1)(c), (d), (e) and (h) of the Metal Trades (General) Award 1966. Provided that—

9.1.1.1 Where in any particular section or area, existing employees have traditionally worked a 40 hour week/rostered day off approach, such arrangements shall continue during the period of operation of this Order; and

9.1.1.2 Such arrangement shall not apply to any employee employed after the date of this Order and/or to any employee transferred to such section or area from any other section or area (Provided such employee did not, immediately prior to such transfer, work under a 40 hour week/RDO System).

9.1.2 Meal and Rest Breaks shall be in accordance with subclauses 13(1)(f) and (g) of the Award, provided that for the purposes of this Order

9.1.2.1 the meal break taken by day workers shall be for half of one hour and shall be unpaid and.

9.1.2.2 Nothing prevents the employer and the majority of employees directly affected to agree upon any variation to the manner in which the meal break prescribed is to apply. Provided further that the Company may not allow the rest period prescribed in subclause 13(l)(g)in the event that any employee breaches any condition expressed or implied in that subclause.

9.1.3 Overtime penalties for non-shift employees shall apply as follows, for work in excess of 38 ordinary hours per week and outside of the span of ordinary hours referred to in subclause 9.1.1 above—

9.1.3.1 From Monday to Friday and Saturday until 12 noon, hours worked in excess of the ordinary hours of work shall be paid at the rate of time and a half for the first two hours and double time thereafter.

9.1.3.2 On Saturday after 12 noon and Sunday, hours worked outside of the ordinary hours of work shall be paid at the rate of double time.

9.1.3.3 On Public Holidays, hours worked during ordinary hours shall be paid at the rate of time and a half in addition to payment for the public holiday. Hours worked outside of the ordinary hours of work on a Public Holiday shall be paid at the rate of double time and a half.

9.1.3.4 For the purposes of calculating overtime payments, each day shall stand alone.

9.2 Shift Workers

9.2.1 The ordinary hours of work for shift workers (continuous or non continuous or sporadic) shall be an average of 38 per week.

9.2.2 A shift employee when on afternoon or night shift shall be paid, for such fifteen per cent more than the employee's ordinary rate prescribed by this Order.

9.2.3 Work performed on a rostered shift shall be paid for as follows—

Saturday - at the rate of time and one half.

Sunday - at the rate of time and three quarters.

Holidays - at the rate of double time.

Provided that these rates shall be paid in lieu of the shift allowances prescribed in sub-clause 9.2.2 above.

9.2.4 A continuous shift employee who is not required to work on a holiday which falls on the employee's rostered day off shall be allowed a day's leave with pay to be added to annual leave or taken at some other time if the employee so agrees.

9.2.5 Overtime Provisions for Continuous Shift Workers

9.2.5.1 Subject to sub-clause 9.2.5.2, below, all time worked in excess of or outside the ordinary working hours, or on a shift other than a rostered shift, shall be paid for at the rate of double time, except where an employee is called upon to work a sixth shift in not more than one week in any four weeks, when the employee shall be paid for such shift at time and a half for the first four hours and double time thereafter.

9.2.5.2 Time worked in excess of the ordinary working hours shall be paid for at ordinary rates—

9.2.5.2.1 if it is due to private arrangements between the employees themselves; or

9.2.5.2.2 if it does not exceed two hours and is due to a relieving employee not coming on duty at the proper time; or

9.2.5.2.3 if it is for the purpose of effecting the customary rotation of shifts.

9.2.6 Average Wage

Nothing in this Order prevents or effects the continuation of the existing practice, in relation to Shift workers, of application of the 'average wage' concept to work arrangements and payment for work performed.

9.3 10 Hour Break Between Work on Successive Days or Shifts

9.3.1 When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that an employee has at least ten consecutive hours off duty between the work of successive shifts.

9.3.2 If, on instructions of the employer, such an employee resumes or continues work without having had such ten consecutive hours off duty, the employee shall be paid at double rates until released from duty.

9.4 The employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirements.

9.5 No union party to this Order, or employee or employees covered by this Order, shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation, or restriction upon the working of overtime in accordance with the requirements of this sub-c1ause.

9.6 The provisions of this clause do not operate so as to require payment of more than double time rates, or double time and a half on a holiday prescribed under this award, for any work/shift.

10. PAYMENT OF WAGES

(Note: Replaces clause 16 of the Award)

10.1 Each employee shall be paid the appropriate rate shown in Clause 13. - Remuneration of this Order. Subject to subclause 10.2 of this clause payment shall be pro rata where less than the full week is worked.

10.2 Payment by cheque or electronic fund transfer

The employee will be paid by direct transfer into the employee's bank (or other recognised financial institution) account. Notwithstanding this provision, if the Company and the employee agrees, the employee may be paid wages by cheque.

10.3 Termination of Emp1oyment

An employee who lawfully leaves the employment or is dismissed for reasons other than misconduct shall be paid all monies due at the termination of service with the Company in accordance with subclause 16(7) and (8) of the Award.

10.4 Time and Wages Record

10.4.1 The employer will keep a time and wages record showing the name of each employee, the classification, the hours worked each day, and the remuneration paid each week.

10.4.2 The time and wages record shall be open for inspection by a duly accredited official of the union during the usual office hours, at the employer's office or other convenient place, and the official shall be allowed to take extracts therefrom.

10.4.3 Before exercising a power of inspection the representative shall give notice of not less than 24 hours to the employer.

10.4.4 Provided that nothing in this subclause shall empower a duly accredited official of the union to enter any part of the premises of the employer or view any record of an employee, pursuant to this subclause, unless the employer is the employer or former employer of a member of the Union and the employee is a member of the union and is covered by this Order.

11. LONG SERVICE LEAVE

(Note: Replaces clause 25 of The Award)

11.1 Upon this Order coming into effect, the employee shall be entitled to long service leave in respect of all continuous service (including such service prior to this Order) in accordance with the following;

11.1.1 13 weeks paid leave after 15 years continuous service, with a pro-rata entitlement to proportionate leave on termination of employment after 10 years continuous service.

11.1.2 After each further 10 years continuous service, an entitlement to 8 and 2/3 weeks pay, with a pro-rata entitlement upon termination.

11.2 The rate of pay applicable for any period(s) of long service leave shall be the ordinary time rate of pay prescribed in clause 13.2.1 of this Order.

11.3 Notwithstanding anything else within this Order, in the event the employee is dismissed for misconduct any entitlement to pro-rata long service leave shall be forfeited.

12. PARENTAL LEAVE

The employee shall be entitled to Parental Leave in accordance with Division 6 of Part 4 of the Minimum Conditions of Employment Act 1993. (Note: Such provisions replace the earlier applicable Maternity Leave prescription).

13. REMUNERATION

13.1 General

The rates of pay below include payment for all allowances, which may otherwise be required under the Metal Trades (General) Award 1966. The company may set off any allowances it is required to pay to the employee against any overaward payments [including any Company, Team and/or Individual Performance Factor payments made] made to him or her, including but not limited to any allowance for height, dirt, hot work, tools, percussion tools and confined space. Provided that any such set off(s) shall only apply to the extent that the total remuneration received by an employee covered by this Order exceeds the minimum weekly base rate of pay for the classification prescribed by the Metal Trades (General) Award 1966.

13.2 Rates of Pay

13.2.1 An employee appointed by the employer to a particular classification will be paid the rate for that classification, in accordance with the following—

Wage Group	A - Base Rate (per week)	B - Tradespersons Allowance (per week)	C -Total Rate (per week)
Trades Assistant	$442.70		$442.70
Storeperson	$444.73		$444.73
2nd Class Machinist Greaser	$459.30		$459.30
	$471.14		$471.14

Wage Group	A - Base Rate (per week)	B - Tradespersons Allowance (per week)	C -Total Rate (per week)
Mechanic	$513.29	$21.97	$535.26
Fitter	$513.29	$21.97	$535.26
Fitter/Welder	$513.29	$21.97	$535.26
Electrician	$513.29	$21.97	$535.26
Electrical Installer	$513.29	$21.97	$535.26
Hydraulic Fitter Special Class	$544.76	$21.97	$566.73
Electrician Special Class	$544.76	$21.97	$576.73

Notes: (1) The abovementioned rates include tool allowance (where previously applicable) and tradesman's allowance (Where previously applicable).

(2) Such rates have been expressed as the lowest common denominator of the rates for the classification previously applied to the employees in question, plus 3%.

13.2.2 An electronics tradesperson, an electrician special class, an electrical fitter and/or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B Grade license issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945, shall be paid an allowance of $13.20 (flat payment) per week.

13.2.3 Leading Hands

In addition to the appropriate total wage prescribed in this clause, an employee formally appointed by the employer to be a leading hand shall be paid per week the relevant all purpose allowance in accordance with the following scale:-

13.2.3.1	if directed by the employer to be in charge of not less than three and not more than ten other workers	$18.00
13.2.3.2	if directed by the employer to be in charge of more than ten and not more than twenty other workers	$27.60
13.2.3.3	if directed by the employer in charge of more than twenty other workers	$35.70

13.3 Apprentices—

(Note: Replaces clause 9 of the Award)

The minimum wage per week shall be in accordance with the following, which is expressed as a percentage of the relevant Tradesperson's base rate under as outlined in Column A of subclause

13.2.1 (as the trades allowance does not apply to apprentices);

Four Year Term	%
First year	42
Second year	55
Third year	75
Fourth year	88
Three and a Half Year Term	%
First six months	42
Next year	55
Next year	75
Final year	88
Three Year Term	%
First year	55
Second year	75
Third year	88

13.4 A casual employee shall be paid 20 per cent of the ordinary rate in addition to the ordinary rate for the calling in which he/she is employed.

14. DISPUTE SETTLEMENT PROCEDURE

(Note: Replaces clause 34 of the Award)

14.1 Should any grievance or dispute arise between an employee and the employer, they commit to confer in good faith and to resolve the matter in accordance with the following—

14.1.1 Step 1 - The matter shall first be raised for discussion with the Maintenance Manager.

14.1.2 Step 2 - If within 48 hours, or longer if the parties agree, the matter is not resolved to the satisfaction of the parties, it shall be referred to the Human Resources or Commercial Manager (or his nominee) for resolution.

14.1.3 Step 3 - If within a further 48 hours, or longer if the parties agree, the matter is still not resolved to the satisfaction of the parties, it shall be referred to the Divisional General Manager for resolution.

14.1.4 Step 4— Union Involvement

If, after a period of a further 48 hours, or longer if the parties referred to in 14.1 above agree, the matter has not been resolved, a duly accredited representative of the union party to this Order, referred to in clause 3 hereof, shall, subject t s49AB of the Industrial Relations Act 1979, have the right to enter the employer's premises during the mid-day meal break of relevant employees covered by this Order subject to subclause 14.1.6 below.

14.1.5 Step 5 - If, after the above procedure has been followed, the matter is still not resolved, it may be referred to the WA Industrial Relations Commission for determination.

14.1.6 The involvement of any union representative(s) in accordance with subclause 14.1.4 above shall be subject to the following conditions—

14.1.6.1 That he produces his authority to the gate keeper or such other person as may be appointed by the employer; and

14.1.6.2 That he interviews employees at places where they are taking their meal or at such other place as is mutually agreed; and

14.1.6.3 That if the employer alleges that a representative is interfering with his work or is creating dissatisfaction amongst his employees or is offensive in his methods or is committing a breach of any of the previous conditions, the employer may refuse the right of entry but the representative shall have the right to bring such refusal before the Western Australian Industrial Relations Commission

14.1.6.4 Provided that where certain employees are working under a system of shift work which precludes a representative from interviewing them during the mid-day meal break the representative shall have the right to enter the employers premises for the purpose of interviewing such employees at such time and und such conditions as to notice as may be mutually agreed by the representative and the employer or failing agreement at such times and under such conditions as the Western Australian Industrial Relations Commission may decide.

14.1.7 For the purposes outlined in 14.1.4 above, the employer shall make available in the Die and Core area and the Clay Transport area, a notice board, (or at the option of the employer an area on another notice board) for the union representative to post notices in relation to such meetings.

14.2 At all times during the above process, normal uninterrupted work shall continue in accordance with directions of the employer.

14.3 The provisions of the Dispute Settlement Procedure outlined above are designed to facilitate the resolution of 'on the job' type disputes only.

15. TRANSFER TO LOWER PAID DUTIES

In circumstances where the management of Midland Brick makes a decision to make an employees position redundant (e.g. through outsourcing, etc) but, rather than making the employee redundant (and terminating his/her employment), offers the employee a transfer to lower paid duties, the employee shall only have an entitlement to notice and shall then be transferred to the new position at the lower rate of pay.

16. VISITATION BY UNION REPRESENTATIVE(S)

(Note: Replaces clause 26 of the Award)

16.1 Subject to all of the matters outlined below, duly accredited representatives of the union party to this Order may attend the Midland Brick site, provided that such visits shall not exceed;

16.1.1 One joint visit by representatives of the unions party to this Order once per month; or

16.1.2 One visit by a representative of each of the union party to this Order in each two month period.

16.2 The duly accredited union representative(s) may enter the employers' premises during the midday meal break on the following conditions;

16.2.1 that he/she provides a minimum of 24 hours notice, in writing to the employer, providing details of the purpose of the visit.

16.2.2 that he/she produces his/her authority to the gatekeeper or such other person as may be appointed by the employer;

16.2.3 that he/she interviews employees at places where they are taking their meal (e.g. Die and Core lunch room); and

16.2.4 that if the employer alleges that a representative is unduly interfering with his/her work or is creating dissatisfaction amongst his/her employees or is offensive in his/her methods or is committing a breach of any previous conditions, the employer may refuse the right of entry but the representative shall have the right to bring such refusal before the Western Australian Industrial Relations Commission.

16.3 The management of Midland Brick may, at its sole discretion, from time to time vary any of the above procedure(s) to provide more favourable visitation rights to a union or union representative - as the abovementioned provision is the minimum prescription of this Order.

17. NOT TO BE USED AS PRECEDENT

This Order shall not be used, or in any way referred to, in the process of developing agreement(s), in any form (and not limited to S41), with or within any other section(s) or division(s) or operation(s) of Midland Brick Company, any other employer within the Boral Group of Companies or in any other plant workplace or enterprise.

18. CONTINUOUS IMPROVEMENT

The union party to this Order are committed to working with the employer to implement improvements in efficiency, effectiveness and profitability of all/any operational areas covered by this Order.

19. NOTIFICATION TO EMPLOYEE OF SIGNIFICANT EFFECT

(Note: Replaces clause 32 of the Award and the effect of the Minimum Conditions of Employment Act)

19.1 In this clause 'employee' does not include a casual employee or an apprentice or industrial trainee within the meaning of the Industrial Training Act 1975.

19.2 For the purposes of this clause, an action by the employer shall be regarded as having a significant effect on an employee covered by this Order if—

19.2.1 There is to be a major change in the section or area in which the employee is assigned in—

19.2.1.1 Composition, operation or size of; or

19.2.1.2 Skills required in, the employers workforce in that section or area that will affect the employee;

19.2.2 There is to be an elimination or reduction of—

19.2.2.1 A job opportunity; or

19.2.2.2 A promotion opportunity; or

19.2.2.3 Job tenure, for the employee;

19.2.3 The ordinary hours of the employees work are to significantly increase or decrease; or

19.2.4 The employee is to be required to be retrained; or

19.2.5 The employee is to be required to transfer to another job or work location; or

19.2.6 The employees job is to be restructured.

19.3 Notwithstanding sub-clause 19.2 above, significant effect does not include redundancy or any circumstances or situation likely, or perceived as likely, to result in activation of the process or procedure agreed between the parties in relation to redundancy.

19.4 Where the employer has decided to take action that is likely to have a significant effect (subject to sub-clauses 19.2 and 19.3 above) on an employee the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made by the employer of the action and discuss with the employer the matters mentioned in sub-clause 19.5 below.

19.5 Subject to sub-clauses 19.2, 19.3 and 19.4 above, the matters to be discussed are—

19.5.1 The likely effects of the action in respect of the employee; and

19.5.2 Measures that may be taken by the employee or the employer to avoid or minimise a significant effect.

19.6 Nothing in this clause or this order requires the employer, when providing information or holding a discussion pursuant to this clause to disclose information that may seriously harm the employers business undertaking or the employers interest in the carrying on or disposition, of the business undertaking.

20. NO FURTHER CLAIMS

20.1 It is an express term of this Order that the union party (including but not limited to their officials, officers, employees and members) and any employees of Midland Brick covered by this Order, shall not, during the period of operation of this Order, make any claim(s)—

20.1.1 In relation to remuneration or conditions of employment; and/or

20.1.2 To vary or amend any term or provision of this Order; and/or

20.1.3 To otherwise amend or attempt or seek to amend any aspect of this Order.

20.2 The claims referred to in 20.1 above include but are not limited to—

20.2.1 Increases in wages and/or conditions, including those which are 'over award';

20.2.2 The application of award variations in wages and/or conditions, including safety net adjustments or other matters arising by way of general order of the Western Australian Industrial Relations Commission;

20.2.3 The application of orders or decisions arising from matters before the Australian Industrial Relations Commission, including, but not limited to, safety net reviews and national wage case decisions.

2003 WAIRC 07667

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MIDLAND BRICK COMPANY PTY LTD, APPLICANT
	v.
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 10 FEBRUARY 2003
FILE NO.	C 228 OF 2002
CITATION NO.	2003 WAIRC 07667

Result Extension of Order

Order

WHEREAS with the consent of the parties, the Commission issued the Midland Brick (Maintenance - Redundancy) Order 2000 and subsequently extended the term of that Order; and

WHEREAS notwithstanding the expiry of the term of the Midland Brick (Maintenance – Redundancy) Order 2000, the Automotive Food Metals Engineering Printing and Kindred Industries Union of Workers Western Australian Branch and Midland Brick Company Pty Ltd have agreed to a further extension of the operation of such Order.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 with the consent of the parties, does hereby order—

THAT the Order be further extended in terms of the attached schedule to be known as the Midland Brick (Maintenance - Redundancy) Order 2003 with effect on and from 10 February 2003.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

SCHEDULE

1. TITLE

This Order shall be known as the Midland Brick (Maintenance - Redundancy) Order 2003.

2. ARRANGEMENT

3. PARTIES TO THE ORDER

The parties to this Order are—

- Midland Brick Company ACN 008 674 244 of Bassett Road, Middle Swan WA 6056 ("the Company" or "the Employer");
- The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch.

4. AREA AND SCOPE

4.1 This Order relates only to the following areas/classifications of maintenance operations of Midland Brick Company Pty Ltd at Middle Swan, Western Australia;

4.1.1 Die and Core Workshop;

4.1.2 Main workshop

4.1.3 Shift and Non shift tradespersons and Trades Assistants

4.1.4 Storepersons

4.2 This Order does not apply in respect of any employee(s) coming within the scope of the Order who;

4.2.1 is/are covered by any of the following instruments—

4.2.1.1 Workplace Agreements under the Workplace Agreements Act 1993 (WA);

4.2.1.2 Australian Workplace Agreements under the Workplace Relations Act 1996 (Commonwealth)

4.2.2 as at the date of this Order were covered by Staff Contracts

5. DATE/PERIOD AND AGREED PROCEDURE IN RELATION TO OPERATION

5.1 This Order shall come into effect on 6 February 2003 and shall continue in full force and effect, for a minimum period of 60 days, until its continued operation is brought to an end as a consequence of one of the following actions (and not otherwise)—

5.1.1 Upon one party providing 30 days written notice to the other party and the Commission of their intention for the continued operation of the Order to come to an end – provided that there shall be no ability for such notice to be provided during the first 30 days of operation of this Order (i.e. the Order is to operate for a minimum period of 60 days); or

5.1.2 In circumstances where the parties have concluded an agreement on terms and conditions to apply for the longer term future, the Commission may, with the consent of the parties, terminate the operation of the Order earlier than the expiry of the term referred to above.

5.2 Within 1 month of the expiry date of this Order the parties agree to meet to attempt to agree on the Terms and Conditions of employment to apply following the expiry of this Order.

5.3 In the event that the parties are unable to agree on the Terms and Conditions of employment to apply following the expiry of this Order, the Terms and Conditions of employees covered by this Order shall, upon the expiry of this Order, automatically and immediately revert to be in accordance with the prescription of the Metal Trades (General) Award 1966.

5.4 Notwithstanding subclause 5.1 above and any of the foregoing, it is an express term of this Order that the Terms and Conditions contained in the Order which provide employees covered by it with better rates of pay or conditions of employment than the provisions prescribed by the Metal Trades (General) Award 1966 shall immediately cease to have any effect in the event that—

5.4.1 The Company or the Union party to this Order or any counterpart Federal Body (i.e. in accordance with the meaning of s 71 of the Industrial Relations Act 1979) of the union party to this Order—

5.4.1.1 Initiates a bargaining period pursuant to the Workplace Relations Act (Commonwealth), or attempts to rely on any earlier notice of initiation of bargaining period pursuant to that Act; or

5.4.1.2 Makes or causes to be made, or is a party to (whether by way of Applicant, Respondent or otherwise) any proceedings or Application (in or to the WA Industrial Relations Commission, the Australian Industrial Relations Commission or any other Court or Tribunal), the effect of which attempts to seeks to vary any term of this Order or impose obligations upon the employer in excess of those contained in this Order.

5.4.2 Industrial Action or disputation, in any form (including but not limited to strikes or any unauthorised stoppage of work, limitations or bans, etc) occurs, save where there has been strict compliance with the Dispute Settlement Procedure.

5.5 In the event that the provisions outlined in subclause 5.4 above, of this Order are enacted for any reason outlined above the terms and conditions of employment applicable to any employee covered by this Order shall, where this Order prescribes a higher or better entitlement to the employee than the relevant prescription of the Metal Trades (General) Award 1966, immediately [in the case of any future entitlement(s) or from the perspective of deeming any prior entitlement(s)] revert to be strictly in accordance with the provisions of the Metal Trades (General) Award 1966 and not otherwise.

6 REDUNDANCY

6.1 In circumstances where the management of Midland Brick Company have made a definite decision that the Company no longer wishes the job an employee has being doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision leads to the termination of employment of the employee, the employer shall, at the time of termination of the employee(s) employment, pay termination entitlements to the employee in accordance with sub-clause 6.3 below.

6.2 For the avoidance of doubt, the procedure and termination entitlements outlined herein shall also apply in the case of—

6.2.1 A decision by the Management at Midland Brick Company to outsource any particular function or area; and/or

6.2.2 The termination of employment of an employee arising from a restructure of maintenance operations, including as a result of any downturn in the industry or market.

6.3 Redundancy Pay - An employee whose employment is terminated for reasons of redundancy shall be entitled to the following payment upon termination of employment—

Years of Service	A - Termination Payment	B - Notice of Pay in lieu of Notice Payment	C - Additional Payment	Total Severance (i.e. A+B+C)
Less than 1 years service	Nil	1 weeks pay		1 weeks pay
1- 2 years	2 weeks pay	2 weeks pay		4 weeks pay
2 - 3 years	4 weeks pay	2 weeks pay		6 weeks pay
3 - 4 years	6 weeks pay	3 weeks pay		9 weeks pay
4 - 5 years	8 weeks pay	3 weeks pay		11 weeks pay
5 - 6 years	8 weeks pay	4 weeks pay	1 weeks pay	13 weeks pay
6 - 7 years	8 weeks pay	4 weeks pay	1 weeks pay	13 weeks pay
7 - 8 years	8 weeks pay	4 weeks pay	1 weeks pay	13 weeks pay
8 - 9 years	8 weeks pay	4 weeks pay	1 weeks pay	13 weeks pay
9 - 10 years	9 weeks pay	4 weeks pay	1 weeks pay	14 weeks pay
10 - 11 years	10 weeks pay	4 weeks pay	2 weeks pay	16 weeks pay
11 - 12 years	11 weeks pay	4 weeks pay	2 weeks pay	17 weeks pay
12 - 13 years	12 weeks pay	4 weeks pay	2 weeks pay	18 weeks pay
13 - 14 years	13 weeks pay	4 weeks pay	2 weeks pay	19 weeks pay
14 - 15 years	14 weeks pay	4 weeks pay	2 weeks pay	20 weeks pay
15 - 16 years	15 weeks pay	4 weeks pay	3 weeks pay	22 weeks pay
16 - 17 years	16 weeks pay	4 weeks pay	3 weeks pay	23 weeks pay
17 - 18 years	17 weeks pay	4 weeks pay	3 weeks pay	24 weeks pay
18 - 19 years	18 weeks pay	4 weeks pay	3 weeks pay	25 weeks pay
19 - 20 years	19 weeks pay	4 weeks pay	3 weeks pay	26 weeks pay
20 - 21 years	20 weeks pay	4 weeks pay	3 weeks pay	27 weeks pay
21 -22 years	21 weeks pay	4 weeks pay	3 weeks pay	28 weeks pay
22 - 23 years	22 weeks pay	4 weeks pay	3 weeks pay	29 weeks pay
23 - 24 years	23 weeks pay	4 weeks pay	3 weeks pay	30 weeks pay
24 - 25 years	24 weeks pay	4 weeks pay	3 weeks pay	31 weeks pay
25 - 26 years	25 weeks pay	4 weeks pay	3 weeks pay	32 weeks pay
26 - 27 years	26 weeks pay	4 weeks pay	3 weeks pay	33 weeks pay
27 - 28 years	27 weeks pay	4 weeks pay	3 weeks pay	34 weeks pay
28 - 29 years	28 weeks pay	4 weeks pay	3 weeks pay	35 weeks pay
29 - 30 years	29 weeks pay	4 weeks pay	3 weeks pay	36 weeks pay

Notes: (1) The Notice/Pay in Lieu of Notice and Additional Payments referred to above are in lieu of any other applicable requirements as to notice.

(2) Employees who have 2 to 3, 3 to 4 or 4 to 5 years of continuous service and who are over 45 years of age will be entitled to the payment of an additional weeks pay in lieu of notice.

6.4 The parties to this Order expressly agree that the procedure prescribed hereunder shall apply, to the exclusion of any other approach, in circumstances where the Company has made a decision pursuant to sub-clauses 6.1 or 6.2 above, the effect of which will result in termination of employment of any employee(s) through redundancy—

6.4.1 Outsourcing, etc.

6.4.1.1 Should the management of the Company decide that a section or area of the maintenance operations covered by this Order is/are to be outsourced (e.g. the work is, for the future, to be sub-contracted) or closed and all employees covered by this Order in such section or area are to be made redundant, the Company shall simply inform such employees of the decision and then make payments in accordance with sub-clause 6.3 hereof to those employees at the time of termination of their employment.

6.4.1.2 In circumstances of termination of employment of any employee covered by this Order as a result of redundancy, adoption of the procedure outlined in sub-clause 6.4.1.1 above shall be regarded as fair, just and equitable.

6.4.2 Should the management of the Company decide that redundancies are to be implemented but the employment of only some employees in a particular section or area will be terminated as a result, the Company shall—

6.4.2.1 Determine without any requirement for involvement of any other party or person, the criteria to apply to the selection of those employees to have their employment terminated. In establishing such criteria, the Company shall give primary and overriding consideration to the needs of the business, including such economic considerations as the management consider appropriate (including but not limited to the cost to the Company of the likely redundancy payments to particular employees).

6.4.2.2 In the event that the selection criteria/process applied by the Company results in a number of employees in a particular section or area which fit within the 'termination criteria' exceeding the actual number of employees in that section or area which the Company is to make redundant and all other things (including the cost to the Company of redundancy payments for such employees), in the opinion of the management of the Company, being equal (although considered unlikely by management), the Company is to—

6.4.2.2.1 Ask for volunteers for redundancy from the employees falling within the 'termination criteria' in the particular section or area in question; and

6.4 2.2.2 In the event of there being more or less volunteers from the particular section or area in question than the number of employees the Company is to make redundant, select the employees to be made redundant; and

6.4.2.2.3 Give effect to the terminations of employment in the same manner as prescribed by sub-clause 6.4.1 of this clause; and

6.4.2.2.4 Subsequently inform the union party to this Order, where applicable, of the number of employees terminated and their names and classifications.

6.4.3 In the context of this clause, "section" or "area" shall mean the section or area in which an employee likely to be subject to termination of employment through redundancy has been working in the fortnightly period immediately preceding the decision being made by management pursuant to this clause.

6.4.4 The procedures outlined herein shall not be subject to any amendment as a result of any action (including further Order of the Commission) occurring during the term of this Order.

6.5 An employee affected by a decision of management in accordance with sub-clause 6.1 hereof shall have no entitlement to payment in accordance with the schedule outlined in sub-clause 6.3 above in the following circumstances where the employer locates suitable alternative employment for the employee with another employer.

In such cases, the employee shall only be entitled to notice in accordance with the provisions of the Workplace Relations Act 1996.

6.6 Employee Leaving During Notice

An employee whose employment is to be terminated for reasons set out in sub-clause 6.1 of this clause may terminate employment during the period of notice and, if so, shall be entitled to the same benefits and payments under this clause had the employee remained with the employer until the expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice.

6.7 Time Off During Notice Period

6.7.1 During the period of notice of termination of employment given by an employer, an employee whose employment is to be terminated for reasons set out in sub-clause 6.1 of this clause that employee shall for the purpose of seeking other employment shall be entitled to be absent from work during each week of notice up to a maximum of eight ordinary hours without deduction of pay.

6.7.2 If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or the employee shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

6.8 Superannuation Benefits

6.8.1 Subject to further Order of the Commission where an employee, who is terminated receives a benefit from a superannuation scheme, the employee shall only receive under sub-clause 6.3 of this clause the difference between the severance pay specified in that sub-clause and the amount of the superannuation benefit the employee receives which is attributable to employer contributions only.

6.8.2 If the superannuation benefit is greater than the amount due under sub-clause 6.3 of this clause then the employee shall receive no payment under that sub-clause.

6.8.3 Provided that benefits arising directly or indirectly from contributions made by an employer in accordance with an award, agreement or Order made or registered under the Industrial Relations Act, 1979 shall not be taken into account unless the Commission so Orders in a particular case.

6.9 Employees With Less Than One Year's Service

This clause shall not apply to employees with less than one year's continuous service and the general obligation on the employer should be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity and to take such steps as may be reasonable to facilitate the obtaining by the employees of suitable alternative employment.

6.10 Employees Exempted

This clause shall not apply where employment is terminated as a consequence of conduct that justified instant dismissal including malingering, inefficiency or neglect of duty or in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specified task or tasks.

6.11 Incapacity to Pay

The employer, in a particular redundancy case may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

2003 WAIRC 07816

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION) WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS AND HON ATTORNEY GENERAL
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 28 FEBRUARY 2003
FILE NO.	C 186 OF 2002
CITATION NO.	2003 WAIRC 07816

Result	Order issued
Representation	
Hon Attorney General:	Mr T. Connolly, Mr N. Cinquina
WA Prison Officers' Union of Workers:	Mr D.R. Seal, Mr P. Giblett

Order

WHEREAS the Commission has called a conference on its own motion between the Hon Attorney General and the Western Australian Prison Officers' Union of Workers;

AND WHEREAS the Commission identified two areas of dispute between the parties namely:

(1) The functions to be maintained and the procedures to be implemented at Hakea Prison in the event of a shortfall of staff on the roster; and

(2) The implementation at Hakea Prison of the staffing profile in accordance with the agreement between the union and the Department registered in the Commission in C 103 of 2002 and the development of the new roster accordingly.

AND WHEREAS the parties negotiated under the Chairmanship of the Commission and reached two agreements in relation to the two disputes set out above;

AND WHEREAS the Commission considers that an order in the terms of the dispute resolution procedure agreed between the parties at Hakea Prison ought issue pursuant to s.44(8)(a) of the Act;

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

(1) THAT this order shall be known as the Hakea Prison Dispute Settlement Procedure Order.

(2) THAT this order applies to the Hon Attorney General and the Western Australian Prison Officers' Union at Hakea Prison.

(3) THAT in lieu of the provisions in Clause 38(2) Stage 1 of the *Gaol Officers Award 1998 No 12 of 1968* the following procedure shall apply to any grievance, complaint, dispute or any matter as raised by the Hakea branch of the union or the Hakea Departmental Management in relation to the agreement of part 4(a) of proceedings in C 186 of 2002 including the facilitation and implementation of the agreement or the definitions contained within the agreement.

(4) (a) Hakea Prison Management, in company with the Senior Officer Operations shall complete the daily reallocating of staff as specified within the 'Staff Shortfall/Redeployment Procedure' document, ensuring that the prison is functioning prior to providing representation for the dispute resolution process as described below.

(b) Representation shall be made on behalf of Hakea Prison management through the Superintendent's delegate. Representation shall be made on behalf of the Hakea Branch through one duly elected Branch representative.

(c) Discussion shall then occur between the parties as described in point (b) above in an attempt to resolve disputed issues. At all times the 'Staff Shortfall/Redeployment Procedure' document will be referred to as the basis for these discussions. If not resolved—

(d) The Superintendent shall meet with the parties as described in point (c) above along with a representative from the disputed area/areas and a Hakea Management representative from the disputed area/areas to discuss the issues. If not resolved—

(e) The matter may be referred through to the Hakea Branch Committee of the Union and/or Hakea Executive in an attempt to seek resolution. If not resolved—

(f) The matter progresses to stage 2 of Clause 38(2) of the *Gaol Officer's Award 1998 No 12 of 1968*.

(5) THAT application C 186 of 2002 otherwise be hereby discontinued.

(Sgd.) A. R. BEECH,
Senior Commissioner.

[L.S.]

CORRECTIONS—

2003 WAIRC 07896

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IHAAN ADRIANSZ, APPELLANT
	- and -
	EPATH WA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 7 MARCH 2003
FILE NO/S.	FBA 48 OF 2002
CITATION NO.	2003 WAIRC 07896

Decision	Order made by the Full Bench corrected
Appearances	
Appellant	Mr T H F Caspersz (of Counsel), by leave
Respondent	Dr J J Edelman (of Counsel), by leave

Correcting Order

This matter having come on for hearing before the Full Bench on the 7th day of March 2003, and having heard Mr T H F Caspersz (of Counsel), by leave, on behalf of the appellant, and Dr J J Edelman (of Counsel), by leave, on behalf of the respondent and the Full Bench having determined that the order of the Full Bench in appeal No. FBA 48 of 2002 given on 21 February 2003 and deposited in the Registry of the Commission on 24 February 2003 be corrected and that reasons for such decision will issue at a future date, and the parties herein having waived their rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 7th day of March 2003, ordered as follows:-

THAT the order of the Full Bench in appeal No. FBA 48 of 2002 given on 21 February 2003 and deposited in the Registry of the Commission on 24 February 2003, be and is hereby corrected by deleting the figure "$4583.33" in the 7th line of Order (2) thereof and substituting therefor the figure "$2665.39".

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

PROCEDURAL DIRECTIONS AND ORDERS—

2003 WAIRC 07555

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 976 OF 2002
CITATION NO.	2003 WAIRC 07555

Result	Matter divided
Representation	
Applicant	Mr J Welch
Respondent	Mr A Harper on behalf of the DOCEP

Order

HAVING HEARD Mr J Welch on behalf of the applicant and Mr A Harper on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be divided into Parts A and B pursuant to section 27(1)(s) of the Act.

(Sgd.) W. S. COLEMAN,

[L.S.] Chief Commissioner.

2003 WAIRC 07511

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BELMONT PARK MOTEL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 981 OF 2002
CITATION NO.	2003 WAIRC 07511

Result	Matter divided
Representation	
Applicant	Mr J Welch
Respondents	Ms S Laferla on behalf of CCIWA
	Mr D Crowe on behalf of the AHA

Order

HAVING HEARD Mr J Welch on behalf of the applicant and Ms S Laferla and Mr D Crowe on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be divided into Parts A and B pursuant to section 27(1)(s) of the Act.

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

2003 WAIRC 07517

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	SHERATON HOTEL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 989 OF 2002
CITATION NO.	2003 WAIRC 07517

Result	Matter divided
Representation	
Applicant	Mr J Welch
Respondents	Ms S Laferla on behalf of CCIWA
	Mr D Crowe on behalf of AHA

Order

HAVING HEARD Mr J Welch on behalf of the applicant and Ms S Laferla and Mr D Crowe on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be divided into Parts A and B pursuant to section 27(1)(s) of the Act.

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

2003 WAIRC 07522

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	KALAMUNDA CLUB (INC) & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 28 JANUARY 2003
FILE NO.	APPLICATION 1014 OF 2002
CITATION NO.	2003 WAIRC 07522

Result	Matter divided
Representation	
Applicant	Mr J Welch
Respondents	Ms S Laferla on behalf of CCIWA Mr D Crowe on behalf of AHA Mr P Seaman on behalf of Clubs WA

Order

HAVING HEARD Mr J Welch on behalf of the applicant and Ms S Laferla and Mr D Crowe on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be divided into Parts A and B pursuant to section 27(1)(s) of the Act.

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

PUBLIC SERVICE APPEAL BOARD—

2003 WAIRC 07789

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT KAY, APPELLANT *v.* DIRECTOR GENERAL OF TRANSPORT, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD CHAIRPERSON - COMMISSIONER P E SCOTT
DATE OF ORDER	FRIDAY, 21 FEBRUARY 2003
FILE NO/S.	PSAB 12 OF 2000
CITATION NO.	2003 WAIRC 07789

Result	Appeal to the Public Service Appeal Board withdrawn by leave

Order

WHEREAS this is an appeal pursuant to section 80I the Industrial Relations Act 1979; and

WHEREAS on the 17th day of January 2003 the Appellant's representative file a Notice of Discontinuance in relation to the application; and

WHEREAS on the 22nd day of January 2003 the Respondent consented to the matter being withdrawn;

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

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

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.
on behalf of the
Public Service Appeal Board

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 10/2001	Andrew Peter Wilson and Others	Family and Children's Services	Scott C.	Dismissed	10/03/03
PSA 5 of 2002	Wendy Jayne Vanroosmalen	Board of Management of Swan Health Service	Scott C.	Withdrawn by Leave	28/02/03
PSA 6 of 2002	Irene Kowalski	Board of Management of Swan Health Service	Scott C.	Withdrawn by Leave	28/02/03