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INDUSTRIAL APPEAL COURT—Appeals against decision of Commission in Court Session—

[2003] WASCA 102

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	BURSWOOD RESORT (MANAGEMENT) LTD -v- AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS' UNION, WESTERN AUSTRALIAN BRANCH [2003] WASCA 102
CORAM	:	SCOTT J (DEPUTY PRESIDING JUDGE) HASLUCK J MCLURE J
HEARD	:	1 APRIL 2003
DELIVERED	:	13 MAY 2003
FILE NO/S.	:	IAC 1 of 2003
BETWEEN	:	BURSWOOD RESORT (MANAGEMENT) LTD Appellant AND AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS' UNION, WESTERN AUSTRALIAN BRANCH Respondent

Catchwords—

Industrial law - Western Australia - *Industrial Relations Act 1979* (WA), s 41(6) - Clause 45 of Burswood International Resort Casino Employees' Industrial Agreement 2001AG 169 of 2001 - Whether cl 45 is repugnant or inconsistent with s 41(6) - Whether 2001 Agreement continued in force after nominal expiry date - Whether Commission had jurisdiction to make award - Section 41(6) extends agreement to avoid a gap between expiry of agreement and replacement

Legislation—

Industrial Relations Act 1979 (WA), s 27(1)(a)(ii), s 41, s 41(6), s 41(7), s 41(8), s 41(9), s 42, s 83, s 90(1)(b), s 114

Labour Relations Reform Act 2002 (WA)

Result—

Application dismissed

Category: B

Representation—

Counsel—

Appellant	:	Mr R L Le Miere QC
Respondent	:	Mr D H Schapper & Mr D J Kelly

Solicitors—

Appellant	:	Clayton Utz
Respondent	:	Derek Schapper

Case(s) referred to in judgment(s)—

A v Hayden (1984) 156 CLR 532

ALHMWU v Burswood (No 1) [2002] WAIRC 05952; 82 WAIG 2112

Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch v Burswood Resort (Management) Ltd [2002] WAIRC 05952

Bond v Larobi Pty Ltd (1992) 6 WAR 489

Burswood Catering and Entertainment Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch [2002] WASCA 354

Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch [2002] WASCA 355

Electrical Trades Union of Australia, New South Wales Branch v Nationwide News (1995) 92 IR 365

Felton v Mulligan (1971) 124 CLR 367

Gerraty v McGavin (1914) 18 CLR 152

Lieberman v Morris (1944) 69 CLR 69

Case(s) also cited—

Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch v Burswood Resort (Management) Ltd [2002] WAIRC 06347; 82 WAIG 4994

Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch and the Hospital Salaried Officers Association of Western Australia (Union of Workers) v Activ Foundation (Inc) [2000] WAIRC 00472; 80 WAIG 4994

Griffin Coal Mining Co Ltd v The Coal Miners Industrial Union of Workers of Western Australia [2000] WASC 107

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1 **SCOTT J (DEPUTY PRESIDING JUDGE)**: This is an appeal from the Commission in Court Session of the Western Australian Industrial Relations Commission delivered on 17 December 2002. By that decision the Commission in Court Session made the Burswood International Resort Casino Employees Award 2002 ("the award") in substitution for the Burswood International Resort Casino Employees Industrial Agreement 2001 ("the 2001 Agreement") and the Burswood Island Resort Employees Award of 1985.

2 The legal proceedings between the appellant and respondent have a long and complex history. This is the third occasion upon which disputes between the parties have been considered by the Industrial Appeal Court.

3 The first of those appeals was the subject of decision in ***Burswood Catering and Entertainment Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch*** [2002] WASCA 354. That decision involved a different appellant to the present. The appellant in that case was part of the Burswood Group. That case involved a challenge to the issue of an award to cover the employees of the appellant. The Industrial Appeal Court held that the Commission in Court Session was not in error in making that award. It is not necessary to revisit that matter in any detail for the purposes of this appeal.

4 The next appeal, which involved this appellant, concerned a challenge to the jurisdiction of the Industrial Relations Commission to hear an application for an award to replace the 2001 Agreement. The application for that award was lodged with the Industrial Relations Commission on 10 July 2002, 10 days after the expiry of the 2001 Agreement. That agreement provided for its expiry on 30 June 2002. That appeal was heard by Scott J (Deputy Presiding Judge), Hasluck and Heenan JJ and the Court decided that the Commission had jurisdiction to hear the application for the award. That decision in ***Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch*** [2002] WASCA 355 was delivered on 18 December 2002, the day after the award presently under consideration was made by the Commission in Court Session. I would comment in passing that it was surprising that the Commission in Court Session made the award at a time when a decision in relation to its jurisdiction to do so was being considered by the Industrial Appeal Court. That having been said, however, as the Industrial Appeal Court unanimously determined that the Commission had jurisdiction to consider the application for the new award, no injustice has been caused. As will become apparent in the course of these reasons, the manner in which the 2001 agreement was replaced by the award is a matter of controversy.

5 The notice of appeal to this Court appeals against the whole of the decision of the Commission in Court Session below on the ground that—

The Commission in Court Session erred in law by wrongly construing or interpreting s 41(6) of the *Industrial Relations Act 1979* ("the Act") and cl 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 ("the 2001 Agreement") by—

(a) holding that cl 45 of the 2001 agreement is, in part, repugnant to and inconsistent with s 41(6) of the Act; and

(b) concluding that cl 45 of the 2001 Agreement does not preclude a party from seeking a new award whilst the 2001 Agreement continues in force.

6 The appellant in this appeal seeks to have the decision of the Commission in Court Session quashed and the application for the award dismissed.

7 The appeal to this Court lies under s 90 of the *Industrial Relations Act 1979* ("the *Industrial Relations Act*") which provides—

"**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.

(2) An appeal under this section shall be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted—

(a) by any party to the proceedings wherein the decision was made; or

(b) by any other person who was an intervener in those proceedings.

(3) On the hearing of the appeal the Court may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of appeal and may remit the matter to the President, the Full Bench, or the Commission in Court Session, as the case requires, for further hearing and determination according to law.

(3a) If any ground of the appeal is made out but the Court is satisfied that no injustice has been suffered by the appellant or a person who is a member of or represented by the appellant, the Court shall confirm the decision the subject of appeal unless it considers that there is good reason not to do so.

(4) The Court may at any time, if it considers that to do so will not prejudice any party to an appeal under this section—

(a) correct clerical mistakes in its judgments or orders, or errors arising in its judgments or orders from accidental slips or omissions; and

(b) generally correct any minor irregularities in its proceedings."

8 Counsel for the appellant contends that this Court has jurisdiction to deal with the matter because it is said that the decision of the Commission in Court Session was erroneous in law in that there had been an error in the construction or interpretation of s 41(6) of the *Industrial Relations Act* and also cl 45 of the 2001 Agreement.

9 It should also be mentioned as part of the history of this application that on 8 March 2002 the respondent applied for a new award during the term of the 2001 Agreement. A preliminary point was taken in the Industrial Relations Commission that the Commission had no jurisdiction to determine the claim because of the operation of cl 45 of the 2001 Agreement which is set out later in these reasons. The Commission in Court Session determined that whilst it had jurisdiction to hear and determine the claim, it should not do so in the public interest whilst the 2001 Agreement was still in its term. It is not necessary to refer in any greater detail to that decision of the Commission in Court Session: ***ALHMWU v Burswood (No 1)*** [2002] WAIRC 05952; 82 WAIG 2112.

10 As I have already indicated, shortly after the 2001 Agreement expired the respondent to this appeal lodged a second application for a new award which resulted in the decision of the Commission in Court Session which is the subject of the present appeal.

11 As can be seen from these reasons already, central to the appeal is the construction of s 41 of the *Industrial Relations Act* and, in particular, s 41(5) s 41(6), s 41(7), s 41(8) and s 41(9). Those sections provide—

"(5) An industrial agreement shall operate—

(a) in the area specified therein; and

(b) for the term specified therein.

(6) Notwithstanding the expiry of the term of an industrial agreement, it shall, subject to this Act, continue in force in respect of all parties thereto, except those who retire therefrom, until a new agreement or an award in substitution for the first-mentioned agreement has been made.

(7) At any time after, or not more than 30 days before, the expiry of an industrial agreement any party thereto may file in the office of the Registrar a notice in the prescribed form signifying his intention to retire therefrom at the expiration of 30 days from the date of such filing, and such party shall on the expiration of that period cease to be a party to the agreement.

(8) When a new industrial agreement is made and registered, or an award or enterprise order is made, in substitution for an industrial agreement ('**the first agreement**'), the first agreement is taken to be cancelled, except to the extent that the new industrial agreement, award or order saves the provisions of the first agreement.

(9) To the extent that an industrial agreement is contrary to or inconsistent with an award, the industrial agreement prevails unless the agreement expressly provides otherwise."

12 The other matter central to the appeal is cl 45 of the 2001 Agreement which provides—

"**45. NO EXTRA CLAIMS**

The company and the union agree that there will be no extra claims for the term of this agreement and whilst it continues in force."

13 Counsel for the appellant contends that by reason of the provisions of s 41(6) of the *Industrial Relations Act* the 2001 Agreement continued in force notwithstanding its expiry so that cl 45 of the 2001 Agreement prevented any extra claims from being made until such time as a party or parties retired from it. It was submitted that, as no party had retired from the 2001 Agreement, s 41(6) continued the agreement in force. It follows, so counsel said, that the Commission had no jurisdiction to make the award the subject of the present appeal.

14 In support of that contention, senior counsel for the appellant referred to the majority judgment of Hasluck and Heenan JJ in ***Burswood Resort (Management) Ltd v ALHMWU*** (*supra*) and in particular the judgment of Hasluck J (with whom Heenan J agreed) at [58] and [59]—

"58 I see considerable force in the submissions made by counsel for the appellant. In my view, the effect of s 41(6) of the Act is to keep in force the 2001 Agreement until such time as a party to it retires from the agreement in the manner provided for by s 41(7) of the Act. It follows from earlier discussion that such a construction appears to be consistent with the scheme of the legislation.

59 When an award or an industrial agreement comes into effect both parties should be able to assume that the relevant arrangements will continue to apply until new arrangements are made in accordance with the prescribed procedure. In many cases, a new agreement will have been negotiated before the former agreement expires. In such a case, upon retirement from the existing agreement, the new agreement will come into effect immediately. If a new agreement cannot be negotiated, as in the present case, the relationship between the parties will be controlled by an underlying award. This will protect the position

> of the employee if it becomes necessary to retire from the existing agreement in the manner contemplated by s 41(7) of the Act in order to apply for a new award."

15 The first thing that should be said about that passage is that it was not necessary for the decision. As I have said, each of the Judges in that matter agreed that the Commission had jurisdiction to deal with the application for the award.

16 One question that falls for consideration in this appeal is whether there is any inconsistency between cl 45 of the 2001 Agreement and s 41(6) of the *Industrial Relations Act*. In my view, there is no inconsistency. As I said in ***Burswood Resort (Management) Ltd v ALHMWU*** (*supra*)—

> "In my opinion, s 41(6) of the *Industrial Relations Act* serves two purposes, namely—
>
> (1) that it extends the operation of an industrial agreement beyond its expiry date in circumstances where the parties have not retired therefrom until a new agreement or award has been made. In other words, the agreement does not expire on its termination, but continues until it is replaced by any one of the methods contemplated by the section.
>
> (2) To act as a transitional provision governing the parties' relationship between the expiration of the agreement and the time when a new agreement or award is made. The section acts as a transitional provision which is reflected in s 41(8) set out earlier in these reasons. The effect of that subsection is, that once either the new industrial agreement, new award, or new enterprise order replaces the existing industrial agreement, then the earlier agreement is taken to be cancelled, except to the extent that the new agreement, award or order preserves any of the provisions of the earlier agreement."

17 The way in which the argument for the appellant was advanced, there is no reason for a fixed term in the agreement. The submission is that the agreement runs on indefinitely until one of the parties retires therefrom pursuant to s 41(6) of the *Industrial Relations Act*. In my view, such a construction is untenable. It should be borne in mind that the 2001 Agreement provided for such things as rates of remuneration and hours and conditions of work. In the context of Industrial Relations legislation it is difficult to accept that the parties would tie themselves to an agreement on an indefinite basis. As I said in the judgment to which I have just referred, it is consistent with the underlying philosophy of the Act that the parties enter into an agreement only for a fixed term. The reason why s 41(6) extends the term is to avoid any gap between the expiry of the agreement and its replacement either with a new agreement or an award. In this case the respondent pursued an award to replace the 2001 Agreement. Upon the coming into operation of that award pursuant to s 41(8) of the *Industrial Relations Act* set out earlier in these reasons, the 2001 Agreement was thereby cancelled.

18 Although it is not necessary to reach any concluded view as to the correct construction of cl 45 of the 2001 Agreement, it may be possible to construe that clause by reference to the underlying intention of the parties.

19 One possibility is that the clause may be construed to mean that during the term of the agreement and any statutory extension thereof, the parties agree to be bound by, and abide by, the provisions of the agreement. In that sense the clause would mean that the parties would be unable to seek any variation of, or additions to, the agreement whilst it is in force either during its term or during any statutory extension.

20 As I have already said, it is not necessary to reach any concluded view on the proper construction of the clause in these proceedings. If the view which I have just expressed is the correct construction of the clause, then it would preclude any of the parties from seeking a variation of or addition to the agreement during its term. It would not, however, prevent negotiations for a new award or agreement during the term of the agreement.

21 In expressing these views as to the possible construction of cl 45, I accept that it involves straining the language of the clause. However, bearing in mind that counsel have said that the agreement was drawn up by lay parties, it is at least possible that the clause, although inelegantly worded, could ultimately be determined to have that meaning.

22 The effect of construing the Act and the agreement in this way is that the terms and conditions of the employees governed by the 2001 Agreement would continue to be governed either by the 2001 Agreement or the new award. Those employees would not be forced to return to any underlying award even if such an award continued to exist.

23 It is also to be noted that under s 41(5) set out earlier in these reasons the two essential matters required for every industrial agreement are that—

> 1. There is an area specified; and
> 2. There is a term specified.

24 In my opinion, it is clear from that provision that the legislation did not contemplate that there should be an agreement of indefinite term. It would be inconsistent with the underlying philosophy of the *Industrial Relations Act* that workers should be tied to agreements without recourse to the Industrial Arbitration Commission for indefinite periods. For that reason, in my opinion, the legislature provided that an industrial agreement could only be for a finite term. As I have also said, to avoid any gap between the expiration of that term and the coming into operation of the new arrangement to replace the industrial agreement, s 41(6) operates so as to continue the agreement in force, notwithstanding its expiry, until such time as it is replaced by one of the methods referred to in that subsection.

25 Counsel for the appellant also contended that the word "claims" in cl 45 should be construed so as to mean a formal claim made in the Industrial Relations Commission. It was contended that negotiations between the appellant and respondent would not breach the clause because those negotiations would not constitute "claims" within the meaning of that clause. In support of that contention counsel for the appellant referred to ***Electrical Trades Union of Australia, New South Wales Branch v Nationwide News*** (1995) 92 IR 365 ("ETU"). That case involved an industrial agreement which provided for various wage increases throughout its life and ultimately with an expiry date of 1 July 1996. The no extra claims clause in that agreement provided—

> "During the period of this agreement from 1 January 1995 to 1 July 1996 it is agreed that neither party will pursue additional claims outside the terms of this agreement."

26 It is to be noted that there is a distinction to be drawn between the clause in that case and the clause in this. In this case there is no reference to "pursuing" additional claims, although that distinction may be of little importance.

27 In the ***ETU*** case the New South Wales Industrial Relations Commission held—

> "The ETU argues that the no extra claims commitment contained in the various accord Mark VII agreements only restricts claims to subject matters which are provided for, in terms, in those agreements. It is argued that the issue of changed rosters of ETU members at Chullora is a local matter extraneous to the Accord agreements and is not prohibited by the commitment from being pursued. In support of its argument the ETU refers to a willingness of the employer to discuss with the unions, during the currency of the Accord agreements, various industrial matters and to implement agreements consequently reached.

> This argument cannot be accepted, if for no other reason than that the commitment is not directed towards stifling discussion and agreement as to industrial matters, but rather to prohibiting the pressing of unauthorised claims against the will of the other party.
>
> In our view, perusal of the terms of the agreements discloses the clear intention of the parties that claims as to matters not specifically authorised by those agreements as being available for further negotiation are prohibited from being pressed against an unwilling party either in the context of industrial action or in arbitral proceedings."

28 In that case the Industrial Relations Commission held that the agreements prevented the pursuit of the claims that were then being sought during the currency of the agreement. In my view, that decision is of no help to the appellants. The parties in this case selected a **term** for the 2001 Agreement. That term, as I have already indicated, expired on 30 June 2002. I accept that it was not possible for the respondent to have made further claims against the appellant in relation to matters covered by the agreement until its expiry. I express no view, because it is unnecessary to do so, as to whether claims for matters falling outside the agreement could be pursued during its term.

29 Importantly, in my opinion, the application for the present award was made by the respondent after the expiry of the term.

30 As McLure J said in the course of argument, the correct approach to this problem is to construe the Act first and then consider the agreement. I agree with that approach.

31 In this case, in my opinion, s 41(6) of the *Industrial Relations Act* is, as I said in the previous judgment in this matter, is designed to avoid a gap between the expiry of an agreement and the coming into existence of a new industrial agreement, award or order to replace it. If there was no such provision, then there would be a real possibility that employees could be paid lower rates of pay and enjoy different terms of employment during the period between the expiry of the agreement and the coming into operation of the replacement award, order or industrial agreement. That is a possibility which, in my view, this legislation was drafted to avoid. The mechanism by which that was achieved was to extend the operation of the industrial agreement until such time as it was replaced in one of the three methods contemplated by s 41(6) of the Act, that is, by—

1. The coming into operation of a new agreement;
2. The coming into operation of a new award; or
3. By retirement of a party from the agreement after its termination.

32 In my view, s 41(8) set out earlier in these reasons is consistent with that view. The effect of the coming into operation of the award in this case was to cancel the 2001 Agreement from the date of the operation of the award. That in turn meant that the employees governed by the new award would move from the agreement to the new award from the date of coming into operation of that award.

33 Whilst, in my view, there is nothing inconsistent between cl 45 and s 41(6), in case I be wrong in that view, in my opinion, cl 45 would have to be read down to the extent of any inconsistency: ***Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch v Burswood Resort (Management) Ltd*** [2002] WAIRC 05952, at [14].

34 For these reasons I am of the opinion that the grounds of appeal have not been made out and that the Commission in Court Session was not in error in making the award the subject of the appeal. The appellant's argument, if successful, would result in the award being quashed. If that was to happen, then the agreement would continue in force until such time as one of the parties to the agreement replaced it in one of the ways available under s 41(6), that is, by a new agreement or award. To negotiate such an agreement or award may take considerable time after the retirement from the agreement. In my opinion, the legislature could not be taken to have intended such an anomaly.

35 For these reasons I am of the view that the appeal should be dismissed.

36 **HASLUCK J**: I have had the advantage of reading in draft the reasons for judgment of the Deputy Presiding Judge. His Honour has set out the history of the proceedings and the terms of the relevant statutory provisions. It will therefore be sufficient for me to refer to the facts and matters underlying the present appeal in a summary form.

37 It is apparent from the narrative that the parties have been involved in two previous appeals, the first of which may now be disregarded. I accept that the observations I made (with which Heenan J agreed) in the second appeal, ***Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch*** [2002] WASCA 355 at par 58 and par 59 were *obiter dicta*, with the result that the issues raised in this, the third appeal are not in any sense foreclosed by the prior ruling. For ease of reference, I will call the case I have just cited, the "second Burswood appeal".

38 The 1985 Burswood Award commenced on 24 February 1987. Subsequently, between 1993 and 2001, a number of industrial agreements were made between the parties. Clause 4 of the 2001 Burswood Agreement provided that the term of the agreement shall be from the date of registration of the agreement to 30 June 2002. By cl 45 of the agreement "the Company and the Union agree that there will be no extra claims for the term of this agreement and whilst it continues in force".

39 It is common ground that negotiations between the parties prior to expiry of the term prescribed by cl 4 were unsuccessful. The areas of disagreement included wage rates and journey cover. Accordingly, on 10 July 2002, shortly after the term of the 2001 Burswood Agreement expired, the Union applied to the Commission in Court Session for a new award. The appellant company contended that the application did not raise an industrial matter and hence the Commission had no jurisdiction. However, on 28 August 2002 the Commission ruled that it had jurisdiction. On 17 December 2002 the Commission determined that it would make a new award largely in terms sought by the respondent Union. A day later the Industrial Appeal Court handed down a ruling in the second Burswood appeal in which it affirmed that the Commission had jurisdiction in respect of the application for a new award.

40 At the substantive hearing concerning the proposed new award the appellant had contended that the Union's claim should be dismissed pursuant to s 27(1)(a)(ii) of the *Industrial Relations Act 1979* on the ground that making the new award was not desirable in the public interest because the application for a new award infringed cl 45 of the 2001 Burswood Agreement which was kept in force by s 41(6) of the *Industrial Relations Act*.

41 The Commission in Court Session ruled against the appellant. It determined that it would not exercise its discretion to dismiss the Union's application on two related grounds; first, cl 45 does not prevent the Union from making claims after the term of the 2001 Burswood Agreement had expired because the words "and whilst it continues in force" in cl 45 were repugnant to and inconsistent with s 41(6) of the Act and were invalid; second, a no extra claims clause should not be interpreted to bar proceedings for a new award when the terms of such a clause are inconsistent with s 42 of the Act.

42 In this, the third Burswood appeal, the appellant renews its contention that cl 45 of the 2001 Burswood Agreement precludes the Union from applying for a new award. The appellant contends that the Commission in Court Session erred in law by wrongly interpreting the statutory provisions bearing upon the application of cl 45 to the circumstances of the present case.

43 In the course of my judgment in the second Burswood appeal, I observed that the *Industrial Relations Act* makes provision for the creation and enforcement of awards and industrial agreements affecting employers and employees with a view to removing

or minimising disputes between the interested parties. The statutory provisions are designed to ensure that rights and duties are defined with certainty and not disputed unless and until the terms of the operative instrument and the relevant statutory procedures have been complied with.

44 In my view, cl 45 of the 2001 Burswood Agreement which precludes "extra claims for the term of this agreement and whilst it continues in force" is entirely consistent with the scheme of the legislation. Both parties should be able to assume that the arrangements made between them will continue to apply until new arrangements are made in accordance with the prescribed procedures.

45 These precepts are reflected in s 41 of the *Industrial Relations Act* which deals with industrial agreements. By s 41(5) an industrial agreement shall operate for the term specified therein. However, by s 41(6) provision is made for an agreement to continue in force in certain circumstances notwithstanding expiry of the term. This suggests that in circumstances where the agreement is working smoothly it is open to the parties to do nothing in which case the agreement will simply run on. The words "continue in force" strongly suggest that in a typical case all the provisions of the agreement will remain operative including a provision such as cl 45 whereby the parties agree that no extra claims shall be made.

46 I pause to say that, in my view, the term "claims" in this context refers to a formal claim for relief presented to a court or tribunal such as the Commission with jurisdiction to resolve any dispute underlying the claim: ***Electrical Trades Union of Australia, New South Wales Branch v Nationwide News*** (1995) 92 IR 365 (the "***ETU*** case"). The term therefore covers an application to the Commission to arbitrate a new award. However, the clause does not preclude the parties from entering into negotiations with a view to resolving some difference of opinion or with a view to reaching agreement as to what arrangements are to be made by way of a new agreement or an award when the existing agreement comes to an end. A clause of this kind should generally be construed in a manner which is consistent with the scheme of the related legislation and, in this case, the relevant statutory provisions including s 41 and s 42 clearly contemplate that the parties will be at liberty to initiate bargaining for a new agreement towards the end or after the term of the current agreement subject to certain procedural constraints.

47 The terms of s 41(6) suggest also that if the parties are not prepared to let the agreement run on because they are in dispute then certain proactive or positive steps must be taken by one or both parties to signify that the existing arrangements are no longer satisfactory and are not to continue in force. The relevant procedure is designed to ensure, presumably, that the parties are not left in a state of doubt or ambiguity as to whether the existing agreement is to remain in force.

48 This view of the matter is inherent in the nature of an agreement based upon consensus, for it would be inimical to the spirit of such an agreement that it could be kept in place after expiry of the term contrary to the wishes of one party. It is inherent also in the structure of s 41 of the Act, for s 41(7) prescribes the positive step which is to be taken in order to bring the existing agreement to an end. In effect, it provides that at any time after, or not more than 30 days before, the expiry of an industrial agreement, any party may file a notice signifying his intention to retire from the agreement at the expiration of 30 days and "such party shall on the expiration of that period cease to be a party to the agreement". In other words, within a framework of statutory provisions which allow for the agreement to run on after the term has expired, s 41(7) requires that a specific step be taken, namely, the giving of notice of intention to retire, in order to bring the agreement to an end.

49 I have already observed that there is nothing in these and related provisions to prevent one or both parties commencing negotiations for a new agreement prior to the expiry of the prescribed term of the existing agreement. If the parties have negotiated a new agreement shortly before the term expires, then, absent a no extra claims clause, the new agreement can take effect immediately after the current term expires. Section 41(6) envisages that where an existing agreement is kept in force after expiry of the term it will be brought to an end either by the making of a new agreement or by the giving of notice of intention to retire. Section 41(8) provides that when a new agreement is made the prior agreement is cancelled. On the other hand, if the negotiations have not been brought to a conclusion within the current term, s 41(6) will keep the existing agreement in force, without any hiatus, until the negotiations are completed.

50 Put shortly, the scheme of the legislation appears to be that in a case where consensus can be achieved, the former regime will be brought to a clear and decisive end by the making of the new agreement. To that extent, I agree with Scott J that s 41(6) can be regarded as a transitional provision which is designed to avert the unwanted consequence of there being a hiatus between one regime and another simply because negotiations were not completed prior to expiry of the term. I agree also with the view that there are essentially three ways in which an agreement will be brought to an end, being either the making of a new agreement (when consensus can be achieved) or the giving of notice of intention to retire (when consensus cannot be achieved) or the making of an award (provided the prior agreement did not contain a no extra claims clause which has been kept in force by s 41(6) of the Act).

51 This brings me to the situation in which consensus cannot be achieved. If, as the end of the term approaches, the parties are in dispute and there is obviously no prospect of any fresh agreement or award being negotiated it is quite clear from the statutory provisions that either party is at liberty to file notice of intention to retire and thus to ensure that the agreement does not continue in force after the term has expired in the manner allowed for by s 41(6) of the Act. In that event, the dispute will probably be brought before the Commission by one party or the other as an industrial matter. It is immediately obvious, on this scenario, that there may indeed be a period of hiatus between the existing agreement and the taking effect of new arrangements either as an award approved by the Commission in the course of resolving the industrial matter or as a new agreement arrived at after a fresh round of negotiations.

52 To my mind, it should not be thought surprising that a hiatus may occur between the ending of one set of arrangements and the commencement of new arrangements. An industrial agreement, like any agreement, depends upon consensus. If consensus cannot be achieved when the term expires then the parties are inevitably at risk that a period of hiatus will occur.

53 To a certain extent, the statutory provisions seek to ameliorate the possibility of hiatus. Thus, as I have noted, s 41(6) provides for the existing agreement to continue in force unless a positive step is taken to bring it to an end by way of notice of intention to retire. Further, in circumstances where one or both parties conclude as the end of the term approaches that no consensus can be achieved, s 41(7) allows for notice of intention to retire to be given 30 days prior to expiry of the term, so that the party principally at risk will have at least 30 days within which to take remedial action to safeguard its position. It will also often be the case that the practical consequences of any hiatus will be ameliorated by the presence of an underlying award.

54 Nonetheless, as an industrial agreement ultimately depends upon consensus there must inevitably be a risk of hiatus. If the legislature had been absolutely determined that no hiatus should (or could) occur then it would not have made provision in s 41(7) for a party to bring an existing agreement to an end by the giving of notice of intention to retire.

55 In my view, it follows from these observations that the need to avoid a hiatus should not be adopted as an overriding principle governing the way in which s 41 of the Act is to be interpreted. It is at this point, with respect, that I part company with the learned Deputy Presiding Judge. To my mind, the prospect that a hiatus could occur, which might, in turn, lead to applications for relief or legal proceedings, is likely to create an incentive for the parties to negotiate constructively with a view to bringing new arrangements into existence. I am not persuaded that the interpretation contended for by the appellant raises the

disconcerting spectre of the parties being committed to an agreement for an indefinite term because, after the prescribed term expires, it is always open to a disaffected party to bring the agreement to an end by giving notice of intention to retire.

56 These general observations are reinforced by a consideration of the various provisions comprising s 42 of the *Industrial Relations Act*. These provisions deal with the initiation of bargaining for industrial agreements. They presume that the rights and duties defined by an existing agreement will be observed until positive steps are taken to introduce new arrangements in accordance with a prescribed procedure. Thus, s 42(5) provides that if there is an applicable industrial agreement in force, bargaining must not be initiated for an industrial agreement in the manner contemplated by s 42(1) earlier than 90 days before the nominal expiry date of the existing agreement.

57 Again, cl 45 of the 2001 Burswood Agreement appears to be entirely compatible with the credo reflected in these provisions. In both cases, the objective is to ensure that the parties will not be caught up in an endless round of negotiations throughout the term of the agreement. The expectation is that once an agreement is made it will be complied with until the expiry of the term approaches.

58 Against the background of these general observations, let me now return to the circumstances of the present case. It will be useful at this stage to look at s 41(6) and (7) in detail. These provisions read as follows—

> "(6) Notwithstanding the expiry of the term of an industrial agreement, it shall, subject to this Act, continue in force in respect of all parties thereto, except those who retire therefrom, until a new agreement or an award in substitution for the first-mentioned agreement has been made.
>
> (7) At any time after, or not more than 30 days before, the expiry of an industrial agreement any party thereto may file in the office of the Registrar a notice in the prescribed form signifying his intention to retire therefrom at the expiration of 30 days from the date of such filing, and such party shall on the expiration of that period cease to be a party to the agreement."

59 It was common ground at the hearing of the present appeal that the term of the 2001 Burswood Agreement expired on 30 June 2002. Consensus could not be achieved, but neither party gave notice of intention to retire either shortly before or after the expiry of the term in the manner allowed for by s 41(7). This inevitably meant, in order to give proper effect to the relevant provisions, that the agreement continued in force, notwithstanding expiry of the term.

60 It follows from my general observations that even if notice of intention to retire had been given by one or other of the parties after expiry of the term, the hiatus that would then have occurred could not be regarded as an arbitrary outcome because it is specifically allowed for by the scheme of the legislation. On that scenario, in circumstances where consensus could not be achieved, it would have been open to the respondent Union to apply for relief by way of a new award, as it has in fact done. If the underlying award, namely the 1987 Award, was thought to be not sufficient to safeguard the position of the employees represented by the Union, then presumably orders for interim relief or expedition would be sought. I note in passing that it was always open to the respondent to have ameliorated the risk of any unwanted consequences arising from a hiatus by giving notice of intention to retire 30 days prior to expiry of the term in the manner expressly allowed for by s 41(7) of the Act.

61 However, as it turns out, no notice of intention to retire was given by either side with the result that, on any view of the matter, as a consequence of s 41(6), the existing agreement continued in force.

62 In the case of an agreement which did not contain a clause such as cl 45, it would have been open to the respondent Union, in circumstances of acute disputation, to commence proceedings for a new award without delay. The effect of s 41(6) is that in the absence of any notice of intention to retire the existing agreements continue in force until it is replaced by a new agreement or an award.

63 In the present case, however, the presence of cl 45 gives rise to a complication. The conclusion that the 2001 Burswood Agreement continued in force after expiry of the term under and by virtue of s 41(6) of the Act leads inevitably to the further conclusion that cl 45 (precluding extra claims) continued in force also, and was in force as at 10 July 2002 when the respondent Union commenced proceedings for a new award. This, in turn, leads to a conclusion that the respondent Union was acting in breach of the agreement in applying to the Commission in court session for a new award.

64 The respondent sought to dispose of this bar to relief by contending that cl 45 upon its proper interpretation does not operate after the expiry of the term and, in any event, to the extent that it does operate beyond expiry of the term, it should be characterised as invalid on the grounds that it is inconsistent with and repugnant to the relevant statutory provisions, especially s 42.

65 It follows from my earlier general observations that, *prima facie*, a clause precluding extra claims while an agreement is in force is not inconsistent with or repugnant to the scheme of the legislation. It is inherent in the statutory provisions that the parties will comply with the terms of the agreement they have made until the agreement is brought to an end or replaced in accordance with a prescribed procedure which cannot be activated until the end of the term approaches. However, my provisional conclusion that the Commission erred in concluding that cl 45 is inconsistent with or repugnant to the statutory provisions has to be examined in more detail in the light of certain submissions made by counsel for the respondent Union as to the proper interpretation of cl 45.

66 Counsel for the respondent Union contended that on the proper construction of the no extra claims clause the word "and" is used cumulatively. That is, no extra claims can be made while the agreement is both in term and in force. If, as in the present case, the first of the two constituents of the clause is no longer present (in that the term has expired) then the clause precluding extra claims is no longer operative. On that view of the matter, it is not necessary to address any issue of inconsistency or repugnancy because cl 45 simply ceased to apply after 30 June 2002, and was therefore not a bar to the commencement of proceedings as at 10 July 2002.

67 I am not persuaded by this line of argument. To my mind, the word "and" in the sentence "that there will be no extra claims for the term of this agreement and whilst it continues in force" is a word connecting two discrete constituents of time. The term of the agreement defines a first limit of time, namely, the term of the agreement, and to that is added a further or outer boundary, namely, that the clause will operate while the agreement continues in force. Hence, as at 10 July 2002, when the respondent Union advanced a claim for a new award the prohibition reflected in the clause remained effective because the agreement as a whole was kept in force under and by virtue of s 41(6) of the Act.

68 The respondent Union went on to submit that upon a literal interpretation of cl 45 it would not be open to the parties to negotiate any future arrangements. On this reading, the term "claim" is said to be wide enough to embrace demands or discussion points of any kind in the context of negotiations for a new agreement as the end of the term approaches. Viewed in this light, cl 45 was said to be inconsistent with and repugnant to the scheme of the statutory provisions (as held by the Commission in court session) in that the statutory provisions clearly contemplate that the parties will be at liberty, subject to certain constraints, to initiate bargaining for industrial agreements.

69 The short answer to this contention, as I indicated in earlier discussion, is that the term "claims" in this context is not concerned with the stifling of discussion or negotiations. It should be construed harmoniously with the related statutory provisions. As the Court indicated in the ***ETU*** case (*supra*), the cl 45 prohibition is of a more limited kind than that contended for by the respondent in the present case. Clause 45 restricts only the pressing of unauthorised claims against the will of the other party with a view to obtaining relief in legal proceedings. Thus, if a formal claim for relief is presented to the Commission (such as the respondent Union's claim for a new award) whilst the no extra claims provision remains in force, the appellant is entitled to rely upon cl 45 as a basis upon which relief should be refused.

70 When I draw these various observations together I find no reason to depart from the views I expressed in the second Burswood appeal. I acknowledged in earlier discussion that these views were not necessary for the resolution of that appeal. Nonetheless, they are consistent with the conclusion I have arrived at in the circumstances of the present case in which consensus could not be achieved and the agreement contained a no extra claims clause. I refer in particular to the following observations at par 58 and par 59 of my reasons for decision in the second Burswood appeal—

> "58. I see considerable force in the submissions made by counsel for the appellant. In my view, the effect of s 41(6) of the Act is to keep in force the 2001 Agreement until such time as a party to it retires from the agreement in the manner provided for by s 41(7) of the Act. It follows from earlier discussion that such a construction appears to be consistent with the scheme of the legislation.
>
> 59. When an award or an industrial agreement comes into effect both parties should be able to assume that the relevant arrangements will continue to apply until new arrangements are made in accordance with the prescribed procedure. In many cases, a new agreement will have been negotiated before the former agreement expires. In such a case, upon retirement from the existing agreement, the new agreement will come into effect immediately. If a new agreement cannot be negotiated, as in the present case, the relationship between the parties will be controlled by an underlying award. This will protect the position of the employee if it becomes necessary to retire from the existing agreement in the manner contemplated by s 41(7) of the Act in order to apply for a new award."

71 It follows from these and my earlier observations that, in my view, in the absence of any notice of intention to retire on either side in the manner allowed for by s 41(7) or the making of any new agreement, the 2001 Burswood Agreement continued in force after expiry of the term on 30 June 2002. This meant that cl 45 continued in force and was in force when the respondent Union presented and pursued a claim for a new award. Upon its proper interpretation, cl 45 precluded the bringing of a formal claim for relief whilst the agreement continued in force, notwithstanding expiry of the term. For the reasons I have given, a no extra claims clause of this kind cannot be regarded as inconsistent with or repugnant to the scheme of the legislation in the circumstances of the present case.

72 Thus, in my view, the Commission in Court Session erred in holding that cl 45 was invalid. Further, it erred in failing to take account of and give proper weight to the fact that the respondent Union as the applicant for a new award was apparently acting in a manner that infringed cl 45 of the existing agreement, being an agreement that was kept in force in the circumstances of the present case by the combined effect of s 41(6) and (7) of the Act. For present purposes, there is no need for me to go further and to make a determination as to how the Commission should have proceeded if it had taken proper account of and given weight to cl 45.

73 I consider that the appeal should be allowed and that orders should be made providing for the matter to be referred back to the Commission to resolve the application for a new award having regard to the reasons of the Industrial Appeal Court in this appeal. I am conscious that, by s 90(3a) of the Act, if any ground of appeal is made out but the Court is satisfied that no injustice has been suffered by the appellant, the Court shall confirm the decision the subject of the appeal unless it considers that there is good reason not to do so. However, in the circumstances of the present case, I consider that the appellant has succeeded on appeal in respect of a significant issue and this constitutes a good reason why the decision below should not be confirmed.

MCLURE J:

Introduction

74 This is an appeal under s 90(1)(b) of the *Industrial Relations Act 1979* (WA) ("*Act*") from the decision of the Commission in Court Session to make a new award entitled the Burswood International Resort Casino Employees Award 2002 ("the 2002 Award"). The 2002 Award was made, on the application of the respondent, in substitution for the Burswood International Resort Casino Employees Industrial Agreement 2001 ("the 2001 Agreement").

75 The 2001 Agreement was registered and its term expired on 30 June 2002 (the nominal expiry date). Clause 45 of the 2001 Agreement provides—

> "The Company and the Union agree that there will be no extra claims for the term of this agreement and whilst it continues in force."

76 The Commission in Court Session rejected the appellant's submission that the claim before the Commission should be dismissed under s 27(1)(a)(ii) of the *Act* on the ground that making a new award was not desirable in the public interest because the application was in breach of cl 45 of the 2001 Agreement.

77 The Commission determined that it would not exercise its discretion to dismiss the application for a new award on the grounds that—

> (a) clause 45 did not prevent the union from making claims after the term of the 2001 Agreement had expired because the words "and whilst it continues in force" are repugnant to and inconsistent with s 41(6) of the *Act* and are invalid; and
>
> (b) a no extra claims clause should not be interpreted to bar proceedings for a new award when its terms are inconsistent with s 42(1), (5) – (8) of the *Act*.

78 The appellant appeals to this Court against the whole of the decision of the Commission on the ground that—

The Commission in Court Session erred in law by wrongly construing or interpreting s 41(6) of the *Act* and cl 45 of the 2001 Agreement by—

> (a) holding that cl 45 of the 2001 Agreement is, in part, repugnant to and inconsistent with s 41(6) of the *Act*; and
>
> (b) concluding that cl 45 of the 2001 Agreement does not preclude a party from seeking a new award whilst the 2001 Agreement continues in force.

79 The appellant seeks to have the decision of the Commission quashed and the application for the award dismissed.

80 The resolution of this appeal depends upon the proper construction of the provisions of the *Act* concerning industrial agreements and of cl 45 of the 2001 Agreement.

History of Applications

81 Following unsuccessful negotiations between the appellant and the respondent, the respondent filed an application for a new award on 8 March 2002, more than three months before the expiration of the term of the 2001 Agreement (first award application). It was proposed that the term of the new award commence on and from the first pay period after 1 July 2002, that is, after the nominal expiry date of the 2001 Agreement.

82 The Commission determined that it had jurisdiction to hear the application but dismissed it on the ground that in bringing the claim for an award and seeking arbitration, the union was in breach of cl 45 of the 2001 Agreement. The Commission construed cl 45 as prohibiting an application for any award before the expiry of the term of the 2001 Agreement but not after it had expired.

83 On 10 July 2002, shortly after the expiry of the term of the 2001 Agreement, the respondent filed a second application for a new award. The appellant's submissions on jurisdiction were heard by the Commission as a preliminary matter. The Commission ruled that it had jurisdiction. The appellant appealed that ruling to this Court which dismissed the appeal: ***Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch*** [2002] WASCA 355. It is accepted that the observations made by Hasluck J in that appeal at par 58 and 59 (with which Heenan J agreed) were *obiter dicta* and thus not binding on this Court.

Scheme of the *Act*

84 The 2001 Agreement was executed on 16 August 2001 and registered by the Commission on 24 August 2001. Shortly after the respondent made its second (and successful) application for a new award, the *Act* was amended by the *Labour Relations Reform Act 2002 (WA)* ("*Reform Act*"). The *Reform Act* amended s 41 (by, *inter alia*, the addition of subsections (8) and (9)) and inserted s 41A (which prohibits registration of an agreement for a term longer than three years) and s 42 (referred to by the Commission in its reasons). These amendments came into effect on 1 August 2002.

85 Under the *Act*, an industrial agreement shall operate for the term specified therein: s 41(5). Subsections (6), (7) and (8) of s 41 provide—

> "(6) Notwithstanding the expiry of the term of an industrial agreement, it shall, subject to this Act, continue in force in respect of all parties thereto, except those who retire therefrom, until a new agreement or an award in substitution for the first-mentioned agreement has been made.
>
> (7) At any time after, or not more than 30 days before, the expiry of an industrial agreement any party thereto may file in the office of the Registrar a notice in the prescribed form signifying his intention to retire therefrom at the expiration of 30 days from the date of such filing, and such party shall on the expiration of that period cease to be a party to the agreement.
>
> (8) When a new industrial agreement is made and registered, or an award or enterprise order is made, in substitution for an industrial agreement ('**the first agreement**'), the first agreement is taken to be cancelled, except to the extent that the new industrial agreement, award or order saves the provisions of the first agreement."

86 Section 42 deals with the initiation of bargaining for an industrial agreement. Bargaining for an industrial agreement may be initiated by an organisation or association of employees or an employer or an organisation or association of employers giving an intended party to the agreement a written notice containing specified matters: s 42(1). However, if there is an applicable industrial agreement in force, bargaining must not be initiated earlier than 90 days before the nominal expiry date (being the expiry date specified in the agreement): s 42(5).

87 Section 41(6) of the *Act* provides for the statutory extension of the term of an industrial agreement and three ways to bring the statutory extension to an end. Firstly, by the parties entering into a new agreement. Secondly, by the Commission making an award in substitution for the agreement. Thirdly, a party can retire from the agreement which then ceases to apply to that party.

88 Further, the purpose and effect of subsections (6), (7) and (8) of s 41 of the *Act* is to avoid any interregnum after the nominal expiry date of an agreement. That is achieved by—

> (a) the statutory continuation in force of the expired agreement until such time as a new industrial agreement is registered or an award (or enterprise order) is made in substitution for the expired agreement;
>
> (b) alternatively, requiring any party who wishes to retire from the agreement after the nominal expiry date to give 30 days notice of an intention to retire. The retirement only takes effect at the end of the notice period, thereby giving the other parties to the statutorily extended agreement an opportunity to take steps to cover the gap that would or may arise as a result of the retirement.

89 It is clear from the scheme of the *Act* that the legislative intention is to permit fixed term agreements and to avoid a vacuum or alternatively an unacceptable fallback position, such as the reactivation of an outdated award in any transitional period, pending replacement of the agreement after its nominal expiry date.

90 Although s 41(6) in effect allows the agreement to continue to regulate the industrial relationship beyond the agreed term without limitation, that outcome can only be achieved with the consent and co-operation of the parties and does not alter the characterisation of the statutory purpose.

91 Further, before the *Reform Act* amendment, the *Act* did not prevent claims for a new agreement or award being made before the nominal expiry date of an agreement. After s 42 of the *Act* was inserted by the *Reform Act*, bargaining for a new agreement cannot be initiated earlier than 90 days before the nominal expiry date.

The 2001 Agreement

92 I turn now to the proper construction of cl 45 of the 2001 Agreement, starting with the word "claims". The broader its scope the greater the apparent inconsistencies with the purpose and effect of the *Act*. The respondent's case is that it includes all claims whether made in the course of negotiations between the parties or by way of formal application to the Commission. The appellant's position is that claims are confined to demands that are being pressed, whether by application to the Commission or by industrial action. It was conceded by the appellant that a notice under s 42(1) of the *Act* would be a prohibited claim under cl 45 of the 2001 Agreement.

93 However, it is unnecessary to determine the scope of the term. It was common cause that the respondent's application for a new award under the *Act* was a claim for the purposes of cl 45 of the 2001 Agreement. The appellant says that on its proper construction, cl 45 narrows the statutory avenues for bringing the statutory extension of the 2001 Agreement to an end from

three to two. That is, the respondent had by agreement confined itself to two theoretical options, being either to retire from the 2001 Agreement or enter into a new agreement with the appellant. As negotiations for a new agreement had failed, the respondent was left with only one option if it wished to apply for a new award and that was to retire from the 2001 Agreement.

94 Thus, a consequence of the appellant's construction of cl 45 is that the 2001 Agreement cannot be terminated by a substitute award. A further consequence of the appellant's construction of cl 45 is that the respondent could not make any application to the Commission for a new award until after its retirement from the 2001 Agreement took effect. These outcomes are inconsistent with the policy, purpose and effect of the *Act*.

95 My preliminary view was, and my considered view remains that on its proper construction cl 45 does not prohibit a claim for the substitution of the 2001 Agreement by a new agreement or an award to take effect after the nominal expiry date of the 2001 Agreement and that is so whether the claim is made before or after the nominal expiry date of the 2001 Agreement.

96 The reference in cl 45 to "extra" claims connotes a claim for entitlements that are in addition to that provided for by, and during the currency of, the 2001 Agreement. Thus, cl 45 only prohibits claims for extra (that is, additional) entitlements beyond those provided for in the 2001 Agreement which "extras" are intended to be operative whilst that agreement remains in force, either because the term has not expired or because the term has been statutorily extended. That construction gives effect to the language of the clause, is consistent with commonsense and is in harmony with the purpose and effect of the *Act*. Clause 45 is not intended to prohibit claims for a new agreement or new award to replace the 2001 Agreement after its nominal expiry date, an outcome which is expressly contemplated in s 41(6) of the *Act*.

Whether cl 45 Void

97 However, as the narrow construction of cl 45 is inconsistent with what the Commission held in the first award application and was not advanced by any party to this appeal, I will consider the matter on the basis that cl 45 prohibits the respondent from making an application for a substitute award before and after the nominal expiry date of the 2001 Agreement.

98 It is made clear in s 41(6) and (8) of the *Act* that the Commission has the power to make a new award in substitution of and which terminates the 2001 Agreement. It is also the case that the Commission will not make such a substitute award of its own motion but only on the application of a relevant party. It follows that the respondent has a statutory right under the *Act* to make an application for an award in substitution of the 2001 Agreement at any time before the agreement ceases to be in force. The central issue is whether the respondent can lawfully fetter that right by agreement and thus expose itself to a penalty for breach of the agreement under s 83 of the *Act*. That depends upon whether cl 45 or any aspect of it is illegal or otherwise void for public policy. A contract may be illegal if it is expressly or impliedly prohibited by statute. Further, a court may refuse to enforce a contract because it offends against a public policy: ***A v Hayden*** (1984) 156 CLR 532 at 571.

99 Ouster of jurisdiction is an example of a type of contract clause which can offend public policy and be void. One type of ouster clause still regarded as contrary to public policy is that which seeks to prevent the enforcement of a statutory right: ***Bond v Larobi Pty Ltd*** (1992) 6 WAR 489 at 497.

100 When a right is given by statute, the question of whether the person to whom the right is given may by contract forego it depends upon the interpretation of the legislation in question: ***Felton v Mulligan*** (1971) 124 CLR 367; ***Lieberman v Morris*** (1944) 69 CLR 69.

101 Section 114 of the *Act* would appear not to apply in this case. There being no express prohibition in the *Act* against contracting out of the relevant provisions, the matter must be determined by reference to the scope and policy of the *Act*: ***Lieberman v Morris*** (*supra*) at pp 78, 84, 86 and 88, 90.

102 In construing the *Act* it is proper to have regard to the legislation as it stands as at the date of enforcement of the contract not at its entry date: ***Gerraty v McGavin*** (1914) 18 CLR 152. In my view, the *Act* impliedly prohibits a party from contracting out of s 41 and s 42. The *Act* regulates industrial agreements and in doing so evinces an intention for the legislative scheme to prevail so that the parties to an agreement are not free to contract out of its provisions. In particular, the *Act* requires that industrial agreements be for a specific term. The consensual and mutually binding contractual relationship ceases at the nominal expiry date. Thereafter, the relationship between the parties and the options available to them are regulated by statute. The statute extends the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement. It is not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date.

103 Further, there is nothing in the language of s 41 of the *Act* as it stood when the 2001 Agreement was entered into or now to suggest that there is any appropriate statutory ground to distinguish between steps towards a substitute award taken before or after the nominal expiry date of the relevant agreement. Insofar as cl 45 prohibits the respondent from taking steps for a substitute award as contemplated in s 41 of the *Act* it is to that extent void.

104 For these reasons, I would dismiss the appeal.

2003 WAIRC 08342

APPEAL AGAINST THE DECISION OF THE COMMISSION IN COURT SESSION IN

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	BURSWOOD RESORT (MANAGEMENT) LTD, APPELLANT
	v.
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	**SCOTT J (Deputy Presiding Judge)**
	HASLUCK J
	MCCLURE J
DATE OF ORDER	FRIDAY, 16 MAY 2003
FILE NO/S.	IAC 1 OF 2003
CITATION NO.	2003 WAIRC 08342

Result	Appeal dismissed
Representation	
Appellant	Mr R L Le Miere QC
Respondent	Mr D H Schapper (of Counsel)

Order

HAVING HEARD Mr R L Le Miere QC for the Appellant and Mr D H Schapper (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT—

The Appeal be dismissed.

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

FULL BENCH—Appeals against decision of Commission—

2003 WAIRC 08230

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PETER JOHN CAFFREY, APPELLANT
	- and -
	CHUBB SECURITY AUSTRALIA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 1 MAY 2003
FILE NO/S.	FBA 54 OF 2002
CITATION NO.	2003 WAIRC 08230

Decision	Appeal dismissed
Appearances	
Appellant	Mr P E Mullally, as agent
Respondent	Mr J H Brits (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the above-named appellant, Peter John Caffrey (hereinafter "Mr Caffrey"), against the decision of the Commissioner at first instance, constituted by a single Commissioner, and contained in an order made on 9 December 2002 whereby a claim for compensation was dismissed. That is the only part of the decision appealed against.

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

3 The appeal is on the following grounds, as amended by leave at the hearing of the appeal (see pages 5-7 of the appeal book (hereinafter referred to as "AB")):-

"1. The learned Commissioner erred in law when having found that—

1.1 The appellant was unfairly dismissed;

1.2 That re-instatement was impracticable;

he was not entitled to the payment of compensation, and his claim for compensation was dismissed.

PARTICULARS

(a) Section 23A (ba) of the Industrial Relations Act empowered the learned Commissioner to order the respondent to pay compensation to the appellant for loss or injury caused by the dismissal.

(b) A sound discretionary judgment by the learned Commission ought to have resulted in an order that the appellant be paid compensation for his period of unemployment subsequent to the dismissal.

(c) The failure by the learned Commissioner to award any compensation to the appellant resulted in a failure by her to properly exercise the discretionary power contained in the said Section 23A(ba), and she therefore fell into error.

2. The learned Commissioner erred in law in her finding that the redundancy payment and the payment in lieu of notice made by the respondent to the appellant at dismissal offset any payments of compensation to which the appellant may be entitled.

PARTICULARS

(a) The appellant was at dismissal pursuant to the express or implied terms of his contract of employment paid a redundancy payment of 26 weeks salary for his 4960 days of service with the respondent and 5 weeks salary in lieu of notice.

(b) Section 29 of the Industrial Relations Act empowered the appellant to refer his dismissal by the respondent on the 8th February 2002 to the Commission which he did on the 6th March 2002, and he thereupon invoked the jurisdiction of the Commission under Sections 23A, 26 and 29 of the said Act.

(c) The application of the said Sections stated in paragraph (b) above, gives rise to a statutory regime of relief for the appellant against a dismissal which is harsh, oppressive or unfair (as this dismissal was).

(d) The learned Commissioner fell into error in failing to assess the appellants loss from the harsh, oppressive and unfair dismissal, separately from the payments stated in paragraph (a) above as those payments did not arise from the nature or character of the dismissal, but by the terms of his contract, and would have been payable by the respondent even if the dismissal had been found to not offend Section 29 of the said Act.

(e) In failing to therefore exercise her discretion properly in accordance with the statutory regime of relief to which the appellant was entitled, the learned Commissioner fell into error, and the appellant was thereby deprived of the proper relief under the said Act.

3. The learned Commissioner erred in law in her assessment of the compensation at the equivalent of 5 weeks wages.

PARTICULARS

(a) The learned Commission, although not ordering compensation found in effect that the appellant had suffered a loss equivalent of 5 weeks wages.

(b) The learned Commissioner when she proceeded to assess the appellants loss failed to have regard to the evidence, which she accepted, that the appellant (save for one week's work when he earnt $1,250) had been unemployed between the dismissal and the date of hearing, and it was the lost earning for that period which ought to have attracted an order under Section 23A.

(c) The learned Commissioner failed to apply the general principles of law in assessing loss and therefore fell in error in reaching a discretionary judgment.

ORDERS SOUGHT ON APPEAL

4. That there be a payment of compensation by the respondent to the appellant assessed for the loss that he suffered from the date of dismissal to the date of hearing."

BACKGROUND AND FINDINGS

4 An application was made by Mr Caffrey pursuant to s.29(1)(b)(i) of *the Act*, whereby he, an employee, alleged that he was unfairly dismissed by the above-named respondent employer, when his position was made redundant, and he was retrenched ((ie) dismissed) on 8 February 2002.

5 On 8 February 2002, he was advised by the respondent, by letter of that date, that his position was being terminated, effective 8 February 2002 for redundancy. Attached to this letter (exhibit A2, page 31 (AB)) was a statement of details of the payments to be made to him (exhibit A3) consisting of payments in lieu of notice and other entitlements.

6 In the letter, he was advised that "Chubb Training Services has sub contract training work in security available" for him. In the letter he was also advised that "Chubb is also very happy to finance any skills upgrade that you will require in this position".

7 Exhibit A3 (page 32 (AB)) records that the total "Termination Payments" were $41,776.56. After the tax was deducted the net amount to be paid was, as recorded, $36,034.56. This consisted of the following:-

(a) For annual leave with loading and before tax $9,281.09

(b) For long service leave before tax $8,947.39

(c) Payment in lieu of notice being an amount equal to five weeks salary $3,798.08

(d) "Separation" – 26 weeks salary - $19,750.00

8 These two figures combined, that is the latter two figures (see paragraphs 7(c) and (d) hereof), are described as "Redundancy Pay Total" in exhibit A3.

9 It was common ground that, at the time of termination, Mr Caffrey's salary was $39,500.00 gross per annum.

10 On 1 November 2001, as the Commissioner at first instance found, he had been informed by the respondent's state manager for training that he should look at the possibility of being transferred to another section. He undertook to look at alternative employment options, and it was Ms Meg O'Brien, the training manager's evidence, that since she had made him, on 1 November 2001, aware that his employment was in jeopardy, and that he had, thereby, been given a degree of notice.

11 On 24 January 2002, as it was found, Ms O'Brien had another meeting with Mr Caffrey, and the possibility of his redeployment to the position of supervisor of security at Perth Airport was canvassed with him. The Commissioner at first instance found that this position was never seriously offered to him. However, the Commissioner also found that it was not unreasonable that he had refused the offer of sub-contract work in the respondent's training division. Further, he refused an offer from the respondent of redeployment as a security guard, which was a lower paid and lower status position, and the Commissioner found it not unreasonable for him to refuse that position on that basis. The Commissioner also found that Mr Caffrey was "terminated" due to a "redundancy situation", which Mr Caffrey had accepted was the case.

12 It was common ground, too, that, on termination, Mr Caffrey was paid the amounts set out in exhibit A3, a total of $36,034.56.

13 The Commissioner also found that, since the dismissal, the appellant had sought work and earned $1250.00 only for one week's work.

14 The Commissioner's finding that Mr Caffrey was unfairly dismissed, which finding is not challenged upon this appeal, was on the following basis:-

a) He was given insufficient notice of his termination and this affected his ability to seek out alternative employment and redeployment options.

b) If he had been given greater notice of his impending termination he may have had sufficient time to canvass alternative work options both within the respondent's operations and externally.

c) He was treated unfairly and was not given sufficient notice and not given time to attend job interviews and the requirements of Part 5 of the *Minimum Conditions of Employment Act* 1993 (hereinafter referred to as "*the MCE Act*") were not complied with. Accordingly, the termination was unfair.

15 It was common ground that the appellant had been employed by the respondent between 11 July 1998 and 8 February 2002, firstly as a security guard, then as operations supervisor, and for some time before, and at the time of his termination, as a senior training instructor. Upon the termination of his employment, he was paid a "redundancy package" equivalent to 26 weeks salary in the sum of $19,750.00.

16 Also, upon the termination of his employment, he was paid an amount equal to five weeks salary in lieu of notice. At the time of termination, he was in receipt of an annual gross salary of $39,500.00 as senior instructor.

17 The Commissioner at first instance found that the appellant was unfairly dismissed because he was not given sufficient notice of his termination in order to seek alternative employment and because there had been a breach of Part 5 of *the MCE Act.*

18 The Commissioner determined that the appellant's loss in this case was represented by a period of time which would constitute sufficient notice over and above what was given to him, to enable possible job interviews to take place and alternative positions to be canvassed, which was assessed at an amount equal to five weeks salary.

19 The Commissioner then went on to hold that, given that the appellant was paid a redundancy payment of 26 weeks pay and five weeks pay in lieu of notice, the latter sum amounted to five weeks pay as compensation to be offset against reasonable notice of five weeks, and thus no monies were due to be paid to the appellant because no loss had been suffered.

20 It should be added that there was no question that this was a genuine retrenchment for redundancy. However, as this Commission has found from time to time, where the circumstances warranted it, a dismissal constituted by a retrenchment for a genuine redundancy may be unfair for a number of reasons (see *WA Access Pty Ltd v Vaughan* (2001) 81 WAIG 373 (FB) as an example). The termination of contract, which is a retrenchment for redundancy (and thus a dismissal), has been upheld by this Commission in cases over quite some years, to be unfair where the process was unfair or where there are or were other elements of unfairness, notwithstanding that the redundancy is or was a genuine one (see *WA Access Pty Ltd v Vaughan* (FB) (op cit)). It would seem that this was not understood or made clear by agent or counsel in *Garbett v Midland Brick Co Pty Ltd* (2003) 83 WAIG 893 (IAC), on a fair reading of the reasons for decision.

ISSUES AND CONCLUSIONS

21 The decision appealed against is a discretionary decision as that term is defined in *Norbis v Norbis* [1986] 161 CLR 513 (see also *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194).

22 It is trite to observe that the appellant must establish that the exercise of the discretion at first instance miscarried according to the principles laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* (1993) 73 WAIG 220 (IAC)), before the Full Bench has any warrant to interfere with the exercise of that discretion.

23 The complaint in the appeal was that the Commissioner at first instance, having found that the appellant was harshly, oppressively or unfairly dismissed, failed to find that there was a loss caused by that act of statutory tort. The duty cast upon the Commissioner by the statute where, as was the case here, the Commissioner has found that the reinstatement is impracticable, is clear. This matter was a relatively simple matter.

24 There have been clear authorities in the Commission for some years enunciating the principles required to be applied in making findings as to loss or injury and assessment of compensation in claims for unfair dismissal in this Commission (see *Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 (FB), *Gilmore and Another v Cecil Bros and Others* (1998) 78 WAIG 1099 at 1103 (IAC), *Gilmore and Another v Cecil Bros and Others* (1996) 76 WAIG 4434 (FB), and see also *Swan Yacht Club (Inc) v Bramwell* (1998) 78 WAIG 579 (FB), *Manning v Huntingdale Veterinary Clinic* (1998) 78 WAIG 1107 at 1108 (FB) and *Capewell v Cadbury Schweppes Australia Ltd* (1998) 78 WAIG 299 (FB)).

25 The principles laid down in these cases by the Full Bench were assisted in their development by the principles developed in unfair dismissal cases in the Australian Industrial Court (see the cases cited in the above-mentioned authorities, and, in particular, but not solely, *May v Lilyvale Hotel Pty Ltd* (1995) 68 IR 112 at 118 and *Nicolson v Heaven and Earth Gallery Pty Ltd* 126 ALR 233 per Wilcox CJ).

26 There are clear and simple steps required to be taken pursuant to s.23A of *the Act* when it comes to determining questions of loss, injury and compensation. I do not propose to reproduce here all of the principles referred to and the steps set out for dealing with these cases which are set out in detail in *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit) at pages 8-10, for example.

27 However, I should observe somewhat tritely, I think, as follows. The Commissioner at first instance makes a determination as to whether the dismissal alleged to have occurred, if it were a dismissal, was harsh, oppressive or unfair. If it is determined to have been unfair, it matters not whether it was substantively unfair or procedurally unfair or both. Indeed, all the Commissioner is required to determine is whether, according to the well known principles laid down in *Miles and Others t/a Undercliffe Nursing Home v FMWU* (1985) 65 WAIG 385 (IAC) ("*the Undercliffe Case*"), the dismissal was an unfair dismissal. That requires a consideration of all of the circumstances of the dismissal (see *RRIA v CMEWU* (1989) 69 WAIG 1027 (FB) ("*Parker's Case*")).

28 The principles to be applied in determining whether the dismissal was unfair or not have been variously expressed but all amount to the same in reality. They are as follows:-

a) "Has there been a fair go all round?"

b) "Whether the legal right of the employer has been exercised so harshly or oppressively against the employer as to amount to an abuse of that right?"

c) "Has there or has there not been oppression, injustice or unfair dealing on the part of the employer towards the employee?" (see per Brinsden J in *the Undercliffe Case* (op cit) at page 386).

d) "The principal task of the Commission was to assess the industrial fairness of the decision taken by the employer, based upon the nature and quality of the conduct involved" (see per Kennedy J in *the Undercliffe Case* (op cit) at page 388).

e) "The "test" to be applied by the Commission both at first instance and on appeal is the test of what is just and equitable upon the substantial merits of the particular case" (see per Olney J in *the Undercliffe Case* (op cit) at page 389).

29 If the Commission decides that question in favour of the employee, the Commission then determines that the employee has established that he/she was unfairly dismissed. Having so determined, the Commission must then decide, if the employee is not to be reinstated, whether the appellant has established that he/she has incurred loss or suffered injury caused by that dismissal. What the loss is is not determined by the nature of the unfairness, and, for those purposes, substantive or procedural unfairness is irrelevant. To submit, as Mr Brits did, that the difference is at all relevant to determining whether there has been a loss, the extent of the loss, and the compensation to be ordered to be paid for that loss, is wrong and seeks to impose an artificial and irrelevant distinction. Put another way, it matters not at all why the dismissal was unfair if it is or was unfair. It is then, as I have said, necessary to determine whether there was a loss and assess the compensation payable for that loss. The only time that the question of whether a dismissal was substantive or procedural might arise as an evidentiary question or a question of proof is when the employee seeks to establish his/her loss. Thus, for example, if an employee's dismissal was unfair only because of procedural unfairness, and it was clear, on the evidence, or the evidence did not exclude, on the balance of probabilities, the likelihood that the employee might have been fairly dismissed three months later, for example, in any event, then his loss would probably be limited to no more than three months salary, subject to matters of mitigation, etc. I do not understand *Dellys v Elderslie Finance Corporation Ltd* (2003) 82 WAIG 1193 (IAC) to be authority for any other proposition. (I would add that that case seems to have involved some inaccurate submissions as to the authorities relied on and principles developed by and applied in the Commission).

30 If it is determined that loss and/or injury has been established to have been incurred or suffered by the appellant employee, caused by the dismissal, then the quantum of compensation is assessed and ordered to be paid.

31 (There has been some confusion in the submissions to us about the process of finding the loss to be established and that of assessing compensation. One does not assess the loss. One assesses the compensation which is ordered to be paid for the loss which has been established, or the injury as the case may be).

32 Once the loss is determined, and determined independent of the statutory cap on compensation, the Commission determines the correct compensation for the loss. The loss established does not depend on whether the statutory cap has been exceeded in quantum of loss or not (see *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit) at pages 8-9 and the cases cited therein, as well as other cases cited (supra)).

33 Having determined the amount of compensation which should be ordered to be paid, but not before that, the Commission then reduces the amount of compensation to be ordered to be paid so that it does not exceed the statutory cap on compensation, if to do so is necessary.

34 There is another matter about which I wish to make some observations. Both at first instance and in submissions to the Full Bench there seems to be adopted an approach that one credits against the compensation to be ordered any amount already paid which might properly be credited to reduce it. It is, I think, expressed and certainly implicit and has been the approach of this Commission, that the amount of the loss found can only be that amount which has been established. That is, if an amount has been paid in relation to a head of loss, then that clearly reduces the amount of the loss which can be established as having been incurred. Alternatively, depending on the amount involved, it might mean that no loss can be established at all. If an amount has been paid, it has obviously not been lost. Compensation, it is trite to say, may only be ordered to be paid for the loss or injury caused by the dismissal and established to have been incurred or suffered (see *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit)). (It is necessary to mention this because it does not seem to have emerged clearly from the submissions of any agent or counsel made thereon in *Dellys v Elderslie Finance Corporation Ltd* (op cit)).

35 The question is firstly, what was the loss which it was open to find was established by the appellant, on the evidence, at first instance? The Commissioner at first instance found that appellant's loss was a period of notice which would constitute sufficient notice over and above what was given to enable job interviews to take place and alternative "issues" such as redeployment, etc, to be canvassed.

36 That period was determined to be five weeks. The appellant was paid a redundancy or severance payment equal to 26 weeks salary, which was the agreed amount, and five weeks pay in lieu of notice in addition, as I have already observed.

37 The Commissioner at first instance found that the appellant suffered no loss and was therefore not entitled to an order for compensation because that was the sole extent of the established compensable loss. At least that is how I read paragraph 59 of the reasons for decision at first instance (see page 25 (AB)). I think that that is clear, notwithstanding that the reasons are somewhat brief.

38 The substance of the properly expressed grounds of appeal, as I apprehend them, was as follows:-

a) There was a loss incurred which was greater than that found by the Commissioner at first instance to have been established.

b) Accordingly, the decision to dismiss the claim for compensation was in error because the amount of the loss was not compensated for.

c) There was no finding of loss.

d) The compensation of an amount equal to five weeks wages for notice was inadequate.

e) The true loss established which should have been compensated for was as follows:-

i) From the date of the dismissal to the date of hearing, save for one week's work when he earned $1250.00, the appellant had not worked, as a matter fact, and had therefore lost an amount equal to a little over 30 weeks salary for the period 8 February 2002 to 10 September 2002, less $1250.00.

ii) That the amount of the redundancy payment and the payment in lieu of notice did not offset any payments to which the appellant was entitled.

iii) That the payments actually made were due and payable under the contract, in any event, and should not have been taken into account in making a finding as to the loss established or by way of reduction of compensation.

39 The quantum of the redundancy payment is not challenged either as an inappropriate amount, or because it was inadequate and its inadequacy rendered the dismissal unfair. There was no such submission at first instance.

40 There was a submission to the Full Bench, however, that the appellant should have been given notice of the redundancy when it was decided that he would be retrenched, his position having been accounted as one which would be made redundant, and it was submitted that this occurred on 1 November 2001. Of course, he was not informed that day, although discussions did occur afterwards based on such a possibility occurring.

41 If he were given three months notice, so the submission went, that would have constituted a reasonable period of notice to enable compliance with *the MCE Act*. I do not understand that submission. I would note that the appellant was only required under *the MCE Act* to be paid up to eight hours for the purpose of being interviewed for further employment. Further, it was not established that the appellant required, given the other jobs offered him and the discussions about the situation, that more

than five weeks be given him. In my opinion, given his years of service, his age, his position and his commitment to the respondent, as well as his work record, he should have been given notice of no less than five weeks, given that he was paid an adequate redundancy or severance payment which was agreed and accepted as an amount equal to six months pay.

42 There are elements of duplication between a redundancy payment and payment in lieu of notice, even though the two are entirely different entitlements. However, I am not persuaded that his loss, occasioned by insufficient notice having been given, is more than five weeks. I say that, in particular, given the substantial amount of severance pay equal to six months wages which he received. Any claim for any more would be a clear duplication.

43 Next, it follows that if he was retrenched because his job become redundant, as in fact he was, it would be necessary for him to establish that it was more probable than not that he would not be unfairly retrenched in the near future. Of course, he did not seek to, and he could not establish that he might not have been, on the balance of probabilities, properly and fairly retrenched after notice within a period of five weeks to the date of his unfair termination, provided that he was paid the 26 weeks redundancy and severance pay and was given a minimum of five weeks notice. I am not persuaded otherwise. Therefore, his loss, since he received a fair redundancy payment and an amount equal to wages for reasonable notice, was not an amount equal to 30 weeks wages, and the Commissioner at first instance made no error in finding as she did. He suffered no loss because of the amount which he was paid, and no loss could or should be found to have been established. Alternatively, as it was expressed by Anderson J in *Dellys v Elderslie Finance Corporation Ltd* (op cit), at least as I understood what His Honour said, the payments made can be credited against the amount otherwise to be ordered for compensation, and, in this case, they cancel each other out.

44 There was no error established in the exercise of the discretion and no ground of appeal has been made out. I would, for those reasons, dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

45 I have had the advantage of reading the draft reasons for decision of the Honourable President. I agree that the appeal should be dismissed.

46 The thrust of the appeal is that the Commissioner at first instance erred in dismissing the appellant's claim for compensation after finding that the termination of employment was unfair. In this respect it is submitted that the Commission failed to properly assess the appellant's loss arising from the harsh, oppressive and unfair dismissal and fell into error in taking into account entitlements paid by the respondent in the termination of employment arising from the appellant's redundancy.

47 The Commission found that the appellant's loss was equivalent to five weeks wages being the "period of time which would constitute sufficient notice over and above that which was given to enable possible job interviews to take place and alternative positions to be canvassed…". This was offset against the payment of five weeks wages paid in lieu of notice when the redundancy became effective.

48 Once the threshold issue of unfairness of a dismissal has been determined the Commission is required to make a finding as to the loss and/or injury which the employee suffered by reason of the dismissal. The finding as to loss is a finding of a fact and sometimes a matter of fact and law. Amongst the range of issues to be addressed in making the finding it is of fundamental importance that there be a causal link between the loss and/or injury claimed and the termination of employment (*Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 (FB)). A termination of employment albeit unfair, does not automatically render the resultant period of unemployment a future loss. Indeed in the circumstances of this appeal the redundancy which was found to be for genuine reasons did not render the appellant's subsequent period of unemployment the loss which was causally linked to the act of being made redundant. Just as a finding of fact will sometimes on the balance of probabilities involve a determination as to how long the claimant might have remained in current employment but for the act of being unfairly dismissed, so too will the inadequacy of notice be the loss causally linked to the unfair dismissal. A finding of fact as to loss based on this is not itself an exercise involving an assessment of compensation; but nor is it a vehicle to reduce an award of compensation (see *Bogunovich's Case* (op cit) at 8 and *WA Access Pty Ltd v Vaughn* (2001) 81 WAIG 373 (FB)).

49 The dichotomy of "substantial" and "procedural" unfairness has been used to distinguish between types of dismissal which are unfair on the basis that although there was justification for the employment relationship being brought to an end and those where there should not have been a dismissal at all. The distinction has been regarded as relevant to the quantification of compensation under section 23A of the *Industrial Relations Act, 1979*. (*Dellys v Elderslie Finance Corporation Ltd* (2003) 82 WAIG 1193 (IAC)). However with respect I suspect that while this approach may provide a convenient framework in which to apply section 23 of the Act there is a risk that the fundamental step of making findings as to loss or injury arising from the unfair termination may be omitted. Compensation is not conditioned by the nature of the unfairness, but determined by the extent of the loss.

50 Although summarily expressed the finding of fact as to the loss arising from the unfairness of the termination made in the matter under appeal was open to the Commissioner in the first instance.

51 In this respect the Commissioner did not err in the exercise of discretionary power pursuant to section 23A of the Act. Having made the finding of loss it was incumbent upon the Commission to then have regard to the amount based on the common law requirement to take into account the amount that would have been earned during the period of reasonable notice before the employment was terminated. In this respect it matters not whether the payment in lieu of notice arose out of the contractual entitlement or not. The fact of that payment was relevant to the quantification of compensation (*Dellys' Case* (op cit)). The assessment of the loss of the period of notice arising from the unfair dismissal and the quantification of compensation arising from that loss as being equivalent to the payment already made to the appellant was open to the Commissioner.

52 On the basis of this there is nothing in the grounds of appeal to justify overturning the decision of the Commission or the order which issued. The appeal should be dismissed.

SENIOR COMMISSIONER A R BEECH—

53 I can shortly state my reasons for dismissing the appeal. The facts of the matter are set out in the Reasons for Decision of his Honour the President. Mr Caffrey, in ground 1 of the appeal, submits that a sound discretionary judgment by the learned Commissioner ought to have resulted in an order that Mr Caffrey be paid compensation for his period of unemployment subsequent to the dismissal.

54 As Mr Mullally properly conceded, however, in the case of a redundancy, as is the case here, considerations arise whether the employment contract would have continued had the dismissal not occurred. There is nothing in the evidence of this matter which could lead to the conclusion that the Commission erred in its findings of the reasons for dismissal. The employment contract would not have continued past the point at which the position was made redundant. The unfairness found by the Commission at first instance derived principally from the failure of the respondent to discuss matters with Mr Caffrey. It cannot be said in those circumstances that Mr Caffrey's loss is the loss of the wages he would have earned had he not been dismissed. To the contrary, once the position held by an employee becomes redundant, it is difficult to see how the employee's

loss can be assessed on the basis of future loss of earnings unless the redundancy is shown to have been false and the dismissal unfair for that reason. In such a circumstance the employee should not have been dismissed and would, had the dismissal not occurred, have remained in employment. The loss caused by the dismissal is based upon the wages he would have earned had he not been dismissed. That is not the case here. I find that ground 1 is not made out.

55 By the second ground of appeal Mr Caffrey states that the Commission fell into error in failing to assess his loss from the harsh, oppressive and unfair dismissal separately from the payments made to Mr Caffrey at the time of dismissal. Those payments included, relevantly, five weeks' salary in lieu of notice and 26 weeks' salary by way of a redundancy payment. Mr Caffrey argues that those payments did not arise from the nature or character of the dismissal but from the terms of the contract (either express or implied) and would have been payable by the respondent even if the dismissal had been found not to be unfair.

56 To the extent that the submission is made that any entitlements due to Mr Caffrey were paid to him independently of whether the dismissal was fair or unfair, the submission must be accepted. The entitlements due to Mr Caffrey upon his dismissal are the entitlements due under his contract of employment. Those entitlements may be express or implied. Once those entitlements are paid, they do not, and cannot, contribute to any finding of unfairness in the dismissal which occurred.

57 The power given to the Commission in s.23A to order the payment of compensation for the loss or injury caused by the dismissal necessarily involves a finding by the Commission of the loss or injury caused by the dismissal. This the Commission did as follows—

> "Compensation
>
> I now turn to the issue of compensation in lieu of reinstatement. I consider the applicant's loss in this case is represented by a period of time which would constitute sufficient notice over and above what was given to enable possible job interviews to take place and alternative positions to be canvassed which I find in this case to be five weeks. However, given that the applicant was paid a redundancy payment of 26 weeks' pay and five weeks' pay in lieu of notice this amount of five weeks' pay as compensation is to be offset against these payments (*Dellys v Elderslie Finance Corporation Ltd*) 82 WAIG 1193. Thus, no monies are due to be paid to the applicant."

(Reasons for Decision at [59])

58 The Commission at first instance thus concluded on grounds reasonably open to her that Mr Caffrey's loss caused by the dismissal was a period of time which would constitute sufficient notice over and above what was given. That was assessed as being five weeks.

59 The Commission then took into account the payments made to Mr Caffrey upon his dismissal. It must be said that the Commission was not only perfectly entitled to do so, the Commission had a duty to do so: *FDR Pty Ltd v. Gilmore* (1998) 78 WAIG 1099 per Anderson J at 1102. His Honour there stated—

> "I am not persuaded that there has been any error of law. Commissioner Beech and the Full Bench expressly adverted to the payment made by the employer and expressly acknowledged that it was a circumstance to be taken into account in the exercise of discretion whether to make an order for compensation under the subsection."

60 In that matter, Mr Gilmore, the dismissed employee was paid six months' wages in lieu of notice plus a further payment equivalent to approximately three weeks' wages for each year of service (see *J Gilmore v. Cecil Bros and Others* (1996) 76 WAIG 1184 at 1189). However, on the facts of that matter, and in particular the reasons for the dismissal being found to be unfair, it could not be said that there was any duplication of the payments made at point of dismissal with the compensation ordered for the unfairness of that dismissal. Much therefore will depend upon the facts of the particular case. In this case, it is difficult for Mr Caffrey to say there is no duplication between the payments made and the loss caused by the dismissal as found by the Commission.

61 I remain of the view that an employer is not able to overcome any deficiencies in fairly dismissing an employee such that the dismissal is harsh, oppressive or unfair merely by paying at termination a sum of money, whether that sum of money is equal to or greater than any entitlements due to the employee (*ibid.* at 1187). Where, as here, the loss established by the Commission at first instance is a loss of a period of time, and where payments by nature of a redundancy payment were made, then without more, it cannot be said that the Commission erred in taking those payments into account. Indeed, in some circumstances, the failure to give insufficient notice may not of itself lead to any loss compensable by the powers given to the Commission under s.23A of the Act (*Garbett v. Midland Brick* [2003] WASCA 36 at [85]). That does not mean that the dismissal was not still an unfair dismissal. It means only that the dismissed employee has not shown that she, or he, has suffered any loss or injury caused by that unfairness.

62 For those reasons, appeal ground 2 is not made out.

63 Appeal ground 3 goes to an allegation that the Commission ought to have ordered compensation to be paid for the period of time Mr Caffrey had been unemployed to the date of hearing. In my view, that ground is not made out for the reasons I have already given.

64 For those reasons, I agree with the order to issue.

THE PRESIDENT—

65 For those reasons the Full Bench dismissed the appeal.

Order accordingly

2003 WAIRC 08220

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER JOHN CAFFERY, APPELLANT
	- and -
	CHUBB SECURITY AUSTRALIA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 1 MAY 2003
FILE NO/S.	FBA 54 OF 2002
CITATION NO.	2003 WAIRC 08220

Decision	Appeal dismissed
Appearances	
Appellant	Mr P E Mullally, as agent
Respondent	Mr J H Brits (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 12th day of March 2003, and having heard Mr P E Mullally, as agent, on behalf of the appellant, and Mr J H Brits (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 1st day of May 2003 wherein it was found that the appeal should be dismissed, it is this day, the 1st day of May 2003, ordered that appeal No. FBA 54 of 2002 be and is hereby dismissed.

By the Full Bench,

(Sgd.) P. J. SHARKEY,

[L.S.] President.

2003 WAIRC 08374

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT ASHLEY JAMES, APPELLANT - and - AUSTRALIAN INTEGRATION MANAGEMENT SERVICES CORPORATION PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 23 MAY 2003
FILE NO/S.	FBA 55 OF 2002
CITATION NO.	2003 WAIRC 08374

Unfair dismissal claim – Appeal to Full Bench – Summary dismissal not unfair – Misconduct Incompetence – Whether employer condoned misconduct

Decision	Appeal dismissed
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Ms M G Saraceni (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the above-named appellant, Robert Ashley James (hereinafter referred to as "Mr James"), against the above-named respondent, Australian Integration Management Services Corporation Pty Ltd (hereinafter referred to as "AIMS"), against the decision of the Commission at first instance, constituted by a single Commissioner. The appeal is brought under s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The decision appealed against is the decision of the Commissioner on 9 December 2002 in matter No 2119 of 2001. The decision appealed against is a decision dismissing an application made by Mr James pursuant to s.29(1)(b)(i) and (ii) of *the Act*.

GROUNDS OF APPEAL

3 The grounds of the appeal are as follows (see page 2 of the appeal book (hereinafter referred to as "AB")):-

> "1. The learned Commissioner erred in fact and in law in finding that the Appellant "misconducted himself by not fulfilling the requirements of the job for which he claimed he had the skills to undertake and for which he was employed" in that—
>
> a) The Appellant's failure to perform particular tasks to the standard required by the Respondent does not amount to incompetence or neglect constituting misconduct justifying summary termination;
>
> b) There was no evidence or no reliable evidence that the Appellant had misrepresented his skills and qualifications to the Respondent or failed or neglected to exercise such skills;
>
> c) The Respondent, in making the decision to recruit the Appellant, did not rely upon any representations by the Appellant about possessing particular skills and abilities or in the alternative, recruited him knowing that the Appellant did not possess all the attributes that the Respondent required;

d) The Respondent waived its right to summarily terminate the Appellant's for performance reasons when it became apparent that the Appellant was not performing to the standard required by the Respondent but nonetheless elected to maintain the contract.

2. The learned Commissioner erred in fact and in law in finding that the Appellant's contract of employment provided for a salary of $60,000 per annum, to be paid pro-rata for the period of the nine month contract, in that—

a) there was no evidence or no reliable evidence that the $60,000 was to be an annual figure to be paid pro-rata; and

b) the finding is contrary to the express terms of the written agreement.

ORDERS SOUGHT

1. The appeal be upheld.

2. The order of the Commission be set aside and in lieu thereof it be ordered—

a) That the Respondent pay to the Appellant a sum equivalent to the value of the balance of the fixed term of the Appellant's contract of employment; and

b) That the Respondent pay to the Appellant the difference between the salary actually paid during the period of employment and the salary that should have been paid calculated on the basis that the salary was $60,000 for the nine month term of the contract."

APPLICATION TO AMEND

4 Application was made on behalf of Mr James to amend the grounds of appeal by inserting a new ground, 1A, in the following terms:-

"1A. The learned Commissioner erred in law in making findings as to the misconduct of the Appellant when the issue of misconduct was not raised or argued by the Respondent, did not form any part of the Respondent or Appellant's cases and the Appellant and the Respondent were not given any opportunity to make submissions as to whether or not misconduct was an issue or there was any or any adequate evidence to sustain such a finding."

5 This ground was effectively covered by ground 1, and for that reason the Full Bench dismissed the application to amend.

BACKGROUND

6 The appellant, Mr James, alleged by an application filed in the Commission pursuant to s.29(1)(b)(i) and (ii) of *the Act*, that he was unfairly dismissed by his employer, AIMS, the respondent, on 9 November 2001. He also claimed monies owing to him, he alleged, under a fixed term contract of employment between the parties.

7 AIMS opposed the application on the basis that there was no unfair dismissal and that Mr James was not owed any monies pursuant to his contract of employment with it.

8 Mr James gave evidence on his own behalf and Mr Stephen James MacPherson, AIMS general manager court security and custodial services, gave evidence on behalf of AIMS. There was also documentary evidence.

9 It is to be noted that the Commissioner at first instance found, having heard and seen the witnesses, that she preferred the evidence of Mr MacPherson to that of Mr James. The findings made for that reason have not been attacked on this appeal. Accordingly, the following narrative of fact is based on those findings of the Commissioner, as well as the evidence of Mr James when there is no conflict between his evidence and the evidence for AIMS.

10 AIMS, at the material times, was a party to a contract with the Ministry of Justice (hereinafter referred to as "MOJ") whereby AIMS provided services related to custody at courts of prisoners, court security and transportation of prisoners, throughout Western Australia. Needless to say, such transporting of prisoners occurs in prison vans or security vehicles. The service provided was described as AIMS Court Security and Custodial Services.

11 Mr James commenced employment with AIMS on 2 July 2001 pursuant to a fixed term contract of employment of nine months duration. He was, however, dismissed on 9 November 2001, after a little over four months employment by AIMS. He was employed by AIMS as a logistics manager, having obtained this position through a recruitment firm called Dunhill Management Services Group (hereinafter referred to as "Dunhills"), and, in particular, Mr Adrian Sommerville, its manager. Mr Sommerville had his resume and thought that he would be suitable for the position. Mr Sommerville then sent him to Mr MacPherson. Mr MacPherson had offered the position to two candidates ahead of Mr James and neither took up the position of logistics manager.

12 In June 2001, Mr James had a meeting with the general manager of AIMS, Mr MacPherson, and there was a discussion about the nature of the job, but Mr James could not recall any discussion about salary. He said that he had previously been informed about the salary by Mr Sommerville of Dunhills. It was, however, Mr James' understanding that he was to be employed on a nine month fixed term contract with a salary of $60,000.00. Further, he was to be provided with a car for business and private use, as well as superannuation payments which would be made on his behalf, and he was to be paid a bonus at the end of the nine month contract if he performed well.

13 In the first interview with Mr MacPherson, Mr James was told the nature of the respondent company, the range of tasks and responsibilities which the position would have, and the nature of the person who would fill the position. Mr MacPherson also emphasised to Mr James the need for someone to fill the position who would be a person on whom Mr MacPherson could rely to take responsibility for the delivery of "outcomes".

14 Mr James was told that he would be given a fair degree of autonomy to implement reforms, checking back with Mr MacPherson on his direction, but not under any direct day to day supervision. What he did in fact do when he was engaged was, until October 2001, to manage AIMS' transport and operations, oversee material acquisitions, manage and develop organisational systems in relation to purchasing practices and undertook a senior role in relation to the performance of AIMS' obligations under its contract with MOJ. That that was the case was not at all contested and was obvious from the evidence.

15 In the course of discussions, during the second interview, there was discussed the fact that whilst Mr James did not immediately strike Mr MacPherson as meeting all of the requirements, they, in discussion "investigated the extent to which he would meet those needs". It was not denied that Mr James assured Mr MacPherson during that interview that he had had considerable success in is previous ventures. In fact, Mr James informed Mr MacPherson that he had reformed and improved a previous organisation to such an extent that it became very profitable. Further, according to Mr James, it became so profitable that the owner sold it, which is why Mr James left the company. (He did not advise Mr MacPherson that this had been his own business).

16 During the second interview, considerable time was spent going through the terms and conditions which would apply to Mr James' employment. On Mr MacPherson's evidence, which the Commissioner at first instance accepted, those conditions were as follows (and see also exhibits A1, R2 and A5):-

a) That he would be paid nine twelfths of an annual salary of $60,000.00 by monthly amounts.

b) That he would be employed for a fixed and finite period of nine months.

c) That he would be provided with a car for work and for private use which would be fully maintained by AIMS.

d) That he would be afforded the use of a telephone.

e) That, at the end of the contract, he would be paid a bonus if his performance merited it.

17 Mr James asserted that his salary was $60,000.00 for the whole of his nine month fixed term contract.

18 Mr MacPherson explained to Mr James in the course of these discussions why the term of the contract was fixed at nine months and why the annual salary would therefore be paid on a pro-rata basis. There was no doubt, and it was not disputed, that it was made clear in the evidence by Mr MacPherson that the contract was for nine months only. Further, as Mr MacPherson said "there was no room for ambiguity" because there had been "specific and clear discussions on that matter". Again, as I have said, the Commissioner at first instance accepted Mr MacPherson's evidence, and, on a careful reading of the transcript, it is quite clear that the reason she gave for so doing was correct.

19 Mr James was provided with a Holden Commodore and paid the monthly portion of nine twelfths of $60,000.00 on or about the 15th day of each month. Mr MacPherson received a copy of an unsigned letter from Dunhills to Mr James dated 28 June 2001 (exhibit R2, page 50 (AB)) in which, inter alia, the amount of $60,000.00 was prescribed as the annual salary and was said to be payable on a pro-rata basis for the period of the contract. There was no evidence that Mr James, at any time before the termination of his contract of employment, complained that he was not being paid what was agreed between the parties.

20 At no time in evidence did Mr James admit or assert that he was incapable of doing the job.

21 Mr MacPherson's evidence, which was not denied, was, in cross-examination even, that Mr James represented himself as being an expert logistics manager to Mr MacPherson (see page 171 of the transcript at first instance).

22 After the interview, Mr James was offered employment commencing on 2 July 2001, but his letter of appointment was dated 11 September 2001 (exhibit A1). He was unaware, he said, why it took so long to have his employment with AIMS confirmed in writing. He signed that letter of appointment himself on 14 September 2001.

23 On Mr MacPherson's evidence, which was accepted, the following were the flaws in Mr James' performance, and the following were the warnings to him or counselling of him by Mr MacPherson:-

a) At management meetings, Mr James was not comfortable and his performance was poor from the start.

b) Mr James admitted that Mr MacPherson told him that it was his job to achieve the outcomes required, every second day. That accords with Mr MacPherson's evidence that he counselled Mr James about his expectations in relation to specific matters being discussed, and in terms of his general performance.

c) Mr MacPherson complained that Mr James was inarticulate and inattentive to detail, and the tasks which were allocated to him he very frequently did not perform. Mr MacPherson himself had to follow them up. That, it is fair to say, is entirely borne out by evidence of particular incidents to which I refer hereinafter.

d) In particular, there were a number of instances of incompetence which were referred to in Mr MacPherson's evidence:-

i) Mr James was asked to complete an assets register which he did not do even though some information about assets was in Queensland, and there was clearly no valid reason offered why he did not pursue and obtain that information and complete the register.

ii) Mr James' communication skills were very poor and of primary school standard. He had to be regularly reprimanded about this or his communications corrected (see page 137 of the transcript at first instance).

iii) A serious matter arose because the inspector of prisons, Professor Richard Harding, criticised in a report the malfunctioning or poor standard of air conditioning in the security vans used for transporting prisoners. This was a serious criticism, particularly because of the transportation of prisoners in the hot areas of this State. It was also a serious matter because the criticism was made by the inspector of prisons. (One ventures to say that it is important in relation to all areas of the State in summer). Such a criticism required an urgent remedy because of the effect such a report might have on the contract with MOJ.

iv) The evidence was quite clear that Mr James accepted an assertion by the air conditioning contractor, when he queried this matter with that contractor, that drivers were not using the air conditioning mechanism correctly. For that reason, he did not seek to remedy the situation. He certainly did not do so with any urgency. The problem was not remedied until Mr MacPherson directed him to make an appointment for the contractor with Mr MacPherson. That occurred with Mr James present and taking very little part. Mr MacPherson's intervention was what solved the problem. Mr MacPherson was, naturally enough, not at all pleased and counselled Mr James about this (see exhibit R5, page 51 (AB)).

v) On 21 September 2001, Mr MacPherson had a meeting with Mr James because it was clear to him that Mr James was having difficulty fulfilling the requirements of his position, as a senior manager. A number of matters were raised, and Mr James was warned that he would be dismissed unless there was an immediate and dramatic improvement in his work (see exhibit R6, and pages 21-22 (AB), which is the note of this discussion made by Mr MacPherson). On Mr MacPherson's evidence, there was no real denial of any of the matters of complaint by Mr James. Indeed, Mr James acknowledged the criticisms and said that he was capable of improving as he was being required to do.

vi) Some time after that, Mr MacPherson counselled Mr James about a serious matter. In August 2001, Mr MacPherson asked Mr James to procure a Mercedes security van to replace one which had been stolen and destroyed by thieves. This was a matter of some urgency, as was expressed to Mr James, because the fleet of security vans was one down in numbers. Mr MacPherson instructed Mr James to ensure that the vehicle was procured with the right configuration and in accordance with the correct specifications. Mr James went to the dealer from whom other vehicles had been obtained in the past and raised an order, but, there was no evidence that he gave the correct and accurate specifications for the vehicle which was required. Further, there is no evidence that the order which he raised contained the correct specification, and, indeed, the order was not adduced in evidence to establish such a fact. The vehicle, which had to be procured from Queensland, did not arrive until about 8 October 2001, which was certainly not an urgent answer to the instruction given by Mr MacPherson. However, more seriously, the vehicle was unsuitable and could not be used for the purposes

for which it was required, because it had only one door at the side, instead of the two required for vehicles carrying prisoners. Because of the necessity for alteration, which, of course, cost more, the vehicle was not available for use until early 2002, well after the termination of Mr James' employment.

e) In early October 2001 (see exhibit R8, page 52 (AB)), because of his poor performance, Mr James was transferred, with his agreement, to a lower level of managerial job, namely transport co-ordinator at Hakea Prison, Perth. This was first of all on a temporary basis, pending his appointment to the role, and was clearly a demotion. It was a more limited and less senior role and was confined to the management of the AIMS transport operation working out of the Hakea Prison.

f) There, he was required to reduce the expenditure on overtime, but failed to do so, that expenditure, in fact, increasing whilst he was there.

g) He was also directed by Mr MacPherson to personally ensure that all drivers of the security vehicles had their permits to drive renewed prior to 31 October 2001. It was clearly a condition of their employment that they could not drive the security vehicles without a permit to do so from the MOJ. It was common ground that he did not do this, and that he delegated the task to another employee. As a result, one driver did not obtain the renewal of his permit, and had to be removed from a vehicle which he was driving without the requisite permit, causing cost and inconvenience and embarrassment to AIMS. This was clearly a serious matter because what occurred was contrary to a strict condition imposed on AIMS by MOJ. Again, Mr James was counselled about this matter, too (see exhibit R9, page 53 (AB)).

h) Mr James had the responsibility of drafting and implementing new rosters for AIMS employees at Hakea Prison. He discussed these with the representatives of the relevant organisation of employees.

i) It was a strict condition of the AIMS/MOJ contract that the vans leave Hakea Prison each day to take prisoners to the courts very punctually. This was so that the courts would not be delayed. Failure to comply with this condition could, it was the evidence, have serious consequences, under the contract, for AIMS.

j) On 8 November 2001, Mr James was late for work because he had to take his daughter to school, his wife being ill. There was a stop work meeting of employees that morning, and the vans did not leave at the required time. Indeed, they did not commence to leave until about 9.00am, and only after a supervisor had reported the delay, and the stop work meeting of employees which caused it, to Mr MacPherson. Mr MacPherson then intervened and remedied the situation. That there was a stop work meeting occurring was unknown to Mr James, he said, and he had not approved of it. As a result of this serious problem, Mr MacPherson asked Mr James to hand over the position at Hakea Prison to another person, and he did so. Later that morning, the same day, on 8 November 2001, Mr James and Mr MacPherson met in Mr MacPherson's office. Mr MacPherson had decided, because of this occurrence and all of the incidents which had occurred, and because, too, of Mr James' inability to perform his work competently, to ask Mr James why his services should not be terminated. At the meeting, Mr MacPherson asked Mr James for an explanation about the failure of the vans to leave on time. Mr James said that he did not know that the stop work meeting was going to occur. Mr James offered no real explanation about the matter, serious as it was. Mr MacPherson informed him about the seriousness of the matter and explained that Mr James had received warnings about his performance and that his contract should be terminated (see pages 111-113 (AB)). Mr MacPherson suggested that it would be better for Mr James if he resigned rather than be dismissed, but, if he did not resign Mr MacPherson said, he would be dismissed. Mr James said that he was shell shocked and therefore said nothing. (Mr MacPherson made a written note after the meeting (exhibit R12, page 54 (AB)).

k) On 9 November 2001, the next day, there was a discussion between them in the course of which Mr James asked Mr MacPherson to reconsider the termination of the contract, but Mr MacPherson declined to do so. There was, however, an agreement reached between them, in any event, that AIMS would pay Mr James four weeks salary in lieu of notice, and that, as it transpired, was done.

l) With the consent of Mr MacPherson, Mr James went away to consider whether he would resign. Later, he advised Mr MacPherson that he would not resign and refused to sign a deed of release forwarded to him by AIMS.

m) On 21 November 2001, he was given written notice of the termination of his employment and paid an amount equal to four weeks salary in lieu of notice. There was, as I have observed, no evidence that Mr James complained during the currency of his contract of employment that he was not being paid the correct amount of his salary. (See exhibit A8).

FINDINGS AT FIRST INSTANCE

24 The Commissioner at first instance found as follows:-

a) That wherever there was a conflict in the evidence she accepted Mr MacPherson's evidence in preference to that given by Mr James, because Mr MacPherson gave his evidence thoroughly and in a clear, considered and forthright manner. He had a detailed and clear recollection of relevant events which was corroborated by a number of exhibits, and she had no reason to doubt his evidence. That, thus, where the evidence was in conflict she preferred the evidence of Mr MacPherson to that given by Mr James.

b) That she did not have the same confidence in the evidence given by Mr James because he reluctantly conceded that his curriculum vitae was inaccurate and he had to be pressed in cross-examination to admit that significant performance issues were raised with him by Mr MacPherson.

c) That she formed the view that Mr James could have been more forthcoming than he was on a number of significant issues, and formed the view further that he deliberately did not recall events as they had actually occurred.

e) That Mr James was employed by AIMS on a full-time basis from 2 July 2001 to 9 November 2001.

f) That he was employed on a fixed term contract of nine months on an annual salary of $60,000.00, together with superannuation contributions and a possible bonus at the end of nine months, depending on performance and that his remuneration also included access to a car and telephone for both business and private use.

g) That Mr James was employed in a senior position as AIMS' logistics manager, and that in this position, which carried a substantial remuneration package of approximately $85,000.00, Mr James was expected to act with initiative and a large degree of autonomy.

h) That Mr James managed AIMS' transport and logistics operations and he oversaw material acquisitions, and that he also managed and developed organisational systems in relation to AIMS' purchasing practises.

i) That he undertook a senior role within the context of AIMS having a contract with the MOJ, which could be terminated if specific targets and expectations were not met.

j) That in September 2001, it became clear to Mr MacPherson that Mr James was having difficulties fulfilling the requirements of the senior management position for which he was employed.

k) That a meeting was held between Mr James and Mr MacPherson on 21 September 2001 whereby Mr MacPherson raised a number of performance issues with Mr James, and that the meeting went on for some time and a range of issues were canvassed.

l) That she accepted Mr MacPherson's summary of the meeting (exhibit R6), namely that Mr MacPherson gave Mr James a very serious warning about his performance, and that dismissal would be the consequence of a failure on his part to immediately and dramatically improve his performance.

m) That in that discussion he gave examples of Mr James' non-performance, including the very poor result from his work on vehicle air conditioning systems, delays in outcomes including the asset register, and poor written communication.

n) That his evidence was also that Mr James acknowledged all of these points, did not argue any of them, and assured Mr MacPherson that he was capable of the improvement needed. That note is dated 21 September 2001.

o) That Mr James acknowledged that problems and mistakes had been made and gave a commitment to Mr MacPherson that he would improve his performance.

p) That Mr James was told that unless there was substantial and immediate improvement in relation to his performance then his contract of employment would be reviewed.

q) That in relation to obtaining a replacement transport vehicle Mr MacPherson told Mr James of the importance of the vehicle configuration and that Mr James was counselled about this serious omission.

(r) That matters came to a head when AIMS temporarily transferred Mr James to the lower level position of transport co-ordinator at Hakea Prison in early October 2001. He was so transferred pending a permanent appointment to that role.

s) That Mr James was instructed by Mr MacPherson to personally ensure the drivers' permits were renewed by 31 October 2001, and it was common ground that Mr James did not do this.

t) That Mr James delegated this task to others even though he was specifically told to personally deal with this matter.

u) That this matter was a serious issue and there were strict conditions binding AIMS under the terms of the AIMS/MOJ contract in relation to this matter.

(v) That an incident occurred which contributed to the employer forming the view that Mr James was unable to fulfil the terms of his contract of employment and that incident was a stop work meeting of transport drivers which took place on 8 November 2001.

(w) That despite attempts by Mr James to negotiate a new roster with the drivers at Hakea Prison those discussions were unsuccessful and this led to a stop work meeting to consider Mr James' proposed roster changes.

(x) That she accepted the evidence of Mr MacPherson that it was most unusual for a stop work meeting to occur, and industrial action had not occurred previously which had any impact on the ability of AIMS to undertake its operations.

(y) That the stop work meeting was a serious matter for AIMS given that part of its contract with the MOJ was to ensure that prisoners were transported to the courts on time.

(z) That Mr James had to take some responsibility for the stop work meeting occurring as ultimately he was responsible for designing and implementing a new roster.

(aa) That the Commissioner accepted Mr MacPherson's evidence that Mr James did not assist with any resolution of this matter and it was up to Mr MacPherson to resolve the issue.

(bb) That once Mr MacPherson intervened in the dispute the transport drivers went back to work.

(cc) That at a meeting between Mr James and Mr MacPherson later that afternoon, namely 8 November 2001, it was put to Mr James that given the ongoing difficulties with his performance he should justify why he should not be terminated.

(dd) That Mr James was unable to demonstrate that his employment as a senior manager should be ongoing.

(ee) That given Mr James was experiencing major difficulties in fulfilling his obligations as a senior manager subsequent to this meeting, it was appropriate for AIMS to form the view that Mr James' contract of employment should be terminated.

(ff) That Mr James was unable to perform the duties required of him as a senior manager and he did not have the necessary competence to fulfil this role.

(gg) That he had represented himself as an experienced senior manager, but was unable to demonstrate the requirements of a position of this nature throughout most of his employment with AIMS.

(hh) That there were sufficient reasons for the termination of Mr James' contract of employment since he effectively misconducted himself by not fulfilling the requirements of the job for which he claimed he had the skills to undertake and for which he was employed.

(ii) That AIMS had legitimate and ongoing concerns in relation to a number of areas where Mr James was unable to complete his duties effectively and efficiently in the manner normally expected of a senior manager.

(jj) That the evidence was clear that Mr James was incapable of even meeting the demands of the lower level position of transportation co-ordinator at Hakea Prison.

(kk) That Mr James was afforded procedural fairness in relation to his termination and was kept informed by Mr MacPherson about his performance problems on an ongoing basis, also being given reasonable opportunities to improve his performance.

(ll) That several disciplinary discussions were held between Mr James and Mr MacPherson (see exhibits R6, R8 and R9).

(mm) That before the meeting of 8 November 2001, AIMS gave Mr James sufficient warning that his job was in jeopardy and that AIMS had serious concerns with Mr James' performance and his ability to undertake the job for which he was employed.

(nn) That Mr James tried hard in order to fulfil his role with AIMS, as acknowledged by Mr MacPherson in his discussions with Mr James on 8 November 2001 when Mr James was given the opportunity to resign.

(oo) That given Mr James' inability to adequately fulfil the requirements of his position, and given that Mr James decided not to resign, it was not unreasonable for Mr MacPherson to terminate the contract of employment.

(pp) That given the way in which the MOJ contract operated and that penalties applied when breaches of the contract occurred, it was not unreasonable for AIMS to be concerned that this contract would be threatened by having Mr James remain in its employment.

(qq) That even though Mr James was terminated without notice, he was, subsequent to termination, paid four weeks pay in lieu of notice.

(rr) That Mr James was not unfairly terminated either procedurally or substantively.

(ss) That Mr James was not owed the balance of his nine month contract. This was because he misconducted himself by not fulfilling the requirements of the senior manager position for which he was employed, and which he had held himself out as having the required skills to properly perform.

(tt) That it was thus appropriate for AIMS to terminate Mr James' contract of employment when AIMS did even though his contract of employment was for a fixed term. This was because by his inability to perform, he repudiated the contract of employment and AIMS was entitled to terminate it.

ISSUES AND CONCLUSIONS

25 The decision in this matter was a discretionary decision as that term is defined in *Norbis v Norbis* (1986) 161 CLR 513 (see also *Coal and Allied Operations Pty Ltd v AIRC and Others* (2000) 203 CLR 194).

26 Accordingly, there is no warrant in the Full Bench to interfere with the decision of the Commission at first instance unless the appellant establishes that the exercise of the discretion miscarried according to the principles laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* (1993) 73 WAIG 220 (IAC)).

27 In particular, the Full Bench has no warrant, unless it is established that there was a miscarriage of the discretion at first instance, to substitute its own exercise of discretion for that of the Commissioner at first instance.

28 Significantly, the grounds of appeal make no attack on the finding that the dismissal of Mr James was not unfair.

29 Next, I also observe that the grounds of appeal do not attack the findings of fact in the matter which were made by the Commissioner after her acceptance of Mr MacPherson's evidence in preference to that of Mr James', as I have previously observed. It follows that all of those findings stand.

Ground 1

30 Ground 1 alleges that the Commissioner at first instance erred in fact and in law in finding that Mr James "misconducted himself by not fulfilling the requirements of the job for which he claimed he had the skills to undertake and for which he was employed" (sic).

31 The attack is on the alleged summary dismissal of Mr James. It is not an attack on the finding that there was no unfair dismissal or that an unfair dismissal had not been established. I would find ground 1 not made out for that reason alone.

32 However, were it to be said that, implicit in that ground was an attack on the finding that there was no unfair dismissal, then I would express myself as I do hereinafter.

33 I would also observe now, since the ground does not accurately express the Commissioner's finding, that the Commissioner at first instance found (see paragraph 120, page 23 (AB)) not that he "misconducted himself", as is expressed in ground 1, but as follows:-

> "I find there were sufficient reasons for the termination of the applicant's contract of employment as the applicant effectively misconducted himself by not fulfilling the requirements of the job for which he claimed he had the skills to undertake and for which he was employed."

34 Ground 1 first alleges that the summary dismissal was not justified because Mr James' failure to perform tasks to the standards required by AIMS, did not amount to incompetence or neglect constituting misconduct justifying summary dismissal; and that there was no evidence, or reliable evidence that he misrepresented his skills and qualifications, or failed or neglected to exercise such skills; and that in making the decision to recruit Mr James, AIMS did not rely on any representations by Mr James that he possessed skills or abilities, or in the alternative, recruited him knowing that Mr James did not possess all of the attributes which AIMS required.

35 Mr James refused to resign and was then dismissed as he was warned would occur. It was not an issue on the grounds of appeal that the dismissal was a purported summary dismissal. The complaint was that it was not justified on the facts or the law.

36 Once the Commissioner at first instance accepted Mr MacPherson's evidence, as she did, and as, on a fair reading of the transcript she was clearly entitled to do, the Commissioner was entitled to make and should have made the following findings:-

a) That the nature of the position of logistics manager, its duties and the requirements by AIMS of the occupant were clearly made clear to Mr James by Mr MacPherson.

b) That, as was the evidence of both witnesses, the position which was offered and accepted, was a senior management position within the West Australian organisation of AIMS.

c) That, although not mentioning that it was his own company, Mr James represented himself as being so competent in management of a company, as to have made that company so successful that it was sold at a profit, thus resulting in his becoming unemployed, but due to his building it up.

d) That Mr James represented himself as an expert logistics manager to Mr MacPherson.

e) That Mr James accepted the senior management position of logistics manager knowing the duties and what was expected of him.

f) That Mr James was told every second day that he was required as a senior manager to deliver outcomes in matters. (That was his own admission).

g) That he did not achieve the objectives laid out for him and did not attend to a number of important matters which he was required to attend to and that he was told so on 8 September 2001 by Mr MacPherson.

h) That Mr James was warned and counselled in September 2001 about his failure to perform competently and also warned on that occasion that his employment was in jeopardy if his performance of his work did not improve.

i) That in October 2001, he was demoted, without any protest on his part, and sent as a transport co-ordinator to deal with transport at Hakea Prison.

j) (i) That he was informed at the beginning by Mr MacPherson, in the interviews before he took up the employment, that the salary which he would be paid was the pro-rata amount equal to nine months salary based on an annual salary of $60,000.00, paid monthly.

(ii) That that was what he was paid and he made no protest about that until after he was dismissed, or there is certainly no evidence that he made any such protest.

k) That Mr James was incompetent and did not exercise the skill and care required of a senior manager or the lower level of skill and care of a manager, when he was demoted, in that:-

i) His ability to communicate in writing was below standard and was indeed "primary school standard".

ii) That he was unable to attend to the matters which he was asked to attend to and matters were not attended to.

iii) (a) That he failed to comply with an instruction to acquire a vehicle to replace a vehicle which had been destroyed by thieves, which was unfit for the use required in that it only had one door when it required two doors.

(b) That he failed to ensure that it had this right specification and that that specification was given and complied with by the supplier of it, notwithstanding that he was instructed to do precisely that.

(c) That, as a result, AIMS was deprived of such a vehicle for some weeks when it was urgent that it be replaced.

(iv) That Mr James failed to ensure that fire blankets required for the safety of persons were properly labelled and distributed with promptness.

(v) That he failed to attend to and solve the problem raised by the inspector of prisons, Professor Richard Harding, about defective air conditioning operations in the security vehicle.

(vi) That as a result of his failure to deal with the matter properly it had to be resolved by Mr MacPherson.

(vii) That he failed to improve operations at Hakea Prison in a subordinate position, in particular, by reducing the amount of overtime work, or at all.

(viii) That he failed to prevent or notify Mr MacPherson of the likely stop work meeting preventing vehicles leaving Hakea with prisoners for the courts at the prescribed time. Indeed, the delay was such as to constitute a breach of the strict conditions of the contract of AIMS with MOJ.

(ix) That he failed to improve his performance after being counselled and warned in September 2001, and, indeed, on other occasions.

(x) That he failed to complete the assets register by obtaining all of the available registration when it was available to him to do so and that he failed to report that he had not done so and/or was not able to do so.

(xi) That he had failed to ensure by personal attention to the matter that all drivers had the required ministry permit to drive the security vehicles, thereby causing disruption and loss to AIMS' operation, when a driver without a permit had to be brought back from the Geraldton-Carnarvon run.

(xii) That he did not perform his duties competently as a senior manager or, very significantly, as a less senior manager after demotion.

(xiii) That he failed to improve in his performance, even after warnings, counselling and demotion.

37 I now turn to questions of law relating to the competence of employees and right to summarily dismiss for incompetence.

38 Of course, it is trite to observe that summary dismissal will only be justified if there is a sufficiently serious breach of contract or the misconduct is such as to indicate that the employee no longer intends to be bound by the contract of employment.

39 Incompetence of an employee may certainly be sufficient justification for the exercise of the right of summary dismissal (see *WA Rewind Company v Skennerton* (1991) 71 WAIG 2045 (FB)).

40 The failure to afford the requisite skill which had been expressly or impliedly promised by an employee is a breach of legal duty and therefore misconduct (see *Harmer v Cornelius* [1843-60] All ER 624). It should be observed, that such a requirement does not apply only to the restricted classes referred to in *Harmer v Cornelius* (op cit).

41 The basis upon which the employer is entitled to summarily dismiss an employee for incompetence is twofold:-

a) There must be an express or implied representation.

b) There must be actual incompetence ((ie) if an employee possessing a particular skill fails to exercise it or if an employee holds himself out as possessing a particular skill which he does not himself possess) (see *Printing Employees Union of Australia v Jackson and O'Sullivan Pty Ltd* (1957) 1 FLR 175 (CIC)).

42 The following principles which amplify what I have just said also apply:-

(a) A representation of the requisite skills by an employee may be implied from the fact that an employee applies for employment in answer to an advertisement setting out the required skills.

(b) An employee has the onus of ascertaining the skills required for the job for which the application is made.

(c) Acceptance of employment will, unless there is evidence to the contrary, amount to an implied representation that the employee has the necessary skill.

(d) There will be no representation where the employer knows that the employee does not possess the requisite skills (see *Printing Employees Union of Australia v Jackson* (op cit)) (see, generally, Macken, O'Grady, Sappideen and Warburton "*The Law of Employment*" (5th Edition), pages 201-204).

43 In this case, the evidence was quite clear and it was open to find that there was an express representation once the duties and role of the position had been explained to Mr James, as they were, that Mr James expressly represented that he was competent to do the job. Further, and alternatively, within those principles, he represented himself impliedly by accepting the position, the duties and responsibilities of which had been explained to him, as being sufficiently competent to do the job, perform the duties and to carry out the functions and requirements which had been explained to him by Mr MacPherson and by Mr Sommerville. Further, there was uncontroverted evidence that he had expressly represented himself as a skilled logistics manager to Mr MacPherson.

44 Moreover, even if he did have the requisite skill or competence, Mr James failed or neglected to use or demonstrate those skills. Thus, despite warnings and counsellings, he did not demonstrate any or any sufficient competence to perform the job of logistics manager, or, indeed, the lesser job of transport co-ordinator. Indeed, Mr James demonstrated, for the reasons which I have expressed above, and on the basis of the findings which it was open to be made, and which I have set out above, that he was actually and patently incompetent and/or that he neglected to exercise the required skills, if he did possess them.

45 Put another way, the Commissioner at first instance was entitled to find as she did:-

a) That Mr James was unable to fulfil his obligations as the senior manager which he represented himself to be.

b) He was actually incompetent and/or neglected to display any or any sufficient competence as a senior manager and as a more junior manager when he was demoted.

c) That he effectively actually misconducted himself by not fulfilling the requirements of two jobs which expressly and/or impliedly he represented himself as competent to undertake.

46 The Commissioner was entitled to find, as she did and was correct in finding on those facts, that Mr James had committed misconduct sufficient to justify summary dismissal, and that he was summarily dismissed. In any event, if there were no summary dismissal then for the same reasons, a fortiori, it was open to find that the termination was entirely fair, because of the major and protracted incompetence displayed by Mr James in two positions, at the very least. Alternatively, the dismissal was not established to be unfair, for all of the above reasons.

Condonation

47 It was also alleged by ground 1 that even if there were misconduct it was condoned. In this case (see *Rankin v Marine Power International Pty Ltd* [2001] VSC 150 (unreported) per Gillard J (delivered 21 May 2001)) (see also *Byrne and Another v Twaddle t/a Mount Hospital Pharmacy and Another* (2003) 83 WAIG 5 at 15 (FB), *Federal Supply and Cold Storage Co of South Africa v Angehrn* (1910) 103 LT 150 and *McCasker v Darling Downs Co-Op Bacon Association* (1988) 25 IR 107), whilst the employer had full knowledge of the employee's misconduct and retained him in his service, AIMS did not abandon, deliberately or otherwise, the right to summarily dismiss the employee. Indeed, in September 2001, when Mr MacPherson counselled and warned Mr James, he expressly reserved the employer's right to dismiss and to dismiss summarily. There was no condonation and that ground has no merit.

Ground 2

48 The second ground contains the allegation that Mr James was not paid what he was entitled to under the contract of employment, namely an amount calculated on the basis that the salary was $60,000.00 for a nine month contract, not nine twelfths of that sum, which would take into account that the contract was for nine months only. First, let me observe that on the evidence of the witnesses and by examination of exhibit A1 (pages 31-32 (AB)), it is quite clear that the letter of 11 September 2001 from AIMS to Mr James does not contain the whole of the contract of employment; and the evidence of Mr James was an admission that that was the case. That being so, the oral evidence of the contract and what it meant was admissible (see *Knight v Alinta Gas Ltd* (2002) 82 WAIG 2392 at 2397 (FB)).

49 Exhibit R2, the letter of 28 June 2001, from Dunhills, which is unsigned, to Mr James, which he says that he did not receive, nonetheless corroborates what Mr MacPherson said that he told Mr James and his evidence was accepted by the Commissioner at first instance.

50 Even if that were wrong, there is an ambiguity in the written evidence of the contract requiring explanation, and Mr MacPherson's evidence, correctly accepted by the Commissioner, explains unequivocally what salary was agreed on. Further, if those views be wrong, it is, on the face of it, an absurdity to allege that a salary expressed in annual terms would apply as a whole to a lesser period than 12 months. Further, it is arguable that the contract of employment entered into initially was terminated consensually and replaced by a new contract of employment when Mr James became transport co-ordinator at Hakea Prison and that was an obstacle to his claim for payment of the contractual entitlements which he claimed. Further, his claim could only be for a salary to the date of termination of his contract for misconduct, in any event, it being correctly conceded by Mr McCorry, and not being asserted on appeal otherwise, that there was a right to terminate for misconduct.

51 It was open to find accordingly that Mr James was to be paid an annual salary of $60,000.00 expressed on a pro-rata basis to cover a nine month contract; and that is what Mr MacPherson unambiguously told him on his accepted evidence. That is, Mr MacPherson told Mr James what he was entitled to and he was therefore entitled, subject to the termination of the contract as it occurred, to be paid nine twelfths of $60,000.00 for salary for the period of nine months. That evidence was clear and accepted and it was open to be accepted. Further, there was evidence that there was no protest by Mr James about the amount being paid, until after Mr James was dismissed. Insofar, also, as that constitutes admissible evidence of the performance of the contract, as it clearly does, then it corroborates Mr MacPherson's evidence of what the agreement was. It was not established at all, for those reasons, that there was any benefit under the contract to which Mr James was entitled which he was not paid.

Finally

52 The Commissioner at first instance was correct to find as she did. The Commissioner was correct to dismiss the application.

53 For those reasons, I am satisfied that there was no error at first instance, discretionary or otherwise established by Mr James on this appeal. No ground of appeal was made out. For those reasons, I would dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

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

COMMISSIONER J F GREGOR—

55 I have had the benefit of reading the Reasons for Decision of His Honour the President in draft. I respectfully adopt those Reasons to which I add the following comments.

56 The Commissioner at first instance made a detailed series of findings on the evidence presented to her. She found that where there was conflict between the evidence given by Mr James, the Appellant herein, and Mr McPherson, who gave the leading evidence for the Respondent herein, that she preferred the evidence of Mr McPherson. The Commissioner expressed the reasons why she reached that conclusion. Suffice to say her Reasons for Decision record findings which are indicative of a failure by Mr James to perform the duties for which he was engaged. The Commissioner eventually concluded that Mr James had not been unfairly terminated.

57 The Appeal does not take issue with the findings of fact made by the Commission and the findings therefore stand. In fact there is no attack upon the finding that there was no unfair dismissal or that unfair dismissal was not established. It appears that the Appeal is directed to the finding that Mr James had not fulfilled requirements of the job and had therefore misconducted himself. In my view this approach is misconceived and the Appeal does not attack the fundamental findings of the Commissioner at first instance. There can be no warrant in those circumstances for the Full Bench to interfere with the Decision because the Appellant has not established that the exercise of discretion has miscarried (*House v The King (1936)* 55 CLR 499).

58 As His Honour the President has found the Decision was a discretionary one. The Full Bench has no warrant to interfere with it unless it is established there was a miscarriage of that discretion. The Appellant has not even attempted to argue that there was such a miscarriage and I respectfully agree with the President that Ground 1 is not made out. As for Ground 2 the clear finding of the Commission was that the annual salary of $60,000.00 was to be expressed on a pro rata basis to cover the nine months contract. In the face of such a finding based as it was upon the Commissioner's determination of the credit of witnesses there is no warrant to interfere with it. The evidence was clear and it was accepted there was no protest about the amount of money which was paid to Mr James until after he was dismissed. This is consistent with Mr McPherson's evidence of what the agreement was. For those reasons I would dismiss Ground 2.

59 The Appeal fails on both grounds and should be dismissed.

THE PRESIDENT

60 For those reasons the Full Bench dismissed the appeal.

Order accordingly

2003 WAIRC 08373

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT ASHLEY JAMES, APPELLANT - and - AUSTRALIAN INTEGRATION MANAGEMENT SERVICES CORPORATION PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 23 MAY 2003
FILE NO/S.	FBA 55 OF 2002
CITATION NO.	2003 WAIRC 08373

Decision	Appeal dismissed
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Ms M G Saraceni (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 1st day of May 2003, and having heard Mr G McCorry, as agent, on behalf of the appellant, and Ms M G Saraceni (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 23rd day of May 2003 wherein it was found that the appeal should be dismissed, it is this day, the 23rd day of May 2003, ordered that appeal No. FBA 55 of 2002 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,

President.

[L.S.]

2003 WAIRC 08443

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSE RODRIGUEZ, APPELLANT - and - PARKS INDUSTRIES PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S J KENNER COMMISSIONER S WOOD
DELIVERED	FRIDAY, 6 JUNE 2003
FILE NO/S.	FBA 6 OF 2003
CITATION NO.	2003 WAIRC 08443

Decision	Appeal upheld, order at first instance suspended and matter remitted to the Commission
Appearances	
Appellant	Mr P E Mullally, as agent
Respondent	No appearance

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the above-named appellant employee against the decision of the Commissioner at first instance, made and perfected on 27 March 2003 in application No 255 of 2003, whereby the Commissioner dismissed an application by the appellant brought pursuant to s.29(3) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The appeal is brought pursuant to s.49 of *the Act*. It is not clear whether it is an appeal against a finding.

3 On the day fixed for the hearing of the appeal Mr P Mullally, Industrial Agent, appeared for the appellant. There was no appearance by or on behalf of the respondent.

GROUNDS OF APPEAL

4 The appellant now appeals against the dismissal of the application, on the following grounds (see pages 2-5 of the appeal book (hereinafter referred to as "AB")):-

> "1. The learned Senior Commissioner erred in law when having listed the appellant's application for hearing he dismissed the appellant's application, without hearing or taking any evidence on oath—
>
> **PARTICULARS**
>
> 1.1 The appellant's application was filed out of time and in his application the appellant sought to obtain the benefit of Section 29(3) of the *Industrial Relations Act*.
>
> 1.2 When the application was called on for hearing on the 27th March 2003 the appellant's Agent opened the case on the question of Section 29(3) and indicated his intention to call the applicant to give evidence in support of his application;
>
> 1.3 The learned Senior Commissioner at the conclusion of the appellant's opening then invited submissions from the Respondent;
>
> 1.4 At the conclusion of the submissions the learned Senior Commissioner then adjourned shortly;
>
> 1.5 Upon resumption, the learned Senior Commissioner then announced that he did not need to hear evidence and proceeded to deliver oral reasons for decision at the conclusion of which he dismissed the application;
>
> 1.6 The appellant was thereby denied his fundamental right to be heard."

Ground 2 goes to the merits of the decision. As Mr Mullally correctly conceded, it would be unnecessary to decide ground 2 of the grounds of appeal if the Full Bench found for the appellant on ground 1.

> **"ORDERS SOUGHT ON APPEAL**
>
> **(AS AMENDED)**
>
> 3 That the Appeal be upheld.
>
> 4 That the decision of the Commission made 27 March 2003 in application number 255 of 2003 be suspended and the matter be referred back to a single Senior Commissioner for hearing and determination according to law and according to the reasons for decision of the Full Bench."

S.27(1)(d)

5 The appellant appeared by an industrial agent. There was no appearance by or on behalf of the respondent. The Full Bench was satisfied that the respondent had been duly served with notice of the hearing of the appeal (ie) notice of proceedings, and proceeded to hear and determine the matter in the absence of the respondent, pursuant to the power conferred by s.27(1)(d).

BACKGROUND

6 The above-named appellant, Jose Rodriguez, (hereinafter called Mr Rodriguez) alleged that he was an employee who was dismissed from his employment by the above-named respondent employer on 18 December 2002.

7 On 28 February 2003, Mr Rodriguez filed an application to the Commission, pursuant to s.29(1)(b)(i) of *the Act*, by which he claimed that he was harshly, oppressively or unfairly dismissed and claiming an order for compensation. He made no claim for reinstatement. That application was opposed.

8 S.29(2) of *the Act* requires that a referral by an employee under s.29(1)(b)(i) must be made not later than 28 days after the day on which the employee's employment is terminated, but subject to s.29(3). The date of termination of employment was alleged to be 18 December 2002.

9 S.29(3) provides that the Commission may accept a referral by an employee under s.29(1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

10 The application, as originally made, seems also to be an application seeking an extension of time within which to make the claim (see page 16 (AB)). The grounds of that application are as follows:-

> "1. The applicant is not familiar with his rights and English is not his first language.
>
> 2. At the date of dismissal his boss told the applicant that he should accept the situation.
>
> 3. A (sic) the date of dismissal he was required to sign a document agreeing to keep everything confidential.
>
> 4. The applicant therefore felt constrained to not seek any advice.
>
> 5. After being unemployed for 8 weeks he decided to seek advice and has now appointed Workclaims Australia to act for him. He signed his Form 27 on the 18th February 2003."

11 An answer and counterproposal was filed on behalf of the respondent on 6 March 2003, which does not comply with *the Industrial Relations Commission Regulations* 1985 (as amended) but nonetheless opposes the application.

12 The matter came on for hearing by the Commission, on its own motion, on 27 March 2003, for the Commission to hear and determine why it would be unfair not to accept the application out of time. Mr Mullally, industrial agent, appeared for Mr Rodriguez and Mr Parks, the managing director, represented the respondent. Submissions were made on behalf of the appellant, at first instance, by Mr Mullally. Submissions were made by Mr Parks who advised that much of what was being said was not in issue. The Commissioner at first instance therefore went on to dismiss the application.

BACKGROUND

13 On 28 February 2003, the above-named appellant, by his agent, filed an application in the Commission alleging that he had been unfairly dismissed from his employment by the respondent, on 18 December 2002. The basis of the claim was that he had suffered an injury to his elbow at work. He was a machinist by occupation. Further, it was said that the evidence would be that he was medically assessed as fit to do light duties only instead of his normal machinist duties. He alleged that he was dismissed, (not retrenched for redundancy), because he was unfit to perform those duties although he had apparently recovered for the most part. It should be said that the answer (see AB 17-21), which has with it, contrary to the rules, a copy of a letter, dated 5 March 2003, seems to say that the application was opposed because the applicant had agreed to a "voluntary redundancy", on terms set out in that letter.

14 The application under s.29(1)(b)(i) claiming unfair dismissal, was filed some 44 days after the date of the alleged dismissal. The basis of the application appears above and appears in the appeal book at (AB 16).

THE HEARING

15 At the hearing at first instance to determine the question of extension of time within which the Commission might accept the refusal of the claim, if it deemed it fair to do so, Mr Mullally representing the appellant, referred to Mr Rodriguez' case, that was that he was injured on 18 September 2002; and that because of the appellant's condition, even though he was improving, he was dismissed from employment by his supervisor, Mr Tony Baxter. The case was, too, that his dismissal was as Mr Baxter told him, to be described as a redundancy. Further, he was told by Mr Baxter, and this would be his evidence it was said, that he would have to sign a document to that effect. In fact he did sign the document and received monies pursuant to it.

16 At (AB 24-26), Mr Mullally outlined the evidence which his client would give to the Commission. The reasons for the delay in filing the application were that canvassed by Mr Mullally (AB 26-27).

17 Mr Mullally then also informed the Commission that he proposed to call the applicant. Then in reply the Senior Commissioner said that he had not anticipated that Mr Rodriguez would be called. Mr Mullally said:-

> MR MULLALLY: "Well, I'm in your hands, sir. I - - ultimately you have to make a judgment and perhaps it could be done by submissions. I'm happy for it to be done on that basis but I —
>
> BEECH SC: Yes, I see. All right.
>
> MR MULLALLY: Perhaps it may be a case where having heard from the respondent we then decide what -—
>
> BEECH SC: Yes, all right. Thank you, Mr Mullally. Mr Parks, it would seem to me that if Parks Industries Pty Ltd is going to disagree with- - - is going to disagree with what Mr Mullally has said, that in fairness I ought to allow Mr Rodriguez to give evidence so that I can at least give him the opportunity to say it in his own words and give you an opportunity to cross-examine him. So if I do that I'll ask him to give evidence and you will have the opportunity to give your evidence in reply. Does that cause you any difficulty if I do it that way?
>
> MR PARKS: Well, what if I agree with what he says?
>
> BEECH SC: Then there's no need because what Mr Rodriguez would say is not in dispute. I had assumed it was in dispute because of the answer that's been filed."

18 Mr Parks then said quite clearly that he, Mr Parks, had the voluntary redundancy agreement and Mr Rodriguez signed it "so I've got nothing else to add".

19 It is to be noted that Mr Mullally's submission was that, if Mr Rodriguez' evidence was taken as "a prima facie case", he did make out a very clear case of unfair dismissal. Also, on the face of it given that his first language is not English he has and had a handicap in the matter.

20 Mr Mullally also canvassed the evidence at (AB 26) which would be given to explain the delay in the filing of the application.. The Commissioner at (AB 28) advised the parties that he was not certain that the matter could be dealt with without calling evidence.

21 Mr Mullally went on to submit that it would be demonstrated that the agreement was neither " voluntary or a redundancy". That, of course, was in direct conflict with what Mr Park's case was. Mr Mullally's submissions related to the evidence which would be given including evidence relating to the reason for the application being filed 44 days late. Mr Parks submitted that the prejudice to the respondent if the claim were "to go forward", was that "I've done everything legally and within my rights and waited too long for a response". Mr Parks also submitted that to grant an extension of time would "open the floodgates to everyone employed for the last 15 years to come forth". For the applicant it was submitted that no prejudice would be suffered by the respondent company. The Senior Commissioner then said that he would stand the matter down for five or ten minutes and go through the notes which he had made.

22 The Senior Commissioner then said:-

> "It would seem to me that the issue is this: If I am able to decide the matter on the basis of Mr Mullally's submissions, then there may be no need for Mr Rodriguez to give evidence this morning in support of those submissions. If, however, I reach the conclusion that some of the issues that Mr Mullally raises are matters that I ought hear from Mr Rodriguez on before deciding the matter, then I will ask Mr Rodriguez to give evidence briefly and allow him to be cross-examined."

23 Having stood the matter down, the Senior Commissioner returned and dismissed the matter.

24 The Commission decided the matter on the basis that, if Mr Rodriguez had given evidence, the evidence would have been as Mr Mullally had outlined it to the Commission.

25 The reasons for the decision to dismiss the application, summarised, are as follows:-

(1) That whilst the appellant found the termination of his employment disturbing and even frightening, and further, was concerned that he did not get a copy of the voluntary redundancy agreement which he had signed and which he had been persuaded not to discuss with anyone, he was unable to accept that Mr Rodriguez was as disturbed as he suggested. (It is difficult to understand how such a finding could be made without hearing Mr Rodriguez).

(2) (a) That the Commission was persuaded that Mr Rodriguez decided to pursue the claim of unfair dismissal more because he had been unemployed for eight weeks than because of the merit of the claim.

(b) In that regard the Commissioner placed weight on the fact that the appellant sought only compensation and not reinstatement.

(c) That the Commission was not satisfied that there was an acceptable explanation for the delay.

(3) As to the merit of the application,

(a) Mr Rodriguez returned to work in October 2002 after his injury of 18 September 2002.

(b) It was not apparent from those dates that Mr Rodriguez was not able to do his job properly.

(c) The statement by Mr Parks that there was a need to reduce the workforce in the quiet period leading up to Christmas was quite plausible.

(d) Mr Rodriguez' suggestion that he was dismissed because of his injury was equally matched by the evidence of the company that there was a need to reduce the size of the workforce. (This finding of course, demonstrates part of the conflicting evidence between the parties).

(e) On its face, the voluntary redundancy agreement was one that he could have refused to sign and Mr Rodriguez faced the task of having to persuade the Commission that the document was incorrect or that there was some other reason why he put it to one side.

(f) The first that the respondent knew of the appellant contesting the dismissal was when the application was lodged and served, namely, two and a half months after the dismissal.

(g) There was a prejudice to the respondent in having to defend a claim where, even accepting the evidence that Mr Rodriguez would give, the merit was not substantial.

26 Generally speaking, in this Commission, as has many times been stated, the Commission is entitled to act upon the assertions of advocates from the bar table even though such assertions are not made on oath, or even if the advocate might not have been competent as a witness according to the ordinary rules of evidence, to make them. If the correctness of these assertions is challenged however, it would at least be imprudent on the part of a Commissioner not to further examine the matter so as to satisfy her/himself of the actual facts, if need be, by evidence formally given. (See *The Queen v The Commonwealth Conciliation and Arbitration Commission and Others; Ex parte The Melbourne and Metropolitan Tramways Board* [1965] 113 CLR 228 at 243 per Barwick C J.) Further, as Menzies J said in the same case at page 252:-

> "An arbitrator would, no doubt, usually refuse to act merely upon the representations of parties made before him if there were a genuine dispute about the relevant facts, but it is a far cry from such a rule of fairness and prudence to an insistence that there cannot be arbitration within the meaning of s.51(xxxv) of the Constitution unless the arbitrator hears and decides upon sufficient evidentiary material submitted to him by the parties."

27 As Kirby J said, too, in *Coal and Allied Operations v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1360:-

> "It seems clear from the passage which I have cited that Giudice J's conception of the "supervisory" role of the Full Bench was such that he felt that it authorised him to consider whether or not as a member of the Full Bench he was "satisfied" of the conclusions to which Boulton J had come on the basis of the same evidentiary material. I say evidentiary material because, as is the case in many tribunals (and as has long been the case in the Commission and its predecessors), decisions are made on materials that could not be described as "evidence" strictly so called. The entitlement of the Commission to act in reliance on such materials, at least in given circumstances, has been acknowledged by this court."

28 His Honour cited, inter alias, the *Tramways Case* (op cit) and *The Queen v Williams*; *ex parte Australian Building Construction Employees' and Builders Labourers Federation* (1982) 153 CLR 402 at 411.

NATURAL JUSTICE OR PROCEDURAL FAIRNESS DENIED?

29 This Commission is bound by the rules of natural justice or procedural fairness. (See *Hocks v Ken and Faye Davies t/a Kembla Built-In Furniture* (1987) 67 WAIG 1527 (FB), *RRIA v AMWSU and Others* (1986) 66 WAIG 1553 (IAC), *RRIA v AMWSU and Others* (1990) 70 WAIG 2083 (IAC); *DeVos and Minit Australia Pty Ltd (*2003) 83 WAIG 219 at 222-4).

30 As a manifestation of the duty to afford procedural fairness or natural justice, the following are some of the relevant principles which apply. (See *DeVos and Minit Australia Pty Ltd* (op cit) and the cases cited therein as well as the cases referred to hereunder):-

(1) The Commission is required to afford parties a reasonable opportunity to present their cases.

(2) There is no obligation on the Commission to ensure that the parties take advantage of that opportunity or to make the case for a party.

(3) A tribunal should not proceed while relying on the parties to assert their rights where to do so would deny the parties the opportunity to be heard.

(4) (a) However, whilst this Commission normally proceeds by way of oral hearings, in contested matters, it does not and does not need to do so where there is no question of credibility, or no contested issues of fact or where facts are agreed or admitted, or where such a course is agreed by the parties, or where the Commission in the proper exercise of its discretion under s.27, directs otherwise. (S.26(1)(a) is not present for mere effect).

(b) For example, in this Commission, assertions from the bar table are often and can be accepted as evidence within the principles which I have set out above.

(5) An oral hearing is necessary in my opinion, in this Commission:-

(a) Wherever there is a conflict of evidence. (See *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516 per Aickin J. See also, *The Queen v The Commonwealth Conciliation and Arbitration Commission and Others; Ex parte The Melbourne and Metropolitan Tramways Board* (op cit)).

(b) Where persons are unable to express themselves in writing and may not have access to assistance to enable that to occur. (See *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs and Others* (1994) 121 ALR 83 (FCFC) and see also *Jeffs v New Zealand Dairy Production and Marketing Board* [1966] 3 ALL ER 863 (PC).

(c) Where personal characteristics are at issue. (See for example *Exell v Harris* (1983) 51 ALR 137 per Neaves J (a promotion appeal)).

(d) Where the allegations are grave. (See *Finch v Goldstein* (1981) 36 ALR 287 per Ellicott J at 304 and *Ansell v Wells* (1982) 43 ALR 41 per Davies J at page 52.

(6) What I have said does affect the use of documents, concessions, admissions, affidavits and written evidence of all types in the Commission. I am referring to the use of oral evidence and the right to be heard orally as an element of the affording of procedural fairness. In other words, the hearing of oral evidence in the context of what I have said in these reasons, is not always an essential element of the proper affording of procedural fairness.

CONCLUSIONS

31 In this case there were direct and fundamental conflicts of evidence foreshadowed and a direct collision between the parties concerning the fundamental issue of whether there was a voluntary redundancy or a dismissal of the employee by the employer. This issue itself could not be resolved as the Commission did by making findings of credibility without seeing the witnesses under examination or cross-examination, on oral submissions on behalf of the parties from the bar table. Indeed, to do so was contrary to the authority which I have cited above. In this case, there was a genuine dispute about the relevant facts

which could only be properly resolved by the parties being given the opportunity to adduce oral evidence in the case after the applicant, as his agent foreshadowed, gave his evidence. No positive finding could be made on the evidence before the Commission merely as it was foreshadowed from the bar table. Given the significance of the strength or otherwise of the appellant's case and of the explanation for the delay and the divergence between the cases of the two parties, the conflict could only be resolved on the authorities which I have cited above, by giving the parties the opportunity to call oral evidence. Thus, having heard and seen the witnesses, the Commission could make whatever findings the Commission decided that it should make. As it was, findings were made which assessed matters based on the mere plausibility of assertions of fact from the bar table instead of evidence on oath or affirmation subject to cross-examination. Those findings, which required oral evidence to be properly made, were those outlined by me above in paragraph 25 (1), (2) and (3). Such findings could not be made without hearing the witnesses, seeing the witnesses and assessing their credibility and in the light of that advantage.

32 Inferences from conflicting facts, not the subject of oral evidence, could not correctly be made in this case and could not be made in a procedurally fair manner, in the circumstances of the case.

33 This was a clear case where the denial of the right to call oral evidence as it was intended to do so, occasioned clear procedural unfairness to Mr Rodriguez.

34 On a fair reading of the transcript of proceedings too, there was no agreement by Mr Mullally to any other course.

35 I find for those reasons that the appellant was not afforded procedural fairness or natural justice.

The principle in *Stead v SGIC* (1986) 161 CLR 141

36 Of course, the matter does not end there. The appellant is not entitled to relief unless he establishes that by the denial of natural justice or procedural fairness he has been deprived of the possibility of a successful outcome. To negate that possibility, it would be necessary for the Full Bench to find that a properly conducted trial could not possibly have produced a different result. Such a finding was not open to be made. In this case, it was abundantly clear that a hearing on the oral evidence was necessary to resolve questions of credibility and conflict in evidence and might have produced a different result had such a hearing taken place, with the Commission seeing and hearing the witnesses. It is not certain but there was some indication that there might have been more witnesses called for the appellant than Mr Rodriguez himself. For those reasons I was of the opinion and would find that, within the meaning of the principle in *Stead v SGIC* (op cit), this Full Bench would not be able to find that a properly conducted hearing could not possibly, on the oral evidence, have produced a different result than the result which was achieved at first instance.

FINALLY

37 I would add that in deciding the question of extension of time, the Commission at first instance might derive some assistance from the discussion of extension of time in relation to other limitation periods such as are reported in cases like *Brisbane South Regional Health Authority v Taylor* (1996-1997) 186 CLR 541 and *Girando and another v Girando* (1997) 18 WAR 450 (FC). See also, *Baker v Shire of Albany* (1994) 14 WAR 46 (FC) and *Clayton v Aust* (1993) 9 WAR 364 (FC).

38 Finally, for those reasons, I concluded that the appellant was not afforded procedural fairness. Therefore, I joined my colleagues in upholding the appeal and making the orders which the Full Bench made in this matter.

COMMISSIONER S J KENNER—

39 I have had the benefit of reading in draft form, the reasons for decision of the President. I am in general agreement with those reasons and add the following brief observations of my own.

40 It would seem that there would only be limited circumstances arising where the Commission would determine whether to exercise its discretion pursuant to s 29(3) of the Industrial Relations Act 1979 ("the Act"), to extend time for the referral to the Commission of an application alleging harsh, oppressive or unfair dismissal, without the need to hear evidence on matters in issue.

41 A first circumstance could be where there are admissions by an applicant, on all relevant issues to be determined. A second circumstance would seem to be where there is common ground between the parties on the relevant factors to consider, by way for example, of an agreed statement of facts with the Commission being requested to determine the application, based on those agreed facts.

42 In the case at first instance, the Commissioner, in effectively precluding the appellant from giving oral evidence, which, from a fair reading of the transcript, he clearly wished to do, denied the appellant natural justice in the circumstances of the case given the conflict on the facts. In my opinion, this denial did deprive the appellant of the possibility of a successful outcome: *Stead v SGIC* (1986) 161 CLR 141.

43 It was for these reasons that I considered that the appeal should be upheld and the matter remitted to the Commission at first instance, for further hearing and determination.

COMMISSIONER S WOOD—

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

THE PRESIDENT—

45 For those reasons, the Full Bench upheld the appeal. The operation of the decision at first instance is suspended and the matter remitted to the Commission at first instance to be heard and determined according to law and the reasons of the Full Bench herein.

2003 WAIRC 08376

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSE RODRIGUEZ, APPELLANT - and - PARKS INDUSTRIES PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S J KENNER COMMISSIONER S WOOD
DELIVERED	FRIDAY, 23 MAY 2003
FILE NO/S.	FBA 6 OF 2003
CITATION NO.	2003 WAIRC 08376

Decision	Appeal upheld, order at first instance suspended and matter remitted to the Commission
Appearances	
Appellant	Mr P E Mullally, as agent
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on the 23rd day of May 2003, and having heard Mr P E Mullally, as agent, on behalf of the appellant, and there being no appearance by or on behalf of the respondent, and the Full Bench having determined that the appeal should be upheld, and that reasons for decision will issue at a future date, and the applicant herein having waived its rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 23rd day of May 2003, ordered as follows:-

(1) THAT appeal No. FBA 6 of 2003 be and is hereby upheld.

(2) THAT the decision of the Commission made at first instance in matter No. 255 of 2003 given on the 28th day of March 2003 be and is hereby suspended and the matter be and is hereby remitted to the Commission at first instance to be heard and determined according to law and the reasons of the Full Bench herein.

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

FULL BENCH—Unions—Application for Alteration of Rules—

2003 WAIRC 08430

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IN THE MATTER OF AN APPLICATION BY THE UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA PURSUANT TO S.62(2) OF THE INDUSTRIAL RELATIONS ACT 1979, APPLICANT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
DELIVERED	TUESDAY, 3 JUNE 2003
FILE NO/S.	FBM 1 OF 2003
CITATION NO.	2003 WAIRC 08430

Decision	Application dismissed
Appearances	
Applicant	Mr R J Walker, Industrial Officer, and with him Mr A E Drewett, Secretary of the United Firefighters Union of Western Australia

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an application by the United Firefighters Union of Western Australia for the alteration of its rules pursuant to s.62(2) of *the Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 That body is an "organisation" as that term is defined in s.7 of *the Act*, which means that it is registered as an organisation under *the Act*.

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

4 The application herein was filed on 27 March 2003 and bears the common seal of the applicant organisation and the signature of its secretary.

5 The application seeks the amendment of rule 5 – Eligibility, and, in particular, rule 5(e)(14)(b) so that it will read as follows:-

"(14) Any person employed:-

(a) By the Western Australian Bush Fires Board; or

(b) As storeman, store officer, general assistant and technical officer by the Western Australian Fire Brigades Board."

That means that the existing exclusion from membership of communications officers, trainee communications officers and communications supervisors (I will refer to all three occupations hereinafter as communications officers) presently expressed in rule 5(e)(14)(b) will not exist and those officers will, if this application is granted, be eligible for membership of the applicant organisation.

6 Particulars of the amendments appear also in the notice of the application dated 1 April 2003 contained in the Western Australian Industrial Gazette ((2003) 83 WAIG 1072) published on 23 April 2003.

7 Regulations 98(1) and (3) of the *Industrial Relations Commission Regulations* 1985 have been complied with.

8 Rule 40 is the alteration of rules rule of the applicant organisation, and that reads as follows:-

> "(1) No amendment, repeal or alteration of the Rules of the Union shall be made unless the amendment, repeal or alteration has been passed and approved by a vote of the majority of Members of the Union present in person at a general meeting of the Union specially called for that purpose, of which fourteen (14) days previous notice specifying the time, place and objects of the meeting has been given by publishing a copy of a notice thereof in a newspaper circulating generally in the district in which the office of the Union is situated, by posting a copy of the notice in a conspicuous place outside that office and by posting a copy of the notice at all places of work.
>
> (2) The Secretary shall publicise any Rule change adopted by a general meeting of the Union, the reasons therefore and that the Members or any of them can object to the proposed alteration by forwarding a written objection to the Registrar within 14 days after the date of resolution by written notices thereof being displayed and made available to the Members at the registered office of the Union and at all places of work and in other ways likely to come to the attention of Members.
>
> (3) Notwithstanding anything contained in this Rule where the Branch is required by law to amend its Rules such amendment when endorsed by a simple majority of the Committee of Management shall be deemed to have been made in compliance with the procedural requirements of this Rule."

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

BACKGROUND, ISSUES AND CONCLUSIONS

10 Following the requirement of s.55(1) & (2) of *the Act*, namely that a notice of the application and a copy of the rules of the organisation as they relate to the qualification of persons for membership, etc, and a notice that persons may object within the time and in the manner prescribed, was published in the Western Australian Industrial Gazette on 23 April 2003, more than 30 days before the hearing of this matter which took place on 26 May 2003.

11 The Full Bench is required to refuse an application such as this, unless it is satisfied as to a number of matters (see s.55 of *the Act*). That requirement is a mandatory requirement (see s.56 of the *Interpretation Act* 1984 (as amended)).

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

(a) There is a statutory declaration of the secretary of the applicant, Mr Anthony Edward Drewett, filed herein and declared on 27 March 2003.

(b) The alteration to the rules sought in this matter has been approved in relation to its rules by the related federal organisation, the United Firefighters Union of Australia.

13 The proposed alteration to the rules, the subject of this application, was to be dealt with by a meeting of the applicant in August 2002, but that meeting was unable to take place because there was a lack of the quorum prescribed by the rules.

14 At a meeting which was quorate according to the rules of the organisation ((ie) an annual general meeting held on 26 February 2003), the meeting resolved to approve the alteration and authorised an application to this Commission for the alterations to be registered. The minutes of the meeting are annexed to Mr Drewett's declaration.

15 I am satisfied from Mr Walker's evidence from the bar table that the resolution approving the proposed alteration was carried by the majority of the financial members present and voting as the rules require.

S.55, s.56 and s.62(4) Requirements

16 Further, the following actions were taken by Mr Drewett according to his evidence to have the proposed variation to the rules dealt with in accordance with the rules of the applicant and in accordance with s.62 of *the Act*:-

(a) A notice was published in "The West Australian" newspaper on 24 January 2003, advertising the time and date of the annual general meeting. Included in the advertisement is notice of the proposed rule change and the purpose for the rule change.

(b) In accordance with rule 14, general meetings and special general meetings, a notice giving at least 14 days notice stating the date, time, place and the business to be transacted at the annual general meeting (including the proposed rule change) was faxed to each workplace on 10 February 2003 (see attachment 12 to Mr Drewett's declaration).

(c) Mr Drewett's evidence is that the practice of the union is for all union faxes to be placed on workplace notice boards. All notices are also posted on the notice board at the front of the union office.

(d) On 13 February 2003, a notice advising a change of venue for the annual general meeting was faxed to all workplaces (see attachment 13).

(e) A reminder notice of the annual general meeting was faxed to all workplaces on 19 February 2003.

(f) The annual general meeting held on 26 February 2003 resolved to endorse the proposed amendments and did so.

(g) Minutes of the meeting were posted to each workplace and subsequently placed on each workplace union notice board.

(h) In accordance with rule 40, the acting secretary, Mr John Walker, faxed a notice to each workplace publicising the rule change adopted by the annual general meeting, the reason for the change, and also advising that members could object to the proposed alteration by forwarding a written objection to the Registrar at the Western Australian Industrial Relations Commission within 14 days. That document, which is attachment 16, is dated 4 March 2003 and is marked "faxed" and contains what it is said to contain.

(i) The applicant's committee of management meeting on 13 March 2003 noted the mail out of the annual general meeting minutes and resolved that the secretary be authorised to "progress" the proposed rule change in the Commission.

(j) It was Mr Drewett's evidence that the applicant has a process of faxing notices and circulars to all workplaces. To ensure all financial members at that workplace have access to the union's notices and information, the long established practice is for the first person receiving a union fax to place the material on the union's notice board. Copies of the faxed notices/circulars are also posted out to each workplace with the minutes of the previous committee of management meeting. The process has worked well over a long time and ensures that all financial members are kept informed of union information. Each shift coming onto duty checks the notice board for updated or new information from the union.

17 I accept that evidence.

18 There were no objections to the alterations filed in the Commission, or otherwise notified.

19 The rules provide for the alteration of the rules by reasonable notice, insofar as it is necessary to so find.

20 The rules of the organisation relating to elections for office provide for election by secret ballot in conformity with s.56(1) of *the Act*, again insofar as it is necessary to so find.

21 Reasonable steps have been taken to adequately inform the members of the intention of the organisation to apply for registration of the proposed alterations to the rules of the organisation and that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar on Mr Drewett's above evidence, which I accept.

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

23 Because none have objected, less than 5% have certainly objected. No-one has objected to this application.

24 It is also a fact, on the undisputed evidence, that both the applicant and the Civil Service Association of Western Australia (Incorporated) (hereinafter referred to as "the CSA"), another organisation of employees, registered under *the Act*, that an agreement has been reached as to coverage by the applicant of communications officers.

25 There is correspondence forming part of exhibit 1 herein which is evidence of the fact that the occupation of communications officers as described in rule 5(e)(14)(b) currently, now sought to be a grounds of eligibility for membership of the applicant rather than being excluded from coverage by the applicant organisation, was formerly an occupation which made employees eligible for membership of the applicant. That is before more recently persons were excluded from membership of the applicant and were eligible for membership of the CSA only. According to the correspondence, as I find, the applicant should have coverage of communications officers who wear uniforms and are part of the firefighting teams, and that is now agreed between the CSA and the applicant.

26 As I understand it, the assertion from the bar table, which I accept, is that all communications officers have now joined the applicant. I would point out that they are not, of course, currently eligible to do so, because they are excluded. Any membership, therefore, is invalid.

27 Communications officers will, even if this application is granted, remain eligible to join the CSA, and the Full Bench asked about that matter in the context of any overlapping of coverage. It is fair to observe, however, that, given the history of former membership and the nature of the role of communications officers, as well as the agreement between the two organisations, namely the CSA and the applicant, I was satisfied that pursuant to s.55 of *the Act*, notwithstanding the overlap in membership coverage, there is good reason consistent with the objects prescribed in s.6 of *the Act*, to permit registration of the alteration sought; indeed to authorise it.

28 Next, the object of s.6(g) is advanced by such an order being made because the rule is being altered to bring it in line with the rules of a federal organisation, the United Firefighters Union of Australia.

29 Such coverage would also enable the applicant to apply for a state award (there being none presently), to cover communications officers.

30 I am satisfied, on the evidence, and for all of those reasons, therefore, that all of the relevant requirements of s.55 and s.56 of *the Act*, modified because this is an application for alteration of rules and not for registration of an organisation, have been met, save and except for s.55(4)(a).

S.55(4)(a) of *the Act*

31 The question arises then within the meaning of s.55(4)(a) whether rule 40 has been complied with. Rule 40 is a mandatory rule. I am satisfied that it has been complied with in every respect except one.

32 Inter alia, rule 40 requires that an alteration to rules must be passed and approved by a majority of members present in person "at a general meeting of the Union specially called for that purpose" (my emphasis), and of which the requisite previous notice prescribed by the rule has been given.

33 Rule 13(2) provides for general meetings and special general meetings, two separate and distinct categories of meeting. (See also Rule 14).

34 In this case, notice was given of a special general meeting to be held in August 2002, which could not be validly held, because no quorum was achievable.

35 Notice was given then of the annual general meeting of 26 February 2003. The notice included notice being published in "The West Australian" newspaper of 24 January 2003 that the proposed rule changes would be considered at that meeting. In that notice, and in the other notice forwarded to notice boards and placed on notice boards, the meeting called an annual general meeting. At the meeting, too, business other than the business of the alteration of the rules was considered. However, the notice given was notice of an annual general meeting. The business to be dealt with was the business of an annual general meeting. I am not satisfied that the meeting which approved the alterations was a meeting called especially for the purpose of considering the proposed alterations within the meaning of rule 40 of the rules of the applicant.

36 Thus, I am unable to find that the alteration which was authorised by an annual general meeting, was authorised in accordance with the rules of the applicant. Thus, too, not being satisfied that s.55(4)(a) of *the Act* has been complied with, I am required to refuse the application and dismiss it.

37 In all other respects, I would have been satisfied that the application should have been granted, having regard to s.55, s.56, s.62(2) and (4), s.26(1)(a), s.26(1)(c) and s.6(e), (f) and (g) of *the Act*.

38 I would add that I have some sympathy with the officers of the applicant, because it is clear that it is difficult to obtain a quorum for meetings which are not general meetings. However, as the Full Bench suggested, part of any new process of application for the authorisation of these alterations might be the holding of a special general meeting called in accordance with rule 40, and complying with rule 40 by proper notice, etc, but held on the same day as an annual general meeting to attempt to obtain a quorum for the former. However, that is a matter for the applicant. In any event, I note that such a meeting

can be held on 14 days notice only (see rule 40), and that might be an option which the applicant's officers would wish to consider. But that after all is a matter for the applicant and not for the Full Bench.

39 For those reasons, I somewhat reluctantly agreed to dismiss this application.

COMMISSIONER P E SCOTT—

40 I have had the benefit of reading the Reasons for Decision of His Honour, the President. I agree with those Reasons and wish to note, in particular, that I too reluctantly agreed to dismiss the application on the basis that s.55(4)(a) of the Industrial Relations Act 1979 has not been satisfied. This is because the meeting at which the members resolved to alter the rules was not a meeting called especially for the purpose of considering the proposed alterations.

COMMISSIONER J L HARRISON—

41 I have had the benefit of reading the reasons for decision of His Honour, the President. I agree with those reasons and have nothing to add.

THE PRESIDENT—

42 For those reasons, the application was dismissed.

2003 WAIRC 08382

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IN THE MATTER OF AN APPLICATION BY THE UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA PURSUANT TO S62(2) OF THE INDUSTRIAL RELATIONS ACT 1979, APPLICANT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
DELIVERED	MONDAY, 26 MAY 2003
FILE NO/S.	FBM 1 OF 2003
CITATION NO.	2003 WAIRC 08382

Decision	Application dismissed
Appearances	
Applicant	Mr R J Walker, Industrial Officer, and with him Mr A E Drewett, Secretary of the United Firefighters Union of Western Australia

Order

This matter having come on for hearing before the Full Bench on the 26th day of May 2003, and having heard Mr R J Walker, Industrial Officer, and with him Mr A E Drewett, Secretary of the United Firefighters Union of Western Australia, on behalf of the applicant organisation, and the Full Bench having determined that the application herein should be dismissed, and that reasons for decision will issue at a future date, it is this day, the 26th day of May 2003, ordered that application No. FBM 1 of 2003 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

FULL BENCH—Unions—Declarations made under Section 71—

2003 WAIRC 08378

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

IN THE MATTER OF AN APPLICATION BY THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT

NEVILLE JOHN JONES AND DIANE MARGARET ROBERTSON, INTERVENERS

CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 23 MAY 2003
FILE NO/S.	FBM 4 OF 2003
CITATION NO.	2003 WAIRC 08378

Decision	Declaration granted
Appearances	
Applicant	Mr D H Schapper (of Counsel), by leave and with him Mr J Dasey, Senior Industrial Officer
Interveners	Dr J J Hockley (of Counsel), by leave, and with him Mr B R Jackson (of Counsel), by leave

Reasons for Decision

THE PRESIDENT AND COMMISSIONER P E SCOTT—

INTRODUCTION

1 These are the reasons of the President and Commissioner P E Scott.

2 This is an application by the Civil Service Association of Western Australia (Incorporated) (hereinafter referred to as "the CSA"), and made pursuant to s.71 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). By the application, which, by virtue of s.71, is an ex parte application, the CSA has applied for a declaration by the Full Bench pursuant to s.71(2) of *the Act* that the Community and Public Sector Union, SPSF Group, Western Australian Branch (hereinafter referred to as "the CPSU") is the counterpart federal body of the CSA, a state organisation as defined in s.71(1) of *the Act*.

3 The grounds of the application are that the requirements for issuing the declaration as prescribed in s.71(3) and (4) of *the Act* have been satisfied.

4 The application was filed on 15 April 2003. It bears the seal of the CSA and the signature of its senior industrial officer, Mr John Dasey. At all material times, the CSA was (and remains) an "organisation" as that term is defined in s.7 of *the Act*. At all material times, therefore, it was a "state organisation" as defined in s.71(1) of *the Act.* The application was heard on 12 May 2003 by the Full Bench.

5 The "CPSU, the Community and Public Sector Union, Western Australian Branch" (see exhibit 1, the branch rules, rule 2 – Name) is the Western Australian branch of an organisation of employees registered under the *Workplace Relations Act* 1996 (hereinafter referred to as "*the Commonwealth Act*"), namely the CPSU (see the CPSU rules, exhibit 1, rule 1 – Name). *The Commonwealth Act* is defined in s.7 of *the Act* as "the *Workplace Relations Act 1996*".

6 "Branch" is defined as in s.71(1) of *the Act* to mean "the Western Australian Branch of an organisation of employees registered under the Commonwealth Act".

7 "Counterpart Federal Body" is defined in s.71(1) of *the Act* as follows:-

> "in relation to a State organisation, means a Branch the rules of which –
>
> (a) relating to the qualifications of persons for membership; and
>
> (b) prescribing the offices which shall exist within the Branch,
>
> are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter; and"

8 "State organisation" means an organisation of employees that is registered under Division 4 of Part II.

NOTICE OF INTERVENTION

9 Two members of the CSA, one a former president, Ms Diane Margaret Robertson, and another member, Mr Neville John Jones, gave through a person named as their agent, Ms Megan in de Braekt, notice of intention to seek leave to intervene in the proceedings pursuant to s.27(1)(k) of *the Act*. Indeed, Ms Robertson had authorised another agent, Mr Graham McCorry, to act with Ms in de Braekt for her. We will return to those questions later in these reasons.

REPRESENTATION AND RIGHT OF AUDIENCE

10 At the commencement of proceedings the Full Bench inquired of Ms in de Braekt, who purported to appear on behalf of Ms Robertson and Mr Jones by way of warrant, as agent, in what capacity she purported, in fact, to appear. There was a general warrant in the Commission authorising her to act as agent for Mr Jones in various matters and a warrant authorising her to act as agent for Ms Robertson, along with Mr McCorry, dated 7 May 2003 and filed herein on 8 May 2003.

11 However, Ms in de Braekt informed the Full Bench that she has been admitted as a legal practitioner in this state by the Supreme Court of Western Australia, and that she held, at the time of hearing, a restricted practising certificate issued to her pursuant to s.16A(1) of the *Legal Practitioners Act* 1893 (as amended) (hereinafter referred to as "*the LP Act*").

12 S.16A(1) reads as follows:-

> "A practitioner admitted under s.15 (2)(a) or 15 (2)(b) shall not—
>
> (a) be entitled to practise;
>
> or
>
> (b) practise,
>
> on his or her own account until completing a term of 12 months as an employed practitioner in the office of a practitioner authorised by this *Act* to take, have and retain an articled clerk."

13 In other words, a legal practitioner cannot practise on his or her own account without completing 12 months of practice as an employed practitioner on a certificate restricted in that manner.

14 Ms in de Braekt advised the Full Bench that she was awaiting "employment" in Francis Burt Chambers. (What "employment" is at the Bar is not clear to me). In the meantime, she said, she was carrying on business as an "industrial agent" in which capacity she was purporting to appear in this matter.

15 It was her submission that, because she could not appear as counsel contrary to *the LP Act* and to the practising certificate, because she was not employed in compliance with s.16A(1), then she could nonetheless appear as an industrial agent, which one assumes she is registered to do.

16 There is no definition of "industrial agent' in *the Act*, save and except as we refer to it hereinafter. Further, a legal practitioner cannot unilaterally revoke or surrender one's practising certificate once it has been issued, although he/she can renounce the right to carry on practice (see *John Holland Constructions v TWU and Another* (1987) 67 WAIG 2233 (FB)). Ms in de Braekt did not renounce the right to carry on practice.

17 A "practitioner" is defined in s.3 of *the LP Act* as follows:-

> "A person admitted and entitled to practise as a barrister and solicitor of the Supreme Court of Western Australia, for the purposes of Part IV includes a person who is entitled by virtue of a law of the Commonwealth to perform in Western Australia the functions of a Barrister or Solicitor, for the purposes of Part V includes a firm of practitioners of which the person is a member and for the purposes of Part IV and Part VA includes a person who has been a practitioner."

18 In *the Act* a "legal practitioner" is defined in s.7 to mean "a person who is, or is deemed to be, a certificated practitioner under and for the purposes of the *Legal Practitioners Act 1893*". We are satisfied and find that Ms in de Braekt is a legal practitioner and a certificated legal practitioner who is not permitted to practise as such, other than as an employee, for a period of 12 months, which period of 12 months has not yet been completed. We find that she is not employed, is not practising, does intend to practise as an employee and is not entitled to practise otherwise.

19 The question is whether being a certificated practitioner she is entitled to practise as an agent whilst holding such a certificate. As we have said, there is no definition as such of industrial agent in s.112A of *the Act*, save and except that there is a reference to what an industrial agent can and/or is permitted to do. That is, an industrial agent is a person carrying on business who does either or both of the following:-

> "(a) appears as an agent under section 31, 81E or 91;
>
> (b) provides advice or other services in relation to industrial matters."

20 A person registered under the section or employed by a person registered as an agent under the section is authorised to appear or give advice in accordance with s.112A(1)(a) and (b).

21 It is noteworthy that, unless a person is a registered industrial agent or a legal practitioner, then a person cannot carry on business as an industrial agent and commits an offence by doing so.

22 The significance of s.112A is that it designates two separate classes of persons entitled to advise in relation to industrial matters and to appear in the Commission, in the Industrial Magistrate's Court pursuant to s.81E, and in the Industrial Appeal Court pursuant to s.91, namely agents, including registered industrial agents and legal practitioners, as defined.

23 In the Commission a person, as well as being able to appear personally, may appear by an agent, or in the case of an organisation, by an officer or agent (see s.31 of *the Act*).

24 However, legal practitioners, in order to be able to appear under s.31 in the Commission, can only do so by the express consent by all the parties in the proceeding before the Commission (see s.31(1)(c)(iv)), or pursuant to s.31(4), where the Commission allows a legal practitioner to appear.

25 It is therefore quite clear that legal practitioners are a special class, who unlike agents or officers of organisations as referred to in s.31, require leave to appear in the Commission. That agents and legal practitioners are separate classes is recognised, also, by reference to them separately otherwise in s.31(3). For example, too, under s.31(5) the Commission may make regulations prescribing the manner in which authorisation is to be given by their principals to agents. This is a special provision relating to agents alone (see s.31(5)). It is trite to observe that the Commission has no power to regulate legal practitioners who are officers of the Supreme Court.

26 Finally, of course, legal practitioners are officers of the Supreme Court admitted as such after they have satisfied standards of qualification and of character. No such prescriptions apply to agents.

27 Significantly, too, by s.31(6) of *the Act* a legal practitioner within the meaning of *the Act* ((ie) a certificated practitioner), as Ms in de Braekt is, but who engages in the practice of law in a place outside the state, is forbidden from appearing as an agent in proceedings before the Commission.

28 Implicit in that sort of provision is that it is a clear recognition, in our opinion, that a certificated practitioner appearing in this state, who practises in this state by virtue of her certificate, has audience because and precisely because of that fact and it is not contemplated that a practitioner could practise as an agent. The legislation does not, on a fair reading, enable certificated legal practitioners, a special class who do not appear except by leave of the Commission, to evade deliberately or not that requirement by purporting to practise as agents.

29 If Parliament had intended that they should do so it would have said so and it has not. In this case, the statute does not permit Ms in de Braekt, as a certificated legal practitioner, to purport to practise as a principal under the cloak of registered agency, for those reasons. In our opinion, a different argument, but one to the same effect, might be mounted in relation to articled clerks who purport to appear in this jurisdiction as if they were practitioners when they are not permitted to practise or to have audience in open court. The two designations and rights of practice are separate and mutually exclusive. We would also add that we are not to be taken in any of these findings or observations as saying that any agent has unrestricted right of audience in this Commission. In our opinion, there may be reasons, having to do with for example, but not restricted to questions of character, competence or the proper conduct of the Commission's affairs or the welfare of her/his principal, why an agent might be denied a right of audience in the Commission.

30 That, however, is a matter which can await determination another day.

31 However, for those reasons, we were of the opinion that Ms in de Braekt had no lawful right to appear in the matter and joined with our colleague Beech S C in granting leave to her to withdraw, when she sought it.

32 Ms in de Braekt purported some days after the Full Bench had reserved its decision, to communicate with the Full Bench about the matter, in writing, when she had no standing to do so. The document was not placed before the Full Bench and was, on the direction of the Full Bench, returned to her.

INTERVENTION

33 We have referred to the notice of intention to seek leave to intervene above. It was conceded on behalf of the applicant that, in this case, there was a sufficient interest in Ms Robertson and Mr Jones to give them leave to intervene pursuant to s.27(1)(k) of *the Act*. In any event, there was, in our opinion, in a matter where the validity of holding office was at stake, clearly sufficient interest in Ms Robertson and Mr Jones. The well known authorities of *The Queen v Ludeke and Others; Ex parte Custom Officers' Association of Australia, Fourth Division* [1985] 155 CLR 513 and *Gairns and Dempsey v RANF* (1989) 69 WAIG 2343 (per Sharkey P) apply. In any event, as we have said, that they had sufficient interest was conceded by counsel, on behalf of the applicant.

34 However, a number of grounds of intervention were struck out and the leave to intervene confined to those grounds which remained.

35 What are/were relevant grounds depend/depended upon the nature of a s.71 application.

36 A s.71 application is an ex parte application by a state registered organisation (in this case the CSA) for a declaration that the Western Australian branch of a federally registered organisation of employees is the "counterpart federal body" in relation to that applicant state organisation (see s.71(1) and (2) of *the Act*).

37 Significantly, too, there is no requirement under *the Act* to advertise such an application so that prospective objectors or other persons or other interested persons can be advised of the making of the application. (This differs entirely in that respect, of course, from s.54, s.62(2), s.72 and s.72A applications).

38 There are only two matters which have to be established by the applicant. The first is that the rules of the branch as defined are able to be deemed by the Full Bench or are the same as the rules of the state organisation relating to the corresponding subject matter, in that:-

(a) The rules prescribing qualifications of persons for membership are or are deemed to be the same, and

(b) The rules prescribing the offices which shall exist within the branch are the same as the rules prescribing offices in the CSA.

(That finding is made in accordance with *the Act* (see s.71(2), (3) and (4)).

39 Those are the only relevant questions. They are very narrow.

40 Further, whether an organisation has acted in accordance with its rules in making an application under s.71 is relevant, because s.61 of *the Act* always applies. An organisation has no authority to act outside its rules.

41 S.61 reads as follows:-

> "Upon and after registration, the organisation and its members for the time being shall be subject to the jurisdiction of the Court and the Commission and to this Act; and, subject to this Act, all its members shall be bound by the rules of the organisation during the continuance of their membership."

42 Grounds directed to merit, matters of discretion and matters relating to the processes of the organisation and the question of fairness and how the organisation should have conducted itself, divorced from the strict letter of the rules on which the application is based, are irrelevant.

43 For those reasons, paragraphs 3, 6 and 7 of Mr Jones' notice was ruled to be relevant and the remainder were ruled irrelevant, and struck out. For the same reasons, paragraphs 4, 7 and 8 of Ms Robertson's notice were ruled to be relevant and the remainder struck out as irrelevant.

ADJOURNMENTS

44 After Ms in de Braekt was denied right of audience after argument, at about 11.00am, she sought and was granted leave to withdraw from the proceedings.

45 The matter was adjourned to 2.15pm, on the day of the hearing, by the Commission to enable Ms Robertson and Mr Jones to be informed of what had occurred, the proposed interveners not being in court during the proceedings in the morning. The Full Bench caused the proposed interveners to be so informed. At 2.15pm, Dr Hockley, of counsel, appeared, announcing himself as having been instructed by solicitors to appear with Mr Brian Jackson for the applicant, and sought an adjournment of the proceedings several times in the course of those proceedings on that afternoon. Ms in de Braekt was in court with the solicitors for the interveners.

46 This was a matter of some consequence to the CSA. The matter had been adjourned when the representative of the proposed intervener sought to appear on a very tenuous basis. Further, the matter was, as it turned out when submissions were made, a narrow one. The lack of comparative detriment to the interveners was borne out by the fact that they were given leave to intervene on the concession of the applicant. However, counsel for the interveners did not seek to cross-examine Ms Gaines, the sole witness who had filed declarations in the matter. However, counsel was able to make oral submissions on behalf of the interveners and to put before the Full Bench, in addition, an already prepared and full set of written submissions in relation to the interveners' case. Some of the written submissions were irrelevant to the notice of intervention even before it was amended by the Full Bench, and certainly some were irrelevant to it after that notice was amended by the Full Bench. However, the remainder were considered. No evidence was adduced on behalf of the interveners; nor did they seek to cross-examine Ms Joanne Margaret Gaines, on her declaration. The detriment to the applicant in not being able to proceed with its application, the result of which whatever it might be, might have the potential to affect the CSA and its members in important matters, would be substantial if the application did not proceed in the Full Bench on the day on which it was listed to be heard. The detriment to the interveners was not so great given that they would have a chance to put their case for the reasons which we have stated, and did put their case in some detail. To grant or refuse the adjournment because counsel was briefed late in this case would not and did not result in a serious injustice to the interveners, in this case, and, if it did, it would not outweigh the serious injustice to the applicant and its members and office holders in the granting of the adjournment. Applying *Myers v Myers* [1969] WAR 19, this was a matter having regard to the likely injustice to either side which required that it proceed. For those reasons, the applications for adjournment were dismissed.

FACTS

47 The relevant facts were, on the relevant documents and uncontested facts, as follows (see also the uncontroverted evidence of Ms Joanne Margaret Gaines in two statutory declarations, exhibits 1 and 2, filed herein). As a matter of record of the Commission, the President decided in *Jones v CSA* (PRES 3 of 2003) (unreported) delivered 10 April 2003 (2003 WAIRC 08115) that the CSA had no counterpart federal body and had not had one since 1994. The reasons for decision and orders of the President in that case and in *Ellis and Others v CSA* (PRES 5 of 2003) (unreported) delivered 16 April 2003 (2003 WAIRC 08180) referred to hereinafter contain a history of these matters. Its previous counterpart federal body was the State Public Services Federation (hereinafter referred to as "the SPSF") which amalgamated with the Community Services Union to become the CPSU, and, by such act, the then current certificate under s.71 was extinguished because the SPSF, a counterpart federal body to the CSA, ceased to exist. The President therefore held that the officers of the CSA did not hold valid office and had not held valid office at least since 28 November 2001.

48 Current office holders in the CSA hold office, as Ms Gaines declared, by virtue of orders made by the President which, inter alia, enable them to hold office until a certificate issues under s.71 of *the Act* in relation to the CPSU and CSA, or an election takes place within the CSA or further order or until a prescribed date. In *Ellis and Others v CSA* (PRES 5 of 2003) (op cit) the President made interim orders to the same effect in relation to all other offices and "final" orders on 5 May 2003.

49 The President made "final" orders in relation to the offices of secretary and assistant secretary to that effect on 16 April 2003 in Pres 3 (op cit) and in relation to all councillors and officers in *Ellis and Others v CSA* (PRES 5 of 2003) (2003 WAIRC 08277 and 2003 WAIRC 08324).

50 At a meeting of the council of the CSA on 30 April 2003, holding office pursuant to the President's orders, and which was quorate, the council passed three motions:-

1. "That the council of the Civil Service Association of Western Australia (Incorporated) endorses and authorises the action of the general secretary in commencing an application in the Western Australian Industrial Relations Commission to secure a declaration that the Western Australian Branch of the Community and Public Sector Union SPSF Group is the counterpart federal body to the CSA. Council notes that such a declaration is a precondition for an application for the issuance of a new certificate under s.71(5) of *the Industrial Relations Act* 1979".
2. "That council authorises and directs the general secretary to make application to the Registrar of the Western Australian Industrial Relations Commission, for a certificate to be issued under s.71(5) of *the Industrial Relations Act* 1979".
3. "That the council of the Civil Service Association of Western Australia (Incorporated) noting rule 22(s) of the Association's rules determines that each office in the Association will, from the date on which the Registrar issues a certificate under s.71(5) be held by the person who, in accordance with the rules of the Western Australian Branch of the Community and Public Sector Union, SPSF Group, holds the corresponding office in the branch".

51 We will turn to the effect of the relevant resolution(s) later in these reasons.

ISSUES AND CONCLUSIONS

52 There are two fundamental questions in this matter. The first is whether the offices in the applicant organisation and the alleged counterpart federal body are the same, or pursuant to s.71 of *the Act* can be deemed to be the same. The second is whether the rules of the alleged counterpart federal body and the applicant organisation are the same or, pursuant to s.71, can be deemed to be the same (see s.71(1), and the definition of "counterpart federal body").

53 The rules of the state organisation and its counterpart federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same. The Full Bench may form the opinion that the rules are substantially the same, notwithstanding that a person who is eligible to be a member of the state organisation is, by reason of his/her being a member of a particular class of persons, ineligible to be a member of a particular class of persons and therefore a member of that state organisation's counterpart federal body; or is on the other hand eligible to be a member of the counterpart federal body but ineligible to be a member of the state organisation.

54 It is perhaps trite but nonetheless necessary to observe that the relevant rules to be considered pursuant to s.71 of *the Act* are the qualification rules and the office holder rules of the organisation (the CSA), and those of the state branch of the CPSU, as the CPSU rules apply to that branch in Western Australia.

55 Rule 5 of the CPSU branch rules prescribes those persons who shall be members of the branch. We also add that rule 5 of the CPSU branch rules provides that:-

> "The members of the Branch shall be those persons admitted to membership of the SPSF Group in accordance with the federal rules whose employer is located in Western Australia and such other members who have been allocated to the Branch by Federal Council."

56 Generally speaking, the federal rules apply only to employees whose employers are located in this state. There was no evidence before us that any other members have been allocated to the branch by federal council in terms of rule 5 of the CPSU branch rules.

57 (We should observe that there seems to be some confusion about the name of the state branch, that the name prescribed by the branch rules (rule 2) is as we have expressed it above para 5 supra).

58 The financial membership of the CSA and the CPSU as at 9 May 2003 was respectively 12,350 and 12,445. Ninety six members of the CPSU employed at Acacia Prison are not eligible for membership of the CSA. Forty two members of the CSA who are CSA employees are eligible for membership of the CPSU by virtue of s.202 of *the Industrial Relations Act* 1988 and an agreement thereunder.

59 There are nine members of the CSA who are eligible to become members but are not members of the CPSU. No independent contractors or superannuation funds employees who are eligible under the rules of the CPSU to be its members are members of the CSA (see Ms Gaines' statutory declaration, exhibit 1, paragraphs 12-18).

Eligibility for Membership – CSA and CPSU Branch Western Australia

60 Both organisations provide for membership of officers employed under the *Public Service Act* 1978-1980 (as amended). A fair reading would enable it to cover the *Public Sector Management Act* 1991 (see *R v Aird; ex parte the Australian Workers Union* [1973] 129 CLR 654 and the liberal interpretation required to be given).

61 Both organisations provide, too, for persons employed by boards or commissions constituted to administer any act and also in any established branches of the public service including state trading commissions, undertakings and government institutions controlled by boards, eligibility for membership.

62 Further, persons employed by the state of Western Australia, by the Crown or a Minister of the Crown in right of this state, are eligible for membership. So too are persons employed by any statutory body representing the state or by any instrumentality or authority whether corporate or unincorporated existing under the control of or acting on behalf of the state (see rule 6 generally and rule 6(a)(1) to (7) of the CSA rules).

63 Rule 6(a)(9) of the CSA rules is wide ranging, too, and reads as follows:-

> "employed by any company or corporation in which issued shares are held by or for or on behalf of or in the interest of the State of Western Australia, or, if there are no issued shares, in which the Governing body by whatever name called includes nominees appointed by or on behalf of or in the interest of the State of Western Australia."

64 As to coverage of university staff, the CSA has that pursuant to rule 6(a)(12)(c), as has the CPSU pursuant to its rules.

65 The CPSU has almost identical coverage under rule 2, Part II, Section 1(H)(III)(A) (see pages 32-36 and pages 42-48 of its rules) in relation to state instrumentalities, statutory bodies and the like in this state.

66 The CSA does cover the following persons who are not eligible to be members of the CPSU. These are:-

(a) Persons employed at Graylands, Selby-Lemnos and Special Care Health Services.
(b) Persons employed by the Parliament.
(c) Some foremen tradesmen not covered by the CPSU.
(d) Its own employees.

67 The CSA does not cover the following persons covered by the CPSU:-

(a) Independent contractors.

(b) Some superannuation employees.

(c) Acacia Private Prison employees.

(d) Persons under the age of 14.

68 We were also referred to an agreement entered into by virtue of s.202 of *the Industrial Relations Act* 1988 which continues under *the Commonwealth Act* and which provides for all members of the CSA to be eligible for membership of the CPSU. The agreement remains in force to the present day pursuant to s.253TA of *the Commonwealth Act* (see the reasons for decision in *Jones v CSA* (PRES 3 of 2003) (op cit) at paragraphs 47 to 58) (2003 WAIRC 08115). Thus, all CSA members are, in any event, eligible to be members of the state branch of the CPSU.

69 For all of those reasons, we were satisfied that the difference between the scope of the eligibility rules prescribing qualifications for membership in each organisation were so minor that they were substantially the same and therefore ought to be deemed to be the same pursuant to s.71 of *the Act*. In particular, the major coverage which is coincidental between the two organisations of employees in the public sector, under the *Public Sector Management Act* 1991 in statutory bodies, instrumentalities, corporations in which the state has an interest, boards and other statutory bodies and in universities is widespread and coincidental.

Offices

70 The rules of the branch prescribing the offices of the state branch of the federal organisation are deemed to be the same as those of the state organisation prescribing the offices which shall exist in the state organisation if, for every office in the state organisation, there is a corresponding office in the branch.

71 The offices are, in fact, identical (see rule 8 of the CPSU rules and rules 12(a) and 13 of the CSA rules). We are therefore satisfied and find, for those reasons, that the branch is the counterpart federal body in relation to the state organisation, the CSA because:-

(a) It is a branch, the rules of which relating to the qualifications of persons for membership, and

(b) Prescribing the offices which shall exist within the branch are, or in accordance with this section, are deemed to be, the same as the rules of the state organisation relating to the corresponding subject matter.

The Rules

72 The interveners allege that the application was not filed in accordance with the rules and is therefore invalid.

73 The substance of the first allegation is that no officer of the CSA validly occupied office on 15 April 2003, the day when the application was filed in this Commission. Accordingly, the application could not and was not validly authorised or instituted. Thus, the application was not before the Commission, not having been validly authorised. Next, it was submitted that the resolutions passed by the council of the CSA on 30 April 2003 which purported to retrospectively regularise or validate after the event, the filing of the application which was done unlawfully, was an act outside power.

74 This was so, it was submitted, because the council was given no power under its rules to take such action.

75 Next, it was submitted that the senior industrial officer, Mr John Dasey, in signing and lodging the application, had acted contrary to the rules and to his authority.

76 It was the applicant's case that the ratification of the application after the event by a properly constituted council validated it. There was cited to us, by way of authority, *Bayer Pharma Pty Ltd v Farbenfabriken Bayer Aktiengesellschaft* [1965] 120 CLR 285 (per Kitto J).

77 Another authority in similar vein *is Presentaciones Musicales SA v Secunda and Another* [1994] 2 All ER 737 (CA).

78 The latter is authority for the proposition that, where a solicitor (as agent) commences proceedings in the name of the plaintiff, whether a company or an individual, without authority, then the plaintiff can ratify the act of the solicitor or adopt the proceedings and cure the original defect. *Bayer Pharma Pty Ltd v Farbenfabriken Bayer Aktiengesellschaft* (op cit) is authority for the proposition that the act of an agent whose appointment as such was void for a legality did not prevent later ratification of that act by the principal since a ratification is a confirmation of the purported grant of authority rather than an adoption by the principal of the unauthorised act. We also quote from the dicta of Kitto J in *Bayer Pharma Pty Ltd v Farbenfabriken Bayer Aktiengesellschaft* (op cit) at pages 290-291 where His Honour said:-

> "I am not sure that I understand the argument, but it seems to me to lose sight of the fact that if Mr Caves appointment as agent was void for illegality the only consequence upon the notices of opposition was that their lodgement was unauthorized. Why their lodgement should be on that account any less susceptible of ratification than any other act done in the name of a purported principal without antecedent authority, I do not see. The argument seemed to be based upon a notion that, in the case of an act done under a purported but ineffectual grant of authority, a ratification is confirmation by the principal of the purported grant of authority, rather than an adoption by him of the unauthorised act. But the argument must be rejected for another reason also."

Ratification is the approval of an act initially done without authority. No authority was cited for the proposition that the CSA could not ratify retrospectively the act of filing the application. In my opinion, under the law of agency and the powers in the CSA as a principal, no rule authorising ratification after the event was required.

79 In this case, the act done by Mr Dasey was plainly within the scope of his authority as employee and agent, given that he is the agent of the CSA, not of the council or executive. At all times, of course, the CSA whose employee he was, remained in existence. If it were not, then his employer, the CSA, through the council, once the council was reconstituted and acted in accordance with the rules, could ratify the act of filing the application, and, in fact, did so validly on the above authorities. The application was therefore, as we would hold, validly made and pursued. We would add that the application was clearly validated by its pursuit in this jurisdiction by the CSA. Indeed, rule 19(j) of the CSA rules recognises the role of Mr Dasey, as an employee, representing the CSA in the Commission. "Representing", in our opinion, in that context, would of necessity include the filing and drafting of relevant documents in relation to any case.

Rule 7(h) of the CSA Rules

80 Rule 7(h) reads as follows:-

> "Notwithstanding the provisions of any other rule to the contrary, no member shall be nominated for, elected to or hold office in the Association if she or he is or becomes an officer of any other registered organisation of employees other than the State Public Service Federation."

81 It was submitted that no member could be elected to hold office in the Association if she or he holds any office in or becomes an officer of any other registered organisation than the SPSF. Of course, the CPSU is, under *the Commonwealth Act*, the successor to the SPSF when it and the CPSU amalgamated (see *Jones v CSA* (PRES 3 of 2003) (unreported) delivered 10 April 2003 (2003 WAIRC 08115) and *Jones v CSA* (PRES 3 of 2003) (unreported) delivered 16 April 2003 (2003 WAIRC 08153)). Accordingly, that rule does not have any effect. In any event, it is irrelevant and has no effect on this application, because it does not forbid membership but merely prevents a person holding office. We do not see how such a rule could stand in the way of an application succeeding under s.71(1) and preventing the issue of a certificate under s.71(5).

82 We would add that it is, in our opinion, not permissible for the Registrar to issue a s.71(5) certificate until an application to alter its rules in accordance with s.71(5)(a) is made and granted.

Finally

83 Finally, for those reasons, we would grant the application and make the s.71 declaration sought, there being no valid obstacle to it being granted, and we being satisfied that, having regard to the provisions of s.71, the branch is the counterpart federal body to the applicant, we would declare accordingly.

SENIOR COMMISSIONER A R BEECH—

84 I have had the advantage of reading in draft form the Reasons for Decision of his Honour the President. I respectfully adopt the reasons he has given in relation to the representation and right of audience, and for not granting the adjournments sought.

85 I also agree that the application should be granted and desire merely to add the following. It is common to the grounds of intervention of both Mr Jones and Ms Robertson that the application is opposed on the basis that it was said not to have been made by valid CSA office holders. It is also submitted that it was not lawfully possible for the CSA Council to retrospectively "authorise" this application, nearly three weeks after it was made. In the written submissions, not prepared by Dr Hockley, which were tendered at the conclusion of the proceedings, it was submitted that the CSA Council did not have the power to "regularise" or "validate" ex post that which was done unlawfully because "those powers" (sic) require specific statutory provisions.

86 The submission made is without authority and, indeed, is contrary to authority. In *ALHMWU v. Gay-dor Plastics Pty Ltd* (1994) 74 WAIG 960 at 962 Fielding C (as he then was) dealt with a submission from the respondent in that matter that the application had not been made in accordance with that union's rules. Relevantly, that union's state council had passed a ratifying resolution in relation to assistant secretaries and research officers signing applications and other documents to industrial tribunals.

87 Fielding C stated that the decided authorities suggest that it is open to a corporation to ratify proceedings commenced without authority (citing *Alexander Ward & Company Limited v. Samyang Navigation Company Limited* [1975] 2 All ER 424; *Danish Mercantile Co Limited v. Beaumont* [1951] 1 All ER 925) and the Commission should not take any stricter view than that taken by the traditional courts in respect of unauthorised proceedings instituted by or on behalf of corporations. With respect, we wholeheartedly agree with my learned colleague's observations. It is quite relevant to recall in this context that the Commission is considering proceedings instituted by or on behalf of a registered organisation which is by virtue of s.60 of the Act, a body corporate.

88 As to the balance of the written submissions, it is apparent that whether or not Ms Walkington or Ms Gaines validly held their respective offices at the time the application was made is immaterial. The application was made by and in the name of the organisation which has continued and remains to be a registered organisation.

THE PRESIDENT—

89 For those reasons the Full Bench granted the application, making the declaration as sought.

Order accordingly

2003 WAIRC 08436

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

IN THE MATTER OF AN APPLICATION BY THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT

NEVILLE JOHN JONES AND DIANE MARGARET ROBERTSON, INTERVENERS

CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 23 MAY 2003
FILE NO/S.	FBM 4 OF 2003
CITATION NO.	2003 WAIRC 08436

Decision	Declaration granted
Appearances	
Applicant	Mr D H Schapper (of Counsel), by leave and with him Mr J Dasey, Senior Industrial Officer
Interveners	Dr J J Hockley (of Counsel), by leave, and with him Mr B R Jackson (of Counsel), by leave

Declaration

This matter having come on for hearing before the Full Bench on the 12th day of May 2003, and having heard Mr D H Schapper (of Counsel), by leave, and with him Mr J Dasey, Senior Industrial Officer, on behalf of the applicant, and Dr J J Hockley (of Counsel), by leave, and with him Mr B R Jackson (of Counsel), by leave, on behalf of the interveners, and the Full Bench having reserved its decision, and thereafter being of the opinion upon the evidence that the rules of the State organisation, the applicant herein, and the Counterpart Federal Body relating to the qualifications of persons for membership of each such body are substantially the same, and the Full Bench also being of the opinion that the rules of the Counterpart Federal Body prescribing the offices which exist in

the Branch are the same in this respect as the rules which exist in the State organisation, the applicant herein, and reasons for decision being delivered on the 23rd day of May 2003, it is this day, the 23rd day of May 2003, ordered and declared a follows:-

(1) THAT the rules of the applicant, the Civil Service Association of Western Australia Incorporated and its Counterpart Federal Body, the CPSU, the Community and Public Sector Union, Western Australian Branch, relating to the qualifications of persons for membership be and are deemed to be the same, in accordance with s71(2) of the *Industrial Relations Act* 1979 (as amended) ("the Act").

(2) THAT the rules of the said Counterpart Federal Body prescribing the offices which shall exist in the Branch be and are hereby deemed to be the same as the rules of the said applicant herein, prescribing the offices which exist in the said applicant, in accordance with s71(4) of the Act.

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

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2003 WAIRC 07964

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KARYN GRANT, APPELLANT - and - BOOMERANG ENVIROMENTAL INDUSTRIES PTY LTD, A.C.N. 008-821-350, T/F THE MICHAILIDIS TRUST, T/A BOOMERANG PEST CONTROL, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 MARCH 2003
FILE NO/S.	FBA 1 OF 2003
CITATION NO.	2003 WAIRC 07964

Decision	Appeal adjourned to a date to be fixed
Appearances	
Appellant	Ms K Grant, on her own behalf
Respondent	Mr O C Moon, as agent

Order

This appeal having come for hearing before the Full Bench on the 20th day of March 2003, and having heard Ms K Grant, on her own behalf as appellant, and Mr O C Moon, as agent, on behalf of the respondent, and the appellant having made an oral application to adjourn the appeal, and the Full Bench having decided to grant the application and reasons for 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 20th day of March 2003, ordered as follows:-

(1) THAT the hearing and determination of appeal no. FBA 1 of 2003 be and is hereby adjourned to a date to be fixed.

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

[L.S.]

2003 WAIRC 08412

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KARYN GRANT, APPELLANT - and - BOOMERANG ENVIROMENTAL INDUSTRIES PTY LTD, A.C.N. 008-821-350, T/F THE MICHAILIDIS TRUST, T/A BOOMERANG PEST CONTROL, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 28 MAY 2003
FILE NO/S.	FBA 1 OF 2003
CITATION NO.	2003 WAIRC 08412

Decision	Appeal discontinued
Appearances	
Appellant	Mr K Trainer, as agent
Respondent	Mr O Moon, as agent

Order

This matter having come on for hearing before the Full Bench on the 28th day of May 2003, and having heard Mr K Trainer, as agent, on behalf of the appellant, and Mr O Moon, as agent, on behalf of the respondent, and the parties herein having consented to the discontinuance of the appeal, and the Full Bench having determined that the appeal should be discontinued, 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 28th day of May 2003, ordered as follows:-

(1) THAT there be leave granted and leave is hereby granted for appeal No. FBA 1 of 2003 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.

PRESIDENT—Matters dealt with—

2003 WAIRC 08346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	INTERCORP SERVICES PTY LTD OF TW CASH & ASSOCIATES, APPLICANT - and - THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 16 MAY 2003
FILE NO/S.	PRES 6 OF 2003, PRES 7 OF 2003, PRES 8 OF 2003, PRES 9 OF 2003
CITATION NO.	2003 WAIRC 08346

Decision	Applications withdrawn
Appearances	
Applicant	Mr W Vogt (of Counsel), by leave
Respondent	Mr T Dixon (of Counsel), by leave

Order

These matters having come on for hearing before me on the 16th day of May 2003, and having heard Mr W Vogt (of Counsel), by leave, on behalf of the applicant, and Mr T Dixon (of Counsel), by leave, on behalf of the respondent, and the applicant having made an oral application to withdraw the applications herein, and the respondent having consented to the withdrawal of the said applications by the applicant, and I having determined that the application to withdraw the applications should be granted, 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 16th day of May 2003, ordered as follows:-

(1) THAT there be leave granted and leave is hereby granted for applications PRES 6 of 2003, PRES 7 of 2003, PRES 8 of 2003 and PRES 9 of 2003 to be withdrawn.

(2) THAT I refrain and do hereby refrain from hearing the said applications further.

(Sgd.) P. J. SHARKEY,

[L.S.] President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2003 WAIRC 08324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN ELLIS AND OTHERS, APPLICANTS
	- and -
	CIVIL SERVICE ASSOCIATION OF WA (INC), RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 14 MAY 2003
FILE NO/S.	PRES 5 OF 2003
CITATION NO.	2003 WAIRC 08324

Decision	Order and Declaration
Appearances	
Applicant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr J Dasey, Senior Industrial Officer

Reasons for Decision

1 This application came before the Commission, constituted by me as the President, on 5 May 2003. It is an application made pursuant to s.66 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). Orders were sought which were not objected to by the respondent organisation, the Civil Service Association of WA (Inc) (hereinafter referred to as "the CSA"). I should observe that Mr Brian Ellis, the applicant, was, at all material times, a member of the CSA, as were the other applicants, and all were members of the council of the Community and Public Sector Union/State Public Services Federation Group, Western Australian Branch, (hereinafter referred to as "the CPSU"), a state branch of the Community and Public Sector Union, a federal organisation. I should also say that all are currently members of the council of the CSA by virtue of interim orders made by me in this matter on 16 April 2003. The facts generally in this matter were not in dispute.

2 The background to this matter is expressed in the orders made and reasons for decision delivered by me in *Jones v CSA* (Pres 3 of 2003) (unreported) delivered on 10 April 2003 and 16 April 2003. (See 2003 WAIRC 08177; 2003 WAIRC 08115 and 2003 WAIRC 08153).

3 By those orders, I, inter alia, declared that since 28 November 2001 the CSA had had no counterpart federal body pursuant to s.71 of *the Act*. As a result, the effect of that was that no person had validly occupied office or occupied office at all in the CSA since that date. Thus, those offices were vacant at all material times, particularly since 28 November 2001.

4 The state branch of a federal organisation, the CPSU, held its elections for the offices of branch secretary, assistant branch secretary and branch president in 2003 and the result of the poll was declared on 1 May 2003 by Mr E M Panegyres of the Australian Electoral Commission who was the returning officer for that election. That, of course, was an election held under the rules of the federal CPSU. The state branch of the CPSU had, of course, been considered within the CSA to be its counterpart federal body and the affairs of both organisations had been conducted as if that were the case.

5 The persons elected to office in that election were Ms Toni Beverley Walkington as branch secretary, Ms Joanne Margaret Gaines as assistant branch secretary, and Mr Brendan Harley Hewson as branch president.

6 The other members of the council remained in office.

7 I had made interim orders in this matter which it is not necessary to reproduce here but which ensured, with the orders made in *Jones v CSA* (Pres 3 of 2003) (2003 WAIRC 08177) (op cit), that all of the office holders of the CPSU held office in the CSA as they had purported to do for some time, until, inter alia, the completion of the CPSU election (see also *Jones v CSA* (Pres 3 of 2003) (op cit)).

8 It is, of course, quite clear and I find, as I did in *Jones v CSA* (Pres 3 of 2003) (op cit), that, and for the same reasons there also being expressed in the affidavit of the applicant, exhibit 2, which I accept, the CSA has had no counterpart federal body since 28 November 2001. Thus, on the evidence, and for the same reasons, as I also am satisfied and find in this case, that all of the offices as defined in s.7 of *the Act*, in the CSA, have been invalidly filled or occupied and have therefore been vacant since that date. That is, of course, subject to the interim orders which I made in this matter and the orders which I made in *Jones v CSA* (Pres 3 of 2003) (op cit). I adopt those latter reasons for convenience and paraphrase the relevant parts, modifying them for the purposes of this order.

9 The CSA has applied under s.71 of *the Act* to this Commission by application dated 15 April 2003 (exhibit 3) for a declaration pursuant to s.71(2) of *the Act* that the CPSU is the counterpart federal body of the CSA. That matter has been listed for hearing by a Full Bench of this Commission on 12 May 2003, which is only a week after the hearing of this matter. The effect of any order made under s.71 might remedy the current difficulty with offices in the CSA.

10 As was said in *Jones v CSA* (Pres 3 of 2003) (op cit), to bring about certainty, the government of the CSA, which has been in place by virtue of the elections in the CPSU, which elections were accepted as elections to the CSA and thought to be valid in accordance with *the Act*, should continue to govern without uncertainty until the s.71 application referred to herein is heard and determined. That, for the time being, would advance s.6(f), an object of *the Act*. Such an approach is consistent, too, with the final orders made in relation to officers in *Jones v CSA* (Pres 3 of 2003) (op cit), namely the purported general secretary and assistant general secretary. Next, any potential for disruption should be avoided and can be avoided if some certainty is given to the affairs of the council temporarily.

11 To make such an order obviously serves the interests of the CSA, its members and the office holders who are the applicants concerned. That is because, for the time being, government, not subject to uncertainty, being the government which has held office for some time, remains to govern the CSA. The detriment to all of the uncertainty and disruption, which might occur for obvious reasons if this order is not made until the matter of the s.71 application is determined or an election in the CSA is held, is obvious.

12 For those reasons, the equity, good conscience and substantial merits of the case and the relevant considerations laid down in *Jones v CSA* (Pres 3 of 2003) (op cit) which I adopt, lead me to the view that I should make an order in similar terms, in substance, to the order made in *Jones v CSA* (Pres 3 of 2003) (op cit). That is an order as sought and not opposed to maintain the former de facto holders of office, with Mr Hewson, the CPSU branch president, as officers of the CSA until, put broadly, the s.71 application is heard and determined or until there is an election or other order or the time fixed generally in my order expires. (See also *Jones v CSA* (Pres 3 of 2003)).

13 For those reasons, I made the orders which I made in this matter.

2003 WAIRC 08277

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN ELLIS AND OTHERS, APPLICANTS
	- and -
	CIVIL SERVICE ASSOCIATION OF WA (INC), RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DEIVERED	MONDAY, 5 MAY 2003
FILE NO/S.	PRES 5 OF 2003
CITATION NO.	2003 WAIRC 08277

Decision	Order and Declaration
Appearances	
Applicants	Mr D H Schapper (of Counsel), by leave
Respondent	Mr J Dasey, Senior Industrial Officer

Order

This matter having come on for hearing before me on the 5th day of May 2003 and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the applicants, and Mr J Dasey, Senior Industrial Officer, on behalf of the respondent, and having determined that my reasons for decision will issue at a future date, it is this day, the 5th day of May 2003, ordered and declared as follows:-

(1) THAT all persons holding office in the Community and Public Sector Union/State Public Services Federation Group, Western Australian Branch, on the date hereof shall hold or continue to hold offices in the Civil Service Association of Western Australia Incorporated for the purposes of its rules until application No. FBM 4 of 2003 is heard and determined or until further order.

(2) THAT no person, save and except by the operation of this or any other existing order of the Commission, currently holds or will hold office validly in the Civil Service Association of Western Australia Incorporated, such offices having been vacant since the 28th day of November 2001.

(3) THAT subject to the terms of order (1) hereof, this order will expire and cease to operate on the 17th day of July 2003 unless the Commission renews it.

(4) THAT the operation of this order may be extended upon application made by a party in writing before its expiry.

(5) THAT the matter may be listed by the Commission, at any time, of its own motion, by notice of hearing to the parties.

(6) THAT the respondent do place a copy of this order in all the Civil Service Association of Western Australia Incorporated workplaces, on noticeboards and/or in other prominent positions, and upon its website, and by communicating the same to all workplace delegates by email, within 30 days of the date hereof.

(7) THAT a statutory declaration stating that order (6) hereof was complied with and how it was complied with shall be filed and served within 60 days of the date hereof.

(8) THAT in the event that orders (6) and (7) hereof have not been complied with then this order shall lapse immediately, and be of no further effect.

(9) THAT there otherwise be liberty to apply.

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

[L.S.]

2003 WAIRC 08437

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN ELLIS AND OTHERS, APPLICANTS
	- and -
	CIVIL SERVICE ASSOCIATION OF WA (INC), RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 4 JUNE 2003
FILE NO/S.	PRES 5 OF 2003
CITATION NO.	2003 WAIRC 08437

Decision	Application granted
Appearances	
Applicant	Mr B C Smith (of Counsel), by leave
Respondent	Mr J Dasey, Senior Industrial Officer

Order

This matter having come on for hearing before me on the 4th day of June 2003, and having heard Mr B C Smith (of Counsel), on behalf of the applicant, and Mr J Dasey, Senior Industrial Officer, on behalf of the respondent, and the respondent having applied for an order to extend the time within which to comply with the order herein dated the 5th day of May 2003, and the applicant having consented to the application by the respondent, and I having determined that the application should be granted, 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 4th day of June 2003, ordered as follows:-

(1) THAT order (6) of the order made in PRES 5 of 2003 dated the 5th day of May 2003 be and is hereby varied by extending the time in which to comply with the order by a period of seven days from the date of this order.

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

2003 WAIRC 08422

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEVILLE JONES, APPLICANT
	- and -
	CIVIL SERVICE ASSOCIATION OF WA INC, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 3 JUNE 2003
FILE NO/S.	PRES 3 OF 2003
CITATION NO.	2003 WAIRC 08422

Decision	Order and declaration
Appearances	
Applicant	Mr G McCorry, as agent
Respondent	Mr J Dasey, Senior Industrial Officer

Order and Declaration

This matter having come on for hearing before me on the 3rd day of June 2003 and having heard Mr G McCorry, as agent, on behalf of the applicant, and Mr J Dasey, Senior Industrial Officer, on behalf of the respondent, and I having determined that I should refrain from the hearing the matter further, and the parties herein having consented to the order hereinafter appearing, 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 3rd day of June 2003, ordered and declared as follows:-

(1) THAT I refrain and I do hereby refrain from hearing the matter identified in the Notice of Hearing issued in the matter by the Commission of its own motion on the 13th day of May 2003 further.

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

2003 WAIRC 08356

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEVILLE JONES, APPLICANT
	- and -
	CIVIL SERVICE ASSOCIATION OF WA INC, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 20 MAY 2003
FILE NO/S.	PRES 3 OF 2003
CITATION NO.	2003 WAIRC 08356

Decision	Order in PRES 3 of 2003 dated 16 April 2003 varied and matter adjourned
Appearances	
Applicant	Mr G McCorry, as agent
Respondent	Mr J Dasey, Senior Industrial Officer

Order

This matter having come on for hearing before me upon the motion of the Commission constituted by the President on the 20th day of May 2003, and having heard Mr G McCorry, as agent, on behalf of the applicant, and Mr J Dasey, Senior Industrial Officer, on behalf of the respondent, and the respondent having made an application to adjourn the matter, and I having determined that the application should be granted and that various orders and directions should be made as necessary or expedient for the expeditious and just hearing and determination of this matter, and having determined that reasons for this 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 20th day of May 2003, ordered and directed as follows:-

(1) THAT the order in PRES 3 of 2003 dated the 16th day of April 2003 be varied and is hereby varied by ordering and directing as follows :-

(a) THAT the statutory declaration of Joanne Margaret Gaines declared on the 6th day of May 2003 and filed herein, be served on the agent for the applicant forthwith.

(b) THAT a statutory declaration of service on the applicant of the statutory declaration of Joanne Margaret Gaines declared on the 6th day of May 2003 and filed herein, be filed before 4.00pm on the 20th day of May 2003.

(2) THAT application No PRES 3 of 2003 be and is hereby adjourned to 10.00am on Tuesday, the 3rd day of June 2003 for further hearing and determination.

(3) THAT Mr Peter Lalor Healy be available in this Commission for cross-examination on the 3rd day of June 2003, aforesaid.

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

[L.S.]

2003 WAIRC 08381

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANE MARGARET ROBERTSON, APPLICANT
	- and -
	CIVIL SERVICE ASSOCIATION (CSA), RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 26 MAY 2003
FILE NO/S.	PRES 10 OF 2003
CITATION NO.	2003 WAIRC 08381

Decision	Orders and Directions
Appearances	
Applicant	Mr G McCorry, as agent
Respondent	Mr J Dasey, Senior Industrial Officer

Orders and Directions

This matter having come on for a directions hearing before me on the 26th day of May 2003 and having heard Mr G McCorry, as agent, on behalf of the applicant, and Mr J Dasey, Senior Industrial Officer, on behalf of the respondent, and the applicant having made an oral application to adjourn the matter, and I having determined that the application to adjourn should be granted, and having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of the matter, 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 May 2003, ordered and directed as follows:-

(1) THAT this directions hearing be and is hereby adjourned to 9.00am on the 3rd day of June 2003.

(2) THAT the respondent do have leave to file and serve an application to strike out the application herein by 4.00pm on the 28th day of May 2003.

(3) THAT the said application to strike out be listed for hearing and determination at 9.00am on the 3rd day of June 2003.

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

[L.S.]

2003 WAIRC 08420

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANE MARGARET ROBERTSON, APPLICANT
	- and -
	CIVIL SERVICE ASSOCIATION (CSA), RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 3 JUNE 2003
FILE NO/S.	PRES 10 OF 2003
CITATION NO.	2003 WAIRC 08420

Decision	Application discontinued
Appearances	
Applicant	Mr G Mccorry, as Agent
Respondent	Mr J Dasey, Senior Industrial Officer

Order

This matter having come on for hearing before me on the 3rd day of June 2003 and having heard Mr G McCorry, as agent, on behalf of the applicant, and Mr J Dasey, Senior Industrial Officer, on behalf of the respondent, and the applicant having sought leave to discontinue the application, and the respondent having consented to the discontinuance of the application by the applicant, and I having determined that the application should be discontinued, 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 3rd day of June 2003, ordered as follows:-

(1) THAT there be leave granted and leave is hereby granted for application No. PRES 10 of 2003 to be discontinued.

(2) THAT I refrain and I do hereby refrain from hearing the said application further.

(3) THAT the application by the respondent to strike out the grounds and particulars of the applicant's application herein be and is hereby dismissed.

(4) THAT there be and is no order made as to costs.

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

AWARDS/AGREEMENTS—Application for—

2003 WAIRC 08390

AEROSPACE ENGINEERING SERVICES PTY LTD INTERIM AWARD 2003.

No. A6 of 2002.

AN INTERIM AWARD PURSUANT TO SECTION 36A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH & ANOTHER, APPLICANTS
	v.
	AEROSPACE ENGINEERING SERVICES PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 12 MAY 2003
FILE NO.	A 6 OF 2002
CITATION NO.	2003 WAIRC 08390

Result	Interim Award made.
Representation	
Applicants	Mr D Hicks on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and Mr J Fiala on behalf of Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (WA Branch)
Respondent	Mr D Cronin of counsel and Mr G Blick on behalf of the Respondent

Order

Having heard Mr D Hicks on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and Mr J Fiala on behalf of Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (WA Branch) and Mr D Cronin of counsel and Mr G Blick 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 the Aerospace Engineering Services Pty Ltd Interim Award 2003 be made in accordance with the following schedule and that the Interim Award shall have effect from the beginning of the first pay period commencing on or after Monday, 5 May 2003 pending the making of the new award.

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

SCHEDULE

1. – TITLE

This Award shall be known as the Aerospace Engineering Services Pty Ltd Interim Award 2003.

2. - ARRANGEMENT

3. - TERM

(1) This Award shall be for a term of 6 months from the date the Commission issues an order making the Award.

(2) The Parties will consult with each other toward the making of a Final Award to apply to the Company. Upon the issuing of a Final Award by the Commission, this Award will automatically cancel.

4. - AREA AND SCOPE

This Award applies to the operations of Aerospace Engineering Services Pty Ltd and to employees of the Company covered in classifications set out in clause 12 of this Award and engaged to perform work in Western Australia who are not party to an Australian Workplace Agreement.

5. - PARTIES BOUND

(1) Aerospace Engineering Services Pty Ltd (ACN 069 272 340) (the Company)

(2) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australia Branch

(3) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch

6. - CONTRACT OF SERVICE

(1) (a) Employees are required to work as directed by the Company from time to time including performing those duties specified in their respective classification.

(b) Employees are required to comply with the Company policies and operational procedures.

(2) Term of Employment

(a) At any time during the term of the employment, the employee or the Company may terminate the employment by giving 4 weeks' written notice to the other party, or payment (or forfeiture) of a sum equal to the employee's applicable wages up to the date of his/her last day of service in lieu of such notice. An additional week's notice will be required where an employee is aged 45 years or over and has at least two years continuous service.

(b) Nothing in this clause will affect the right of the Company to dismiss an employee immediately without notice or payment in lieu thereof for misconduct for serious breach of the employment contract.

7. - PROBATION AND TRAINING

(1) Technical Employees

(a) All new technical employees will be employed on probation for a period of 6 months from the commencement of employment, during which period the employee must be security cleared by the Company. If an employee is not security cleared the Company may terminate the employee's employment immediately without notice.

(b) During the probationary period, the employee must undertake training and pass appropriate tests as required by the Company. Further training and testing may also be required following the completion of the probationary period.

(c) Prior to the completion of the probationary period, technical employees must obtain an approval stamp for signing off aircraft work. A failure to obtain an approval stamp within the 6 month probation period will result in an extension of the probationary period for a further 2 months. If a technical employee fails to obtain the approval stamp within the extended period of probationary service (without a valid reason), the employment will be terminated without the need for any further notice from the Company.

(d) During the probationary period, technical employees will be paid an annual salary of $31,000. Upon successful completion of the probationary period employees will receive an annual salary of $32,000 per annum. The annual salary is inclusive of the basic wage and all other allowances (excluding shift allowance and overtime

rates which are paid in accordance with Clause 10 and Clause 11, respectively). This does not apply to technicians performing sheet metal and ground support equipment technician duties who will be paid $32,000 per annum from commencement.

(e) During the probationary period either an employee or the Company may terminate the employment by giving 1 week's notice to the other party, or payment (or forfeiture) of the equivalent wages in lieu of such notice. This shall not affect the right of the Company to dismiss an employee immediately without notice for misconduct or serious breach of the employment contract.

(f) Following successful completion of the probationary period, including the required training and testing, an employee's employment with the Company will be confirmed in writing.

(g) All employees are subject to a performance review conducted annually.

(2) Non Technical Employees

(a) All new non technical employees will be employed on probation for a period of 3 months from the commencement of employment, during which period the employee must be security cleared by the Company. If an employee is not security cleared the Company may terminate the employee's employment immediately without notice.

(b) During the probationary period, the employee must undertake training and pass appropriate tests as required by the Company. Further training and testing may also be required following the completion of the probationary period.

(c) During the probationary period, employees will be paid in accordance with their classification set out in the remuneration clause of this Award. The annual salary is inclusive of the basic wage and all other allowances.

(d) During the probationary period either an employee or the Company may terminate the employment by giving 1 week's notice to the other party, or payment (or forfeiture) of the equivalent wages in lieu of such notice. This shall not affect the right of the Company to dismiss an employee immediately without notice for misconduct or serious breach of the employment contract.

(e) Following successful completion of the probationary period, including the required training and testing, an employee's employment with the Company will be confirmed in writing.

(f) All employees are subject to a performance review conducted annually.

8. - HOURS OF WORK

(1) The ordinary hours of work will be 42 hours per week exclusive of meal and tea breaks, generally at times falling between the hours of 0530 and 1830 hours worked from Monday to Friday, but subject to the Company's operational requirements. Ordinary working hours shall not exceed 12 hours in any one day.

(2) Employees who at the commencement of this Award were contracted to work only 38 hours per week will continue to work 38 hours per week.

9. – PART-TIME HOURS

If the Employee is engaged on a part-time basis, the Employee will be notified of the ordinary hours of work from time to time, and the Employee will be entitled to receive payment for wages and be entitled to leave on a pro-rata basis in the same proportion as the number of hours regularly worked each week bears to 42 hours.

10. – SHIFTWORK

(1) Employees may be required to work shifts outside the normal work hours of 0530 to 1830 hours on any day from Monday to Friday to suit the operational requirement and flying programmes of the Company.

(2) Payment for Shift Work

(a) Where the ordinary hours of a rostered shift commence before 0530 hours or finish after 1830 hours on any day of the week, the rate to be paid shall be the Standard Hourly Rate plus 15%.

(b) Where work is performed on a Saturday, Sunday or public holiday, the rates to be paid shall be as follows—

Saturday	the Standard Hourly Rate multiplied by a factor of 2.0
Sunday	the Standard Hourly Rate multiplied by a factor of 2.0
Public Holiday	the Standard Hourly Rate multiplied by a factor of 2.5

(c) All overtime worked by shift workers will be paid at 2 times the Standard Hourly Rate except for overtime worked by shift workers on public holidays, which shall be paid at 2.5 times the Standard Hourly Rate.

11. – OVERTIME

(1) The Company will require an employee to work reasonable overtime, over and above ordinary hours having regard to the operational requirements of the Company.

(2) Overtime Rates

(a) Overtime worked, for employees working 42 hours per week, will be paid at 2 times the Standard Hourly Rate.

(b) Subject to subclause (c), overtime worked for employees contracted to work 38 hours per week will be paid at 1.5 times the Standard Hourly Rate for the first two hours and 2 times the Standard Hourly Rate thereafter.

(c) If the employee is contracted to work 38 hours and is performing shift work, all overtime will be paid at 2 times the Standard Hourly Rate.

(d) Overtime worked on public holidays shall be paid at 2.5 times the Standard Hourly Rate.

12. – CLASSIFICATIONS

(1) Administration

(a) Administration Assistant 1

(i) Has necessary keyboard and computer literacy skills to perform required tasks.

(ii) Has a minimum of 2 years in similar work.

(iii) Carries out clerical, administrative and / or other departmental duties and tasks as required.

(b) Administration Assistant 2

(i) Achieved and can perform all the necessary skills and duties of an Administration Assistant 1.

(ii) Has worked as an Administration Assistant 1 with the Company for at least 2 years.

(iii) As required, performs more difficult clerical, administrative and / or other departmental duties and tasks than the Administration Assistant 1.

(iv) Able to guide and train Administration Assistant 1 employees in on the job training.

(v) Must possess an overall knowledge of the various administration and other departmental functions in his / her area and expertise and be proficient in them.

(vi) Must possess good computer operator skills across the full range of applicable software packages.

(c) Administration Officer

(i) Achieved and can perform all the necessary skills and duties of an Administration Assistant 2.

(ii) Able to train and supervise Administration Assistants in on the job training.

(iii) Lead, supervise and manage a group of Administration Assistants in various departmental functions in at least one sub-section.

(iv) Able to carry out administrative staff functions such as compilation of reports and data.

(v) Interprets departmental administrative operations and quality systems. Execute administrative quality procedures.

(vi) For accounts clerks, must possess relevant TAFE qualifications.

(vii) Undertakes performance appraisals of staff under their supervision.

(2) Stores

(a) Storeperson Level 1

(i) The storeperson holds a trade certificate or equivalent airforce training certificate and has completed and passed stores training or has a minimum of 2 years experience in similar work.

(ii) Carry out various warehousing duties and/or material handling functions as instructed.

(iii) Able to operate warehousing equipment and/or have appropriate keyboard operating skills.

(b) Storeperson Level 2

(i) Achieved and can perform all the necessary skills and duties of a Storeperson 1.

(ii) Has worked for at least 2 years as a Storeperson 1 for the Company.

(iii) Perform more complex material handling functions and tasks.

(iv) Able to guide and train storepersons in on the job training and Storepersons 1.

(v) Must possess an overall knowledge of the various material functions in his area of expertise.

(c) Stores Officer

(i) Achieved and can perform all the necessary skills and duties of a Storeperson 2.

(ii) Has worked for at least 2 years as a Storeperson 2 for the Company.

(iii) Able to train and supervise storepersons in on the job training and Storepersons 1 and 2.

(iv) Lead, supervise and manage a group of storepersons in material management functions in at least one sub-section.

(v) Interprets material handling and material quality systems. Executes material quality procedures.

(vi) Able to carry out material staff functions such as stock reconciliation and compilation of material reports.

(vii) Undertakes performance appraisals of staff under their supervision.

(3) Technician Roles

(a) Technician

(i) Holds trade certificate or equivalent Airforce training certificate.

(ii) Has a minimum of 2 years aircraft working experience and has completed and passed the S211 aircraft type training.

(iii) Performs daily routine repair, servicing and component removal and installation under supervision.

(b) Senior Technician 1

(i) Holds trade certificate or equivalent Airforce training certificate and has completed and passed the S211 aircraft type training.

(ii) Has a minimum of 4 years aircraft working experience.

(iii) Performs various technical duties and other associated aircraft and/or equipment duties and functions.

(iv) Performs and signs off servicing, inspection, maintenance, modification, repair and basic system fault diagnosis.

(v) Interprets quality systems and executes quality procedures.

(vi) The following approvals must been obtained—

- Crew Chief Authorisation
- Full Stamp Approval

(vii) Guide, supervise and train technicians in on the job training.

(viii) Assist with performance appraisals of staff under their supervision.

(c) Senior Technician 2

(i) Achieved and can perform all the necessary skills and duties of a Senior Technician 1.

(ii) Has worked for at least 18 months as a Senior Technician 1 for the Company.

(iii) Interprets quality systems and executes quality procedures.

(iv) Performs complex aircraft fault diagnosis and trouble shooting.

(v) Guide, supervise and train technicians or lower grade senior technicians in on the job training.

(vi) For Airframe / Engine; Egress / Armament; Radar / Electrical / Instrument / Communications / Navigation; and Safety Equipment technicians, have been qualified and appointed either as an independent checker or authorised to release aircraft for flight.

(vii) Manage staff under their supervision which includes conducting quarterly and annual performance appraisals.

(d) Senior Technician 3

(i) Achieved and can perform all the necessary skills and duties of a Senior Technician 2.

(ii) Has worked for at least 12 months as a Senior Technician 2 for the Company.

(iii) Perform in process and final inspections.

(iv) Able to manage and supervise technicians or lower grade senior technicians in on the job training.

(v) Perform work area audits and surveillance to ensure compliance to standard operating procedures and customer requirements.

(vi) Perform accident / incident investigations.

(vii) Review standard operating procedures.

(viii) Lead, supervise, train and manage a team of technicians in aircraft / equipment fault diagnosis and trouble shooting in production work.

(ix) Conduct quarterly and annual performance appraisals of staff under their supervision.

(4) Service Engineers

(a) Service Engineer 1

(i) Achieved and performs all the necessary skills of a Senior Technician 3.

(ii) Has worked for at least 12 months as Senior Technician 3 in the Company.

(iii) Performs production, planning, scheduling, organising, coordination, staffing, directing and controlling.

(iv) Leads, supervises and manages a team of technicians in complex aircraft fault diagnosis and trouble shooting, and in production work.

(v) Manage all tasks and activities in Log Cell / Counter / Ops Brief / SOAP / Tools Crib / POL / PC-EMIS / GSE / IMTE / Publications, flight launching, receiving, rectification, depot and workshop.

(vi) Plan, lead, distribute, co-ordinate and manage day-to-day work to completion and on time.

(vii) Provide guidance, training, direction and on the job training to staff under their care for all aircraft/equipment maintenance work, aircraft/equipment fault troubleshooting and complex aircraft/equipment fault diagnosis and troubleshooting.

(viii) Observe and practice engineering standards and tools/ loose article control with quality and safety.

(ix) Conduct spares provisioning.

(x) Plan and ensure serviceable equipment, POL, GSE, IMTE, tools are available for work to be carried out.

(xi) Update Work Cards/Sheets, other documentation, PC EMIS and F1400.

(xii) Lead, control, guide, train and discipline staff under their supervision.

(xiii) Conduct quarterly and annual performance appraisal of staff under their supervision.

(b) Service Engineer 2

(i) Achieved and can perform all the necessary skills and duties of a Service Engineer 1.

(ii) Has worked for at least 24 months as a Service Engineer 1 for the Company.

(iii) Leads, supervises and manages a large team of technicians in complex aircraft fault diagnosis and trouble shooting, and in production work.

(c) Senior Service Engineer

(i) Achieved and can perform all the necessary skills and duties of a Service Engineer 2.

(ii) Leads, supervises and manages the work operation of a sub-section or section.

13. – REMUNERATION

The Employee will receive a consolidated base annual salary in accordance with their classification in the following tables. The annual salary is inclusive of all other allowances (such as leave loading; meal allowances when working overtime and for working on weekends and public holidays; remote site allowance; additional meal money for remote sites; laundry allowance and previous work experience allowance), other than those allowances specifically provided for such as overtime and shiftwork which are set out in this Award.

38 Hour Week Remuneration			
Classification	***Annualised Salary (AS)***	***Base Weekly Payment (BWP)***	***Standard Hourly Rate***
Administrative Assistant 1	*$23,426 – $27,426*	*AS/52 weeks*	*BWP/38 hours*
Administrative Assistant 2	*$25,426 - $28,426*	*AS/52 weeks*	*BWP/38 hours*
Administrative Officer	*$27,426 - $30,426*	*AS/52 weeks*	*BWP/38 hours*
Storesperson 1	*$22,852 - $25,852*	*AS/52 weeks*	*BWP/38 hours*

38 Hour Week Remuneration			
Classification	***Annualised Salary (AS)***	***Base Weekly Payment (BWP)***	***Standard Hourly Rate***
Storesperson 2	*$23,852 - $26,852*	*AS/52 weeks*	*BWP/38 hours*
Stores Officer	*$25,852 - $28,852*	*AS/52 weeks*	*BWP/38 hours*
Snr Technician 1	*$27,265 – $30,472*	*AS/52 weeks*	*BWP/38 hours*
Snr Technician 2	*$28,868 – $32,075*	*AS/52 weeks*	*BWP/38 hours*
Snr Technician 3	*$30,473 - $33,680*	*AS/52 weeks*	*BWP/38 hours*
Service Engineer 1	*$31,542 - $34,749*	*AS/52 weeks*	*BWP/38 hours*
Service Engineer 2	*$32,611 - $35,818*	*AS/52 weeks*	*BWP/38 hours*
Senior Service Engineer	*$34,215 – $37,422*	*AS/52 weeks*	*BWP/38 hours*

42 Hour Week Remuneration			
Classification	***Annualised Salary (AS)***	***Base Weekly Payment (BWP)***	***Standard Hourly Rate***
Administrative Assistant 1	*$27,495 – $32,190*	*AS/52 weeks*	*BWP/42 hours*
Administrative Assistant 2	*$29,843 - $33,364*	*AS/52 weeks*	*BWP/42 hours*
Administrative Officer	*$32,190 - $35,711*	*AS/52 weeks*	*BWP/42 hours*
Storesperson 1	*$26,822 - $30,343*	*AS/52 weeks*	*BWP/42 hours*
Storesperson 2	*$27,995 - $31,516*	*AS/52 weeks*	*BWP/42 hours*
Stores Officer	*$30,343 - $33,864*	*AS/52 weeks*	*BWP/42 hours*
Snr Technician 1	*$32,000 - $35,765*	*AS/52 weeks*	*BWP/42 hours*
Snr Technician 2	*$33,883 - $37,648*	*AS/52 weeks*	*BWP/42 hours*
Snr Technician 3	*$35,765 - $39,530*	*AS/52 weeks*	*BWP/42 hours*
Service Engineer 1	*$37,020 - $40,785*	*AS/52 weeks*	*BWP/42 hours*
Service Engineer 2	*$38,276 - $42,039*	*AS/52 weeks*	*BWP/42 hours*
Senior Service Engineer	*$40,157 - $43,922*	*AS/52 weeks*	*BWP/42 hours*

14. - SICK LEAVE

(1) Subject to subclause (b) and (c), employees are entitled to 10 days paid sick leave per annum credited at 1 January each year.

(2) Sick leave will continue to accrue weekly on a pro rata basis. If an employee leaves the Company and has taken sick leave in excess of sick leave that has accrued, the difference between sick leave taken and sick leave accrued will be deducted from the employee's final payment.

(3) Employees must advise the Company of any inability to attend work due to sickness as soon as possible on the day concerned, and provide a doctor's certificate stating that an employee is unfit for work as proof of sickness or injury on each such occasion.

15. - CARER'S LEAVE

(1) Employees are entitled to use up to 5 days sick leave each year to care for members of an employee's immediate family or household who are sick and require care and support. This entitlement is subject to an employee being responsible for the care and support of the person concerned. In normal circumstances an employee is not entitled to take carer's leave where another person has taken leave to care for the same person.

(2) Before taking carer's leave, an employee must give at least 1 days' notice before their next rostered starting time, unless the employee has a good reason for not doing so. The notice must include—

(a) the name of the person requiring care and support and their relationship to an employee;

(b) the reason for taking such leave;

(c) the estimated length of absence.

(3) Employees must establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.

16. - ANNUAL LEAVE

(1) Employees are entitled to 20 days annual leave per annum, accruing weekly. Such leave shall be taken at times agreed between the Company and the employee, subject to the operational requirements of the Company. Only accrued leave will be approved.

(2) Employees may be required to take annual leave, or such period of unpaid leave as may be necessary, should the Company wish to observe a close-down period.

(3) The preceding year's leave entitlement (20 days) must be taken within twelve months of falling due.

17. - BEREAVEMENT LEAVE

(1) Employees may take up to 3 days paid bereavement leave upon the death of the employee's:-

(a) spouse or de facto spouse;

(b) child or step-child;

(c) parent or step-parent; or

(d) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family.

(2) The 3 days of leave need not be consecutive. Bereavement Leave is not to be taken during a period of any other kind of leave.

18. - PARENTAL LEAVE

The Employee is entitled to parental leave in accordance with the Minimum Conditions of Employment Act of 1993 (WA).

19. - MOBILITY OF EMPLOYMENT

(1) The Company may require an employee to work in any location or area in accordance with its operational requirements.

(2) Operational requirements may lead to an employee being redeployed (either temporarily or permanently) to a distant location. The Company will bear all reasonable costs in terms of transport and accommodation for any such re-deployment.

20. - CHANGES WITH A SIGNIFICANT EFFECT

(1) The Company will inform an employee as soon as is reasonably practicable after a definite decision has been made to implement changes which will have a significant effect on an employee including—

(a) the restructuring of an employee's job,

(b) change of work location and/or ordinary hours of work;

(c) the need for retraining; and

(d) a major change in the composition, operational size and skills required by the Company.

21. – CONFIDENTIALITY

(1) Employees must keep confidential information relating to the Company's affairs. Employees cannot disclose to third parties during their employment, or thereafter, any information relating to the Company's affairs which may come to the employee's knowledge in the course of the employee's employment, unless the information enters the public domain otherwise than as a result of a breach of this clause.

(2) Upon termination employees must return all documents, files, books, manuals, records or other information whether in written, electronic, magnetic or other form relating to the Company's affairs whether created or brought into existence by the employee or otherwise.

(3) Upon termination or request of the Company, employees must return all property and equipment of the Company which is in the employee's possession.

22. – NO END OF CONTRACT PAYMENTS

Employees are not entitled to end of contract payments or other payments not set out in this Award upon the expiry of the employee's contract of employment.

23. – DISPUTE RESOLUTION PROCEDURE

(1) The objective of this procedure is to ensure an effective and amicable resolution of disputes in the workplace. This will be done via consultation, co-operation and discussions. The Company aims to ensure that no industrial disputes will lead to any loss in production and wages.

(2) The following steps should be followed in resolving any industrial dispute or grievances—

(a) The first step will involve discussion between the employee(s) concerned and their immediate supervisor;

(b) The second step will involve discussions between the employee(s) concerned, their immediate supervisor, the Programme Manager and the Human Resources & Administration Manager;

(c) The third step will involve discussions between the parties mentioned in the second step together with Director of Operations. The employee(s) concerned may also nominate another AES employee to act as their witness to the discussions;

(d) The last step will be for the dispute to be referred by either party to the Western Australian Industrial Relations Commission (WAIRC).

(3) There shall be a commitment by both the Company and its employees to adhere to the above procedures. This should be facilitated by the earliest possible advice by one party to the other on any issue or problem which may give rise to a grievance or dispute.

(4) Throughout all stages of the above procedure, all relevant facts will be identified, duly recorded and signed by all parties involved.

(5) Emphasis shall be placed on a negotiated settlement. If, however, the negotiation process is exhausted without the dispute being resolved, the parties shall jointly or individually refer the matter to the WAIRC for assistance in resolving the dispute.

(6) In order to allow for the peaceful resolution of grievances, the parties shall be committed to avoid work stoppages, lockouts, bans or limitations on the performance of work while the process of negotiation and conciliation is being pursued.

24. - MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $431.40 per week payable from the first pay period on or after 1 August 2002.

(3) The Minimum Adult Award Wage of $431.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) 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.

(a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) 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.

(6) Subject to this clause the Minimum Adult Award Wage shall—

(a) apply to all work in ordinary hours.

(b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(7) Minimum Adult Award Wage

(a) 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 arrangements. Absorption which is contrary to the terms of an agreement is not required.

(b) 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.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

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 08328

BURSWOOD INTERNATIONAL RESORT CASINO EMPLOYEES' AWARD 2002

No. A4 of 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 14 MAY 2003
FILE NO/S.	APPLICATION 38 OF 2003
CITATION NO.	2003 WAIRC 08328

Result Award Varied

Order

WHEREAS this is an application to vary the *Burswood Island Resort Employees* A*ward 2002*; and

WHEREAS on 12 February 2003 the parties requested that the matter be dealt with under Principle 10 of the State Wage Principles; and

WHEREAS the matter was referred to the Chief Commissioner for his consideration and the matter was then allocated to the Commission as constituted to hear the matter; and

WHEREAS on 21 March 2003 the Commission convened a conference for the purpose of conciliation between the parties and no agreement was reached; and

WHEREAS the application was set down for hearing and determination on the 14 May 2003; and

WHEREAS at the hearing on 14 May 2003 the parties advised the Commission that they had reached agreement on the variation being sought; and

HAVING heard Mr J Winters and with him Mr D Kelly on behalf of the applicant and Mr G Blyth as agent and with him Mr K Bui on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Burswood International Resort Casino Employees' Award 2002 (No. A4 of 2002) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 14th day of May 2003.

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

[L.S.]

SCHEDULE

1. Clause 8. – Junior Employees: Delete subclause (2) of this clause and insert the following in lieu thereof—

(2) The minimum fortnightly rates of wages for work in ordinary time to be paid to junior employees shall be as follows—

	Percentage of the Lowest Adult Male or Female Total Rate %
Under 18 years of age	70
Between 18 and 19 years of age	80
At 19 years of age	Full Adult Wages

Provided that any junior employee employed in the classifications of Bar Attendant, Cellarperson or Casino Operations employees shall be paid full adult rates.

2. Clause 13. – Additional Rates For Ordinary Hours: Delete subclause (2)(b) of this clause and insert the following in lieu thereof—

(b) All ordinary hours worked between midnight Saturday and midnight Sunday shall be paid at the rate of time and three-quarters, provided that those employees employed in the classifications of Bar Attendant, Head Bar Attendant and Casino Operations employees shall be paid at the rate of double time.

3. Clause 15. – Casual Employees: Delete subclause (3)(a) of this clause and insert the following in lieu thereof—

(3) (a) Casual employees shall be paid at the rate of time and one half for all hours worked, provided that this rate shall increase to double time for employees employed in the classifications of Bar Attendant, Head Bar Attendant and Casino Operations employees and time and three-quarters for all other employees for all work performed on a Sunday, and to double time and one half for all work performed on the holidays referred to in paragraph (a) of sub-clause (1) of Clause 21. – Public Holidays of this Award.

2003 WAIRC 08431

INDEPENDENT SCHOOLS ADMINISTRATIVE AND TECHNICAL OFFICERS AWARD 1993.

No. A15 of 1991.

INDEPENDENT SCHOOLS (BOARDING HOUSE) SUPERVISORY STAFF AWARD.

No. A9 of 1990.

INDEPENDENT SCHOOLS PSYCHOLOGISTS AND SOCIAL WORKERS AWARD.

No. 3 of 1996.

INDEPENDENT SCHOOLS' TEACHERS AWARD 1976.

No. R 27 of 1976.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	THE ANGLICAN SCHOOLS COMMISSION (INC.) AND OTHERS
	APPL 922 OF 2002, 1045 OF 2002 AND 1047 OF 2002
	AQUINAS COLLEGE AND OTHERS
	APPL 1046 OF 2002, RESPONDENTS
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY 4 JUNE 2003
FILE NOS	APPLICATIONS 922 OF 2002, 1045 OF 2002, 1046 OF 2002, 1047 OF 2002
CITATION NO.	2003 WAIRC 08431

Result	Awards Varied
Representation	
Applicant	Mr N Briggs
Respondent 1	Dr I Fraser
Respondent 2	Mr P Andrew

Reasons for Decision

1 Applications were filed by the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers ("the Union") to vary the following awards—

- *Independent Schools Administrative and Technical Officers Award 1993* (No. A 15 of 1991) filed on 30 May 2002.

- *Independent Schools Psychologists and Social Workers Award* (No. 3 of 1996) filed on 7 June 2002.
- *Independent Schools (Boarding House) Supervisory Staff Award* (No. A 9 of 1990) filed on 7 June 2002.
- *Independent Schools' Teachers' Award 1976* (No. R27 of 1976) filed on 7 June 2002.

2 Each application is seeking substantially the same amendments. Some of the variations sought by the Union incorporate terms and conditions applying in the non-government schools' sector which have already been achieved through enterprise bargaining. Other variations update the awards to bring them into line with the provisions of the *Workplace Relation Act 1996* covering termination of employment, and to incorporate requirements included in the *Minimum Conditions of Employment Act 1993,* the *Superannuation Guarantee (Administration) Act 1992,* and the recently amended *Industrial Relations Act 1979* ("the Act"). Increases to allowances pursuant to Principle 5 of the Statement of Principles of the 2002 State Wage Case (82 WAIG 1369) ("the Principles") are also included in the variations.

3 The variations relating to redundancy and long service leave entitlements include terms and conditions above the existing award safety net. As these variations are required to be progressed under Principle 10 of the Principles the Chief Commissioner allocated these applications to the Commission as presently constituted to be dealt with under this Principle.

4 After the applications were lodged the parties engaged in substantial negotiations. Subsequent to these discussions taking place the Union filed amended schedules for each application on 7 April 2003. The amended schedules incorporated variations agreed to by each of the parties to the awards, except for one issue which remained in dispute, the payment of relief teachers as detailed in the Union's proposed new Clause 14 (5) of the *Independent Schools' Teachers' Award 1976* (No. R 27 of 1976) (application 1047 of 2002). Given that this issue remained in dispute the Commission decided to split application 1047 of 2002 and progress this issue as a separate matter under a new application, being 1047A of 2002.

5 The Union submitted that the terms of the variations relating to redundancy and long service leave, which are consented to by the respondents, incorporate conditions currently applying to the majority of employees covered by these awards. The union confirmed that these enhanced terms and conditions have been gained through enterprise bargaining. The Union argued that employees not covered by enterprise agreements should not be excluded from the terms of these provisions. The union also argued that the cost impact of these variations on the awards' respondents would be minimal as the majority of employers in the industry currently pay the additional rates incorporated in the variations, and few employees would be affected by the variations.

6 I am satisfied that the variations relating to redundancy and long service leave, brought under Principle 10 of the 2002 State Wage Case, should be incorporated into the awards as the applicant has demonstrated that the variations as proposed should be granted. It is clear that the cost impact of the variations is minimal, and that these variations could not be progressed under s.41 agreements as that process has been exhausted. Further, I accept the Union's argument that these variations could not be pursued under any other Principle.

7 In relation to the other proposed variations, having heard each party's submissions and given that these variations are by consent, it is my view that it is appropriate to amend the awards as detailed in the amended schedules lodged by the Union on 7 April 2003 as I am satisfied that they meet the requirements of the Principles and that they should be incorporated in the awards.

Operative date

8 The Union argues that all variations except those relating to redundancy and long service leave should have an operative date of date of hearing.

9 The Union submits that the variations outlined in the amended schedules in relation to redundancy should be operative from 15 November 2003 as this is the date that substantive agreement was reached between the parties on most issues. In relation to the variation to long service leave entitlements for employees covered by the *Independent Schools (Boarding House) Supervisory Staff Award* (No A 9 of 1990) the Union argues that the operative date should be 1 January 2003 as this is the beginning of the school year and that the entitlement accruing under this clause would not be effective until 1 January 2004 when employees have completed 12 months' service. Given that most of the respondents to this award already provide entitlements equal to or better than the proposed amendment, the Union argues that the cost impact of a retrospective date of operation for this clause is minimal.

10 The respondents argue that the operative date for all variations except those relating to redundancy and the payment of relief psychologists, social workers, and relief boarding house supervisors and houseparents should be the date of hearing. The respondents maintain that in relation to the payment of redundancy entitlements and the wages due to relief psychologists, social workers, and relief boarding house supervisors and houseparents, these should have a prospective operative date of 1 January 2004 as the variations involve budgetary issues for some of the respondents, given the way in which schools are funded and operated. However, the respondents' representatives did not put forward any details of the nature and extent of any hardship which the respondents would suffer if the operative date was the date of hearing.

11 Having considered the arguments put forward by the parties I have formed the view that all variations except those relating to long service leave entitlements under the *Independent Schools (Boarding House) Supervisory Staff Award* (No A 9 of 1990) shall have an operative date of date of hearing.

12 I refuse to grant a retrospective date for the operation of the variations relating to redundancy as I have insufficient evidence before me as to when an agreement was reached in relation to this issue.

13 It is clear that the respondents have had substantial notice of the nature of all of the proposed variations and given that there has been no details about any hardship that will be suffered if the operative date was to be date of hearing, it is my view that the operative date of the award changes, except for the operative date for long service leave entitlements of the *Independent Schools (Boarding House) Supervisory Staff Award* (No A 9 of 1990) should be the date of hearing, that being 14 April 2003. In relation to the operative date for long service leave entitlements under the *Independent Schools (Boarding House) Supervisory Staff Award* (No A 9 of 1990) I accept the applicant's argument that an operative date of 1 January 2003 is appropriate for this variation. I accept that the school year operates on a calendar year basis starting in January. I also accept the applicant's argument that the cost impost on respondents to the award is minimal by this variation having an operative date of 1 January 2003 instead of 14 April 2003. On this basis it is my view that there are special circumstances sufficient to warrant an operative date of 1 January 2003, in respect to the variation to long service leave entitlements relating to the *Independent Schools (Boarding House) Supervisory Staff Award* (No A 9 of 1990).

14 An Order will now issue in accordance with these Reasons for Decision.

2003 WAIRC 08432

INDEPENDENT SCHOOLS ADMINISTRATIVE AND TECHNICAL OFFICERS AWARD 1993.

No A15 of 1991.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	ANGLICAN SCHOOLS COMMISSION (INC) AND OTHERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 4 JUNE 2003
FILE NO/S.	APPLICATION 922 OF 2002
CITATION NO.	2003 WAIRC 08432

Result Award Varied

Order

HAVING heard Mr N Briggs on behalf of the applicant and Dr I Fraser and Mr P Andrew as agents on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Independent Schools Administrative and Technical Officers Award 1993 (No A15 of 1991) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 14th day of April 2003.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof—

1. Title
1B. Minimum Adult Award Wage
2. Arrangement
3. Area
4. Scope
5. Definitions
6. Contract of Service
7. Hours of Duty
8. Special Leave
9. Sick Leave
10. Leave Without Pay
11. Annual Leave
12. Long Service Leave
13. Carer's Leave
14. Classifications
15. Salaries
16. Bereavement Leave
17. Parental Leave
18. Travelling Allowances
19. Salary Record
20. Inspection of Records
21. Right of Entry
22. Location Allowance
23. Higher Duties
24. Public Holidays
25. Superannuation
26. Consultative Provisions
27. Supported Wage
28. Redundancy Provisions

Appendix - Resolution of Disputes Requirement
Schedule A. - Salaries (ASNA)
Schedule B. – Parties

2. Clause 4. – Scope: Delete this clause and insert the following in lieu thereof—

This Award applies to administrative and technical officers as defined, who are employed by an independent school in the classifications mentioned in Clause 14. - Classifications of this Award and not being principals, deputy principals, bursars (as defined in Clause 5. - Definitions of this Award), teachers' aides or child care workers as defined in the Teachers' Aides' (Independent Schools) Award 1988.

3. Clause 5. – Definitions: Delete this clause and insert the following in lieu thereof—

(1) "Officer" shall mean any person employed on the administrative or technical staff of an independent school with the exception of those classifications mentioned in Clause 4. - Scope.

(2) "Full Time Officer" shall mean any person employed regularly on the administrative or technical staff of an independent school and whose total ordinary hours are 37.5 hours per week for a minimum of 40 weeks per year.

(3) "Part-Time Officer" shall mean any person employed regularly on the administrative or technical staff of an independent school and whose total ordinary hours and/or weeks worked in the school, are less than those prescribed for full-time officers.

(4) "Temporary Officer" shall mean an officer engaged full-time or part-time as a replacement officer or for such purpose as may be required to fulfil the obligations of the school, provided that the period of engagement of a temporary officer shall be not less than twenty consecutive working days and not normally more than a period of twelve months.

(5) "Relief Officer" shall mean any person employed full-time or part-time on a daily rate for a period not exceeding nineteen consecutive days at the same school.

(6) "Bursar" shall mean any person employed in a senior management position who has managerial responsibilities including the delegated authority to act for the employer from time to time in the recruitment and termination of staff.

(7) "Independent School" shall mean a school which is an efficient school within the meaning of the School Education Act, 1999 and which is not administered by or on behalf of the government of Western Australia.

(8) "Experience" for the purpose of this Award shall mean the full-time equivalent years of any relevant experience acquired by an officer, at his/her classification level determined in accordance with Clause 14. - Classifications of this Award.

(9) "Continuous Service" shall include full-time, part-time and temporary service, paid leave, any stand down period and unpaid leave of less than two (2) consecutive weeks, with the same employer.

4. Clause 6. – Contract of Service: Delete this clause and insert the following in lieu thereof—

(1) (a) Each officer shall, upon engagement, be given a letter of appointment wherein the general conditions of appointment are stated.

(b) This shall include statements of the classification and the salary step relevant to the appointment and the number of weeks of work per year, excluding annual leave, for which the officer has been engaged.

(2) The letter of appointment shall not contain any provision which is inconsistent with or contrary to any provision of this Award.

(3) During the school vacation periods or any part thereof during which an officer cannot be usefully employed, the employer shall be relieved of the obligation to provide work and the officer shall not be entitled to the payment of salary in respect of any such period during which no work is performed other than any period during which the officer is on annual leave or a public holiday where the public holiday falls on a day on which the officer would normally be employed to work. Provided that the maximum period covered by this subclause shall be eight (8) weeks in any one year. Such leave shall be termed 'stand down'.

(4) Except in the case of a relief officer, the termination of service of any officer shall require a minimum period of notice as set out below—

(a) Employer's period of notice

Officer's period of continuous service	Employer's period of Notice
Up to 3 years	at least 2 weeks
More than 3 years but less then 5 years	at least 3 weeks
More than 5 years	at least 4 weeks

If the officer is over 45 years of age and has served at least two (2) years of continuous service this notice is to be increased by one (1) week.

(b) Officer's period of notice.

Termination of service by an officer shall require a minimum of two (2) weeks' notice.

(c) Failure to give the required notice shall make that party liable to forfeiture of payment to the other party of an amount equivalent to that period of notice not given or served.

(d) The requirements of this subclause may be waived in part or whole by mutual agreement between the officer and the employer.

(5) The contract of service of a temporary officer shall be terminable at any time by either party giving not less than one week's notice, except in the case of continuous service exceeding one year, notice shall be as prescribed in subclause (4) of this clause.

(6) The engagement of a relief officer shall be by the day and where the period of employment exceeds five days the notice of termination of service shall be one day. Where the employment is for five days or less the engagement shall be considered to be a specific period and notice shall not be required.

(7) A part-time officer shall receive payment for sick leave, long service leave and annual leave in the proportion of which his/her hours and/or weeks worked bear to the hours and/or weeks worked of a full-time officer.

(8) Upon termination a statement of service and a separate reference when requested by the officer shall be provided to the officer by the employer.

(9) Nothing within this clause detracts from the employer's right to dismiss summarily any officer for serious misconduct, in which case salary shall be paid up to the time of dismissal only.

5. Clause 7. – Hours of Duty: Delete subclause (4) of this clause and insert the following in lieu thereof—

(4) All time worked at the direction of the employer before the usual starting time or after the usual finishing time, or beyond 7.5 hours in any one day, or outside the spread of hours as prescribed under subclause (1) or (2) of this clause, shall be deemed overtime and shall, at the discretion of the officer, be paid for at the officer's ordinary rate of pay or be paid time off equivalent to the time worked. The paid time off taken in accordance with this subclause shall be at such time as is agreed between the officer and the employer.

6. Clause 8. – Special Leave. Delete this clause and insert the following in lieu thereof—

(1) An officer shall, on sufficient cause being shown, be granted special leave with pay.

(2) "Sufficient cause" is defined as a matter or situation for which—

(a) no other paid leave is available,

(b) no other arrangements can reasonably be made,

(c) the absence from duty is required due to pressing necessity.

(3) The period determined at the discretion of the employer having regard to all the circumstances would not normally exceed three (3) days in any one instance.

(4) Such discretion is not to be harshly or unfairly exercised.

7. Clause 9. – Sick Leave: Delete this clause and insert the following in lieu thereof—

(1) An officer who is unable to attend or remain at the place of employment during the normal hours of duty by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provision—

(a) Entitlement to payment shall accrue at the rate of one-twenty sixth of a week, for each completed week of service with the employer.

(b) An officer who claims an entitlement under this clause shall provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(c) If in the first or successive years of service with the employer, an officer is absent on the grounds of personal ill health or injury for a period longer than his/her entitlement to paid sick leave, payment may be adjusted at the end of that year of service or at the time the officer's services terminate if such termination occurs before the end of that year of service, to the extent that the officer had become entitled to further paid sick leave during that year of service.

(2) A temporary officer shall retain the benefit of accumulated sick leave credits upon appointment as a permanent officer provided that the service is continuous. For the purpose of this paragraph school vacations shall not be deemed to break the continuity of service.

(3) The unused portions of entitlements to paid sick leave in any one year shall accumulate from year to year subject to this subclause and may be claimed by the officer if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during that year at the time of the absence. An officer shall not be entitled to claim payment for any period exceeding ten weeks in any one year of service.

(4) An officer on unpaid leave, except stand down, shall not accrue an entitlement to payment under this clause.

(5) The provisions of this subclause with respect to payment do not apply to an officer who is entitled to payment under the Workers' Compensation and Rehabilitation Act 1981 nor to an officer whose injury or illness is the result of the officer's own misconduct.

(6) This clause shall not apply to a relief officer.

8. Clause 10. –Leave Without Pay: Delete subclause (2) of this clause and insert the following in lieu thereof—

(2) An officer applying for leave under this clause must state the period of such leave and the reason for which the leave is being sought.

9. Clause 11. – Annual Leave: Delete this clause and insert the following in lieu thereof—

(1) An entitlement to payment of annual leave will accrue at the rate of one – thirteenth of a week for each completed week of service. An officer who has been employed for all term weeks in a calendar year shall be entitled to 20 days' paid annual leave.

(2) All time for which the school is closed due to vacation leave shall count for the purpose of determining an officer's right to payment under this clause.

(3) Leave may be taken at a time agreed to between the employer and the officer.

(4) If after one week's continuous service in any qualifying period an officer lawfully leaves his/her employment or his/her employment is terminated by the employer through no fault of the officer, the officer shall be paid salary instead of annual leave proportionate to his/her length of service calculated to the nearest completed week of service.

(5) A leave loading equivalent to 17.5 per cent of four weeks' salary shall be paid to an officer who has become entitled to annual leave in accordance with this clause.

(6) If an officer's commencement is after 1 January, then, by agreement between the employer and the officer, the officer may be granted proportionate annual leave to the end of the calendar year. Subsequent years of employment can commence on 1 January.

(7) If any award holiday falls within an officer's period of annual leave and is observed on a day which in the case of that officer would have been an ordinary working day, there shall be added to that period one day, being an ordinary working day, for each such holiday observed as aforesaid.

10. Clause 12. – Long Service Leave: Delete this clause and insert the following in lieu thereof—

(1) Subject to subclause (3) of this clause:

(a) An officer who has completed ten years' continuous service with an employer shall be entitled to ten weeks' paid long service leave.

(b) For each subsequent period of ten years' service an officer shall be entitled to an additional ten weeks' paid long service leave.

(c) On termination of the officer's employment—

(i) by the officer's death;

(ii) in any circumstances otherwise than for serious misconduct;

an officer shall be entitled to a proportionate amount, on the basis of ten (10) weeks' paid leave for ten (10) years' continuous service for the number of year's continuous service with the employer completed since the officer last became entitled to an amount of long service leave.

(2) In calculating an officer's entitlement under this clause continuous service with the employer prior to 1 January 1993 shall be taken into account in the following manner—

(a) In the case of an officer who has already accrued an entitlement to long service leave with the employer prior to 1 January 1993, the officer shall continue to accrue subsequent entitlements to long service leave in accordance with the provisions on subclause (1) of this clause.

(b) In the case of an officer who, at 1 January 1993, had not accrued an entitlement to long service leave, the officer's entitlement shall be calculated on the following basis—

For any period of continuous employment prior to 1 January 1993, an amount calculated on the basis of 13 weeks' long service leave on full pay for each 15 years of continuous service.

(3) The expression "continuous service" does not include—

(a) Any period exceeding two weeks during which the officer is absent on leave without pay. In the case of leave without pay which exceeds eight weeks in a continuous period, the entire period of that leave is excised in full;

(b) Any service of an officer who resigns or is dismissed, other than service prior to such resignation or prior to the date of any offence in respect of which the officer was dismissed by the employer, when that prior service has actually entitled the officer to long service leave under this clause.

(4) Any entitlement to annual leave that falls due during the period of long service leave shall be recognised as extra leave and not included in the long service leave.

(5) Any public holiday which occurs during the period an officer is on long service leave shall be treated as part of the long service leave and extra days instead thereof shall not be granted.

(6) Where an officer has become entitled to a period of long service leave in accordance with this clause, the officer shall commence such leave as soon as possible after the accrual date in a manner mutually agreed between the employer.

(7) Payment for long service leave shall be made in full before the officer goes on leave or by agreement between the officer and the employer, at the same time as the officer's salary would have been paid if the officer had remained at work in which case the payment shall be made by arrangement between the officer and the employer.

(8) Where an officer has completed at least seven (7) years' service but less than ten (10) years' service and employment is terminated—

(a) by the officer's death; or

(b) in any circumstances, other than serious misconduct;

the amount of leave shall be such proportion of 10 weeks' leave as the number of completed years of such service bears to 10 years.

(9) In the case to which subclause (8) of this clause applies and in any case in which the employment of the officer who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of employment otherwise than by death, pay to the officer and upon termination of employment by death, pay to the personal representative of the officer upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which the officer is entitled or deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

(10) Where the continuous service of an officer during the accrual period contains any period where the officer's hours were less than those of a full-time officer the officer's entitlement shall be calculated as follows—

(a) the number of weeks accrued shall be in accordance with subclause (1) above, and

(b) payment for the leave taken shall be the average that the officer's hours bears to that of a full-time officer over the accrual period.

(11) Notwithstanding the provisions of subclause (1) of this clause, the provisions for long service leave which apply at an individual school may be set by written agreement between the employer and the Union; provided that such agreement shall not set provisions less favourable than those prescribed for under subclause (1) hereof.

Any agreement reached in accordance with this subclause shall be registered in the Western Australian Industrial Relations Commission in accordance with Section 41 of the Industrial Relations Act, 1979.

11. Clause 12. – Long Service Leave: After this clause insert new number, title and clause as follows—

13. – CARER'S LEAVE

(1) Use of Sick Leave—

(a) An officer with responsibilities in relation to either members of his/her immediate family or members of his/her household who need care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement for absences to provide care and support for such persons when they are ill. Such leave shall not exceed five (5) days in any calendar year and is not cumulative.

(b) The officer shall, if required, provide a written statement as to the fact of illness of the person for whom the care and support is required.

(c) The entitlement to use sick leave is subject to—

(i) the officer being responsible for the care of the person concerned; and

(ii) the person concerned being either a member of the officer's immediate family or a member of the officer's household.

(iii) the term "immediate family" includes:

(aa) a spouse (including a former spouse), of the officer; and

(bb) child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the officer.

(d) The officer shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and his/her relationship to the officer, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the officer to give prior notice of absence, the officer shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

(2) Use of Unpaid Leave

An officer may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill.

(3) Nothing contained in this clause shall prevent an officer from making application for leave as prescribed in Clause 8. – Special Leave of the Award.

12. Clause 13. – Classifications: Delete this number and title and insert the following in lieu thereof—

14. – CLASSIFICATIONS

13. Clause 14. – Salaries: Delete this number, title and clause and insert the following in lieu thereof—

15. - SALARIES

(1) (a) The minimum annual salary, according to classification and experience, payable to an officer shall be—

		Total Salary
Level	Step	$ per Annum
LEVEL 1	Step 1	24028
	2	24278
	3	24528
	4	24778
	5	25028
	6	25278
LEVEL 2	Step 1	26028
	2	26528
	3	27028
	4	27633
	5	28133
	6	28633
LEVEL 3	Step 1	29633
	2	30129
	3	30729
	4	31329
	5	31929
	6	32425
LEVEL 4	Step 1	31029
	2	32029
	3	33029
	4	34029
	5	35029
	6	36029

(b) On appointment an officer shall be placed at the appropriate salary level according to full-time experience and the classifications as prescribed in Clause 14. - Classifications.

(c) On application by the officer and by agreement with the employer, salary may be deemed to include an amount which is paid on behalf of the officer into an approved superannuation fund nominated in accordance with the provisions of Clause 25. - Superannuation of the Award, and not being an employer contribution to superannuation paid in accordance with the Superannuation Guarantee (Administration) Act 1992, Federal legislation or an employer's contributory superannuation fund.

(d) An officer appointed to a salary rate shall proceed by annual increments to the maximum of that classification level.

(e) If during progression through the salary steps, and within an appropriate time frame prior to the officer's next annual increment, the employer considers such increment to be inappropriate due to work performance and as such does not recommend or authorise further progression, then the employer shall state the reasons in writing to the officer concerned.

Such reasons should indicate the areas where the employer considers improvement is required.

If the improvement required is achieved, then the officer shall then proceed to his/her appropriate salary level.

(f) An officer shall only progress from one level to another in accordance with the provisions as prescribed in Clause 14. - Classifications.

(g) The years of experience are indicated by the equivalent number of steps from the entry level.

(h) For the purposes of determining weekly or fortnightly salary, the annual salaries as prescribed in subclause (1) of this clause, shall be divided by 52.16 or 26.08 respectively.

(i) Where the conditions of employment of any officer are subject to the provisions of subclause (3) of Clause 6. - Contract of Service of this Award, then by agreement between the officer and the employer salary may be averaged over the period of a full year.

(2) Junior Classification

An officer under the age of 20 years shall receive the following percentages of the rate appropriate to Level 1.

Under 17 years of age	60%
17 years of age	70%
18 years of age	80%
19 years of age	90%

(3) A relief officer shall be paid a loading of twenty-five per cent in addition to the salaries prescribed in subclause (1) of this clause.

14. Clause 15. – Bereavement Leave: Delete this number, title and clause and insert the following in lieu thereof—

16. - BEREAVEMENT LEAVE

Entitlement to Bereavement Leave

(1) Subject to subclause (4) of this clause, on the death of—

(a) the spouse or defacto spouse of an officer;

(b) the child or step-child of an officer;

(c) the parent, step-parent or parent-in-law of an officer;

(d) brother or sister of an officer; or

(e) any person who, immediately before that person's death, lived with the officer as a member of the officer's family,

the officer is entitled to paid bereavement leave of up to two days.

(2) The two days need not be consecutive.

(3) Bereavement Leave is not to be taken during a period of any other leave.

(4) An officer who claims to be entitled to paid leave under this section is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to—

(a) the death that is the subject of the leave sought; and

(b) the relationship of the officer to the deceased person.

15. Clause 16. – Maternity Leave: Delete this number, title and clause and insert the following in lieu thereof—

17. - PARENTAL LEAVE

(1) Eligibility for Parental Leave

An officer shall become entitled to take up to 52 consecutive weeks of unpaid leave in respect of—

(a) the birth of a child to the officer or the officer's spouse; or

(b) the placement of a child with the officer with a view to the adoption of the child by the officer.

(2) An officer is entitled to take parental leave if he or she—

(a) has had at least 12 months' continuous service with that employer immediately preceding the date upon which the officer proceeds upon such leave; and

(b) has given the employer at least ten (10) weeks' written notice of his/her intention to take such leave, and the start and finish dates of such leave.

(c) An officer is not entitled to take parental leave at the same time as the officer's spouse but this subclause does not apply to one week's parental leave—

(i) taken by the male parent immediately after the birth of the child; or

(ii) taken by the officer and the officer's spouse immediately after a child has been placed with them with a view to their adoption of the child.

(d) An officer shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with this subclause, if such failure is occasioned by the confinement occurring earlier than the presumed date.

(3) Parental Leave to start 6 weeks before the birth

Subject to subclauses (4), (5) and (7) of this clause, the period of parental leave for a female employee shall be for an unbroken period of up to 52 weeks and shall include up to six weeks' leave to be taken immediately before the presumed date of confinement, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

(4) Transfer to a Safe Job

Where in the opinion of a duly qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the officer make it inadvisable for the officer to continue at her present work, the officer shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of parental leave. If the transfer to a safe job is not practicable, the officer may, or the employer may require the officer to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as parental leave for the purposes of subclauses (8), (9), (10) and (11) of this clause.

(5) Variation of Period of Parental Leave

(a) The period of parental leave may be lengthened by agreement between the officer and the employer in accordance with the provisions of Clause 10. - Leave Without Pay of this Award.

(b) The period of parental leave may be shortened by agreement between the officer and the employer.

(6) Cancellation of Parental Leave

(a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an officer terminates other than by the birth of a living child.

(b) Subject to paragraph (c) of this subclause, where the pregnancy of an officer then on parental leave terminates other than by the birth of a living child, it shall be the right of the officer or officer's spouse to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the officer to the employer that he or she desires to resume work.

(c) An officer's right to resume work within the period specified in paragraph (b) of this subclause shall be subject to the practicality of enabling the officer to resume within that period, but in any case that limitation shall not be invoked to extend the period of leave beyond the date originally agreed to.

Where the officer's resumption is delayed, he or she may undertake temporary employment with another employer without affecting his or her contract of service with the school from which he or she took parental leave.

(7) Special Parental Leave and Sick Leave

(a) Where the pregnancy of an officer or an officer's spouse not then on parental leave terminates after twenty-eight weeks other than by the birth of a living child then—

(i) the officer shall be entitled to such period of unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the officer's return to work, or

(ii) for illness other than the normal consequences of confinement the officer shall be entitled, either instead of or in addition to special parental leave, to such paid sick leave as to which the officer is then entitled and which a duly qualified medical practitioner certifies as necessary before the officer returns to work.

(b) Where an officer not then on parental leave suffers illness related to the officer's pregnancy, the officer may take such paid sick leave as to which the officer is then entitled and such further unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the officer returns to work.

(c) For the purposes of subclauses (9), (10) and (11) of this clause, parental leave shall include special parental leave.

(d) An officer returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which the officer held immediately before proceeding on such leave or, in the case of an officer who was transferred to a safe job pursuant to subclause (4) of this clause, to the position the officer held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the officer is qualified and the duties of which the officer is capable of performing, the officer shall be entitled to a position as nearly comparable in status and salary or wage to that of the officer's former position.

(8) Parental Leave and Other Leave Entitlements

(a) An officer may take, in conjunction with or in addition to parental leave, any annual leave or long service leave or any part thereof to which the officer is then entitled.

(b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an officer during the officer's absence on parental leave.

(9) Effect of Parental Leave on Employment

Notwithstanding any award, or other provision to the contrary, absence on parental leave shall not break the continuity of service of an officer but shall not be taken into account in calculating the period of service for any purpose of the Award.

(10) Termination of Employment

(a) An officer on parental leave may terminate his or her employment at any time during the period of leave by notice given in accordance with this Award.

(b) An employer shall not terminate the employment of an officer on the ground of the officer's pregnancy or of the officer's absence on parental leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(11) Return to Work After Parental Leave

(a) An officer shall be entitled to the position which the officer held immediately before proceeding on parental leave or, in the case of an officer who was transferred to a safe job pursuant to subclause (4) of this clause, to the position which the officer held immediately before such transfer. Where such position no longer exists but there are other positions available for which the officer is qualified and the duties of which the officer is capable of performing, the officer shall be entitled to a position as nearly comparable in status and salary or wage to that of the officer's former position.

(b) The officer will notify the employer in writing not less than six (6) weeks prior to the presumed date of return, when the officer requests to return to work under different arrangements from those which the officer held immediately prior to the commencement of parental leave.

(12) Replacement Officers

(a) A replacement officer is an officer specifically engaged as a result of an officer proceeding on parental leave.

(b) Before an employer engages a replacement officer under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the officer who is being replaced.

(c) Before an employer engages a person to replace an officer temporarily promoted or transferred in order to replace an officer exercising his or her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the officer who is being replaced.

(d) Provided that nothing in this subclause shall be construed as requiring the employer to engage a replacement officer.

(e) A replacement officer shall not be entitled to any of the rights conferred by this clause except where his/her employment continues beyond 12 months' qualifying period.

16. Clause 17. – Travelling Allowances: Delete this number, title and clause and insert the following in lieu thereof—

18. - TRAVELLING ALLOWANCES

(1) Where an officer is required by the employer to work away from the officer's usual place of employment the employer shall pay the officer any reasonable travelling expenses incurred except where an allowance is paid in accordance with subclause (2) hereof.

(2) Where an officer is required and authorised to use his/her own motor vehicle in the course of duty, the officer shall be paid an allowance of not less than that prescribed for taxation purposes by the Australian Taxation Office.

17. Clause 18. – Salary Record: Delete this number, title and clause and insert the following in lieu thereof—

19. – SALARY RECORD

(1) The employer/principal shall keep or cause to be kept, records containing the following particulars—

(a) Full name and residential address of each officer.

(b) The start and finish times, the hours worked each day and each week, and the number of weeks worked per year, exclusive of annual leave.

(c) The salary paid each pay period.

(d) The employer shall provide a salary advice slip showing gross salary and any deductions made for such pay period.

(2) Salaries shall be paid at least monthly.

18. Clause 19. – Salary Record: After this clause insert new number, title and clause as follows—

20. – INSPECTION OF RECORDS

(1) An authorised representative of the Union may enter, during work hours, any premises where relevant employees work, for the purpose of investigating any suspected breach of the Industrial Relations Act 1979, the Long Service Leave Act 1958, the Minimum Conditions of Employment Act 1993, the Occupational Safety and Health Act 1984 or an award, order, industrial agreement or employer-employee agreement that applies to any such employee.

(2) For the purpose of investigating any such suspected breach, the authorised representative may—

(a) subject to the provisions of the relevant Act, award, order, industrial agreement or employer-employee agreement require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records or other documents kept by the employer that are related to the suspected breach;

(b) make copies of the entries in the employment records or documents related to the suspected breach; and

(c) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach.

(3) The authorised representative will provide written notice of at least

(a) 24 hours if the records and documents are kept on the employer's premises, or

(b) 48 hours if the records are kept elsewhere.

19. Clause 20. – Inspection of Records: After this clause insert new number, title and clause as follows—

21. – RIGHT OF ENTRY

(1) An authorised representative of the Union may enter, during working hours, any premises where relevant officers work, for the purposes of holding discussions at the premises with those officers.

(2) The authorised representative will provide the employer/principal with prior notification of entry.

(3) The meeting will not disrupt the officer's performance of his/her duties.

(4) Where such a meeting is of an urgent nature and upon a request being made to the employer/principal, the employer/principal may approve paid time off to meet with the authorised union representative. Such approval will not be unreasonably withheld.

20. Clause 19. – Location Allowances: Delete this number, title and clause and insert the following in lieu thereof—

22. - LOCATION ALLOWANCES

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

TOWN	PER WEEK
Agnew	$16.60
Argyle	$43.50
Balladonia	$16.60
Barrow Island	$28.30
Boulder	$6.90
Broome	$26.50
Bullfinch	$7.80
Carnarvon	$13.50
Cockatoo Island	$29.10
Coolgardie	$6.90
Cue	$16.90

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

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

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

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

(3) Where an officer—

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

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

such officer shall be paid 66.66 per cent of the allowances prescribed in subclause (1) of this clause.

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

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

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

(7) For the purposes of this clause—

(a) "Dependant" shall mean—

(i) a spouse or defacto spouse; or

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

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

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

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

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

21. Clause 20. – No Reductions: Delete this number, title and clause.

22. Clause 21. – Higher Duties: Delete this number and title and insert the following in lieu thereof—

23. - HIGHER DUTIES

23. Clause 22. – Public Holidays: Delete this number, title and clause and insert the following in lieu thereof—

24. - PUBLIC HOLIDAYS

(1) (a) The following day or days observed instead shall, subject to this subclause be allowed as holidays without deduction of pay, namely, New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any days named in this subclause.

(b) When any of the days mentioned in paragraph (a) hereof falls on a Saturday or a Sunday the holiday shall be observed the next succeeding Monday.

(c) Where a holiday or substituted holiday prescribed in paragraphs (a) or (b) hereof falls on a day not usually observed by the school as a holiday, and upon which the officer is required to work, the officer shall have one (1) day added to Annual Leave.

(d) Where a holiday or substituted holiday prescribed in paragraphs (a) or (b) falls during term or Christmas vacation, in a period where the officer is stood down without pay because he/she is not required to work and is not being paid annual leave or other leave, such officers shall be entitled to payment for such holidays.

24. Clause 23. – Superannuation: Delete this number, title and clause and insert the following in lieu thereof—

25. - SUPERANNUATION

The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled - Compliance, Nomination and Transition.

(1) Employer Contributions

(a) An employer shall contribute to superannuation for each eligible officer in accordance with the Superannuation Guarantee (Administration) Act 1992 to one of the following approved superannuation funds—

(i) CONCEPT ONE - superannuation plan which was established and is governed by a trust deed and rules dated 23 September 1986, as amended; and

(ii) an exempted fund allowed by subclause (3) of this clause.

(b) Employer contributions shall be paid at least monthly for each week of service that the eligible officer completes with the employer.

(c) "Ordinary Time Earnings" means the salary or other remuneration periodically received by the officer in respect to the time worked in ordinary hours and/or any other rate paid for all purposes of the award to which the officer is entitled for ordinary hours of work.

(2) Fund Membership

(a) "Eligible Officer" shall mean an officer employed under the terms of this Award.

(b) An officer shall not be eligible to join the fund until he/she has completed one month's satisfactory service. On completion of this period the officer shall be entitled to the appropriate employer contribution, from the date of the officer's commencement.

(3) Exemption

Exemptions from the requirements of this clause shall apply to an employer who at the date of this Award—

(a) was contributing to a superannuation fund, in accordance with an order of an Industrial Tribunal; or

(b) was contributing to a superannuation fund in accordance with an order or award of an Industrial Tribunal, for a majority of officers and makes payment for officers covered by this Award in accordance with that order or award; or

(c) subject to notification to the Union, was contributing to a superannuation fund for officers covered by this Award where such payments are not made pursuant to an order of an Industrial Tribunal.

(d) was not contributing to a superannuation fund for officers covered by this Award; and

(i) written notice of the proposed alternative superannuation fund is given to the Union; and

(ii) contributions and benefits of the proposed alternative superannuation fund are no less than those provided by this clause; and

(iii) within one month of the notice prescribed in paragraph (i) being given, the Union has not challenged the suitability of the proposed fund by notifying the Western Australian Industrial Relations Commission of a dispute.

(4) The employer shall provide such facilities as is appropriate to ensure that all officers are adequately informed of the provisions of the superannuation funds available.

Compliance, Nomination and Transition

Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of an officer, on and from 30 June 1998—

(a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless—

(i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and

(ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the officer permitted to nominate a fund or scheme;

(b) The officer shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the officer;

(c) The employer shall notify the officer of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;

(d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirements of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the officer to whom such is directed;

(e) The officer and employer shall be bound by the nomination of the officer unless the officer and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;

(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an officer;

Provided that on and from 30 June 1998, and until an officer thereafter nominates a complying superannuation fund or scheme—

(g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer;

or

(h) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.

25. Clause 24. – Consultative Provisions: Delete this number and title and insert the following in lieu thereof—

26. - CONSULTATIVE PROVISIONS

26. Clause 25. – Supported Wage: Delete this number and title and insert the following in lieu thereof—

27. - SUPPORTED WAGE

27. Clause 27. – Supported Wage: After this clause insert new number, title and clause as follows—

28. – REDUNDANCY PROVISIONS

(1) Discussions Before Termination

(a) Where an employer has made a definite decision that the employer no longer wishes the job the officer has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the officers directly affected and with his/her union, where applicable.

(b) The discussion shall take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and shall cover among other things, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to minimise any adverse affect of any terminations on the officers concerned. The employer will confirm the content of these discussions in writing.

(2) Notice Period of Termination on Redundancy

(a) If the services of an officer are to be terminated due to redundancy, the officer shall be entitled to notice of termination as prescribed in Clause 6. – Contract of Service, of this Award, provided that officers to whom notification of termination of service is to be given because of the introduction of automation or other like technology changes shall be given not less than three (3) months' notice of termination.

(b) Should the employer fail to give notice of termination as required in subclause 2(a) the employer shall pay to the officer an amount calculated in accordance with the ordinary rate of pay for a period being the difference between the notice given and that required to be given.

(c) Payment of Notice Treated as Service – If an employer makes payment for all or any of the period of notice prescribed, then the period for which such payment is made shall be treated as service for the purposes of calculating any service related entitlements of the officer arising pursuant to this Award and shall be deemed to be service with the employer for the purposes of Long Service Leave.

(3) Officer Leaving During Notice

An officer whose employment is to be terminated for reasons set out in 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 officer remained with the employer until the expiry of such notice. This is with the provision that in such circumstances the officer shall not be entitled to payment instead of notice.

(4) Time Off During Notice Period

(a) During the period of notice of termination of employment given by an employer, an officer whose employment is to be terminated for reasons set out in this clause shall be entitled for the purpose of seeking other employment, to be absent from work for eight ordinary hours without deduction of pay.

(b) An officer who claims to be entitled to paid leave under this clause is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(5) Severance Pay

(a) In addition to the period of notice prescribed in Clause 6. – Contract of Service, of this Award, for ordinary termination, an officer whose employment is terminated for reasons set out this clause shall be entitled to the following amount of severance pay in respect of a continuous period of service.

PERIOD OF CONTINUOUS SERVICE	SEVERANCE PAY
Less than 1 year	Nil
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years and over	8 weeks

"Weeks Pay" means the ordinary weekly rate of wage for the officer concerned.

(6) Alternative Employment

An employer, in a particular redundancy case, may make application to the Western Australian Industrial Relations Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an officer.

(7) Officers Exempted

This clause shall not apply to relief or temporary officers or where employment is terminated as a consequence of conduct that justifies instant dismissal.

28. Appendix – Resolution of Disputes Requirement: After this appendix insert new title and schedule as follows—

SCHEDULE A. – SALARIES (ASNA)

The following schedule provides a history of Clause 15. – Salaries of the Award including all Arbitrated Safety Net Adjustments (ASNA) as at 1 August 2002.

(1) (a) The minimum annual salary, according to classification and experience, payable to an officer shall be—

Level	Step	Minimum Salary $ per Annum	ASNA	Total Salary $ per Annum
LEVEL 1	Step 1	18,500	5528	24028
	2	18,750	5528	24278
	3	19,000	5528	24528
	4	19,250	5528	24778
	5	19,500	5528	25028
	6	19,750	5528	25278
LEVEL 2	Step 1	20,500	5528	26028
	2	21,000	5528	26528
	3	21,500	5528	27028
	4	22,000	5633	27633
	5	22,500	5633	28133
	6	23,000	5633	28633
LEVEL 3	Step 1	24,000	5633	29633
	2	24,600	5529	30129
	3	25,200	5529	30729
	4	25,800	5529	31329

Level	Step	Minimum Salary $ per Annum	ASNA	Total Salary $ per Annum
LEVEL 3—*continued*	5	26,400	5529	31929
	6	27,000	5425	32425
LEVEL 4	Step 1	25,500	5529	31029
	2	26,500	5529	32029
	3	27,500	5529	33029
	4	28,500	5529	34029
	5	29,500	5529	35029
	6	30,500	5529	36029

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.

29. Schedule A. – Parties: Delete this title and schedule and insert the following in lieu thereof—

SCHEDULE B. – PARTIES

NAME	**ADDRESS**
EMPLOYER PARTIES	
The Anglican Schools Commission (Inc.)	PO Box 2520 MT CLAREMONT WA 6010
Aquinas College	Locked Bag 11, Bentley Delivery Centre WA 6983
Association of Independent Schools Of Western Australia (Inc.)	3/41 Walters Drive Herdsman Business Park OSBORNE PARK WA 6017
Bible Baptist Christian Academy	Lot 374 Chidlow Street MT HELENA WA 6555
Catholic Education Commission of WA	PO Box 198 LEEDERVILLE WA 6903
Community School	160 High Street FREMANTLE WA 6160
Forrestfield Christian School	336 Hawtin Road FORRESTFIELD WA 6058
Guildford Grammar School	Locked Bag 5 GUILDFORD WA 6935
Hale School	Hale Road WEMBLEY DOWNS WA 6019
Korsunski-Carmel School	Cresswell Road DIANELLA WA 6062
Kulkarriya Community School	PO Box 3 FITZROY CROSSING WA 6765
Methodist Ladies College	PO Box 222 CLAREMONT WA 6010

NAME	ADDRESS
EMPLOYER PARTIES	
Montessori School	PO Box 194 KINGSLEY WA 6026
Penrhos College	PO Box 690 COMO WA 6952
Presbyterian Ladies College (Inc.)	14 McNeil Street PEPPERMINT GROVE WA 6011
The Roman Catholic Archbishop of Perth (Inc.)	Victoria Square PERTH WA 6000
Scotch College (Inc.)	PO Box 223 CLAREMONT WA 6010
Seventh Day Adventist School	Cnr Ninth and Wungong Roads ARMADALE WA 6112
Speech and Hearing Centre for Children (WA) Inc.	PO Box 186 WEMBLEY WA 6913
St Hilda's Anglican School For Girls (Inc.)	PO Box 34 MOSMAN PARK WA 6912
St. Mary's Anglican Girls School (Inc.)	PO Box 105 KARRINYUP WA 6923
Trinity College	Trinity Drive EAST PERTH WA 6004
Wesley College	PO Box 149 SOUTH PERTH WA 6951
UNION PARTY	
The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers	PO Box 8444, Perth Business Centre, PERTH WA 6849

30. Appendix – S.49B – Inspection of Records Requirements: Delete this title and appendix.

2003 WAIRC 08433

INDEPENDENT SCHOOLS PSYCHOLOGISTS AND SOCIAL WORKERS AWARD.

No 3 of 1996.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPLICANT *v.* THE ANGLICAN SCHOOLS COMMISSION (INC.) AND OTHERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY 4 JUNE 2003
FILE NO/S.	APPLICATION 1045 OF 2002
CITATION NO.	2003 WAIRC 08433

Result	Award varied

Order

HAVING heard Mr N Briggs on behalf of the applicant and Dr I Fraser and Mr P Andrew as agents on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Independent Schools Psychologists and Social Workers Award (No 3 of 1996) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 14th day of April 2003.

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

SCHEDULE

1. Clause 2. – Minimum Adult Award Wage: Delete this number and title and insert the following in lieu thereof—

1B. – MINIMUM ADULT AWARD WAGE

2. Clause 3. – Arrangement: Delete this number, title and clause and insert the following in lieu thereof—

2. – ARRANGEMENT

3. Clause 4. – Area: Delete this number and title and insert the following in lieu thereof—

3. - AREA

4. Clause 5. – Scope: Delete this number, title and clause and insert the following in lieu thereof—

4. – SCOPE

This Award applies to Psychologists and Social Workers (as defined) employed by an Independent School and shall not apply to Principals, Deputy Principals, or a person who is in Holy Orders or who is a member of a religious teaching order unless it is so stated in a written contract of employment between that person and the school. This Award shall not apply to the Non Government Schools Psychology Service.

5. Clause 6. – Definitions: Delete this number, title and clause and insert the following in lieu thereof—

5. - DEFINITIONS

(1) "Psychologist" shall mean an employee who is employed as a psychologist and who is registered as a psychologist with the Psychologists' Board of Western Australia.

(2) "Provisional Registered Psychologist" shall mean an employee employed as a psychologist and who is provisionally registered as a psychologist with the Psychologists' Board of Western Australia.

(3) "Social Worker" shall mean an employee employed as a social worker and who by qualification is eligible for membership of the Australian Association of Social Workers.

(4) "Part-time Psychologist or Social Worker" shall mean a psychologist or social worker employed regularly on the staff of an independent school who works less than the normal hours which a full-time psychologist or social worker is required to work.

(5) "Temporary Psychologist or Social Worker" shall mean a psychologist or social worker engaged as a full-time or part-time psychologist or social worker on a temporary basis, at the same school.

(6) "Relief Psychologist or Social Worker" shall mean a psychologist or social worker engaged as full-time or part-time on a daily or half daily basis for a period not exceeding nineteen consecutive working days.

(7) "Independent School" shall mean a school which is an efficient school within the meaning of the School Education Act 1999 and which is not administered by or on behalf of the Government of Western Australia.

(8) "Union" shall mean the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers.

(9) "Continuous Service" shall include full-time, part-time and temporary service, paid leave, leave without pay, school vacation periods and any stand down period, with the same employer.

6. Clause 7. – Term: Delete the number and title and insert the following in lieu thereof—

6. - TERM

7. Clause 8. – Contract of Service: Delete this number, title and clause and insert the following in lieu thereof—

7. - CONTRACT OF SERVICE

(1) (a) A psychologist or social worker shall, upon engagement, be given a letter of appointment in which the general conditions and the special conditions (if any) of his/her appointment are stated. A copy of that letter shall be retained by the school and signed by the psychologist or social worker within one week of commencing work. This subclause shall not apply to a relief psychologist or social worker.

(b) The conditions stated in the letter of appointment shall, while the employment continues, be observed by the parties and shall not be subject to any alteration of significance without the consent of the psychologist or social worker.

(2) When a psychologist or social worker accepts an appointment within an Independent School in Western Australia for the first time, the appointment is probationary and as such the psychologist or social worker is subject to professional appraisal in the second year of employment so as to determine suitability for ongoing employment.

(3) (a) Except in the case of a relief or temporary psychologist or social worker, the termination of the service of a psychologist or social worker shall require a minimum of six weeks' notice by either party to take effect from the close of school business at the end of the school term.

(b) Subject to the provisions of this subclause, failure to give the required notice shall make either party liable to pay or forfeit to the other party an amount equivalent to the period of notice not given.

(c) The requirements of this subclause may be waived in part or in whole by mutual agreement between the psychologist or social worker and the employer. Any request to waive such notice shall not be unreasonably withheld by the employer, where it is deemed that the psychologist or social worker has not been able to give the required notice through no fault of his/her own.

(4) During the school vacation periods or any part thereof during which a psychologist or social worker cannot be usefully employed, the employer shall be relieved of the obligation to provide work and the psychologist or social worker shall not be entitled to payment of salary in respect of any such period during which no work is performed, other than a period during which the psychologist or social worker is on annual leave or a public holiday falls on a day on which the psychologist or social worker would normally be employed to work. Provided that the maximum period covered by this subclause shall be no more than five (5) weeks in any one year. Such period shall be termed "stand down".

(5) The contract of service of a temporary psychologist or social worker shall be terminable at any time by either party giving not less than one week's notice, except in the case of continuous service exceeding one (1) year, notice shall be as prescribed in subclause (3) of this clause.

(6) The engagement of a relief psychologist or social worker shall be by the day and where the period exceeds five consecutive days the notice shall be one day. Where the employment is for five days or less the engagement shall be considered to be a specific period and notice shall not be required.

(7) A part-time psychologist or social worker shall receive payment of sick leave, long service leave and vacation leave on a proportional basis to a full-time psychologist or social worker.

(8) Upon termination of service a statement of service when requested by the psychologist or social worker shall be provided to the psychologist or social worker by the employer.

(9) Nothing within this clause detracts from the employer's right to dismiss summarily any psychologist or social worker for serious misconduct in which case salary shall be paid up to the time of dismissal only.

8. Clause 7. – Contract of Service: After this clause insert new number, title and clause as follows—

8. – SPECIAL LEAVE

(1) A psychologist or social worker shall, on sufficient cause being shown, be granted special leave with pay.

(2) "Sufficient cause" is defined as a matter or situation for which—

(a) no other paid leave is available;

(b) no other arrangements can reasonably be made;

(c) the absence from duty is required due to pressing necessity.

(3) The period determined at the discretion of the employer having regard to all the circumstances would not normally exceed three (3) days in any one instance.

(4) Such discretion is not to be harshly or unfairly exercised.

9. Clause 8. – Special Leave: After this clause insert new number, title and clause as follows—

9. – SICK LEAVE

(1) (a) A psychologist or social worker shall be entitled to payment for non attendance on the ground of personal ill health or injury, at the rate of twelve and one half (12.5) days per year accruing on a weekly basis from the beginning of each year. Notwithstanding that a psychologist or social worker may be stood down for up to 5 weeks each year in accordance with his/her contract of service, his/her sick leave shall be treated as accruing over the full year.

(b) The unused portion of the entitlement prescribed in paragraph (a) of this subclause in any accruing year shall accumulate and may be availed of in any succeeding year.

(c) A psychologist or social worker who claims an entitlement under this clause shall provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(d) Where a psychologist or social worker has utilised sick leave in excess of his or her entitlement the employer may deduct the excess portion from the final payment of wages to the psychologist or social worker.

(e) A psychologist or social worker shall upon request to the employer be advised of the unused portion of sick leave. Where a psychologist or social worker has utilised sick leave in excess of their entitlement, he/she shall be advised of the provisions of paragraph (c) of this subclause.

(2) This clause shall not apply where the psychologist or social worker is entitled to compensation under the Worker's Compensation and Rehabilitation Act 1981.

10. Clause 9. – Sick Leave: After this clause insert new number, title and clause as follows—

10. – LEAVE WITHOUT PAY

(1) While a psychologist or social worker has the right to apply for leave without pay the granting of such leave is at the discretion of the employer.

(2) (a) A psychologist or social worker applying for leave under this clause must state the period of such application and the reason for which the application is being sought.

(b) Leave without pay does not involve loss of continuity of service for salary, sick leave and long service leave purposes. Any period exceeding two weeks during which the psychologist or social worker is absent on leave without pay shall not be taken into account in calculating the period of service for any purposes of this Award. In the case of leave without pay, which exceeds eight weeks in a continuous period, the entire period of that leave is excised in full.

(c) If a psychologist or social worker is granted leave without pay the question of the psychologist's or social worker's specific duties on return to work should be considered before the granting of such leave and any arrangements made documented. If no prior arrangement is made a psychologist or social worker upon return to service shall be entitled to a position commensurate with the position held immediately prior to the commencement of such leave.

(d) The maximum period for which leave is granted under this clause shall be one year.

11. Clause 9. – Leave: Delete this number, title and clause.

12. Clause 10. – Holidays and Vacation: Delete this number, title and clause and insert the following in lieu thereof—

11. – HOLIDAY AND VACATION LEAVE

(1) Except as hereinafter provided, a psychologist or social worker shall be entitled to seven (7) weeks per year vacation leave, without deduction of pay. Such leave shall be taken during term and Christmas vacations unless otherwise agreed between the employer and the psychologist or social worker.

(2) If after one week's continuous service in any calendar year a psychologist or social worker lawfully terminates his/her employment or his/her employment is terminated by the employer through no fault of the psychologist or social worker, the psychologist or social worker shall be granted salary instead of vacation leave proportionate to his/her length of service.

(3) (a) Where a psychologist or social worker has been paid for vacation leave which at the time of termination has not been fully accrued, the employer may deduct from any monies owed that portion to which the psychologist or social worker is not entitled.

(b) Where the employment of a psychologist or social worker is terminated by the employer prior to the attainment of the accrued vacation leave, then the provisions of this sub-clause shall not apply.

(4) A psychologist or social worker shall accrue an entitlement to payment under this clause whilst on paid leave or stand down.

(5) (a) A leave loading equivalent to 17.5 per cent of four weeks' salary shall be paid to a psychologist or social worker, including a part-time or temporary psychologist or social worker, who has completed twelve months' continuous service with the employer or who has been employed for all four terms in a calendar year.

(b) The loading shall be paid in the final pay in December of that year.

(c) If the services of a psychologist or social worker commences after the beginning of first term in a calendar year then by agreement between the employer and the psychologist or social worker, the leave loading may be paid, proportionate to the length of service in that year, in December of that year.

13. Clause 11. – Long Service Leave: Delete this number, title and clause and insert the following in lieu thereof—

12. - LONG SERVICE LEAVE

(1) Subject to subclause (2)

(a) A psychologist or social worker who has completed ten (10) years' continuous service with an employer shall be entitled to thirteen (13) weeks' paid long service leave.

(b) For each subsequent period of ten (10) years' service a psychologist or social worker shall be entitled to an additional thirteen (13) weeks' paid long service leave.

(c) On termination of the psychologist's or social worker's employment in any circumstances otherwise than for serious misconduct the psychologist or social worker shall be entitled to payment of long service leave in respect of the number of years' service with the employer completed since the psychologist or social worker last became entitled to an amount of long service leave of a proportionate amount on the basis of thirteen (13) weeks' for ten (10) years' service.

(2) The expression "continuous service" does not include—

(a) Any period exceeding two weeks during which the psychologist or social worker is absent on leave without pay. In the case of leave without pay which exceeds eight (8) weeks in a continuous period, the entire period of leave is excised in full.

(b) Any service of a psychologist or social worker who resigns or is dismissed, other than service prior to such resignation or prior to the date of any offence in respect of which he/she is dismissed by the employer, when that prior service has actually entitled the person to long service leave under this clause.

Provided that continuous service includes any period during which the psychologist or social worker is stood down for up to five (5) weeks each year in accordance with his/her contract of service.

(3) Any public holiday which occurs during the period a psychologist or social worker is on long service leave shall be treated as part of the long service leave and extra days shall not be granted.

(4) Where a psychologist or social worker has become entitled to a period of long service leave in accordance with this clause, the psychologist or social worker shall commence such leave as soon as possible after the accrual date in a manner and at a time mutually agreed between the employer and the psychologist or social worker.

(5) Payment for long service leave shall be made in full before the psychologist or social worker goes on leave or by agreement between the psychologist or social worker and the employer, at the same time as the psychologist's or social worker's salary would have been paid if the psychologist or social worker had remained at work in which case the payment shall be made by arrangement between the psychologist or social worker and the employer.

(6) Where a psychologist or social worker has completed at least seven (7) years' service but less than ten (10) years' service and employment is terminated—

(a) by the psychologist's or social worker's death; or

(b) in any circumstances, otherwise than serious misconduct;

the amount of leave shall be such proportion of 13 weeks' leave as the number of completed years of such service bears to ten (10) years.

(7) In the case to which subclause (6) of this clause applies, and in any case in which the employment of the psychologist or social worker who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall—

(a) upon termination of employment otherwise than by death, pay to the psychologist or social worker a sum equivalent to the amount which would have been payable in respect of the period of leave to which he/she is entitled or deemed to have been entitled and which would have been taken but for such termination;

(b) upon termination of employment by death, pay to the executor of the psychologist's or social worker's estate, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he/she is entitled or deemed to have been entitled and which would have been taken but for such termination.

Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

(8) Where the continuous service of a psychologist or social worker during the accrual period contains any period where the psychologist's or social worker's hours were less than those of a full time psychologist or social worker, the psychologist's or social worker's entitlement shall be calculated as follows—

(a) the number of weeks accrued shall be in accordance with subclause (1) above; and

(b) payment for the leave taken shall be the average that the psychologist's or social worker's hours bears to that of a full time psychologist or social worker over the accrual period.

14. Clause 12. – Parental Leave: Delete this number, title and clause and insert the following in lieu thereof—

13. – PARENTAL LEAVE

(1) Eligibility for Parental Leave

A psychologist or social worker shall become entitled to take up to 52 consecutive weeks of unpaid leave in respect of -

(a) the birth of a child to the psychologist or social worker or the psychologist or social worker's spouse; or

(b) the placement of a child with the psychologist or social worker with a view to the adoption of the child by the psychologist or social worker.

(2) A psychologist or social worker is entitled to take parental leave if he or she—

(a) has had at least 12 months' continuous service with that employer immediately preceding the date upon which the psychologist or social worker proceeds upon such leave, and

(b) has given the employer at least ten (10) weeks' written notice of his/her intention to take such leave, and the start and finish dates of such leave.

(c) A psychologist or social worker is not entitled to take parental leave at the same time as the psychologist's or social worker's spouse but this subclause does not apply to one week's parental leave—

(i) taken by the male parent immediately after the birth of the child; or

(ii) taken by the psychologist or social worker and the psychologist's or social worker's spouse immediately after a child has been placed with them with a view to their adoption of the child.

(d) A psychologist or social worker shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with this subclause, if such failure is occasioned by the confinement occurring earlier than the presumed date.

(3) Parental Leave to start 6 weeks before the birth

Subject to sub-clauses (4), (5) and (7) of this clause, the period of parental leave for a female psychologist or social worker shall be for an unbroken period of up to 52 weeks and shall include up to six weeks' leave to be taken immediately before the presumed date of confinement, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the psychologist or social worker is fit to work.

(4) Transfer to a Safe Job

Where in the opinion of a duly qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the psychologist or social worker make it inadvisable for the psychologist or social worker to continue at her present work, the psychologist or social worker shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of parental leave. If the transfer to a safe job is not practicable, the psychologist or social worker may, or the employer may require the psychologist or social worker to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as parental leave for the purposes of subclauses (8), (9), (10) and (11) of this clause.

(5) Variation of Period of Parental Leave

(a) The period of parental leave may be lengthened by agreement between the psychologist or social worker and the employer in accordance with the provisions of Clause 10. - Leave Without Pay of this Award.

(b) The period of parental leave may be shortened by agreement between the psychologist or social worker and the employer.

(6) Cancellation of Parental Leave

(a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of a psychologist or social worker terminates other than by the birth of a living child.

(b) Subject to paragraph (c) of this subclause, where the pregnancy of a psychologist or social worker then on parental leave terminates other than by the birth of a living child, it shall be the right of the psychologist or social worker or the psychologist or social worker's spouse to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the psychologist or social worker to the employer that he or she desires to resume work.

(c) A psychologist's or social worker's right to resume work within the period specified in paragraph (b) of this sub-clause shall be subject to the practicality of enabling the psychologist or social worker to resume within that period, but in any case that limitation shall not be invoked to extend the period of leave beyond the date originally agreed to.

Where the psychologist's or social worker's resumption is delayed, he or she may undertake temporary employment with another employer without affecting his or her contract of service with the school from which he or she took parental leave.

(7) Special Parental Leave and Sick Leave

(a) Where the pregnancy of a psychologist or social worker or a psychologist's or social worker's spouse not then on parental leave terminates after twenty-eight weeks other than by the birth of a living child then—

(i) the psychologist or social worker shall be entitled to such period of unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the psychologist or social worker returns to work, or

(ii) for illness other than the normal consequences of confinement the psychologist or social worker shall be entitled, either instead of or in addition to special parental leave, to such paid sick leave as to which the psychologist or social worker is then entitled and which a duly qualified medical practitioner certifies as necessary before the psychologist or social worker returns to work.

(b) Where a psychologist or social worker not then on parental leave suffers illness related to the psychologist or social worker's pregnancy, the psychologist or social worker may take such paid sick leave as to which the psychologist or social worker is then entitled and such further unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the psychologist or social worker returns to work.

(c) For the purposes of sub-clauses (9), (10) and (11) of this clause, parental leave shall include special parental leave.

(d) A psychologist or social worker returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which the psychologist or social worker held immediately before proceeding on such leave or, in the case of a psychologist or social worker who was transferred to a safe job pursuant to subclause (4) of this clause, to the position the psychologist or social worker held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the psychologist or social worker is qualified and the duties of which the psychologist or social worker is capable of performing, the psychologist or social worker shall be entitled to a position as nearly comparable in status and salary or wage to that of the psychologist's or social worker's former position.

(8) Parental Leave and Other Leave Entitlements

(a) A psychologist or social worker may take, in conjunction with or in addition to parental leave, any annual leave or long service leave or any part thereof to which the psychologist or social worker is then entitled.

(b) Paid sick leave or other paid authorised Award absences (excluding annual leave or long service leave), shall not be available to a psychologist or social worker during the psychologist's or social worker's absence on parental leave.

(9) Effect of Parental Leave on Employment

Notwithstanding any Award, or other provision to the contrary, absence on parental leave shall not break the continuity of service of a psychologist or social worker but shall not be taken into account in calculating the period of service for any purpose of the Award.

(10) Termination of Employment

(a) A psychologist or social worker on parental leave may terminate his or her employment at any time during the period of leave by notice given in accordance with this Award.

(b) An employer shall not terminate the employment of a psychologist or social worker on the ground of the psychologist's or social worker's pregnancy or of the psychologist's or social worker's absence on parental leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(11) Return to Work After Parental Leave

(a) A psychologist or social worker shall be entitled to the position which the psychologist or social worker held immediately before proceeding on parental leave or, in the case of a psychologist or social worker who was transferred to a safe job pursuant to subclause (4) of this clause, to the position which the psychologist or social worker held immediately before such transfer. Where such position no longer exists but there are other positions available for which the psychologist or social worker is qualified and the duties of which the psychologist or social worker is capable of performing, the psychologist or social worker shall be entitled to a position as nearly comparable in status and salary or wage to that of the psychologist's or social worker's former position.

(b) The psychologist or social worker will notify the employer in writing not less than 6 weeks prior to the presumed date of return, when the psychologist or social worker requests to return to work under different arrangements from those which the psychologist or social worker held immediately prior to the commencement of parental leave.

(12) Replacement psychologist or social workers

(a) A replacement psychologist or social worker is a psychologist or social worker specifically engaged as a result of a psychologist or social worker proceeding on parental leave.

(b) Before an employer engages a replacement psychologist or social worker under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the psychologist or social worker who is being replaced.

(c) Before an employer engages a person to replace a psychologist or social worker temporarily promoted or transferred in order to replace a psychologist or social worker exercising his or her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the psychologist or social worker who is being replaced.

(d) Nothing in this subclause shall be construed as requiring the employer to engage a replacement psychologist or social worker.

(e) A replacement psychologist or social worker shall not be entitled to any of the rights conferred by this clause except where his/her employment continues beyond the twelve months' qualifying period.

15. Clause 13. – Family Leave: Delete this number, title and clause and insert the following in lieu thereof—

14. – CARER'S LEAVE

(1) Use of Sick Leave

(a) A psychologist or social worker with responsibilities in relation to either members of his/her immediate family or members of his/her household who need care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement for absences to provide care and support for such persons when they are ill. Such leave shall not exceed five (5) days in any calendar year and is not cumulative.

(b) The psychologist or social worker shall, if required, provide a written statement as to the fact of illness of the person for whom the care and support is required.

(c) The entitlement to use sick leave is subject to—

(i) the psychologist or social worker being responsible for the care of the person concerned; and

(ii) the person concerned being either a member of the psychologist's or social worker's immediate family or a member of the psychologist's or social worker's household.

(iii) the term "immediate family" includes—

(aa) a spouse (including a former spouse), of the psychologist or social worker; and

(bb) a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the psychologist or social worker.

(d) The psychologist or social worker shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the psychologist or social worker, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the psychologist or social worker to give prior notice of absence, the psychologist or social worker shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

(2) Use of Unpaid Leave

A psychologist or social worker may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill.

(3) Nothing contained in this clause shall prevent a psychologist or social worker from making application for leave as prescribed in Clause 8. - Special Leave of the Award.

16. Clause 14. – Carer's Leave: After this clause insert new number, title and clause as follows—

15. - BEREAVEMENT LEAVE

(1) Entitlement to Bereavement Leave

Subject to subclause (4) of this clause, on the death of—

(a) the spouse or defacto spouse of a psychologist or social worker;

(b) the child or step child of a psychologist or social worker;

(c) the parent, step-parent or parent in-law of a psychologist or social worker;

(d) the brother or sister of a psychologist or social worker; or

(e) any person who, immediately before that person's death, lived with the psychologist or social worker as a member of the psychologist's or social worker's family,

the psychologist or social worker is entitled to paid bereavement leave of up to two (2) days.

(2) The two (2) days need not be consecutive.

(3) Bereavement Leave is not to be taken during a period of any other leave.

(4) A psychologist or social worker who claims to be entitled to paid leave under this section is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to—

(a) the death that is the subject of the leave sought; and

(b) the relationship of the psychologist or social worker to the deceased person.

17. Clause 14. – Salaries: Delete this number, title and clause and insert the following in lieu thereof—

16. – SALARIES

1 (a) The minimum annual salary payable to a psychologist or social worker engaged in the undermentioned classifications shall be—

SALARY LEVEL	ANNUAL SALARY $
Step 1	34874
Step 2	36533
Step 3	38371
Step 4	40667
Step 5	44228
Step 6	46550
Step 7	48671
Step 8	50886

(b) On appointment, a psychologist or social worker shall be placed at the appropriate salary level according to the provisions of subclause (2) of this clause. Recognition of qualifications and experience other than that outlined in this Award shall be determined by agreement between the employer and the psychologist or social worker. In the event that the parties cannot agree on the level of qualifications and/or experience that should apply then the matter may be referred to the Western Australian Industrial Relations Commission.

(c) On application by the psychologist or social worker and by agreement with the employer, salary may be deemed to include an amount which is paid on behalf of the psychologist or social worker into an Approved Superannuation fund nominated in accordance with the provisions of Clause 23. - Superannuation of the Award, and not being an employer contribution to superannuation paid in accordance with the Superannuation Guarantee (Administration) Act 1992, Federal legislation or an employer's contributory superannuation fund.

(d) A copy of any agreement reached in accordance with paragraph (c) of this subclause shall be attached to the salary record of the psychologist or social worker concerned.

(e) For the purposes of determining weekly or fortnightly salary, the annual salaries as prescribed in this subclause, shall be divided by 52.16 or 26.08 respectively.

(2) Psychologists and Social Workers appointed to the under mentioned classifications shall be paid in accordance with the following—

(a) A social worker as defined shall commence at Step 1 and proceed by annual increments to and including Step 6.

(b) A provisional psychologist shall commence at Step 1 and proceed by annual increments to and including Step 2.

(c) A psychologist who attains full registration status with the Psychologists Board of Western Australia shall commence at Step 4 and proceed by annual increments to and including Step 8.

(d) The years of experience is indicated by the number of steps from the commencement level of each classification.

(3) Part-time psychologists or social workers shall be paid in accordance to the following formula—

$$\frac{\text{Hours worked}}{37.5} \times \text{Full time weekly rate of pay}$$

(4) (a) A relief social worker shall be paid according to the following formula—

(i) Half day = 0.1 x Weekly rate for Step 5

(ii) Full day = 0.2 x Weekly rate for Step 5

(b) A relief psychologist shall be paid according to the following formula—

(i) Half day = 0.1 x Weekly rate for Step 6

(ii) Full day = 0.2 x Weekly rate for Step 6

Note: a half day is up to 3.75 hours and a full day is up to 7.5 hours.

(5) Where the conditions of employment of a psychologist or social worker are subject to the provisions of subclause (4) of Clause 7. – Contract of Service of this Award, then, by agreement in writing between the employer and the psychologist or social worker, salary may be averaged over the full year.

18. Clause 15. – Right of Entry: Delete this number, title and clause and insert the following in lieu thereof—

17. - NO REDUCTION

This Award shall not in itself operate to reduce the salary or conditions of any psychologist or social worker below that actually received by him/her or worsen any conditions pertaining to him/her at the date hereof.

19. Clause 16. – No Reduction: Delete this number, title and clause and insert the following in lieu thereof—

18. – RIGHT OF ENTRY

(1) An authorised representative of the Union may enter, during working hours, any premises where relevant psychologists or social workers work, for the purposes of holding discussions at the premises with those psychologists or social workers.

(2) The authorised representative will provide the employer/principal with prior notification of entry.

(3) The meeting will not disrupt the psychologist's or social worker's performance of his/her duties.

(4) Where such a meeting is of an urgent nature and upon a request being made to the employer/principal, the employer/principal may approve paid time off to meet with the authorised union representative. Such approval will not be unreasonably withheld.

20. Clause 18. – Right of Entry: After this clause insert new number, title and clause as follows—

19. - SALARY RECORD

(1) The employer/principal shall keep or cause to be kept, records containing the following particulars—

(a) Full name and residential address of each psychologist or social worker.

(b) The start and finish times, the hours worked each day and each week, and the number of weeks worked per year, exclusive of holiday and vacation leave.

(c) The salary paid each pay period, and the deductions.

(d) The employer/principal shall provide a salary advice slip showing gross salary and any deductions made for such pay period.

(2) Salaries shall be paid at least monthly, except in the case of a relief psychologist or social worker who shall be paid as soon as possible on completion of the engagement.

21. Clause 19. – Salary Record: After this clause insert new number, title and clause as follows—

20. – INSPECTION OF RECORDS

(1) An authorised representative of the Union may enter, during work hours, any premises where relevant psychologists or social workers work, for the purpose of investigating any suspected breach of the Industrial Relations Act 1979, the Long Service Leave Act 1958, the Minimum Conditions of Employment Act 1993, the Occupational Safety and Health Act 1984 or an Award, Order, Industrial Agreement or Employer-Employee Agreement that applies to any such psychologist or social worker.

(2) For the purpose of investigating any such suspected breach, the authorised representative may

(a) subject to the provisions of the relevant Act, Award, Order, Industrial Agreement or Employer-Employee Agreement require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records or other documents kept by the employer that are related to the suspected breach;

(b) make copies of the entries in the employment records or documents related to the suspected breach; and

(c) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach.

(3) The authorised representative will provide written notice of at least:

(a) 24 hours if the records and documents are kept on the employer's premises, or

(b) 48 hours if the records are kept elsewhere.

22. Clause 17. – Location Allowances: Delete this number, title and clause and insert the following in lieu thereof—

21. - LOCATION ALLOWANCES

(1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, a psychologist or social worker shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$16.60
Argyle	$43.50
Balladonia	$16.60
Barrow Island	$28.30
Boulder	$6.90
Broome	$26.50
Bullfinch	$7.80
Carnarvon	$13.50
Cockatoo Island	$29.10
Coolgardie	$6.90
Cue	$16.90
Dampier	$23.00
Denham	$13.50
Derby	$27.50
Esperance	$5.00
Eucla	$18.50
Exmouth	$23.90
Fitzroy Crossing	$33.30
Goldsworthy	$14.80
Halls Creek	$38.10
Kalbarri	$5.70

TOWN	PER WEEK
Kalgoorlie	$6.90
Kambalda	$6.90
Karratha	$27.30
Koolan Island	$29.10
Koolyanobbing	$7.80
Kununurra	$43.50
Laverton	$16.80
Learmonth	$23.90
Leinster	$16.60
Leonora	$16.80
Madura	$17.60
Marble Bar	$41.70
Meekatharra	$14.60
Mount Magnet	$18.10
Mundrabilla	$18.10
Newman	$15.90
Norseman	$14.20
Nullagine	$41.60
Onslow	$28.30
Pannawonica	$21.50
Paraburdoo	$21.30
Port Hedland	$22.80
Ravensthorpe	$8.80
Roebourne	$31.40
Sandstone	$16.60
Shark Bay	$13.50
Shay Gap	$14.80
Southern Cross	$7.80
Telfer	$38.60
Teutonic Bore	$16.60
Tom Price	$21.30
Whim Creek	$27.10
Wickham	$26.30
Wiluna	$16.80
Wittenoom	$36.90
Wyndham	$41.00

(2) Except as provided in subclause (3) of this clause, a psychologist or social worker who has—

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

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

(3) Where a psychologist or social worker—

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

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

such psychologist or social worker shall be paid 66.66 per cent of the allowances prescribed in subclause (1) of this clause.

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

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

(5) Where a psychologist or social worker is on annual leave or receives payment instead of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

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

(7) For the purposes of this clause—

(a) "Dependant" shall mean—

(i) a spouse or defacto spouse; or

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

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

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

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

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

23. Clause 21. – Location Allowances: After this clause insert new number, title and clause as follows—

22. - TRAVELLING ALLOWANCES

(1) Where a psychologist or social worker is required by the employer to work away from the psychologist's or social worker's usual place of employment the employer shall pay the psychologist or social worker any reasonable travelling expenses incurred except where an allowance is paid in accordance with subclause (2) hereof.

(2) Where a psychologist or social worker is required and authorised to use his/her own motor vehicle in the course of duty, the psychologist or social worker shall be paid an allowance of not less than that provided for taxation purposes by the Australian Taxation Office

24. Clause 18. – Superannuation: Delete this number, title and clause and insert the following in lieu thereof—

23. – SUPERANNUATION

The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled – Compliance, Nomination and Transition.

(1) Employer Contributions

(a) An employer shall contribute to superannuation for each eligible psychologist or social worker in accordance with the Superannuation Guarantee (Administration) Act 1992 to one of the following approved superannuation funds—

(i) CONCEPT ONE - superannuation plan which was established and is governed by a trust deed and rules dated 23 September 1986, as amended; and

(ii) an exempted fund allowed by sub-clause (3) of this clause.

(b) Employer contributions shall be paid at least monthly for each week of service that the eligible psychologist or social worker completes with the employer.

(c) "Ordinary Time Earnings" means the salary or other remuneration periodically received by the psychologist or social worker in respect to the time worked in ordinary hours and/or any other rate paid for all purposes of the Award to which the psychologist or social worker is entitled for ordinary hours of work.

(2) Fund Membership

(a) "Eligible psychologist or social worker" shall mean a psychologist or social worker employed under the terms of this Award.

(b) A psychologist or social worker shall not be eligible to join the fund until he/she has completed one month's satisfactory service. On completion of this period the psychologist or social worker shall be entitled to the appropriate employer contribution, from the date of the psychologist or social worker's commencement.

(3) Exemption

Exemptions from the requirements of this clause shall apply to an employer who at the date of this Award—

(a) was contributing to a superannuation fund, in accordance with an Order of an Industrial Tribunal; or

(b) was contributing to a superannuation fund in accordance with an Order or Award of an Industrial Tribunal, for a majority of psychologists or social workers and makes payment for a psychologist or social worker covered by this Award in accordance with that Order or Award; or

(c) subject to notification to the Union, was contributing to a superannuation fund for a psychologist or social worker covered by this Award where such payments are not made pursuant to an Order of an Industrial Tribunal.

(d) was not contributing to a superannuation fund for a psychologist or social workers covered by this Award; and

(i) written notice of the proposed alternative superannuation fund is given to the Union; and

(ii) contributions and benefits of the proposed alternative superannuation fund are no less than those provided by this clause; and

(iii) within one month of the notice prescribed in paragraph (i) being given, the Union has not challenged the suitability of the proposed fund by notifying the Western Australian Industrial Relations Commission of a dispute.

(4) The employer shall provide such facilities as is appropriate to ensure that all psychologists or social workers are adequately informed of the provisions of the superannuation funds available.

Compliance, Nomination and Transition

Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of a psychologist or social worker, on and from 30 June 1998—

(a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless—

(i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and

(ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the psychologist or social worker permitted to nominate a fund or scheme;

(b) The psychologist or social worker shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the psychologist or social worker;

(c) The employer shall notify the psychologist or social worker of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;

(d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirement of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the psychologist or social worker to whom such is directed;

(e) The psychologist or social worker and employer shall be bound by the nomination of the psychologist or social worker unless the psychologist or social worker and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;

(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme required by a psychologist or social worker;

Provided that on and from 30 June 1998, and until a psychologist or social worker thereafter nominates a complying superannuation fund or scheme—

(g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer; or

(h) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.

25. Clause 19. – Dispute Settling Procedures: Delete this number and title and insert the following in lieu thereof—

24. – DISPUTE SETTLING PROCEDURE

26. Clause 24. – Dispute Settling Procedures: After this clause insert new number, title and clause as follows—

25. - REDUNDANCY PROVISIONS

(1) Discussions Before Termination

(a) Where an employer has made a definite decision that the employer no longer wishes the job the psychologist or social worker has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the psychologist or social worker directly affected and with his/her Union, where applicable.

(b) The discussion shall take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this sub clause and shall cover among other things, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to minimise any adverse affect of any terminations on the psychologist or social workers concerned. The employer will confirm the content of these discussions in writing.

(2) Notice Period of Termination on Redundancy

(a) If the services of a psychologist or social worker are to be terminated due to redundancy, the psychologist or social worker shall be entitled to notice of termination as prescribed in Clause 6. – Contract of Service, of this Award, provided that psychologist or social workers to whom notification of termination of service is to be given because of the introduction of automation or other like technology changes shall be given not less than three (3) months' notice of termination.

(b) Should the employer fail to give notice of termination as required in subclause 2(a) the employer shall pay to the psychologist or social worker an amount calculated in accordance with the ordinary rate of pay for a period being the difference between the notice given and that required to be given.

(c) Payment of Notice Treated as Service – If an employer makes payment for all or any of the period of notice prescribed, then the period for which such payment is made shall be treated as service for the purposes of calculating any service related entitlements of the psychologist or social worker arising pursuant to this award and shall be deemed to be service with the employer for the purposes of Long Service Leave.

(3) Psychologist or Social Workers Leaving During Notice

A psychologist or social worker whose employment is to be terminated for reasons set out in 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 psychologist or social worker remained with the employer until the expiry of such notice. This is with the provision that in such circumstances the psychologist or social worker shall not be entitled to payment instead of notice.

(4) Time Off During Notice Period

(a) During the period of notice of termination of employment given by an employer, a psychologist or social worker whose employment is to be terminated for reasons set out in this clause shall be entitled for the purpose of seeking other employment, to be absent from work for eight ordinary hours without deduction of pay.

(b) A psychologist or social worker who claims to be entitled to paid leave under this clause is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(5) Severance Pay

In addition to the period of notice prescribed in Clause 7 – Contract of Service, of this Award, for ordinary termination, a psychologist or social worker whose employment is terminated for reasons set out in this clause shall be entitled to the following amount of severance pay in respect of a continuous period of service—

PERIOD OF CONTINUOUS SERVICE	SEVERANCE PAY
Less than 1 year	Nil
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years and over	8 weeks

"Weeks Pay" means the ordinary weekly rate of wage for the psychologist or social worker concerned.

(6) Alternative Employment

An employer, in a particular redundancy case, may make application to the Western Australian Industrial Relations Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for a psychologist or social worker.

(7) Psychologists or Social Workers Exempted

This clause shall not apply to relief or temporary psychologists or social workers or where employment is terminated as a consequence of conduct that justifies instant dismissal

27. Clause 25. – Redundancy Provisions: After this clause insert new title and schedule as follows—

SCHEDULE A – SALARIES (ASNA)

The following schedule provides a history of Clause 16. – Salaries of the Award including all Arbitrated Safety Net Adjustments (ASNA) as at 1 August 2002

The minimum annual salary payable to a psychologist or social worker engaged in the under mentioned classifications shall be—

Column A shall apply from the beginning of the first pay period commencing on or after the date of the Award.

Column B shall apply from the beginning of the first pay period commencing on or after 1 August 2001.

SALARY LEVEL	ANNUAL SALARY $		ASNA	TOTAL
	Column A	Column B		
Step 1	32265	33048	1826	34874
Step 2	33924	34707	1826	36533
Step 3	35762	36545	1826	38371
Step 4	38058	38841	1826	40667
Step 5	41619	42402	1826	44228
Step 6	43941	44724	1826	46550
Step 7	46062	46845	1826	48671
Step 8	48277	49060	1826	50886

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.

28 Schedule A. – Employer Parties: Delete this title and schedule and insert the following in lieu thereof—

SCHEDULE B – PARTIES

NAME	ADDRESS
The Anglican Schools Commission (Inc.)	PO Box 2520, MT CLAREMONT WA 6010
Aquinas College	Locked Bag 11, Bentley Delivery Centre WA 6983
Association of Independent Schools of Western Australia (Inc.)	3/41 Walters Drive, Herdsman Business Park, OSBORNE PARK WA 6017
Bible Baptist Christian Academy	Lot 374 Chidlow Street, MT HELENA WA 6555
Catholic Education Commission of Western Australia	PO Box 198, LEEDERVILLE WA 6903
Forrestfield Christian School	336 Hawtin Road, FORRESTFIELD WA 6058

NAME	ADDRESS
Guildford Grammar School	Locked Bag 5, GUILDFORD WA 6935
Hale School	Hale Road, WEMBLEY DOWNS WA 6019
Korsunski-Carmel School	Cresswell Road, DIANELLA WA 6062
Kulkarriya Community School	PO Box 3, FITZROY CROSSING WA 6765
Methodist Ladies College	PO Box 222, CLAREMONT WA 6010
Montessori School	PO Box 194, KINGSLEY WA 6026
Perth College	PO Box 25, MT LAWLEY WA 6929
Penrhos College	PO Box 690, COMO WA 6952
Presbyterian Ladies College (Inc.)	14 McNeil Street, PEPPERMINT GROVE WA 6011
The Roman Catholic Archbishop of Perth (Inc.)	Victoria Square, PERTH WA 6000
Scotch College (Inc.)	PO Box 223, CLAREMONT WA 6010
Seventh Day Adventist School	Cnr Ninth and Wungong Roads, ARMADALE WA 6112
Speech and Hearing Centre for Children (W.A.) Inc.	PO Box 186, WEMBLEY WA 6913
St Hilda's Anglican School for Girls (Inc)	PO Box 34, MOSMAN PARK WA 6912
St Mary's Anglican Girls School (Inc.)	PO Box 105, KARRINYUP WA 6923
Trinity College	Trinity Avenue, EAST PERTH WA 6004
Wesley College	PO Box 149, SOUTH PERTH WA 6951
UNION PARTY	
The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers	PO Box 8444, Perth Business Centre PERTH WA 6849

2003 WAIRC 08435

INDEPENDENT SCHOOLS (BOARDING HOUSE) SUPERVISORY STAFF AWARD NO 19 OF 1990.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	AQUINAS COLLEGE AND OTHERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 4 JUNE 2003
FILE NO/S.	APPLICATION 1046 OF 2002
CITATION NO.	2003 WAIRC 08435

Result	Award varied

Order

HAVING heard Mr N Briggs on behalf of the applicant and Dr I Fraser and Mr P Andrew as agents on behalf of the respondents, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Independent Schools (Boarding House) Supervisory Staff Award (No A9 of 1990) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 14th day of April 2003 except for Clause 13. – Long Service Leave which shall operate from 1 January 2003.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof—

1. Title
1B. Minimum Adult Award Wage
2. Arrangement
3. Area
4. Scope
5. Definitions
6. Contract of Service
7. Hours of Duty
8. Rosters
9. Part-Time Supervisors
10. Meals
11. Salaries
12. Holiday and Vacation Leave
13. Long Service Leave
14. Sick Leave
15. Bereavement Leave
16. Parental Leave
17. Leave Without Pay
18. Carer's Leave
19. Special Leave
20. Travelling Allowances
21. Lodging Conditions
22. Location Allowances
23. General Conditions
24. Salary Record
25. Inspection of Records
26. Right of Entry
27. Protective Clothing
28. Higher Duties
29. Superannuation
30. Consultative Provisions
31. Redundancy Provisions

Appendix - Resolution of Disputes Requirement
Schedule A. - Salaries (ASNA)
Schedule B. – Parties

3. Clause 4. – Scope: Delete this clause and insert the following in lieu thereof—

This Award applies to Independent Schools with boarding houses and their employees who directly supervise or who are responsible for the supervision of, the educational, recreational and personal general welfare of students in or about a boarding house and shall include those supervisory duties outside a boarding house that are from time to time directed by the employer, but shall not include those persons employed as cleaners, caretakers, kitchen and canteen staff, laundry staff, nursing staff, grounds staff, and those employees primarily employed as teachers or to a member of a religious order unless it is so stated in a written contract of employment between that person and the employer.

This Award shall not apply to volunteer tutors and volunteer resident assistants, whose role it is to provide management support and to oversee students whilst under supervision, in return for which free board and lodging is provided.

3. Clause 5. – Definitions: Delete this clause and insert the following in lieu thereof—

(1) "Houseparent" - shall mean any supervisor who works under the direct supervision of a resident teacher or supervisor, is a non-resident at the school and who is required for duty either prior to and/or during and/or immediately following each school day Monday to Friday. Unless explicitly stated to the contrary, conditions for houseparents are the same as for a supervisor.

(2) "Part-Time Supervisor" - shall mean an employee who works less hours than those usually worked by a full time supervisor at that boarding house.

(3) "Relief Supervisor" - shall mean an employee employed as per the boarding house roster for a period not exceeding four consecutive weeks, at the same school.

(4) "Senior Supervisor" - shall mean any employee who is responsible for the overall supervision of the boarding school.

(5) "Shift" - shall mean the defined hours of duty (including broken periods) allocated to an employee in accordance with the work roster, for any 24 hour period.

(6) "Supervisor" - shall mean an employee who is employed to supervise in accordance with Clause 4. - Scope, of this award.

(7) "Union" - shall mean The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers.

(8) "Temporary Supervisor" shall mean any person engaged as a full-time or part-time replacement supervisor, provided that the period of engagement of a temporary supervisor shall be not less than twenty consecutive working days and not more than a period of twelve months except where the substantive supervisor on unpaid leave is granted an extension the temporary supervisor's engagement may be extended for the period of the extension.

(9) "Continuous Service" shall include full-time, part-time and temporary service, paid leave and unpaid leave of less than two (2) consecutive weeks, with the same employer.

4. Clause 6. – Contract of Service: Delete subclause (3) of this clause and insert the following in lieu thereof—

(3) Except in the case of a relief supervisor, the termination of the service of any supervisor shall require a minimum period of notice as set out below—

(a) Employer's period of notice

Supervisor's period of continuous service	Employer's period of Notice
Up to 3 years	at least 2 weeks
More than 3 years but less than 5 years	at least 3 weeks
More than 5 years	at least 4 weeks

If the supervisor is over 45 years of age and has served at least two (2) years of continuous service this notice is to be increased by one (1) week.

(b) Supervisor's period of notice

Termination of service by a supervisor shall require a minimum of two (2) weeks' notice.

(c) Failure to give the required notice shall make that party liable to forfeiture of payment to the other party of an amount equivalent to that period of notice not given or served.

(d) The requirements of this subclause may be waived in part or whole by mutual agreement between the supervisor and the employer.

5. Clause 11. – Salaries: Delete this clause and insert the following in lieu thereof—

(1) The minimum annual salary, according to classification and experience, payable to a supervisor shall be—

(a) Supervisor—

	Total Salary $ per Annum
1st year of experience	24234
2nd year of experience	25003
3rd year of experience	26028
4th year of experience	27053
5th year of experience	28183
6th year of experience	29208

(b) Senior Supervisor

1st year of experience	30642
Thereafter	32179

(c) Relief Supervisor

(i) A relief supervisor shall be paid per rostered shift at a rate calculated at step 6 of paragraph (a) of this subclause, divided by 200.

(ii) A relief houseparent shall be paid per rostered shift at a rate calculated at step 5 of paragraph (a) of this subclause, divided by 200.

(d) Houseparent—

Notwithstanding the provision of paragraph (a) of this subclause, the maximum salary level for this classification shall be that determined as the fifth year of experience.

(e) 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) On appointment as a supervisor at a boarding school, the employer shall, on production of satisfactory evidence by the employee of previous full-time equivalent experience in a similar school position, place that employee on a salary point commensurate with such previous experience.

6. Clause 12. – Holiday and Vacation Leave: Delete this clause and insert the following in lieu thereof—

(1) Except as hereinafter provided, a supervisor shall be allowed the holidays granted by the school in which he/she is employed, including term and Christmas vacations, without deduction of pay. A supervisor may be required for duty prior to the beginning of each term and following the end of each term for the purposes of preparing for the opening and/or closure of the boarding house.

(2) If after one week's continuous service in any calendar year a supervisor lawfully terminates his/her employment or his/her employment is terminated by the employer through no fault of the supervisor, the supervisor shall be granted salary instead of vacation leave proportionate to his/her length of service. Provided that a supervisor who was actually engaged for all four terms in that calendar year shall be entitled to be paid for the whole of the vacation period of that year.

(3) (a) Where a supervisor has been paid for leave which at the time of termination has not been fully accrued, the employer may deduct from any monies owed that portion to which the supervisor is not entitled.

(b) Where the employment of a supervisor is terminated by the employer prior to the attainment of the accrued vacation leave, then the provisions of this subclause shall not apply.

(4) A supervisor on paid leave shall accrue an entitlement to payment under this clause.

(5) (a) A leave loading equivalent to 17.5 per cent of four weeks' salary shall be paid to a supervisor, including a part-time or temporary supervisor, who has completed twelve months' continuous service with the employer or who has been employed for all four terms in a calendar year.

(b) The loading shall be paid in the final pay in December of that year.

(c) If the service of a supervisor commences after the beginning of first term in a calendar year then by agreement between the employer and the supervisor, the leave loading may be paid, proportionate to the length of service in that year, in December of that year.

(6) (a) Provided that and subject to (b) of this subclause, instead of the provisions of subclause (1) of this clause, a Houseparent shall be entitled to a minimum of four weeks' paid vacation leave for each period of 12 months' service.

(b) Any supervisor who as at 31 May 1994 was being paid throughout school vacation periods shall not have that benefit reduced.

7. Clause 13. – Long Service Leave: Delete this clause and insert the following in lieu thereof—

(1) Subject to subclause (3)—

(a) A supervisor who has completed ten (10) years' continuous service with an employer shall be entitled to ten (10) weeks' paid long service leave.

(b) For each subsequent period of ten (10) years' service a supervisor shall be entitled to an additional ten (10) weeks' paid long service leave.

(c) On termination of the supervisor's employment in any circumstances otherwise than for gross misconduct the supervisor shall be entitled to payment of long service leave in respect of the number of years' service with the employer completed since the supervisor last became entitled to an amount of long service leave of a proportionate amount on the basis of ten (10) weeks' for ten (10) years' service.

(2) For any period of continuous employment prior to 1 January 2003, a supervisor shall accrue an entitlement to long service leave calculated on the basis of 13 weeks' long service leave on full pay for each 15 years of continuous service.

(3) The expression "continuous service" does not include—

(a) Any period exceeding two weeks during which the supervisor is absent on leave without pay. In the case of leave without pay which exceeds eight weeks in a continuous period, the entire period of that leave is excised in full;

(b) Any service of a supervisor who resigns or is dismissed, other than service prior to such resignation or prior to the date of any offence in respect of which he/she is dismissed by the employer, when that prior service has actually entitled the person to long service leave under this clause.

(4) Subject to subclause (6) of this clause, term and Christmas holidays observed by the school shall be recognised as extra leave and not included in the long service leave.

(5) Any public holiday which occurs during the period a supervisor is on long service leave shall be treated as part of the long service leave and extra days shall not be granted.

(6) Where a supervisor has become entitled to a period of long service leave in accordance with this clause, the supervisor shall commence such leave as soon as possible after the accrual date in a manner mutually agreed between the employer and the supervisor.

(7) Payment for long service leave shall be made in full before the supervisor goes on leave or by agreement between the supervisor and the employer, at the same time as the supervisor's salary would have been paid if the supervisor had remained at work in which case the payment shall be made by arrangement between the supervisor and the employer.

(8) Where a supervisor has completed at least seven (7) years' service but less than ten (10) years' service and employment is terminated—

(a) by the supervisor's death; or

(b) in any circumstances, otherwise than serious misconduct;

the amount of leave shall be such proportion of ten (10) weeks' leave as the number of completed years of such service bears to ten (10) years.

(9) In the case to which subclause (8) of this clause applies and in any case in which the employment of the supervisor who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of employment otherwise than by death, pay to the supervisor and upon termination of employment by death, pay to the personal representative of the supervisor upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he/she is entitled or deemed to have been entitled and which would have been taken but for such termination.

Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

(10) Where the continuous service of a supervisor during the accrual period contains any period where the supervisor's hours were less than those of a full-time supervisor the supervisor's entitlement shall be calculated as follows—

(a) the number of weeks accrued shall be in accordance with subclause (1) above, and

(b) payment for the leave taken shall be the average that the supervisor's hours bears to those of a full-time supervisor over the accrual period.

8. Clause 14. – Sick Leave: Delete this clause and insert the following in lieu thereof—

(1) (a) A supervisor who is unable to attend or remain at the place of employment during the normal hours of duty by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.

(b) Entitlement to payment shall be ten (10) days' pay for each completed year of service. Such leave will accrue on a weekly basis.

(c) A supervisor who claims an entitlement under this clause shall provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(d) If in the first of successive years of service with the employer a supervisor is absent on the ground of personal ill health or injury for a period longer than his/her entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the supervisor's services terminate, if before the end of that year of service, to the extent that the supervisor has become entitled to further paid sick leave during that year of service.

(2) A temporary supervisor shall retain the benefit of accumulated sick leave on appointment as a permanent supervisor provided that the service is continuous. For the purpose of this paragraph school vacations shall not be deemed to break the continuity of service.

(3) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this subclause may be claimed by the supervisor if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during that year at the time of the absence. Provided that a supervisor shall not be entitled to claim payment for any period exceeding ten (10) weeks in any one year of service.

(4) A supervisor on paid leave shall accrue an entitlement to payment under this clause.

(5) The provisions of this subclause with respect to payment do not apply to supervisors who are entitled to payment under the Workers' Compensation and Rehabilitation Act 1981 nor to supervisors whose injury or illness is the result of a supervisor's own misconduct.

9. Clause 15. – Bereavement Leave: Delete this clause and insert the following in lieu thereof—

(1) Entitlement to Bereavement Leave

Subject to subclause (4) of this clause, on the death of—

(a) the spouse or defacto spouse of a supervisor;

(b) the child or step-child of a supervisor;

(c) the parent, step-parent or parent-in-law of a supervisor;

(d) the brother or sister of a supervisor; or

(e) any person who, immediately before that person's death, lived with the supervisor as a member of the supervisor's family,

the supervisor is entitled to paid bereavement leave of up to two (2) days.

(2) The two (2) days need not be consecutive.

(3) Bereavement Leave is not to be taken during a period of any other leave.

(4) A supervisor who claims to be entitled to paid leave under this section is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to:

(a) the death that is the subject of the leave sought; and

(b) the relationship of the supervisor to the deceased person.

10. Clause 16. – Maternity Leave: Delete this title and clause and insert the following in lieu thereof—

16. – PARENTAL LEAVE

(1) Eligibility for Parental Leave

A supervisor shall become entitled to take up to 52 consecutive weeks of unpaid leave in respect of—

(a) the birth of a child to the supervisor or the supervisor's spouse; or

(b) the placement of a child with the supervisor with a view to the adoption of the child by the supervisor.

(2) A supervisor is entitled to take parental leave if he or she—

(a) has had at least 12 months' continuous service with that employer immediately preceding the date upon which the supervisor proceeds upon such leave; and

(b) has given the employer at least ten (10) weeks' written notice of his/her intention to take such leave, and the start and finish dates of such leave.

(c) A supervisor is not entitled to take parental leave at the same time as the supervisor's spouse but this subclause does not apply to one week's parental leave—

(i) taken by the male parent immediately after the birth of the child; or

(ii) taken by the supervisor and the supervisor's spouse immediately after a child has been placed with them with a view to their adoption of the child.

(d) A supervisor shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with this subclause, if such failure is occasioned by the confinement occurring earlier than the presumed date.

(3) Parental Leave to start six (6) weeks before the birth

Subject to subclauses (4), (5) and (7) of this clause, the period of parental leave for a female supervisor shall be for an unbroken period of up to 52 weeks and shall include up to six (6) weeks' leave to be taken immediately before the presumed date of confinement, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the supervisor is fit to work.

(4) Transfer to a Safe Job

Where in the opinion of a duly qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the supervisor make it inadvisable for the supervisor to continue at her present work,

the supervisor shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of parental leave. If the transfer to a safe job is not practicable, the supervisor may, or the employer may require the supervisor to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as parental leave for the purposes of subclauses (8), (9), (10) and (11) of this clause.

(5) Variation of Period of Parental Leave

(a) The period of parental leave may be lengthened by agreement between the supervisor and the employer in accordance with the provisions of Clause 17. - Leave Without Pay of this award.

(b) The period of parental leave may be shortened by agreement between the supervisor and the employer.

(6) Cancellation of Parental Leave

(a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of a supervisor terminates other than by the birth of a living child.

(b) Subject to paragraph (c) of this subclause, where the pregnancy of a supervisor then on parental leave terminates other than by the birth of a living child, it shall be the right of the supervisor or supervisor's spouse to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the supervisor to the employer that he or she desires to resume work.

(c) A supervisor's right to resume work within the period specified in paragraph (b) of this subclause shall be subject to the practicality of enabling the supervisor to resume within that period, but in any case that limitation shall not be invoked to extend the period of leave beyond the date originally agreed to.

Where the supervisor's resumption is delayed, he or she may undertake temporary employment with another employer without affecting his or her contract of service with the school from which he or she took parental leave.

(7) Special Parental Leave and Sick Leave

(a) Where the pregnancy of a supervisor or a supervisor's spouse not then on parental leave terminates after twenty-eight weeks other than by the birth of a living child then—

(i) the supervisor shall be entitled to such period of unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the supervisor's return to work; or

(ii) for illness other than the normal consequences of confinement the supervisor shall be entitled, either instead of or in addition to special parental leave, to such paid sick leave as to which the supervisor is then entitled and which a duly qualified medical practitioner certifies as necessary before the supervisor returns to work.

(b) Where a supervisor not then on parental leave suffers illness related to the supervisor's pregnancy, the supervisor may take such paid sick leave as to which the supervisor is then entitled and such further unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the supervisor returns to work.

(c) For the purposes of subclauses (9), (10) and (11) of this clause, parental leave shall include special parental leave.

(d) A supervisor returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which the supervisor held immediately before proceeding on such leave or, in the case of a supervisor who was transferred to a safe job pursuant to subclause (4) of this clause, to the position the supervisor held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the supervisor is qualified and the duties of which the supervisor is capable of performing, the supervisor shall be entitled to a position as nearly comparable in status and salary or wage to that of the supervisor's former position.

(8) Parental Leave and Other Leave Entitlements

(a) A supervisor may take, in conjunction with or in addition to parental leave, any annual leave or long service leave or any part thereof to which the supervisor is then entitled.

(b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to a supervisor during the supervisor's absence on parental leave.

(9) Effect of Parental Leave on Employment

Notwithstanding any award, or other provision to the contrary, absence on parental leave shall not break the continuity of service of a supervisor but shall not be taken into account in calculating the period of service for any purpose of the Award.

(10) Termination of Employment

(a) A supervisor on parental leave may terminate his or her employment at any time during the period of leave by notice given in accordance with this Award.

(b) An employer shall not terminate the employment of a supervisor on the ground of the supervisor's pregnancy or of the supervisor's absence on parental leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(11) Return to Work after Parental Leave

(a) A supervisor shall be entitled to the position which the supervisor held immediately before proceeding on parental leave or, in the case of a supervisor who was transferred to a safe job pursuant to subclause (4) of this clause, to the position which the supervisor held immediately before such transfer. Where such position no longer exists but there are other positions available for which the supervisor is qualified and the duties of which the supervisor is capable of performing, the supervisor shall be entitled to a position as nearly comparable in status and salary or wage to that of the supervisor's former position.

(b) The supervisor will notify the employer in writing not less than six (6) weeks prior to the presumed date of return, when the supervisor requests to return to work under different arrangements from those which the supervisor held immediately prior to the commencement of parental leave.

(12) Replacement Supervisors

(a) A replacement supervisor is a supervisor specifically engaged as a result of a supervisor proceeding on parental leave.

(b) Before an employer engages a replacement supervisor under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the supervisor who is being replaced.

(c) Before an employer engages a person to replace a supervisor temporarily promoted or transferred in order to replace a supervisor exercising his or her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the supervisor who is being replaced.

(d) Nothing is this subclause shall be construed as requiring the employer to engage a replacement supervisor.

(e) A replacement supervisor shall not be entitled to any of the rights conferred by this clause except where his/her employment continues beyond the twelve months' qualifying period.

11. Clause 16. – Parental Leave: After this clause insert new number, title and clause as follows—

17. – LEAVE WITHOUT PAY

(1) While a supervisor has the right to apply for leave without pay the granting of such leave is at the discretion of the employer.

(2) A supervisor applying for leave under this clause must state the period of such leave and the reason for which the leave is being sought.

(3) Leave without pay does not involve loss of continuity of service, for salary, sick leave and long service leave purposes. Any period exceeding two weeks during which the supervisor is absent on leave without pay shall not be taken into account in calculating the period of service for any purposes of this Award. In the case of leave without pay which exceeds eight weeks in a continuous period, the entire period of that leave is excised in full.

(4) If a supervisor is granted leave without pay the question of the supervisor's specific duties on return to work should be considered before the granting of such leave and any arrangements made documented. If no prior arrangement is made a supervisor upon return to service shall be entitled to a position commensurate with the position held immediately prior to the commencement of such leave.

(5) The maximum period for which leave is granted under this clause shall be one year.

12. Clause 17. – Leave Without Pay: After this clause insert new number, title and clause as follows—

18. CARER'S LEAVE

(1) Use of Sick Leave

(a) A supervisor with responsibilities in relation to either members of his/her immediate family or members of his/her household who need care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement for absences to provide care and support for such persons when they are ill. Such leave shall not exceed five (5) days in any calendar year and is not cumulative.

(b) The supervisor shall, if required, provide a written statement as to the fact of illness of the person for whom the care and support is required.

(c) The entitlement to use sick leave is subject to—

(i) the supervisor being responsible for the care of the person concerned; and

(ii) the person concerned being either a member of the supervisor's immediate family or a member of the supervisor's household.

(iii) the term "immediate family" includes—

(aa) a spouse (including a former spouse), of the supervisor; and

(bb) child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the supervisor.

(d) The supervisor shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the supervisor, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the supervisor to give prior notice of absence, the supervisor shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

(2) Use of Unpaid Leave

A supervisor may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill.

13. Clause 18. – Carer's Leave: After this clause insert new number, title and clause as follows—

19 . – SPECIAL LEAVE

(5) A supervisor shall, on sufficient cause being shown, be granted special leave with pay.

(6) "Sufficient cause" is defined as a matter or situation for which—

(a) no other paid leave is available;

(b) no other arrangements can reasonably be made;

(c) the absence from duty is required due to pressing necessity.

(7) The period determined at the discretion of the employer having regard to the circumstances would not normally exceed three (3) days in any one instance.

(8) Such discretion is not to be harshly or unfairly exercised.

14. Clause 17. – Travelling Allowances: Delete this number, title and clause and insert the following in lieu thereof—

20. - TRAVELLING ALLOWANCES

(1) Where a supervisor is required by the employer to work away from the supervisor's usual place of employment the employer shall pay the supervisor any reasonable travelling expenses incurred except where an allowance is paid in accordance with subclause (2) hereof.

(2) Where a supervisor is required and authorised to use his/her own motor vehicle in the course of duty, the supervisor shall be paid an allowance of not less than that provided for by the Australian Taxation Office, as amended from time to time.

15. Clause 18. – Lodging Conditions: Delete this number and title and insert the following in lieu thereof—

21. - LODGING CONDITIONS

16. Clause 21. – Lodging Conditions: After this clause insert new number, title and clause as follows—

22. – LOCATION ALLOWANCES

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

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

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

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

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

(3) Where a supervisor—

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

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

such supervisor shall be paid 66.66 per cent of the allowances prescribed in subclause (1) of this clause.

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

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

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

(7) For the purposes of this clause—

(a) "Dependant" shall mean—

(i) a spouse or defacto spouse; or

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

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

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

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

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

17. Clause 19. – General Conditions: Delete this number, title and clause and insert the following in lieu thereof—

23. – GENERAL CONDITIONS

The employer shall make provision for the following—

(1) A boarding house supervisor is to be on duty at all times that boarders require supervision except where such supervision is conducted by a teacher or in sick bay where the supervision is carried out by the school nurse.

(2) Access by supervisors to telephone facilities for emergency use.

(3) Access by authorised supervisors to proper records or information concerning boarders taking medication or who are subject to allergies.

(4) Access by authorised supervisors to information regarding procedures for obtaining medical assistance.

(5) Written authority for supervisors responsible for the distribution of any medication required to be taken by a student in the boarding house.

18. Clause 20. – Salary Record: Delete this number, title and clause and insert the following in lieu thereof:

24. - SALARY RECORD

(1) The employer/principal shall keep or cause to be kept, records containing the following particulars—

(a) Full name and residential address of each supervisor.

(b) The start and finish times, the hours worked each day and each week, and the number of weeks worked per year, exclusive of annual leave.

(c) The salary paid each pay period.

(d) The employer shall provide a salary advice slip showing gross salary and any deductions made for such pay period.

(2) Salaries shall be paid at least monthly.

19. Clause 24. – Salary Record: After this clause insert new number, title and clause as follows—

25. – INSPECTION OF RECORDS

(1) An authorised representative of the Union may enter, during work hours, any premises where relevant supervisors work, for the purpose of investigating any suspected breach of the Industrial Relations Act 1979, the Long Service Leave Act 1958, the Minimum Conditions of Employment Act 1993, the Occupational Safety and Health Act 1984 or an Award, Order, Industrial Agreement or Employer-Employee Agreement that applies to any such supervisor.

(2) For the purpose of investigating any such suspected breach, the authorised representative may—

(a) subject to the provisions of the relevant Act, Award, Order, Industrial Agreement or Employer-Employee Agreement require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records or other documents kept by the employer that are related to the suspected breach;

(b) make copies of the entries in the employment records or documents related to the suspected breach; and

(c) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach.

(3) The authorised representative will provide written notice of at least—

(a) 24 hours if the records and documents are kept on the employer's premises, or

(b) 48 hours if the records are kept elsewhere.

20. Clause 25. – Inspection of Records: After this clause, insert new number, title and clause as follows—

26. - RIGHT OF ENTRY

(1) An authorised representative of the Union may enter, during working hours, any premises where relevant supervisors work, for the purposes of holding discussions at the premises with those supervisors.

(2) The authorised representative will provide the employer/principal with prior notification of entry.

(3) The meeting will not disrupt the supervisor's performance of his/her duties.

(4) Where such a meeting is of an urgent nature and upon a request being made to the Principal, the Principal may approve paid time off to meet with the authorised union representative. Such approval will not be unreasonably withheld.

21. Clause 26. – Right of Entry: After this clause, insert new number, title and clause as follows—

27. - PROTECTIVE CLOTHING

Where a school requires that a supervisor wear protective clothing in the course of his or her duties, other than with respect to sporting activity, such clothing shall be supplied by the school.

Protective clothing so issued shall remain the property of the school and be maintained in good order and condition by the supervisor, fair wear and tear excepted.

22. Clause 21. – No Reduction: Delete this number, title and clause.

23. Clause 22. – Location Allowance: Delete this number, title and clause.

24. Clause 23. – Higher Duties: Delete this number and title and inserting the following in lieu thereof—

28. - HIGHER DUTIES

25. Clause 24. – Superannuation: Delete this number, title and clause and insert the following in lieu thereof—

29. - SUPERANNUATION

The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled – Compliance, Nomination and Transition.

(1) Employer Contributions

(a) An employer shall contribute to superannuation for each eligible supervisor in accordance with the Superannuation Guarantee (Administration) Act 1992 to one of the following approved superannuation funds—

(i) CONCEPT ONE - superannuation plan which was established and is governed by a trust deed and rules dated 23 September 1986, as amended; or

(ii) an exempted fund allowed by subclause (3) of this clause.

(b) Employer contributions shall be paid at least monthly for each week of service that the eligible supervisor completes with the employer.

(c) "Ordinary Time Earnings" means the salary or other remuneration regularly received by the supervisor in respect to the time worked in ordinary hours and shall include payments which are made for the purpose of Location Allowances or any other rate paid for all purposes of the Award to which the supervisor is entitled for ordinary hours of work. Provided that "ordinary time earnings" shall not include any payment which is for vehicle allowances, fares or travelling time allowances (including payments made for travelling related to distant work), commission or bonus.

(2) Fund Membership

(a) "Eligible Supervisor" shall mean a supervisor employed under the terms of this Award.

(b) A supervisor shall not be eligible to join the fund until he/she has completed one month's satisfactory service. On completion of this period the supervisor shall be entitled to the appropriate employer contribution, from the date of the supervisors' commencement.

(3) Exemption

Exemptions from the requirements of this clause shall apply to an employer who at the date of this Award—

(a) was contributing to a superannuation fund, in accordance with an Order of an Industrial Tribunal; or

(b) was contributing to a superannuation fund in accordance with an Order or Award of an Industrial Tribunal, for a majority of supervisors and makes payment for supervisors covered by this Award in accordance with that Order or Award; or

(c) subject to notification to the Union, was contributing to a superannuation fund for supervisors covered by this Award where such payments are not made pursuant to an Order of an Industrial Tribunal.

(d) was not contributing to a superannuation fund for supervisors covered by this Award; and

(i) written notice of the proposed alternative superannuation fund is given to the Union; and

(ii) contributions and benefits of the proposed alternative superannuation fund are no less than those provided by this clause; and

(iii) within one month of the notice prescribed in paragraph (i) being given, the Union has not challenged the suitability of the proposed fund by notifying the Western Australian Industrial Relations Commission of a dispute.

(4) The employer shall provide such facilities as is appropriate to ensure that all supervisors are adequately informed of the provisions of the superannuation funds available.

Compliance, Nomination and Transition

Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of an supervisor, on and from 30 June 1998—

(a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless—

(i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and

(ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the supervisor permitted to nominate a fund or scheme.

(b) The supervisor shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the supervisor;

(c) The employer shall notify the supervisor of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;

(d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirement of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the supervisor to whom such is directed;

(e) The supervisor and employer shall be bound by the nomination of the supervisor unless the supervisor and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;

(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme required by a supervisor;

Provided that on and from 30 June 1998, and until an employee thereafter nominates a complying superannuation fund or scheme—

(g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer; or

(h) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.

26. Clause 25. – Consultative Provisions: Delete this number and title and insert the following in lieu thereof—

30. - CONSULTATIVE PROVISIONS

27. Clause 30 – Consultative Provisions: After this clause insert new number, title and clause as follows—

31. – REDUNDANCY PROVISIONS

(1) Discussions Before Termination

(a) Where an employer has made a definite decision that the employer no longer wishes the job the supervisor has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the supervisors directly affected and with their Union, where applicable.

(b) The discussion shall take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and shall cover among other things, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to minimise any adverse affect of any terminations on the supervisors concerned. The employer will confirm the content of these discussions in writing.

(2) Notice Period of Termination on Redundancy

(a) If the services of a supervisor are to be terminated due to redundancy, the supervisor shall be entitled to notice of termination as prescribed in Clause 6. – Contract of Service, of this Award, provided that supervisors to whom notification of termination of service is to be given because of the introduction of automation or other like technology changes shall be given not less than three (3) months' notice of termination.

(b) Should the employer fail to give notice of termination as required in subclause 2(a) the employer shall pay to the supervisor an amount calculated in accordance with the ordinary rate of pay for a period being the difference between the notice given and that required to be given.

(c) Payment of Notice Treated as Service – If an employer makes payment for all or any of the period of notice prescribed, then the period for which such payment is made shall be treated as service for the purposes of calculating any service related entitlements of the supervisor arising pursuant to this Award and shall be deemed to be service with the employer for the purposes of Long Service Leave.

(3) Supervisor Leaving During Notice

A supervisor whose employment is to be terminated for reasons set out in 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 supervisor remained with the employer until the expiry of such notice. This is with the provision that in such circumstances the supervisor shall not be entitled to payment instead of notice.

(4) Time Off During Notice Period

(a) During the period of notice of termination of employment given by an employer, a supervisor whose employment is to be terminated for reasons set out in this clause shall be entitled for the purpose of seeking other employment, to be absent from work for eight ordinary hours without deduction of pay.

(b) A supervisor who claims to be entitled to paid leave under this clause is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(5) Severance Pay

(a) In addition to the period of notice prescribed in Clause 6. – Contract of Service, of this Award, for ordinary termination, a supervisor whose employment is terminated for reasons set out in this clause shall be entitled to the following amount of severance pay in respect of a continuous period of service.

PERIOD OF CONTINUOUS SERVICE	SEVERANCE PAY
Less than 1 year	Nil
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years and over	8 weeks

"Weeks Pay" means the ordinary weekly rate of wage for the supervisor concerned.

(6) Alternative Employment

An employer, in a particular redundancy case, may make application to the Western Australian Industrial Relations Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for a supervisor.

(7) Supervisors Exempted

This clause shall not apply to relief or temporary supervisors or where employment is terminated as a consequence of conduct that justifies instant dismissal.

28. Appendix – Resolution of Disputes Requirement: After this appendix insert new title and schedule as follows—

SCHEDULE A – SALARIES (ASNA)

The following schedule provides a history of Clause 11. – Salaries of the Award including all Arbitrated Safety Net Adjustments (ASNA) as at 1 August 2002.

(1) The minimum annual rate of salary payable to supervisors engaged in the undermentioned classifications shall be—

(a) Supervisor—

	Minimum Salary $ per Annum	ASNA	Total Salary $ per Annum
1st year of experience	18706	5528	24234
2nd year of experience	19475	5528	25003
3rd year of experience	20500	5528	26028
4th year of experience	21525	5528	27053
5th year of experience	22550	5633	28183
6th year of experience	23575	5633	29208

(b) Senior Supervisor—

	Minimum Salary $ per Annum	ASNA	Total Salary $ per Annum
1st year of experience	25113	5529	30642
Thereafter	26650	5529	32179

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.

29. Schedule A – Parties: Delete title and schedule and insert the following in lieu thereof—

SCHEDULE B – PARTIES

NAME	ADDRESS
EMPLOYER PARTIES	
Aquinas College	Locked Bag 11, Bentley Delivery Centre WA 6983
Association of Independent Schools of Western Australia, Union of Employers (Inc.)	3/41 Walters Drive Herdsman Business Park OSBORNE PARK WA 6017
Catholic Education Commission of WA	PO Box 198 LEEDERVILLE WA 6903
Christ Church Grammar School	Queenslea Drive CLAREMONT WA 6010
Guildford Grammar School	Locked Bag 5 GUILDFORD WA 6935
Hale School	Hale Road WEMBLEY DOWNS WA 6019
Iona Presentation College	33 Palmerston Street MOSMAN PARK WA 6012
Keaney College	BINDOON WA 6502
Mazenod College	Gladys Road LESMURDIE WA 6076
Methodist Ladies College	PO Box 222 CLAREMONT WA 6010

NAME	ADDRESS
Perth College	PO Box 25 MOUNT LAWLEY WA 6929
Penrhos College	PO Box 690 COMO WA 6952
Presbyterian Ladies College (Inc.)	14 McNeil Street PEPPERMINT GROVE WA 6011
Santa Maria College	Moreing Road ATTADALE WA 6156
Scotch College (Inc.)	PO Box 223 SWANBOURNE WA 6010
St Brigid's College	200 Lesmurdie Road LESMURDIE WA 6076
St Hilda's Anglican School For Girls (Inc)	PO Box 34 MOSMAN PARK WA 6912
St Mary's Anglican Girls School (Inc)	PO Box 105 KARRINYUP WA 6923
The Roman Catholic Archbishop of Perth (Inc.)	Victoria Square PERTH WA 6000
Wesley College	PO Box 149 SOUTH PERTH WA 6951
UNION PARTY	
The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers	PO Box 8444 Perth Business Centre WA 6849

30. Appendix - S.49B - Inspection of Records Requirements: Delete this title and appendix.

2003 WAIRC 08434

INDEPENDENT SCHOOLS' TEACHERS' AWARD 1976.

No R27 of 1976.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPLICANT *v.* THE ANGLICAN SCHOOLS COMMISSION (INC.) AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY 4 JUNE 2003
FILE NO.	APPLICATION 1047 OF 2002
CITATION NO.	2003 WAIRC 08434

Result Award varied

Order

HAVING heard Mr N Briggs on behalf of the applicant and Dr I Fraser and Mr P Andrew as agents on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Independent Schools' Teacher Award 1976 (No. R 27 of 1976) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 14th day of April 2003.

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

[L.S.]

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof—

2. Clause 4. – Scope: Delete this clause and insert the following in lieu thereof—

This Award applies to teachers (as defined) employed in the classifications mentioned in Clause 14. - Salaries of this Award, but it does not apply to a person who is in Holy Orders or who is a member of a religious teaching order unless it is so stated in a written contract of employment between that person and the school in which he/she is engaged in teaching duties.

3. Clause 5. – Definitions: Delete this clause and insert the following in lieu thereof—

(1) "Teacher" shall mean any person employed on the teaching staff of an independent school but does not include the Deputy Principal or the Principal.

(2) "Part-time Teacher" shall mean a teacher employed regularly on the staff of an independent school and who works less than the normal hours that a full-time teacher is required to work.

(3) "Temporary Teacher" shall mean a teacher engaged as full-time or part-time as a replacement teacher or such other purpose as may be required to fulfil the teaching obligations of the school, provided that the period of engagement of a temporary teacher shall be not less than twenty consecutive working days and not more than a period of twelve months, except where the substantive teacher on unpaid leave is granted an extension the temporary teacher's engagement may be extended for the period of this extension.

(4) "Relief Teacher" shall mean a teacher employed part-time or full-time on a daily or half daily basis for a period not exceeding nineteen consecutive days in the same school.

(5) "Independent School" shall mean a school which is an efficient school within the meaning of the School Education Act 1999 and which is not administered by or on behalf of the Government of Western Australia.

(6) "Promotional Position" shall mean a position which involves—

(a) the supervision of other members of staff

and/or

(b) administrative duties in excess of those usually required of a teacher in an Independent School

and/or

(c) pastoral care duties or any other Promotional Position responsibilities in excess of those usually required of a teacher in an Independent School.

(7) "Senior Teacher" shall mean a teacher, appointed as such in accordance with the provisions of this award, who has demonstrated high level skills and practice in teaching and who participates as a team member in the development of the school.

(8) "Continuous Service" shall include full-time, part-time and temporary service, paid leave and unpaid leave of less than two (2) consecutive weeks, with the same employer.

4. Clause 6. – Term: Delete the number, title and clause.

5. Clause 7. – Contract of Service: Delete the number, title and clause and insert new number, title and clause in lieu thereof:

6. - CONTRACT OF SERVICE

(1) (a) A teacher shall, upon engagement, be given a letter of appointment in which the general conditions and the special conditions (if any) of his/her appointment are stated. A copy of that letter shall be retained by the school and signed by the teacher within one week of commencing work. This subclause shall not apply to a relief teacher.

(b) The conditions stated in the letter of appointment shall, while the employment continues, be observed by the parties and shall not be subject to any alteration of significance without the consent of the teacher.

(c) Paragraph (a) of this subclause does not authorise the inclusion in a letter of appointment of any provision which is inconsistent with or contrary to any provision of this Award.

(2) Except in the case of relief or temporary teachers, the termination of the service of a teacher shall require a minimum of six weeks' notice by either party to take effect from the close of school business at the end of school term. Failure to give the required notice shall make that party liable to forfeiture of or payment to the other party of an amount equivalent to six weeks' pay or an amount equivalent to that period of notice not given or served.

Provided that the requirements of this subclause may be waived in part or whole by mutual agreement between the teacher and the employer.

(3) The contract of service of a temporary teacher shall be terminable at any time by either party giving not less than one (1) week's notice, save that in the case of continuous service exceeding one (1) year, notice shall be as prescribed in subclause (2) of this clause.

(4) The engagement of a relief teacher shall be by the day or half day and where the period exceeds five consecutive days the notice shall be one day. Where the employment is for five consecutive days or less the engagement shall be considered to be a specific period and notice shall not be required.

(5) A part-time teacher shall receive payment for sick leave, long service leave and vacation leave on a pro-rata basis in the proportion that his/her hours of work bear to the hours of a full-time teacher.

(6) Upon termination a statement of service and a separate reference when requested by the teacher shall be provided to the teacher by the employer.

(7) Nothing within this clause detracts from the employer's right to dismiss summarily any teacher for serious misconduct in which case salary shall be paid up to the time of dismissal only.

6. Clause 8. – Leave: Delete this number, title and clause.

7. Clause 6. – Contract of Service: After this clause insert new number, title and clause as follows—

7. – SPECIAL LEAVE

(1) A teacher shall, on sufficient cause being shown, be granted special leave with pay.

(2) "Sufficient cause" is defined as a matter or situation for which—

(a) no other paid leave is available,

(b) no other arrangements can reasonably be made,

(c) the absence from duty is required due to pressing necessity.

(3) The period determined at the discretion of the employer having regard to all the circumstances would not normally exceed three (3) days in any one instance.

(4) Such discretion is not to be harshly or unfairly exercised.

8. Clause 7. – Special Leave: After this clause insert new number, title and clause as follows—

8. – SICK LEAVE

(1) (a) A teacher who is unable to attend or remain at the place of employment during the normal hours of duty by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.

(b) Entitlement to payment shall be twelve and one half day's pay for each completed year of service. Such leave will accrue on a weekly basis. A teacher who was actually engaged for all four terms in a calendar year shall be entitled to a year's entitlement.

(c) A teacher who claims an entitlement under this clause shall provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(d) If in the first of successive years of service with the employer, a teacher is absent on the ground of personal ill health or injury for a period longer than his/her entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the teacher's services terminate, if before the end of that year of service, to the extent that the teacher has become entitled to further paid sick leave during that year of service.

(2) A temporary teacher shall retain the benefit of accumulated sick leave on appointment as a permanent teacher provided that the service is continuous. For the purpose of this paragraph school vacations shall not be deemed to break the continuity of service.

(3) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this subclause may be claimed by the teacher if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during that year at the time of the absence. Provided that a teacher shall not be entitled to claim payment for any period exceeding thirteen weeks in any one year of service.

(4) A teacher on paid leave shall accrue an entitlement to payment under this clause.

(5) The provisions of this subclause with respect to payment do not apply to teachers who are entitled to payment under the Workers' Compensation and Rehabilitation Act 1981 nor to teachers whose injury or illness is the result of the teacher's own misconduct.

9. Clause 8. – Sick Leave: After this clause insert new number, title and clause as follows—

9. – LEAVE WITHOUT PAY

(1) While a teacher has the right to apply for leave without pay the granting of such leave is at the discretion of the employer.

(2) A teacher applying for leave under this clause must state the period of such leave and the reason for which the leave is being sought.

(3) Leave without pay does not involve loss of continuity of service for salary, sick leave and long service leave purposes. Any period exceeding two weeks during which the teacher is absent on leave without pay shall not be taken into account in calculating the period of service for any purposes of this Award. In the case of leave without pay, which exceeds eight weeks in a continuous period, the entire period of that leave is exercised in full.

(4) If a teacher is granted leave without pay the question of the teacher's specific duties on return to work should be considered before the granting of such leave and any arrangements made documented. If no prior arrangement is made a teacher upon return to service shall be entitled to a position commensurate with the position held immediately prior to the commencement of such leave.

(5) The maximum period for which leave is granted under this clause shall be one year.

10. Clause 9. – Holidays and Vacations: Delete the number, title and clause and insert new number, title and clause as follows—

10. - HOLIDAY AND VACATION LEAVE

(1) Except as hereinafter provided, a teacher shall be allowed the holidays granted by the school in which he/she is employed, including term and Christmas vacations, without deduction of pay.

(2) If after one week's continuous service in any calendar year a teacher lawfully terminates his/her employment or his/her employment is terminated by the employer through no fault of the teacher, the teacher shall be granted salary instead of vacation leave proportionate to his/her length of service. Provided that a teacher who was actually engaged for all four terms in that calendar year shall be entitled to be paid for the whole of the vacation period of that year.

(3) (a) Where a teacher has been paid for leave, which at the time of termination has not been fully accrued, the employer may deduct from any monies owed that portion to which the teacher is not entitled.

(b) Where the employment of a teacher is terminated by the employer prior to the attainment of the accrued vacation leave, then the provisions of this subclause shall not apply.

(4) A teacher on approved paid leave, shall accrue an entitlement to payment under this clause.

(5) A teacher who is justifiably dismissed for serious misconduct shall not be entitled to the benefits of the provisions of this clause.

(6) (a) A leave loading equivalent to 17.5 per cent of four weeks' salary shall be paid to a teacher, including a part-time and temporary teacher, who has completed twelve months' continuous service with the employer or who has been employed for all four terms in a calendar year.

(b) The loading shall be paid in the final pay in December of that year.

(c) If the service of a teacher commences after the beginning of first term in a calendar year then by agreement between the employer and the teacher, the leave loading may be paid, proportionate to the length of service in that year, in December of that year.

11. Clause 10. – Long Service Leave: Delete the number, title and clause and insert new number, title and clause as follows—

11. - LONG SERVICE LEAVE

(1) Subject to subclause (3)—

(a) A teacher who has completed ten (10) years' continuous service with an employer shall be entitled to 13 weeks' paid long service leave.

(b) For each subsequent period of ten (10) years' service a teacher shall be entitled to an additional 13 weeks' paid long service leave.

(c) On termination of the teacher's employment in any circumstances otherwise than for serious misconduct the teacher shall be entitled to payment of long service leave in respect of the number of years' service with the employer completed since the teacher last became entitled to an amount of long service leave of a proportionate amount on the basis of 13 weeks' for ten (10) years' service.

(2) In calculating a teacher's entitlement under this clause continuous service with the employer prior to the 1st day of January 1984 shall be taken into account in the following manner—

(a) In the case of a teacher who has already accrued an entitlement to long service leave with the employer prior to the 1st day of January 1984, the teacher shall continue to accrue subsequent entitlements to long service leave in accordance with the provisions of subclause (1) of this clause.

(b) In the case of a teacher who, at the 1st day of January 1984, had not accrued an entitlement to long service leave, the teacher's entitlement shall be calculated on the following basis—

For any period of continuous employment prior to the 1st day of January, 1984, an amount calculated on the basis of 13 weeks' paid long service leave for each 15 years of continuous service.

(3) The expression "continuous service" does not include—

(a) Any period exceeding two weeks during which the teacher is absent on leave without pay. In the case of leave without pay which exceeds eight weeks in a continuous period, the entire period of that leave is exercised in full;

(b) any service of a teacher who resigns or is dismissed, other than service prior to such resignation or prior to the date of any offence in respect of which he/she is dismissed by the employer, when that prior service has actually entitled the person to long service leave under this clause.

(4) Subject to subclause (6) of this clause, term and Christmas holidays observed by the school shall be recognised as extra leave and not included in the long service leave.

(5) Any public holiday which occurs during the period a teacher is on long service leave shall be treated as part of the long service leave and extra days shall not be granted.

(6) Where a teacher has become entitled to a period of long service leave in accordance with this clause, the teacher shall commence such leave as soon as possible after the accrual date in a manner mutually agreed between the employer and the teacher by one of the following options—

(a) as a semester, with approved leave without pay for that portion which exceeds the long service leave period;

(b) as a term, with any excess entitlement being taken with future long service leave or paid out on termination, resignation or retirement. The excess cannot be used to reduce a future accrual period;

(c) as a term, with the excess entitlement falling during the Christmas vacation period being paid for in addition to the ordinary payment for such vacation. The excess leave may be taken during the vacation period prior to or following the term's long service leave.

(7) Payment for long service leave shall be made in full before the teacher goes on leave or by agreement between the teacher and the employer, at the same time as the teacher's salary would have been paid if the teacher had remained at work in which case the payment shall be made by arrangement between the teacher and the employer.

(8) Where a teacher has completed at least 7 years' service but less than 10 years' service and employment is terminated—

(a) by the teacher's death; or

(b) in any circumstances, otherwise than serious misconduct;

the amount of leave shall be such proportion of 13 weeks' leave as the number of completed years of such service bears to 10 years.

(9) In the case to which subclause (8) of this clause, applies and in any case in which the employment of the teacher who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of employment otherwise than by death, pay to the teacher and upon termination of employment by death, pay to the personal representative of the teacher upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he/she is entitled or deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

(10) Where the continuous service of a teacher during the accrual period contains any period where the teacher worked on a part time basis the teacher's entitlement shall be calculated as follows—

(a) the number of weeks accrued shall be in accordance with subclause (1) above; and

(b) payment for the leave taken shall be the average that the teacher's part time service bears to that of a full time teacher over the accrual period.

12. Clause 11. – Long Service Leave: After this clause insert new number, title and clause as follows—

12. – CARER'S LEAVE

(1) Use of Sick Leave

(a) A teacher with responsibilities in relation to either members of his/her immediate family or members of his/her household who need care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement for absences to provide care and support for such persons when they are ill. Such leave shall not exceed five (5) days in any calendar year and is not cumulative.

(b) The teacher shall, if required, provide a written statement as to the fact of illness of the person for whom the care and support is required.

(c) The entitlement to use sick leave is subject to—

(i) the teacher being responsible for the care of the person concerned; and

(ii) the person concerned being either a member of the teacher's immediate family or a member of the teacher's household.

(iii) the term "immediate family" includes—

(aa) a spouse (including a former spouse), of the teacher; and

(bb) child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the teacher.

(d) The teacher shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and his/her relationship to the teacher, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the teacher to give prior notice of absence, the teacher shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

(2) Use of Unpaid Leave

A teacher may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill.

(3) Nothing contained in this clause shall prevent a teacher from making application for leave as prescribed in Clause 7. - Special Leave of the Award.

13. Clause 12. – Carer's Leave: After this clause insert new number, title and clause as follows—

13. - BEREAVEMENT LEAVE

Entitlement to Bereavement Leave

(1) Subject to subclause (4) of this clause, on the death of—

(a) the spouse or defacto spouse of a teacher;

(b) the child or step-child of a teacher;

(c) the parent, step-parent or parent-in-law of a teacher;

(d) brother or sister of a teacher; or

(e) any person who, immediately before that person's death, lived with the teacher as a member of the teacher's family,

the teacher is entitled to paid bereavement leave of up to two days.

(2) The two (2) days need not be consecutive.

(3) Bereavement Leave is not to be taken during a period of any other leave.

(4) A teacher who claims to be entitled to paid leave under this section is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to—

(a) the death that is the subject of the leave sought; and

(b) the relationship of the teacher to the deceased person.

14. Clause 11. – Salaries: Delete the number, title and clause and insert the following in lieu thereof—

14. – SALARIES

(1) (a) The minimum annual salary payable to teachers engaged in the undermentioned classifications shall be—

	Total Salary Per Annum $
Step 1	27568
Step 2	28901
Step 3	30129
Step 4	31667
Step 5	33102
Step 6	34332
Step 7	35562
Step 8	37099
Step 9	38790
Step 10	40174
Step 11	41300
Step 12	42838
Step 13	44375

(b) On appointment, a teacher shall be placed at the appropriate salary level according to qualifications and full-time teaching experience in Australia. Recognition of qualifications and experience other than that outlined in this clause shall be determined by agreement between the employer and the teacher. In the event that the parties cannot agree on the level of qualifications and/or experience that should apply then the matter may be referred to the Independent Schools Industrial Affairs Consultative Committee.

(c) On application by the teacher and by agreement with the employer, salary may be deemed to include an amount which is paid on behalf of the teacher into an Approved Superannuation fund nominated in accordance with the provision of Clause 22. - Superannuation of the Award, and not being an employer contribution to superannuation paid in accordance with Superannuation Guarantee (Administration) Act 1992, Federal legislation or an employer's contributory superannuation fund.

(d) A copy of any agreement reached in accordance with paragraph (c) of this subclause shall be attached to the salary record of the teacher concerned.

(e) For the purposes of determining weekly or fortnightly salary, the annual salaries as prescribed in this subclause, shall be divided by 52.16 or 26.08 respectively.

(2) In determining the appropriate minimum salary level the following will apply—

(a) Teachers not elsewhere provided for shall commence at Step 1 and proceed by annual increments to and including Step 9.

(b) Two-year or three-year trained teacher holding a Teacher's Certificate or a teacher holding a University Degree (other than Bachelor of Education) but not a Teacher's Certificate shall commence at Step 3 and proceed by annual increments to and including Step 9.

(c) Teacher holding—

University Degree and Diploma of Education; or

University Degree and Teacher's Certificate; or

Bachelor of Education Degree;

shall commence at Step 5 and proceed by annual increments to and including Step 13.

(d) Teacher holding the qualifications as outlined in paragraph (c) of this subclause plus a second or higher degree as outlined in paragraph (h) of this clause shall commence at Step 6 and proceed by annual increments to and including Step 13.

(e) The term Degree or Diploma will be deemed to include equivalent qualifications. In the event of a dispute the matter may be referred to the Independent Schools Industrial Affairs Consultative Committee.

(f) A teacher who obtains an additional qualification which is recognised as the equivalent to an additional year of training, shall be credited with the extra year for salary purposes.

(g) The qualifications referred to in paragraph (f) above, shall be determined by agreement through the Independent Schools Industrial Affairs Consultative Committee and shall be reviewed each year and shall be listed to apply from the beginning of each calendar year.

(h) A teacher who obtains a second, or higher degree shall be credited with one extra year's experience for salary purposes. For the purpose of this subclause, a second or higher degree shall mean to include a graduate diploma or a degree at honours level.

(i) The years of experience is indicated by the equivalent number of steps from the entry level.

(3) SENIOR TEACHER—

(a) Subject to the provisions for implementing the classification set out in the Appendix to this Award, an appointee to a Senior Teacher classification shall be entitled to the following annual allowance—

Level One - 3.2% of the maximum total salary per annum as prescribed in subclause (1) of this clause.

Level Two - 6.9% of the maximum total salary per annum as prescribed in subclause (1) of this clause.

(b) A teacher in a promotional position who achieves a Senior Teacher Level 1 classification shall be entitled to the minimum allowance applicable to the promotion position or the Senior Teacher Level 1 classification whichever is the greater.

(4) Part-time and part-time temporary teachers shall be paid in accordance with this Award for duties performed in proportion to the time those duties bear to an ordinary full-time teaching week.

(5) (a) Relief Teachers employed for five consecutive working days or less shall be paid a daily rate calculated as follows—

(i) Less than four year trained, a rate calculated at step 3 of subclause (1) of this clause, divided by 200.

(ii) Four year trained, a rate calculated at step 5 of subclause (1) of this clause, divided by 200.

(b) Relief teachers employed for more than five (5) consecutive working days shall be paid for the period at the rate of salary appropriate to their qualifications and experience on a weekly basis of annual salary divided by forty (40) or a daily basis of annual salary divided by two hundred (200).

(6) SECONDARY SCHOOLS

(a) A teacher appointed to a promotional position in a secondary school shall be placed within one of the following promotion levels in accordance with the duties as prescribed.

Promotional Level 1

The management of a major department, for example, secondary English, or an equivalent responsibility, for example, in the pastoral care of students.

Promotional Levels 2, 3 and 4

The levels assigned will recognise the gradation of responsibilities which apply within a school among various promotional positions.

For example, for promotional Level 2: the management of a small department or an equivalent level of responsibility.

For example, for promotional Level 3: second in charge of a major department, or an equivalent level of responsibility.

For example, for promotional Level 4: co-ordinator of a subject, i.e., subject teachers with minimal supervision of other staff, or an equivalent level of responsibility.

(b) All allowances relating to promotional positions are minima.

(c) The scale of promotional allowances paid shall be based on the promotional level as determined in paragraph (a) of this subclause and the school category as defined in paragraph (d) of this subclause.

(d) The category of the school shall be determined as follows—

(i) Category A: School above 600 full-time equivalent students.

(ii) Category B: School between 300 and 600 full-time equivalent students.

(iii) Category C: School below 300 full-time equivalent students.

(e) The minimum allowance payable for a promotional position shall be as follows—

(i) Promotional Level 1 Category A: 12.5 per cent of the maximum salary level as prescribed in subclause (1) of Clause 14. - Salaries.

(ii) Promotional Level 1 Category B: 10.5 per cent of the maximum salary level as prescribed in subclause (1) of Clause 14. - Salaries.

(iii) Promotional Level 1 Category C: 8.5 per cent of the maximum salary level as prescribed in subclause (1) of Clause 14. - Salaries.

(iv) Promotional Levels 2, 3 and 4 shall be paid 70 per cent, 50 per cent and 30 per cent respectively of Promotion Level 1 of the appropriate school category.

(7) PRIMARY SCHOOLS

(a) Allowances for promotional positions in primary schools, where appointed under this Award, shall be at the Assistant Principal (Administration), Assistant Principal (Religious Education) level or similar designation relevant to the school.

(b) Where a primary school has in excess of 700 full-time equivalent students, an additional promotional position may be appointed at the discretion of the employer.

(c) The allowance payable to Assistant Principals shall be as follows—

(i) Schools with 300 to 700 full-time equivalent students - $6000.00 per annum.

(ii) Schools with 100 to 300 full-time equivalent students - $3000.00 per annum.

(8) Notwithstanding the provision of subclauses (7) and (8) of this clause, where an agreement is reached between the employer and the teacher on any allowance or benefit for promotional positions, expressed in terms other than those prescribed under this clause, then, subject to notification to the Union of such agreement, such conditions shall apply for the purposes of this Award.

15. Clause 12. – Right of Entry: Delete the number, title and clause and insert the following in lieu thereof—

15. - RIGHT OF ENTRY

(1) An authorised representative of the Union may enter, during working hours, any premises where teachers work, for the purposes of holding discussions at the premises with those teachers.

(2) The authorised representative will provide the employer/principal with prior notification of entry.

(3) The meeting will not disrupt the teacher's performance of his/her duties.

(4) Where such a meeting is of an urgent nature and upon a request being made to the principal, the principal may approve paid time off to meet with the authorised Union representative. Such approval will not be unreasonably withheld.

16. Clause 13. – No Reduction: Delete this number, title and clause—

17. Clause 14. – Protective Clothing: Delete this number and title and insert the following in lieu thereof—

16. - PROTECTIVE CLOTHING

18. Clause 15. – Maternity Leave: Delete the number, title and clause and insert the following in lieu thereof—

17. - PARENTAL LEAVE

(1) Eligibility for Parental Leave

A teacher shall become entitled to take up to 52 consecutive weeks of unpaid leave in respect of—

(a) the birth of a child to the teacher or the teacher's spouse; or

(b) the placement of a child with the teacher with a view to the adoption of the child by the teacher.

(2) A teacher is entitled to take parental leave if he or she—

(a) has had at least 12 months' continuous service with that employer immediately preceding the date upon which the teacher proceeds upon such leave; and

(b) has given the employer at least 10 weeks' written notice of his/her intention to take such leave, and the start and finish dates of such leave.

(c) a teacher is not entitled to take parental leave at the same time as the teacher's spouse but this subclause does not apply to one week's parental leave—

(i) taken by the male parent immediately after the birth of the child; or

(ii) taken by the teacher and the teacher's spouse immediately after a child has been placed with them with a view to their adoption of the child.

(d) a teacher shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with this subclause, if such failure is occasioned by the confinement occurring earlier than the presumed date.

(3) Parental Leave to start 6 weeks before the birth

Subject to subclauses (4), (5) and (7) of this clause, the period of parental leave for a female teacher shall be for an unbroken period of up to 52 weeks and shall include up to six weeks' leave to be taken immediately before the presumed date of confinement, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the teacher is fit to work.

(4) Transfer to a Safe Job

Where in the opinion of a duly qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the teacher make it inadvisable for the teacher to continue at her present work, the teacher shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attached to that job until the commencement of parental leave. If the transfer to a safe job is not practicable, the teacher may, or the employer may require the teacher to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as parental leave for the purposes of subclauses (8), (9), (10) and (11) of this clause.

(5) Variation of Period of Parental Leave

(a) The period of parental leave may be lengthened by agreement between the teacher and the employer in accordance with the provisions of Clause 9. - Leave Without Pay of this Award.

(b) The period of parental leave may be shortened by agreement between the teacher and the employer.

(6) Cancellation of Parental Leave

(a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of a teacher terminates other than by the birth of a living child.

(b) Subject to paragraph (c) of this subclause, where the pregnancy of a teacher then on parental leave terminates other than by the birth of a living child, it shall be the right of the teacher or teacher's spouse to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the teacher to the employer that he or she desires to resume work.

(c) A teacher's right to resume work within the period specified in paragraph (b) of this subclause shall be subject to the practicality of enabling the teacher to resume within that period, but in any case that limitation shall not be invoked to extend the period of leave beyond the date originally agreed to.

Where the teacher's resumption is delayed, he or she may undertake temporary employment with another employer without affecting his or her contract of service with the school from which he or she took parental leave.

(7) Special Parental Leave and Sick Leave

(a) Where the pregnancy of a teacher or a teacher's spouse not then on parental leave terminates after twenty-eight weeks other than by the birth of a living child then—

(i) the teacher shall be entitled to such period of unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the teacher's return to work; or

(ii) for illness other than the normal consequences of confinement the teacher shall be entitled, either instead of or in addition to special parental leave, to such paid sick leave as to which the teacher is then entitled and which a duly qualified medical practitioner certifies as necessary before the teacher returns to work.

(b) Where a teacher not then on parental leave suffers illness related to the teacher's pregnancy, the teacher may take such paid sick leave as to which the teacher is then entitled and such further unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before the teacher returns to work.

(c) For the purposes of subclauses (9), (10) and (11) of this clause, parental leave shall include special parental leave.

(d) A teacher returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which the teacher held immediately before proceeding on such leave or, in the case of a teacher who was transferred to a safe job pursuant to subclause (4) of this clause, to the position the teacher held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the teacher is qualified and the duties of which the teacher is capable of performing, the teacher shall be entitled to a position as nearly comparable in status and salary or wage to that of the teacher's former position.

(8) Parental Leave and Other Leave Entitlements

(a) A teacher may take, in conjunction with or in addition to parental leave, any annual leave or long service leave or any part thereof to which the teacher is then entitled.

(b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to a teacher during the teacher's absence on parental leave.

(9) Effect of Parental Leave on Employment

Notwithstanding any award, or other provision to the contrary, absence on parental leave shall not break the continuity of service of a teacher but shall not be taken into account in calculating the period of service for any purpose of the Award.

(10) Termination of Employment

(a) A teacher on parental leave may terminate his or her employment at any time during the period of leave by notice given in accordance with this Award.

(b) An employer shall not terminate the employment of a teacher on the ground of the teacher's pregnancy or of the teacher's absence on parental leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(11) Return to Work After Parental Leave

(a) A teacher shall be entitled to the position which the teacher held immediately before proceeding on parental leave or, in the case of a teacher who was transferred to a safe job pursuant to subclause (4) of this clause, to the position which the teacher held immediately before such transfer. Where such position no longer exists but there are other positions available for which the teacher is qualified and the duties of which the teacher is capable of performing, the teacher shall be entitled to a position as nearly comparable in status and salary or wage to that of the teacher's former position.

(b) The teacher will notify the employer in writing not less than six (6) weeks prior to the presumed dated of return, when the teacher requests to return to work under different arrangements from those which the teacher held immediately prior to the commencement of Parental leave.

(12) Replacement Teachers

(a) A replacement teacher is a teacher specifically engaged as a result of a teacher proceeding on parental leave.

(b) Before an employer engages a replacement teacher under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the teacher who is being replaced.

(c) Before an employer engages a person to replace an teacher temporarily promoted or transferred in order to replace an teacher exercising his or her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the teacher who is being replaced.

(d) Nothing in this subclause shall be construed as requiring the employer to engage a replacement teacher.

(e) A replacement teacher shall not be entitled to any of the rights conferred by this clause except where his/her employment continues beyond the twelve months' qualifying period.

19. Clause 16. – Relief Teachers: Delete this number, title and clause—

20. Clause 17. – Location Allowances: Delete the number, title and clause and insert the following in lieu thereof—

18. - LOCATION ALLOWANCES

(1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this Award, a teacher shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$16.60
Argyle	$43.50
Balladonia	$16.60
Barrow Island	$28.30
Boulder	$6.90
Broome	$26.50
Bullfinch	$7.80
Carnarvon	$13.50
Cockatoo Island	$29.10
Coolgardie	$6.90
Cue	$16.90
Dampier	$23.00
Denham	$13.50
Derby	$27.50
Esperance	$5.00
Eucla	$18.50
Exmouth	$23.90
Fitzroy Crossing	$33.30
Goldsworthy	$14.80
Halls Creek	$38.10
Kalbarri	$5.70
Kalgoorlie	$6.90
Kambalda	$6.90
Karratha	$27.30
Koolan Island	$29.10

TOWN	PER WEEK
Koolyanobbing	$7.80
Kununurra	$43.50
Laverton	$16.80
Learmonth	$23.90
Leinster	$16.60
Leonora	$16.80
Madura	$17.60
Marble Bar	$41.70
Meekatharra	$14.60
Mount Magnet	$18.10
Mundrabilla	$18.10
Newman	$15.90
Norseman	$14.20
Nullagine	$41.60
Onslow	$28.30
Pannawonica	$21.50
Paraburdoo	$21.30
Port Hedland	$22.80
Ravensthorpe	$8.80
Roebourne	$31.40
Sandstone	$16.60
Shark Bay	$13.50
Shay Gap	$14.80
Southern Cross	$7.80
Telfer	$38.60
Teutonic Bore	$16.60
Tom Price	$21.30
Whim Creek	$27.10
Wickham	$26.30
Wiluna	$16.80
Wittenoom	$36.90
Wyndham	$41.00

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

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

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

(3) Where a teacher—

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

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

such teacher shall be paid 66.66 per cent of the allowances prescribed in subclause (1) of this clause.

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

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

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

(7) For the purposes of this clause—

(a) "Dependant" shall mean—

(i) a spouse or defacto spouse; or

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

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

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

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

(9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in

accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

21. Clause 18. – Location Allowances: After this clause insert new number, title and clause as follows—

19. - TRAVELLING ALLOWANCES

(1) Where an teacher is required by the employer to work away from the teacher's usual place of employment the employer shall pay the teacher any reasonable travelling expenses incurred except where an allowance is paid in accordance with subclause (2) hereof.

(2) Where a teacher is required and authorised to use his/her own motor vehicle in the course of duty, the teacher shall be paid an allowance of not less than that provided for taxation purposes by the Australian Taxation Office, unless otherwise agreed by the teacher.

22. Clause 19. – Travelling Allowances: After this clause insert new number, title and clause as follows—

20. – SALARY RECORDS

(1) The employer shall keep or cause to be kept, records containing the following particulars—

(a) Full name and residential address of each teacher.

(b) The full time or part time percentage, and the number of weeks worked per year, exclusive of Holiday and Vacation leave.

(c) The salary paid each pay period, and their deductions.

(d) The employer shall provide a salary advice slip showing gross salary and any deductions made for such pay period.

(2) Salaries shall be paid at least monthly, except in the case of a relief teacher who shall be paid as soon as possible on completion of the engagement.

23. Clause 20. – Salary Records: After this clause insert new number, title and clause as follows—

21. – INSPECTION OF RECORDS

(1) An authorised representative of the Union may enter, during work hours, any premises where relevant teachers work, for the purpose of investigating any suspected breach of the Industrial Relations Act 1979, the Long Service Leave Act 1958, the Minimum Conditions of Employment Act 1993, the Occupational Safety and Health Act 1984 or an award, order, industrial agreement or employer-employee agreement that applies to any such teacher.

(2) For the purpose of investigating any such suspected breach, the authorised representative may—

(a) subject to the provisions of the relevant Act, Award, Order, Industrial Agreement or Employer-Employee Agreement require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records or other documents kept by the employer that are related to the suspected breach;

(b) make copies of the entries in the employment records or documents related to the suspected breach; and

(c) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach.

(3) The authorised representative will provide written notice of at least—

(a) 24 hours if the records and documents are kept on the employer's premises; or

(b) 48 hours if the records are kept elsewhere.

24. Clause 18. – Superannuation: Delete the number, title and clause and insert new number and title and clause as following in lieu thereof—

22. - SUPERANNUATION

The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled - Compliance, Nomination and Transition.

(1) Employer Contributions

(a) An employer shall contribute to superannuation for each eligible teacher in accordance with the Superannuation Guarantee (Administration) Act 1992 to one of the following approved superannuation funds—

(i) CONCEPT ONE - superannuation plan which was established and is governed by a trust deed and rules dated 23 September 1986, as amended; and

(ii) an exempted fund allowed by subclause (3) of this clause.

(b) Employer contributions shall be paid at least monthly for each week of service that the eligible teacher completes with the employer.

(c) "Ordinary Time Earnings" means the salary or other remuneration periodically received by the teacher in respect to the time worked in ordinary hours and/or any other rate paid for all purposes of the Award to which the teacher is entitled for ordinary hours of work.

(2) Fund Membership

(a) "Eligible Teacher" shall mean a teacher employed under the terms of this Award.

(b) A teacher shall not be eligible to join the fund until he/she has completed one month's satisfactory service. On completion of this period the teacher shall be entitled to the appropriate employer contribution, from the date of the teacher's commencement.

(3) Exemption

Exemptions from the requirements of this clause shall apply to an employer who at the date of this Award—

(a) was contributing to a superannuation fund, in accordance with an order of an industrial tribunal; or

(b) was contributing to a superannuation fund in accordance with an Order or Award of an industrial tribunal, for a majority of teachers and makes payment for teachers covered by this Award in accordance with that order or award; or

(c) subject to notification to the Union, was contributing to a superannuation fund for teachers covered by this Award where such payments are not made pursuant to an order of an industrial tribunal.

(d) was not contributing to a superannuation fund for teachers covered by this Award; and

(i) written notice of the proposed alternative superannuation fund is given to the Union; and

(ii) contributions and benefits of the proposed alternative superannuation fund are no less than those provided by this clause; and

(iii) within one month of the notice prescribed in paragraph (i) being given, the Union has not challenged the suitability of the proposed fund by notifying the Western Australian Industrial Relations Commission of a dispute.

(4) The employer shall provide such facilities as is appropriate to ensure that all teachers are adequately informed of the provisions of the superannuation funds available.

Compliance, Nomination and Transition

Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of a teacher, on and from 30 June 1998—

(a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless—

(i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and

(ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the teacher permitted to nominate a fund or scheme;

(b) The teacher shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the teacher;

(c) The employer shall notify the teacher of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;

(d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirement of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the teacher to whom such is directed;

(e) The teacher and employer shall be bound by the nomination of the teacher unless the teacher and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;

(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme required by a teacher;

Provided that on and from 30 June 1998, and until a teacher thereafter nominates a complying superannuation fund or scheme—

(i) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer;

or

(ii) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.

25. Clause 19. – Consultative Provisions: Delete the number and title and insert new number and title as following in lieu thereof—

23. - CONSULTATIVE PROVISIONS

26. Clause 23. – Consultative Provisions: After this clause insert new number, title and clause as follows—

24. – REDUNDANCY PROVISIONS

(1) Discussions Before Termination

(a) Where an employer has made a definite decision that the employer no longer wishes the job the teacher has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the teachers directly affected and with their Union, where applicable.

(b) The discussion shall take place as soon as is practicable after the employer has made a definite decision which will invoke the provisions of paragraph (a) of this subclause and shall cover among other things, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to minimise any adverse affect of any terminations on the teachers concerned. The employer will confirm the content of these discussions in writing.

(2) Notice Period of Termination on Redundancy

(a) If the services of a teacher are to be terminated due to redundancy, the teacher shall be entitled to notice of termination as prescribed in Clause 6. – Contract of Service, of this Award, provided that teachers to whom notification of termination of service is to be given because of the introduction of automation or other like technology changes shall be given not less than three (3) months' notice of termination.

(b) Should the employer fail to give notice of termination as required in subclause 2(a) the employer shall pay to the teacher an amount calculated in accordance with the ordinary rate of pay for a period being the difference between the notice given and that required to be given.

(c) Payment of Notice Treated as Service

If an employer makes payment for all or any of the period of notice prescribed, then the period for which such payment is made shall be treated as service for the purposes of calculating any service related entitlements of the teacher arising pursuant to this Award and shall be deemed to be service with the employer for the purposes of Long Service Leave.

(3) Teacher Leaving During Notice

A teacher whose employment is to be terminated for reasons set out in this clause may terminate employment during the period of notice and, if so, shall be entitled to the same benefits and payment under this clause had the teacher remained with the employer until the expiry of such notice. Provided that in such circumstances the teacher shall not be entitled to payment instead of notice.

(4) Time Off During Notice Period

(a) During the period of notice of termination of employment given by an employer, a teacher whose employment is to be terminated for reasons set out in this clause shall be entitled for the purpose of seeking other employment, to be absent from work for eight ordinary hours without deduction of pay.

(b) A teacher who claims to be entitled to paid leave under this clause is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(5) Severance Pay

In addition to the period of notice prescribed in Clause 6. – Contract of Service, of this Award, for ordinary termination, a teacher whose employment is terminated for reasons set out this clause shall be entitled to the following amount of severance pay in respect of a continuous period of service.

PERIOD OF CONTINUOUS SERVICE	SEVERANCE PAY
Less than 1 year	Nil
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years and over	8 weeks

"Weeks Pay" means the ordinary weekly rate of wage for the teacher concerned.

(6) Alternative Employment

An employer, in a particular redundancy case, may make application to the Western Australian Industrial Relations Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for a teacher.

(7) Teachers Exempted

This clause shall not apply to relief or temporary teachers or where employment is terminated as a consequence of conduct that justifies instant dismissal.

27. Appendix 1: After this appendix insert new Schedule as follows—

SCHEDULE A. – SALARIES (ASNA)

The following schedule provides a history of Clause 14. – Salaries of the Award including all Arbitrated Safety Net Adjustments (ASNA) as at 1 August 2002.

The minimum annual salary payable to teachers engaged in the undermentioned classifications shall be—

	Minimum Salary $ per Annum	ASNA	Total Salary $ per Annum
Step 1	21935	5633	27568
Step 2	23268	5633	28901
Step 3	24600	5529	30129
Step 4	26138	5529	31667
Step 5	27573	5529	33102
Step 6	28803	5529	34332
Step 7	30033	5529	35562
Step 8	31570	5529	37099
Step 9	33261	5529	38790
Step 10	34645	5529	40174
Step 11	35875	5425	41300
Step 12	37413	5425	42838
Step 13	38950	5425	44375

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 adjustment 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.

In the rates 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.

28. Schedule A. - Parties: Delete this title and schedule and insert new title and schedule as follows—

SCHEDULE B - PARTIES

EMPLOYER PARTIES

NAME	ADDRESS
The Anglican Schools Commission (Inc.)	PO Box 2520 MT CLAREMONT WA 6010

NAME	ADDRESS
Aquinas College	Locked Bag 11, Bentley Delivery Centre WA 6983
Association of Independent Schools Of Western Australia (Inc.)	3/41 Walters Drive Herdsman Business Park OSBORNE PARK WA 6017
Bible Baptist Christian Academy Street	Lot 374 Chidlow MT HELENA WA 6555
Catholic Education Commission of W.A.	PO Box 198 LEEDERVILLE WA 6903
Forrestfield Christian School	336 Hawtin Road FORRESTFIELD WA 6058
Guildford Grammar School	Locked Bag 5 GUILDFORD WA 6935
Hale School	Hale Road WEMBLEY DOWNS WA 6019
Korsunski-Carmel School	Cresswell Road DIANELLA WA 6062
Kulkarriya Community School	PO Box 3 FITZROY CROSSING WA 6765
Methodist Ladies College	PO Box 222 CLAREMONT WA 6010
Montessori School	PO Box 194 KINGSLEY WA 6026
Perth College	PO Box 25 MOUNT LAWLEY WA 6929
Penrhos College	PO Box 690 COMO WA 6952
Presbyterian Ladies College (Inc.)	14 McNeil Street PEPPERMINT GROVE WA 6011
The Roman Catholic Archbishop of Perth (Inc.)	Victoria Square PERTH WA 6000
Scotch College	PO Box 223 CLAREMONT WA 6010
Seventh Day Adventist School	Cnr Ninth and Wungong Roads ARMADALE WA 6112
Speech and Hearing Centre for Children (W.A.) Inc.	PO Box 186 WEMBLEY WA 6913
St. Hilda's Anglican School For Girls (Inc.)	PO Box 34 MOSMAN PARK WA 6912
St. Mary's Anglican Girls School (Inc.)	PO Box 105 KARRINYUP WA 6923
Trinity College	Trinity Avenue EAST PERTH WA 6004
Wesley College	PO Box 149 SOUTH PERTH WA 6951

UNION PARTY

The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers	PO Box 8444, Perth Business Centre PERTH WA 6849

2003 WAIRC 08335

RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD 2000

No. A17 of 1981

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	WEDNESDAY, 19 MARCH 2003
FILE NO/S.	APPLB 976 OF 2002
CITATION NO.	2003 WAIRC 08335

Result	Award varied
Representation	
Applicant	Mr J Welch
Respondent	Mr A Harper

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 the Rangers (National Parks) Consolidated Award 2000 be varied in accordance with the following schedule and that such variation 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 14. – Conditions and Allowances: Delete subclause (3) of this clause and insert the following in lieu thereof—

(3) Mobile Rangers shall, in addition to their normal rate of pay, be paid an allowance of $95.50 per week to offset the costs associated with living in and maintaining a caravan.

This allowance is to be moved year to year to reflect the change in CPI for Perth.

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

2003 WAIRC 08357

AWU UXO UNIT AWARD 1996

No. A4 of 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, FIRE AND EMERGENCY SERVICES AUTHORITY, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	TUESDAY, 20 MAY 2003
FILE NO/S.	APPLICATION 1431 OF 2002
CITATION NO.	2003 WAIRC 08357

Result	Order issued

Order

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

WHEREAS on the 20th day of March 2003 the Applicant advised the Commission that the matter would be discontinued; and

WHEREAS on the 13th day of May 2003 the Applicant filed a Notice of Discontinuance in relation to the application; and

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

THAT this application be, and is hereby dismissed.

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

NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 148 of 2003

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "MANDURAH FORUM TAKEAWAY AND SDA AGREEMENT 2003"

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

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

3. AREA AND SCOPE

This Agreement shall be binding upon Lamb Family Trust ("the employer") trading as Mandurah Forum Takeaway and the Shop, Distributive and Allied Employees' Association of Western Australia ("the Union") in respect of all employees who are eligible to join the Union employed in the classifications defined in Clause 6 - Definitions by the employer throughout the State of Western Australia.

6. DEFINITIONS

(1) "Retail Employee Grade I" shall mean a service assistant engaged in a retail or wholesale establishment who is in the first six months of employment and who is gaining the skills required of an Retail Employee Grade II, provided that no employee aged under 16 years may be employed in this classification.

(2) "Retail Employee Grade II" shall mean an employee performing one or more of the following functions in a retail or wholesale establishment:

a) the receipt of and preparation for sale and/or display of goods in or about any shop,

b) the packaging or packing, weighing, assembling, pricing or preparing of goods or provisions or produce for sale,

c) the display, shelf filling, replenishing or any other method of exposure or presentation for sale of goods,

d) the sale of goods by any means,

e) the receiving, arranging, or making payment by any means,

f) the recording by any means of a sale or sales,

g) the wrapping or packing of goods for dispatch.

h) the receiving, handling, storing, assembling, recording, preparing, packing, weighing and/or wrapping, branding, sorting, stacking or unpacking, checking, distributing, or dispatching goods in a shop, store or warehouse or the delivering of goods from a shop, store or warehouse including the proper checking of branding and marking of goods and the keeping of necessary records. Such functions may include the use of computerised or mechanical equipment.

i) the collection or requisitioning of goods in or from places other than the employer's establishment.

j) the collection of monies in or from places other than the employer's establishment.

k) the arranging, creating, labelling or presentation of merchandise, fixtures and the surrounding areas. Such functions may include the use of tools, paint or other equipment associated with the visual display and presentation of merchandise.

l) the production of tickets and/or show cards.

The functions set out in this sub clause include the work of soda fountain and/or milk bar assistants, messengers, checkout operators, persons employed on information desks or booths, refund assistants, persons employed on service desks, persons employed as bag checkers in or about the entrance to stores, persons employed on customer service or as door greeters, persons employed as lay buy attendants, persons employed in hiring out activities in a shop, persons engaged in the cooking and/or preparation of provisions for sale in a shop, persons engaged to collect trolleys by any means, persons engaged as spruikers in shops, persons engaged in operating photographic processing machinery, store persons, dispatch hands, packers, canvasses, collectors, window dressers, visual merchandisers and ticket writers.

(3) Retail Employee Grade III shall mean an employee engaged in retail service functions including office and or/cashier duties or maintaining the pricing file, in store ticketing or office technology functions and who may also perform the duties of a Retail Employee Grade II on a needs basis.

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

J A SPURLING
REGISTRAR
9 June 2003

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2003 WAIRC 08325

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE AND HON ATTORNEY GENERAL, RESPONDENTS
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 15 MAY 2003
FILE NO/S.	PSACR 9 & PSACR 10 OF 2003
CITATION NO.	2003 WAIRC 08325

Result	Applications dismissed.
Representation	
Applicant	Mr M. Amati
Respondents	Mr E. Rea (as agent)

Reasons for Decision

1 These are two applications by the Civil Service Association of Western Australia Incorporated against the Director General, Department of Justice and the Hon Attorney General, as the Minister for Justice, in relation to eight employees of the Hon Attorney General employed as Group-Workers at the Killara Youth Support Centre.

The Facts

2 It is agreed between the parties that the employees are all government officers pursuant to s.80C of the *Industrial Relations Act 1979*. The employees are permanent employees and have been working at the Killara Centre for between 7 and 12 years with the formal title of "Killara Group-Workers", Level 2. As a precondition for them being deployed at Killara, the employees have passed an internal merit based selection process based on the duties and responsibilities allocated to them. Although each employee is substantively a Group-Worker, since June 2002 these employees have been working as, and being paid as, Juvenile Justice Officers by completing higher duties allowance forms at the request of their employer.

3 I also find from the evidence of Ms Annette Wells, the Director of Community Justice Services for the Department of Justice, that a decision was taken to create new positions of Juvenile Justice Officers. Ms Wells' evidence of the reason for that decision is that presently the Group-Workers are located at Killara pursuant to a two year transfer option. In this regard, the Killara Centre is able to access staff who work at the detention centres. However, experience has shown that the detention centres' needs come first and the Killara Centre has had difficulty selecting the staff it requires. An advantage of creating and advertising new positions to create a permanent classification at the Killara Centre is that this problem will be overcome.

4 Further, Ms Wells' evidence was that the Group-Workers did not want to go through the selection process every two years. This issue also will be overcome.

5 I find as a fact that up to 12 positions of Juvenile Justice Officer Level 3/4 based at Killara have been created and advertised.

6 Correspondingly, a decision has been taken that any Group-Worker who is unsuccessful in being selected for one of the Juvenile Justice Officer positions will remain as a Group-Worker but is likely to return to a detention centre.

7 Ms Wells' evidence was that the duties of Group-Workers working in a detention centre and Group-Workers working at the Killara Centre are distinctly different. That evidence is similar to the evidence of Mr Michael Davies who is presently the acting manager at the Killara Centre but who is substantively a Group-Worker. Mr Davies' evidence is viewed by me as being representative of the Group-Workers at the Killara Centre generally.

8 Mr Davies' evidence was that he first worked at the Killara Centre in 1994. He last applied for one of the positions there in 1996. His evidence was that in reality the Group-Workers were not applying for positions every two years but rather "going through the motions" every two years.

9 Mr Davies' evidence was that on 21 June 2001 there was a change from being employed by the Ministry of Justice to working in a public service position. The Group-Workers were put on higher duties. Mr Davies regards himself now as being paid pursuant to the *Public Service Award 1992*. In Mr Davies' view, he still performs the same work, works with the same people and has the same supervisors and whether Group-Workers are employed by one employer and Juvenile Justice Officers are employed by a different employer makes no difference.

10 I have referred to Mr Davies' and Ms Wells' evidence for these two particular and critical, conclusions:

11 1. As a matter of fact, up to 12 new positions of Juvenile Justice Officer Level 3/4 have been created and advertised.

12 2. They are positions subject to the *Public Sector Management Act 1994*.

The Claim

13 With those facts established, I now turn to consider the union's claim. The claim of the union is as follows—

> "The Civil Service Association of Western Australia Incorporated seeks an order in the following terms—
>
> > The Arbitrator hereby orders that the permanent officers working at the Killara Youth Centre, whose positions have been transformed from the Killara Group-Worker positions Level 2 to Juvenile Justice Officer positions, Level 3/4, be reclassified with the positions.
>
> The Hon Attorney General objects to and opposes the claim."

14 As will be seen from the structure of the claim, the union argues that the Group-Worker positions have been "transformed" into Juvenile Justice Officer positions. There is good reason in merit for the union to use that word. All of the evidence before the Commission shows that the Group-Workers at the Killara Centre have been performing that work for at least 7 to 12 years. There is not only no criticism at all of any of the Group-Workers, there is evidence that they are each highly regarded. The work they performed as Group-Workers and the work they perform presently acting in the positions of Juvenile Justice Officer are almost identical other than for an after hours crisis function, a function which I assess from the evidence as not being

significant for the purposes of the proceedings before the Commission. Further, and significantly as to merit, the evidence of Ms Wells clearly shows that the "employer" for the purposes of the Group-Workers and the "employer" for the purposes of the Juvenile Justice Officer positions, and indeed the decision maker for the purposes of the creation of the Juvenile Justice Officer positions, are effectively one and the same: the Department of Justice.

15 It is the legality of the situation where the union runs into some difficulty. It is unarguable that the Hon Attorney General is the employer of the Group-Workers and that the Director General of the Department of Justice will be the employer of the Juvenile Justice Officers. Detention Centres are created by s.13 of the *Young Offenders Act 1994*. Officers and employees are appointed by the Minister: s.11. The terms and conditions of employment of Group-Workers are governed by the *Institution Officers Allowances and Conditions Award 1977*. The award identifies the parties to the award as the Hon Minister for Community Development and the Hon Attorney General on the one part and the union on the other (following the variation at (1994) 74 WAIG 900). The "employer" defined in the *Group Workers General Agreement 2002* is the Minister for Justice (PSA AG 45 of 2002). The evidence before me is that the positions of Juvenile Justice Officer are created pursuant to s.64 of the *Public Sector Management Act 1994*. Their employing authority is, by s.5(1)(c)(i) of that Act, the Chief Executive Officer of the Department of Justice. The Hon Attorney General and the Director General are thus two different and separate employers.

16 Further, although the union claims that the Group-Worker positions have been "transformed" that word has no legal status. It is not a word that is used in the *Public Sector Management Act 1994* nor for that matter the *Youth Offenders Act 1994* or any subsidiary employment legislation. There has not been a transformation at law. There has been the creation of 12 new Juvenile Justice Officer positions.

17 The claim of the union is that the Arbitrator should order that the employees employed as Group-Workers (and who are acting in the Juvenile Justice Officer positions) should be reclassified as Juvenile Justice Officers Level 3/4. However, the claim can only be considered if the Arbitrator has the power to make the order sought. I turn to consider the Arbitrator's powers.

18 The powers given to a Public Service Arbitrator are as follows—

"80E. Jurisdiction of Arbitrator

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

(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —

(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a Government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and

(b) a claim in respect of a decision of an employer to downgrade any office that is vacant.

…

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

…

(7) Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act."

19 As to the jurisdiction in s.80E(1) I have no difficulty agreeing with Mr Amati's very able submission that the union's claim is an "industrial matter" as that is referred to in s.80E(1). Indeed, the respondents in these proceedings do not argue otherwise. However, by subsection (5) the powers given to the Arbitrator do not affect or interfere with the respondents' exercise of the powers in relation to the union's claim, but any act, matter or thing done by the respondents in relation to the industrial matter is liable to be reviewed, nullified, modified or varied by the Arbitrator in the course of the exercise of the jurisdiction.

20 I suspect, for example, that the creation by the Director General of the Juvenile Justice Officer positions is an act, matter or thing that is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise of the Arbitrator's jurisdiction. However, the union does not ask the Arbitrator to interfere with the creation of the Juvenile Justice Officer positions. Rather, the union's claim accepts that the positions are created. The union's claim is for an order that the employees employed as Group-Workers be reclassified with those positions.

21 Although the Public Service Arbitrator has the jurisdiction in s.80E that I have outlined above, it is the case that an Arbitrator exercising that jurisdiction does not have the power to make an order directing a public service employer to act contrary to his or her obligations under the *Public Sector Management Act 1994*. Indeed, it cannot be in accordance with equity, good conscience and the substantial merits of the case to do so: *The Ministry for Education and the Director General of the Education Department of Western Australia v. The Civil Service Association of WA* (1977) 2185 at 2187. In that case, the Arbitrator made an order that the Hon Minister for Education grant permanency to temporary Level 1 ministerial employees who had been employed in schools continuously for at least two years and grant permanent status to all Level 1 contract and temporary public servants with two years' continuous service. However, the ability of the Hon Minister for Education to grant permanency was governed by s.64 of the *Public Sector Management Act 1994* and it was held that the Arbitrator's order would have required the Hon Minister to act contrary to the *Public Sector Management Act 1994*. Accordingly, the Arbitrator's orders were quashed on appeal.

22 Therefore, it is necessary to examine whether the order sought would require either of the respondents to this matter to act contrary to the *Public Sector Management Act 1994*.

23 I turn to consider the relevant provisions of the *Public Sector Management 1994*. Those relevant provisions include the power to reclassify (as the union seeks by way of an order in these proceedings) and also the circumstances which arise from the fact that the Juvenile Justice Officer positions which have been created are new permanent positions in the public service.

24 A Chief Executive Officer of a Department or organisation has the function of classifying and determining the remuneration of employees in that Department or organisation and their offices, posts or positions: s.29(1)(h). The power is to be exercised by the Chief Executive Officer in relation to employees in the Department. In the present circumstances, the power to reclassify Group-Workers lies with their employer the Hon Attorney General. The power to reclassify Juvenile Justice Officers lies with

their employer the Director General of the Department of Justice. There is no power in s.29 for the Director General of the Department of Justice to reclassify Group-Workers employed by the Hon Attorney General because the Director General of the Department of Justice is not the employer of the Group-Workers. In any event, as Mr Rea submitted on the part of the respondents, the positions of Group-Worker have not been reclassified.

25 In fact, what has occurred is that new permanent public service positions have been created. By s.64(1) of the *Public Sector Management Act 1994* the appointments to those positions must be in accordance with approved procedures and the relevant vacancies have first to have been advertised in a daily newspaper. I find that for the Arbitrator to order the reclassification of Group-Workers so that they become permanent public service officers would be to require the Chief Executive Officer of the Department of Justice to act contrary to the *Public Sector Management Act 1994*. That is something that is beyond the powers given to a Public Service Arbitrator.

26 Effectively, to grant the union's claim would be to require the Chief Executive Officer to appoint Group-Workers to the vacant public service positions without following the approved procedures which he is required to follow by the *Public Sector Management Act 1994*.

27 Mr Amati, appearing for the union and on behalf of the Group-Workers, has argued passionately to the contrary. Mr Amati maintains that the Group-Worker positions have been reclassified. However, the facts are against this submission. The Group-Worker positions remain Group-Worker positions. They have not been reclassified.

28 He relies strongly upon "Approved Procedure 1 - Approved Classification System and Procedures", a Public Sector Management document (exhibit DOJ 2, tab 2). The last paragraph of that procedure is as follows—

> "Reclassification of the substantive holder of a reclassified job
>
> CEO's (or other relevant employing authorities) may approve the reclassification of the substantive occupant of a job, subject to compliance with Clause 8(1)(b) and (c) of the PSM Act, and provided that the officer has been in the position and undertaking the higher level duties that warranted reclassification of the position, for a continuous period of 12 months."

29 As its title indicates, that provision applies to the reclassification of the substantive holder of a reclassified job. On the facts of this matter, firstly, there is not a reclassified job. The job of Group-Worker has not been reclassified. It remains. Further, the position of Juvenile Justice Officer Level 3/4 is not a reclassification. It is a new and separate position. Secondly, the "substantive occupants" are Group-Workers. As Mr Davies' evidence acknowledges, his substantive position is Group-Worker, although the acting positions are, generally, the Juvenile Justice Officer positions. Therefore, the approved procedure relied on by the union relates to the reclassification of a Group-Worker within a Group-Worker position which has been reclassified. That has simply not happened on the facts in this case. Accordingly, Approved Procedure 1 does not provide a means whereby the Public Service Arbitrator can require the Director General of the Department of Justice to reclassify Group-Workers employed by the Hon Attorney General to Juvenile Justice Officers employed by the Director General.

30 It was next submitted that the Group-Workers meet the test in s.64(1) because they have already passed a merit based selection process. The requirement in s.64 requires the relevant vacancy to be first advertised in a daily newspaper circulating throughout the state. The evidence is that the vacant Group-Worker positions were not so advertised. Further, the appointment must follow the approved procedures. The order sought by the union would cut across those approved procedures.

31 The union submitted that s.37 of the *Public Sector Management Act 1994* provides for the absorption of government officers into the public service by a means other than s.64. Section 37 in fact provides a right of appeal in respect of an appointment as a public service officer of a person who was employed in an organisation immediately before the organisation became a part of the public service and the relevant employing authority determines that the remuneration payable to the public service officer shall be at a rate less than was payable to him or her as an employee of the organisation immediately prior to it becoming part of the public service. I am unable to agree with the submission that s.37 provides a means for the absorption of Group-Workers into the public service by a means other than s.64.

32 It was also submitted that when the 16% Commuted Overtime Allowance is added to the Group-Workers' salary, Group-Workers have salary parity with Juvenile Justice Officers at Level 3/4. However, I am not persuaded this is so. The only true comparison is to be made by comparing the salaries, without adding allowances. That compares a salary of $39,946 for a Group-Worker with the Level 3/4 salary in the Public Service General Agreement of $44,972. There is not salary parity. In fact, the respondents' position that the appointment to Juvenile Justice Officer Level 3/4 is in effect a promotion for Group-Workers is made out.

33 The final submission with which I need to deal concerns the evidence of the appointment of Mr Flavell. Mr Flavell's circumstances were used as an example of how an employee of the Hon Attorney General was reclassified as a public service officer. The example of Mr Flavell was therefore heavily relied upon as providing the precedent to justify the granting of the orders sought in this matter. The evidence before me is the evidence of Mr Flavell himself, the evidence of Ms Mitchell (who had some limited knowledge of Mr Flavell's position) and the letter to Mr Flavell confirming the arrangements (exhibit DOJ 1). From all of that evidence, it is apparent that what in fact occurred was not a reclassification as the union now seeks for Group-Workers. The facts show that Mr Flavell became a re-deployee who was transferred into an equivalent salary position. Therefore, Mr Flavell's circumstances do not amount to a precedent which can be followed by the Public Service Arbitrator in this matter. The facts are not the same.

34 I have therefore reached the conclusion that the union's claim is not able to be granted by virtue of the legislative requirements for the appointment to public service positions. In reaching this conclusion I wish to record that I do so with some regret. The evidence overall shows the merit overwhelmingly in the union's favour. The creation of the Juvenile Justice Officer positions by effectively, although not legally, the same employer is for the purpose of ensuring some permanency for the workforce. As a result, as the evidence of Mr Davies illustrates, the Group-Workers are now obliged not just to apply for positions in which they have been acting satisfactorily for some years, they are obliged to undergo an interview process which for some, at least, is of itself a distressing experience. I fully understand and appreciate the evidence of Mr Davies that he is distressed at having to compete on his ability to apply for a job rather than his ability to do the job. It also seems to him farcical that if he is not successful he is to return to a detention centre doing the job he was last doing 12 years ago and for which he would require retraining. For him to be a manager at the Killara Centre one day and to not be able to get a job there the next day is inexplicable.

35 Whether that happens in the case of Mr Davies, or any of the others on whose behalf he so eloquently spoke, remains to be seen and is not a matter for these proceedings. I add that had the evidence before me about the reason for creating the Juvenile Justice Officer positions not been as plausible as it is, the union would have been entirely justified in criticising the creation of the Juvenile Justice Officer positions in principle. That criticism has not occurred and would not be valid if it had.

36 For all of the above reasons the order which can issue from these proceedings will dismiss the union's applications.

———

2003 WAIRC 08326

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 15 MAY 2003
FILE NO.	PSACR 9 OF 2003
CITATION NO.	2003 WAIRC 08326

Result	Application dismissed.
Representation	
Applicant	Mr M. Amati
Respondent	Mr E. Rea (as agent)

Order

HAVING HEARD Mr M. Amati on behalf of the applicant and Mr E. Rea (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby order—

THAT the application be dismissed.

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

_____

2003 WAIRC 08327

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	HON ATTORNEY GENERAL, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 15 MAY 2003
FILE NO.	PSACR 10 OF 2003
CITATION NO.	2003 WAIRC 08327

Result	Application dismissed.
Representation	
Applicant	Mr M. Amati
Respondent	Mr E. Rea (as agent)

Order

HAVING HEARD Mr M. Amati on behalf of the applicant and Mr E. Rea (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby order—

THAT the application be dismissed.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2003 WAIRC 08427

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RUSSELL SHAUN BROWN, APPLICANT
	v.
	RCR TOMLINSON LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 12 MAY 2003
FILE NO.	APPLICATION 231 OF 2003
CITATION NO.	2003 WAIRC 08427

Result	Referral out of time not accepted
Representation	
Applicant	Mr RS Brown
Respondent	Ms L Gibbs of Counsel

Reasons for Decision

(Given extemporaneously and subsequently edited by the Commissioner)

1 On 25 February 2003 the applicant, Mr Russell Shaun Brown, made application to the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") alleging that he had been harshly, oppressively and unfairly dismissed by the respondent, RCR Tomlinson Ltd. He also claimed certain contractual entitlements; they being, as per paragraph 24 on the notice of application—

> "$6500 – Redundancy this would have had to be paid under RCR's new workplace agreement.
>
> $3200 – For Accrued Sick Leave which was wiped out.
>
> $4800 – For Long Service Leave which soon would have been on a pro rata.
>
> $10000 – For financial hardship due to my new job paying much lesser for the same work. It will take a long time and cost me a lot more than $10000 to get back that has been taken from me."

2 Section 29(3) of the *Industrial Relations Act 1979*, is a provision inserted to provide for a discretionary decision by the Commission to accept an application beyond the 28 days time limit where, in the Commission's view, it would be unfair not to do so.

3 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".

4 Prima facie, however, by virtue of the time limit, a matter is required to be within time unless of course there is good reason for it not to be so, and in that sense all applications are to be treated expeditiously.

5 The considerations relevant to whether it might be considered unfair not to accept the application are covered in the decision of the Senior Commissioner in *Anthony William Andrew v Metway Property Consultants and Auctioneers* 82 WAIG 3260, and the decisions therein referred to, being *Clark v. Natures Cargo (1999)* 95 IR 201 *and Clark v. Ringwood Private Hospital (1997)* 74 IR 413. The factors to be taken into account, which are the factors that I consider relevant, are whether there is 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 or she contested the termination, and the prejudice to the respondent. They are factors that are well covered in those decisions, and should be applied in this instance.

6 I have no issue with the credibility of the witnesses. On the evidence before me I find that the application is 74 days out of time; the dismissal having occurred on 15 November 2002 and the application having been received and stamped by the Commission on 25 February 2003.

7 The decision in *Anthony William Andrew v Metway Property Consultants and Auctioneers* 82 WAIG 3260 was referred by the Commission to the parties in advance of hearing for them to consider. Let me first go to the question of length of delay. Given a 28 day limit applies, the delay in this case is excessive. The applicant, in his evidence, says that he took steps to put the application in on time being 13 December 2002. I do not doubt that. As I say, his evidence is credible. His signature on the bottom of the application was originally dated 11 December 2002. He says that on advice he did not put the application into the Western Australian Industrial Relations Commission (WAIRC) and instead lodged an application with the Australian Industrial Relations Commission. I accept that evidence, and albeit he received wrong advice, he took timely steps to pursue the application.

8 The applicant's evidence is also, however, that once advised prior to Christmas that the application was challenged by the respondent, and part of the challenge being on jurisdictional grounds, he then rang the Commission. At that stage prior to Christmas he knew there was a jurisdictional challenge to his application and took no further steps at that point in time to clarify his application, or to make this application.

9 Likewise, what is also relevant, is that he missed the hearing on 4 February 2003 in the Federal Commission. I do not know why the applicant did not attend the Federal Commission other than he says that he was not aware of it. Having missed that hearing there is then a delay of 21 days from 4 February 2003 up until 25 February 2003 before the applicant took steps to correct the application.

10 Now, all of that, in my view, is not an adequate approach to pursuing the application, given the 28 day time limit. There is good reason for the limit and that is that applications before the Commission should be treated with some expedition, especially as the remedy of reinstatement is the prime remedy. What is relevant in the issue of delay is that pre-Christmas the applicant knew that there was a jurisdictional challenge and approximately 10 weeks after he lodged the application. That is the query I have in respect of whether the delay is acceptable and I do not find it to be so. Likewise, I do not find the steps taken to be adequate.

11 The prejudice to the respondent is that they have to face an application which is well and truly out of time. The evidence of the applicant and of the respondent is that there was a downturn at the time of dismissal and the applicant was made redundant.

12 The respondent says, and Mr Ramshak's evidence in cross-examination by the Commission is quite plain, that Mr Brown was a good worker and good on the machines; but Mr Brown was chosen because he was displaced from night shift and hence was not on a particular machine. There were also other people made redundant at that time.

13 Now, for the application to succeed the applicant would have to show that another employee should have been made redundant (*Amalgamated Metal Workers and Shipwrights Union of Western Australia & the Operative Painters and Decorators Union of Australia, West Australian Branch and Australian Shipbuilding Industries (WA) Pty Ltd* 67 WAIG 733). I find that this termination was a true redundancy. I very much doubt on the evidence before me that Mr Brown could show that it should have been another employee. That is not in any sense to say he was not a good employee. The evidence of the respondent is that he was.

14 In terms of the requirements under the *Minimum Conditions of Employment Act 1993*, it is clear on the evidence of the respondent that Mr Brown was advised of his redundancy shortly after the decision was taken; Mr Brown being on leave and then on jury duty, and advised at the first available opportunity when he returned to work. Quite clearly the term implied into the contract for the employer to ensure a discussion take place about the alternatives available to Mr Brown was not complied with. It may be that the dismissal then could be deemed to be unlawful, but in all the circumstances I would very much doubt that it could be considered to be an unfair dismissal and I would find that the dismissal was not unfair. The merits of the application weigh against the application being received out of time.

15 Even if the merits of the application were stronger, there is the question of loss. Mr Brown on his own evidence received employment on the Monday following. He does not seek reinstatement in his application. He received employment at approximately the same hourly rate. He was receiving an hourly rate in his application of $21.528. He now receives an hourly rate of $21.50. The loss, if there is any, is minimal. He received 4 weeks notice in payment which would have to be taken into account. The evidence is that there was a downturn in work and so regular overtime is not something that I would necessarily take into account in assessing loss.

16 For all of those reasons I consider that it would not be unfair for Mr Brown's application not to be accepted out of time and a declaration will issue to that effect.

17 The applicant has claimed contractual benefits. I very much doubt that the last two points of the claim being for long service leave and for financial hardship can be claimed. What I would intend to do is to convene in conference to deal with the other two matters in respect of redundancy and sick leave which are claimed as contractual benefits.

2003 WAIRC 08428

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RUSSELL SHAUN BROWN, APPLICANT
	v.
	RCR TOMLINSON LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 3 JUNE 2003
FILE NO.	APPLICATION 231 OF 2003
CITATION NO.	2003 WAIRC 08428

Result	Referral out of time not accepted
Representation	
Applicant	Mr RS Brown
Respondent	Ms L Gibbs of Counsel

Order

HAVING heard Mr RS Brown on his own behalf and Ms L Gibbs of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby declares—

THAT it would not be unfair not to accept Mr Brown's referral under s.29(1)(b)(i).

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

2003 WAIRC 08258

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IDA MARY CURTOIS, APPLICANT
	v.
	WONTHELLA HOUSE INC, GERALDTON SEXUAL ASSAULT RESOURCE CENTRE INC, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 7 MAY 2003
FILE NO.	APPLICATION 1816 OF 2002, APPLICATION 1927 OF 2002
CITATION NO.	2003 WAIRC 08258

Result	Reinstatement. Compensation awarded.
Representation	
Applicant	Mr D. Armstrong (of Counsel) appeared on behalf of the Applicant
Respondent	Mr E. Rea appeared on behalf of the Respondents

Reasons for Decision

(Ex tempore as edited by the Commissioner)

1 The Commission is dealing with two applications by Ida Mary Curtois (the Applicant). On 1st November 2002 she applied for orders pursuant to s.23A of the *Industrial Relations Act 1979*, (the Act), on the grounds that she had been unfairly dismissed

from employment with Wonthella House Incorporated (Wonthella House). The Applicant says that the grounds on which she makes the application is that the dismissal was harsh, oppressive or unfair. On 25th November 2002 she filed another application, this time against Geraldton Sexual Assault Resource Centre Incorporated (SARC). In that application, again, she seeks orders from the Commission for remedy under s.23A of the Act on the grounds that she was dismissed from employment with SARC in a harsh, oppressive or unfair manner.

2 First, some chronology: The Applicant commenced work with Wonthella House on or about the 16th of December 1999. She was employed as an Advocate Educator. The principal duties are contained in the duty statement before the Commission but they are advocacy, which includes preparation of affidavits for support in court cases for clients of Wonthella House and for clients of the advocacy service in connection with applications for restraining orders under the Restraining Orders Act. In addition, the position provides support relocating clients of the advocacy service who are in a domestic violence situation and liaising with relevant agencies to achieve those ends.

3 I will discuss the duties later. The Applicant had been employed since December 1999 and early in 2002, in April, she was engaged by SARC as a Crisis Line Counsellor. That employment complemented the work that she did with Wonthella House. Because of her personal circumstances, she worked part-time 3 days a week for Wonthella House; she had commitments which necessitated her being available to look after a potentially disabled foster child on other days, but she was able to operate the SARC crisis line the other 2 days of the week that she was not working for Wonthella House.

4 The Applicant provided her background to the Commission: It is relevant to this case. The Applicant has an extremely long history in the care industry, I hope that is not an offensive way to describe it. From 1980 she was president of the Foster Care Association that involved her in support and advocacy for children and families; liaison with government, production of handbooks, liaising with Ministers of the Crown, public speaking, generating public awareness of foster care. She also managed the Foster Care Association. In the years from 1986 to 1990 she had various placements with the-then Department of Community Development (DCD) with Ngala Mothercraft Centre as a social work student on a 14 week placement; other placements she had through DCD were part of her studies for a degree in social work which she achieved in 1990, when she graduated with Bachelor of Social Work (Curtin). She also worked as a social worker for DCD; she acted as a senior social worker in charge of child placement; she has worked as a local area coordinator with the Disability Services Commission and through until 1996 it appears as though she worked in the Geraldton area as a social worker with the Aboriginal Legal Services and also with the Geraldton City Council.

5 Here is a person who, with a strong background in social work focussed on work in disability services, fostering and family and children's services.

6 There is nothing in the history of the employment relationship with either Wonthella House or SARC adverse to the continuation of the relationship until 11th September 2002. Prior to that, on the contrary, the Applicant had at least three performance appraisals which were positive in her favour. But there were events preceding 11th September 2002 which caused Wonthella House on 11th September 2002 to suspend her on full pay for alleged breaches of her contract of employment. These were set out in a letter from Wonthella House of 11th September 2002 (Exhibit A10), which required that she answer the letter by 13th September 2002. The Applicant though had already written to the Respondent by that time (Exhibit A9) about the events which were the subject of complaint.

7 On 13th September 2002 (Exhibit A11) the Applicant sent a letter in detail denying any misconduct as had been alleged against her. For reasons that I will touch upon later, it took until 8th October 2002 (Exhibit A13) for the Respondent to get back to the Applicant and inform her that she had until 14th October 2002 to show cause why her contract of employment should not be terminated.

8 According to the Applicant's Counsel, Mr Duncan Armstrong, and I interpolate here on legal advice, she did not add further to the response that she had been given earlier to the Wonthella House because that response was on her view, and on the view of her advisers, adequate. In the event she did not respond further. Whether that was prudent or not I will discuss in due course.

9 On 14th October 2002 (Exhibit A14) there was another letter sent to the Applicant. She was asked to return her keys and she later received a pay-out of salary and annual leave, some time in the next week, probably on 22nd October 2002.

10 The allegations which were made by Wonthella House against the Applicant and answered by her in her various correspondence were such that Wonthella House decided to terminate her employment. As I understand it, the dismissal was predicated upon the dealings that the Applicant had with a family that had been known to her for a long time in her function as an advocate, both with Wonthella House and with previous employers. It was a family which resided trust in the Applicant and had sought her help. The Applicant in relocating this family, on the allegation of Wonthella House, put herself and employees of Wonthella House at risk and thereby was in breach of a number of rules which are detailed in the letter sent to the Applicant by Wonthella House on 8th October 2002 (Exhibit A13).

11 Suffice to say, the Applicant has denied, and continues to deny, that she committed any misconduct and on the contrary that she acted in accordance with her professional judgment at all times and with as much consultation as she was able to arrange with her employer during a period of crisis in dealing with a family over this weekend of 7th and 8th September 2002.

12 Insofar as her employment with SARC is concerned, that was brought to an end upon the presumptions which were used in the Wonthella House dismissal to the extent that the Applicant is alleged to have breached a rule not to allow anything else she does to interfere with her ability to take calls on the SARC Crisis Line. The Crisis Line Counsellor carries a mobile telephone and is paid a small hourly payment to do so. The counsellor is not restricted in the location other than from having to remain within the mobile service area. It should be said at this stage that it was not the usual practice for the Applicant to answer the Crisis Line calls over the weekend, but due to circumstances she had been asked by whoever supervised her duties at SARC to carry the phone over the weekend. And it seems that it would not be unknown to Wonthella House that the Applicant had a relationship with SARC as an employee answering the phone, if I can put it that way, because as it turns out SARC has been merged with or taken over by Wonthella House so that it's operations have now been absorbed into the Wonthella House operations. For all intents and purposes Geraldton's SARC has ceased to exist.

13 I had the opportunity to hear evidence from the Applicant; the evidence was extensive. There was a detailed examination in-chief by her Counsel and a thorough cross examination by Mr Rae who appeared for Wonthella House. What I gather from the evidence she gave is this: She had known the family in question for a long time. The family, and particularly the seven children, reposed a considerable amount of trust in her. The partner of the mother who is the father of the youngest five of the children was from time to time in prison for drug use and on other offences including breach of restraining orders. His treatment of the children's mother was extremely violent. It was not said though that he was violent towards the children. But his conduct was such that over the time that when he was last incarcerated the Applicant obtained violence restraining orders against him on behalf of some, if not all, of the children. It may not be all, but at least some of the children. From time to time over the last 10 years the Applicant had assisted this family when they were in crisis in various ways, such as repairs to the house when it had been damaged; replacement of chattels which had been wrecked by the mother's partner and that kind of

thing. It is the Applicant's contention that apart from one other care worker in the town, a person by the name of Chris Hall from Westview, she was the only person in whom the mother reposed trust and significantly she was the only person that the children trusted.

14 In the first week of September 2002, while the Applicant was at work, there had been contact from the mother. The father was to be released from gaol. There were arrangements in place for her to be informed. The mother thought that the police would tell her that he was to be released, however they did not and he was released. The mother became aware through an attempt made to force entry into her house and made contact with the Applicant for help.

15 This request for help was processed in what I understand to be the normal way; there were discussions about it at Wonthella House and on the Wednesday and Thursday preceding the weekend of 6th September 2002, about what could be done to assist the family. Ms Quinn the Manager of Wonthella House was involved in those discussions, so was Ms Dymock the case manager. On the Friday preceding the weekend in which the events took place, Ms Quinn was concerned that the Applicant had too much involvement in the affair and for her own good she should go home and ordered her, I suppose, is the better way to describe it, to do so. Before the Applicant did she was authorised to make a couple of phone calls to see if a placement could be arranged for the family the Eastern States (see Exhibit A8 which sets out the telephone numbers).

16 The Applicant had commenced her weekend break. She had the SARC mobile phone because she was on call; she received no calls on the Saturday on the crisis line. She had every intention on the Sunday of enjoying lunch at a beach in Geraldton with her family - her extended family, actually. On the Sunday morning she received a phone call from Chris West to tell her that the children's mother ('A') had been in contact looking for the Applicant. 'A' had done so because she knew that Chris would have a way of contacting the Applicant. The message was that the kids needed to be removed from the house to a safe place immediately. 'A' told Chris West that she knew that would mean involving the police and that for her own safety, 'A' was then going to the refuge operated by Wonthella House. The Applicant then rang the refuge and spoke to Helen Dominco. Ms Dominco is a refuge worker who was not on duty at the time but was at the refuge doing some follow up on an event which had happened the night before. When the Applicant reached the refuge; there was a discussion between her and Helen.

17 The Applicant says that Helen had checked to see if there is room available at the refuge and there was. The Applicant made various other phone calls to Chris West and other agencies to investigate their capacity to help for the children. The Applicant had her own motor vehicle with her and she says that when she said that was not big enough, Helen offered her the keys of the Wonthella House vehicle which was of a suitable size to go and pick the children up from their home.

18 The Applicant says that she left the refuge and went around to the police station to arrange a police escort. She says that she spoke to Constable Balfour who said that an escort would be provided and that she should go to the vicinity of the house where the children were and wait for the police. This she did. In the meantime she dropped 'A' off at a place the location of which was not given in evidence. She dropped 'A' off somewhere. I am also not sure what the mother intended to do. The evidence of the Applicant is that 'A' thought the children would be safer if she was absent while they were picked up. The Applicant went to the house but she did not attempt to approach it; she waited for the police. She parked around the corner from the house out of sight. From this location she made a number of phone calls to the police to see where they were because they did not attend when they said they would. After she had been there some time, she saw two of the children out on the street. One of them recognised her car and came to her; she spoke with the child and from that conversation she gleaned that no one had been at the house since the mother had left. She had been waiting for some time so she made a judgment that she would go to the house and pick the children up. She rang the police and advised her intention. The police officer agreed on the basis that the Applicant would call when she had collected the children and the police escort would then stand down. All of these telephone calls were made on the SARC mobile and would be verifiable from the telephone account.

19 The Applicant picked the children up but she did not take them straight back to the refuge at Wonthella House because she was of the belief that 'A' would need to be present for their admission. Whether she is right about that, I do not know, but that is her explanation. The children were taken to her family function for the purpose of feeding them. It was past their lunchtime and they needed to be fed. The Applicant took them to a place where she thought that they could be fed in safety and they were.

20 She also and clearly says that she collected the children from their home because she did not think they would go with anyone else. This was predicated upon her understanding of the trust that they reposed in her.

21 The Applicant eventually phoned Wonthella House. She was told that Ms Quinn and Ms Dymock were then on site and she then passed the message that she would return forthwith. And this is what happened. She left the children at the refuge and then went about her business. The Applicant says that Ms Quinn was not at all happy with the events on the Sunday and told her so. Ms Quinn told her that there were safety issues involved and that she could expect a warning for her conduct because what had happened was, on the face of it outside, a number of the policy rules of Wonthella House. The Applicant thought about what Ms Quinn had said and decided to pre-empt the warning by writing a letter to Ms Quinn and she did so. The letter was sent forthwith. Later, on 11th September 2002, she received a letter to which I referred earlier which specified the allegations that Wonthella House made against her. Those allegations are set out in Exhibit A10 and they are wide-ranging. There was a complaint that the Applicant did not clarify to other agencies that she was acting in her own capacity and not for Wonthella House; that she inappropriately used a government vehicle; that she attended a house without a police escort and entered into premises. This was said to be high risk activity and was in contradiction of Wonthella House policy and procedures. That without the mother present, the children were taken by the Applicant to a personal function in the Wonthella House van; that the workers at the refuge were placed at risk because of an allegation that people armed with guns were watching the house; that the Applicant was, in any event, not employed by Wonthella House as a refuge worker and she could have placed the Board in jeopardy of legal actions by her conduct and that she was not contactable during the duration of her actions on Sunday 8th September 2002.

22 The preceding is a sufficient resume of the factual matrix of the events. I will now deal first with the Applicant's dismissal from SARC.

23 The Applicant was dismissed because of something that did not occur. She was dismissed because if she had not been able to answer a phone call that came, she would have been in breach of SARC policy. She never received a phone call but she had the SARC mobile in her possession over the whole of time the events transpired. The whole basis of her dismissal is misconceived. How it can be said that she has misconducted herself when there was never any demand for her services, because after all she was only on call and was not called, is a mystery to me. It seems when put together with the rest of this story that it was decided, "Well, if you're going from Wonthella House, you're going from SARC as well" and that is what happened. That dismissal is clearly on any application of the test of a fair go all round, misconceived and therefore unfair. I will come back to SARC later.

24 I will deal now with Wonthella House. I have had the opportunity of listening to a number of witnesses in this case. I must make findings about their credibility. I have no hesitation in finding that the Applicant is a truthful witness and so is Ms Quinn. They might have different views, but they told me the truth as they see it. I am not so happy about the evidence of Ms

Dymock. Ms Dymock was evasive. She eventually reached a conclusion where I think she thought she could frankly answer questions put to her by Mr Armstrong but I am concerned about the quality of her evidence in general. The evidence of Helen Dominco was truthful and corroborated by the Applicant's version of events at the refuge when Ms Dominco was present.

25 There is not a lot of difference about the facts of what occurred in terms of picking the children up and taking them, eventually, to the refuge. It is interpretation upon the conduct of the Applicant by Wonthella House which has led to this proceeding.

26 I think this case has to be viewed on the following basis: Here is a person, the Applicant, who has got over 25 years experience in dealing with children at risk, domestic violence and people who are dysfunctional. Not only has she had the experience with a wide group of employers, she is highly professionally qualified as well. She acts within a professional code of ethics and clearly is a person who has dedicated her life to this vocation, if I can call it that, because I think that is what it is to her.

27 This vocation is a difficult one to follow. It is trying and emotionally draining and it needs strong people who will make decisions to do it well.

28 The Applicant had formed a professional relationship with this family, because that is all it was, over a long period. I think her relationship with them and the context in which she could place that relationship, given her experience, placed her in a position where she could make sound, reasonable judgments about what she needed to do to help them. One thing is clear about the social work professional, is that people in crisis do not necessarily have problems between 8.00am and 5.00pm. People's problems visit them at any time of the day or night, and even on weekends. When people need help that is when the help needs to be delivered. That is not to say that an employee is at large to do whatever they feel like but in this industry, one needs to view it in a different light to how one would deal for instance with psychologist in a hospital on day work or in many other of the paramedical professions.

29 The Applicant had been told by the mother of the children that she was in distress because she knew that her partner, the father of some of the children, was out of prison and she thought he had tried to break into the family home. This was likely because he had threatened her with violence and worse because he believed he had been incarcerated because she had cooperated in the issue of Restraining Orders against him. She was frightened and she needed help. The Applicant then commenced, properly through Wonthella House, to help her and everyone involved was working to that end. This need for help became a crisis on the weekend when somehow or other the mother thought that, although her partner was in Kalgoorlie, he had arranged for other people to watch her, that these people may be armed with firearms, that they were people who one could expect might be armed because of their background and she was terrified by this. She tried to contact the Applicant for help and eventually did.

30 According to the Applicant, whose evidence I believe about this, 'A' was extremely distressed and worried and the Applicant, even though she was on her Sunday off with her family, decided she had to respond to the plea for help. She did so by going to the refuge and meeting with 'A'. This meeting occurred in the presence of refuge worker Helen Dominco who, while technically not on duty, I suppose was on duty because she was at the refuge doing a follow-up work from the night before. It is open to find and I do that Ms Dominco suggested that the Applicant use the Wonthella House vehicle because it was capable of carrying 7 children. I do not think by any stretch of the imagination one could say, as is alleged against her, that she illegally used a government vehicle or 'incorrectly obtained the use' is how it is described. There is no way that that contention can be sustained. The vehicle was taken with consent of a servant of Wonthella House to deal with the situation as it arose. The Applicant knew that she had to contact the case manager Ms Dymock and when she was able, she did.

31 The Applicant went to pick up the children. She did not immediately approach or enter in the house, as the allegation appears to be against her. She went first to the police and sought assistance and back-up. It is notorious that police, not only in Geraldton but in many places in this State, just cannot attend every incident at the time that it is notified. In this area there is probably one policeman for every 25,000 people. They cannot immediately respond to every call. The Applicant, an experienced person, knew this and went and waited for the police to arrive. She kept in contact with them. I accept her evidence that she did and that was evidence which could have easily been checked by looking at the SARC telephone records. There is no evidence this was done. It was a reasonable thing to expect to be done by Wonthella House if the result of disbelieving the Applicant is that she would be sacked.

32 The Applicant did not immediately enter the house. She waited nearly 2 hours before she did and then only having reasonably informed herself by talking to one of the kids that it was safe to do so. She did not blunder into the house. She was aware, and I accept her evidence that she was aware, that this was a potentially dangerous activity and that she took no more risks than it was necessary that she take in order to protect these children. She did not then enter the house without making sure that if anything happened to her, the police would know where she had been and would be able to locate her and she did that by ringing Constable Bazzard, a female constable, telling her that she was going to enter the house and the constable said, "Okay, you do that and - - " in other words, those who were to provide the escort agreed with her that she should extract the children. The children were picked up from the house, the Applicant took them to her family to feed them. She may have been misguided in this. It may well be that if she had taken them to Wonthella House they could have been fed there, but she was honouring an agreement that she had with the mother that she would wait for the mother to come back so the mother could be with them for their admission. It is upon the honouring of such agreements that the trust between the Applicant and the family had blossomed.

33 All these were decisions she made as part of dealing with the problem that confronted her, the nature of which she had 25 years experience and training to deal with. The children were eventually admitted, if that is the right word, to Wonthella House refuge. There was much made by Wonthella House about security, men with guns. What concerns me about Wonthella House's complaint about the Applicant's conduct over the Sunday, and that she was doing things without authority is that if it was so dangerous, it is very difficult for me to understand why they did not communicate this apprehension of danger to the police and make more efforts than they did to find her. In reality they sat around waiting for her to turn up. The allegation about the need for additional security was continued when the children were in the refuge but the evidence of Ms Dymock is that the reason that an extra care worker was on, because 'A' was giving them trouble. There was nothing done about security on the basis that there were men with guns. One would have thought if there were men with guns and the children were then located in the refuge, that the police would have been told that "There are men with guns" and they could have mounted whatever operational action that they thought appropriate, but they did not do that because it was never told about it. The inaction of the Applicant's Wonthella House superiors is completely at odds with their assessments of the danger. Assessments on the basis of which they have sacked her.

34 The case resolves down to, was the conduct of the Applicant justifiable in the circumstances and were appropriate investigations undertaken or made by the Respondent? It is clear that an employer has to satisfy themselves that what an employee has done was not reasonably open. It is also clear that an employer is not a policeman or a lawyer, they do not have to satisfy themselves to the standards that this Commission does or a lawyer might, as to the truth or not of a particular set of circumstances which have arisen in the workplace. What they have to do is satisfy themselves that there was a reasonable apprehension that a course of events might happen (see *Bi-Lo Pty Ltd v Hooper (1992)* 59 SAIR 342 @ 352-3). That does not diminish the responsibility on them to ensure that there is a proper investigation as to whether the employee's conduct was

reasonable. In this case they should have taken into account that the Applicant was a very experienced, highly qualified person; that she had been dealing with this family for 10 years and she had been called on her day off to deal with a crisis situation and that she took all reasonable precautions for her safety and the safety of the children by going to the police. Whether or not the police could respond is not really the issue. The fact of the matter is that the Applicant still did not act until she was reasonably sure that she could safety extract the children from their house. She made all these decisions in a crisis situation calling on her professional qualifications and over 20 years experience. Qualifications and experience that with respect, far exceed those of her manager and the case manager.

35 There should have been at least an attempt made to check the veracity of her contentions for instance, it would have been easy to check if she had made all the various telephone calls to agencies and the police. Or the police could have been asked to verify their involvement. All of these checks would constitute actions that an employer should take to see if the conduct of an employee was reasonable. However I look at this dismissal, I cannot see that it can be said that the conduct goes to the root of the contract of service such to justify summary termination. Because this was a summary termination it must be unfair because it lacks the necessary ingredient of a fair go all round.

36 If I am wrong and if the termination was not summary and was a termination on notice, on the above findings there are still insufficient reasons for the employer to justify the termination and because of that, on application of the principle in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385, the termination also lacks the necessary ingredient of being a fair go all round and therefore was unfair. And I so find.

37 The question of remedy arises. The primary remedy established under the Act is reinstatement. The Commission is only, on a finding of unfair dismissal, able to consider compensation if it, on its own investigation, finds that reinstatement would be unavailing (s.23A). The best evidence I have about whether that might be the case or not is from Ms Dymock. It is clear from her evidence that she would not have any problems working with the Applicant. On the other hand Ms Quinn does not want her back but in my view, the amount of contact that Ms Quinn needs to have with her is considerably less than the case manager. I intend to order the primary remedy of reinstatement and I expect that Ms Quinn as a professional person will work to make the relationship happy and fruitful for both parties.

38 I need to say this though, that an employer can have a reasonable expectation that its policies are adhered to and that it would be in everyone's interests that upon resumption of work that the Applicant undergo training and exposure to those policies. I intend to order that in the order that I will issue for her reinstatement. I intend to order that the Applicant be reinstated within a period of 14 days from this date. I will issue interim orders to that effect. I intend to make in those orders that the employment contact deemed to be continuous for the purposes of the assessment of sick leave, annual leave and the like. I do not intend to make an order for compensation in the form of money in respect to Wonthella House.

39 When these Reasons were delivered viva voce I reserved the right to comment on other issues. The question of remedy concerning SARC is one. I have recorded earlier in these Reasons that for all intents and purposes SARC has been absorbed within Wonthella House its operations have ceased. This means that reinstatement is unavailable.

40 Mr Armstrong submitted that although SARC has ceased to operate as an entity its estate, if I can describe it that way, is now contained within the funds of Wonthella House. There is no reason why, as I understand the argument that an award of compensation should not be made against SARC. The Applicant is entitled to a remedy on the finding of unfair dismissal and as reinstatement is unavailable the Commission is empowered to and should make an order for compensation against SARC.

41 I have considered the argument and have concluded that the Applicant is entitled to remedy. Reinstatement is not available and in accordance with the powers contained in s.23A I will award compensation. The Applicant's lost is set out in Exhibit A17. I accept the calculations in that exhibit and the Applicant's attempts to mitigate her lost. She will be awarded 26 weeks at $110.57 or $2,874.82. In making this award I apply the principle that an employee who is unfairly dismissed and who is not reinstated is to be returned to the same position by award of compensation to that which they would have enjoyed but for the dismissal (*Boganovich v Bayside Western Australia Pty Ltd (1999)* (79 WAIG 8).

2003 WAIRC 08298

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IDA MARY CURTOIS, APPLICANT
	v.
	WONTHELLA HOUSE INC, GERALDTON SEXUAL ASSAULT RESOURCE CENTRE INC, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 12 MAY 2003
FILE NO.	APPLICATION 1816 OF 2002, APPLICATION 1927 OF 2002
CITATION NO.	2003 WAIRC 08298

Result Reinstatement. Compensation Awarded

Order

HAVING heard Mr D. Armstrong (of Counsel) who appeared on behalf of the Applicant and Mr E. Rea who appeared on behalf of the Respondent, the Commission pursuant to the powers vested in it by s.23A of the *Industrial Relations Act, 1979,* hereby orders:

1. THAT Ida Mary Curtois was unfairly dismissed from employment by Wonthella House Inc, on or about 14th October 2002 and with Geraldton Sexual Assault Resource Centre Inc, on or about 30th October 2002;
2. THAT Ida Mary Curtois be reinstated in employment with Wonthella House Inc within fourteen days of the date hereof;
3. THAT pursuant to the powers vested in it the Commission has decided in addition to making an Order under s.23A(3) that Ida Mary Curtois be reinstated, that it make an Order under s.23A(5)(a) to maintain the continuity of the employee's employment;

4. ON resumption of work the parties are to meet for the purpose of the Respondent Wonthella House Inc publishing to Ida Mary Curtois those policies and procedures it expects her to apply in the discharge of her functions.
5. THAT reinstatement to Geraldton Sexual Assault Resource Centre Incorporated is unavailing.
6. THAT Geraldton Sexual Assault Resource Centre Incorporated pay the Applicant $2,874.82 compensation.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 08406

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROY DAVIES, APPLICANT
	v.
	CARPET CALL WA PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 28 MAY 2003
FILE NO.	APPLICATION 2102 OF 2002
CITATION NO.	2003 WAIRC 08406

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr D. Schapper (of counsel)
Respondent	Mr M. Jensen (of counsel)

Reasons for Decision

1 The applicant in this matter, Mr Davies, was employed by the respondent from July 1991 until his dismissal on 17 December 2002. He was employed initially as the warehouse manager and then as the operations manager, a position which he held until his dismissal. In his capacity as operations manager for the respondent, his evidence is that he operated principally behind the scenes organising the operations side of floor covering purchase. He claims his dismissal was harsh, oppressive and unfair.

2 I find the relevant facts to be as follows. The respondent's complaints procedure prior to December 2002 had been in place for approximately 10 or 11 years. That procedure was as follows. Complaints by customers would be logged by Mr Davies. A copy of the complaint was forwarded to a consultant. The consultant would investigate the complaint and report back to Mr Davies. On the basis of the information provided, the respondent would determine whether the complaint was a matter going to the warranty of the manufacturer, whether it was a problem caused by the contract layers, whether the problem was of the type which would pass when the carpet had settled down or whether some other action should be taken. The consultant charged a fee to the respondent for each call-out plus one hour on site.

3 In December 2002 the WA General Manager decided that the system needed to change. The general manager is Mr Beyerman. On his evidence, in December 2002 he noticed on the monthly accounts report an entry of "internal erosion" of approximately $11,000 per month. He queried the entry with Mr Davies, who in turn referred him to the company accountant Mr Cox. Mr Beyerman discovered that the account entry covered, in part, the warranties unrecoverable relating to the fees paid to the consultant. He examined the consultant's file for a six month period, and rounded it off to an annual cost of $70,000 per annum.

4 He spoke to Mr Davies about the cost. It is reasonably agreed between Mr Davies and Mr Beyerman that Mr Davies indicated to Mr Beyerman that the figure seemed high given that the respondent recovered what could be recovered.

5 Mr Beyerman spoke to the Queensland and Melbourne operations of the respondent regarding their complaints procedure. His conversation with the operations manager in Melbourne was overheard by the owner of the respondent who is based in Melbourne. The owner is Mr Smith. Mr Smith then rang Mr Beyerman to ask what had been the purpose of his call. Mr Beyerman's evidence is that Mr Smith was amazed that the complaints procedure in WA operated so that the WA operation did not itself look at any of the installations nor manage the operations of the consultant. Mr Beyerman proposed a change based upon the manner in which complaints were dealt with in Queensland and Melbourne. He raised the matter at the management meeting on 12 December 2002.

6 The management meeting was attended by Mr Davies, Mr Beyerman, Mr Cox, Mr Johnston, Mr Ellis (the assistant to the accountant) and Mr Grigg (the contract sales manager). I have considered the evidence of that meeting. As a result of the evidence of Mr Beyerman, which is largely corroborated by the evidence of Mr Cox, Mr Ellis and Mr Grigg, I find that Mr Beyerman's proposal was as follows. Mr Beyerman stated to the meeting that there was no management of the complaint by the respondent before it was given to the consultant. Mr Beyerman stated that the amount of $70,000 paid to the consultant was unacceptable and would have to change. Even the respondent's contract layers had no opportunity to check the complaint before the consultant gave them a back-charge.

7 Mr Beyerman proposed that the complaints would first be given to Mr Davies. Mr Davies would look at them and determine from the basis of each complaint whether the cause was something that should go to the manufacturer or to the layers to be attended to. For those complaints where the cause was not clear, Mr Davies would contact the customer. This was estimated as requiring about four or five telephone calls per day. If there were to be any site visits necessary, Mr Davies would be requested to do two or three visits on a Thursday afternoon. The visits would be in the area where Mr Davies lived such that at the conclusion of the last visit he would merely go straight home. Mr Davies would be using the company vehicle which was part of his employment conditions. Those complaints that Mr Davies was not able to attend to would then be referred to the consultant.

8 Mr Davies' evidence of what was proposed at the meeting is significantly different with respect to the following. Mr Davies' evidence is that Mr Beyerman stated that the consultant would be terminated effective immediately (because it was to be prior to Mr Beyerman going on holidays) and Mr Davies was to take over the complaints. Further, Mr Davies denies that there was

any suggestion that any visits to be done by him would be those which could be in the vicinity of his home or to be done on the way home. Mr Davies is in no doubt whatsoever that the consultant was to be terminated and he was to take over the workload.

9 I have considered the oral evidence before me regarding what Mr Beyerman proposed at the meeting of 12 December 2002. I consider that all persons who gave evidence did so honestly to the best of their recollection. Nevertheless, I have not found Mr Davies' evidence more compelling than the evidence of Mr Beyerman, Mr Cox, Mr Grigg and Mr Ellis. I find on the balance of probabilities that the proposal brought to the meeting by Mr Beyerman is as Mr Beyerman's evidence would have it.

10 I return to the balance of the meeting. It is common ground that Mr Davies refused the proposition put by Mr Beyerman. He believed it was fallacious, that his workload was higher than either of his other State counterparts and that he was too busy to pick up the additional work. Mr Beyerman indicated that with this procedure, possibly half the complaints might not require Mr Davies to do anything at all. Further, if it was the Thursday afternoon which was a difficulty, it could be changed to any particular afternoon. Mr Beyerman indicated that he would sit in Mr Davies' chair for that afternoon to deal with most of the things that Mr Davies would otherwise have dealt with.

11 Mr Davies tendered to the meeting a document he had himself prepared in anticipation of the agenda item following Mr Beyerman's initial comments to him prior to the meeting regarding the monthly account figures. Mr Davies' calculations showed that far from the consultant costing the respondent $70,000, after the respondent recovered the amounts from warranty or layer rectification, the true cost of the consultant was in the order of $28,000.

12 For his part, Mr Beyerman concedes that his costing was not accurate. In cross-examination, Mr Beyerman agreed that the consultant's actual cost may be some $25,000 to $30,000 per annum. In his estimate of $70,000, Mr Beyerman agreed he had not conducted an historical analysis. He realised that some of the payments to the consultant would be recoverable. His evidence is that it was the procedure that was weak and that his suggestions would introduce a more efficient practice of the respondent taking ownership of the complaints procedure. Therefore, Mr Beyerman would not have changed his proposal even if he had previously known the figures which Mr Davies produced. The process of handling the complaints needed to change from a "best practice" perspective.

13 Mr Davies' evidence is that he still refused. I am satisfied both from the evidence of Mr Beyerman, and the evidence of Mr Davies himself, that Mr Beyerman suggested that the proposal be trialled for "a couple of months to see how it goes". Mr Beyerman suggested that Mr Davies contact Mr Smith directly. However, Mr Davies did not do so, considering that as Mr Beyerman had "started it" he was driving the issue and he should finish it.

14 Mr Beyerman's evidence is that Mr Davies said that he would resign. I accept Mr Beyerman's evidence because of the evidence of Mr Cox that at the meeting of 12 December 2002, Mr Davies had been "pretty blunt" and that Mr Davies simply refused to negotiate. Mr Ellis' evidence is that Mr Davies was quite negative to the new proposal and felt that there was no need for any change because things were going well. Mr Grigg's evidence is that Mr Davies did not want any part of the proposal and said that he would not co-operate with it. Mr Grigg recalled Mr Davies saying that as Mr Beyerman was driving the matter, Mr Beyerman should deal with it. I therefore conclude that Mr Davies' rejection of the proposal was more blunt and absolute than his own evidence reveals. I also accept Mr Beyerman's evidence that at the end of the discussion on that topic, Mr Davies did say that he would resign.

15 Mr Beyerman thought that Mr Davies was too emotional and that it would be better to allow a period of time for Mr Davies to calm down and the proposal could be discussed the next day. In particular, I do not accept that Mr Beyerman was inflexible in his proposition. Whilst I accept that Mr Beyerman considered that the system needed to change, he was open to discussion. That is consistent with Mr Ellis' evidence that the decision had not been made by Mr Beyerman. Indeed, on the evidence, I find that in light of Mr Davies' refusal to accept the concept of the change proposed, even for a trial period, no decision was made regarding the proposal at that meeting.

16 Mr Davies acknowledges that the next morning he and Mr Beyerman discussed the matter again. Mr Beyerman's evidence of that discussion is that he discussed the detail of the proposal again and how it was to be done. Mr Davies still rejected the proposition. I accept that Mr Beyerman said to Mr Davies that Mr Davies' attitude was backing Mr Beyerman into a corner. There was too much that was "black and white" and Mr Davies was giving Mr Beyerman nothing to work with. Mr Davies said to Mr Beyerman that if he was requested to implement the change in writing he would still refuse; he could be given a warning and he would still refuse; a further warning and he could be dismissed and he would take the respondent for unfair dismissal. Mr Davies acknowledges that he did say these things.

17 Mr Beyerman considered he did not have too many options and he left shortly thereafter by prior arrangement to go to Melbourne. Whilst in Melbourne he spoke to Mr Smith. He states that Mr Smith stated to him that the proposal from Mr Beyerman was "fair and reasonable" from Mr Smith's point of view.

18 In the meantime, Mr Cox found an opportunity in the days after the meeting of 12 December 2002 to have a discussion with Mr Davies. This happened on the following Monday. He stated to Mr Davies that Mr Davies needed to sensibly look at the proposition and work with the respondent to find a way of handling it and substantially complying with it. Mr Davies said words to the effect "if it is not broken don't fix it". Mr Davies handed Mr Cox a document he had prepared over the weekend.

19 During this period Mr Grigg also appealed to Mr Davies to accept the trial period in order to test the proposition and see whether it was viable. The respondent had tried a number of things over the years on this basis. Mr Davies stated to him that he would not do so and that if the respondent dismissed him, then it would dismiss him. Mr Davies also gave him a copy of the document he had drawn up on the Sunday.

20 Mr Davies' evidence is that he drew up a document on the Sunday to support his position. He wanted to point out that there had been no complaints regarding the existing system, in fact, there had been letters received from customers praising the response of the respondent when complaints had been made. Mr Davies believed therefore that the change being proposed by Mr Beyerman was based upon a false premise. As to Mr Davies picking up the additional workload, he pointed out in his evidence that this was a fortnight before Christmas and is one of the respondent's busiest times. The respondent's staff had not increased over time yet Mr Davies had picked up other work such as timber flooring and some work previously done by Trevor. Mr Davies' evidence is that his own workload had increased "enormously" and he worked at home on weekends in order to stay ahead at work. He would not be able to pick up another 20 complaint calls and possibly 7 or 8 visits.

21 The document prepared by Mr Davies (exhibit 6) commenced with the words—

> "If we all take a deep breath and look at the issue I think the following could be adopted."

22 Mr Davies' proposal was that Mr Beyerman would go through the sheets attached to his proposal with the sales staff so that sales staff would have an understanding of the initial problems that clients see in a newly installed product. Sales staff should be addressed on how to minimise the expectation of the client to have a service call for every issue raised. Mr Beyerman should receive the service sheets (the complaints) from the stores and sign them off as genuine calls that need responding to. The consultant would continue taking the calls. The accounts would go to Mr Cox who would set up a true accounting

structure which showed the true costs and recovered costs. Finally, his proposal would be revisited after three months to see if the volume of calls had reduced. He concluded—

"When we have established this we can truly make the correct decisions."

23 Mr Davies attached to the front sheet of his proposal a number of pages. Those pages contained a number of general observations regarding issues to do with good management by the respondent. He attached a summary of the awards to carpet layers and a letter from a satisfied client. He included an appraisal of the role of the consultant, including the loyalty of the consultant himself. He wrote of the role of Mr Johnston, of the layers, the manufacturers and of his own position.

24 Mr Beyerman returned from Melbourne after the weekend. He had not seen Mr Davies' document whilst in Melbourne. Mr Grigg had told him about it and read it to him over the telephone. He obtained a copy of it and rang Mr Smith in Melbourne to ask him about it. Mr Beyerman states that Mr Smith had seen the document but Mr Smith's view was that Mr Davies' proposal did not actually change where the respondent was presently heading by asking the operations manager, Mr Davies to review complaints before the consultant did so.

25 On 17 December 2002, Mr Beyerman called Mr Davies into see him. The meeting involved Mr Beyerman, Mr Davies and Mr Cox. Mr Beyerman handed Mr Davies a memo of that date signed by Mr Beyerman. The memo is as follows—

"Roy

This memo is to clarify recent discussions in regard to our handling of customer complaints. After much discussion with Jim Smith, Barry Cook, Peter Rudd and Steve Harry below sets out a directive to you of how these matters are to be handled.

1. You are to take responsibility for all customer service issues. You are to communicate via a telephone call with every customer when a service sheet is generated. Many of these issues can be handled through that conversation rather than a visit by a consultant.
2. You are to make service calls. You have a company car to conduct company business on site.

We have made this decision over much discussion based on the following—

1. Cost to the company.
2. The need to innovate to follow company procedure nationally.
3. The positives in the Operations Manager inspecting the quality of our installations.

The above is a reasonable and lawful instruction and I seek written confirmation of your commitment to implement the above in the best interests of the organisation.

Regards

Peter Beyerman
General Manager"

(Exhibit 7)

26 Mr Davies read the memo and stated that he was sorry but he could not give written confirmation as requested. Mr Beyerman again went through the proposal. Mr Davies' response was that he could not do it and would not do it. It was a time factor. Mr Beyerman stated that Mr Davies was giving Mr Beyerman no option by refusing and not trying to work through the proposal. Mr Davies confirmed that he was refusing.

27 Mr Cox contributed to the discussion, trying to find a compromise so that the respondent could work with it.

28 Mr Beyerman states that he asked Mr Davies three times and was refused each time. Mr Beyerman said that he had no other option and he therefore dismissed Mr Davies. Mr Beyerman's evidence is that he had not intended for the matter to end that way.

29 Mr Davies' evidence about that meeting is not significantly different in my estimation. Mr Davies said that if he did accept the direction he would be letting the respondent down. Mr Davies said he asked about his suggestions however, Mr Beyerman did not comment. Mr Davies said that Mr Beyerman had "lit the match" and that he would not be able to do the increased workload. There were other ways of dealing with the issue and Mr Beyerman's suggestion was not based upon a correct analysis.

30 At the end of the meeting Mr Davies suggested that if he was to be dismissed that it should be done with dignity. If the dismissal could be agreed he would assist in a number of matters. The agreement would involve payment of a certain sum of money for each week of service. Mr Beyerman left the meeting and spoke to Mr Smith in Melbourne. As a result of that conversation Mr Beyerman declined Mr Davies' suggestion. Mr Davies was dismissed with the payment of all entitlements, plus three months' salary in lieu of notice and he was allowed to keep the company supplied motor vehicle over the Christmas period.

Consideration

31 The respondent submits strongly that the direction to Mr Davies by Mr Beyerman on 17 December 2002 was both a lawful and a reasonable direction. In my view, that is a correct submission. As the Industrial Appeal Court recently stated, in relation to operational matters a direction to an employee must be both lawful and reasonable (*Nydegger v. Tredways Shoestore South Hedland* (1997) 77 WAIG 1381 per Scott J at 1384; 72 IR 455).

32 On the facts of this case, I find that Mr Davies' position as operations manager, and the duties performed by Mr Davies were broad enough to encompass the duties he was being directed to perform in relation to customer complaints. Indeed, Mr Davies does not argue otherwise. It is not submitted on Mr Davies' behalf that it was not part of his role to deal with such complaints. The evidence is that Mr Davies believed he did not have the time to do it, not that it was not part of his role. I therefore find that the direction given to Mr Davies was indeed lawful.

33 The direction must also be reasonable. Mr Davies submits that it was not reasonable due to his workload. However, I find against Mr Davies for two principal reasons. The first of those reasons is that the respondent was prepared to subject the proposal to a trial period consistent with the manner changes had been trialled by the respondent on earlier occasions. Mr Davies' repeated refusal to accept the change is a matter of record. I am quite satisfied in my mind that if, at the end of the trial period, the workload had proved too much for Mr Davies and the balance of his work was not being completed, then Mr Davies' refusal would be recognised as having being justified.

34 The second of the reasons is that Mr Beyerman was prepared to sit at Mr Davies' desk during the afternoon when Mr Davies was absent in order to assist Mr Davies in his workload. In this regard, Mr Beyerman, and through him the respondent, was prepared to accommodate some of Mr Davies' reservations. For those two reasons I find that the direction to Mr Davies was both lawful and reasonable.

35 It was submitted on behalf of Mr Davies that the mere failure to follow a lawful and reasonable direction does not mean that the dismissal may not also have been harsh, oppressive or unfair. That submission is demonstrably correct. An employee's failure to follow a lawful and reasonable direction will provide grounds for lawful dismissal. However, the claim before this Commission is not that the respondent dismissed Mr Davies unlawfully. The claim is that the respondent dismissed Mr Davies unfairly. To put it another way, the issue before the Commission is to decide whether the respondent's lawful right to dismiss Mr Davies was exercised so harshly against Mr Davies as to an amount to an abuse of that right (*Undercliffe Nursing Home v. FMWU* (1985) 65 WAIG 385).

36 It was submitted on behalf of Mr Davies that the dismissal was unfair because Mr Davies had more than 10 years' service with the respondent. Mr Davies was nearly 56 years of age. Further, he had been complimented about his work during that time. On 3 July 2001, Mr Smith had written to Mr Davies congratulating him on his support and integrity over those 10 years (exhibit No. 1). Mr Davies had received a memorandum from Mr Cook on 26 February 2002 commenting that Mr Davies had done a commendable job in reducing overall stock levels under difficult circumstances (exhibit 2). He was a good employee.

37 Further, notwithstanding Mr Davies' length of service, the timeframe between Mr Beyerman making the suggestion to the management meeting of 12 December 2002 and Mr Beyerman's dismissal of Mr Davies five days later on 17 December 2002 was a very short timeframe indeed to dismiss someone with such long service. Even though Mr Davies had rejected the proposition at the management meeting of 12 December 2002, by the following Sunday he had drawn back from his blank refusal and had gone to considerable trouble to draw up a proposal of compromise. It was submitted that this proposal was hardly considered at all by the respondent. What the respondent ought to have done was looked at the proposal to train the sales staff and trialled Mr Davies' proposal to see whether complaints were reduced. It was submitted that reducing the number of complaints made was the most effective way of dealing with the issue.

38 Mr Beyerman acknowledged, according to the submission, that Mr Davies' document was a substantial document and yet Mr Beyerman hardly gave it any consideration before handing the written requirement to Mr Davies, followed by Mr Davies' dismissal. Furthermore, it was submitted that although three months' pay in lieu of notice was given to Mr Davies, this represented the minimum for an employee with 10 years' service. To dismiss Mr Davies by giving him the minimum requirement should be seen as harsh in all of the circumstances given his age, his position and his length of service.

39 I have given earnest consideration to the submissions made before me. I have taken the opportunity to carefully read Mr Davies' proposal. Ultimately, I have reached the following conclusion. The proposal put by Mr Beyerman for a change in the way customer complaints were dealt with was lawful and reasonable. It was also the respondent's prerogative to consider how it would deal with customer complaints. If the proposal had been demonstrably not in the respondent's interest, Mr Davies as a management employee may have had grounds for resisting the change such that to dismiss him for it would be unfair.

40 However, Mr Beyerman's proposal was demonstrably in the respondent's interest. It was quite reasonable for the respondent to wish to have management control over complaints rather than referring them directly them to a consultant. In principle, therefore, I can see no reasonable basis for Mr Davies' repeated rejection of the proposal. Further, I agree with Mr Beyerman when he said that an examination of Mr Davies' proposal shows that he still nevertheless rejected the changes being proposed. Rather, Mr Davies's proposal was an alternative. It was not, for example, a means of Mr Davies accepting Mr Beyerman's proposal with changes that would be acceptable to Mr Davies. Mr Davies' proposal still carried with it the complete rejection of Mr Beyerman's proposal. Indeed, in my estimation, Mr Davies maintained his fundamental position that no change was warranted to the manner of dealing with customer complaints. In the words he is alleged to have used, Mr Davies' view was that if there was not a problem there was no need to fix it. Mr Davies' proposal was merely to see whether or not there was a problem.

41 For that reason I have concluded that Mr Davies' complete and resolute refusal to countenance the proposal from the respondent placed the respondent in a position where it had little alternative.

42 The timeframe between 12 December 2002 and the dismissal on 17 December 2002 is indeed a tight timeframe. In some circumstances, to have dismissed Mr Davies within less than one week of the proposal being introduced would be unfair. However, on the facts, Mr Davies was resolute in his opposition to the change. His resolution remained firm notwithstanding he was aware that he could, and may well likely be, dismissed for his opposition. He acknowledged as much. I have found nothing in Mr Davies' firm position which suggests that with more time on the respondent's part, Mr Davies would alter his position. Accordingly, I see no basis for upholding a submission that the tight timeframe is a ground of unfairness.

43 Similarly, it is also the case that his dismissal occurred in the lead-up to Christmas. Dismissing an employee just before Christmas may be a contributing factor to a finding of unfairness. This factor is to be balanced against the payment in lieu of notice to him of three months' pay, allowing him the continued use of the respondent's motor vehicle and the subsequent payment of a vehicle allowance for the duration of the period in lieu of notice. Given Mr Davies' position, his age, his salary, his experience and his length of service, those termination arrangements were not unreasonable (*Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499).

44 Mr Davies' long experience with the respondent, indeed the preparedness on his part to work on Sunday mornings in a way that was of advantage to the respondent and even the particular care he took to clean and polish the respondent's motor vehicle before he returned it at the due date, all speak most highly of Mr Davies' character and integrity. Mr Davies had been, on the evidence before me, a very good operations manager for the respondent. The issue, however, is that he was a manager and on an operational matter he opposed, and maintained his opposition to, his employer's proposed change. In the circumstances of this matter, and notwithstanding his character and integrity, Mr Davies' resolute opposition to how his employer wished to change the complaints procedure made his position untenable.

45 For all of those reasons, I have not been persuaded that his dismissal was harsh, oppressive or unfair and his claim is hereby dismissed.

2003 WAIRC 08407

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROY DAVIES, APPLICANT
	v.
	CARPET CALL WA PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 28 MAY 2003
FILE NO.	APPLICATION 2102 OF 2002
CITATION NO.	2003 WAIRC 08407

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr D. Schapper (of counsel)
Respondent	Mr M. Jensen (of counsel)

Order

HAVING HEARD Mr D. Schapper (of counsel) on behalf of the applicant and Mr M. Jensen (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 hereby dismissed.

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

2003 WAIRC 08415

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE DIMASI, APPLICANT
	v.
	ALPHAPHARM PTY LTD ABN 93 002 359 739, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 9 MAY 2003
FILE NO/S.	APPLICATION 291 OF 2003
CITATION NO.	2003 WAIRC 08415

Catchwords	Harsh, oppressive and unfair dismissal – Extension of time for application to be referred to Commission – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Extension of time to accept referral not granted – *Industrial Relations Act 1979 (WA)* ss 29(1)(b)(i),(2)&(3)
Result	Order issued
Representation	
Applicant	Mr B Stokes as agent
Respondent	Ms K Marshall of counsel

Reasons for Decision

(Ex tempore)

1. The Commission has before it application 291 of 2003 by Julie Dimasi against Alphapharm Pty Ltd. The application is made pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"), by which it is said that the respondent unfairly dismissed the applicant on or about 21 August 2002. The applicant by this claim seeks reinstatement and compensation. The respondent opposes the applicant's claim and sets out the particulars of its defence by notice of answer dated 26 March 2003.
2. The Commission called these proceedings on of its own motion by reason of the fact that the notice of application was filed outside of the 28 day time limit as required pursuant to the terms of s 29(2) of the Act. It is the case, however, that by reason of ss 29(2) and (3) of the Act, although there is a requirement for claims of this nature to be referred to the Commission within 28 days of the date of termination of employment, there is a power in s 29(3) of the Act for the Commission to accept a referral by an employer under s 29(1)(b)(i) alleging unfair dismissal out of time if the Commission considers that it would be unfair not to do so.
3. That is the circumstance which the Commission presently has before it, given that the application was filed some six months or thereabouts out of time as required by the Act.
4. The Commission as presently constituted considered this type of application in the matter of *Azzalini v Perth Inflight Catering Services* (2002) 82 WAIG 2992. In that case the Commission set out what it considered to be relevant principles in relation to applications of this kind, and in particular at para 28 of the judgment set out a number of factors which the Commission should take into account in considering whether an extension of time should be granted or not. Those factors include the following—
    - *(a) Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;*
    - *(b) An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;*
    - *(c) It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;*
    - *(d) Considerations relevant to whether it would be unfair to not extend time include—*
        - *(i) the length of any delay;*
        - *(ii) the explanation for the delay;*

(iii) steps taken if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested;

(iv) the merits of the substantive application in the sense that there is a sufficiently arguable case; and

(e) Whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent, without more, is not a sufficient basis of itself, to grant an application for an extension of time.

5. I adopt and apply those principles for the purposes of this matter.

6. On the applicant's own case, whilst I have sympathy for the circumstances in which the applicant found herself in, the Commission must firstly consider the length of the delay. That may well have justified some delay from August 2002 perhaps at the latest to the end of last year in December 2002. But from January 2003 it is quite apparent on the applicant's own admissions in evidence that she was taking advice. Most critically, even despite all of that, in early February 2003 she took advice from a registered industrial agent in this jurisdiction, Mr Fayle, as evidenced by a letter from him of 4 February 2003 to the respondent.

7. On the basis that the applicant accepts in her evidence that she was advised of her application being well out of time and yet nothing further was done until 7 March 2003 I simply have to conclude that the delay, whilst inordinate, has been compounded, clearly, in my view, by the applicant's failure, it seems, to take heed of advice and to commence proceedings, I would have thought, forthwith after at least 4 February 2003, if not before.

8. On the question of whether there is an arguable case, on the applicant's case and the respondent's affidavits there might be some suggestion of an element of procedural unfairness and I put it no higher than that. But, however, in my view the overwhelming factors against the applicant are the inordinate delay on the one hand, and secondly, in the face of that delay the failure to act upon advice which has always been open to her. In my view it would be quite unjust to the respondent in these circumstances, for the Commission to exercise its discretion to extend time pursuant to s 29(3) of the Act.

9. While I have some sympathy for the circumstances in which the applicant found herself in shortly after the termination of her employment, I am simply not persuaded on what is before the Commission that I should exercise my discretion to extend time.

10. Therefore the application to extend time will be refused and the substantive application will be dismissed for want of jurisdiction by order.

2003 WAIRC 08317

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE DIMASI, APPLICANT
	v.
	ALPHAPHARM PTY LTD ABN 93 002 359 739, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 9 MAY 2003
FILE NO/S.	APPLICATION 291 OF 2003
CITATION NO.	2003 WAIRC 08317

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr B Stokes as agent
Respondent	Ms K Marshall of counsel

Order

HAVING heard Mr B Stokes as agent on behalf of the applicant and Ms K Marshall 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.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 08331

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY KIM FARRELL & KIRK D'SOUZA, APPLICANTS
	v.
	Q MULTIMEDIUM LIMITED, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 14 MAY 2003
FILE NO/S.	APPLICATION 1335 OF 2001 & APPLICATION 1336 of 2001
CITATION NO.	2003 WAIRC 08331

Contractual benefit - Claim for payment in lieu of notice - Written contract varied orally - Termination payment paid in full - Claim dismissed

Result	Applications for outstanding contractual entitlements dismissed
Representation	
Applicant	Mr K Trainer, agent on behalf of the applicants
Respondent	Mr D Jones, agent on behalf of the respondent

Reasons for Decision

1 The applications as amended, which were heard together, are claims for outstanding contractual entitlements. In each case payments are sought for two weeks salary arising out of the termination of employment with the respondent company.

2 Messers Farrell and D'Souza were employed as joint managers of the then media division of Q Multimedium Limited. Their promotions to these positions took place several months before their employment came to an end in July 2001.

3 On 14th June they attended a meeting with Mr Kennedy the Managing Director of the company. He told them that the division was to close. In the course of that discussion the applicants sought confirmation that the period of notice under their contracts of service would be four weeks. It is claimed that Mr Kennedy confirmed those terms and thereby reaffirmed the oral amendment to their written contracts which provided for one weeks notice or payment in lieu thereof. With the impending closure of the division some staff were to finish up forthwith. The applicants together with those employees selected by them to wind up existing contracts were to continue to work until the closure of the division had been effected. That, on various accounts, would be merely a matter of weeks.

4 It is the applicants' assertion that in the discussion on 14th June not only was the period of notice confirmed but that they were advised that they would receive their salary up to the closure of business and on termination would be paid four weeks in lieu of notice. An initiative put forward by the Managing Director to pay the amount in lieu of notice as two weeks pay for redundancy and two weeks pay as notice was noted by the applicants. That arrangement had been promoted to minimise tax. What was important to the applicants at that time was that their contractual entitlement to four weeks notice had been confirmed and that on the undertaking of the Managing Director it would be paid as an amount equivalent to four weeks salary when the division was closed and their services no longer required.

5 The final payments each included only two weeks notice and two weeks redundancy payment. That later payment was in line with payments made to all other staff. From these final payments the claims are made for an additional two weeks wages as payment in lieu of notice in accordance with what the applicants believe their contractual arrangements entitled them to.

6 For the respondent the claim is denied. It is argued that the contractual entitlements agreed to on 14th June have been discharged in full. The payments made on termination were in line with arrangements entered into between the parties and expressed in terms of notice and redundancy pursuant to an undertaking given to them by the Managing Director Mr Kennedy on 14th June.

7 It was Mr Farrell's evidence in chief that on the 14th June there was a meeting attended by himself, Mr D'Souza and Mr Kennedy the Managing Director of Q Multimedium.

8 As Mr Farrell expressed it, he had been aware that Mr Kennedy had been in discussion with other parties concerning the future of the division. On 14th June Mr Kennedy told him and Mr D'Souza that the division would be closing. Mr Farrell stated that he sought to confirm with Mr Kennedy that the respondent would honour the four week notice period previously agreed to. This was confirmed by Mr Kennedy at that meeting. It was also Mr Farrell's evidence that Mr Kennedy suggested a tax minimising method of dealing with the notice payment. To this Mr Farrell stated that "you can call it whatever you like…so long as I get four weeks notice". It was Mr Farrell's evidence that at that meeting there was no discussion as to a firm date of closure, indeed Mr Kennedy asked how long it would take to "close things down". To this Mr Farrell stated he and Mr D'Souza undertook to see what needed to be done and to use their best endeavours to finish up everything as soon as they could. They undertook to give Mr Kennedy a closing date as soon as they could. But no date was given to Mr Kennedy at that meeting.

9 It also appears from Mr Farrell's evidence in chief that he and Mr D'Souza were requested by Mr Kennedy to determine which employees would be leaving the firm on the announcement of the closure. That announcement was to be made on 18th June (the following Monday).

10 By conclusion of that meeting Mr Farrell's evidence was that—

(1) he had confirmed his entitlement to four weeks notice;

(2) he knew that the division was to close and that closure was to be effected as soon as possible;

(3) he and Mr D'Souza were required to work out which staff were to leave immediately on the announcement of the closure and which staff were to be retained; and

(4) he and Mr D'Souza were to work out a closing date as soon as they could.

11 Following advice from Mr Kennedy that he and the other staff within the division were being terminated, Mr Farrell busied himself with finding out what needed to be done in respect of himself and other members of staff. He did some research on redundancy. Next day Mr Farrell informed the Board on what he thought was a fair and equitable way to deal with the redundancies. Present at that meeting were Mr Kennedy, Mr Canfield, director, Mr Robinson, company secretary and Mr D'Souza.

12 From Mr Farrell's viewpoint the discussion at that meeting centred on how the announcement of the closure was to be made to staff, the importance of staff receiving their entitlements to accrued leave, an appropriate notice period and the relevance of legislation to the circumstances of the closure. He stated that he also raised with those at the meeting the issue of redundancy and how it should be handled in the absence of any arrangements or policy. He stated that he put to the directors that they should consider making payments of two weeks pay for each year or part year of completed service.

13 At this point from his evidence it appeared that Mr Farrell had been speaking about staff generally including himself. He did not leave that meeting with a decision from the Board as to any arrangements for redundancy.

14 Later that day he and Mr D'Souza met with Mr Kennedy. The previous day they (Mr Farrell and Mr D'Souza) had been requested to determine who would be leaving the firm on the announcement of the closure of the division. Names were supplied to Mr Kennedy and he was also given an indication of how long work was likely to continue. Mr Farrell stated that even at that time he and Mr D'Souza did not have a fixed date as to closure. He stated that they were working on the idea that there would be three or four week's additional work remaining. Importantly at that meeting Mr Farrell stated that he also sought to confirm how Mr Kennedy would handle the fact that some people would be leaving on Monday and receiving certain

entitlements and other people would be required to stay on. In other words some would be paid wages in lieu of notice and others would be required to work out their notice.

15 It was Mr Farrell's evidence that he had raised this at the previous meeting with the directors earlier that day and then sought confirmation from Mr Kennedy. Mr Farrell stated that Mr Kennedy informed him that the people who stayed on working would continue to be paid a normal salary and that their notice period would be paid out at the end of their work.

16 It was Mr Farrell's evidence that there had been no discussion with Mr Kennedy on 14th June as to when notice would commence nor had this matter been discussed on 15th June.

17 On 18th June Mr Kennedy was in Singapore to make an announcement to staff working at that location about the closure. The people in Perth were addressed by Mr Canfield on the afternoon of 18th June. He informed employees that the division was closing, that named employees would be finishing up and that other employees would continue until the outstanding work was completed.

18 Those members of staff finishing up that day were to meet with Mr Robinson to receive their final payments. Mr Farrell stated that it was announced by Mr Canfield that those employees who were required to continue to work would continue to be paid and would receive their final package on the last day of work. This advice was consistent with what Mr Farrell said he had been told by Mr Kennedy on 15th June. Mr Farrell told staff who sought clarification from him as to their entitlement that it was the respondent's intention that those who were required to remain would be paid their normal wage and would be paid out their notice at the end of their employment. This is how he understood it from Mr Kennedy.

19 As to his own position, Mr Farrell stated that he was unsure as to his redundancy entitlement. Mr Farrell stated that he was however sure as to his entitlement to payment of four weeks wages in lieu of notice when he finished up. There had been no decision made on redundancy while he was in attendance with the directors at the meeting with them on 15th June.

20 He only discovered the payment by talking to people whose services had been terminated on 18th June. Mr Farrell stated that he discovered at that stage that they had received two weeks pay for each year of service and for those who had not completed a year's service payment of two weeks wages was made as redundancy. According to Mr Farrell these people became aware of this payment not by way of documentation provided to them but from the briefing that had been given by the company secretary when they finished up on 18th June.

21 It was Mr Farrell's evidence that throughout the week commencing 18th June he sought to confirm his own entitlement to redundancy. With Mr Kennedy's absence from Perth, he spoke with Mr Robinson. The company secretary referred him back to Mr Kennedy. The discussion with Mr Robinson took place on or about 20th June.

22 Mr Farrell stated that he spoke with Mr Kennedy as soon as possible after Mr Kennedy's return from Singapore. This he believed to be on or about 26th June. It was at that meeting also attended by Mr D'Souza that it became clear to him that Mr Kennedy had a different view as to what their final entitlements would be. Mr Kennedy informed the applicants that they were entitled to four weeks pay only. Mr Farrell stated to him that their entitlement extended beyond the four weeks payment in lieu of notice to also include two weeks salary as a redundancy payment. This he stated was based on what had transpired "with other staff and as far as dealing with us fairly". The position remained in dispute at the conclusion of the conversation.

23 It was also Mr Farrell's evidence that the date for closing the division was communicated by him to Mr Kennedy at that meeting on 26th June. Up until then it had not been fixed.

24 It was Mr Farrell's evidence that it was never clear in his mind as to what was Mr Kennedy's view on redundancy. However only upon receipt of his final pay slip was it revealed that he was paid two weeks in lieu of notice and two weeks redundancy.

25 As set out above his claim is that the payment should have been for four weeks pay in lieu of notice, there now being no issue with the payment of two weeks redundancy payment.

26 Mr Farrell's services were terminated on 6th July.

27 Under cross examination Mr Farrell rejected the suggestion that he was aware of the closure of the division on or about 30th May. He acknowledged that at the meeting on 14th June with Mr Kennedy an estimation of three to four weeks for winding up operations was discussed but he was emphatic that there had been no commitment to a final date of 6th July. Equally as emphatically he rejected the proposition that on 14th June Mr Kennedy told him that he would be finished up on that date and that this advice had prompted his enquiry about whether the respondent would honour the commitment of four weeks notice. Mr Farrell did acknowledge that Mr Kennedy may have pointed out to him in that discussion that he didn't think that Mr Farrell had any entitlement to redundancy because his service had been less than one year. When the issue of redundancy was raised at the Board meeting the next day it was Mr Farrell's belief that no distinction had been made between the staff generally and him and Mr D'Souza.

28 It was put to Mr Farrell that at the Board meeting on 15th June that he was present when the recommendation which he had put forward for employees with less than twelve months service to be paid two weeks salary as a redundancy was agreed to. Mr Farrell's evidence was that he was only aware of the Boards decision when people who left on 18th June got their final payment.

29 Mr D'Souza's evidence in chief traversed the same events as those of his former colleague Mr Farrell. On 14th June he attended the meeting with Mr Kennedy and Mr Farrell at which the closure of the division was discussed. Following on from that there was confirmation that the verbal amendment to the contracts of service to provide four weeks notice would be honoured. Mr D'Souza also testified that Mr Kennedy put forward the proposition that for taxation purposes it would be better to pay the notice as two weeks redundancy and two weeks notice. Mr Kennedy prevailed on him and Mr Farrell to review their project timelines and to determine which employees would be required and for how long.

30 Next day he and Mr Farrell attended a Board meeting to discuss the closure of the division and how terminations of employment would be effected. At first Mr D'Souza did not recall any other meetings that day but remembered that he had met with Mr Kennedy again before 18th June. On reflection he remembered that arrangements had been discussed for finalising projects and those employees whose services were needed would be paid their notice at the completion of the project and that those whose services were to be terminated on Monday 18th June would be paid "notice and leave". He recalled that the point of the discussion was that it would be unfair to have some people work out their notice and not others. Mr D'Souza acknowledged that his own situation was not specifically discussed at that meeting but he believed that as part of the project team those arrangements applied equally to him. However following the meeting on 18th June at which staff were notified of the closure of the division Mr D'Souza acknowledged there was uncertainty concerning his own entitlement to redundancy. Along with Mr Farrell he approached Mr Robinson. Both of them were referred to Mr Kennedy.

31 It was then Mr D'Souza's evidence that they approached the Managing Director on 26th June and asked whether they would be receiving "the same arrangements as everyone else". Mr Kennedy confirmed that they would receive four weeks payment. However they pressed him for the same consideration for a redundancy payment as had been extended to other staff. Mr Kennedy reaffirmed that the arrangement confirmed at their meeting on 14th June was all that they were getting. Mr D'Souza

stated in evidence that they hadn't covered their arrangements on 14th June as that discussion had been restricted to the terms of payment for notice. On Mr D'Souza's evidence no further discussion on the topic was possible because "it just got too heated". As far as he was concerned the matter remained unresolved.

32 Mr D'Souza's final payment on 6th July included two weeks pay in lieu of notice and two weeks pay as redundancy.

33 It was at the meeting on 26th June that the termination date of 6th July was agreed. That date was arrived at on 26th June when arrangements were completed for the respondent to extricate itself from a particular contract. These negotiations were completed on 25th June.

34 Under cross examination Mr D'Souza gave evidence that he was aware of initiative to sell the division several weeks before the meeting with Mr Kennedy on 14th June. At that time he was aware that the respondent was definitely closing down the division.

35 Although at times confused by the number of meetings on a particular day he acknowledged that on 14th June he was made aware by Mr Kennedy that the division was closing down. At that meeting the estimate that it would take three to four weeks to wind things up had been proffered by him and Mr Farrell. He was under no misunderstanding that his position with the company was coming to an end and in this context the enquiry was raised by Mr Farrell as to whether the four weeks notice would be honoured. It was not the case, on Mr D'Souza's evidence that Mr Kennedy had said that he would be paid an additional four weeks pay and that was to include any redundancy pay that might be due but rather that the four weeks would be paid as redundancy and notice because of tax implications. Furthermore he recalled Mr Farrell's statement along the lines that he didn't care how it was split up as long as he got his four weeks notice.

36 As to when the date of 6th July as the finishing date was notified to him and Mr Farrell, Mr D'Souza was unsure. He acknowledged that at the meeting with the Directors on 15th June time was spent talking about who would be required to get the projects completed by 6th July. At that meeting on 15th June redundancy payments were discussed but it had been recognised that it was hard to "define a general payout for everyone". As far as Mr D'Souza was concerned he understood he was included in the application of any policy on redundancy. However the first time the issue of a redundancy payment specifically for him and Mr Farrell had been raised was when they met with Mr Kennedy on 26th June. While Mr Kennedy insisted that the arrangement on 14th June was inclusive of redundancy, they had insisted that all that had been agreed upon was the period of notice.

37 Mr Kennedy for the respondent gave evidence that in May the applicants were made aware that the multimedia division on the company was falling on hard times. Indeed the two managers compiled the sales budget that Mr Kennedy presented to a strategy meeting on 30th May. It was apparent from this that the divisions operations in both Perth and Singapore were not viable. The decision was conveyed to the applicants directly after the strategy meeting. The only thing that could delay the closure was an expression of interest from a Melbourne based buyer. According to Mr Kennedy, Mr Farrell and Mr D'Souza were continuously informed on developments. However by 14th June the buyer had not come forward and on that day Mr Kennedy stated that he informed the applicants that the business was closing. He acknowledged that he did not state a date but asked for an assessment of when the operation could close given the extent of outstanding work. He stated that on 14th June he was advised that it was approximately three weeks away given that no more contracts were entered into. On that assessment, the 6th July was the target date for closure. Mr Farrell had sought confirmation that the respondent would honour the commitment to four weeks notice. It was Mr Kennedy's evidence that at the meeting on 14th June he advised Mr Farrell and Mr D'Souza that "from 6th July onwards there would be an additional payment of four weeks pay…and that this would include any redundancies or anything else that you might be entitled to but we have in all our advice that you have not worked a year and you would not be eligible for redundancies". He added that he undertook to see if there was any tax benefit on how the final payment was configured. To this Mr Farrell answered that he didn't care how it was done as long as he got his four weeks pay.

38 Mr Kennedy gave evidence that the three met again that afternoon to confirm how much work was left and for Mr Farrell and Mr D'Souza to work out staff levels to finish off outstanding contracts.

39 As to events on 15th June, Mr Kennedy recalled that there had only been one meeting that day. The purpose had been to discuss the terminations of staff and to clarify who was needed to meet the target date of 6th July. At the meeting Mr Farrell had raised redundancies. He felt that if the company did not pay redundancies to staff who had not worked for less than one year there would be a problem. This was notwithstanding Mr Kennedy's advice that such employees did not have any entitlement. As far as Mr Kennedy was concerned the discussion about redundancy benefits did not include any reference to Mr Farrell or Mr D'Souza. As far as he was concerned their arrangements had been confirmed at 14th June discussions.

40 Mr Kennedy departed for Singapore but returned to Perth on 19th June. He claimed he was available to the applicants from that date until his departure on leave on 27th June. When he met with Mr Farrell and Mr D'Souza on 26th June they pressed him for two weeks redundancy payment. It was Mr Kennedy's evidence that he told them that this had already been addressed on 14th June when he agreed to the payment of four weeks pay from 6th July and this payment included any entitlement to redundancy although he believed that they were not due for any redundancy having worked less than twelve months. He told them that they "had got a good payout" in that they received seven weeks pay in all.

41 Under cross examination Mr Kennedy emphasised that the target date of 6th July for the division to cease operations had been set in discussion with Mr Farrell and Mr D'Souza on 14th June. While he had estimated that a three week period was necessary to close the division, it was Mr Farrell and Mr D'Souza who confirmed the viability of that date. In the context of the discussion on the closure Mr Farrell had raised the issue of the four week period of notice. Mr Kennedy confirmed that to have been the case. However while the period of notice had been the issue raised it was has evidence that his commitment went to the payment of four weeks additional wages. His reference to Mr Farrell's request for confirmation as to the period of four weeks notice was that the respondent undertook to give Mr Farrell and Mr D'Souza an additional four weeks pay from 6th July, the target date for closure. This payment it was stated by Mr Kennedy included any redundancy albeit that he claims to have told the applicants that his advice was that there was no entitlement to such payment given the length of their service.

42 The target date was fixed on the premise of existing work being completed by that date and if a project could not be finalised by then, the joint manager (in this case Mr D'Souza) was to try and get out of the contract. The joint managers were directed to hold on to staff that would give the division the greatest opportunity to get work finished by 6th July.

43 Mr Kennedy acknowledged that at the meeting on 14th June he did not explicitly say that "your period of notice commences today". What he claimed to have said was that "everyone's jobs… are being closed down and that on 6th July your work is complete; you will be leaving the company". From this he stated the conclusion understood by Mr Farrell and Mr D'Souza was that they were on notice from 14th June to 6th July and that is why the four weeks pay was an additional payment.

44 From Mr Kennedy's evidence it is not an issue that on 15th June other arrangements were put in place for the payment of redundancies for employees with less than twelve months service. The applicants were members of management. Their arrangement was finalised on 14th June and that had no relationship with that of production employees discussed and implemented by policy on 15th June.

45 In a further attempt to clarify the issue surrounding notice and payment of four weeks notice Mr Kennedy stated that when Mr Farrell sought to confirm the period of four weeks notice, he (Mr Kennedy) had made it clear that the jobs would be terminated on 6th July and then he would give them an additional four weeks pay which would include any redundancies but to which he believed there were no entitlements.

46 Mr Kennedy denied that he said that he would give the applicants payment for four weeks notice at the time their services terminated. What he claimed to have made clear was that their positions would be terminated on 6th July and so they were getting three weeks notice but in addition to this they would receive another four weeks pay broken up to minimise tax. Great emphasis was placed on the 6th July as the final date not withstanding some uncertainty as to whether contractual obligations could be cancelled. One contract was projected to go beyond 6th July but the division was able to get out of that contract.

47 Further evidence was presented by Mr Canfield a director of the respondent company. He reiterated that the decision to close the multimedia division down had been taken by the company on 30th May and that the management team, including Mr Farrell and Mr D'Souza were continually informed on developments since that time. He went on to outline his memory of the meeting held in the respondent's Boardroom on 15th June with Mr Kennedy, Mr Farrell, Mr D'Souza and himself present. At that time they had discussed the work to be completed, and that this would be achieved by 6th July. It was decided at that meeting that Mr Kennedy would go to Singapore to close that operation. Mr Canfield would address staff in Perth on the closure at 3:00pm on 18th June. He recalled that the issue was raised by Mr Farrell of the potential problem of getting people with less than twelve months service with no entitlement to redundancy to complete the work. They might walk out or not work efficiently. On Mr Canfield's evidence this discussion referred to production staff and did not included Mr Farrell or Mr D'Souza as they were members of the management team.

48 It was then Mr Canfield's evidence that on 18th June he addressed the Perth staff on the closure. He informed them that some staff was required to complete the projects but that 6th July was the last day for those that were required to stay. These people were identified by him to the meeting. The others were thanked and Mr Canfield asked them to see Mr Robinson the company secretary to receive their termination pays which he noted to them were "above the requirements".

49 Under cross examination Mr Canfield stated that the list of people to stay was communicated verbally to the meeting on 15th June by Mr Farrell and Mr D'Souza. The names had been discussed at that time and the discussion confirmed after the applicants had left the meeting. He acknowledged that principles had been agreed to at that meeting. As far as Mr Canfield was concerned it appears that those who left the respondents employment on 18th June were to be paid notice and redundancy but those who were required to stay to complete projects were given notice and were to receive only a redundancy payment on termination. The discussion about the application of redundancy to people who were not really entitled to it because of the length of their service covered only production staff. It did not on Mr Canfield's recollection include Mr Farrell and Mr D'Souza as positions on management had been put in place prior to that meeting. From his discussions with Mr Kennedy it was Mr Canfield's understanding that the applicants' terms had been amended some time earlier to provide for two weeks notice and two weeks redundancy. It was put to him that what had been agreed to previously was four weeks notice. Mr Canfield rejected this. He had no knowledge of discussions that took place between Mr Farrell, Mr D'Souza and Mr Kennedy on 14th June.

50 From the respondents point of view the discussions that took place on 14th June are critical to the determination of the claims. It was submitted that by that day the applicants knew that the business was going to close. On 14th June the final date of 6th July was specified. This was established on their own assessments of the time necessary to finish the work. Importantly with this established the issue of four weeks notice was addressed. It was not that they would receive four weeks notice but that at Mr Kennedy's initiative they would be paid four weeks termination payment on 6th July. According to the respondent this meant that they were in effect being 'given' three weeks notice (i.e. the period form 14th June to 6th July) together with a payout of four weeks wages. There was no entitlement to redundancy but that the amount was configured to accommodate a tax benefit by including a redundancy component.

51 The terms of their termination payment were finalised on that day and subsequent discussion with Mr Kennedy and Mr Canfield on 15th June about redundancy was particular to production staff. Indeed that is according to the respondent clear in that there was no issue that this affected Mr Farrell and Mr D'Souza. They never pursued the matter until 20th June and then not again until 26th June, Mr Kennedy's last day at work before going on leave. That approach was strenuously rebuffed. Anyway, it is submitted, the redundancy payment to production staff was an ex gratia payment.

52 In the respondents view the contractual obligation which stemmed from an entitlement to four weeks notice was discharged in a most beneficial manner to the applicants. Not only did they secure the payment of four weeks wages at termination but they received it in a tax effective manner in line with the Managing Directors undertaking to them and they were given several weeks notice of the closure of the business and their termination.

53 From the applicants' point of view the matter can be disposed of summarily by reference to the payment for redundancy. It is submitted that the company chose to provide Mr Farrell and Mr D'Souza with two weeks payment as they had done with other staff. The question of redundancy is simply not a live issue. It is only relevant to the extent that an amount was paid to be four weeks at the time of termination. It is not open to the respondent to concede that the payment was made in accordance with the company policy (as per Mr Kennedy's evidence under cross examination at p. 81) and then try to include it into the termination payment of four weeks. The payment of redundancy can't be used to offset the contractual commitment to four weeks payment in lieu of notice.

54 It is submitted that from the discussions that took place on 14th June it should be found that commitment was entered into to pay the four weeks payment in lieu of notice on termination i.e. when the business ceased to operate. In accepting this, the proposition put by Mr Kennedy that he had in effect given seven weeks notice should be rejected. That argument is built on the foundation that the 6th July was confirmed as the date of closure on 14th June. This is on the applicant's assessment of the evidence including that of Mr Canfield not the case. At best it was a proposed date and the date of closure was not confirmed to the applicants until the 26th June. In other words there was no unequivocal communication as to when the period of notice was to commence.

55 A further attack on the credibility of the respondents Managing Director was based on his evidence concerning the development and notification of the names of those employees to be retained to finish off outstanding projects.

56 On the evidence it is submitted that there was no period of notice communicated to the applicants in the terms claimed by the respondent. What was agreed was that they would receive four weeks pay in lieu of notice on termination. In fact they only received two weeks and the balance remains outstanding.

57 In the first instance it is worthwhile seeing if matters can be disposed of on the basis submitted by the applicants that the case turns around one issue alone i.e. the redundancy payment. In this respect it is necessary to ascertain whether payments made on termination and identified in the common exhibits of copies of the termination payment slips and calculation sheets reflect the

proper intent of the respondent. The payments to the respective applicants clearly identify that amounts were calculated on the basis of payment of ten days salary for redundancy. The transcript to which the applicant's refer states—

> "MR TRAINER:…Did the board discuss the policy to be applied in redundancies with Mr D'Souza and Mr Farrell present? …..No. (Mr Kennedy)
>
> Did the board discuss what entitlements to redundancy Mr Farrell or Mr D'Souza might have?.....Well they didn't have any. It had all been agreed.
>
> Well, the board, as I understand it, took a policy decision to pay those people who had less than twelve months service, two weeks redundancy pay?.....That's after we already agreed Bradley (Farrell) and Kirk's (D'Souza) termination. They're different issues. They were managers. These were staff.
>
> Well that's,...the board struck the policy of two weeks for those who had less than twelve months service?.....That's right.
>
> And that policy was struck after the discussion with Farrell and D'Souza?.....That's right.
>
> After the discussion with Farrell and D'Souza, which focused and was directed towards entitlements to notice?.....Again, we were advised that we would have problems if we didn't pay redundancies. All our informations were that we legally did not have to do that
>
> All right?.....So I wonder where the direction was coming from.
>
> And yet when you terminated them you did pay redundancy, did you not?..... We did.
>
> You paid two weeks each…..Yep.
>
> As you have paid each other of those staff with less than twelve months service?.....That's right.
>
> And in fact you applied the Company policy adopted at the board on the 15th?..... To pay…..
>
> To pay two weeks for those with less than two years service?..... That's right."

(*Transcript pp. 80 – 81*)

58 Within the full context of these passages of cross examination I am not satisfied that the concession being claimed that the redundancy payments to the applicants were in line with the company policy with respect to production staff. The answers with respect to the actual payments to the applicants are statements of fact but as to the operation of the policy with respect to them I think has to be conditioned by the opening answers quoted above, i.e. that the Board didn't discuss the policy to be applied to Mr Farrell and Mr D'Souza. Indeed as far as Mr Kennedy made clear they were members of management and the application of policy to production staff was a different issue.

59 Furthermore I accept the evidence of all of the witnesses that participated in the discussion on 14th June i.e. Mr Farrell, Mr D'Souza and Mr Kennedy, that when the four weeks notice was confirmed and Mr Kennedy stated that it would be paid on termination that it was accepted that a tax minimisation arrangement would be implemented whereby the payment would be calculated on the basis of two weeks notice and two weeks redundancy. It does not behove the applicants to claim the respondents intention to pay them a bona fide redundancy payment when on 26th June their request for that consideration was strenuously rejected by Mr Kennedy in circumstances which indicated that the conversation was somewhat heated.

60 The identification in the termination payment of a redundancy component provided a windfall opportunity to argue that there is a contractual entitlement to additional notice. However in my view it is no more than that. There is no substance to argument that the claims can be disposed of on this basis. I am satisfied that the entitlements extended to production staff were ex gratia payments prompted by concern put to the Board by Mr Farrell there could be difficulties in getting people to stay and remain productive in the light of the multimedia divisions closure. It was not that Mr Farrell or Mr D'Souza had threatened to leave. They acted professionally and on all accounts in their employers best interests in affecting the closure of the division. But they had on their own evidence secured their own position before taking up the issue of redundancy and the necessity to have that arrangement for production staff in place to overcome any problems. Furthermore on the issue of redundancy I accept Mr Kennedy's evidence that in discussing the confirmation of the amendment to the applicants written contract to thereby provide for four weeks notice, he had pointed out to them that he believed that they did not have any entitlement to the payment given their lengths of service. In any event the arrangements for the payment of four weeks wages on termination in lieu of a period of notice was stated by Mr Kennedy to include any claim to redundancy, albeit that he did not think such an entitlement existed. I accept this was part of the discussion which secured the commitment to the payment on termination.

61 As the argument about redundancy does not dispose of the claims it is necessary to see if the payments that were made to the applicants satisfy the respondent's contractual obligations.

62 It is common ground that the written contract that specified one weeks notice was amended verbally to provide for four weeks notice. In its terms the respondent had discretion to make a payment in lieu of notice or with part notice and part payment in lieu thereof (see Exhibit J1 Clause 11.2). It is not in issue that these terms were invoked.

63 I am satisfied that the requirements for four weeks notice was reaffirmed when Mr Kennedy, Mr D'Souza and Mr Farrell met on 14th June. Although there is some confusion as to whether there were one or two meetings on that day or the next I find that there was at that time uncertainty about the company's future and that it was known to the applicants that the division was to close. There was the possibility of a sale to a Melbourne buyer but by 14th June the shut down date of 6th July was established as a target date to which the joint managers of the division were committed to implement. While I consider that it remained a target date for some time, and that was likely to have been until the date on which the company was able to extricate itself from a particular contract, i.e. 25th June, I reject the evidence that at no time up to 26th June was notification of the termination date communicated to the applicants. Mr D'Souza conceded that the 6th July was a target date. The strategy of closing down the division, finishing of existing projects, getting out of other contracts, retaining a number of staff and terminating the services of others was not done without a target date firmly in mind. In this regard Mr Kennedy's evidence has a cogency which in my view reflects the decision making processes that enabled notification to be given to staff on 18th June.

64 As joint managers charged with the responsibility to close down the unviable operation it is unrealistic to think that they did not have a precise understanding of the timetable being implemented. It is not in my view that as joint managers they were required to be given an unambiguous statement as to when their services would be terminated; it was sufficient that having developed the time lines for shutting down the operation and knowing that the division was to close that they were aware that 6th July was the target date from 14th June.

65 I am satisfied that the issue of confirmation of the amendment to the notice period under the applicants' contracts of employment came up in the context of the realisation that the division was to close. And that a further amendment was accepted by the applicants to the four weeks notice. It was modified to be four weeks pay on termination. That was accepted by Mr Farrell and Mr D'Souza as evidenced by the formers retort when the undertaking for tax minimisation was given that he didn't care how he got it as long as he was paid the four weeks.

66 The reference to obtaining seven weeks by way of notice and payment in lieu of notice is an elaboration by Mr Kennedy that developed in the confrontation over redundancy on 26th June. It has no foundation in terms of a contractual entitlement and in my view is a rationalisation of a position to highlight how much better off the applicants were than just receiving their contractual entitlement to four weeks notice.

67 From these findings I have accepted the evidence of Mr Kennedy over that of Mr Farrell and Mr D'Souza on issues relevant to the determination of the contractual entitlement and the context in which it was established and paid. I have disregarded the evidence of Mr Canfield as being unhelpful. His understanding of the application of the redundancy policy was contrary to all other witnesses.

68 I am satisfied that there was established a contractual entitlement to four weeks pay on termination and that this was paid on the basis of two weeks notice and two weeks redundancy in line with the commitment given to the applicants on 14th June. The claims for additional two weeks pay for each of the applicants are rejected.

69 The applications are dismissed.

2003 WAIRC 08339

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY KIM FARRELL & KIRK D'SOUZA, APPLICANTS
	v.
	Q MULTIMEDIUM LIMITED, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 14 MAY 2003
FILE NO/S.	APPLICATION 1335 OF 2001 & APPLICATION 1336 of 2001
CITATION NO.	2003 WAIRC 08339

Result	Application for outstanding contractual entitlement dismissed
Representation	
Applicant	Mr K Trainer, agent on behalf of the applicants
Respondent	Mr D Jones, agent on behalf of the respondent

Order

HAVING HEARD Mr K Trainer on behalf of the applicants and Mr D Jones on behalf of the respondent, the Commission, by the powers conferred on it by the *Industrial Relations Act, 1979* hereby orders—

THAT the applications be and are hereby dismissed.

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

2003 WAIRC 08359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KELLY JANE FRANCIS, APPLICANT
	v.
	PILBEAM FAMILY TRUST T/A STAMP-IT RUBBER STAMP CO (WA), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 24 MARCH 2003
FILE NO/S.	APPLICATION 27 OF 2003
CITATION NO.	2003 WAIRC 08359

Catchwords	Harsh, oppressive and unfair dismissal – Extension of time for application to be referred to Commission – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Extension of time to accept referral not granted – *Industrial Relations Act 1979* ss 29(1)(b)(i),(2)&(3)
Result	Application dismissed
Representation	
Applicant	Ms K Francis on her own behalf
Respondent	Mr R Pilbeam

Reasons for Decision

(Ex tempore)

1. The Commission has before it application 27 of 2003 by Kelly Jane Francis against the Pilbeam Family Trust trading as Stamp-it Rubber Stamp Company (Western Australia). The application is made pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"), by which it is said that the respondent unfairly dismissed the applicant on or about 4 December 2002. The applicant by this claim does not seek reinstatement but rather seeks compensation. Additionally, the applicant seeks compensation in the sum, as particularised, of some $13,750. The respondent opposes the applicant's claim and sets out the particulars of its defence by notice of answer dated 29 January 2003.

2. The Commission called these proceedings on of its own motion by reason of the fact that the notice of application was filed outside of the 28 day time limit as required pursuant to the terms of s 29(2) of the Act. It is the case, however, that by reason of ss 29(2) and (3) of the Act, although there is a requirement for claims of this nature to be referred to the Commission within 28 days of the date of termination of employment, there is a power in s 29(3) of the Act for the Commission to accept a referral by an employer under s 29(1)(b)(i) alleging unfair dismissal out of time if the Commission considers that it would be unfair not to do so.

3. That is the circumstance which the Commission presently has before it, given that the application was filed some week or thereabouts out of time as required by the statute.

4. The Commission as presently constituted considered this type of application in the matter of *Azzalini v Perth Inflight Catering Services* (2002) 82 WAIG 2992. In that case the Commission as presently constituted set out what it considered to be relevant principles in relation to applications of this kind, and in particular at para 28 of the judgment set out a number of factors which the Commission should take into account in considering whether an extension of time should be granted or not. Those factors include the following:

   (a) Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;

   (b) An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;

   (c) It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;

   (d) Considerations relevant to whether it would be unfair to not extend time include—

      (i) the length of any delay;

      (ii) the explanation for the delay;

      (iii) steps taken if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested;

      (iv) the merits of the substantive application in the sense that there is a sufficiently arguable case; and

   (e) Whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent, without more, is not a sufficient basis of itself, to grant an application for an extension of time."

5. I adopt and apply those principles for the purposes of this matter.

6. The applicant informs the Commission, and as set out briefly in the particulars of claim, that the reason that her application was not referred to the Commission within 28 days after termination of employment was that she was advised to seek legal advice and that the firm of solicitors which she endeavoured to do so was apparently on leave until 6 January 2003. It appears that the applicant contacted that firm of solicitors on or about 8 January 2003 and because of costs associated with retaining solicitors, decided to commence these proceedings without representation. In my view whilst that is an issue, the fact that the applicant made the decision to commence proceedings without representation and did so of her own volition on 8 January 2003 is a relevant consideration.

7. Additionally, the applicant, to her considerable credit, I might say, admits to the Commission that very shortly after her dismissal she sought information from a government department responsible for labour relations matters, which information she duly received, which information included relevant legislation, a notice of application, that is, form 1 as required by the regulations to commence these proceedings, and also was advised, and information was available to her, that these proceedings needed to be commenced within 28 days of termination of her employment.

8. Again I say to her credit the applicant conceded that she was aware of the requirement for such claims to be filed within the 28 day time limit, but informed the Commission that she did not do so as she wished to first discuss the matter with solicitors as to whether she should proceed with her claim.

9. The respondent opposes the application and says that at all times it treated the applicant fairly and there was no indication to it that the claim would be filed against it, until such time as the notice of application was received by service.

10. Having regard to the relevant factors set out in *Azzalini* and in particular the requirement that, prima facie, time limits as required by the Act must be met, and the applicant's very creditable concession that she was aware of such time limits, I am not persuaded in the circumstances that the Commission ought extend time. In my view, if time limits are to mean anything in this jurisdiction then, prima facie, they should be met. A significant factor in this case is the admission by the applicant, again I say to her credit, that shortly after she was dismissed she sought and obtained information and advice from a relevant government department as to the necessity to bring these proceedings within 28 days.

11. This is not a case in its circumstances where the applicant was entirely ignorant of the obligations imposed on her by the law. Despite this, again to her credit, she freely admits that she took no steps until 8 January 2003 to commence these proceedings.

12. Whilst there may be an arguable case on the merits, given the circumstances of the applicant's state of knowledge and the requirements imposed by the Act, and the onus being on the applicant to make diligent and proper inquiries and to comply with the requirements of the statute, I am of the view that the application to extend time ought be refused.

2003 WAIRC 07991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KELLY JANE FRANCIS, APPLICANT
	v.
	PILBEAM FAMILY TRUST T/A STAMP-IT RUBBER STAMP CO (WA), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 24 MARCH 2003
FILE NO/S.	APPLICATION 27 OF 2003
CITATION NO.	2003 WAIRC 07991

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms K Francis on her own behalf
Respondent	Mr R Pilbeam

Order

HAVING heard Ms K Francis on her own behalf and Mr R Pilbeam on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2003 WAIRC 08271

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLE NATALIE GAMLIN, APPLICANT
	v.
	CAPEBAY HOLDINGS, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 17 APRIL 2003
FILE NO.	APPLICATION 1688 OF 2002
CITATION NO.	2003 WAIRC 08271

Result	Contractual benefit awarded
Representation	
Applicant	Ms N N Gamlin
Respondent	Mr K Foo

Reasons for Decision

(Given extemporaneously and subsequently edited by the Commissioner)

1 This is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant, Ms Nicole Natalie Gamlin, states in her application that she was employed full-time by the respondent, Capebay Holdings, from 23 May 2002 until 6 August 2002 as an accounts clerk/administrator. The claim is for the payment of notice of one week, the applicant alleges is due under her contract of employment.

2 On the evidence it is clear as follows. The applicant sought leave from the respondent in early July 2002. The applicant's leave form was incorrect and she was asked by Mr Foo to submit another form, and that form was submitted. I accept the applicant's evidence that leave was approved at that stage verbally and she then sought to make plans to book her holiday. I accept that the respondent knew that her holiday had been booked and knew that she was intending to take leave when she did.

3 All of this is in conflict between the parties but is not relevant to the issue to be decided. The point that I am to decide is whether the notice claimed is a contractual benefit and whether it is due. There is no contest that it has not been paid. It is clear on the evidence of Mr Foo and Ms Gamlin that Ms Gamlin was terminated late on 6 August 2002, and in doing so the contract was terminated at the hands of the respondent which Mr Foo says was for performance reasons.

4 It is apparent from the contract, and I do not seek to read the details of the contract into the record, that Ms Gamlin at that stage was under probation and that being the case was due one week's notice if her services were terminated. That is not in dispute. It is also apparent from the contract that one week's notice was payable unless the employee was found guilty of malingering, neglect of duty or misconduct. None of those features of the contract appear to be relevant in these circumstances. Ms Gamlin's action in seeking to take leave that was approved, and when she had made travel plans, could hardly be construed as neglect of duty and worthy of summary dismissal.

5 The fact that the employment was terminated at the employer's hands means that one week's notice was payable as well as the other contractual benefits; in this case being the annual leave. There was no dispute between the parties as to annual leave, and I have to assume that the correct amount of annual leave was paid. It is apparent that under the contract one week's notice must be paid, and one week's notice is what will issue as the order from this Commission.

6 The applicant was paid $17.00 per hour and was part-time according to the contract, with initial hours of 25 hours per week. The applicant seeks to calculate the hours for the week owed by averaging the weekly hours she worked. She calculates that she worked a total of 399.25 hours over 10 weeks and hence claims 39.925 hours X $17; ie $678.72. The averaging of hours is an appropriate method to adopt in these circumstances. The applicant has provided each of her payslips, which are part of the record, and I have checked those payslips and agree with her calculations. I would therefore issue an order that $678.72 gross less taxation be paid by the respondent to Ms Gamlin within 7 days of the order.

2003 WAIRC 08334

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLE NATALIE GAMLIN, APPLICANT
	v.
	CAPEBAY HOLDINGS, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 15 MAY 2003
FILE NO.	APPLICATION 1688 OF 2002
CITATION NO.	2003 WAIRC 08334

Result	Contractual benefit awarded
Representation	
Applicant	Ms N N Gamlin
Respondent	Mr K Foo

Order

HAVING heard Ms NN Gamlin on her own behalf and Mr K Foo on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders-

THAT the respondent, do hereby pay, as and by way of a denied contractual entitlement, the amount of $678.72 gross less taxation to Natalie Gamlin within 7 days of the date of this order.

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

2003 WAIRC 08414

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUDITHE ELLEN GIBSON, APPLICANT
	v.
	THE SISTERS OF MERCY PERTH (AMALGAMATED) INC TRADING AS SANTA MARIA COLLEGE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 29 MAY 2003
FILE NO/S.	APPLICATION 644 OF 2002
CITATION NO.	2003 WAIRC 08414

Result	Application alleging unfair dismissal and denied 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 Judithe Ellen Gibson ("the applicant") pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relation Act 1979* ("the Act"). The applicant alleges she was unfairly dismissed from her employment as a housemother with the Sisters of Mercy Perth (Amalgamated) Inc trading as Santa Maria College ("the respondent") on 20 March 2002. The applicant also maintains she is due benefits under her contract of employment. The respondent argues that it was appropriate to summarily terminate the applicant on 20 March 2002 and that there are no benefits due to the applicant under her contract of employment.

Background

2 The applicant was employed as a housemother at Santa Maria College ("the College") on 2 February 1987 until she was summarily terminated on 20 March 2002. At termination the applicant was employed full-time, earning $589.48 per week. The applicant's contract of employment was governed by the terms and conditions of the Roman Catholic Archbishop of Perth Inc Non-Teaching Staff Enterprise Bargaining Agreement 2000 (No. AG 143 of 2001) which is to be read in conjunction with the Independent Schools (Boarding House) Supervisory Staff Award (No. A 9 of 1990) ("the Award").

Respondent's evidence

3 Therese Marie Rustand is the respondent's full-time nurse. She has been a registered nurse since 1979. Ms Rustand initially commenced employment on a part-time basis and began working full-time in January 2002. Ms Rustand was responsible for the care of both day students and boarders. She was on call 24 hours a day for any emergency or health problems which arose.

4 Ms Rustand conducted professional development sessions relating to the College's policies and procedures for the College's housemothers on an ongoing basis. She also conducted tutorials on specific medical and health issues as necessary. At the beginning of each school year Ms Rustand would discuss medical issues relating to specific students with housemothers. Information relating to a student's specific medical conditions was stored in manuals that were kept in each boarding house.

5 Ms Rustand gave evidence that at the beginning of the 2002 school year she compiled a medical manual titled the Santa Maria College Housemothers' Health Manual 2002 ("the Medical Manual") (Exhibit R1). The Medical Manual, which outlines the respondent's medical procedures and processes, was for housemothers to refer to when dealing with boarders' health issues.

6 Ms Rustand maintained that the Medical Manual was distributed to all housemothers, including the applicant, at a professional development session which she conducted in the College's boardroom on 30 January 2002. The minutes of this meeting (Exhibit R2) confirm that the applicant was in attendance when the Medical Manual was circulated to housemothers. Ms Rustand confirmed that page two of the Medical Manual refers to procedures that housemothers should adopt when giving medication to students. Ms Rustand confirmed that the respondent had additional procedures in place for the distribution of medication to boarders. These procedures are outlined in Exhibit R3. Ms Rustand confirmed that these guidelines were in place and operational since February 2000.

7 Ms Rustand gave evidence about four incidents involving the applicant. In August 2000 it came to Ms Rustand's attention that the applicant had given one of her own Panadeine Forte tablets to a boarder. As this prescription tablet was not prescribed for this student the applicant had breached the respondent's medication procedures. Ms Rustand was concerned about the applicant's actions in respect to this matter, so she made a written report of the incident (Exhibit R4). Ms Rustand made it clear to the applicant at the time of the incident that her actions were dangerous and illegal.

8 In October 2001 Ms Rustand became concerned about an incident involving the applicant and a student who displayed suicidal tendencies. It was her understanding that the applicant advised the student's father not to take the student away from the College even though the applicant was aware that the student was distressed and suicidal. When this issue was raised by the applicant with Ms Rustand the following day, Ms Rustand spoke to the student and after liaising with her father the student was taken to a medical practitioner and later that day left the school and did not return.

9 Ms Rustand stated that the respondent had procedures in place for dealing with students at high risk. This was confirmed in the Santa Maria Boarding Community, Current Practise Regarding Student Welfare Communication (Exhibit R6). Ms Rustand was concerned that the applicant did not follow the procedures for dealing with the student at risk of self-harm as detailed in Exhibit R6. Ms Rustand thus made a report in the student's medical file of what took place in relation to this incident (Exhibit R5).

10 In March 2002 Ms Rustand became aware of another incident involving the applicant. On 9 March 2002 Ms Rustand received a call from one of the respondent's housemothers, Sr Margaret Lipsett, who was concerned about the health of an asthmatic student who was a boarder in the applicant's house. Sr Lipsett was looking after this student that evening because the applicant was on an excursion with some of the boarders from her house. Subsequent to Sr Lipsett telephoning Ms Rustand about the student's deteriorating health Ms Rustand went to the College and took the student to hospital. She asked the student about what medication she had taken during that day as there was no entry on the student's medical record apart from a record of two lots of medication which were given to the student prior to the applicant commencing duty that morning. The student recalled the medication which she had been given by the applicant, however this differed from the medication detailed by the applicant in the Bertrand House changeover book. Ms Rustand stated that it was necessary for her to know the specific medication and dosage students are given so as to adequately assess the student's condition and to determine if further medical treatment is required. Ms Rustand was concerned that the applicant had not filled out the student's medical record detailing the medication she had given the student that day. Ms Rustand's stated that the applicant breached the respondent's procedures as she did not fill out the student's medical record sheet indicating when the medication was given to the student. Ms Rustand also claimed that the applicant did not follow the instructions on the student's personal medical file requiring that a nebuliser be used to assist the asthmatic student if she was unwell. In Ms Rustand's view it should have been clear to the applicant that the student was very ill and required urgent attention. Ms Rustand confirmed that housemothers had been given professional development to deal with asthmatic students and that the applicant was well aware of how to deal appropriately with this student. It was Ms Rustand's view that the number of cold and flu tablets that she understood were given to the student by the applicant on 9 March 2002 was excessive and could have masked the student's symptoms. The student was a known asthmatic and Ms Rustand was concerned about possible heart problems the student could suffer as a result of the medication given to her by the applicant. In the event the student was admitted to hospital late on the evening of 9 March 2002 with severe asthma and a collapsed lung.

11 In early March 2002 Ms Rustand became concerned about the applicant's behaviour in relation to the distribution of dexamphetamine tablets to a student. It was brought to Ms Rustand's attention that there was a discrepancy on the College's Register of Drugs of Addiction Used and Received ("Drug Register"). This Drug Register was kept by the College for any Schedule 8 drugs (dangerous drugs of addiction) administered by the College. Under College policy housemothers were required to record the date on which a tablet was distributed, to whom the tablet was given, the amount of tablets received, the amount of tablets taken and then count and record the balance of tablets that were left. The person who effected each transaction was to sign the Drug Register confirming what had been distributed and how many tablets were left. In early March 2002 a discrepancy was raised with Ms Rustand about the number of dexamphetamine tablets that were recorded in the balance column of the Drug Register and the number actually remaining. Ms Rustand checked the Drug Register kept by the College (Exhibit R11) and as the incident related to tablets dispensed by the applicant, Ms Rustand raised this matter with the applicant. The applicant confirmed to Ms Rustand that she did not normally count the tablets before entering the number of tablets remaining in the Drug Register in the balance column. Ms Rustand discovered that the Drug Register had been altered subsequent to her discussion with the applicant as the numbers in the balance column were changed. Ms Rustand was unaware of who effected these changes. Ms Rustand was concerned about the applicant's failure to follow the required procedures when filling out the Drug Register given that Ms Rustand had explained to housemothers how the Drug Register should be completed. In Ms Rustand's view the applicant took no responsibility for this discrepancy when the issue was raised with her as the applicant stated to Ms Rustand that it was her policy not count the tablets. Ms Rustand completed a report of this incident and handed it to Ms Pitos (Exhibit R12).

12 Under cross examination Ms Rustand was asked who prepared the minutes of the professional development meeting on 30 January 2002 (Exhibit R2). Ms Rustand stated that she was unaware of who prepared the minutes but in her view the minutes were a true and accurate record of what took place at the meeting.

13 In relation to the Drug Register **(**Exhibit R11) Ms Rustand conceded that there was an anomaly in the document in relation to the total number of tablets distributed on 25 February 2002 and that the applicant was not involved with this anomaly.

14 Ms Rustand stated that it was her understanding that housemothers were aware that there was a nebuliser kept in Bertrand House and the Medical Centre. Ms Rustand confirmed that the Medical Centre would have been locked when the applicant went there to look for a nebuliser. Ms Rustand explained that as the lock had recently been changed housemothers could not access the Medical Centre at this time.

15 Ms Rustand confirmed that she had complained to the applicant in the past about the applicant ringing her after hours in relation to frivolous matters.

16 Anne Marie Pitos is the Principal of Santa Maria College and has held this position since 1 July 2000. Ms Pitos was aware that in August 2000 the applicant was involved in an incident which involved the applicant giving an unprescribed drug to a student. She spoke to Ms Bahen, the head of boarding, and Ms Rustand about the incident and asked them to provide her with

reports about the incident. Ms Pitos was shocked by the applicant's lack of judgement in relation to this incident and the applicant's disregard for College procedures relating to giving students unprescribed drugs.

17 In October 2001 it was brought to Ms Pitos' attention that the applicant was dealing with a student who had suicidal tendencies. Ms Pitos asked for reports to be prepared in relation to the incident. As a result of reading reports from Ms Bahen and Ms Rustand about the incident (Exhibit R13), Ms Pitos decided that the student had been at risk and in dealing with the student the applicant had not followed the respondent's procedures. On this basis, she arranged to meet with the applicant the following Saturday. At this meeting Ms Pitos asked the applicant why she did not follow the respondent's procedures in relation to this issue. The applicant stated that it was her view that the student was not at risk. Ms Pitos stood the applicant down on full pay to consider the matter further and to make it clear to the applicant that the applicant's behaviour in relation to this matter was serious.

18 On 29 October 2001, Ms Pitos sent a letter to the applicant about this incident (Exhibit R14). This letter advised the applicant that she had not dealt with the student appropriately and the applicant's actions had severely compromised the well being of the student involved. Further, Ms Pitos believed that the applicant's actions in dealing with this student constituted serious misconduct. The applicant was asked to formally respond to these concerns and Ms Pitos stated that she would review the applicant's contract of employment after receiving this response (Exhibit R14). The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers ("the Union") responded on behalf of the applicant on 30 October 2001 (Exhibit R15). After receiving this letter the respondent convened a meeting between the parties which was held on 5 November 2001. Attached to the Union's letter was a report written by the applicant stating her views about the incident.

19 At the meeting held on 5 November 2001, Ms Pitos pointed out to the applicant the importance of following set procedures and the applicant was counselled in relation to the incident. Ms Pitos told the applicant that failure to follow procedures in future could lead to the applicant's contract of employment being terminated. On 9 November 2001 Ms Pitos wrote to the applicant stating that at this stage Ms Pitos had chosen not to terminate the applicant's contract of employment however, failure to provide an appropriate standard of care to students in the future would lead to a review of the applicant's contract of employment. The applicant was also given a written warning concerning this incident (Exhibit R16). The applicant was reinstated to normal duties as at 1 November 2001.

20 In March 2002, Ms Bahen and Ms Rustand raised two further issues with Ms Pitos relating to the applicant. The first issue related to the applicant failing to deal appropriately with a chronic asthmatic student, who had been in the applicant's care on 9 March 2002. Ms Pitos was given a report from Sr Lipsett relating to the applicant not recording the medication given to the chronic asthmatic student on 9 March 2002, which was contrary to the respondent's procedures. (Exhibit R17). The applicant had also failed to appropriately document Schedule 8 medication that she had distributed to a student. Ms Pitos confirmed that the respondent was required to keep a record of the distribution of these drugs and number of tablets held by the College. As a result of the applicant's actions there was a discrepancy in the number of dexamphetamine tablets held by the respondent. Further, records relating to the February/March 2002 distribution of drugs had been altered without any confirmation of who had made the alteration.

21 As a result of receiving this information Ms Pitos convened a meeting with the applicant on 13 March 2002. At this meeting Ms Pitos discussed the seriousness of these incidents with the applicant. Ms Pitos highlighted that the applicant had not followed the respondent's procedures as detailed in the Boarding Community Staff Handbook ("the Handbook") (Exhibit A5) and the Medical Manual which were kept at each house. Ms Pitos stated that at this meeting the applicant acknowledged that she did not count how many Schedule 8 tablets were left after distributing the tablets and that it was not her intention to do so in the future. Further, the applicant confirmed that she altered the records of the number of drugs that remained. The applicant also agreed that on 9 March 2002 she did not note the medication she had given the asthmatic student on the student's medical record sheet (Exhibit R9). As a result of this discussion, Ms Pitos stood the applicant down. In her view the applicant's behaviour was serious as the applicant had again not followed the respondent's procedures thus compromising the respondent's duty of care towards its students. She told the applicant that she wanted an adequate response about why proper procedures were not followed in relation to the asthmatic student and why the Drug Register was altered without any one being advised. Ms Pitos confirmed the respondent's position to the applicant by letter dated 15 March 2002 (Exhibit R18). This letter asked for the applicant to respond to the events surrounding these two incidents and the applicant was asked to justify why, by no later than 4.00pm Tuesday 19 March 2002, she should remain employed at the College. The applicant was informed that once a response was received by Ms Pitos a decision would be made about the applicant's ongoing employment.

22 Ms Pitos received a letter from the applicant on or about 20 March 2002 (Exhibit R19), however, in Ms Pitos' view the applicant's response was inadequate. It did not refer to the issues to which the applicant was asked to respond and no explanation was given by the applicant for not following the respondent's procedures. The applicant attended a meeting with Ms Pitos on 20 March 2002 where she was advised that her response was inadequate. Ms Pitos discussed previous concerns relating to the applicant's employment and told the applicant that she no longer trusted her as a housemother given that the applicant was not following the respondent's established and well known procedures. The applicant did not respond to Ms Pitos and no additional information was provided to Ms Pitos by the applicant at the meeting. Ms Pitos advised the applicant that given the applicant's serious misconduct her contract of employment was terminated immediately. Ms Pitos made a file note of this meeting (Exhibit R20), and confirmed her decision to terminate the applicant's contract of employment in a letter to the applicant dated 20 March 2002 (Exhibit R21).

23 Under cross examination Ms Pitos was asked if she advised the applicant about the nature of the meeting she convened with the applicant on 13 March 2002, and whether the applicant was given the opportunity for a support person to attend. Ms Pitos stated that she could not recall if she had told the applicant what the meeting was about and whether or not she could have someone in attendance.

24 It was put to Ms Pitos that the Bertrand House change over book had different details of the medication given to the student than those details provided to her by Ms Rustand and Sr Lipsett. Ms Pitos stated that it was her view that the applicant had not followed the proper procedures in contemporaneously detailing the medication given to the student and that was the main issue that the respondent had with the applicant in relation to this issue. Ms Pitos confirmed she stated that she had the applicant's termination letter prepared prior to meeting with the applicant on 20 March 2002.

The Applicant's Evidence

25 The applicant worked for 17 years with the respondent, the first two years on a casual and part-time basis. Until recently there had been no issues with her performance. She stated that in November 2001 Ms Bahen told her not to bother her after hours unless the situation was an emergency, and to use her own judgement. The applicant stated that subsequent to the incident in October 2001 involving the student at risk of self harm she took stress leave due to the way in which she was treated by the respondent. The applicant stated that she did not receive a copy of the Medical Manual (Exhibit R1) at the professional development meeting held in January 2002.

26 In relation to the issue in October 2001 relating to the student threatening self harm, the applicant maintains that the student did not raise any issue with her about her wish to harm herself. At 10.00pm on the evening that the student was unwell the applicant encouraged the student to speak to her father on the telephone. After the student spoke to her father, the student's father rang and spoke to the applicant, at the applicant's instigation. After this conversation the student's father decided that as his daughter appeared to be settled and was to be picked up by him after school the next day, he would not collect the student that evening.

27 In relation to the March 2002 incident concerning the administration of Schedule 8 tablets, the applicant stated that Ms Rustand rang her at home and queried an error in the number of tablets remaining on one of the Drug Register forms. The applicant told Ms Rustand that she did not normally count the remaining Schedule 8 tablets. As Ms Rustand told the applicant to check the Drug Register, the applicant later altered the records, and as she made this alteration at the end of her shift she was unable to advise Ms Rustand that she had made this alteration.

28 The applicant was asked about the incident concerning the asthmatic student. The applicant stated that on 9 March 2002 she was diligent in checking the health of this student as she checked the student every half hour, she gave the student senega because the student was feeling sick and she ensured that the student ate lunch. At no stage during the day did the student exhibit any sign of asthma. At 4.30pm the applicant asked the student if her condition was asthma related and the student replied that it was not. At 4.30pm she gave the student one cold tablet. The student then ate dinner and it was only then that the applicant was advised by the student that she could be having an asthmatic attack. The applicant looked for a nebuliser but she could not locate one in Bertrand House, nor could she access the one in the Medical Centre as it was locked. The applicant then escorted the student to the care of Sr Lipsett at Catherine House as the applicant was required to attend a social with other boarders. The applicant then went to the social. The applicant stated that it was her intention to fill out the student's medical record sheet on her return from the social. However, when she returned the student's medical record sheet was missing. Even though the student's medical record sheet was filled out by the housemother on duty prior to the applicant coming on duty, the applicant was unaware that the student had been given other tablets that day because the student's record sheet had not been "flagged" by the previous housemother. The applicant stated that she put the details of the student's medical condition and the medication given to her in the change over book instead of on the student's medical record because this book was easily available to the applicant. Further, the applicant intended to put the required details on the student's medical record sheet later that evening or the next day. She stated that she had written student medical information in the change over book previously and later transferred this information to the student's medical record sheet.

29 The applicant stated that she thought the process used to effect her termination was unfair. When she met with Ms Pitos on 13 and 20 March 2002 she believed that Ms Pitos did not give her side of the story the weight that it was due. At the meeting with Ms Pitos on 13 March 2002 the applicant discussed Sr Lipsett's understanding of what took place in regard to the asthmatic student. The applicant told Ms Pitos that Sr Lipsett's recollection of events was not true. She stated that she had not received a copy of the reports given to Ms Pitos by Ms Bahen and Ms Rustand about the incidents.

30 The applicant tabled a number of cards and letters from parents and students which she had kept over the years. The applicant stated that these cards and letters were testament to the high regard in which she was held by the boarders whom she had successfully looked after for many years.

31 Since termination the applicant has had financial difficulties. Given her age she has been unable to find alternative employment and she had to sell her house because she could not continue to make the mortgage payments.

32 Under cross examination, the applicant agreed that there was an issue in March 2000 where there was a conflict between her and Ms Rustand, and that she received counselling subsequent to this incident.

33 The applicant was asked if she was aware of the Santa Maria College Boarding School Medication Guidelines (Exhibit R3). She stated that she had not seen these guidelines however, she was aware of the procedures outlined in the guidelines. She confirmed that if the respondent asked her to follow a procedure, given to her either verbally or in writing, then she was expected to adhere to the requirements of this procedure.

34 The applicant was asked about the incident which took place on 9 March 2002 concerning the asthmatic student. The applicant stated that she gave the student one tablet at approximately 4.30pm and that this and other medication given to the student was recorded in the change over book at various times throughout 9 March 2002.

35 The applicant conceded that the incident in August 2000 was a serious issue. She stated that she gave the student a Panadeine Forte tablet as no other medication was available at the time and the student was in pain. The applicant stated that since this incident she had not given students unprescribed tablets. In relation to the incident in October 2001 concerning the student who was suicidal the applicant confirmed that the student's father told the applicant that the student may slash her wrists. The applicant stated however, that even given this threat, it was her view that the student was not at risk. The applicant reported the incident to the nurse the next day as she did not think it necessary to advise Ms Bahen of the issue that evening. The applicant confirmed that the respondent gave her a warning in relation to this incident.

36 The applicant confirmed that she was aware that her contract of employment could be in jeopardy given the accusations put to her at the meeting of 13 March 2002 but she felt that there would be no use in responding in detail to Ms Pitos' request for a written response to the allegations levelled against her. She stated that as she had only received the letter on the Monday prior to the day on which she was supposed to respond it was difficult for her to put together a comprehensive response. The applicant stated that she had ongoing personality issues with Ms Bahen and Ms Rustand and she had previously raised this matter with Ms Pitos. The applicant maintained that the respondent had only trained her in first aid and that she was given no training relating to altering legal documents, such as the Drug Register.

37 Tracey Bahen was summonsed by the applicant to give evidence. She was the respondent's Head of Boarding for approximately seven years. Ms Bahen stated that she prepared the Handbook in early 2002 (Exhibit A5). She stated that this was distributed to housemothers on 30 January 2002 and was formally discussed at a staff meeting, where the applicant was in attendance, on 13 February 2002. At this meeting the Handbook was discussed in detail and housemothers were asked to ensure that they understood all aspects of the document and were given the opportunity to clarify any uncertainties. Ms Bahen understood that the applicant was aware of all of the procedures detailed in the Handbook. She confirmed that the Handbook incorporated a number of policies and procedures that had been in place at the College for some years and was to be read in conjunction with the Medical Manual.

38 Ms Bahen was asked about the incident which took place on 9 March 2002, relating to the student with asthma. After Ms Rustand contacted Ms Bahen about this incident, Ms Bahen asked Sr Lipsett to prepare a report on what had transpired. After receiving this report Ms Bahen spoke to the applicant. She discussed the reasons for the applicant not following appropriate procedures given that the student was a known asthmatic. Ms Bahen stated that she was particularly concerned about the applicant's behaviour as the applicant should have kept a contemporaneous record of the medication she gave to the student and that it was not appropriate for the applicant to record medication given to students in the changeover book. Ms Bahen

stated that she lost confidence in the applicant's ability to follow proper procedures. As a result of the applicant's actions in relation to this matter Ms Bahen documented the background to this incident and gave this report to Ms Pitos.

39 Under cross examination Ms Bahen confirmed that she had over 30 years experience in education, teaching and youth counselling. As part of her role as Head of Boarding she dealt with team development and appropriate care of the boarders. It was her duty to develop and maintain policies and procedures in relation to this duty of care. She confirmed that she was the applicant's supervisor.

40 Ms Bahen was asked about three incidents concerning the applicant. Ms Bahen stated that the applicant was reprimanded for giving a student an unprescribed Panadeine Forte tablet. Ms Bahen was concerned about the applicant's response when she was reprimanded as it appeared to Ms Bahen that the applicant did not accept responsibility for the incident, even though it was clear to Mr Bahen that in relation to this matter the applicant had not followed the respondent's procedures.

41 Ms Bahen was asked about the October 2001 incident relating to the boarder who had suicidal tendencies. Ms Bahen stated that given the seriousness of the student's state of health the applicant should have either called herself, the Principal or the College nurse all of whom were available twenty four hours a day to deal with emergencies of this nature. Ms Bahen stated that the respondent had clear procedures in place at the time for dealing with issues of this nature as confirmed in the respondent's document dealing with student welfare (Exhibit R6). Ms Bahen was particularly concerned about the applicant's behaviour because the applicant did not mention the student during the normal handover session and she only found out about the incident from Ms Rustand. The issue was very serious and the student did not return subsequent to leaving the College for treatment. When she spoke to the applicant about her inappropriate behaviour in relation to this incident it was Ms Bahen's opinion that the applicant was dismissive in her response. She stated that the issue was sensitive as four boarders required counselling over the incident. Ms Bahen also stated that it was inappropriate for the applicant to allow the student to remain on her own at any stage during this incident. She confirmed that she prepared a report about this incident for Ms Pitos.

42 Ms Bahen stated that the Medical Manual which updated existing policies (Exhibit R1) was given to all staff at the meeting held on 30 January 2002. She confirmed that the manual contained no significant changes to the respondent's existing procedures. She confirmed that at this meeting Ms Rustand discussed the manual page by page. The Handbook was then distributed to housemothers to be discussed at the meeting held on 13 February 2002.

43 Ms Bahen was asked about the incident on 9 March 2002 relating to the asthmatic student. She stated that Ms Rustand contacted her on the evening of 9 March 2002 advising her that she was taking the student to hospital and that there were no records of the medication given to the student that afternoon as apart from an entry about medication given that morning, the record sheet was blank. Ms Bahen stated that she was very concerned about this as any medication given to a student should be recorded when the medication is given. She stated that the changeover book which was usually completed at the end of the day was not the appropriate place to detail medication given to a student. Subsequent to this incident occurring, Ms Bahen met with Ms Pitos on 11 March 2002, and on 13 March 2002 she gave Ms Pitos a copy of a report relating to this incident. Ms Bahen stated that it was her view that the applicant was aware of the respondent's policies for filling out student medication records and that the applicant had adequate opportunity to clarify any misunderstandings relating to this policy. She also confirmed that tutorials had been conducted by the respondent concerning procedures contained in the Medical Manual.

44 Under re-examination Ms Bahen confirmed that in August 2000, when the applicant was reprimanded for giving a student a Panadeine Forte tablet, the applicant volunteered that she had given the student the tablet in the first instance. She was asked where the respondent expected medication to be noted once given to a student. Ms Bahen referred to page 2 of the Medical Manual which states that when medication is given to a student the name of the student is to be entered into the student's medical record file together with the time of administration of the medication and the dosage. The housemother should then initial the time slot once the medication has been administered and taken in front of the housemother.

Submissions

45 The applicant submitted that even though the applicant had not fully complied with the respondent's procedures the applicant did not repeat the misdemeanours for which she was reprimanded, therefore it was inappropriate to terminate the applicant's contract of employment. In relation to the October 2001 incident the applicant submits that as the applicant reported the incident in the changeover book and told the nurse about the student this was sufficient in the circumstances. In relation to the incident on the 9 March 2002 the applicant was unable to fill out the student's medical record sheet it had been removed and taken away from Bertrand House when the student was taken to hospital. The applicant submitted that perhaps she was guilty of too much care to the students and not enough attention to documentation. Even though there were discrepancies in the Drug Register in relation to tablets given by the applicant to students and the number of tablets retained the applicant maintained that she was not appropriately trained in order to undertake these duties or to undertake other procedures required of her by the College. Further, there were options open to the respondent apart from terminating the applicant's contract of employment given the applicant's exemplary work history.

46 The respondent stated it was appropriate to summarily terminate the applicant's contract of employment as she had repudiated her contract of employment by behaving in the way she did. The applicant was charged with a duty of care to boarders at the College and the applicant failed to demonstrate that she was able to fulfil this requirement as by the time the applicant was terminated she was unable to provide adequate care and supervision in accordance with the respondent's procedures. At least two of these issues, which involved breaches of well established procedures, involved life threatening situations. The respondent maintained that the applicant consistently flouted the respondent's procedures. The respondent's procedures were reasonable and appropriate and the applicant was well aware of them. As a result of the applicant continually flouting procedures and putting boarders' lives at risk the respondent no longer had trust in the applicant to undertake her job to the appropriate standard of care that was required of her. On this basis it was untenable for the respondent to continue employing the applicant.

47 The respondent maintained that the applicant was afforded procedural fairness in relation to disciplinary processes that were undertaken at the beginning of 2002. Further, the applicant was warned in October 2001 that any further incident relating to not following procedures could result in her contract of employment being terminated.

48 The respondent argued that the applicant was not due any benefits under her contract of employment with the respondent as no evidence was given during the proceedings about this claim.

Findings and Conclusions

Credibility

In my view all witnesses gave their evidence honestly and to the best of their recollection. Most of the evidence given in these proceedings was not in dispute. One issue in contention, however, was whether the applicant was given a copy of the Medical Manual in January 2002 (Exhibit R1). The applicant denied that she was given a copy of this manual at the staff development meeting held in January 2002 but she confirmed that she was aware of the procedures outlined in the manual. Given that the applicant conceded that she was aware of the procedures as detailed in the Medical Manual I do not see this dispute as being

critical to the outcome of this matter. There was also an issue about the medication given by the applicant to the asthmatic student on 9 March 2002. Again, even though there is conflict in the evidence on this matter I do not believe that this issue is critical to the determination of this matter.

Authorities

49 The applicant's dismissal was summary in nature. The onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified. (see: *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679)

50 The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree. (see: *Robe River Iron Associates v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819). In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed—

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

51 On the facts as I find them I am satisfied, at least on balance that the respondent has demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal. Further, I am satisfied that the applicant was treated fairly. She was given an opportunity to defend herself against the allegations relied upon to effect the termination. She was afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

52 Based on the evidence I make the following findings.

53 I find that throughout the applicant's lengthy employment with the respondent as a housemother there were no serious issues concerning the applicant's conduct until August 2000.

54 In August 2000 the applicant was involved in an incident which caused concern to the respondent as the applicant breached the respondent's procedures relating to giving medication to one of its students. The applicant gave a student a Panadeine Forte tablet. This was a prescription tablet which was not prescribed for this student. As the respondent had a policy that students were not to be administered prescription drugs not prescribed for them it was inappropriate for the applicant to administer this tablet to the student. The applicant was aware of the respondent's policy in relation to this matter and she understood that this incident was serious. When reprimanded, the applicant acknowledged that she had breached the respondent's procedures in giving the student the tablet. In her defence, the applicant stated that she gave the student the tablet as there was nothing else available at the time and the student was in pain and that once reprimanded she had not repeated this breach again. Further, it was the applicant who told the College nurse about administering the tablet the day after giving the tablet to the student. Notwithstanding the applicant's concession I accept that in relation to this issue the applicant's behaviour constituted a breach of the respondent's procedures.

55 In October 2001 the applicant was involved in another breach of the respondent's procedures. It related to an incident concerning a boarder who had suicidal tendencies. When this incident was raised with Ms Pitos she requested reports from Ms Bahen and Ms Rustand and then arranged to meet with the applicant. The respondent's procedures required that either Ms Bahen, Ms Rustand or Ms Pitos should be notified immediately when it was apparent to a housemother that a student was at risk. The reports requested by Ms Pitos confirmed that the applicant had breached the respondent's procedures by not raising the issue of the student indicating that she was suicidal sooner than she did. Even though the applicant believed the student was not at risk at the time, as the student had mentioned she wanted to inflict self-harm, I accept that this issue was very serious. In my view the applicant should have contacted senior staff as soon as she was aware of the student's possible intentions as it is clear that the applicant was well aware that this was required of her in a situation of this nature. The evidence is clear that after this incident Ms Pitos gave the applicant an opportunity to explain why proper procedures were not followed in relation to this matter and Ms Pitos and the applicant discussed her concerns about the applicant's actions. The applicant was given an opportunity to respond verbally and in writing, which the Union later did on the applicant's behalf. Subsequent to meeting with the applicant and after receiving the applicant's written response Ms Pitos held another meeting with the applicant whereby Ms Pitos highlighted the importance of the applicant following the respondent's procedures in a matter of this nature and the applicant was counselled about her behaviour. The applicant was warned that any future incidents involving the applicant's failure to follow set procedures could lead to the applicant's contract of employment being terminated. This warning was confirmed in a letter to the applicant from Ms Pitos, dated 9 November 2001 (Exhibit R16) and a copy of this letter was placed on the applicant's personal file.

56 In March 2002 the applicant was involved in two further incidents involving the failure to follow the respondent's procedures. The first incident related to a student who was a known asthmatic. I accept that the applicant made every effort to deal with this student as best she could when the applicant became aware that the student was unwell, however, contrary to the respondent's clear and accepted policy, on 9 March 2002 the applicant neglected to record the medication given to the student on the student's medical record sheet at the time the medication was given to the student. The applicant was aware that there was a requirement that all medication administered to a student had to be recorded contemporaneously in the student's medical record sheet. Even though the applicant recorded the medication given to the student in the handover book, this did not conform to the respondent's procedures. In my view the applicant's behaviour of not contemporaneously recording medication given to the student constituted a serious breach of the respondent's procedures. Due to the applicant's failure to follow these procedures, no information about the medication given to the student on that day was readily available to Ms Rustand and hospital staff when the student was admitted to hospital with a collapsed lung late in the evening of 9 March 2002. This omission on the part of the applicant could have had very serious adverse consequences for this student. It later emerged that it was unclear what medication had been administered to the student on 9 March 2002 as the student and the applicant had different recollections of the medication given. This inconsistency highlights the necessity of following the established procedures as outlined in the Medical Manual and the seriousness of the applicant's actions.

57 Further, it is clear that the applicant breached the respondent's procedures in not accurately accounting for the number of Schedule 8 tablets dispensed and retained by the College. As there was a requirement on both the respondent and the applicant

to keep records on the number of these tablets distributed and retained and to whom the tablets have been administered I consider the applicant's actions in relation to this matter to again amount to a serious breach of the respondent's procedures. In my view it was inappropriate for the applicant to refuse to count remaining tablets after dispensing this medication. I do not accept the applicant's contention that she was not properly trained to deal with the Drug Register. I accept Ms Rustand's evidence that appropriate training was given to housemothers on this and other requirements on housemothers. It is also clear on the evidence that the applicant was aware of the necessity to account for these tablets as she entered the number of tablets dispensed on the College's Drug Register.

58 When these two matters came to Ms Pitos' attention she arranged to meet with the applicant on 13 March 2002 to discuss the seriousness of the incidents. Ms Pitos made it clear to the applicant at this meeting that she had not followed the respondent's procedures in relation to these two matters. The applicant was given an opportunity to respond in writing as to why she should not be terminated. As the applicant did not provide an adequate response to this request in the required timeframe in my view it was appropriate for the respondent to terminate the applicant's contract of employment on 20 March 2002. The applicant had committed ongoing serious breaches of the respondent's procedures and did not adequately justify her actions in relation to these breaches when these issues were raised with her.

59 Whilst I accept that the applicant was a caring housemother who was doing her job to the best of her ability I acknowledge that there is a strong onus on the applicant and the respondent to provide appropriate care for the students for whom they have responsibility. In order to ensure this appropriate standard of care the respondent has in place set procedures which should have been adhered to by the applicant. It is clear on the evidence that the applicant was aware of the procedures and did not follow them. In the circumstances it was appropriate for the respondent to terminate the applicant's contract of employment.

60 I find that the respondent adequately investigated each incident involving the applicant breaching its procedures. I also find that the respondent adopted a fair process in dealing with the applicant's behaviour in relation to the incidents relied upon by the respondent to effect the applicant's termination. At each stage reports were gathered about each incident and allegations arising out of these reports were put to the applicant and discussed with her. At all times the applicant was given the opportunity to consider the allegations against her and to respond. Further, after the events of October 2001 the applicant was warned that any further breach of the respondent's procedures could result in the applicant's contract of employment being terminated (Exhibit R16). Even though the applicant was not afforded a lengthy amount of time in March 2002 in which to respond to the allegations concerning the asthmatic student and the issue concerning the Drug Register I believe that given the serious nature of these issues that it was appropriate for the respondent to deal with these matters expeditiously.

61 In all of the circumstances even though the applicant had a lengthy and successful period of employment until the year 2000, I am satisfied that the respondent has demonstrated that there was sufficient reason to summarily terminate the applicant's contract of employment on 20 March 2002 and that the applicant was afforded procedural fairness in relation to the termination. I am also satisfied that the respondent conducted appropriate investigations into the applicant's conduct in relation to these matters. Given these findings it is my view that the applicant was not unfairly terminated.

62 The applicant is claiming benefits due to her under her contract of employment. 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 claim is a benefit to which the applicant was entitled under his or her contract of employment.

63 In relation to the applicant's claim for monies due to her for payment in lieu of notice, as detailed in Form 1, given that I have found that it was appropriate for the respondent to summarily terminate the applicant's contract of employment, the applicant is not due any payment for notice.

64 The applicant claims that she is due payment for six hours that she was required to attend work for personal development sessions during Terms 1 and 3 of 2001. The applicant did not give any evidence in relation to these meetings, and no information was given as to whether the applicant attended these meetings. Further, no evidence was given as to any contractual arrangement whereby the applicant would be paid for attendance on these days. As there is an onus on the applicant to demonstrate that there was an agreement in place to be paid for attending work on these days and as no evidence was given in relation to this issue, the applicant has not discharged the onus on her to establish any entitlement to this claim. Accordingly the applicant's claim for benefits due to her under her contract of employment will be dismissed.

65 An Order will now issue dismissing the application.

2003 WAIRC 08413

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	JUDITHE ELLEN GIBSON, APPLICANT
	v.
	THE SISTERS OF MERCY PERTH (AMALGAMATED) INC TRADING AS SANTA MARIA COLLEGE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY 29 MAY 2003
FILE NO/S.	APPLICATION 644 OF 2002
CITATION NO.	2003 WAIRC 08413

Result	Application alleging unfair dismissal and denied contractual benefits dismissed

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—

THAT the application be and is hereby dismissed.

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

[L.S.]

2003 WAIRC 08442

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JANETTE MARY GOOGE, APPLICANT
	v.
	RICHARD ANDREWS, LINEHAUL AUSTRALIA PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 5 JUNE 2003
FILE NO.	APPLICATION 520 OF 2003
CITATION NO.	2003 WAIRC 08442

Result	Application alleging unfair dismissal discontinued and denied contractual entitlements adjourned.
Representation	
Applicant	Ms J. Googe
Respondent	Mr R. Andrews

Order

WHEREAS an application was lodged in the Commission pursuant to section 29 of the *Industrial Relations Act 1979*;

AND WHEREAS a conference between the parties was convened;

AND WHEREAS subsequent to the conference the applicant advised the Commission that she no longer wished to continue with that part of the application which claims unfair dismissal;

AND HAVING HEARD Ms J. Googe on her own behalf as the applicant and Mr R. Andrews on behalf of the respondent;

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

(1) THAT the claim by Janette Mary Googe that she was unfairly dismissed is hereby discontinued.

(2) THAT the claim by Janette Mary Googe that she has been denied a benefit to which she is entitled under her contract of employment is hereby adjourned for 21 days from the date of this order.

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

2003 WAIRC 08377

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUDREY JEAN HARVEY, APPLICANT
	v.
	LRC PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 23 MAY 2003
FILE NO.	APPLICATION 1497 OF 2002
CITATION NO.	2003 WAIRC 08377

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr G De Petra

Reasons for Decision

1 The applicant Ms Audrey Harvey applied pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act") for a finding that she was dismissed unfairly by Mr De Petra of the respondent on 9 August 2002. She seeks compensation for her alleged unfair dismissal. She worked for the respondent as a part time Office Manager from 9 January 2002 until 30 August 2002. Her hours of work were from 8am to 3pm each day, Monday to Friday.

2 Ms Harvey's evidence is as follows. When she commenced work for the respondent she says there was no order to the office. The files, the accounts and the invoices were in a dreadful mess. By the end of the second week of employment Ms Harvey approached Mr De Petra to encourage him to introduce the MYOB system for the accounts. This was designed to improve the organisation of the office. With Mr De Petra's agreement the applicant arranged for Ms Monica Brown, a person experienced with MYOB, to assist with implementing the new system. Ms Brown attended the respondent's office on Saturday mornings with Ms Harvey to attempt to reconcile the invoices with the bank accounts, and implement the MYOB program. About three quarters of the way through the task Mr De Petra advised Ms Harvey that he was cancelling the MYOB program. He indicated that it was not working. Ms Harvey was told to terminate Ms Brown's services and not to use the MYOB program again.

3 Ms Harvey says that each month Mr De Petra instructed her to make certain payments. As part of this she prepared electronic documentation each month but did not prepare one for the month of August 2002. On 9 August 2002 Mr De Petra called Ms Harvey into his office at approximately 2:45 pm and stated as follows—

> "Well, things are not going as I want them. You haven't become an extension of my brain. I'm changing things in the office" (Transcript pg 30).

She queried as to what aspects he wanted changed and he suggested the computer. She suggested he try MYOB again and he refused this suggestion. Ms Harvey recorded the conversation when she arrived home that day [Exhibit A13]. On 12 August 2002 Ms Harvey asked Mr De Petra for reasons as to why she was dismissed. He indicated that he would write her a letter to tell her the reasons why. Again Ms Harvey wrote out a record of this conversation [Exhibit A14]. On the day of her dismissal, that is 9 August 2002, Ms Harvey says Mr De Petra said he was reluctant to let her go as he was very confident in leaving her to run the office. He indicated that she had a very good telephone manner and was able to deal with contractors very well. He also indicated that all files and documents were in order. The only reason he gave for her termination was that he was changing direction. Ms Harvey says she was never given a warning or told that her position was in jeopardy. Ms Harvey asked Mr De Petra when he would like her to leave. It was agreed that she would leave on 30 August 2002.

4 Ms Harvey denied in her evidence and under cross-examination that she made an entry on 20 August in electronic banking for Davco [Exhibit A 1.2]. Ms Harvey says she did not make the payment to Instant Bins at the beginning of August. When the MYOB program was ceased at Mr De Petra's direction the business used Banklink which was controlled by Mr De Petra's accountant. Ms Harvey says that she would be faxed a list of cheque numbers and she would have to indicate to who they were to be paid.

5 Ms Harvey says that she has earned $6,991.11 since the time of her dismissal in casual employment doing market research. She sought work through the newspapers and did a retraining course.

6 Mr De Petra in his answer and counterproposal states as follows—

> "Audrey Harvey was employed by LRC Pty. Ltd for a period of 8 months from 9/1/02 till 30/8/02.
>
> Before Audrey commenced employment, the standard of work expected and the full scope of the job were explained clearly and in full to her, during her employment I do not disagree with her statement that "the office was clean, her telephone manner was good, and the filing was neat and tidy". However the manner in which her main duties which she has clearly stated as "Bookkeeping, MYOB, Accounts and Electronic Banking", were carried out was far from acceptable and did not meet the standards that were discussed on commencement of her employment.
>
> I always highlighted Audrey's mistakes to her and gave her a chance to rectify them; I feel that as an employer I gave more than ample time to improve her work, over the period of 8 months she was granted 3 extensions on her probation period in the hope that she would improve. I discussed the problems with her regularly but no improvements were made.
>
> Due to the nature of the mistakes usually involving monies owed to suppliers I lost all confidence in her and had to constantly check her work, which meant me spending lengthy periods in the office, instead of being on site to supervise my contractors in order to run a smooth operation.
>
> Her manner towards myself (The owner and director of the Company) when questioned about her ongoing mistakes was always argumentative. This eventually led to an irreconcilable breakdown in our working relationship which I was no longer willing to tolerate.
>
> Listed below are a few examples of her unacceptable work. Evidence is available on request.
>
> 1. Payment to contractor entered on Banking System for Electronic Transfer, then the same bill paid again by cheque for the sum of $7046.64
> 2. Payment made to contractor on 14th August 2002. Procedure is to enter on Job Cards to enable us to bill the client, as of 3rd September this was still not done.
> 3. Requested that final account for the sum of $l0,000 be made out for client on 6th August 2002. As of 21st August 2002, nothing had been done.
> 4. Simple verbal requests to fax suppliers and order certain quantities of materials not carried out correctly, this then resulted in me phoning the suppliers and getting the materials returned which in turn created costs
> 5. A checklist was needed for simple tasks when locking up the office as they were quite often forgotten for example
>
> a: Office lights
> b. Turn off photocopier
> c. Closing Safe
> d. Turn on Answering Machine
> e Set Alarm System"

7 Mr De Petra gave evidence that prior to employing the applicant he had a secretary for a few months, ie Monica Valli, and prior to that he had a secretary for 11 years. He describes her as follows—

> "Not that she was anything - - anything special, I don't believe, but she did grow with the company and she was running a pretty basic manual MYOB system." (Transcript pg 77)

She moved to Exmouth. At that time he says he used a basic, manual MYOB system. He says that at interview he mentioned that Ms Harvey would need to be familiar with computers and the MYOB system was also mentioned. He says that when Ms Valli and Ms Harvey worked for him his business was sliding. He now has a secretary and is not having any problems with her. He describes himself as a very approachable person.

8 Under cross-examination Mr De Petra says, in response to why he dismissed Ms Harvey, that he had four lengthy discussions with her about her performance prior to her termination. He says that one of these discussions occurred in July and they discussed the general running of the office and the problem with reconciling accounts. He says that he also discussed giving her an extension of time. This discussion was not recorded in his diary. He says that he tried very hard to work with Ms Harvey but they did not get along and it was not working.

9 I have no hesitation accepting the evidence of Ms Harvey over that of Mr De Petra. She was very consistent, precise and credible in her evidence and under cross-examination. It is clear that she was left to run the office and did so and that Mr De Petra became unhappy about the handling of accounts and about Ms Harvey. The two, as personalities, did not seem to get along. The following exchange is enlightening; Mr De Petra queried Ms Harvey about the MYOB system and how his previous office manager had managed the office. He then admits, referring to his previous employee, as follows:

> "I didn't know what she was doing, to be quite honest. All I knew was the office was functioning." (Transcript pg 45)

My clear impression is that the same is true of Ms Harvey. Namely, Mr De Petra did not know what she was doing, however, his impression was that she was difficult and the office was not functioning.

10 At various points in the cross-examination Mr De Petra in seeking to clarify issues found himself agreeing with Ms Harvey's evidence. In a later exchange under cross-examination, which I also consider to be indicative of the working relationship, Mr

De Petra refers to Ms Harvey at one point as being argumentative. He also refers to her as being strong minded. She agrees that he did remark at one stage that she was strong minded but she says:

> "I just have a sense of how to do things right and how things should be done right." (Transcript pg 49)

Yet Mr De Petra goes on to agree with Ms Harvey that he did ask her to come in and sort out the mess that the office was in. In other words it was up to her to organise.

11 Mr De Petra contends that Ms Harvey was under probation at the time of dismissal. He says that she commenced on three months probation and that this was extended. Ms Harvey says that she was never on probationary employment. As indicated, I have much greater confidence in the evidence of Ms Harvey over that of Mr De Petra. However, more specifically I do not consider, given the evidence of Mr De Petra, that it is credible to suggest that he had difficulties with her as early as 5 March 2002 and yet chose to extend her probation on at least one occasion. There is no record or diary note regarding probation or an extension of probation. Exhibit A8 which is Mr De Petra's diary note of 5 March 2002, according to his evidence, states that he "could not stand her" and then refers to various complaints about her behaviour and work. That diary reference also suggests that he gave her a warning at that time and states that "things were not going too good at all". I consider that it is improbable that Ms Harvey was ever under probation and I find that her employment was not subject to a period of probation.

12 I should also say that the clear impression I formed of Ms Harvey at hearing was that if such problems had arisen and she had been spoken to about them she would have most probably corrected the problem straightaway or left her employment. Exhibit A5 is an example of this whereby an issue to do with closing the office arose and on her evidence, which I accept, and which is not challenged to any degree by Mr De Petra, she implemented an immediate regime to address the issue.

13 Finally, and more specifically, there is an exchange between Ms Harvey and Mr De Petra at Transcript pg 52. Mr DePetra queried Ms Harvey as to whether there was a trial period when she first commenced employment. He asked her,

> "Did I not say to you that if we have a personality clash or I can't get on with you or you can't get on with me, we have - - we both have the option to go our own ways without any animosity?---Yes.
>
> Did I say that or not?---But you never specified any trial period. Any length. So was the 8 months the trial period?
>
> I'll agree with that. Okay?---Thank you."

In other words if there was a personality clash or if they could not get on then each was free to go their own way without any animosity, but no trial period or probation was agreed.

14 I need to say more about the diary notes of Mr De Petra [Exhibits A8, A9 and A10]. It is clear from the text of those entries and from Mr De Petra's evidence (Transcript pg 79, 80-81) that they are not contemporaneous notes. Mr De Petra says that they were made two to three weeks after the day in question but that his memory of the events is good. I have doubts that the notation in [Exhibit A9] which states "so we would give it another 6 weeks" was made only some two to three weeks after 17 or 18 June 2002. This statement of a finite time being given to Ms Harvey, seemingly during which her performance had to improve, was not backed by any other evidence on behalf of Mr De Petra. It is not supported by the relatively detailed letter of 12 September 2002 [Exhibit A15] in which Mr De Petra outlines the reasons for dismissal. It is also in sharp contrast to [Exhibit A12] which is a note by Ms Harvey which she says she made on 18 June 2002. In that note she only refers to being accused of leaving the lights and the photocopier on and to stay out of his way the next day. She says "I am beginning to feel he doesn't like me or want me here". I have no doubt, having witnessed Ms Harvey give evidence, that if she had been told that she was given six weeks more in her job then this would have been recalled and noted. As stated her recall appears both clear and precise.

15 I turn to the complaint concerning the use of the MYOB program. Mr De Petra appears to attach considerable importance to this and complains that he went down this path because of Ms Harvey and it did not work and was expensive for him. Yet a fair reading of the evidence would suggest that Ms Harvey suggested that the program would be useful due to the poor state of the office paperwork. Mr De Petra agreed to the implementation of the program, with the endorsement of his accountant. He agreed to engage outside assistance to implement the program and then abandoned the program before it could be fully implemented, and refused to allow Ms Harvey to use it again. It is hard to see how Ms Harvey should be criticised for this. More importantly Mr De Petra directed that the program be abandoned in March 2002 and Ms Harvey was dismissed in August 2002. She certainly should not be penalised, so far down the track for the MYOB program, on Mr De Petra's evidence, seemingly disrupting the smooth functioning of the office.

16 Mr De Petra in a letter [Exhibit A19] to Mr Trainer, agent for the applicant, refers to a number of complaints concerning Ms Harvey's work performance. He alleges that she either got wrong certain payments, orders or banking and did not follow up properly on some accounts even though instructed to do so. I do not intend to go to each of these issues. In simple terms some of the respondent's complaints relate to a period after Ms Harvey's termination or after her employment and I have confidence that Ms Harvey's evidence can be accepted on each of these points. Mr De Petra agrees that Ms Harvey was organised and having seen both persons give evidence I consider that it is more likely that any difficulties arose from a lack of instruction by Mr De Petra, not a lack of application by Ms Harvey. There was clearly a difficulty in communication between Mr De Petra and Ms Harvey and I consider that the source of that difficulty was mostly Mr De Petra. Ms Harvey seemingly failed to become an "extension of his brain" and cannot be blamed for that.

17 There was a clash of personalities between Mr De Petra and Ms Harvey; not in the sense of a hostile conflict but instead not being able to get along together and understand each other in a small office environment. This was apparent to Ms Harvey at least from 18 June 2002. Notwithstanding this I do not consider that Ms Harvey's application to her duties was deficient in anyway. Additionally, I do not accept that Mr De Petra warned Ms Harvey about her performance or advised her that her job was at risk (*Margio v Fremantle Arts Centre Press* 70 WAIG 2559 @ 2561). Instead I consider that Ms Harvey worked conscientiously to improve the office administration which had been left in a disorganised state prior to her commencement. Having reached these conclusions I do not consider that Ms Harvey was afforded a fair go all round (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). Her position was intended to be a long term job. She was dismissed initially without adequate reason and later received a letter explaining the reasons, which to a very large degree had not been canvassed with her previously. The letter reinforces my view that Mr De Petra simply could not get along with Ms Harvey. In all the circumstances I find that Ms Harvey was dismissed unfairly.

18 Reinstatement is not a practical option in my view. The employment relationship has deteriorated to such an extent that it could no longer work. Ms Harvey has sought and obtained work since her termination. Ms Harvey states at Transcript pg 40–41 that the only employment since the time of termination has been as a casual employee undertaking market research and that she has earned just under $7,000.00. She states that she worked also for a Mr Roopes from CSI in Hamilton Hill for 4 hours. She also spent 2 weeks working for a timber yard setting up their MYOB accounts. Ms Harvey spent three weeks in a government retraining course for people over 45. Ms Harvey also states that she was recently offered a job through a friend, possibly managing a hotel in York, however this was declined as she did not wish to return to that industry. The submission of the

applicant's agent Mr Trainer is that she has earned a total of $6,991.11 since termination which took effect on 30 August 2002. I accept this and infer from the payslips tendered that this is a gross figure. Her weekly salary with the respondent was $425.00 gross per week [Exhibit A16].

19 I turn now to calculate the applicant's loss and determine compensation in accordance with the principles outlined in *Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8. Some 28 weeks have elapsed from dismissal until the time of hearing during which Ms Harvey would, but for her dismissal, have earned $11,900.00 gross. From this must be deducted the applicant's efforts in mitigation being $6,991.11 gross, leaving an amount of $4,908.90 gross to the nearest cent (rounded).

20 Mr Trainer in his closing submissions says as follows—

> "We say that the evidence before you indicates that the loss will be, at least in the short term, ongoing, and we say that the Commission is entitled therefore to make some assessment at least of how much further - and we would say that you couldn't conclude less than a month further - into Ms Harvey's period beyond the job that she is not in that position." (Transcript pg 94)

21 Having regard to Mr Trainer's submission there is insufficient evidence from the applicant as to what ongoing loss is being suffered. Her evidence in chief is that she is currently employed as a casual market researcher, but does not disclose her current income. The applicant has not provided to the Commission any calculations in support of her contention that there is an ongoing loss or how this should be calculated.

22 Exhibit A17 is a bundle of payslips from UWA and Surveys QA Pty Ltd, ie some of Ms Harvey's employers since the time of her termination. Seemingly from [Exhibit A16] the applicant earned $358.00 net weekly. From [Exhibit A17] which appears to be her most recent payslip, and is dated 23 February 2003, it appears that she has earned $310.74 net weekly. However, the payslips provided are not complete and show considerable variation in payments. It is therefore difficult to make any reasonable assumptions about the ongoing loss. Accordingly, I would make no finding as to ongoing loss.

23 Given the reasons expressed above I would find that Ms Harvey was dismissed unfairly on 9 August 2002 and should be awarded in compensation of $4,908.90 gross less any taxation due to the Commissioner of Taxation.

2003 WAIRC 08453

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUDREY JEAN HARVEY, APPLICANT
	v.
	LRC PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 9 JUNE 2003
FILE NO.	APPLICATION 1497 OF 2002
CITATION NO.	2003 WAIRC 08453

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr G De Petra

Supplementary Reasons for Decision

1 Parties were asked by letter dated 23 May 2003 whether they sought a Speaking to the Minutes. The Minute of Proposed Order awarded the applicant a sum in compensation of $4,908.90 less any taxation payable to the Commissioner of Taxation. The Commission was advised on 4 June 2003 by letter from the agent for the applicant that the applicant sought a variation to the order. The letter states in part—

> "Further to our discussion yesterday, I confirm that the applicant in the matter seeks a variation to the terms of the order by the inclusion of a time for compliance. Given that the draft Minutes have been available to the parties for some time, the Respondent ought to be in a position to comply with an order within seven days. We therefore ask that the order of the Commission provide seven days for compliance."

2 My Associate was instructed to contact Mr De Petra by telephone on 4 June 2003 to ascertain his views as to whether he agreed to the insertion in the order of a seven day time limit. Mr De Petra advised that he would not agree to a seven day time frame and that the amount ordered was too much to pay in one sum. The respondent further advised that he was unwilling to pay the money in a lump sum as the applicant may spend it all at once and that he intended to pay the amount in instalments.

3 Having considered the submissions of the parties I consider that it would be reasonable for the payment to be made in full to the applicant within fourteen days of the order issuing.

2003 WAIRC 08454

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUDREY JEAN HARVEY, APPLICANT
	v.
	LRC PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 9 JUNE 2003
FILE NO.	APPLICATION 1497 OF 2002
CITATION NO.	2003 WAIRC 08454

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr G De Petra

Order

HAVING heard Mr K Trainer on behalf of the applicant and Mr G De Petra on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, Audrey Jean Harvey, was unfairly dismissed by the respondent on the 9th day of August 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay within 14 days of this order, as and by way of compensation, the amount of $4,908.90 to Audrey Jean Harvey less any taxation that may be payable to the Commissioner of Taxation.

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

2003 WAIRC 08370

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MELINDA KOSTOVSKI, APPLICANT
	v.
	GULL PETROLEUM (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 6 MAY 2003
FILE NO.	APPLICATION 260 OF 2003
CITATION NO.	2003 WAIRC 08370

Catchwords	Harsh, oppressive and unfair dismissal – Extension of time for application to be referred to Commission – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission not satisfied applying principles that discretion should be exercised – Extension of time to accept referral not granted – Application dismissed for want of jurisdiction – *Industrial Relations Act 1979* ss 29(1)(b)(i),(2)&(3)
Result	Application dismissed
Representation	
Applicant	Ms M Kostovski on her own behalf
Respondent	Ms J Auerbach of counsel

Reasons for Decision

(Ex tempore)

1. The Commission has listed this matter of its own motion for the purposes of considering whether it ought exercise its discretion pursuant to ss 29(2) and (3) of the Industrial Relations Act 1979 ("the Act") to extend time for the purposes of receiving the applicant's claim, the application having been filed on 28 February 2003. It is common ground that the applicant's employment came to an end on or about 16 December 2002, therefore the application as filed is some 28 days or thereabouts, out of time.

2. The application itself alleges that the respondent, Gull Petroleum (WA) Pty Ltd harshly, oppressively or unfairly dismissed her on or about 16 December 2002 from her position as a console operator at the respondent's premises on Great Eastern Highway in Burswood.

3. The applicant, it is common ground, was casually employed and was employed, it appears, on the material before the Commission, pursuant to a state workplace agreement executed in or about June 2002.

4. The applicant alleges that her employment came to an end on 16 December 2002 in circumstances which are controversial. She says in brief to the Commission that whilst serving and working in the service station on the day in question she had what was described, I think, fairly, as an altercation with a co-employee as a consequence of which she left the premises alleging she was in receipt of abuse and generally inappropriate conduct by the other employee.

5. As a consequence of that at about 2.30 pm on the day, that is, 16 December, telephone contact was made with the manager of the site whose name has not been indicated to the Commission. It appears that following that telephone call the matter was placed in the hands of the respondent's area manager which ultimately, according to a document before the Commission by way of exhibit A1 being a letter of termination of employment of 16 December 2002, the applicant's employment as a casual console attendant was terminated on a variety of grounds which are particularised as follows.

6. Reference is made to previous counselling for taking extended breaks during working time. Secondly, it was said that the applicant refused to serve customers when requested to do so and left the work premises, most particularly on the respondent's case, without notification or authority during a busy period of time. The respondent says in the letter that it had no alternative in those circumstances but to terminate the applicant's employment.

7. Thereafter, it seems, the matters relevant to these proceedings then took their course. The applicant told the Commission that because some time in later 2002 she was presented with what was described as an Australian Workplace Agreement which appears, on what is before the Commission presently, was unexecuted and unregistered, she thought at the time

that her employment was terminated that her employment was governed by that instrument and therefore she ought commence proceedings challenging the termination of her employment in the Australian Industrial Relations Commission pursuant to s 170CE(1) of the Workplace Relations Act 1996, which she in due course did.

8. I note, however, that it appears on what is before the Commission presently that that application was not filed with the registry of the Australian Industrial Relations Commission until on or about the last day for filing of such claims, that is, 21 days after the date of termination of the applicant's employment.

9. It is also common ground, and the applicant, to her credit, accepts that prior to the dismissal she was previously counselled for leaving her workplace without permission although she said to the Commission that subsequently her work was the subject of some compliment by the relevant manager.

10. In relation to matters such as this the principles in this jurisdiction are well settled. I simply refer to the decision of the Commission as presently constituted in *Azzalini v Perth Inflight Catering Services* (2002) 82 WAIG 2992, in particular, my observations at para 28 where the Commission set out what it considers to be the relevant principles.

11. I adopt and apply those principles for the purposes of determining this matter.

12. Those principles involve a consideration of firstly, the length of any delay; secondly, any explanation for such a delay; thirdly, the steps taken, if any, by an applicant to evidence non-acceptance of the termination of employment and that it would be contested; and fourthly, the merits of the substantive application in the sense that there is a sufficiently arguable case. Finally, the Commission must consider any prejudice that might flow to a respondent as a consequence of granting an extension of time although the absence of prejudice to a respondent without more is not a sufficient ground of itself.

13. The Commission has considered the submissions and material before it. In relation to the first factor, that is, length of delay, in my opinion, the delay is a significant delay, that being some 46 days or thereabouts between the termination of employment and the date these proceedings were commenced. The applicant explains that by saying that when she became aware that the federal proceedings were not the appropriate jurisdiction, she immediately commenced these proceedings on or about the same time, that being 28 February 2003.

14. Secondly, in relation to the explanation for the delay, as I have already mentioned in brief, the applicant says she was confused and thought the Australian Workplace Agreement applied to her employment and therefore she ought to commence proceedings in the Australian Industrial Relations Commission. She did so, however, I have noted that she did not do so until on or about the last day for commencing those proceedings in that jurisdiction and there was little or no evidence before the Commission to indicate to it any other steps that were taken prior to that time to properly ascertain in which jurisdiction the applicant should commence these proceedings.

15. I note, however, that in a letter from the respondent which was dated 8 January 2003 and tendered as exhibit R1 in these proceedings, the applicant wrote to the respondent on or about 3 January 2003 complaining about her termination and raising concerns regarding the circumstances, it would appear.

16. The applicant told the Commission she did attempt to obtain legal aid, but was not able to do so apparently. As I have mentioned no other steps appear to have been taken by her to ascertain what her position was in terms of the appropriate forum to commence these proceedings, either by way of contacting an adviser, a solicitor, an agent or any relevant government agency.

17. In my opinion there is an onus on employees who wish to commence proceedings in this jurisdiction to take all reasonable steps to ensure that they are commencing proceedings in the appropriate jurisdiction. The commencement of proceedings is a matter not to be taken lightly, in my view, and there is some obligation on an employee to take those sorts of steps, in my opinion.

18. It is also significant to note that according to the respondent's counsel it filed a motion for dismissal of the proceedings in the Australian Industrial Relations Commission for want of jurisdiction at a time which would have made it apparent, in the respondent's submission to the applicant, that the federal jurisdiction was not the appropriate jurisdiction, and moreover, at such a time when these proceedings could have been commenced by the applicant within time.

19. It is significant to note that despite that, no steps were taken by the applicant for a considerable period of time until 28 February 2003 when these proceedings were commenced.

20. As to the merits of the matter, necessarily in matters of this kind the materials and submissions in evidence before the Commission are somewhat scant. Whilst I have some concerns as to the manner of the termination as it was effected by the respondent, I am not persuaded on what is presently before the Commission, that the applicant's case is overly strong. The Commission must emphasise, as the Commission did in *Azzalini* at para 28 of the reasons for decision to which I have referred, that prima facie, time limits imposed by the Act in this jurisdiction are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour.

21. Secondly, an extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling justice to be done between the parties. And thirdly, it is for an applicant to demonstrate that strict compliance with s 29(2) of the Act requiring claims to be filed within 28 days will work an injustice and be unfair in all of the circumstances.

22. Having considered all of the materials before the Commission and applying the principles of the Commission as presently constituted in *Azzalini*, I am simply not persuaded on what is before the Commission that I ought to exercise my discretion to grant an extension of time. For those reasons the extension of time is refused and the application is dismissed for want of jurisdiction and the Commission so orders.

2003 WAIRC 08449

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MELINDA KOSTOVSKI, APPLICANT
	v.
	GULL PETROLEUM (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 6 MAY 2003
FILE NO/S.	APPLICATION 260 OF 2003
CITATION NO.	2003 WAIRC 08449

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms M Kostovski on her own behalf
Respondent	Ms J Auerbach of counsel

Order

HAVING heard Ms M Kostovski on her own behalf and Ms J Auerbach 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.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 08425

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EILEEN MASSANDY, APPLICANT
	v.
	FRED MARGARIA CLEANING SERVICES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 9 MAY 2003
FILE NO.	APPLICATION 318 OF 2003
CITATION NO.	2003 WAIRC 08425

Result	Application out of time accepted
Representation	
Applicant	Ms M Cunniffe as agent
Respondent	Mr J Faulkner

Reasons for Decision

(Given extemporaneously and subsequently edited by the Commissioner)

1 On 11 March 2003 the applicant, Mrs Eileen Massandy, 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, Fred Margaria Cleaning Services. The date of termination in the application is 7 February 2003 and the application was lodged in the Commission on 11 March 2003.

2 Section 29(3) of the *Industrial Relations Act 1979*, is a provision inserted to provide for a discretionary decision by the Commission to accept an application beyond the 28 days time limit where, in the Commission's view, it would be unfair not to do so.

3 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".

4 Prima facie, however, by virtue of the time limit, a matter is required to be within time unless of course there is good reason for it not to be so, and in that sense all applications are to be treated expeditiously.

5 The considerations relevant to whether it might be considered unfair not to accept the application are covered in the decision of the Senior Commissioner in *Anthony William Andrew v Metway Property Consultants and Auctioneers* 82 WAIG 3260, and the decisions therein referred to, being *Clark v. Natures Cargo (1999)* 95 IR 201 *and Clark v. Ringwood Private Hospital (1997)* 74 IR 413. The factors to be taken into account, which are the factors that I consider relevant, are whether there is 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 or she contested the termination, and the prejudice to the respondent. They are factors that are well covered in those decisions, and should be applied in this instance.

6 I will accept the referral of the application out of time for the following reasons. I consider it would be unfair not to do so because the applicant was dismissed without notice on 7 February 2003, and on the face of it, was dismissed without warning.

7 The applicant was on probationary employment at the time, which is a period of employment which forms part of the selection process. That is the respondent is still in the process of determining whether the applicant should continue in employment. Nevertheless, the applicant is still entitled to notice and is still entitled to be counselled about her work.

8 The point of conflict appears to be, on the evidence of both parties, a disagreement in respect of whether there was adequate time to complete duties. That does not negate the requirements on the respondent to at least terminate on notice and to give some form of warning or counselling to the applicant. So in respect of the merits of the claim, prima facie the application has merit. The substance of that I will determine another day.

9 In respect to the question as to whether the respondent had been forewarned of the application, the letter of 28 February 2003 [Exhibit A1] is clear. The respondent was warned of the applicant's concerns and the evidence is there was no response to that letter on behalf of the respondent. The evidence is that after that time the applicant then took steps to make the application.

10 In terms of the delay, the delay is four days. Now, whilst the delay is not lengthy, applications need to be on time. The explanation for the delay is this. The applicant's letter was sent on Friday, 28 February 2003 and no response was received to the letter. The following Monday, 3 March 2003 was a public holiday. The evidence of Ms Cunniffe is that she attended at the Commission approximately a week and a half prior to the lodgement of the application. The dates stipulated in the evidence of the applicant are not precise but it would appear to be around 4 March 2003 that she obtained the relevant forms.

11 The evidence of Ms Cunniffe is that she read the form and realised it needed to be within a certain time limit. She says 21 days when in fact the time limit is 28 days. The evidence of the applicant then is that one of her children was sick during the week the application was due. Whereby I have sympathy for that particular issue it is not of itself telling. The application was due on Friday, 7 March 2003. The evidence is that over that weekend another of the applicant's children was taken to hospital. She then completed the application with her sister on the following Monday night and lodged it on Tuesday, 11 March 2003 at approximately 2.30pm in the afternoon.

12 So the delay incurred is basically Monday and half of Tuesday. In the circumstances, particularly the lack of response from the respondent, then the illness and hospitalisation of the applicant's children, the reasons for the delay are understandable.

13 In respect of the prejudice to the respondent, there is no prejudice to the respondent above and beyond having to face an application for unfair dismissal. For the reasons expressed I will issue a declaration that it would be unfair not to accept the application pursuant to section 29(3).

2003 WAIRC 08426

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EILEEN MASSANDY, APPLICANT
	v.
	FRED MARGARIA CLEANING SERVICES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 3 JUNE 2003
FILE NO.	APPLICATION 318 OF 2003
CITATION NO.	2003 WAIRC 08426

Result	Application out of time accepted
Representation	
Applicant	Ms M Cunniffe as agent
Respondent	Mr J Faulkner

Order

HAVING heard Ms M Cunniffe on behalf of the applicant and Mr J Faulkner 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 Massandy's referral under s.29(1)(b)(i).

[L.S.]

(Sgd.) S. WOOD,
Commissioner.

2003 WAIRC 08312

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE JOESEPH MORETTI, APPLICANT
	v.
	CANNING VALE WEAVING MILLS LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 14 MAY 2003
FILE NO.	APPLICATION 355 OF 2003
CITATION NO.	2003 WAIRC 08312

Unfair dismissal – extension of time to file application

Result	Extension of time - dismissed
Representation	
Applicant	Mr S.J. Moretti appeared on his own behalf
Respondent	Ms B. Arthur appeared on behalf of the Respondent

Reasons for Decision

(Ex tempore as edited by the Commissioner)

1 This is an application by Shane Joseph Moretti (the Applicant) for an extension of time to file an application which seeks orders under section 23A of the *Industrial Relations Act 1979* (the Act) against Canning Vale Weaving Mills (the Respondent). The subject of the application as filed is that the Applicant says that he was, after entering into a three months fixed time contract with the Respondent, given no notice that the contract was going to expire or an option for renewal. By his admission the contract came to an end by effluxion of time and he says that is unfair.

2 During the hearing he sought leave to strike out a claim for $2000.00 in lieu of notice. Leave was granted.

3 The Applicant was first employed in a fulltime position with the Respondent in 1998. That employment contract came to an end by resignation in June 2002. The parties then made a new contract which involved part-time employment; they then made another fresh contract, which contract is the subject of these proceedings on 1st October 2002. The details of that contract (Exhibit M1) were transmitted to the Applicant by a letter signed by Ms Brooke Arthur, the Personnel Manager of the Respondent. The letter was returned to the Respondent having been signed by the Applicant accepting the terms and conditions of employment therein. The position was a payroll administrator; the commencement date of the contract was 1st October 2002, it specifies an hourly rate of $25.00. Terms of engagement relevant to the proceedings are as follows: A three months fixed term contract which may be extended by mutual agreement; review date of this contract to be on or before 31st December 2002. There are other provisions not relevant to these proceedings concerning superannuation, hours of work, sick leave and holidays and a confidentiality requirement.

4 The fixed term contract continued until 31st December 2002. The evidence of the Applicant is that prior to that date there were no discussions between the parties which may have led to a renewal as could be said to be predicted in the 'Terms of Engagement' clause of the contract. On the evidence the review date provided an option for extension that was never exercised and this was confirmed by Ms Brooke who appeared for the Respondent. To complete the picture of the employment contract, it is agreed by the Applicant that he was paid what he described as an ex-gratia payment of $4000.00. This payment was offered as an incentive for him to finish off the job fully by 31st December 2002 and to provide one week handover. It is also admitted by him that the $4000.00 was paid in two equal moieties on 31st January and 28th February 2003.

5 After he left the Respondent's employ on 31st December 2002 the Applicant had a series of email communications with one Marcello Cabrera who apparently was his supervisor. The substance of those emails goes to the amount of taxation on the ex-gratia payment.

6 The preceding recitation is sufficient summary of the facts of the matter for the purposes of these Reasons for Decision.

7 The Commission is asked to extend the time to file the application. The time limits imposed by the Act in s.29(2) are to be complied with prima facie. If they are not to be complied with, an Applicant has to establish the circumstances where the discretion to extend time, which is resides in s.29(3) of the Act should be exercised in his favour. It is not automatic, it is a discretion that resides in the Commission the sole purpose of which is to do justice between the parties. The Applicant has to demonstrate to the Commission that a strict compliance with s.29(2) would work an injustice against him and would be unfair in all of the circumstances.

8 There are a number of considerations that have been established by the Commission in *Nicole Azzalini v Perth Inflight Catering (2002) 82* WAIRC 2992 as to whether it would be fair or not to extend time. First, the length of any delay, and in this case it is three months. That is an extensive period given that the purpose of the time limit of 28 days is to allow matters relating to unfair dismissal to be decided as close to the time that the dismissal occurred as is practicable. The delay in this application is almost three times the period provided in the Act.

9 The explanation for the delay is also relevant. The Applicant provides no explanation for the delay other than that he was exchanging emails with a representative of the Respondent. But those emails related to the mode of taxation of the ex gratia payment that was made to him, they did not raise issues of the dismissal itself as the considerations in *Azzalini* (ibid) require.

10 The third limb of establishing that there would be injustice is the steps that were taken by the Applicant to inform the Respondent that the termination would be contested. There were none.

11 The final issue to be considered is the merit of the substantive application in the sense of whether there is a sufficiently arguable case. I deal with that matter now because it is important. The contract between the parties is only the contract they made between 1st October and 31st December 2002. The other relationships, and they had two different types of employment contract as far as I can ascertain, are not relevant to the extant application. What is before the Commission is a three month fixed term contract with an option for renewal. That option was not exercised by either party. The contract of employment came to an end by effluxion of time on 31st December 2002. It is fair to say from the Applicant's evidence that he understood that; he knew that it would come to an end on 31st December 2002. It is clearly the law that there can be no dismissal in such a circumstance (see *Sir Charles Gairdner Hospital v ALHMWU (1994)* 74 WAIG 2319). The employee has a right to bring an application to the Commission under s.29 of the Act if, in the case of an employee, that he has been harshly, oppressively, unfairly dismissed for from his employment. There are two conditions precedent for that right to be exercised first, that the applicant was an employee, and this Applicant clearly meets that test, that is admitted. But in this case, he was not dismissed so the jurisdiction which resides in the Commission to hear the industrial matter referred under s.29 of the Act does not arise and this application is without jurisdiction in any event.

12 Even if that is wrong, there can be no unfairness when a contract comes to an end by effluxion of time, for the reasons I have set out before. A key to whether an extension of time ought to be granted is whether there is a sufficiently arguable case. There is no case at all in this instance to be argued. It would be wrong, in those circumstances, to grant an extension of time and I decline to do so and the application must therefore be dismissed.

13 An order of dismissal will issue accordingly. I make the following comment. It appears to me that the Applicant's concerns relate to taxation. These are not matters that can be determined by this Commission. Tax, if any, to be paid arising from an employment contract is determined by the Commissioner of Taxation exercising powers under the Taxation Assessment Act 1936. If the Applicant has any issues relating to taxation, of the amount of taxation on moneys paid to him by the Respondent, he has to take that up with the appropriate authority enforcing the Taxation Assessment Act.

———

2003 WAIRC 08313

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	SHANE JOESEPH MORETTI, APPLICANT
	v.
	CANNING VALE WEAVING MILLS LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 14 MAY 2003
FILE NO.	APPLICATION 355 OF 2003
CITATION NO.	2003 WAIRC 08313

Result	Dismissed

Order

HAVING heard Mr S.J. Moretti on his own behalf and Ms B. Arthur 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 extension of time be, and is hereby dismissed.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

2003 WAIRC 08260

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	NATHAN JAMES ROBERTS, APPLICANT
	v.
	JOHN RYAN OWNER OF METRO SECURITY SERVICES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 1 MAY 2003
FILE NO.	APPLICATION 242 OF 2003
CITATION NO.	2003 WAIRC 08260

Result	Application lodged out of time dismissed.
Representation	
Applicant	Mr N. Roberts
Respondent	Mr S. Blyth (of counsel)

Reasons for Decision
(Extemporaneous)

1 The applicant in this matter, Mr Nathan Roberts was employed as a security guard between 15 January 2003 and 28 January 2003. The correct identity of his employer is in dispute but that is not a critical issue at this stage.

2 Mr Roberts was dismissed on 28 January 2003. On 26 February 2003 he referred to the Commission a claim of unfair dismissal. By s.29(2) of the *Industrial Relations Act 1979* the claim should have been referred to the Commission within 28 days of the day his employment terminated. Accordingly, his referral is one day out of time.

3 By s.29(3) of the Act, the Commission may accept a referral that is out of time if the Commission considers it would be unfair not to do so. I propose to decide the matter by considering the reason for the delay, the merits of the claim of unfair dismissal, whether the respondent knew that Mr Roberts would be challenging his dismissal and what prejudice there will be to the respondent if the referral is accepted (*Andrew v. Metway Property Consultants* (2002) 82 WAIG 3260).

4 Firstly, in relation to the reason for the delay. I have some sympathy for Mr Roberts' position when he says he did not have the money for the filing fee. I accept that generally an employee who is dismissed might find it difficult to find money in his or her particular circumstances. Certainly Mr Roberts has indicated that he had other debts that, for whatever reason, he had to put first.

5 However, I confess that I was not entirely persuaded as to the reason for not having money for this claim given Mr Roberts' strong denial of the allegation that led to his dismissal. That is, I accept that the allegation that led to the decision to dismiss Mr Roberts is a serious allegation and I would have thought that that would have meant he would give a greater priority to ensuring that the money he had went towards an unfair dismissal claim.

6 In relation to the second matter, the merit of the application, I find against Mr Roberts for this reason. I find that he was dismissed for two reasons as he himself has stated in his application. I accept that the separation certificate gives only one reason. However, I also accept that if this matter went to a hearing it is likely, or more likely than not, that Mr McInerney's evidence would be that there were two reasons for the dismissal.

7 This has to be seen in context. Mr Roberts was on probation and he was only in the first 10 days of his employment. It is clear that a probationary period is an extension of the hiring process and that during a period of probation both the employer and

employee can bring the probationary period to an end in a far easier way in the sense of the process to be followed than in the case of an employee who is not on probation (*East Kimberley Aboriginal Medical Service v. Australian Nursing Federation* (2000) 80 WAIG 3155).

8 Within his 10 days' employment Mr Roberts had already received one written warning that, I understand from his statement, he agrees was validly given. He apologised for that but nevertheless he already received one written warning. The evidence will be that he also had received two verbal warnings. He states that he did not. However, his claim, if it went to a hearing, would be on the basis that evidence would be called that he also received two verbal warnings. All of this occurring within the first 10 days of probationary employment.

9 That of itself is a matter of some seriousness from the Commission's point of view because the *Industrial Relations Act 1979* in s.23A(2) requires the Commission to take into account whether an employee was subject to a written period of probation and had been employed for less than three months. That makes Mr Roberts' task of showing the merit in his application somewhat more difficult. If one then introduces into it the serious allegation that has been referred to in these proceedings and which led to the decision to dismiss, then the evidence that is to be brought against Mr Roberts would make his task, so far as the merit is concerned, quite formidable.

10 I approach the matter this way. If this application was to go a hearing, the Commission is not to decide whether or not Mr Roberts did or did not do the matters alleged in the allegation. This is not a court for such a purpose. What the Commission will have to decide is whether the employer in following an enquiry into the allegation was able to conclude on reasonable grounds, on the information available to the employer at that time, that the employee was guilty of the misconduct alleged and that taking into account any mitigating circumstances either associated with the misconduct or the employee's work record that such misconduct justified dismissal (*Bi-Lo v. Hooper* (1992) 53 IR 224 at 229).

11 On the information as I understand it that the employer had available to him at the time the decision to dismiss was made, I suspect it is more likely than not, that that test would be met. For that reason I find if this matter went to a hearing, even though I accept that Mr Roberts denies the allegation, he would find it difficult to persuade the Commission that on basis of the allegation before the employer, which has now been confirmed in writing, the employer did not in the context of a probationary employee who in the first 10 days had already received one written and possibly a further two oral warnings have reasonable grounds for bringing Mr Roberts' probationary employment to an end.

12 In relation to the third matter, the respondent was not aware that the dismissal was to be challenged until the papers were served.

13 As to the fourth matter, the fact is that the period of delay is only one day. If the sole reason for the Commission's decision in this matter related to that one day then Mr Roberts would be bound to succeed. That is because, as has been properly conceded, the employer has suffered no prejudice by the additional one day.

14 However, the fact remains that even though the Commission has the power to accept a referral after the period of 28 days, that does not mean the 28 days loses significance. It is there to bring finality to the period within which a claim may be lodged. It is there in order to bring to an end the period that the employer has to wait to see whether or not an unfair dismissal claim is lodged. Even though it is only one day, in the context of Mr Roberts' probationary employment, and that within the 10 days of his employment he has already received a written warning, possibly two oral warnings, and an allegation has been made against him, I have not been persuaded that it would be unfair not to accept his claim.

15 The application is hereby dismissed.

2003 WAIRC 08261

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATHAN JAMES ROBERTS, APPLICANT
	v.
	JOHN RYAN OWNER OF METRO SECURITY SERVICES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 6 MAY 2003
FILE NO.	APPLICATION 242 OF 2003
CITATION NO.	2003 WAIRC 08261

Result	Application lodged out of time dismissed.
Representation	
Applicant	Mr N. Roberts
Respondent	Mr S. Blyth (of counsel)

Order

HAVING HEARD Mr N. Roberts on his own behalf as the applicant and Mr S. Blyth (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 is hereby dismissed.

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

2003 WAIRC 08241

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRAHAM SPARNON, APPLICANT
	v.
	AIR BP, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY 5 MAY 2003
FILE NO/S.	APPLICATION 722 OF 2002
CITATION NO.	2003 WAIRC 08241

Result	Application for contractual benefits dismissed
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Ms C Kruger (as agent)

Reasons for Decision

1 This is an application by Graeme Sparnon ("the applicant") pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant claims that he is owed three months' wages under his contract of employment with his former employer Air BP ("the respondent"). The respondent denies that the applicant is owed any outstanding wages.

Background

2 The applicant was employed by the respondent as a refueller at Perth Airport between the 17 April 1998 and 20 March 2002. In 2001 the respondent made a decision to contract out its refuelling operations at Perth Airport. The applicant was one of 17 employees at Perth Airport who was chosen to be made redundant. On 28 November 2001 the respondent wrote to the applicant advising him of his entitlements under the proposed retrenchment arrangement, which was expected to become effective on 29 March 2002.

3 Exhibit A1 is a letter dated 11 January 2002 whereby the applicant confirmed that he accepted being made redundant by the respondent. Reproduced below is a copy of this letter, formal parts omitted.

> "…..
>
> Re: Retrenchment Option
>
> As a result of the discussions held with refuellers on the 20th and 21st November at Perth Airport the company would like to know your view about accepting the retrenchment option as discussed.
>
> If you would like to choose the retrenchment option would you please tick the box below, sign and date the letter and return to the Airport Manager on or before the 7th December 2001.
>
> Yours sincerely
>
> Airport Manager
>
> ✓ I would like to accept the Company's retrenchment option as outlined at the above meetings.
>
> Signature: (Signed)
>
> Name: GRAEME SPARNON (print)
>
> Date: 14/1/2002 "

4 On 3 March 2002 the applicant was sent a letter by the respondent confirming that his last day of employment would be 20 March 2002 (Exhibit A2). This letter included information on the termination payment that the applicant was to receive, superannuation information and information on where to obtain assistance with financial planning. The applicant was also given the opportunity to participate in an outplacement program. A certificate of service was enclosed with the letter, and there was reference to an exit check list and procedures.

5 In 2002 the respondent contracted out its refuelling work to Australian Airsupport Services ("Airsupport"). On obtaining the contract Airsupport advertised for refuellers at a lower rate of remuneration than that paid to the respondent's refuellers. As expressions of interest for these positions came from inexperienced people Airsupport entered into a contract with OzJobs, a division of Employment National, to supply trainers to assist with the training of the new refuellers to be employed by Airsupport.

6 On or about 14 March 2002 it became clear to Airsupport and the respondent that Airsupport had not recruited the required number of trainers through OzJobs. Thus, the respondent made a decision to retain four existing refuellers after 20 March 2002 for a short period to assist in the training of new refuellers. These four refuellers were chosen by the respondent on the basis of their skills, experience and performance, and they agreed to have their redundancy payments deferred for three months.

7 The respondent made it clear to its remaining employees that there would be no other positions available after 20 March 2002 apart from these four positions. This was confirmed in an email to the respondent's refuellers from the respondent's Perth Airport Manager, Mr Chris Taylor on 14 March 2002 (Exhibit A4).

Applicant's Evidence

8 The applicant claims that his acceptance of the respondent's retrenchment package on 20 March 2002 was contingent on the respondent arranging for him to be guaranteed three months' employment as a trainer with OzJobs. The applicant stated that he had a discussion with Mr Taylor in early March 2002 whereby Mr Taylor asked the applicant if he would be interested in a training job with OzJobs. In early March 2002 the applicant received a copy of an offer of a temporary training position with OzJobs (Exhibit A3). This offer was as follows, formal parts omitted:

> "Dear
>
> We are pleased to offer you a temporary position with OzJobs.

You will be engaged as a Trainer, working at Perth Airport. The expected period of your engagement will be approximately 3 months from 20/3/02. The period of the engagement may change. If it does, OzJobs will notify you.

The conditions of your assignment are based on conditions contained in the Transport Workers (Mixed Industries) Award 1984 (hereafter, the "Award"), with the following conditions affecting or replacing some parts of the Award—

1. You will be employed on a Casual basis for this assignment.
2. You will be paid a flat rate of $24.00 per hour, with a bonus payment of $500.00 on the completion of 2 consecutive weeks being worked.
3. If you decide to leave this assignment before it is completed, you are required to give one week's notice to OzJobs.

If you have any queries regarding these arrangements, please contact OzJobs as soon as possible.

While you are on assignment at the Perth Airport, you will receive direction regarding duties and hours of work from the management of our client, Australian Airsupport Services.

If you agree to these arrangements, please indicate this by signing this letter in the presence of a witness, where indicated below.

Thank you for being a part of the OzJobs team; we look forward to a successful working relationship with you."

9 The applicant stated that he was unhappy with the offer and negotiated with OzJobs to be paid at the end of the three month contract instead of being paid weekly. He stated that on 11 March 2002 Ms Gila Da Cunha on behalf of OzJobs, agreed to this and a revised contract was drawn up for him to sign. The applicant understood that he would start as a trainer with OzJobs on 21 March 2002.

10 The applicant stated that he had a meeting with Mr Taylor on 14 March 2002. Mr Taylor informed him that as insufficient trainers had applied for positions with OzJobs the respondent had made a decision to retain four refuellers as direct employees. The applicant was unhappy about this and told Mr Taylor that he would take some action over this decision. The applicant stated that a job as a trainer with OzJobs did not eventuate because the respondent made the decision on 14 March 2002 to retain four refuellers as direct employees to train the new refuellers. The applicant stated that when he found out about these four positions he rang Ms Da Cunha at OzJobs and he stated that Ms Da Cunha was surprised when he informed her that OzJobs had lost the contract to employ trainers. Further Ms Da Cunha was surprised at the respondent's decision to keep on four refuellers.

11 In cross examination the applicant confirmed that he was offered a position as a trainer by OzJobs. It was put to the applicant that he had until 18 March 2002 to advise OzJobs whether or not he would be interested in a training position with OzJobs. The applicant could not recall this deadline being put to him. The applicant confirmed that acceptance of the respondent's redundancy offer was not a precondition to the applicant obtaining contract training work with OzJobs. The applicant agreed that he was upset on 14 March 2002 when he found out that four employees were to be retained by the respondent to train new refuellers in preference to the applicant being chosen. It was put to the applicant that he contacted Ms Da Cunha at OzJobs on 20 March 2002 about taking up a training position. The applicant stated that he did not contact Ms Da Cunha on this date. He confirmed that Mr Taylor encouraged him to take up a training position with OzJobs.

Respondent's Evidence

12 Ms Da Cunha is the Senior Recruitment Manager with OzJobs and held that position in 2002. She confirmed that there was a contract between Airsupport and OzJobs to recruit approximately eight short term contract trainers to assist in the training of new refuellers employed by Airsupport. OzJobs agreed with Airsupport on the conditions of employment for these trainers, taking into account the terms and conditions of the relevant Award. She stated that on or about 11 March 2002 she discussed the conditions of the training position with the applicant and negotiated with the applicant to defer payment of his wages until the end of the contract. She stated that when she asked the applicant if he was interested in a training position the applicant informed her that he would "get back to her". Ms Da Cunha informed him that he would need to advise her by 18 March 2002 if he was interested in this position. Ms Da Cunha stated that OzJobs had difficulty filling the training positions and she was aware that the respondent had decided to retain four refuellers as direct employees to undertake the training role. She stated that when the applicant rang her on 20 March 2002 about taking up a training position with OzJobs, she advised the applicant that he was too late to take up this role, as he only had until 18 March 2002 to accept the offer made to him by OzJobs. Ms Da Cunha understood that the applicant was unhappy about not being offered one of the four training positions with the respondent.

13 Ms Da Cunha confirmed that she had diary notes of her discussions with the applicant (Exhibit R1). Her diary notes are reproduced below, formal parts omitted—

"On Thursday 7th March, I offered Graeme Sparnon a position as a staff trainer for approximately 3 months. He was to decide by Monday 18 March and the position was to start on Thursday 21 March.

On the morning of Friday 8th March, Graeme rang me on my mobile and said "I am not interested".

On the afternoon of the Friday 8th March Graeme rang me and said "If we could strike up a deal where I don't get paid until the end of the assignment, I might consider doing the trainer's position".

On Monday 11th March, I rang Graeme to say "Yes, we could do it" and he said he would get back to me.

On Wednesday 20th March, Graeme rang me and said he was upset with BP for not considering him to be one of the guys to continue on the package they were offering and he wanted to know if he could still have the trainer's position. I said "No, you are too late"."

14 Ms Da Cunha stated that she was advised by Airsupport on or about 7 March 2002 that they had decided to only fill six training positions as the response from the existing workforce for refuelling positions had not been positive. Ms De Cunha stated that Airsupport supplied her with eight to ten names of refuellers to contact for training positions. Ms Da Cunha confirmed that the applicant asked for a copy of the contract with OzJobs. Ms Da Cunha could not recall the applicant contacting her on 14 March 2002. When it was put to Ms Da Cunha that her office had faxed a copy of a contract of employment to the applicant on 15 March 2002, she stated that it must have been someone else from her office who faxed the document. In the end three trainers were employed on a contract basis through OzJobs to work with the four refuellers kept on by the respondent.

15 Ms Da Cunha stated that she recalled that she had a number of discussions between 7 and 18 March 2002 on general employee issues and the recruitment of trainers with Mr Taylor. Mr Taylor supplied the telephone numbers of the employees who she approached. She could not recall the exact date when Airsupport advised OzJobs that four employees were to be kept on by the respondent however, she stated that she was advised of this prior to 18 March 2002. Ms Da Cunha was asked if the applicant

had contacted her by the due date of 18 March 2002, would he have been offered a position as a trainer. She stated that it was possible that he may have been.

16 Mr Taylor was the respondent's Perth Airport Manager during 2002. He stated that given that the respondent had contracted out the refuelling contract to Airsupport all existing refuellers undertaking this work, including the applicant, were to be made redundant in early 2002. Mr Taylor confirmed that the respondent's redundancy offer was accepted by the applicant on 14 January 2002.

17 One of Mr Taylor's roles was to facilitate interviews with potential trainers or refuellers with both Airsupport and OzJobs. Mr Taylor confirmed that Airsupport was contracted to supply trainers and refuellers under its contract with the respondent. Airsupport in turn contracted to OzJobs to fill the temporary training positions required given the lack of experience of the refuellers who had applied for positions with Airsupport. Mr Taylor recalled that he had a number of discussions with the applicant and he encouraged him as well as other refuellers to apply for the training positions with OzJobs. He stated that he told the applicant that he would like him to apply for this position as he respected the applicant's ability and experience. He stated that he was aware of the conditions of employment being offered to the trainers by OzJobs however, he had no input into the letter that OzJobs sent out to potential trainers (Exhibit A3).

18 Mr Taylor stated that it was clear by about 13 March 2002 that insufficient trainers had applied for work through OzJobs, thus the respondent decided to retain four direct employees as trainers to ensure that Airsupport was able to honour its contract with the respondent. The four employees who were chosen were selected on experience and appraisals which had been recently undertaken. The respondent asked these four employees to defer their redundancy date for approximately three months.

19 Mr Taylor stated that on 14 March 2002 he distributed an email to the respondent's refuellers (Exhibit A4). A copy of this email is reproduced below, formal parts omitted.

> "…
>
> Subject: latest situation.
>
> Guys,
>
> Just a quick note to update you all on recent developments.
>
> As Airsupport were unable to recruit a suitable number of trainers with local knowledge to assist with training, we have reached agreement with four existing BP people to stay on for an additional 4 months employed on agreed terms by BP. These are Mike Bassett, Graham Morris, Colin Chadwick & Frank Gill. Their function will be to assist with training of new operators and supporting the transition. The four were chosen after input from several people, and were picked due to their overall skills, excellent track record and experience.
>
> I must make it clear there will be no other positions available on BP payroll after 20th March.
>
> There is some likelihood that positions relating to temporary training roles may still be avail (sic) with Airsupport. Any queries on these positions must be directed to Airsupport or via Ozjobs. They will not be available indefinitely so I urge you to seek out these opportunities should you so wish."

20 Mr Taylor stated that subsequent to distributing this email to refuellers the applicant approached Mr Taylor. The applicant stated that he was unhappy about four employees being kept on as refuellers and he told Mr Taylor that he would take the matter further.

21 Mr Taylor stated that at no time did he offer the applicant ongoing employment with the respondent to be undertaken subsequent to 20 March 2002.

22 Under cross examination Mr Taylor stated that he could not remember meeting the applicant on 14 March 2002 prior to issuing the email on that date (Exhibit A4). However, he recalled telling the applicant later on that day when he met with him that because OzJobs was having difficulty in filling the training positions, four refuellers were to remain employed by the respondent.

23 Mr Taylor confirmed that there was no contractual relationship between the respondent and OzJobs. His understanding was that OzJobs had a contract with Airsupport to supply trainers to train the new refuellers.

24 Mr Taylor stated that he encouraged all interested employees, including the applicant, to apply for work with Airsupport and OzJobs. He stated that the position was always going to be fluid because the number of trainers required depended on how many experienced employees applied for the refueller positions. Even though Airsupport were initially looking for eight trainers that figure could have been reduced at any time depending on the skills and experience of the trainers who were finally employed. Mr Taylor stated that it was his view that the applicant had the skills to adequately undertake the training job. When Mr Taylor distributed his email to refuellers on 14 March 2002 (Exhibit A4) he was operating on the understanding that four positions were still available to be filled through OzJobs but he was unaware of the exact number of positions Airsupport would finally require.

Submissions

25 The applicant submitted that there was an understanding that the respondent had guaranteed him three months' work as a trainer subsequent to his contract of employment with the respondent ceasing. The evidence confirmed that there were a number of discussions between the applicant and Mr Taylor whereby the applicant was encouraged by him to undertake this training work. On this basis it was appropriate for the applicant to have the understanding that provided he applied for the training position with OzJobs he would be guaranteed three months' of extra employment. Therefore he should be paid for this three months' work which was guaranteed by the respondent.

26 The applicant submitted that on the 14 March 2002 when the applicant decided to retain four refuellers as permanent employees rather than make them redundant at the same time as the applicant this meant that the applicant had no prospect of ongoing work with OzJobs. Thus, the respondent repudiated its original agreement with the applicant.

27 The respondent argued that as there was no contractual arrangement between the respondent and the applicant to provide the applicant employment subsequent to his termination, thus there was no obligation on the respondent to pay the applicant an additional three months' in wages. The applicant had not discharged the onus on him to demonstrate that he had a contract with the respondent which entitled him to the amount claimed. The respondent submits that the evidence clearly demonstrates that the applicant had no automatic entitlement to work as a trainer for three months subsequent to the applicant being made redundant. Further, there was no relationship between the applicant accepting a redundancy payment from the respondent and the applicant being guaranteed work subsequent to his redundancy.

28 The applicant was not offered employment by the respondent after he was terminated and there was no acceptance by the applicant of work with the respondent subsequent to his termination, therefore there was no ongoing contractual arrangement between the applicant and the respondent subsequent to the applicant's termination. Further, there was no evidence of any

contractual arrangement between OzJobs and the respondent, as asserted by the applicant, for OzJobs to employ the applicant for three months after he was terminated by the respondent. OzJobs had a contract with Airsupport, not the respondent. Mr Taylor's role was to encourage employees to take up positions with OzJobs and Airsupport, not to act as their agent and offer employment with these entities. Under its contract with the respondent, Airsupport was obligated to supply refuellers in order to fulfil its contract with the respondent. There was no obligation on Airsupport or OzJobs to employ any of the respondent's former employees once these employees were terminated by the respondent.

29 As the applicant did not challenge the choice of the four refuellers who were retained by the respondent, there was no issue in this regard. Further, the applicant failed to take up the offer of a training position with OzJobs of his own volition. By the time the applicant had decided to take the training job with OzJobs there were no further training positions available.

Findings and Conclusions

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 his 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 accordingly 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).

Credibility

31 Even though there was some conflict in the evidence given in these proceedings I accept that each witness gave their evidence to the best of their recollection and many of the critical elements relating to this matter were not in dispute. However, I place more weight on the evidence given by the respondent in this matter as the evidence given by Mr Taylor and Ms Da Cunha was consistent and corroborated by documentation. Thus, where there is any conflict in the evidence given I prefer the evidence given by the respondent's witnesses.

32 Taking into account my views about the evidence given I make the following findings.

33 I find that the applicant has not established that he is owed three months' wages as a benefit under his contract of employment with the respondent.

34 Even though the applicant believed that the respondent had guaranteed him an additional three months' work subsequent to his termination the applicant was unable to bring forward any evidence in support of this claim. I formed the view that the applicant was upset about not being given the opportunity to remain employed by the respondent after 20 March 2002. When the applicant had a discussion with Mr Taylor on 14 March 2002 after being informed of this decision the applicant was very angry and upset about the respondent's decision to retain four refuellers as direct employees to train the new refuellers instead of making them redundant. This distress could have impacted on the applicant's understanding about his future employment prospects. Even though the applicant believed he had a right to three months' additional work subsequent to his termination it is clear on the evidence given by Mr Taylor and Ms Da Cunha, that there was no agreement between the applicant and the respondent that the applicant was to be guaranteed employment for a period of three months after termination.

35 On the basis of Mr Taylor's and Ms Da Cunha's evidence I have reached the following conclusions.

36 There was no link between the applicant accepting a redundancy payment from the respondent and the applicant being entitled to three months' guaranteed work as a trainer with OzJobs subsequent to him being made redundant.

37 There was no contractual arrangement between the applicant and the respondent for the respondent to guarantee three months' work to the applicant subsequent to his termination.

38 There was no contractual agreement between the respondent and Airsupport and/or OzJobs for the applicant to be guaranteed three months' employment subsequent to his termination by the respondent.

39 OzJobs had a contract with Airsupport, not the respondent, to supply trainers for the new refuellers.

40 The applicant had the opportunity to apply for a position as a trainer with OzJobs and it was made clear to the applicant that he had until 18 March 2002 to indicate whether he wanted to take up this position. The applicant did not indicate to OzJobs by the due date that he wished to take up this position. The evidence is clear that the applicant was responsible for arranging employment with OzJobs, and that he failed to do so by the due date. It was not up to the respondent to supply this employment or guarantee that the applicant would be employed in this position.

41 I find that the respondent's decision on 14 March 2002 to retain four refuellers after 20 March 2002 did not impede the applicant's ability to take up a position with OzJobs. The applicant was informed on 14 March 2002 of this decision, four days before the cut off date to apply for a position with OzJobs. Further, the evidence was clear that more than four refuellers were required to train the new refuellers employed by Airsupport. Thus, even though the respondent decided to retain four refuellers it did not preclude the applicant from taking up employment with OzJobs.

42 Given the above, it is clear that the applicant has not discharged the onus on him to demonstrate that he is owed three months' wages under a contractual arrangement with the respondent.

43 An Order will issue dismissing the application.

2003 WAIRC 08242

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRAHAM SPARNON, APPLICANT
	v.
	AIR BP, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	MONDAY, 5 MAY 2003
FILE NO/S.	APPLICATION 722 OF 2002
CITATION NO.	2003 WAIRC 08242

Result	Application for contractual benefits dismissed

Order

HAVING HEARD Mr P Mullally (as agent) on behalf of the applicant and Ms C Kruger (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.) J. L. HARRISON,
[L.S.] Commissioner.

2003 WAIRC 08372

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID SUPARTA, APPLICANT
	v.
	SWAN TRANSIT OPERATIONS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 9 MAY 2003
FILE NO/S.	APPLICATION 135 OF 2003
CITATION NO.	2003 WAIRC 08372

Catchwords	Harsh, oppressive and unfair dismissal – Extension of time for application to be referred to Commission – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission not satisfied applying principles that discretion should be exercised – Extension of time to accept referral not granted – Application dismissed for want of jurisdiction – *Industrial Relations Act 1979* ss 29(1)(b)(i),(2)&(3)
Result	Order issued
Representation	
Applicant	Mr P Sorensen of counsel
Respondent	Mr A Drake-Brockman of counsel

Reasons for Decision

(Ex tempore)

1. The substantive application in this matter is one brought by David Suparta, against Swan Transit Operations Pty Ltd by which application Mr Suparta, as applicant, alleges that on or about 22 November 2002 he was unfairly dismissed as a bus driver from the respondent's employment.
2. I note at this stage that an issue has been taken in the respondent's notice of answer and counter proposal as to whether the named respondent is the proper respondent for the purposes of these proceedings. However, I do not deal with and do not need to deal with that matter at this stage of the proceedings.
3. The Commission of its own motion listed the present proceedings because the application filed on 4 February 2003 self-evidently is significantly out of time. Depending upon the dates on which the employment, if there was employment, actually terminated, it seems to the Commission at least the application is some 46 days out of time or thereabouts therefore the onus is on the applicant to persuade the Commission that it ought exercise its discretion to extend time for the purposes of s 29 of the Act.
4. It is trite to observe that s 29(2) of the Act requires an applicant in this jurisdiction to commence proceedings alleging that he or she has been unfairly dismissed not later than 28 days after the day on which the employee's employment is terminated. However, by s 29(3) of the Act the Commission may accept a referral by an employee pursuant to subsection (1)(b)(i) of s 29 that is out of time, if the Commission considers that it would be unfair not to do so.
5. The Commission as presently constituted in the matter of *Azzalini v Perth Inflight Catering Services* (2002) 82 WAIG 2992 set out what it considered to be appropriate principles in determining applications of this kind. In particular I refer to para 28 of that decision. I adopt and apply those principles for the purposes of determining this matter and I simply refer to and reaffirm my observations at sub paras 28(a),(b) and (c) as follows that—
    (a) Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;
    (b) An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties; and
    (c) It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;
6. The Commission then in sub paras 28(d)(i) through to (iv) sets out the relevant factors that it considers ought be appropriate including at sub para (e) the question of prejudice.
7. For the present purposes, notwithstanding the significant amount of evidence led in relation to the present application, the facts in outline form, in my view, can be summarised broadly as follows.
8. The applicant in short says he commenced training with the respondent for a position as a trainee bus driver on or about 28 October 2002. It would appear on the evidence which dates do not appear to be entirely controversial that on or about 30 October 2002 the applicant was subjected to some scrutiny by way of searches and questioning from the Australian Federal Police and ASIO in relation to alleged links to a fundamentalist Islamic group known as Jemaah Islamiah.

9. The issue in relation to the intervention by the Australian Federal Police and ASIO appears to have generated considerable publicity at that time and the Commission can take judicial notice of that, in my view. In relation to that incident the applicant was at that time still in the process of undergoing training as a bus driver, and indeed, on that day, 30 October, he was supposed to be attending training and it is common ground that as a consequence of the events on that day there was approximately one half a day's training or thereabouts lost on that occasion.

10. Thereafter, whilst the circumstances are not entirely clear, it appears that on or about 22 November 2002 a meeting took place between the applicant and Mr Buchanan, the respondent's area manager, at the respondent's premises. It would seem, however, that from about 4 November 2002 the applicant was not in attendance at the respondent's premises.

11. The purpose of that meeting was for a discussion to take place between Mr Buchanan and the applicant at which Mr Buchanan indicated to the applicant his concerns in relation to the publicity surrounding the events that occurred on or about 30 October and the possible community and public backlash to both the applicant and the respondent if the applicant was to continue as a trainee driver as the respondent put it, whilst accepting the applicant always avers that he was employed at the time.

12. The upshot of that meeting was that the respondent took a decision to discontinue the applicant's further engagement by it for those reasons. The evidence also is that the applicant on that day or about that time, it seems, consulted a solicitor, firstly, it seems, in relation to the events involving the Australian Federal Police and ASIO, but later consulted his present solicitor and counsel as to the position regarding his training and employment, if there was employment, with the respondent.

13. It would appear that that latter issue was raised some time in late November or December or early December 2002. The evidence also is that from about mid-December 2002 through to about mid-January 2003 there were some discussions between the applicant's then solicitor and representatives of the respondent in relation to a possible negotiated resolution of issues that had at that time been raised concerning the applicant and the events which flowed from 30 October.

14. As I have observed, the present application was filed on 4 February 2003. Given that, at best, the case for the applicant is that the application is approximately 46 days out of time which, in the Commission's opinion, is a considerable delay in bringing these proceedings.

15. I deal with the first of the factors identified in *Azzalini*, that is, the length of delay in bringing the application. As I have just stated, in my opinion, a period of some 46 days is a significant delay and is a factor which must be taken against the applicant and the application presently, in my opinion.

16. Secondly, the question of the explanation for the delay, I turn to that question. In my view, on the evidence the state of the evidence is such that there is no real and proper explanation for the delay. It is clear on the evidence that at least by late December 2002 to early January 2003 the applicant was consulting a solicitor in relation to his position vis-a-vis the respondent.

17. In my opinion had this matter been progressed expeditiously the application ought and could have been brought by way of commencing proceedings pursuant to s 29 of the Act notwithstanding that there may have been discussions between the parties in an endeavour to try and resolve the position.

18. It is trite to observe that those discussions cannot ever be assumed to bring a resolution and primarily the applicant's rights in the meantime should be preserved.

19. Thirdly, in relation to the steps taken, if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested, there was evidence before the Commission that there was some dialogue in relation to the applicant's circumstances. I have doubts, however, as to whether that specifically related to an allegation that the applicant was unfairly dismissed; rather, it would seem that it was more directly concerned with the publicity and issues surrounding the events of 30 October 2002 and any implications that might have for the respondent.

20. Next I turn to the question of the sufficiently arguable case criterion. In my opinion, on the evidence as it is at this stage, which necessarily is rather scant on the merits, I have significant doubts as to whether the applicant, as a matter of fact and law, was an employee of the respondent as at the time it is alleged the relationship came to an end. In my opinion it would appear more likely than not on the evidence that at the time that the relationship between the applicant and the respondent came to an end, the applicant was undergoing a period of training as a precursor to an offer and acceptance of employment in a formal sense.

21. Whilst I accept that there is evidence of some payment to the applicant by way of evidence through Mr Buchanan, and secondly, through exhibit A1, a statement from the Transport Workers Superannuation Fund, in my view that is explicable in terms of a training fee, not necessarily a binding contract of the employment which would give rise to a claim that the employment was terminated unfairly and therefore enliven the Commission's jurisdiction. However, I do not reach any concluded view about that matter given the state of the evidence before the Commission at this stage.

22. Secondly, and in any event, it does seem common ground between the parties that had there been an employment relationship, that that relationship would have been subject to a period of probation of some three months and in my view, that is not an irrelevant consideration in terms of the overall merits of the applicant's claim had he been an employee of the respondent from the outset.

23. Other issues are raised by the respondent's counsel, Mr Drake-Brockman, in his outline of submissions in relation to the effect of a federal agreement, that is the Swan Transit Certified Agreement 2001 and the Transport Workers Swan Transit Award 2002, both instruments made pursuant to the terms of the Workplace Relations Act 1996 (Cth) and their relationship to s 29 of the Act in terms of a possible conflict for the purposes of s 109 of the Commonwealth Constitution. I do not need to resolve or deal with those issues in relation to the present application.

24. Finally, dealing with the question of prejudice as set out at para 28(e) of my decision in *Azzalini*, it is the case, as I have said in that decision, it is a relevant factor as to whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent without more is not a sufficient basis of itself to grant an application for an extension of time and I simply note that factor for present purposes.

25. Despite the efforts of Mr Sorensen on behalf of the applicant to persuade the Commission that it ought accept the applicant's claim out of time, having regard to all of the factors that I have dealt with and the evidence as it is before the Commission presently, I am not persuaded that I ought grant the application to extend time and exercise the Commission's discretion in favour of the applicant. Accordingly, for those reasons, the application for an extension of time is refused and the substantive application is dismissed for want of jurisdiction and the Commission so orders.

2003 WAIRC 08295

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID SUPARTA, APPLICANT
	v.
	SWAN TRANSIT OPERATIONS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 9 MAY 2003
FILE NO.	APPLICATION 135 OF 2003
CITATION NO.	2003 WAIRC 08295

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr P Sorensen of counsel
Respondent	Mr A Drake-Brockman of counsel

Order

HAVING heard Mr P Sorensen of counsel on behalf of the applicant and Mr A Drake-Brockman 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.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 08289

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FIONA ANNE WEBSTER, APPLICANT
	v.
	PRESTIGE PROPERTY MANAGEMENT SERVICES, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY 9 MAY 2003
FILE NO/S.	APPLICATION 737 OF 2002
CITATION NO.	2003 WAIRC 08289

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement
Representation	
Applicant	Mr A Chilvers (of counsel)
Respondent	Mr J Brits (of counsel)

Reasons for Decision

1 This is an application by Fiona Anne Webster ("the applicant") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that she was unfairly dismissed from her employment with Prestige Property Management Services ("the respondent") on 17 April 2002. The respondent denies that the applicant was unfairly terminated.

Background

2 The applicant was employed in February 2000 to manage the Wickham Swimming Pool ("the Pool"). The Pool is operated by the respondent under a contractual arrangement with Robe River Iron Associates ("RRIA"). A copy of this contract is contained in Exhibit R1. There was no written contract of employment between the applicant and the respondent however, there was an initial agreement between the applicant and the respondent's Regional Manager, Mr Rod Stewart that the applicant would be paid $40,000 per annum to work 90 hours per fortnight in summer between 1 October and 31 March and 80 hours per fortnight in winter between 1 April and 30 September. The applicant's duties were outlined in a document drawn up by the respondent in July 2001 (Exhibit R4).

3 The applicant worked a rolling roster over seven days. An assistant and other pool attendants were employed to assist in running the Pool. A diary was maintained containing issues relating to the Pool's day to day operation. The Pool's manager was expected to liaise with RRIA employees on a day to day basis on Pool issues that RRIA was responsible for under its contract with the respondent. The Pool was open in summer from 6.00am to 8.00pm Monday to Friday and from 9.00am to 6.00pm Saturdays, Sundays and Public Holidays. In winter the Pool was open Monday to Sunday from 9.00am to 5.00pm (Public Holidays inclusive).

4 At the time the applicant was terminated her hourly rate of pay had increased to $18.50 per hour for each hour worked.

The Respondent's Evidence

5 Mr Stewart has been the respondent's Regional Manager since March 1996. On 12 April 2002 it was brought to his attention that there was an issue relating to the swimming leg of a triathlon to be held at the Pool out of normal hours on 14 April 2002. Mr Stewart stated initially that he was concerned that the applicant had instructed Ms Jennifer Spriggs and Ms Elizabeth Darnell, pool attendants employed by the respondent, that "they were to collect $1.00 per head from the people that attended

the triathlon and to put that money in their pocket" (Transcript Page 6). Mr Stewart was also concerned that the triathlon was to be held outside of the Pool's normal hours. Mr Stewart was asked about how Ms Darnell, who was employed on a temporary basis whilst the applicant was on annual leave, was to be paid for her attendance at the Pool for the triathlon. Mr Stewart was concerned about paying Ms Darnell as under the respondent's contract of employment with RRIA (Exhibit R1) there was no capacity for an employee to be employed out of the Pool's normal hours of operation without prior written approval from RRIA being obtained. He claimed that under Schedule A. - Clause 16 of the contract all requests for out of hours use of the Pool should come to RRIA through the respondent and on this occasion Mr Stewart had not received any request to open the Pool out of normal hours.

6 As a result of this issue coming to his attention Mr Stewart arranged to meet with the applicant at the Pool on 17 April 2002. Ms Sharon Edwards, the respondent's Manager of the Wickham Lodge, also attended the meeting. At this meeting, which lasted for approximately 15 minutes, the applicant was asked about the Nickol Bay Triathlon Club (Inc) ("the Club") booking the Pool out of normal hours for the triathlon to be held on 14 April 2002. Mr Stewart gave evidence that the applicant stated that this booking did not result in any costs being incurred by the respondent as the Club was paying the applicant's wages for the additional hour that was worked. Mr Stewart responded by saying to the applicant that the respondent had an issue with public liability because of the applicant's actions as access to the Pool out of hours was unauthorised. The applicant was asked if she was aware of procedures for out of hours Pool bookings and she replied that she was. She stated that RRIA was aware that the Club was using the facility out of hours. The applicant stated that she did not see what the big deal was. He stated that the applicant gave no explanation as to why she had allowed the Club to use the Pool in the way she had. Given the applicant's response Mr Stewart stood the applicant down.

7 Prior to this meeting Mr Stewart contacted RRIA about the triathlon being held out of normal Pool hours. He understood from his discussions with RRIA that RRIA was not aware that the Club was to use the Pool out of normal hours on 14 April 2002. He also stated that he had discussions with Ms Spriggs and Ms Darnell about the triathlon. Mr Stewart understood that Ms Darnell was told to collect one dollar per head from each triathlete entering the Pool and that this money was to be used for her wages for the additional hour that she worked at the Pool.

8 Subsequent to meeting with the applicant on 17 April 2002 Mr Stewart had further discussions with RRIA. As the applicant had no reasonable explanation for collecting money from the Club and as the respondent's procedures had been breached in relation to out of hours use of the Pool Mr Stewart determined that the applicant was to be terminated. He contacted the applicant late in the afternoon of 17 April 2002 and summarily terminated her effective on that date. The applicant was paid all entitlements up to that day and no payment in lieu of notice was made to the applicant.

9 After the applicant was terminated the Club wrote to the respondent apologising for not seeking permission to use the Pool for the triathlon (Exhibit R3).

10 Mr Stewart was asked if at any stage he had given the applicant permission to manage the Pool as she saw fit. He stated that he did not. Mr Stewart stated that even though a new pool manager had been appointed to manage the Pool after the applicant was terminated, he did not want to terminate the applicant's contract of employment on 17 April 2002 because it was difficult to find pool managers.

11 Under cross examination Mr Stewart was asked whether or not the applicant was provided with a copy of the respondent's contract with RRIA relating to the operation of the Pool (Exhibit R1). Mr Stewart stated that a copy of the contract was kept in the office at the Pool. He stated that he discussed the relevant points of this contract and the respondent's policies and procedures with the applicant soon after she commenced employment with the respondent. He confirmed that when the applicant first commenced employment with the respondent she did not have a written duty statement.

12 Mr Stewart was asked about the Pool's diaries. He confirmed that the diaries register the number of swimmers visiting the Pool and contain relevant information about daily happenings at the Pool. He confirmed the diaries recorded that four triathlons had taken place out of hours and the number of competitors involved in each triathlon. These triathlon dates and the monies paid are confirmed in a letter from the Club to the applicant dated 24 April 2002 (Exhibit A3).

13 Once the issue of the triathlon, which was scheduled to be held out of hours on 14 April 2002 was raised with Mr Stewart, Mr Stewart stated that he obtained permission from RRIA to open the Pool out of hours for the triathlon and a pool attendant was paid for the additional hour worked for this triathlon.

14 Mr Stewart confirmed that, apart from minor issues, the respondent did not have any issue with way in which the applicant performed her duties.

15 Mr Stewart stated that on 12 April 2002, after Ms Edwards rang him concerning monies to be collected for the triathlon which was to take place on 14 April 200, he then initiated an investigation. He claims that Ms Darnell told him that the applicant told her to collect one dollar per head and to put it in her pocket as payment for being on duty. Mr Stewart's evidence was that Ms Darnell then raised this payment with the Assistant Manager, Ms Spriggs as she was unsure about keeping the money. Mr Stewart stated that he was concerned that Ms Darnell would need to be paid by the respondent and not RRIA for the additional hour that she worked on the 14 April 2002.

16 Mr Stewart stated that at the meeting with the applicant on 17 April 2002, he did not ask the applicant what had happened to the money that had been collected for the three previous triathlons held on 11 March 2001, 22 April 2001 and 10 March 2002. He did not do so because he understood the applicant kept the money as wages as the applicant stated there was no issue for the respondent as no wages had to be paid for staff attending these triathlons. He confirmed that Ms Edwards was asked to attend the meeting to be the respondent's witness. He confirmed that he did not check the Pool's diaries before speaking to the applicant on 17 April 2002. It was put to Mr Stewart that he pressured the applicant during this meeting. Mr Stewart stated that the applicant was given an adequate opportunity to respond to the issues raised with her. He confirmed that the applicant looked shocked during the meeting. He also stated that the respondent considered referring this matter to the police, however, the respondent chose not to pursue this option further.

17 Ms Edwards has managed the Wickham Lodge on behalf of the respondent for the past five years. She has known the applicant since she commenced employment as the Pool's Manager. She stated that on the 12 April 2002, Ms Spriggs asked her about Ms Darnell collecting and retaining money from trialthletes who were to be at the Pool on 14 April 2002. Ms Edwards undertook to take this matter up with Mr Stewart and get back to Ms Darnell.

18 Ms Edwards was in attendance at the meeting on 17 April 2002 concerning the applicant. She confirmed that the applicant was asked about the arrangements for the triathlon on 14 April 2002. The applicant stated that she did not see the issue as a problem because the triathlon was taking place out of hours and no wages were required to be paid by the respondent. She confirmed the applicant stated that one dollar was paid by each triathlete who came to the Pool and Mr Stewart indicated to the applicant that this was a problem to the respondent as the Pool operated on no fees being charged. The applicant was asked if she was aware of the procedure for out of hours bookings. The applicant confirmed that she was aware of these procedures. Ms Edwards confirmed that the applicant stated that RRIA was aware of the triathlons taking place as Ms Karen Woods, the

Project Officer for the Pool employed by RRIA had been consulted about the triathlons. Mr Stewart replied that the current Project Officer, Ms Justine Britton was unaware of the triathlons taking place. Ms Edwards stated that the applicant was given the opportunity to provide any further relevant information. The applicant responded by saying that it was a silly thing to do and indicated that she was aware she was going to be sacked over the incident.

19 Under cross examination Ms Edwards confirmed that the applicant did not seek to hide the fact that the triathlons had taken place at the Pool out of hours. Ms Edwards could not recall if the applicant was asked where the money collected from each triathlon had gone. Ms Edwards was asked about normal procedures for out of hours use of the Pool. She stated that all employees were aware of the procedures, which she understood were not written down. She understood that written permission for out of hours use must be sought from RRIA by the respondent prior to any out of hours activity going ahead. If RRIA did not agree to the use, then the Pool could not be used. She confirmed that at the end of the meeting held on 17 April 2002 the applicant was upset. She confirmed that a full copy of the respondent's contract with RRIA (Exhibit R1) was at the Pool's office.

The Applicant's Evidence

20 When the applicant was first employed by the respondent in February 2000 she stated that she was not given any specific induction from the respondent however, she attended an induction conducted by RRIA. She was told about the specifics of her role at the Pool by the respondents' assistant pool manager. She stated that a number of documents were held at the Pool's office. Copies of the daily diaries were kept there, and there were parts of an old copy of a contract between the respondent and RRIA, which she stated was not the same as the contract contained in Exhibit R1.

21 The applicant confirmed that in relation to Pool matters she initially liaised directly with RRIA's Project Officer, Ms Woods and later with Ms Britton when she replaced Ms Woods. She confirmed that RRIA undertook maintenance on the Pool and that much of the contact with RRIA was via Ms Edwards. The applicant confirmed that from early 2002 she reported directly to RRIA each month about issues relating to the Pool. Exhibit A1 is a copy of the February 2002 Monthly Report which she sent to RRIA, and copied to Mr Stewart.

22 The applicant was asked about the Club triathlons. The applicant stated that some time in February 2001 the Club Secretary, Ms Erica Lang contacted her about using the Pool in March 2001, as part of a triathlon event. The applicant was aware that the Club required the Pool to be used out of hours as the extreme heat in the north-west necessitated using the Pool prior to the Pool's normal Sunday opening time of 9.00am. She stated that she mentioned the issue of the triathlons occurring briefly to Mr Stewart and he responded by stating that she was the Pool Manager and it was her role to run the Pool as she saw fit. The applicant confirmed that of the four triathlons held in 2001 and 2002 she was in attendance between 7.30am and 8.30am at the triathlons held on 11 March 2001 and 10 March 2002. The Assistant Pool Manager, Ms Rosemary Cresswell attended the triathlon held on 22 April 2001. In relation to the one held on 14 April 2002 the applicant was on annual leave when this triathlon took place. The applicant stated that she did not seek payment for attending the triathlons, as she attended the Pool voluntarily as a service to the community. At the end of each triathlon monies were paid by the Club based on the number of triathletes competing and the applicant used these monies to reimburse the applicant's expenditure on pool toys and equipment which included a basketball ring and a cricket set. She stated that the triathlon monies were not kept for her personal use and that she spent more on toys and pool equipment than she received from the triathlons. She stated that the cost of the toys was reimbursed from the triathlon payments and not from any other source. She confirmed that she discussed the triathlons with Ms Woods and that Ms Woods informally approved the out of hours use of the Pool. Ms Britton was also informed about the triathlons taking place and on behalf of RRIA she had also approved the triathlons taking place.

23 As the applicant was to be away on annual leave when the triathlon was to take place on 14 April 2002 she approached Ms Darnell and asked her if she would volunteer to be on duty. The applicant stated that Ms Darnell agreed to undertake these duties on a voluntary basis. The applicant informed Ms Darnell that donations would be paid by the triathletes and that she was to put the money in a container located in the Pool's office. The applicant did not tell Ms Darnell that the money was to be kept by her for her personal use. She confirmed that at the triathlon held on 10 March 2002 Ms Spriggs collected donations from the triathletes and left the money in a Tupperware container in a cupboard in the Pool office which is where the other triathlon monies were kept.

24 In relation to the meeting of 17 April 2002 with Mr Stewart and Ms Edwards, the applicant stated that the meeting went for between 10 and 15 minutes. She stated by way of background that her relations with Mr Stewart during her employment with the respondent had not been smooth. She found Mr Stewart to be abrupt and unhelpful at times. The applicant stated that prior to the meeting she was unaware that the holding of the triathlons out of hours was an issue for the respondent. She was shocked by what was put to her at the meeting as she had no advance warning about the issues to be discussed and she could not recall very much about what took place. When asked by Mr Stewart about the triathlons occurring, the applicant recalled that she stated that RRIA's Project Officer, Ms Woods had given permission for the triathlons to occur and she recalled after the meeting that she had also spoken to Ms Britton about the triathlons taking place. The applicant told Mr Stewart that she did not tell Ms Darnell that she could keep the monies collected from the triathletes. The applicant told Mr Stewart that she could not recall any requirement about the necessity for her to seek formal permission for conducting out of hours activities at the Pool. She did not recall saying that holding the triathlons presented no problem for the respondent as the respondent did not have to pay any wages for the Pool being opened out of hours. She stated that Mr Stewart did not ask her at the meeting about what had happened to the money collected from each triathlon.

25 The applicant stated that she was shocked and emotional both during and after the meeting. She confirmed that Mr Stewart telephoned her after the meeting and informed her that she was terminated effective on that date.

26 On 26 April 2002 the applicant wrote to the respondent to clarify the background to the collection of monies from the Club and seeking to demonstrate to Mr Stewart where the money had been spent (Exhibit A2). She outlined to Mr Stewart that the monies collected from the triathlons were donations and not payment for wages for working the additional hours when the Pool was open. Further, she stated that she supervised the triathlons in her own time. However, she received no response from Mr Stewart.

27 Subsequent to being terminated the applicant obtained employment in July 2002 as a part-time secretary earning $13.00 per hour on a casual basis working approximately 40 hours per week. Since January 2003 she has been working 25 hours per week earning $13.00 per hour.

28 Under cross examination the applicant confirmed that she had difficulty communicating with Mr Stewart and that she did not get on well with him. She stated that Mr Stewart spoke to her in an abrupt manner at the meeting held on 17 April 2002. She stated that she was unable to give a full explanation of what had occurred in relation to the collection of monies at the triathlons because she was in shock. It was her view that the running of the triathlons was not a problem. She stated that it was an oversight on her part not to have informed Ms Spriggs that Ms Darnell had agreed to work the additional hour for the triathlon which was to be held on 14 April 2002 free of charge.

29 The applicant reiterated that at the meeting held on 17 April 2002 she was not asked what had happened to the money collected from the triathlons and that if this issue had been raised at the time she would have shown Mr Stewart the toys and pool equipment that had been purchased with the money. She stated that in relation to using the Pool for the triathlons she was not aware that written permission from RRIA was necessary. Further, she had cleared the Pool's use for the triathlons with Ms Woods and Ms Britton, and she understood that verbal permission from RRIA for the triathlons to go ahead was all that was necessary. The applicant also stated that Ms Woods and Ms Britton were both aware that she was purchasing toys and equipment for the Pool from monies donated by the Club. She confirmed that the diaries kept in the Pool office noted that the triathlons took place on the dates they were held. She stated she did not tell Mr Stewart about buying these toys and equipment because she did not think it was necessary.

30 Ms Cresswell worked as the applicant's Assistant at the Pool for approximately 14 months until December 2001. She stated that she was aware that the Club triathlons took place out of normal Pool hours. She worked at the Pool at the triathlon held on 22 April 2001 and she was aware that she was not being paid for this attendance. She confirmed she put monies donated from that triathlon into a container of money held at the Pool. The triathlon donations and any monies that were found at the Pool were kept in this container. She confirmed that this money was spent on toys and equipment for use at the Pool.

31 Ms Cresswell recalled speaking to both Ms Woods and Ms Britton separately about the triathlons. She stated that Ms Wood encouraged the triathlons taking place and she stated that Ms Wood was aware that the respondent's employees would not be paid for attending these events. In relation to Ms Britton's knowledge of the triathlons she stated that she was at a meeting with Ms Britton when the triathlons were discussed and it was her understanding that Ms Britton was happy for the status quo to continue in relation to the triathlons taking place.

32 Under cross examination Ms Cresswell was asked whether she knew that it was necessary to seek permission to operate the Pool out of hours. Ms Cresswell stated that she was aware of this requirement but often this was dealt with verbally and direct with RRIA. She was not aware that it was necessary for a request of this nature to be dealt with formally in writing. Ms Cresswell was aware that the applicant bought toys for the Pool and she saw some of the applicant's receipts for the toys purchased. She stated that some toys were bought before the triathlons took place and some were purchased after each triathlon. She stated that the applicant used some of the money collected to replace toys which were broken. Ms Cresswell confirmed that the applicant once told her how much money was left in the container after she had bought some toys from money collected from the triathlons.

Submissions

33 The respondent maintains that the applicant was terminated for two reasons. Firstly, the applicant allowed the Pool to be used out of standard hours without obtaining prior authorisation from RRIA as specified in Schedule A. - Clause 16 of the contractual arrangement between RRIA and the respondent (Exhibit R1). The respondent stated that the applicant was aware of the necessity to obtain permission from RRIA and that the applicant breached the respondent's contract with RRIA by allowing the triathlons to take place without authority from the respondent and RRIA. Secondly, the applicant was terminated because the entry fee charged for each triathlete was used for the applicant's own gain and that the applicant acted dishonesty in keeping the money collected from each triathlon. The applicant did not adequately explain what had happened to the money that was collected from the triathlons and no receipts were shown demonstrating the purchase of the toys claimed to have been bought by the applicant. The respondent's Pool diaries do not contain any entries of monies received from the triathlons or confirmation that toys were purchased with the monies collected. The respondent maintained that given these actions, the applicant misconducted herself sufficient to warrant summary termination.

34 The respondent argued that once these issues were brought to its attention a proper enquiry was undertaken. All relevant employees were interviewed and RRIA representatives were consulted.

35 The respondent stated the applicant's actions were serious given the public liability exposure to the respondent and RRIA in having the Pool open out of hours without permission and that it may have resulted in the respondent losing its contract with RRIA.

36 The applicant submits that the respondent has not demonstrated that there was sufficient reason for summarily terminating the applicant's contract of employment. In relation to the applicant's failure to obtain permission to use the Pool out of hours it was not clear that the applicant was aware that written permission had to be obtained in order to open the Pool outside of the Pool's normal hours. Further, much of the evidence relied upon by the respondent in coming to the view that the applicant had misconducted herself was based on hearsay. The applicant argued that both Ms Woods and Ms Britton, RRIA employees responsible for the administration of the Pool, were aware of the arrangement to open the Pool out of hours for the triathlons and condoned it. Further the Pool's diaries confirmed that the triathlons took place thus the applicant did not hide the fact that these triathlons occurred. In relation to the allegation that the applicant kept the monies collected from the triathlons for her own gain, the applicant maintains there was uncontradicted evidence given by the applicant and Ms Cresswell that the monies collected from the triathlons were used to purchase toys and pool equipment thus, the money collected was not used for the applicant's personal gain. Further, Mr Stewart did not ask the applicant what had happened to the money that had been collected from the triathlons during the meeting with the applicant on 17 April 2002. There was no additional cost to the respondent for the running of the triathlons and as RRIA were aware of the triathlons taking place there was no breach of Schedule A. - Clause 16 of the respondent's contract with RRIA.

37 The applicant maintains that the respondent did not conduct a proper investigation into this matter. It was unclear exactly who the respondent consulted to obtain background information about these issues and no one from RRIA gave evidence that they were unaware that the triathlons had taken place. At the meeting held on 17 April 2002 the applicant was put under pressure by Mr Stewart. She was stressed and shocked during the meeting given the manner in which it was conducted, and therefore the applicant was unable to properly respond to the allegations put to her. A letter sent by the applicant to the respondent after she was terminated to clarify her position in relation to the matters raised was ignored by the respondent.

38 In all of the circumstances the applicant maintains that she was unfairly terminated.

Findings and conclusions

Credibility

39 I carefully observed the witnesses whilst they gave evidence. I was concerned about the evidence given by Mr Stewart. Some of the evidence he gave about events which occurred in the lead up to the meeting with the applicant on 17 April 2002 and with whom he spoke as part of his investigation about RRIA's knowledge of the triathlons was unconvincing. Mr Stewart's evidence of his discussion with Ms Darnell was vague and given in a hesitant manner. He could not even recall if he spoke directly with Ms Darnell or spoke to her on the telephone (Transcript Page 26). Further, some of the evidence Mr Stewart gave was inconsistent. At the outset Mr Stewart gave evidence that he understood that both Ms Darnell and Ms Spriggs had been instructed by the applicant to retain monies collected at two triathlons (Transcript Page 6), however he contradicted this

statement later by confirming that Ms Spriggs had been told by the applicant to put the triathlon money she collected in the Pool office (Transcript Page 11).

40 The applicant's evidence in relation to what she told Ms Spriggs and Ms Darnell to do with the money collected on the days that the triathlons were held was more convincing and plausible. The applicant's evidence about what happened to money collected at each triathlon was consistent with Mr Stewart's evidence in relation to what Ms Spriggs was told (Transcript Page 11) and the applicant's version of what happened to the money collected was corroborated by Ms Cresswell's evidence. I therefore give the evidence of the applicant about what was to happen to the money collected at each triathlon and what the applicant told Ms Darnell to do with the money collected more weight than Mr Stewart's evidence.

41 I also have some doubts about the evidence given by Mr Stewart and Ms Edwards about what transpired at the meeting held with the applicant on 17 April 2002. Although much of the evidence given by those in attendance at this meeting is consistent, Ms Edwards did not mention the issue of public liability being mentioned by Mr Stewart nor did Mr Stewart mention that the applicant stated that she knew she was going to be sacked over this incident. Given the important nature of these issues in the context of this meeting I have some doubts about the evidence given by Mr Stewart and Ms Edwards about what was stated by the applicant at this meeting. Also, Mr Stewart stated at this meeting that he understood Ms Britton was unaware that the triathlons were taking place, yet mention is made about a triathlon taking place in March 2002 in the applicant's memo to Ms Britton dated 4 March 2002 (Exhibit A1). Even though the applicant's recollection of this meeting was somewhat vague and she stated she was in a state of shock during the meeting, I accept the applicant's evidence about her recollection of what was stated at this meeting. The main issue in contention arising from this meeting was whether the applicant was retaining money paid by the Club as wages. I find the applicant's explanation in relation to this issue more plausible as it was corroborated by Ms Cresswell's evidence and it was not in dispute that toys and pool equipment, not paid for by RRIA or the respondent, were used at the pool on an ongoing basis. I also accept the applicant's evidence that she was unaware that it was necessary for her to seek written permission to conduct all out of hours activities at the Pool. I accept the applicant's evidence, as corroborated by Ms Cresswell that Ms Wood and Ms Britton had given permission informally, on behalf of RRIA, for the triathlons to occur out of hours. I am assisted in reaching this view by the contents of the applicant's memo to Ms Britton dated 4 March 2002, about the March 2002 triathlon taking place (Exhibit A1).

42 Given the inconsistencies in the respondent's evidence and given that it is my view that the applicant and Ms Cresswell gave their evidence honestly and to the best of their recollection, where the evidence given by Mr Stewart, Ms Edwards, the applicant and Ms Cresswell conflicts I prefer the evidence given by the applicant and Ms Cresswell.

Was the Applicant's dismissal unfair?

43 This dismissal was summary in nature. The onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified. (see: *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679)

44 The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree, (see *Robe River Iron Associates v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819), and the onus is on the employer to justify the dismissal. In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed—

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

45 On the facts as I find them I am satisfied, at least on balance, that the respondent has not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal. Further, I am satisfied that the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself against the allegations relied upon to effect her termination. I am also not convinced that the respondent conducted a full and extensive investigation into the events surrounding the applicant's termination. In the circumstances it is my view that the applicant was not afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

46 Given my conclusions on witness credit I make the following findings.

47 The applicant was employed as the respondent's Pool Manager at Wickham for over two years prior to being summarily terminated on 17 April 2002. The applicant was terminated for allowing the Pool to be used by the Club out of hours without obtaining prior written authorisation and for collecting money from competitors attending each triathlon to use for her own gain. I accept that prior to the applicant's termination the respondent had no major issues with the applicant's performance.

48 I find that on or about 12 April 2002 Mr Stewart was informed by Ms Edwards that a query had been raised by Ms Spriggs about the payment of wages for Ms Darnell, a temporary pool assistant, who was asked to work outside of normal hours at a triathlon to be held on 14 April 2002. Mr Stewart was concerned about this issue as the respondent faced the prospect of having to pay Ms Darnell for working an additional hour on this date, without prior approval being given by RRIA as specified under the respondent's contract with RRIA (Exhibit R1). He also had concerns about the respondent's public liability exposure if the Pool opened without prior authorisation from RRIA.

49 Schedule A. - Clause 16 of the contract between RRIA and the respondent reads as follows—

> "**Hours of Work**
>
> Hours of work shall be as nominated in Schedule B though from time to time the Engineer may direct additional hours are (sic) to be worked or vary the hours to be worked. Any such additional hours shall be invoiced at the rate nominated in Schedule C. The Contractor shall ensure no additional hours are worked without the receipt of an authorised RRIA Works Order."

50 As Mr Stewart had not received any written request to open the Pool out of hours on 14 April 2002 he investigated the issue. Mr Stewart gave evidence that Ms Darnell told him that the applicant asked her to commence work one hour before her normal start time on 14 April 2002 and to collect an entry fee of $1.00 from each triathlete. Mr Stewart stated that the applicant told

Ms Darnell to put the money collected into her pocket as payment for being on duty for the triathlon. Given my comments about witness credit I do not accept Mr Stewart's evidence in relation to what he claims Ms Darnell stated to him. Further, Ms Darnell did not give evidence in support of Mr Stewart's claim. I prefer the applicant's evidence that Ms Darnell agreed to be on duty on a voluntary basis on 14 April 2002 and that Ms Darnell was told to put any monies paid by the athletes in a container held in the Pool office. I accept that the applicant did not tell Ms Darnell that the money collected at the triathlon was to be retained by her for her own use and I find that the money collected was not to be for the applicant's personal use. I also accept the applicant's evidence that she did not advise Ms Spriggs that Mr Darnell was to work at the triathlon on a voluntary basis.

51 The respondent argues that the applicant was terminated because she collected money from each triathlete for her own gain. I find that money collected from each triathlon was not used by the applicant for her own gain. I accept the applicant's evidence that she stated to Mr Stewart at the brief meeting held on 17 April 2002 that holding the triathlons involved no cost to the respondent as wages were not being claimed. I also accept that the applicant informed Mr Stewart that nobody was in danger nor were lives at risk or the respondent or RRIA exposed to a damages claim because the Club had appropriate public liability insurance cover. This is confirmed by Exhibit A3. I accept the applicant's and Ms Cresswell's evidence that both of them worked at the triathlons on a voluntary basis and monies collected from the triathlons were used to reimburse the applicant for the purchase of pool toys and equipment on an ongoing basis. It is also clear on the evidence that at the meeting on 17 April 2002 the applicant was not asked what had happened to the money collected from the triathlons. Thus, there is no evidence to sustain the respondent's allegation that the applicant retained the money collected from the triathlons for her own gain.

52 The respondent claims the applicant breached Schedule A. - Clause 16 of its contract with RRIA by allowing the Pool to be used out of hours without prior authority from RRIA. I am not convinced that the Pool could only be opened out of hours on the basis of prior written permission being obtained from RRIA. Schedule A. - Clause 16 of Exhibit R1 is headed Hours of Work. The Clause refers to prior permission being required to be obtained from RRIA to enable payment of the respondent's Pool employees when working out of the Pool's normal hours. Clause 16 does not relate to a procedure for dealing with varying the Pool's normal hours when payment for wages is not required, which was the case in this instance. Neither the applicant, Ms Cresswell or Ms Darnell were seeking payment for working out of hours at the Pool for the triathlons thus it is my view that Clause 16 of the respondent's contract with RRIA was not breached by the applicant.

53 In any event I find that the applicant had permission from RRIA to open the Pool out of normal hours for the triathlons to be held after having discussions with both Ms Wood and Ms Britton about the triathlons. I accept the applicant's evidence that she had ongoing informal contact with RRIA representatives who dealt with the Pool and through this contact there was some informality in the arrangements relating to the Pool's use. This was evidenced by the monthly communications between the applicant and RRIA an example of which is the February 2002 Monthly Report (Exhibit A1). The applicant used these reports to liaise directly with RRIA about issues concerning the running of the Pool. This report was sent in March 2002 by the applicant to Ms Britton and copied to Mr Stewart. It refers to a triathlon being held at the Pool on Sunday 10 March 2002. On the basis of the applicant's evidence, as corroborated by Ms Cresswell, and given the contents of Exhibit A1, I am of the view that RRIA was aware that the triathlons were taking place out of hours and this was condoned by RRIA even though written permission was not given by RRIA to open the Pool out of hours for the triathlons.

54 Given these findings it is my view that the respondent has not demonstrated that there were valid reasons for terminating the applicant's contract of employment. If I am wrong in reaching the view that the applicant did not breach Clause 16 of the respondent's contract with RRIA and the applicant should have ensured that prior written permission from RRIA was obtained for all out of hours use of the Pool, in my view the applicant's actions in relation to this matter would have warranted a warning, not summary termination. In reaching this conclusion I take into account that the applicant had no previous warnings about her performance and the applicant did not hide the fact that the triathlons were taking place (the dates and times of the triathlons were mentioned in the Pool diaries). Also mention is made of the March 2002 triathlon in the applicant's memo to Mr Stewart and Ms Britton. Further, the Club had its own public liability insurance in place to cover the triathlons.

55 I find that the respondent did not conduct a full and comprehensive investigation into the events surrounding the applicant's termination. Mr Stewart was vague about his discussions with Ms Darnell. It appears that Mr Stewart did not speak face to face with Ms Darnell until after he had decided to meet with the applicant on 17 April 2002. Mr Stewart did not review the Pool's diaries which contained entries about the triathlons taking place. Clearly his enquiries to RRIA about the triathlons taking place were cursory as the memo from the applicant to RRIA and Mr Stewart concerning a triathlon taking place in March 2002 (Exhibit A1) confirms that RRIA and Mr Stewart were aware that at least one triathlon had taken place.

56 In my view the applicant was not given an adequate opportunity at the meeting held on 17 April 2002 to put her case in relation to the issue of her keeping the money collected from the triathlons for her own benefit. Mr Stewart did not ask the applicant what had happened to the money that was collected. Mr Stewart assumed the applicant had retained the money because the applicant stated that the respondent did not have to pay her or Ms Darnell's wages for attending the triathlons. I am of the opinion that it would have been reasonable for Mr Stewart to have explored the issue of what happened to the monies collected in more detail with the applicant than he did given the serious nature of the allegation against the applicant. I also accept the applicant's evidence that if she was asked by Mr Stewart where the money collected for the triathlons had gone, she would have shown Mr Stewart the Pool toys and equipment that she had bought with the money collected.

57 I find that the applicant was denied procedural fairness by not being advised that the meeting of 17 April 2002 was to be disciplinary in nature. It is also my view that the applicant was not given an adequate opportunity to give a considered response to what was alleged against her. No notice was given to the applicant of the serious nature of the issues to be discussed at the meeting and in my view the meeting was not long enough to fully canvass in detail all of the issues that should have been explored.

58 In all of the circumstances the applicant was not afforded "a fair go all round".

59 Reinstatement is not being sought by the applicant. I am satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for re-instatement would be impracticable. It is also clear on the evidence that the applicant has satisfied the onus on her to seek out alternative employment. Thus, I am satisfied the applicant took reasonable steps to mitigate her loss.

Compensation

60 I therefore now turn to the question of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886.

61 I find that the applicant had a reasonable prospect of ongoing work with the respondent if she had not been unfairly terminated. The respondent continues to operate the Pool and the applicant's position was filled after the applicant was terminated. The respondent had no performance issues in relation to the applicant's employment and it is clear on the evidence that the applicant worked well with both RRIA employees and community groups. Further, Mr Stewart gave evidence that Pool

managers were hard to find in the Northwest. Thus, it is my view that had the applicant not been unfairly terminated she would have had an expectation of ongoing employment with the respondent for at least a further twelve months after termination. Having regard to all of the circumstance of the case I conclude that the applicant should be compensated for her loss to the fullest extent possible, subject to the cap in s.23A(8) of the Act.

62 I find the applicant's loss to be as follows. At termination the applicant was earning $18.50 per hour working 80 hours per fortnight for the winter months between 1 April and 30 September and 90 hours per fortnight in the summer months between 1 October and 31 March. At termination the applicant's weekly gross income, based on the winter hours was $740.00 gross, and for summer hours the applicant's weekly gross income was $832.50. Lost wages for 12 months equates to 26 weeks for the winter months being $19,240 ($740.00 x 26wks) and 26 weeks for the summer months being $21,645.00 ($832.50 x 26), which comes to a total of $40,885.00 gross. From this amount I deduct $15,600.00 (25 weeks x 40hrs @ $13.00 per hour = $13,000 gross plus, 8 weeks x 25hrs @ $13.00 per hour = $2600 gross) that the applicant has been paid since termination.

63 The sum I have identified as being lost equates to more than the equivalent of six months' remuneration. As s.23A of the Act caps the awarding of compensation at six months' remuneration, I therefore order that an amount of six months' remuneration, being $20,442.50 gross, be paid to the applicant.

64 An Order will now issue.

2003 WAIRC 08329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FIONA ANNE WEBSTER, APPLICANT
	v.
	PRESTIGE PROPERTY MANAGEMENT SERVICES , RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY 14 MAY 2003
FILE NO/S.	APPLICATION 737 OF 2002
CITATION NO.	2003 WAIRC 08329

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement

Order

HAVING HEARD Mr A Chilvers (of counsel) on behalf of the applicant and Mr J Brits (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby—

1 DECLARES THAT the dismissal of Fiona Anne Webster by the respondent was unfair and that reinstatement is impracticable;

2 ORDERS the respondent to pay Fiona Anne Webster compensation in the sum of $20,442.50 gross within 7 days of the date of this order.

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

SECTION 29 (1)(b)—Notation of—

Parties		Number	Commissioner	Result
Anning MA	Tony and Karen Gorton T/as Peppers Café	537/2003	KENNER C	Granted
Battley J	Patricia Edinger	2018/2001	KENNER C	Discontinued
Boskovic S	Hacali Pty Ltd	1371/2002	KENNER C	Discontinued
Brockhoff PG	Australian Plantation Timbers& Others	689/2002	COLEMAN CC	Dismissed
Campbell D	Broadwater Hotels Resorts & Apartments	2042/2002	KENNER C	Discontinued
Charlie B	Yura Yungi Medical Service	1078/2002	HARRISON C	Discontinued
Cousens PW	All Bent Engineering	305/2003	KENNER C	Dismissed
Cowan DT	Pep Employment Services Inc	146/2003	SCOTT C	Discontinued
De Jager D	Robe River Mining Co Pty Ltd	2090/2002	KENNER C	Discontinued
Evans K	R.D.P. Patterson Pty Ltd T/a Dr Roger Paterson	2083/2002	BEECH SC	Discontinued

Parties		Number	Commissioner	Result
Fisher K	Great Western Aviation Pty Ltd	253/2003	GREGOR C	Discontinued
Fox RD	Crushing Services International	236/2003	GREGOR C	Order Issued
Frigger A	Curtin University of Technology	310/2003	HARRISON C	Discontinued
Ginn K	Walkers Grading Pty Ltd	1482/2002	WOOD C	Discontinued
George G	Shire of Kojonup	1335/2003	HARRISON C	Dismissed
Gombos V	Lorraine Adamer Knightside Holdings Pty Ltd T/A House of Stuart	1670/2002	GREGOR C	Discontinued
Gould DT	Commissioner for Police	132/2002	SCOTT C	Dismissed
Grassi A	Metro Investments (ACN 008 789 866) A/T/F Hardware Unit Trust t/as Metro Hardware	1918/2002	BEECH SC	Discontinued
Gullotti C	Hoylevans Pty Ltd Glen Evans Capones Restaurant	1772/2002	GREGOR C	Discontinued
Hahn ME	Sigma Chemicals (1986) Pty Ltd	225/2003	BEECH SC	Discontinued
Higgins DM	Jay Lewis, WA Shed Company	345/2003	COLEMAN CC	Dismissed
Ho J	State One Holdings Pty Ltd	2053/2002	KENNER C	Discontinued
Holmes KE	Portsilk Holdings Pty Ltd	1462/2002	GREGOR C	Discontinued
Hunter M	St John of God Hospital Subiaco Inc	547/2003	KENNER C	Discontinued
Jolley C	Farmate WA Pty Ltd	281/2003	BEECH SC	Discontinued
Kelly PJ	Australian Plantation Timbers & Others	663/2002	COLEMAN CC	Dismissed
Knobel IJ	Australian Plantation Timber Limited & Others	880/2002	COLEMAN CC	Dismissed
Le Noble EA	Australian Plantation Timber Limited & Others	776/2002	COLEMAN CC	Dismissed
LeBas P	Great Eastern Motor Lodge	254/2003	BEECH SC	Discontinued
Magee PK	Geoff Greenhill, Newfield Central Pty Ltd	85/2003	GREGOR C	Order Issued
Mansfield GB	Australian Plantation Timber Limited & Others	713/2002	COLEMAN CC	Dismissed
Marshall S	Wentworth Mutual Limited	375/2003	SCOTT C	Discontinued
Matthews AG	Citigroup Pty Ltd (In Liquidation)	1502/2001	SCOTT C	Discontinued
Nendel B	Electronic Interiors, (Ryan Neill – Electronic Interiors Sales Manager)	468/2003	SCOTT C	Dismissed
O'Sullivan AL	Australian Plantation Timber Limited & Others	593/2002	COLEMAN CC	Dismissed
Prince RC	Robe River Mining Co Pty Ltd	343/2003	SCOTT C	Dismissed
Talmage K	Transfield Services Aust. Pty Ltd	120/2003	KENNER C	Discontinued
Parker JM	Carrier Air Conditioning Pty Ltd ACN 000024742	123/2003	SCOTT C	Discontinued
Pes S	G & G Steelworks	59/2003	BEECH SC	Discontinued
Philippe MR	MacMahon Underground	311/2002	HARRISON C	Discontinued
Richards JA	Australian Plantation Timber Limited & Others	669/2002	COLEMAN CC	Dismissed
Shannahan GM	Brian Gardner Motors Honda North	1504/2002	KENNER C	Discontinued
Sheedy R	Danka Australia Pty Ltd	2046/2002	KENNER C	Discontinued
Tuvik E	Albany Auto's (Greg Dean)	194/2003	GREGOR C	Dismissed
Van Der Wal C	Solutions Skin Fitness	599/2003	BEECH C	Discontinued
Viggers DW	Australian Plantation Timbers & Others	662/2002	COLEMAN CC	Dismissed
Williams JM	Kwini Holdings Pty Ltd	186/2003	BEECH SC	Discontinued
Williams LC	Australian Plantation Timbers & Others	664/2002	COLEMAN CC	Dismissed

CONFERENCES—Matters referred—

2003 WAIRC 08309

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	SEAGATE STRUCTURAL ENGINEERING PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 13 MAY 2003
FILE NO.	CR 267 OF 2002
CITATION NO.	2003 WAIRC 08309

Unfair dismissal – dismissal following redundancy – assessment of compensation

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Result	Unfairly Dismissed
Representation	
Applicant	Mr L. Edmonds appeared for the Applicant
Respondent	Ms P. Fox appeared for the Respondent

Reasons for Decision

1 In December 2002 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch (AMWU) applied for a conference pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) seeking the assistance of the Commission in the resolution of a dispute between it and Seagate Structural Engineering Pty Ltd (the Respondent) over what the AMWU claimed was the unfair dismissal of Simon Hall who was employed as a trades assistant by the Respondent.

2 The AMWU contended that the Respondent told Mr Hall on or about 27th November 2002 that he was to be made redundant. In doing so it did not comply with either Clause 32 or 32A of the Metal Trades General Award No. 13 of 1965 (the Award) or with the provisions of the *Minimum Conditions of Employment Act 1993* (the MCE) which relate, interalia, to the necessity for employers to advise workers in the event that they plan to make them redundant. In short the requirements for Part 5A of the MCE were not complied with.

3 The Commission conducted a conference between the parties on 27th December 2002 but that conference was unsuccessful in resolving the dispute and by consent the matter was referred for hearing and determination. The Schedule to the Memorandum of Matters for Hearing and Determination under s.44 delineates the dispute as follows—

> *"The Automotive, Food, Metals, Engineering Printing and Kindred Industries Union of Workers - Western Australian Branch (the Union) say that its member Mr Simon Hall was unfairly dismissed by Seagate Structural Engineering Pty Ltd on or about 27 November 2002 for reasons of redundancy.*
>
> *The Applicant union maintains there was no valid reason for the termination and/or the termination was unfair and unjust in any event.*
>
> *The Respondent maintains the termination was fair and requests the application be dismissed."*

4 It should be noted that the Schedule was prepared by the AMWU. It does not seek orders of any particular kind but for the purpose of these Reasons for Decision the Commission has interpolated that in the event of a finding of unfairness in the termination the AMWU would seek orders in respect of such finding, either in the form of an order for reinstatement or for compensation as if the matter had been determined under s.23A of the Act.

5 There is little difference between the parties on the facts. The AMWU says that Mr Hall was employed as a fulltime worker in June 1996. For 2½ years before that time he had worked for the Respondent as a casual. He performed duties including driving, grinding, forklift driving, crane driving, setting up small scaffolds as well as cleaning and sweeping. He was not licensed to drive either the forklift or the crane. His evidence was that when he was asked to do so he did. But he was concerned about operating the equipment without a license so on a couple of occasions had requested that the Respondent arrange for him to sit for official certification. Prior to his dismissal no such arrangements were made.

6 According to Mr Hall he asked to see Ms Fox, who he thought to be the Respondent's Manager because he was unlicensed to drive the crane and forklift and he knew another worker who had been employed after him was being sent to do his qualification.

7 Mr Hall first approached Ms Fox during the morning of 27th November 2002, she told him that she was busy and to come back later. When he did so and he enquired why a workmate who is a trades assistant and who had not been employed by the Respondent as long as he, had been was sent to obtain a forklift ticket. His angst was compounded because the following day he was asked to do the work of the other worker because he would not be present. The response from Ms Fox was simply that the Respondent did not have the money. They could only afford to send one person and had selected the other worker. Ms Fox asked if Mr Hall had anymore questions, he said no and stood up to leave, Ms Fox told him to sit down and told him that he was being finished up. Mr Hall said she gave a sheepish smirk as she said so.

8 Mr Hall asked Ms Fox why he was being finished up and she said through lack of work. It was Mr Hall's contention that could not be the truth because there had been a notice put on the notice board just a few days before asking employees to work overtime (Exhibit E1).

9 Mr Hall then asked for Ms Fox to confirm in writing that he had been made redundant and in due course he received a memo from Ms Fox (Exhibit E2). The memo simply advises "Y*our redundancy is due to a severe downturn in the workload and subsequent financial constraints on the Company*".

10 Mr Hall said he was never given any chance to have an input into the issue of his redundancy but Ms Fox told him that it had been planned for some months. Mr Hall knew of no criteria which had been applied through the workforce to select who should go.

11 The only evidence on behalf of the Respondent was given by Ms Patricia Fox. She described the Respondent as a small company which now employed 14 people, at its busiest it employed up to 36. Ms Fox started as an estimator working for the Manager and then later took over running the administration of the Company doing the invoicing and keeping control of the work in progress.

12 Ms Fox said she did not believe that she had told Mr Hall that his redundancy was being planned for months but she did say she was planning it for some time because work had dropped off. There had been ebb and flow of work and to meet delivery dates overtime had to be increased.

13 Ms Fox produced exhibits setting out a schedule of contracts (Exhibit F1) and the invoice value compared to budget (Exhibit F2).

14 Significantly for this case Ms Fox conceded that in hindsight she did not handle the dismissal very well. She said she was very nervous having to tell Mr Hall that he had been made redundant. She described the selection process as "*we decided to get rid of Simon because he was the person we could do without*."

15 In cross examination Ms Fox told the Commission that Mr Hall had paid four weeks in lieu of notice, plus eight weeks redundancy money, plus four weeks annual leave, making a total of twelve weeks pay.

16 At the time Mr Hall was made redundant the company was finished the major work but it did not know whether anything else was going to come up after that. Traditionally fabrication industry is quiet at Christmas however just before Christmas there was a need to expedite a small job this meant working long hours. Since that job was finished the work has continued to tapered off.

17 This is sufficient summary of the evidence before the Commission.

18 It is quite obvious that Mr Hall has been made redundant and when the Respondent did so by bringing his employment contract to an end it did not comply with the requirements of Part 5 of the MCE nor did it comply with Clause 32 or 32A of the Award.

19 It has been held in *W.A. Access Pty Ltd v Vaughan (2001)* 81 WAIG 373 by the Full Bench that termination of a contract where it is a retrenchment for redundancy would be unfair where the process was unfair or where there were other elements of unfairness notwithstanding that the redundancy is or was a genuine one. This is clearly such a case. Not only was the termination unfair for the manner in which it was given it was unfair because of the circumstances in which it was given and amounts to an abuse of the employers right to terminate (*Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia, Hospital, Service & Miscellaneous, WA Branch (1985)* 65 WAIG 385.

20 The question of remedy needs to be addressed. Ms Fox submitted information in the form of Exhibits F1 and F2 concerning the work the Respondent had on hand. This information clearly shows diminution in the work available. I accept her explanation of the notice which was placed on the notice board prior to Mr Hall's dismissal which asked for additional overtime to be worked. Ms Fox claimed that was to meet a deadline on a contract and I accept her evidence in that respect. Ultimately though it appears that the Respondent was running out of work and the reduction in the workforce which was affected by the dismissal of Mr Hall and the voluntary termination of another employee would have happened in any event.

21 From the evidence before the Commission it is clear that the Respondent therefore was entitled to bring the contract to an end for the purposes of redundancy but is mentioned in paragraph 19 that does not necessarily make the termination fair.

22 The question is whether Mr Hall should be reinstated. Clearly that is not an option in this case having accepted the evidence of Ms Fox as to the Respondent's work disposition. The Commission then should assess compensation. The factual matrix appears to me to indicate that although Mr Hall was dismissed in November 2002 he may well have been continued to be employed until February 2003 when the schedule shows that work had almost dried up completely. This means that if Mr Hall was properly made redundant that could have incurred sometime early in February 2003 and therefore the Respondent could have been justified in making him redundant some two months after it did.

23 I therefore find his loss for the purpose of assessment of compensation to be two months.

24 Considering the assessment of the amount of compensation the Commission applies the principles which have been restated by the Full Bench in *Peter John Caffrey v Chubb Security Australia Pty Ltd* 2003 WAIRC 08230 issued 1st May 2002. The situation in *Caffrey* (ibid) is on all fours with the situation here. In *Caffrey* a person had been redundant, it was found that the act of doing so was unfair but that he would have gone in any event in five weeks. Mr Caffrey had also been paid the equivalent of 26 weeks redundancy and severance pay and five weeks notice. The Full Bench found that those payments exceeded the loss he suffered, therefore he suffered no loss because of the amount he was paid and no loss should have been found to be established.

25 In this case Mr Hall has been paid the equivalent of 12 weeks for the redundancy I have found on a proper application of the facts he would have been probably employed for another two months. Two months is the extent of his loss therefore he has been compensated in excess of his loss already and for that reason there is no compensation orderable or payable to him pursuant to the Act.

26 This matter will be completed by an order that Mr Simon Hall was unfairly dismissed but there will be no order for reinstatement or compensation.

2003 WAIRC 08308

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	SEAGATE STRUCTURAL ENGINEERING PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 13 MAY 2003
FILE NO.	CR 267 OF 2002
CITATION NO.	2003 WAIRC 08308

Result	Unfairly dismissed

Order

HAVING heard Mr L. Edmonds (of Counsel) who appeared on behalf of the Applicant and Ms P. Fox who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

1. THAT Mr Simon Hall was unfairly dismissed.
2. THAT reinstatement is unavailing.
3. THAT there will be no order for compensation.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Employees Union, Western Australian Branch, The	Mrs Mop	WOOD C C60/2003	09-May-03	Alleged unfair dismissal	Concluded
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Delron Cleaning Pty Ltd	BEECH SC C70/2003	24-Apr-03	Dispute concerning the Department's tendering process	Concluded
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Department of Education of WA	HARRISON C C9/2003	20-Jan-03 24-Jan-03	Termination	Concluded
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Derby Health Service	SCOTT C C75/2003	07-May-03	Dispute over contract of employment	Concluded
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Hillarys Primary School	HARRISON C C270/2002	23-Jan-03	Alleged unfair dismissal	Concluded
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Mountwish Pty Ltd trading as Kids Cove Childcare Centre	HARRISON C C61/2003	09-Apr-03	Industrial action	Concluded
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	Westpork Pty Ltd	WOOD C C58/2003	30-Apr-03	Dispute re issuing of a final warning.	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - The	Steelstruct Engineering Pty Ltd	GREGOR C C62/2003	17-Apr-03	Alleged unfair dismissal	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - The	Pasonnay Pty Ltd t/as International Drillquip	GREGOR C CR250/2002	N/A	Alleged Termination	Discontinued
Civil Service Association of Western Australia Incorporated	The Totalisator Agency Board of Western Australia	SCOTT C PSAC8/2003	19-Mar-03	Negotiations for an agency specific agreement	Concluded
Civil Service Association of Western Australia Incorporated	Chief executive Officer, Department of Land Administration	SCOTT C PSAC7/2003	11-Mar-03 04-Apr-03	Alleged breach of the Public Sector Management Act	Referred
Civil Service Association of Western Australia Incorporated	Chief executive Officer, Department of Sport and Recreation	SCOTT C PSAC15/2003	N/A	Disciplining Procedures under Public Service Management Act	Concluded

Parties		Commissioner Conference Number	Dates	Matter	Result
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union, The	Downer RML Pty Ltd	GREGOR C C81/2003	09-May-03	Industrial action	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union, The	Law Castings	WOOD C C83/2003	15-May-03	Dispute re redundancy entitlements for employees	Concluded
Construction, Forestry, Mining and Energy Union Western Australian Branch	Brierty Contractors	GREGOR C C102/2003	29-May-03	Dispute over new agreement	Concluded
Construction, Forestry, Mining and Energy Union Western Australian Branch	Master Builders Association of WA	GREGOR C C44/2003	08-Apr-03	Dispute re payment of wages	Concluded
Hospital Salaried Officers Association of Western Australia (Union of Workers)	Metropolitan Health Service Board	SCOTT C PSAC15/2000	14-Sep-00 7-Nov-00 5-Dec-00 2-Aug-01 28-Sep-01 3-Apr-02 26-Aug-02 13-Sep-02 24-Sep-02	Dispute Over Contracts of Employment of Hospital Salaried Officers	Concluded
Hospital Salaried Officers Association of Western Australia (Union of Workers)	The Hon. Minister for Health	SCOTT C PSAC13/2003	02-Apr-03	Implementation of clause 31 of the Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001	Concluded
Shop, Distributive and Allied Employees' Association of Western Australia Branch, The	Destination Holdings Pty Ltd (ACN 009 345 760) t/as Supa Valu Shenton Park T/as Dewsons Nedlands	WOOD C C21/2003	07-Mar-03	SDA requests time and wage records from employer.	Concluded
Shop, Distributive and Allied Employees' Association of Western Australia Branch, The	Grant Consultants Pty Ltd (ACN009 188 096) t/a Dewsons Kingsley	HARRISON C C206/2002	29-Oct-03	Request for records of the commencing and finishing times of each period of work each day for employees	Discontinued
Shop, Distributive and Allied Employees' Association of Western Australia Branch, The	Grant Consultants Pty Ltd (ACN009 138 694) t/a Dewsons Padbury	HARRISON C C207/2002	29-Oct-03	Request for records of the commencing and finishing times of each period of work each day for employees	Discontinued
Shop, Distributive and Allied Employees' Association of Western Australia Branch, The	Ruschi Pty Ltd ATF GB Family Trust t/as Supa Valu Westfield	HARRISON C C2/2003	10-Feb-03	Time and wages records	Concluded
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	J and BM Bylsma	WOOD C C218/2002	13-Nov-02	Non payment of entitlements	Concluded
Western Australian Prison Officers Union of Workers	The Honourable Attorney General	BEECH SC C1/2003	15-Jan-03 23-Jan-03 10-Jun-03	Enterprise Bargaining Negotiations	Concluded

CORRECTIONS—

2003 WAIRC 08336

CULTURAL CENTRE AWARD 1987

No. A28 of 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	LIBRARY BOARD OF W.A & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	THURSDAY, 15 MAY 2003
FILE NO/S.	APPLICATION 1029 OF 2002
CITATION NO.	2003 WAIRC 08336

Result	Correction Order issued
Representation	
Applicant	Mr J Welch
Respondent	Mr A Harper

Correction Order

WHEREAS an error occurred in the Order dated 28 January 2003 issued in Application 1029 of 2002, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Schedule attached to the Order dated 28 January 2003 in Application 1029 of 2002 be amended in the following terms—

1. In 1. Clause 8. – Overtime: In subclause (9)(a) delete the figure $5.00 and replace it with $8.60.
2. In 1. Clause 8. – Overtime: In subclause (9)(a) delete the figure $8.60 and replace it with $5.00.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2003 WAIRC 08152

INDEPENDENT SCHOOLS' TEACHERS' AWARD 1976

No. R27 of 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	THE ANGLICAN SCHOOLS COMMISSION (INC.) AND OTHERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 16 APRIL 2003
FILE NO/S.	APPLICATION 1047 OF 2002
CITATION NO.	2003 WAIRC 08152

Result	Application to vary award divided
Representation	
Applicant	Mr N Briggs
Respondent	Dr I Fraser and Mr P Andrew

Order

WHEREAS on 7 June 2002 the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers applied to vary the *Independent Schools' Teachers' Award 1976* ; and

WHEREAS at the hearing before the Commission on 14 April 2003 to vary the Award there was a disagreement as to the parties' intentions in relation to the new Clause 14 subclause (5) of the Award dealing with payment for relief teachers; and

WHEREAS the Commission formed the view that the application should be divided, and the parties consented to that occurring;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s.27(1)(s) of the *Industrial Relations Act 1979*, hereby order—

(1) THAT application 1047 of 2002 be divided into two parts to be numbered 1047 of 2002 and 1047A of 2002 respectively;

(2) THAT application 1047A of 2002 be that part of application 1047 of 2002 that relates to the payment of relief teachers as contained in the variation to the new Clause 14 subclause (5) of the Award;

(3) THAT application 1047 of 2002 be that part of application 1047 of 2002 which relates to the remaining variations to the Award.

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

2003 WAIRC 07999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY GEORGE, APPLICANT
	v.
	SHIRE OF KOJONUP, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 26 MARCH 2003
FILE NO/S.	APPLICATION 1335 OF 2002
CITATION NO.	2003 WAIRC 07999

Result	Application for an Interlocutory Order granted

Order

HAVING heard Mr R Castiglione of counsel on behalf of the applicant and Mr R Collinson of counsel and with him Ms K Groves 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—

1) THAT each party allow for inspection of documents relevant to the categories detailed by the applicant on or before 27 March 2003.

2) THAT the applicant is to provide further and better particulars of his claim to the respondent no later than 28 March 2003.

3) THAT leave is granted to the respondent to file and serve an amended Notice of Answer and Counter Proposal no later than 31 March 2003.

4) THAT the parties have liberty to apply in relation to orders 1 to 3 above.

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

2003 WAIRC 08316

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRIS TONICH, APPLICANT
	v.
	PEOPLE WHO CARE, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 13 MAY 2003
FILE NO/S.	APPLICATION 1566 OF 2002
CITATION NO.	2003 WAIRC 08316

Result	Direction issued
Representation	
Applicant	Mr G Bostock of counsel
Respondent	Mr D Saunders

Direction

HAVING heard Mr G Bostock of counsel on behalf of the applicant and Mr D Saunders on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT each party shall give an informal discovery by serving its list of documents by 27 May 2003;
2. THAT inspection of documents shall be completed by 3 June 2003.

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

2003 WAIRC 08385

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COROMAL CARAVANS PTY LTD T/A COROMAL CARAVANS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 27 MAY 2003
FILE NO.	APPLICATION 1601 OF 2002
CITATION NO.	2003 WAIRC 08385

Result Discontinued

Order

WHEREAS on 23rd September 2002 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch, applied to the Commission for orders pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on 8th October 2002 the Commission conducted conciliation proceedings between the parties and the matter was stood over pending further discussions between the parties; and

WHEREAS on 8th May 2003 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch advised the Commission that agreement was reached between the parties and the Commission decided to discontinue the proceedings.

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

THAT the application be, and is hereby, discontinued.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

2003 WAIRC 08392

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	SOLAHART INDUSTRIES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 27 MAY 2003
FILE NO.	APPLICATION 1654 OF 2002
CITATION NO.	2003 WAIRC 08392

Result Discontinued

Order

WHEREAS on 2nd October 2002 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch applied to the Commission for an order pursuant to s.42I of the *Industrial Relations Act, 1979;* and

WHEREAS on 8th November 2002 the Commission convened conciliation proceedings between the parties for 21st November 2003 and again on 25th February 2003.and the matter was stood over pending further discussions between the parties; and

WHEREAS on 2nd May 2003 the matter was listed For Mention and stood over pending further advice from the Applicant; and at a hearing convened on 22nd May 2003 the Applicant sought leave to discontinue the application and the Commission decided to discontinue the proceedings.

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

THAT the application be, and is hereby, discontinued.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

2003 WAIRC 08307

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TROY ERNEST PICKARD, APPLICANT
	v.
	METSO MINERALS (AUSTRALIA) LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 12 MAY 2003
FILE NO.	APPLICATION 2055 OF 2002
CITATION NO.	2003 WAIRC 08307

Result Order for Discovery

Order

WHEREAS on 7th May 2003 Troy Ernest Pickard (the Applicant) applied to the Commission for an order for discovery of documents from Metso Minerals (Australia) Ltd; and

WHEREAS on 12 May 2003 a conference was convened between the parties regarding the discovery of documents and having heard from the parties the Commission decided to grant discovery for—

1. The personnel file of Troy Ernest Pickard.
2. Copies of all emails from Amanda Heary to Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
3. Copies of all emails from PMCI (Philipines) to Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
4. Copies of all emails forwarded from Patrick Ng regarding Jackie Ng's comments about Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
5. Copies of all emails from KC Lim to Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
6. Copies of all emails from J Marmet concerning B Goh re Troy Ernest Pickard between approximately September to November 2002 relevant to this application.
7. Copies of emails between J Marmet and Troy Ernest Pickard around mid 2002 re dispute re decision of Mr Pickard.
8. Copies of the Respondent's policy and procedures regarding bonus and performance evaluations.

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

THAT the Respondent provide discovery of the following—

1. The personnel file of Troy Ernest Pickard.
2. Copies of all emails from Amanda Heary to Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
3. Copies of all emails from PMCI (Philipines) to Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
4. Copies of all emails forwarded from Patrick Ng regarding Jackie Ng's comments about Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
5. Copies of all emails from KC Lim to Troy Ernest Pickard between 1/7/02 to 30/11/02 relevant to this application.
6. Copies of all emails from J Marmet concerning B Goh re Troy Ernest Pickard between approximately September to November 2002 relevant to this application.
7. Copies of emails between J Marmet and Troy Ernest Pickard around mid 2002 re dispute re decision of Mr Pickard.
8. Copies of the Respondent's policy and procedures regarding bonus and performance evaluations.
9. Provision of discovery to be made within 10 days of the date of this Order.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 08259

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID L COWAN, APPLICANT
	v.
	PEP EMPLOYMENT SERVICES (INC), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	TUESDAY, 6 MAY 2003
FILE NO.	APPLICATION 146 OF 2003
CITATION NO.	2003 WAIRC 08259

Result Order issued

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS on the 29th day of April 2003 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the Applicant sought to amend the application and delete the outstanding contractual benefits claim; and

WHEREAS the Respondent consented to the application being amended;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders that—

THE application be amended to delete that part which relates to a claim of denied contractual benefits pursuant to section 29 (1)(b)(ii) of the Industrial Relations Act 1979.

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

2003 WAIRC 08129

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COSIMO ANTONIO PACECCA, APPLICANT
	v.
	MR FRED BORTHWICK - DIRECTOR - OPAL PLAZA PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	FRIDAY, 11 APRIL 2003
FILE NO/S.	APPLICATION 223 OF 2003
CITATION NO.	2003 WAIRC 08129

Result Order issued

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on the 9th day of April 2003 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the parties agreed that the name of the Respondent should be amended;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby orders—

THAT the name of the Respondent be amended to Opal Plaza Pty Ltd.

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

2003 WAIRC 08462

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS), APPLICANT
	v.
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 10 JUNE 2003
FILE NO/S.	APPLICATION 880 OF 2003
CITATION NO.	2003 WAIRC 08462

Result Application for shortened time for answers granted

Order

WHEREAS an application has been made for a reduction of the time required for the filing of answers in application 880 of 2003; and

WHEREAS the Commission dealt with this matter ex parte in chambers and formed the view that an order should issue reducing the time for filing answers pursuant to r.78;

NOW THEREFORE, I, pursuant to the powers vested in me pursuant to s.27 of the *Industrial Relations Act,* 1979 hereby order—

THAT the respondents required to be served with a copy of this application do file a notice of answer and counter proposal in answer to the application no later than seven (7) days from the date of service.

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

2003 WAIRC 08463

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS), APPLICANT
	v.
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 10 JUNE 2003
FILE NO/S.	APPLICATION 881 OF 2003
CITATION NO.	2003 WAIRC 08463

Result Application for shortened time for answers granted

Order

WHEREAS an application has been made for a reduction of the time required for the filing of answers in application 881 of 2003; and

WHEREAS the Commission dealt with this matter ex parte in chambers and formed the view that an order should issue reducing the time for filing answers pursuant to r.78;

NOW THEREFORE, I, pursuant to the powers vested in me pursuant to s.27 of the *Industrial Relations Act,* 1979 hereby order—

THAT the respondents required to be served with a copy of this application do file a notice of answer and counter proposal in answer to the application no later than seven (7) days from the date of service.

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

2003 WAIRC 08464

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS), APPLICANT
	v.
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 10 JUNE 2003
FILE NO/S.	APPLICATION 882 OF 2003
CITATION NO.	2003 WAIRC 08464

Result Application for shortened time for answers granted

Order

WHEREAS an application has been made for a reduction of the time required for the filing of answers in application 882 of 2003; and

WHEREAS the Commission dealt with this matter ex parte in chambers and formed the view that an order should issue reducing the time for filing answers pursuant to r.78;

NOW THEREFORE, I, pursuant to the powers vested in me pursuant to s.27 of the *Industrial Relations Act,* 1979 hereby order—

THAT the respondents required to be served with a copy of this application do file a notice of answer and counter proposal in answer to the application no later than seven (7) days from the date of service.

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

2003 WAIRC 08465

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS), APPLICANT
	v.
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 10 JUNE 2003
FILE NO/S.	APPLICATION 883 OF 2003
CITATION NO.	2003 WAIRC 08465

Result Application for shortened time for answers granted

Order

WHEREAS an application has been made for a reduction of the time required for the filing of answers in application 883 of 2003; and

WHEREAS the Commission dealt with this matter ex parte in chambers and formed the view that an order should issue reducing the time for filing answers pursuant to r.78;

NOW THEREFORE, I, pursuant to the powers vested in me pursuant to s.27 of the *Industrial Relations Act,* 1979 hereby order—

THAT the respondents required to be served with a copy of this application do file a notice of answer and counter proposal in answer to the application no later than seven (7) days from the date of service.

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

2003 WAIRC 08343

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMTEL LTD T/A STRAMIT BUILDING PRODUCTS, APPLICANT
	v.
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 15 MAY 2003
FILE NO.	C 84 OF 2003
CITATION NO.	2003 WAIRC 08343

Result	Order issued.
Representation	
Applicant	Mr G. Bartlett (of counsel) and with him Mr B. Western and Mr M. Holmes (of counsel)
Respondent	Mr L. Edmonds (of counsel) and with him Mr M. Golesworthy and Ms A. Rainey

Order

WHEREAS the Commission convened an urgent conference in this matter pursuant to s.44 of the *Industrial Relations Act 1979*;

AND WHEREAS the Commission is informed that Amtel Ltd t/a Stramit Building Products and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch are parties to a State registered Enterprise Bargaining Agreement;

AND WHEREAS the parties have been negotiating for an agreement to replace that Enterprise Bargaining Agreement;

AND WHEREAS the Commission was informed that the employees members or eligible to be members of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch will commence industrial action at the premises of Stramit Building Products to occur at 6.00am tomorrow the 16th day of May 2003.

AND WHEREAS the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch has not followed the disputes settlement procedure of the Metal Trades (General) Award No 13 of 1965 as it expressly committed to do in the *Stramit Building Products Enterprise Bargaining Agreement 2001* No. AG 238 of 2001.

AND WHEREAS the Commission is of the opinion that the industrial action called for 16 May 2003 with less than one day's notice to the applicant company will cause a deterioration in industrial relations between the parties;

AND WHEREAS the Commission is of the opinion that an order should issue to prevent that deterioration for a limited time pending the further negotiations and if necessary conciliation between the parties,

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

1. That Amtel Ltd t/a Stramit Building Products schedule discussions with the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch to commence Monday 19 May 2003 on all outstanding matters including the 6 outstanding claims.
2. That the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch not take industrial action at the premises of Stramit Building Products on 16th day of May 2003.
3. That the parties report back to the Commission at a time to be fixed on Wednesday 21 May 2003.

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

2003 WAIRC 08340

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR HEALTH, APPLICANT
	v.
	WESTERN AUSTRALIAN BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION INCORPORATED, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 15 MAY 2003
FILE NO/S.	P 42 OF 2001
CITATION NO.	2003 WAIRC 08340

Result Order issued.

Order

HAVING heard Mr F Furey on behalf of the applicant and Mr P Jennings on behalf of the respondent the Public Service Arbitrator pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed.

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

2003 WAIRC 07769

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 20 FEBRUARY 2003
FILE NO/S.	P 59 OF 2002
CITATION NO.	2003 WAIRC 07769

Result Interim Order issued.

Order

WHEREAS this is an application pursuant to Section 80E of the Industrial Relations Act 1979, to the Public Service Arbitrator in relation to disciplinary proceedings involving the applicant's member, Ms Heise-Podger; and

WHEREAS on 9 December 2002 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference, no agreement was reached and the parties were requested to provide written submissions as to how this matter should be progressed; and

WHEREAS on 5 February 2003 the Public Service Arbitrator convened a further conference for the purpose of dealing with the submissions put by the parties; and

WHEREAS at the end of the conference the parties were given time to consider a recommendation put by the Public Service Arbitrator; and

WHEREAS on 10 February 2003 the respondent advised that they were not able to accept the recommendation of the Public Service Arbitrator; and

WHEREAS on 14 February 2003 the Public Service Arbitrator convened a further conference; and

WHEREAS at the conclusion of that conference there was agreement to a consent order issuing;

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

1. THAT the respondent shall not continue disciplinary proceedings against Ms Heise-Podger whilst Ms Heise-Podger is on paid leave between the period 14 February 2003 and 16 May 2003.
2. THAT the applicant shall not request the Public Service Arbitrator to determine application P59 of 2002 during the period 14 February 2003 and 16 May 2003.
3. THAT a conference shall be convened in relation to this matter on or about the week commencing 11 May 2003 to discuss the further progress of this application
4. THAT should Ms Heise-Podger return to work prior to 16 May 2003 the Public Service Arbitrator shall convene an urgent conference to discuss the progress of this application.

[L.S.]

(Sgd.) J. L. HARRISON,
Commissioner.
Public Service Arbitrator.

2003 WAIRC 08411

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY 28 MAY 2003
FILE NO/S.	P 59 OF 2002
CITATION NO.	2003 WAIRC 08411

Result Application pursuant to Section 80E dismissed

Order

WHEREAS this is an application pursuant to Section 80E of the Industrial Relations Act 1979 to the Public Service Arbitrator in relation to the applicant's member, Ms Heise-Podger; and

WHEREAS on 9 December 2002 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference, no agreement was reached and the parties were requested to provide written submissions as to how this matter should be progressed; and

WHEREAS on 5 February 2003 the Public Service Arbitrator convened a further conference for the purpose of dealing with the parties submissions; and

WHEREAS at the end of the conference the Public Service Arbitrator put a recommendation to the parties for consideration; and

WHEREAS the respondent advised on 10 February 2003 that they were unable to accept the recommendation and a final decision in relation to Ms Heise-Podger was imminent; and

WHEREAS on 14 February 2003 the Public Service Arbitrator convened a further conference; and

WHEREAS at the conclusion of that conference a consent order issued in the following terms—

1. THAT the respondent shall not continue disciplinary proceedings against Ms Heise-Podger whilst Ms Heise-Podger is on paid leave between the period 14 February 2003 and 16 May 2003.
2. THAT the applicant shall not request the Public Service Arbitrator to determine application P59 of 2002 during the period 14 February 2003 and 16 May 2003.
3. THAT a conference shall be convened in relation to this matter on or about the week commencing 11 May 2003 to discuss the further progress of this application.
4. THAT should Ms Heise-Podger return to work prior to 16 May 2003 the Public Service Arbitrator shall convene an urgent conference to discuss the progress of this application.

WHEREAS on 6 May 2003 the Public Service Arbitrator's Associate contacted the parties to convene a conference to discuss the further progress of the application; and

WHEREAS on 14 May 2003 the Applicant requested further time to discuss the issues with Ms Heise-Podger; and

WHEREAS on 21 May 2003 the Applicant filed a Notice of Discontinuance in respect of the application; and

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) J. L. HARRISON,
Commissioner.
Public Service Arbitrator.

2003 WAIRC 08409

DISPUTE REGARDING CONDUCT OF MR HOLLIS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	THE CHIEF EXECUTIVE OFFICER, DEPARTMENT OF CULTURE AND THE ARTS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	WEDNESDAY, 28 MAY 2003
FILE NO.	PSAC 26 OF 2003
CITATION NO.	2003 WAIRC 08409

Result Recommendation issued

Recommendation

WHEREAS this is an application in respect of a dispute regarding conduct by Mr Hollis and disciplinary action taken against him; and

WHEREAS on Tuesday, the 27th day of May 2003, the Public Service Arbitrator convened a conference for the purpose of conciliation between the parties; and

WHEREAS having heard from the parties the Public Service Arbitrator issued a recommendation for the resolution of the matter;

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

1. THAT all disciplinary processes and decisions of the respondent in respect of Mr Hollis arising from the issue of inappropriate email communications in respect of this matter be withdrawn including that the respondent's records be amended accordingly.
2. THAT both Mr Hollis and Ms Williams give serious consideration to being more sensitive in their communications associated with the workplace and in particular relating to each other.
3. THAT the Chief Executive Officer of the respondent speak with both Mr Hollis and Ms Williams regarding the respondent's requirements in respect of their approach to communications with each other with a view to difficulties being avoided, and if and when they arise, being resolved.

[L.S.]

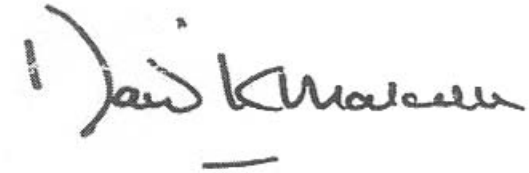
(Sgd.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

NOTICES—Appointments—

INDUSTRIAL RELATIONS ACT 1979

I, the undersigned, the HONOURABLE DAVID KINGSLEY MALCOLM AC CitWA, Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(6) of the *Industrial Relations Act 1979 (WA)*, DO HEREBY NOMINATE THE HONOURABLE CHRISTOPHER JAMES LONSDALE PULLIN, a Judge of the Supreme Court of Western Australia, to be an Acting Ordinary Member of the Western Australian Industrial Appeal Court on 3 June 2003 or until the completion of the hearing and determination of any proceedings his Honour may be participating in at the expiration of that period.

As witness my hand this 28th day of May 2003.



Chief Justice of Western Australia.

RECLASSIFICATION APPEALS—

2003 WAIRC 08368

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PETER ERNEST BULLEN, PETER BRASH AND D'ARCY KEVIN SPIVEY, APPELLANTS
	v.
	WORKCOVER W.A, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	THURSDAY, 22 MAY 2003
FILE NOS	PSA 5 OF 2000, PSA 7 OF 2000 AND PSA 8 OF 2000
CITATION NO.	2003 WAIRC 08368

Result	Appeals dismissed for want of jurisdiction

Reasons for Decision

1 These are reclassification appeals each filed on 4 April 2000. By 6 December 2000, no action had been taken by the appellants to pursue their appeals. On that date, the Registrar wrote to them each in the following terms, formal parts omitted:

> "As it has been some time since the Commission has received any advice with regard to this Appeal, could you please inform this office of your intentions in this matter, specifically whether or not you intend to proceed with your application.
>
> Written advice may be sent to the above address or by facsimile on 08 9420 4500
>
> In the absence of any written advice of your intentions within 21 days from the date of this letter, the matter will be referred to the Public Service Arbitrator who will dismiss the file for want of prosecution."

2 The appellants each replied by identical letters dated 11 December 2000 in the following terms, formal parts omitted—

> "Thank you for your letter of 5 December 2000 regarding the application I have lodged in the Industrial Relations Commission relevant to a reclassification appeal.
>
> Regrettably, it transpires that because I have been the subject of a workplace agreement and no specific provisions are included in that agreement to afford me the opportunity of having my reclassification reviewed, it seems I cannot proceed with this application.
>
> For your information I hope to have an appropriate clause included in a new workplace agreement to be completed early in the new year which will afford me the opportunity of filing a further application in your Commission.
>
> However, having said that if this current application can be held in abeyance until early next year I would like to proceed with this application for a reclassification once my new workplace agreement has been entered into.
>
> If that cannot be done it would appear that I have no option, but to formally ask for this application be withdrawn.
>
> May I please hear from you as to whether you believed it appropriate for the matter to be held in abeyance until a new workplace agreement is entered into in February of next year."

3 The Commission's file indicates no answer to the appellants' enquiries and nothing further was heard from the appellants until the Registrar again wrote to them on 10 June 2002, in similar terms to his letters of 6 December 2000. The appellants, Messrs Bullen, Brash and Spivey together wrote a letter to the Registrar dated 3 July 2002, in the following terms, formal parts omitted—

> "Thank you for your letters dated 10 June 2002 forward (sic) Peter Brash, D'Arcy Spivey, Peter Bullen and Marcus Cocker indicating that this matter should be progressed or that it would be dismissed for want of prosecution.
>
> Firstly we apologies for the delay in replying.
>
> Save for Marcus Cocker who has retired, we are seriously contemplating progressing the reclassification appeal. This being the case, may we please crave your indulgence for the next few months while the Workplace Agreement, under which we are employed, expires.
>
> We will then be in a position to request that this appeal proceed.
>
> We look forward to hearing from you in due course."

4 On 9 September 2002, the files were allocated to the Public Service Arbitrator ("the Arbitrator"). On 11 September 2002 Mr Bullen telephoned the Arbitrator's Associate purportedly on behalf of all of the appellants to advise that the workplace agreement by which they had been bound was still in force for another 5 weeks or so and that the appellants would contact the Commission once the workplace agreement had expired to request that matters be progressed. On 18 September 2002, Mr Bullen indicated to the Associate that in fact the appeals had not been served upon the respondent and the respondent was not aware of them. He said that the appellants planned to serve the respondent only when their workplace agreements had expired. On 25 September 2002, the appellant's filed a Declaration of Service which indicated that the Notices of Appeal had been served upon the respondent on 23 September 2002. The respondent then advised the Arbitrator that it wished to respond in writing to the appeals and on 25 November 2002 provided an outline of submissions challenging the jurisdiction of the Commission on the basis that the appellants' employment was the subject of a workplace agreement entered into on 24 July 1996 and that the current workplace agreement which bound each of them, entered into in 2001, did not expire until February 2003. The parties agreed that the matter ought be dealt with by the Arbitrator on the basis of written submissions and on 23 December 2002 the appellant's wrote to the Commission in the following terms, formal parts omitted:

> "We have had the benefit of reading the respondent's submission in respect of the jurisdiction of the above matter.

We do not propose going into any great detail as to the content of those submissions, save to say that we believe that there are good and valid reasons why the application for reclassification should proceed in its current form.

As a corollary to that, it is submitted that a Commissioner has the discretion as to whether he or she can hear a particular matter, especially having regard to section 26 of the Act that requires a Commissioner to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

To do otherwise would, it is respectfully submitted, require us to undergo further cost and time delays in filing fresh reclassification applications when the Workplace Agreement ceases to have effect on 1 January 2003, when we will revert to a common EBA.

Finally in that regard it seems to us that one of the platforms the current Government came into power on was an undertaking to abolish workplace agreements, bearing in mind that the Government has been in power for in excess of 2 years.

In all the circumstances we ask that the Commissioner exercise any discretionary powers she believes she has so that this matter may be heard in its current form."

5 For the purposes of determining this matter, I will treat the respondent's written "Outline of Submissions" and the appellant's letter of 23 December 2002, as their respective submissions as each has confirmed that there is no desire to make further comment or submissions.

6 According to those submissions, at the time of filing the appeals, on 4 April 2000, each of the appellants was a party to a collective workplace agreement, pursuant to the Workplace Agreements Act 1993, together with their employer. That workplace agreement was replaced by another collective workplace agreement in 2001, and which expired in February 2003.

7 The decisions of the Commission in *Oliver v Goldfields Esperance Development Commission* (1997) 77 WAIG 2819 and *Dragicevich v Department of Resources Development* (2000) 80 WAIG 428 make clear that an employer and an employee who are parties to a workplace agreement are not employer and employee respectively for the purposes of the Industrial Relations Act 1979. Accordingly, there is no industrial matter in that regard upon which the Commission might exercise jurisdiction.

8 In this matter, at the time the appellants filed Notices of Appeal, in 2000, their employment was the subject of a workplace agreement pursuant to the Workplace Agreements Act 1993. Accordingly, at the time of the filing of the appeal, the Commission and in particular the Arbitrator had no jurisdiction to deal with their appeals. The mere expiration of the workplace agreement does not then bring an appeal which was outside jurisdiction within it.

9 The provisions of s.26 of the Industrial Relations Act 1979, which require the Commission to act according to equity, good conscience and the substantial merits, without regard to technicalities and legal form is aimed at the Commission dealing with matters expeditiously and with relative informality, bearing in mind the objects of the Act. It does not enable the Commission to deal with matters beyond jurisdiction. It cannot deal with matters where it has no power or authority. This is such a case. Accordingly, these appeals must be dismissed for want of jurisdiction.

2003 WAIRC 08365

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PETER ERNEST BULLEN, APPELLANT
	v.
	WORKCOVER W.A, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 22 MAY 2003
FILE NO.	PSA 5 OF 2000
CITATION NO.	2003 WAIRC 08365

Result Appeal dismissed for want of jurisdiction

Order

HAVING heard the appellant on his behalf and the respondent, both by way of written submission, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT this appeal be, and is hereby dismissed for want of jurisdiction.

[L.S.]

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

2003 WAIRC 08366

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PETER BRASH, APPELLANT
	v.
	WORKCOVER W.A, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 22 MAY 2003
FILE NO.	PSA 7 OF 2000
CITATION NO.	2003 WAIRC 08366

Result Appeal dismissed for want of jurisdiction

Order

HAVING heard the appellant on his behalf and the respondent, both by way of written submission, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT this appeal be, and is hereby dismissed for want of jurisdiction.

[L.S.]

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

2003 WAIRC 08367

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	D'ARCY KEVIN SPIVEY, APPELLANT
	v.
	WORKCOVER W.A, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 22 MAY 2003
FILE NO.	PSA 8 OF 2000
CITATION NO.	2003 WAIRC 08367

Result Appeal dismissed for want of jurisdiction

Order

HAVING heard the appellant on his behalf and the respondent, both by way of written submission, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT this appeal be, and is hereby dismissed for want of jurisdiction.

[L.S.]

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 23 of 2001	Daniel Peter Millard	Department of Justice	Scott C.	Withdrawn by Leave	05/05/03
PSA 24 of 2001	Jacqueline Anne Woolley	Department of Justice	Scott C.	Withdrawn by Leave	05/05/03
PSA 25 of 2001	Darryl Ernest Taylor	Department of Justice	Scott C	Withdrawn by Leave	05/05/03

SCHOOL TEACHERS—Matters dealt with—

2002 WAIRC 06155

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY JOHNSTON, APPLICANT
	v.
	MR RON MANCE, ACTING DIRECTOR GENERAL DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 6 AUGUST 2002

FILE NO/S. APPLICATION 2302 OF 2001
CITATION NO. 2002 WAIRC 06155

Result Declaration issued
Representation
Applicant Mr M Farrell
Respondent Mr D Newman

Reasons for Decision

1 The substantive application in this matter is described as "To appeal under s 29(b) of the Industrial Relations Act by virtue of the provision of s 78(2) of the Public Sector Management Act 1994, for orders to reverse the decision of the respondent to reprimand and transfer Mr Geoffrey Johnston, a teacher employed by the respondent."

2 This would appear to be the first application of its kind, consequent upon the repeal of the Education Act 1928 ("the EA") and s 23B of the Industrial Relations Act 1979 ("the Act"). As a result of this, the parties to the present proceedings have requested the Commission to determine a number of preliminary questions going to the jurisdiction and powers of the Commission to entertain the present application. The parties agreed upon the issues to be determined, with the Commission consenting to hearing the questions as a preliminary issue, in all of the circumstances.

Background

3 The applicant is a school teacher and by letter dated 7 December 2001, he was found guilty of a serious breach of discipline. As a consequence of this, the applicant was reprimanded and transferred from the school where he was a teacher, Cowaramup Primary School. The applicant, represented by the State School Teaches Union of WA ("the Union"), challenges that decision and maintains that throughout the process, the applicant was denied natural justice. Furthermore, it is alleged that "charges" against the applicant were invalid and the respondent's decision to impose the penalty it did was wrong.

Questions to be determined

4 The questions to be determined by the Commission as a preliminary issue are set out in an agreed document entitled "Notice of Jurisdictional Questions Raised by the Parties". The questions are as follows—

> *"**Question 1***
>
> *Should the reference in section 78(2) of the Public Sector Management Act 1994 ("the PSMA") to section 29(b) of the Industrial Relations Act 1979 ("the IR Act") be read as a reference to section 29(1)(b)?*
>
> ***Question 2***
>
> *If the answer to question 1 is "yes", is the application to the Commission under section 78(2) PSMA or a provision within the IR Act and how therefore, is a matter properly brought?*
>
> ***Question 3***
>
> *If the answer to question 2 is "yes", and in any event, does the reference in section 78(2) PSMA to 29(1)(b)(or section 29(b) merely indicate that an individual may refer the industrial matter to the Commission as 29(1)(b) provides (and section 29(b) provided) and not that the matter should be dealt in the same way as one of the matters referred to in section 29(1)(b)(i), section 29(1)(b)(ii), both or either?*
>
> ***Question 4***
>
> *If the answer to question 3 is "no", which provision should apply?*
>
> ***Question 5***
>
> *Depending upon the answer to questions 3 and 4, what approach should be taken to a referral to the Commission of a matter pursuant to section 78(2) PSMA? In particular is it the case that the Commission may only interfere with the decision of the employer where it is considered that the employer acted unreasonably or may the Commission review the decision de novo and substitute its own view?*
>
> ***Question 6***
>
> *With respect to section 8, of Schedule 1, Transitional Provisions of the School Education Act 1999, was it open to the employer to bring matters of suspected misconduct pursuant to the PSMA against the applicant, where knowledge and action about that behaviour arose under the Education Act 1928 (now repealed)?"*

5 In determining these questions, I firstly turn to consider the relevant legislative provisions. Section 78 of the Public Sector Management Act 1994 ("PSMA") provides as follows—

> ***"78. Rights of appeal and reference***
>
> *(1) Subject to subsection (3) and to section 52, an employee who —*
>
> *(a) is a Government officer within the meaning of section 80C of the Industrial Relations Act 1979; and*
>
> *(b) is aggrieved by a decision made in the exercise of a power under section 79(3)(b) or (c) or (4), 82, 86(3)(b), (8)(a), (9)(b)(ii) or (10)(a), 87(3)(a), 88(1)(b)(ii) or 92(1),*
>
> *may appeal against that decision to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the Industrial Relations Act 1979, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division.*
>
> *(2) Despite section 29 of the Industrial Relations Act 1979, but subject to subsection (3), an employee who —*
>
> *(a) is not a Government officer within the meaning of section 80C of that Act; and*
>
> *(b) is aggrieved by a decision referred to in subsection (1)(b),*
>
> *may refer the decision mentioned in paragraph (b) to the Industrial Commission as if that decision were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly.*

(3) Despite section 29 of the Industrial Relations Act 1979, but subject to section 52, an employee —

(a) against whom proceedings have been taken under this Part for a suspected breach of discipline arising out of alleged disobedience to, or disregard of, a direction which is by virtue of section 94(4) a lawful order for the purposes of section 80(a); and

(b) who is aggrieved by a decision made in the exercise of a power under section 82, 86(3)(a), (8)(a), (9)(b)(i) or (10)(a), 87(3)(a) or 88(1)(b)(i),

may refer the decision referred to in paragraph (b) to the Industrial Commission as if that decision were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly.

(4) In exercising its jurisdiction under subsection (3) in relation to a decision consisting of a lawful order referred to in section 94(4), the Industrial Commission shall confine itself to determining whether or not that decision has been, or is capable of having been, complied with."

6 Section 29 of the Act is in the following terms—

"29. By whom matters may be referred

(1) An industrial matter may be referred to the Commission —

(a) in any case, by —

(i) an employer with a sufficient interest in the industrial matter;

(ii) an organization in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organization; or

(iii) the Minister;

and

(b) in the case of a claim by an employee —

(i) that he has been harshly, oppressively or unfairly dismissed from his employment; or

(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service,

by the employee.

[(1a) repealed]

(2) A referral by an employee under subsection (1)(b)(i) cannot be made more than 28 days after the day on which the employee's employment terminated.

[Section 29 inserted by No. 94 of 1984 s.19; amended by No. 15 of 1993 s.10; No. 1 of 1995 ss.7 and 43; No. 3 of 1997 s.24; No. 36 of 1999 s.247.]"

7 Provisions of the School Education Act 1999 ("SEA") are also relevant, they being s 239 and clause 8 of Schedule 1 - Transitional Provisions, which are in the following terms—

"239. Teaching staff and other officers, substandard performance and disciplinary matters

(1) Part 5 of the PSMA has effect as if in that Part references to —

(a) an employee included —

(i) a member of the teaching staff; and

(ii) an officer who comes within section 235(1)(c);

and

(b) an employing authority that is not the Minister (within the meaning in that Part) included references to the chief executive officer.

(2) In addition to the actions that may be taken under the provisions of sections 79(3) and 86(3)(b)(ii) of the PSMA, the chief executive officer may under those provisions make a determination under section 238(1)(a) in respect of a member of the teaching staff.

(3) Without limiting section 80 of the PSMA, a contravention of this Act is to be taken to be a breach of discipline for the purposes of that section….

8. Inquiries under section 7C

(1) If before the commencement an inquiry under section 7C(3) of the repealed Act has begun in relation to a teacher, the inquiry may continue and be completed and —

(a) the chief executive officer may exercise powers under the section; and

(b) the section otherwise applies,

in relation to the teacher as if the section had not been repealed.

(2) For the purposes of subsection (1) an inquiry has begun under section 7C(3) if the chief executive officer has in writing requested a person to hold the inquiry."

8 Before turning to the specific questions to be answered, it is trite to observe that the Commission should approach the task of answering the questions posed in accordance with the established canons of statutory interpretation. That being that the legislation should be interpreted having regard to the ordinary and natural meaning of the words used in the legislation concerned. This also involves ascertaining the meaning of a provision in a statute, in the context of the statute as a whole, consistent with ascertaining the purpose to be achieved by it: s 18 Interpretation Act 1984.

9 With those observations in mind, I now turn to the respective questions.

Question 1

10 Section 78(2) of the PSMA, with which the present matter is concerned, makes reference to s 29 (b) of the Act. Section 29 of the Act, as introduced in the 1979 legislation, was amended by amending Act No 94 of 1994 by the repeal of the then s 29 and the substitution of a new s 29, containing paragraphs (a) and (b) in the same terms as the present s 29(1)(a) and (b) of the Act. By amending Act No 15 of 1993 s 29 was again amended to re-number the then s 29(a) and (b) as s 29(1)(a) and (b) and to insert a new s 29(2), prescribing a 28 day time limit for matters to be referred to the Commission.

Subsequent amendments to s 29 occurred in 1995 by amending Act 1 of 1995 to insert a new s 29(1a) providing for appeals under the then s 23B being instituted by a teacher. Additionally, a new s 29(3) was inserted, to enable an extension of the 28 day time limit in prescribed circumstances. By amending Act No 3 of 1997, ss 29(3) and (4) were repealed. Subsequently, by amending Act No 36 of 1999 in relation to the SEA, s 29(1a) was repealed, leading to s 29 in its form, prior to the enactment of the Labour Relations Reform Act 2002, which amendments are not material for the purposes of determining the present questions.

11 It can therefore be seen from the above history of s 29 of the Act, that as at the coming into effect of the PSMA, s 29(b) no longer existed in the Act. It had become s 29(1)(b) as at the end of 1993. Given that the former s 29(b) referred to claims of unfair dismissal and contractual entitlements, referred to the Commission by an employee, the question is whether that must be taken to have been an intended reference by parliament to s 29(1)(b) of the Act as it was on the commencement of the PSMA.

12 As is evident, a literal reading of s 78(2) would lead to an absurdity as this provision refers to a section in the Act that no longer exists, and indeed, did not exist as at the time of the enactment of the PSMA. In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 35 ALR 151 it was said by Gibbs CJ at 156—

> *"There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case."*

13 It is also the case that if it is obvious that there has been a simple mistake in the drafting of legislation, then courts and tribunals will be prepared to read the legislation in its proper form: *Statutory Interpretation in Australia 4th Ed*. Pearce and Geddes at para 2.14. In *Lindner v Wright* (1976) 14 ALR 105, the cross reference in a section of legislation to subsection (3) should have been a reference to subsection (4). In this case, Muirhead J was prepared to read it accordingly on the basis that the draftsperson had made a mistake. Muirhead J said at 110—

> *"The fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole": Higgins J in Amalgamated Society of Engineers v. Adelaide Steam Ship Co Ltd (1920) 28 CLR 129 at 161 (see also Nolan v Clifford (1904) 1 CLR 429)…But here we have not ambiguity nor any doubt, nor indeed argument as to the intention of the legislature - an intention apparently defeated by a draftsman's slip - or indeed perhaps by a printer's slip.. I must of course regard it as settled law that "it is no power of the judicial function to fill gaps disclosed in legislation": Marshall v. Watson (1972) 124 CLR 40 at 649; (1972) ALR 641 at 646, per Stephen J..... But whilst I can find no authority directly in point, it seems to me that I am faced not with a gap to be filled, but with a clear mistake and I consider when intention is so clear that to correct that mistake and give force to the sub-section involves not "legislation" but interpretation. I take the view and so hold that section 8A(6) should be read as though "sub-section (4)" was inserted instead of "sub-section (3)"...*

14 I adopt this approach for the purposes of this matter. In my opinion, the reference to s 29(b) in s 78(2) of the PSMA must be regarded as a drafting or printing slip, and should be read as s 29(1)(b), which in my opinion, would accord with the intention of the parliament when the PSMA was enacted.

15 I therefore answer Question One with "yes".

Question 2

16 In relation to this question, in my view, the intention to be gleaned from the plain meaning of the words used in s 78(2), is that an individual employee, who is not a government officer within the meaning of s 80C of the Act, and is aggrieved by one of the specified types of decisions, is able, as an individual, to refer the subject matter of that decision to the Commission and the subject matter of that decision is deemed to be an industrial matter for the purposes of the Act. That means that the matter referred is taken to be and is subject fully to the terms of the Act and hence the jurisdiction and powers of the Commission, to inquire into and deal with that matter under s 23 of the Act and not the PSMA.

Question 3

17 The answer to this question in my view is in part to be determined by a consideration of the terms of s 78 of the PSMA as a whole. The question to be determined is whether referrals to the Commission pursuant to s 78(2) of the PSMA, are only limited to claims of harsh, oppressive or unfair dismissal or the denial of contractual benefits.

18 Firstly, s 78(1) of the PSMA enables a government officer to appeal against various decisions to the Public Service Appeal Board, constituted pursuant to Division 2 of Part IIA of the Act. The various decisions from which an appeal may be brought, are those set out in s 78(1)(b). Those decisions include reducing the level of classification of an employee; terminating the employment of an employee; suspending an employee without pay; and reprimanding, transferring, fining or reducing the salary of an employee.

19 By s 78(2)(b) of the PSMA, the decisions about which a non-government officer is aggrieved, and which may be the subject of a referral to the Commission under the Act, are the same decisions referred to in s 78(1)(b) referred to above. Furthermore, by s 78(3), it is provided that an employee, who has had proceedings taken against them for a suspected breach of discipline under the PSMA, may refer the matter to the Commission as if it were an industrial matter. Importantly in this connection, s 78(4) of the PSMA provides that in relation to exercising jurisdiction under s 78(3), the Commission must confine itself to determining whether or not that decision challenged has been, or is capable of having been, complied with.

20 In my opinion, from a consideration of these provisions as a whole, it is apparent that the intention of the legislature in s 78(2) was to enable a range of decisions, not confined to termination of employment or contractual benefits, to be referred to the Commission as if those matters were an industrial matter for the purposes of the Act. Given that s 78(2) is a deeming provision enabling individual employees to refer the prescribed matters to the Commission, in my view, those matters are not limited to claims of unfair dismissal or contractual entitlements. This construction is also supported by the use of the words "Despite section 29 of the Industrial Relations Act 1979" in the introductory part of ss 78(2) and (3), to the effect that the matters able to be referred are not limited to those specified in s 29(1)(b)(i) and (ii) of the Act.

Question 4

21 It is unnecessary for me to consider this question in light of my conclusions as to Question 3.

Question 5

22 In referring one of the specified matters to the Commission as if that matter were an industrial matter, the Commission's jurisdiction is enlivened to "inquire into and deal with" that industrial matter: s 23(1) Act. By section 78(1) of the PSMA,

a government officer may appeal against one of the prescribed decisions to the Public Service Appeal Board. In the determination of an appeal, the Public Service Appeal Board has jurisdiction and power pursuant to s 80I(1) of the Act to "adjust all matters" referred to it on appeal. It would appear therefore, from the language of s 78(1), read with the jurisdiction and powers of the Public Service Appeal Board, that the nature of those proceedings, whilst an "appeal", is in the nature of a de novo proceeding, enabling the Public Service Appeal Board to hear and determine the matter afresh, if the circumstances require it. Some support for this view would appear to be found in the decision of the Public Service Appeal Board in *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266.

23 A similar approach was taken to the interpretation of the right of appeal by a teacher to the former Government School Teachers Tribunal, pursuant to the repealed s 78(1)(b) of the Act: *Milentis v Minister for Education* (1987) 67 WAIG 1124. In *Milentis*, the Full Bench concluded that the nature of an appeal to the Government School Teachers Tribunal was to be essentially heard de novo, however this would depend on the grounds of appeal in each particular case. In so concluding, the Full Bench adopted and applied observations of the then Chief Justice when considering the nature of an appeal to a tribunal created by statute under the Prisons Act. In *Ex parte Hill, Director of WA Prisons Department v Ormsby* No 1987 of 1985 the Chief Justice said at 11—

> *"The nature of the appeal is not, I think, to be determined by a resort to the cases which are legion dealing with appeals within or to establish courts and by asking whether it is an appeal by way of rehearing in the sense in which that word was understood in old chancery practice. In the context of this Act no a priori restriction should be placed upon the right which it gives and which by the statute is called an appeal. The intention of the statute, in my opinion, is simply to allow the prison officer to challenge the determination (?) or penalty before the Tribunal upon any grounds which are said to render it either unjust or wrong. Grounds of appeal are to be given and the manner in which the Tribunal goes about its task will be controlled by those grounds. But that manner is not controlled or restricted by anything to be found within the nature or character of the appeal itself. If the grounds are such that in the judgement of the Tribunal justice cannot be done without hearing the proceedings all over again then it has power to do so. If, on the other hand, the grounds can be adequately dealt with by the Tribunal on such record of the proceedings below as comes up to it, supplemented or not by evidence, then the Tribunal can deal with the appeal on a more restricted basis. The procedure to be adopted is such as will, on the grounds of appeal, enable full and complete justice to be done."*

24 This approach was also broadly applied in relation to appeals under the former s 23B of the Act.

25 Whilst s 78(2) does not refer to an "appeal" to the Commission, it seems plain enough from the language in the section as a whole, that it is concerned with challenges to a decision taken by the employer in relation to which the employee is "aggrieved". Reference to "aggrieved" is made in s 78(1)(b) dealing with appeals to the Public Service Appeal Board, and also in ss 78(2)(b), (3) and (4) dealing with referrals to the Commission. In my opinion, given the nature of the proceeding contemplated by s 78 of the PSMA, a matter referred to the Commission pursuant to s 78(2) by an aggrieved employee from one of the nominated decisions, is to be dealt with in the same manner as a matter referred under s 78(1) of the PSMA. That is, I do not consider that such a proceeding ought to be regarded as an "appeal" in the strict sense, as that issue was discussed by the Full Bench in *Milentis.* Nor is it the case in my opinion, that the Commission is limited to determining only the reasonableness of the employer's decision.

26 In other words, depending upon the nature of the challenge to the decision under review, such a proceeding may involve the Commission re-hearing the matter afresh or it may only be necessary to consider the decision taken by the employer "on such record of the proceedings below as comes up to it, supplemented or not by evidence": *Ormsby*. It would seem to be the case therefore, that consistent with the reasoning of the Full Bench in *Milentis*, the decision of the employer is not to be totally disregarded in the Commission hearing and determining the matter.

27 Furthermore, it also seems to me that if the referral to the Commission pursuant to s 78(2) of the PSMA involves an allegation of harsh, oppressive or unfair dismissal, then, consistent with the referral of such a matter to the Commission pursuant to s 44 of the Act, s 23A should apply to such matters in terms of the relief to be granted. Such a matter, although referred to the Commission under s 78(2) of the PSMA, would nonetheless constitute "a claim of harsh, oppressive or unfair dismissal" for the purposes of s 23A of the Act and any relief to be granted. In my opinion, it would be incongruous if this were not to be the case, as claimants commencing proceedings under ss 29(1)(b)(i) and 44 would be entitled and limited to the remedies under s 23A if successful, whereas those under s 78(2) of the PSMA would not be so limited, for example, as to matters of compensation for loss and injury. Given the scheme of the Act in relation to such matters, I do not think parliament could have intended such an outcome. Different considerations may apply of course in cases where it is alleged that a dismissal was unlawful, for example, on the grounds of a failure by the employer to comply with a mandatory statutory requirement.

28 Also, whilst it is not necessary to finally decide the matter for the purposes of these proceedings, and I do not do so in the absence of argument, it would also appear to be the case that given that any unfair dismissal claim by a teacher would be "referred under" s 78(2) of the PSMA and not "referred under" s 29(1)(b)(i) of the Act, then arguably s 29(2) of the Act, providing for a 28 day time limit for such referrals, would not apply.

29 Therefore, matters referred to the Commission pursuant to s 78(2) of the PSMA are not restricted to consideration by the Commission of the reasonableness of the employer's conduct, but the Commission may review the employer's decision de novo, as the circumstances warrant and determine the matter afresh and substitute its own decision for the employer's decision if that is appropriate.

Question 6

30 By clause 8 of Schedule 1 - Transitional Provisions, it is provided that an inquiry that has begun in relation to a teacher, pursuant to the former s 7C(3) of the EA, may continue and be completed. It is provided by clause 8(2), that an inquiry is taken to have begun if the chief executive officer has in writing, requested a person to hold the inquiry. The effect of this provision is manifestly to preserve the conduct of an inquiry, as the relevant procedure under the repealed EA, in respect of conduct falling within that former provision.

31 By s 239 of the SEA, Part 5 of the PSMA, dealing with substandard performance and disciplinary matters, applies to teaching staff from the commencement of the SEA which was 1 January 2001. In my opinion, in respect of conduct that would otherwise have fallen within the purview view of s 7C of the repealed EA, but in respect of which an inquiry had not begun as defined in clause 8 of schedule 1 of the SEA, the process contemplated by s 239 of the SEA applies. In my opinion, these provisions go to the procedure by which matters such as misconduct, are to be dealt with.

32 I do not accept the submissions of the applicant, that to so hold means that the terms of the SEA in this respect, would have retrospective operation. It is of course the case that there is a presumption that legislation will not have retrospective operation: *Maxwell v Murphy* (1957) 96 CLR 261 per Dixon CJ at 267. However, in considering the question of the retrospective operation of legislation, it is important to distinguish between an Act having a prior effect on past events

and an Act basing future action on past events (see generally Pearce and Geddes at para 10.4). In *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27 Jordan CJ said at 31—

> *"... As regards any matter or transaction, if events have occurred prior to the passing of the Act which had brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities."*

33 In my opinion, that is the position which exists presently, in that the terms of the SEA in relation to substandard performance and disciplinary matters, constitute future operation of legislation based on past events. In my view, parliament could never have intended to let certain conduct, for example serious misconduct, fall into a hiatus between both pieces of legislation without any right of recourse by an employer.

34 The answer to this question is therefore "yes".

35 I declare accordingly.

2003 WAIRC 08318

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY JOHNSTON, APPLICANT
	v.
	MR RON MANCE, ACTING DIRECTOR GENERAL DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 14 MAY 2003
FILE NO/S.	APPLICATION 2302 OF 2001
CITATION NO.	2003 WAIRC 08318

Catchwords	Unfair and unlawful transfer – Penalty imposed on teacher – Allegations of conduct in breach of statutory obligations – Statutory scheme in relation to discipline for teachers in government schools – Principles of natural justice and procedural fairness – Whether denied and whether statutory scheme complied with
Result	Application upheld. Order issued
Representation	
Applicant	Mr M Cox of counsel
Respondent	Mr D Newman

Reasons for Decision

1 In reasons for decision dated 6 August 2002, the Commission dealt with a number of preliminary issues in relation to the Commission's jurisdiction to entertain the present claim. In those reasons for decision, the Commission concluded that the present proceedings were validly brought and the Commission can enquire into and deal with the subject matter of the applicant's claim under the terms of the Industrial Relations Act 1979 ("the Act").

2 The background to the present claim, was set out in the Commission's earlier reasons for decision at para 3 as follows—

> *"The applicant is a school teacher and by letter dated 7 December 2001, he was found guilty of a serious breach of discipline. As a consequence of this, the applicant was reprimanded and transferred from the school where he was a teacher, Cowaramup Primary School. The applicant, represented by the State School Teaches Union of WA ("the Union"), challenges that decision and maintains that throughout the process, the applicant was denied natural justice. Furthermore, it is alleged that "charges" against the applicant were invalid and the respondent's decision to impose the penalty it did was wrong."*

3 The applicant, represented by Mr Cox of counsel, attacked the respondent's decision-making essentially on the basis that it had not complied with the relevant provisions of the Public Sector Management Act 1994 ("the PSM Act"), they being in particular ss 81, 83 and 86 dealing with discipline for public sector employees. It was also submitted that the respondent denied the applicant natural justice for a number of reasons, dealt with below. The respondent, represented by its industrial officer Mr Newman, denied that the applicant had been treated unfairly or inappropriately under the PSM Act.

4 The present proceedings are brought pursuant to s 78(2) of the PSM Act, following the decision of the respondent to impose penalties on the applicant flowing from the terms of s 239 of the School Education Act 1999 ("the SE Act"), which incorporate the relevant provisions of Part 5 of the PSM Act in relation to discipline for government officers.

The Evidence

5 Mr Johnston is a teacher employed by the Department of Education and has been a teacher for about 24 years. At the material times he was appointed to the Cowaramup Primary School ("the School"). He is classified as a senior teacher and holds a Bachelor of Education degree and a Teachers Certificate. The relevant history of this matter commenced when the applicant received a letter from the respondent dated 12 March 2001 in relation to alleged breaches of discipline committed by the applicant in October 2000. Given the importance of the particular matters raised, and subsequent events, formal parts omitted, and omitting the full names of those involved, I set out the terms of this letter in full as follows—

> *"From information that has been brought to my attention, I suspect that you may have acted in a manner which could constitute a breach of discipline pursuant to the Public Sector Management Act 1994 ("the Act").*
>
> *Specifically it is suspected that—*
>
> - *On 25 October 2000, being a school day, you did hit without just or reasonable cause, during school hours and in your classroom at the Cowaramup Primary School, a student of that school, J L, in the back with heavy force;*

- *On 26 October 2000, at Cowaramup Primary School and during a discussion held after school hours with Mrs J L, mother of J, you admitted that you had hit the child;*
- *On 26 October 2000, at Cowaramup Primary School and during a discussion held after school hours with Mrs J L, you also admitted that you had previously hit students;*
- *In the latter half of the 2000 school year at the Cowaramup Primary School following a lunch break at which you were on yard duty and in the vicinity of the school oval, you did forcibly push C K a student at the school in the back without just or reasonable cause in order to make him move quicker while he had an injured foot;*
- *In the latter half of the 2000 school year at Cowaramup Primary School following a lunch break at which you were on yard duty and in the vicinity of the school oval, you did threaten and intimidate C K by stating to him "if you don't move along I will give you the biggest kick forward of your life" at the same time or shortly after you had pushed him.*

Should these allegations be found to be true, they may constitute a breach in discipline in your employment as a teacher as per section 80(b)(i), and section 80(c) or section 80(d) of the Act.

In accordance with section 81(1) of the Act, I am providing you with an opportunity of furnishing a written explanation in relation to the above matters. Please ensure your submission is received by close of business Friday 23 March 2001. You are to address your submission, marked "Private and Confidential" to Mr John Ryan, A/Director, Workplace Relations, 151 Royal Street, East Perth, WA, 6004. In the event that no submission is received by this date, I may decide to take further action in the absence of that explanation.

It is noted that you have already responded to similar allegations made through an informal inquiry in accordance with section 7C(4) of the now repealed Education Act 1928. As an inquirer had not been appointed in writing by the commencement of the new Schools Education Act 1999, that process has now been stopped. You may wish to affirm, amend, or adjust your earlier response. You may also decide to submit a fresh response to the allegations. However you choose to respond to these matters, that advice must be received by the above date.

Should it be deemed necessary, following your explanation or otherwise, and pursuant to section 81(2) of the Act, I may request and authorise an investigation into the allegations. I would further advise that, and should it be required, if by the conclusion of the disciplinary process prescribed by the Act the allegations are substantiated, one or more of the penalties outlined in section 83(1), or following a formal charge of serious misconduct as per section 86(3) of the Act, may be imposed. Please find enclosed a copy of the relevant sections of the Act and a copy of the Department's Discipline Policy, Procedure and Guidelines for your information."

6 The applicant responded to these allegations by letter dated 26 March 2001 and denied them.

7 Subsequently, by letter dated 3 April 2001, the respondent wrote to the applicant advising that it had taken note of the applicant's explanation to the matters raised in the respondent's letter of 12 March 2001 and notified the applicant that pursuant to s 81(2) of the PSM Act, an independent inquiry would be undertaken in relation to the alleged breaches of discipline. Again, formal parts omitted, this letter is reproduced as follows—

"Thankyou for your letter dated 26 March 2001 responding to allegations of a suspected breach of discipline raised against you.

I note your explanation in these matters.

In accordance with section 81(2) of the Public Sector Management Act ("the Act"), I shall be authorizing an independent inquirer to undertake an investigation into the alleged breaches of discipline. Specifically it is alleged that;

- *On 25 October 2000, being a school day, you did hit without just or reasonable cause, during school hours and in your classroom at the Cowaramup Primary School, a student of that school, J L, in the back with heavy force;*
- *On 26 October 2000, at Cowaramup Primary School and during a discussion held after school hours with Mrs J L, mother of J, you admitted that you had hit the child;*
- *On 26 October 2000, at Cowaramup Primary School and during a discussion held after school hours with Mrs J L, you also admitted that you had previously hit students;*
- *In the latter half of the 2000 school year at the Cowaramup Primary School following a lunch break at which you were on yard duty and in the vicinity of the school oval, you did forcibly push C K a student at the school in the back without just or reasonable cause in order to make him move quicker while he had an injured foot;*
- *In the latter half of the 2000 school year at Cowaramup Primary School following a lunch break at which you were on yard duty and in the vicinity of the school oval, you did threaten and intimidate C K by stating to him "if you don't move along I will give you the biggest kick forward of your life" at the same time or shortly after you had pushed him.*

You will be provided an opportunity to furnish an explanation in relation to these matters in the course of the investigation.

Should the above allegations be found, on the balance of probability to be true, you may be charged with a breach of discipline pursuant to section 80(b)(i) arising from section 9(b) and section 80(c) of the Act. I would further advise, and should it be required, by the conclusion of the disciplinary process prescribed by the Act, if the allegations are substantiated one or more of the penalties outlined in section 83(1) or following a formal charge of serious misconduct, as per section 86(3) of the Act may be imposed. Enclosed, please find a copy of the relevant sections of the Act and a copy of the Department's Discipline Policy, Procedures and Guidelines for your information."

8 The appointed inquirer, Mr Dodd, notified the applicant by letter dated 2 May 2001, that he had been appointed by the respondent to conduct the investigation. In that letter, Mr Dodd particularised the possible breaches of discipline that he was to investigate as follows—

1. *On 25 October 2000 you hit J L, a student at Cowaramup Primary School, in the back.*
2. *On 26 October 2000 you admitted to Mrs L that you had previously hit a student; and*
3. *During the 2000 school year, you forcibly pushed C K, a student at Cowaramup Primary School, in the back in order to make him move quicker while he had an injured foot, and stated "if you do not move along I will give you the biggest kick forward of your life".*

9 The applicant testified that on or about 5 May 2001, he was telephoned by Mr Dodd to arrange an appointment to interview him in relation to the investigation. Mr Dodd informed the applicant that he was instructed by the respondent to also investigate parent concerns from parents Ws, W, Rs and Wy. The applicant advised Mr Dodd that he had no knowledge of these matters and he only wished to discuss the subject matter of the investigation. The applicant was concerned that he had no

inkling of these parental concerns, nor any opportunity to respond to them, at the time they were raised with Mr Dodd by the respondent. Mr Dodd, in his evidence, also referred to these matters and that the applicant declined to comment upon them.

10 On 14 May 2001, the applicant was interviewed by Mr Dodd. Mr Dodd informed the applicant that the only issues to be explored were those relevant to JL, as the parent of the other child the subject of the complaint, Mrs K, had withdrawn her complaint.

11 On this same day, Mr Dodd testified that he also interviewed several other teachers in connection with his investigation. Furthermore, previously, on 7 May, Mr Dodd had visited the School and interviewed other teachers, students and parents, in connection with his investigation. On 30 May 2002, Mr Dodd presented his report to the respondent. A copy of Mr Dodd's report was annexed to his witness statement, which was tendered as exhibit R1.

12 The content of the report prepared by Mr Dodd ("the Dodd Report") is important. In it, he sets out the allegations and complaints, the conduct of the inquiry; "evidence" before the investigation; witness credibility; general comment and his conclusions and findings.

13 In the "allegations and complaints" section of the Dodd Report, the three broad allegations, set out in Mr Dodd's letter of 2 May 2001 are set out. Mr Dodd goes on to refer to the withdrawal of the complaint by Mrs K. Mr Dodd refers to this and his advice to an officer of the respondent that he would not be pursuing this matter. Furthermore, Mr Dodd refers two copies of various file notes prepared by the principal of the School and several letters from "other concerned parents" relating to the applicant. Mr Dodd refers to these parents as having been interviewed during the course of his investigation and that "the information gathered was useful in gaining some understanding of broader concerns in respect of Mr Johnston's teaching practices." Mr Dodd stated that in respect of these matters, they could not be formally included in the terms of his investigation, as they had not been put to the applicant and the respondent should pursue these matters by way of a separate investigation, if it wished to.

14 Reference is also made to documents comprising file notes and letters from parents, provided to Mr Dodd by the School principal. A copy of this file was attached and marked appendix B to the Dodd Report. It was noted by Mr Dodd, that few if any of the allegations contained in appendix B, had been put to the applicant.

15 The next section of the Dodd Report then goes on to refer to "evidence". Despite noting in the previous section of the report that materials provided by the respondent and Mr Fahey, the principal, were outside the terms of the investigation, Mr Dodd then proceeded to set out in some detail, observations by persons he interviewed, that clearly did not directly relate to the allegations concerning JL and Mrs L, referred to as the "basis of his investigation" at the outset of the Dodd Report. This material, includes references made by Mr Fahey, as to "a history of complaints or expressions of concern by parents in respect to Mr Johnston and his teaching practices" (p 4 Dodd Report). Reference is made to an interview with Ms Dente a teacher at the school (pp 7 - 8 Dodd Report). Reference is made to comments by Ms Dente about her opinion of the applicant unrelated to the L incident. Reference was also made to an interview with Mr Morris and "other witnesses" (pp 11 - 12 Dodd Report) that were generally quite critical of the applicant.

16 In the section headed "General Comment" (pp 13 - 14 Dodd Report) it is relevantly observed as follows—

> *"There appears from the information gathered to date, to be a broad level of concern amongst parents in respect to Mr Johnston's behaviour in the classroom. This is supported by the comments made by various witnesses to the effect Mr Johnston treat children unfairly, intimidates and humiliates some and favours better students. There are allegations that he has bullied children.*
>
> *Other allegations have been made against him to the effect (sic) that there has been inappropriate physical contact between Mr Johnston and students. Mrs L mentioned she had heard that B K and C K (no relation) had both been hit. J L states he had seen another child struck my Mr Johnston. Mr Morris makes mention of a possible incident involving S A.*
>
> *Many of the letters forwarded to the school or District Office and contained in Appendix C, provide numerous allegations of improper conduct. Mrs C's letter dated December 12, 2000 (folios 4-5 Appendix C) describe an incident in 1996 where Mr Johnston allegedly manhandled her son.*
>
> *These matters all fall outside the terms of reference of this investigation.*
>
> *It is unclear what action if any has been taken to date in relation to these matters. I understand Mr Johnston has not been confronted with these allegations. This may be due in part to the practice adopted by Principal in directing parents to discuss their concerns with the teacher in the first instance. It is highly likely, based on the first hand accounts provided to this investigation, many parents chose not to adopt this course of action due to a fear (real or otherwise) that their children might be the subject of further harassment or intimidation."*

17 In the "Conclusions and Findings" (pp 14 - 17 Dodd Report) it is stated as follows—

> *"The information provided by the various witnesses* ***together with that contained in the letters of complaint from other parents (see Appendix C) leads to a conclusion, based on the balance of probabilities, that Mr Johnston did hit J L on the back on the material date.***
>
> *I also accept Mrs L's recollection that Mr Johnston apologised to her for his actions.*
>
> *His act is a serious contravention of departmental policy relating to physical contact with students. It also breaches the duty of care imposed upon him as a teacher in respect to students under his supervision and control." (My emphasis)*

18 In cross-examination, Mr Dodd conceded that none of the materials referring to "non-L incidents", referred to in the Dodd Report, were ever put to the applicant. He also accepted that it would have been a reasonable assumption for the applicant to have, that he did not need to respond or deal with these other matters as they would not be relied on by the respondent, which assumption was proved not to be correct.

19 Following the Dodd Report, on or about 5 July 2001 the applicant received a letter dated 4 July 2001 from the respondent, setting out various charges of breach of discipline under it seems, both the SE Act and the PSM Act. Those charges, as contained in the respondent's letter of 4 July 2001, were set out in the letter as follows—

> *"Further to the letter dated 3 April 2001, in which you were advised that an inquiry into a number of alleged issues of misconduct had been authorized. I have now received and considered the report following the investigation.*
>
> ***Arising from the findings of the investigation*** *and in accordance with section 83(1)(b) of the Public Sector Management Act 1994 ("the Act"),* ***I find that you have committed a serious act of misconduct.*** *Specifically you are charged with a serious breach of discipline in that—*
>
> *1. By your actions on the 25 October 2000, in attempting to cause J L to focus on his work and placing your hand in his back and moving him forward, you failed to foster and facilitate learning as required*

by section 64(1)(a) of the School Education Act 1999. This being contrary to section 80(b)(i) of the Act.

2. *By your actions on the 25 October 2000, in attempting to cause J L to focus on his work and placing your hand in his back and moving him forward, you failed to demonstrate ethical values and behaviours associated with lawful obedience, respect of persons, integrity and leadership. This being contrary to section 80(b)(i) of the Act.*

3. *By your actions on the 25 October 2000, in attempting to cause J L to focus on his work and placing your hand in his back and moving him forward, you failed to obey a lawful directive relating to the discipline or restraint of a student. This being contrary to section 80(b)(i) of the Act.*

With regard to the matters associated with C K, I am aware that Mrs K wished these matters to be withdrawn. I also note that the investigator did not pursue these matters with you. However, I am of the view that the information presented in your original response to all the allegations, provides sufficient evidence that would allow me to form a view on these events.

As a consequence on the matters put to regarding C K, ***I also find you have committed a serious act of misconduct.*** *Specifically you are charged with a serious breach of discipline in that—*

4. *By your actions in the latter half of the 2000 school year, in attempting to cause C K to move more quickly back to class following a lunch break, by placing your hand in his back and moving him forward and by the uttering of an inappropriate statement, you failed to foster and facilitate learning as required by section 64(1)(a) of the School Education Act 1999. This being contrary to section 80(b)(i) of the Act.*

5. *By your actions in the latter half of the 2000 school year, in attempting to cause C K and others, to move more quickly back to class following a lunch break, in stating "if you don't move along I will give you the biggest kick forward of your life", you failed to demonstrate ethical behaviours associated with respect of persons, integrity and leadership. This being contrary to section 80(b)(i) of the Act.*

Pursuant to section 86(1)(c) of the Act you are only required to admit or deny the charge(s) within 10 working days from the receipt of this letter.

Following your formal admission or denial of the charge, I shall consider all relevant information and the necessary action required of this process by section 86 of the Act. I would advise that should you admit the charge, I am obliged to consider an appropriate penalty to be applied against you and inform you of that penalty. However, should you deny the charge, I may direct in accordance with section 86(4) of the Act that a disciplinary inquiry be held into these matters." (My emphasis.)

20 It is to be noted, that the charges contained in this letter, restored the allegations in relation to JK, into which there had not been an investigation, for reasons set out above.

21 There followed correspondence between the State School Teachers Union ("the union") and the respondent, raising concerns by the union as to the particularisation of the charges and requests for documents.

22 By letter dated 31 July 2001 from the respondent to the applicant, the applicant was notified that pursuant to s 86(4) of the PSM Act, an independent inquirer was to be appointed to undertake a disciplinary inquiry into the charges against the applicant, which charges had been denied by the applicant.

23 Subsequently, by letter dated 25 September 2001, the inquirer, Ms Archibald, wrote to the applicant, confirming an earlier telephone conversation that she wished to interview him in relation to the charges against him. In this letter, Ms Archibald refers to being informed that the union was seeking information on behalf of the applicant but advised that it was her intention to complete her report to the respondent, without delay, whether or not she had been able to interview the applicant. The applicant responded by letter dated 28 September, and informed Ms Archibald, that he was willing to meet with her but because of other personal commitments advised he would be unavailable for an interview over the two week school holiday break. He also requested that Ms Archibald contact Mr Farrell at the union, who was acting on his behalf, for any further inquiries.

24 Ms Archibald responded by letter of 5 October 2001 to the applicant, advising that she was available on either 17 or 18 October 2001 to interview the applicant. She further advised that if she was unable to interview the applicant on either of these days, she would not be able to incorporate any of the applicant's comments into her report to the respondent. Next it seems, on 12 October 2001, the union wrote to the manager industrial relations of the respondent, referring to its earlier letter of 25 September 2001, questioning the validity of the charges against the applicant, and stating that the union did not consider it appropriate for any interview to proceed until those matters had been resolved. Furthermore, reference was made by the union in that letter of 12 October 2001, to a request for documents under the Freedom of Information Act 1992.

25 I pause to note that there was a point of contention as to whether the respondent's reply to the union's letter of 25 September 2001, dated 27 September 2001, was received by the union. Evidence was called from Mr Lampard, the document management / system support officer of the union. He testified that he oversees the management of all correspondence received by the union, reference to which is recorded in a database. He said that he checked all the document records and the respondent's letter of 27 September 2001 had not been received by the union and recorded. Mr Farrell also gave evidence. He testified that the first occasion when he saw the respondent's letter of 27 September 2001, advising that the inquiry would proceed with or without the applicant's input, was on or about 3 September 2002. He further testified that he had a telephone discussion with Ms Archibald in October 2001 and he informed her that the union was awaiting a response to a request for production of documents from the respondent and further clarification of some issues. Mr Farrell said he informed Ms Archibald that it would be a denial of natural justice if the inquiry proceeded whilst these matters remained outstanding. Mr Farrell also testified that on or about 31 October 2001 he spoke with Mr Newman of the respondent about a response to the union letter dated 25 September 2001 and was informed that a draft had been prepared but not yet signed and he would have his manager sign it.

26 The applicant testified that the next he heard of this matter, was receipt of a letter dated 7 December 2001 from the respondent to himself, advising that the inquiry into the charges had concluded and the inquirer had found the charges proven. A penalty of a reprimand and transfer was imposed. Formal parts omitted, this letter provides as follows—

"In my letter to you dated 31 July 2001, you were advised that a disciplinary inquiry into a charge of serious misconduct had been authorized. I have now received and considered the report following the inquiry.

The findings and recommendations of the inquirer are that the misconduct has been proven and, that you be reprimanded and transferred as a consequence. The inquirer has also recommended that at the new school you shall be closely supervised and provided counselling to assist you resolve your apparent behavioural issues. Specifically you were charged with a serious breach of discipline in that—

1. *By your actions on the 25 October 2000, in attempting to cause J L to focus on his work and placing your hand in his back and moving him forward, you failed to foster and facilitate learning as required by section 64(1)(a) of the School Education Act 1999. This being contrary to section 80(b)(i) of the Act.*
2. *By your actions on the 25 October 2000, in attempting to cause J L to focus on his work and placing your hand in his back and moving him forward, you failed to demonstrate ethical values and behaviours associated with lawful obedience, respect of persons, integrity and leadership. This being contrary to section 80(b)(i) of the Act.*
3. *By your actions on the 25 October 2000, in attempting to cause J L to focus on his work and placing your hand in his back and moving him forward, you failed to obey a lawful directive relating to the discipline or restraint of a student. This being contrary to section 80(b)(i) of the Act.*
4. *By your actions in the latter half of the 2000 school year, in attempting to cause C K to move more quickly back to class following a lunch break, by placing your hand in his back and moving him forward and by uttering an inappropriate statement, you failed to foster and facilitate learning as required by section 64(1)(a) of the School Education Act 1999. This being contrary to section 80(b)(i) of the Act.*
5. *By your actions in the latter half of the 2000 school year, in attempting to cause C K and others, to move more quickly back to class following a lunch break, in stating "if you don't move along I will give you the biggest kick forward of your life", you failed to demonstrate ethical behaviours associated with respect of persons, integrity and leadership. This being contrary to section 80(b)(i) of the Act.*

In determining the appropriateness of those recommendations, I have considered your good and loyal employment record and as raised by you, the issue of health.

I have also given consideration to the characteristics and nature of the position held by you, together with your knowledge and experience as a senior teacher. I believe that the trust, integrity and demonstration of respect for others, incumbent in your role must be seen by all as a fundamental and essential requirement when dealing with young impressionable children.

Therefore, in relation to the above issues and in accordance with section 86(3)(b) of the Act, I accept the recommendations of the inquirer and impose the following penalties—

You are reprimanded.

That you be transferred from Cowaramup Primary School.

You should understand there are positions in the community for which a higher than normal standard of personal conduct is required. The office of teacher is such a position. The position requires that a person must be of good character and display honesty and integrity at all times. Children need someone who can act as a role model and not merely someone to teach them reading, writing and arithmetic.

I cannot impress upon you strongly enough the significance of these charges. However, I trust and expect that you will learn from this regrettable episode, and continue your career with the Department with a greater understanding and diligence.

This letter shall be maintained on file. Should there be any future issues of misconduct this information will be considered for the purposes of any appropriate penalty to be issued against that issue. In the meantime I consider these matters closed."

Archibald Inquiry

27 As noted, the respondent appointed Ms Archibald to undertake the inquiry following on from The Dodd Report. This inquiry was conducted pursuant to s 86(4) of the PSM Act.

28 Ms Archibald testified that for the purposes of her inquiry, she was provided a number of documents by the respondent, including the Dodd Report. Ms Archibald testified that on or about 13 August 2001 she contacted the applicant and advised him of her appointment as an inquirer, and asked about his availability for an interview. At this point, the applicant told Ms Archibald that the union was acting on his behalf and it would contact her. Later that day it seems, Mr Farrell from the union telephoned Ms Archibald to advise that the applicant did not wish to be interviewed by her until the union had received additional information from the respondent. That same day, Ms Archibald interviewed Mrs K, in relation to the complaint concerning C. Over the ensuing days, Ms Archibald had further telephone discussions with Mr Farrell of the union, and made arrangements to meet with and did meet with and interview various staff and parents of children at the School. The details of these interviews and other documents relied upon by Ms Archibald, were set out in full in her report to the respondent, annexed to her witness statement tendered as exhibit R2.

29 Ms Archibald referred to correspondence between her and the applicant, referred to by the applicant in his evidence. Importantly, on 11 and 12 October, Ms Archibald had telephone contact with Mr Farrell, and a letter from Mr Farrell, advising that the applicant should not be interviewed until the union received the information it was seeking. Subsequently, on 29 October 2001, Ms Archibald submitted her report to the respondent.

30 In evidence, Ms Archibald said that although she did not interview the applicant, her findings were based upon information from parents and staff interviews, a review of the applicant's personnel and investigation files held by the respondent, and documents from the Dodd Report. She testified that her recommendations in her report were founded upon the interviews with parents and staff from the School. It was her evidence that her view from this process was that the school community in the majority, was clearly against the applicant. Furthermore, Ms Archibald testified that whilst the applicant's actions may have been said to not be that far from the ordinary, in the circumstances his conduct caused the children distress and was inappropriate. Furthermore, Ms Archibald said that of greater relevancy to her, were statements by various persons that the applicant would create fear in that he would admonish and intimidate both children and adults by invading their "personal space."

31 In cross-examination, Ms Archibald conceded that she was aware the union was acting on behalf of the applicant and that the union had requested that the interview with the applicant not proceed until issues raised by it with the respondent had been resolved. Furthermore, Ms Archibald conceded that other materials provided by the respondent for the purposes of her inquiry, were never put to the applicant and additionally, she was aware that the content of the Dodd Report was also never put to the applicant and that she had read these materials and taken them into account. Ms Archibald also conceded that various

observations made in her report, as to broader community concerns and the general climate at the School, had not been put to the applicant and he had no opportunity to respond to such matters.

32 In terms of Ms Archibald's conclusions at pp 18 to 19 of her report, she accepted that her broad conclusion as to the climate of fear etc. created by the applicant, referred to at the top of p 19, was her finding and conclusion in relation to all of the five charges against the applicant.

33 Mr Ayling, the respondent's manager of industrial relations, also gave evidence. His witness statement was tendered as exhibit R3. Mr Ayling testified that on reviewing the Dodd Report, he formed the view that issues raised in relation to C K were capable on the evidence of being dealt with further despite Mrs K's request that they not be. It was Mr Ayling's evidence also, that neither the matters raised in the bundle of documents or further issues raised by Mr Dodd, formed any part of the decision making process about the applicant. Mr Ayling subsequently received the Archibald Report, and based upon the findings and recommendations, endorsed those findings and recommendations to the Director General of the respondent. It was also Mr Ayling's evidence in cross-examination, that once having received the Archibald Report, he did not seek a response from the applicant on the penalty to be imposed. Mr Ayling also said that he read the Dodd Report and the Archibald Report and saw the materials that were not put to the applicant. He further testified that materials in the Dodd Report, dated as far back as 1996, and matters referred to at p 14 of the Dodd Report, were relied upon by the respondent to determine the next stage of the inquiry process.

Consideration

34 As the Commission noted at the outset of these reasons, the primary attack of the applicant on the decision of the respondent, arising from both the Dodd Report and the Archibald Report, was that the applicant was fundamentally denied natural justice and moreover, the respondent failed to substantively comply with the statutory scheme under the PSM Act, in relation to disciplinary matters, during the course of the process involving the applicant. It was also submitted by counsel for the applicant that the principle of double jeopardy, as applying to the crown in criminal proceedings, also applied to disciplinary proceedings taken by the crown against its employees. In this connection, it was also submitted that the respondent laid three charges in relation to the one JL incident and therefore those charges were bad for duplicity. Furthermore, Ms Archibald's conclusions were invalid in that she only made one finding in relation to charges 1, 2 and 3 and one finding in relation to charges 4 and 5. For all of these reasons, counsel for the applicant submitted that the respondent's decision should be quashed.

35 Those parts of the PSM Act relevant for the purposes of these proceedings are ss 80, 81, 83 and 86 as contained in Division 3 of Part 5 of the PSM Act. For convenience, I set these provisions out as follows—

"80. Breaches of discipline

An employee who —

(a) disobeys or disregards a lawful order;

(b) contravenes —

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

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

(c) commits an act of misconduct; or

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

commits a breach of discipline.

81. Procedure when breach of discipline suspected

(1) An employing authority may, when it suspects that a person has committed a breach of discipline whilst serving as an employee in its public sector body and has given the person such notice in writing of the nature of the suspected breach of discipline as is prescribed, give the person a reasonable opportunity to submit an explanation to the employing authority.

(2) After having given the respondent the reasonable opportunity referred to in subsection (1), the employing authority may —

(a) if it is not the Minister, investigate or direct another person to investigate; or

(b) if it is the Minister, direct another person to investigate,

the suspected breach of discipline in accordance with prescribed procedures.

(3) A person to whom a direction is given under subsection (2) shall comply with that direction.

(4) A direction shall not be given under subsection (2) to the Commissioner…

83. Powers of employing authority other than Minister after investigation of alleged breach of discipline

(1) If, following the investigation of an alleged breach of discipline under section 81, an employing authority which is not the Minister finds, whether as a result of its own investigation or that of a person directed under section 81(2)(a), that —

(a) a minor breach of discipline was committed by the respondent, that employing authority may in accordance with prescribed procedures —

(i) reprimand the respondent;

(ii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the last day during which he or she was at work as an employee before the day on which that finding was made; or

(iii) both reprimand, and impose the fine referred to in subparagraph (ii) on, the respondent;

(b) a serious breach of discipline appears to have been committed by the respondent, that employing authority shall cause the respondent to be charged in accordance with prescribed procedures with having committed that alleged breach of discipline; or

(c) no breach of discipline was committed by the respondent, notify the respondent of that finding and that no further action will be taken in the matter.

(2) For the purposes of this section, a breach of discipline committed as a result of disobedience to, or disregard of, a lawful order referred to in section 94(4) is a serious breach of discipline…

86. Procedure when charge of breach of discipline brought

(1) A charge under section 83(1)(b), 84(2)(b)(ii) or 85 shall —

(a) be in writing;

(b) contain the prescribed details of the alleged breach of discipline; and

(c) require the respondent to indicate within such period of not less than 7 days as is specified in the charge whether or not he or she admits or denies the charge.

(2) A respondent charged under section 83(1)(b), 84(2)(b)(ii) or 85 shall admit or deny the charge within the relevant period referred to in subsection (1)(c).

(3) Subject to section 89, if a respondent admits a charge under subsection (2) and the employing authority finds the charge to be proved, the employing authority —

(a) shall, if the charge is a charge of committing a breach of discipline consisting of disobedience to, or disregard of, a lawful order referred to in section 94(4), dismiss the respondent; or

(b) may —

(i) reprimand the respondent;

(ii) transfer the respondent to another public sector body with the consent of the employing authority of that public sector body or, if the respondent is an employee other than a chief executive officer or chief employee, transfer him or her to another office, post or position in the public sector body in which he or she is currently employed;

(iii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the period of 5 days during which he or she was at work as an employee immediately before the day on which the finding of a breach of discipline was made;

(iv) reduce the monetary remuneration of the respondent;

(v) reduce the level of classification of the respondent; or

(vi) dismiss the respondent,

or, except when the respondent is dismissed under subparagraph (vi), take action under any 2 or more of the subparagraphs of this paragraph.

(4) If a respondent denies a charge under subsection (2) and the employing authority is not the Minister, the employing authority may —

(a) hold, or direct a person to hold, a disciplinary inquiry into the charge in accordance with prescribed procedures; or

(b) if it considers that a special disciplinary inquiry should be held into the charge, request the Minister to direct that a special disciplinary inquiry be held into the charge by a person named in that direction.

(5) A directed person shall, subject to subsections (6) and (7), comply with the relevant direction given under subsection (4)(a).

(6) If, at any time after the commencement of a disciplinary inquiry held under subsection (4)(a), the employing authority or directed person considers that a special disciplinary inquiry should be held into the charge, the employing authority may request the Minister to direct that —

(a) a special disciplinary inquiry be held into the charge by a person named in that direction; or

(b) the disciplinary inquiry be converted into a special disciplinary inquiry and that the person holding the disciplinary inquiry hold the resulting special disciplinary inquiry.

(7) If the Minister complies with a request made under subsection (4)(b) or (6) and makes a direction referred to in —

(a) subsection (4)(b), the person named in that direction shall comply with that direction;

(b) subsection (6)(a), the person named in that direction shall comply with that direction and the relevant disciplinary inquiry being held under subsection (4)(a) is terminated; or

(c) subsection (6)(b), the disciplinary inquiry concerned is converted into a special disciplinary inquiry and the person holding that disciplinary inquiry shall hold the resulting special disciplinary inquiry.

(8) If a directed person finds at the conclusion of a disciplinary inquiry that —

(a) a breach of discipline was committed by the respondent, the directed person shall submit that finding to the employing authority and recommend to the employing authority that it act in relation to the respondent under subsection (3) as if the respondent had admitted the charge under subsection (2); or

(b) no breach of discipline was committed by the respondent, the directed person shall submit that finding to the employing authority and recommend to the employing authority that it notify the respondent of that finding and that no further action will be taken in the matter.

(9) On receiving a finding and recommendation under subsection (8), the employing authority shall —

(a) accept the finding; and

(b) in the case of a recommendation made under —

(i) subsection (8)(a) in relation to a charge of committing a breach of discipline consisting of disobedience to, or disregard of, a lawful order referred to in section 94(4), dismiss the respondent;

(ii) subsection (8)(a) in relation to a charge other than a charge referred to in subparagraph (i), accept that recommendation and act accordingly in relation to the respondent, or decline to accept that recommendation and take such other action in relation to the respondent as could have been recommended under that subsection; or

(iii) subsection (8)(b), accept that recommendation and act accordingly in relation to the respondent.

(10) If an employing authority finds at the conclusion of a disciplinary inquiry held by itself that —

(a) a breach of discipline was committed by the respondent, the employing authority shall act under subsection (3) as if the respondent had admitted the charge under subsection (2); or

(b) no breach of discipline was committed by the respondent, the employing authority shall notify the respondent of that finding and that no further action will be taken in the matter.

(11) If a respondent denies a charge under subsection (2) and the employing authority is the Minister, the Minister shall direct a person to hold a special disciplinary inquiry into the charge and the person shall comply with that direction.

(12) A direction shall not be given under this section to the Commissioner.

(13) In this section —

***"directed person"** means person directed under subsection (4)(a) to hold a disciplinary inquiry into the charge concerned;*

***"disciplinary inquiry"** means disciplinary inquiry held or directed to be held under subsection (4)(a)."*

36 Furthermore, rights, duties and obligations between employers and employees in the public sector, where that relationship is governed by statute, is quite different from such a relationship in the private sector, generally governed by the common law. In circumstances where it is established that mandatory statutory requirements have not been met, steps taken and decisions arrived at may well be held to be ultra vires and invalid. This proposition has recently been affirmed by the Full Court of the Supreme Court of Western Australia in *Re Kenner; Ex-Parte Minister for Education* (2003) WASCA 37 at para 24 per Olsson AUJ (Parker and Templeman JJ agreeing). These propositions were also dealt with at some length in *Re Railway Appeal Board; Ex parte the Western Australian Government Railway's Commission v Railway Appeal Board* (1999) 21 WAR 1 where Malcolm CJ said at 11—

"The present case is not concerned with a simple master and servant relationship the subject of a contract governed by the common law. It is one subject to a statutory regime under the Act which deals, inter alia, with disciplinary matters. In these circumstances, different considerations arise where the contract is governed by statutory provisions. In Byrne (at 420) Brennan CJ, Dawson and Toohey JJ said—

> *"No doubt there are terms which are incorporated by statute in contracts of a particular kind so that the ordinary remedies for breach of contract are available in relation to them [eg, the Sale of Goods Act 1923 (NSW)]. And apart from statute, a term may be implied by law as an incident of a particular class of contract [see Lister v Romford Ice & Cold Storage Co Ltd [1957] AC 555 at 576; Liverpool City Authority v Irwin [1977] AC 239; Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337 at 345-346], but we do not understand the appellants to be submitting that any such implication arises here. They rely upon the statutory force given to the award and say that, because the relationship between the parties is contractual, the provisions of the award – or at least some of them including cl 11(a) in this case – become terms of the contract enforceable by the use of contractual remedies as well as the remedies provided by statute.*
>
> *A right to the payment of award rates is imported by statute into the employment relationship, which is contractual in origin, and, express promise apart, it is only in that sense that it can be said that award rates are imported as a statutory right imposing a statutory obligation to pay them. The importation of the statutory right into the employment relationship does not change the character of the right. As Latham CJ points out in his judgement in Amalgamated Collieries of WA Ltd v True [(1938) 59 CLR 417 at 423], the legal relations between the parties are in that situation determined in part by the contract and in part by the award. And as the judgement of the Privy Council in that case suggests, a provision in an award may also be made a term of the contract by agreement between the parties, but that is only to emphasise the distinction between an obligation imported by statute and one arising by agreement"*

As will be seen, the differentiating feature in Byrne from the present case is that the employer in Byrne was not a statutory body.

A decision made or an action taken by a statutory body in breach of essential requirements of due process or in absence of jurisdiction is invalid and void. In Balmain Association Inc v Planning Administrator for the Leichhardt Council (1991) 25 NSWLR 615 at 637, Kirby P, Priestley and Handley JJA said—

> *"The High Court has said repeatedly that a statutory power to affect rights, privileges and legitimate expectations must be exercised in accordance with the common law requirements of natural justice and procedural fairness unless Parliament has clearly indicated to the contrary: see, eg, Haoucher v Minister of State for Immigration & Ethnic Affairs (1990) 169 CLR 648 at 651-652, 678-679 . . . Something more than the repeal of earlier provisions for notice and a hearing is necessary to exclude the ordinary requirements of procedural fairness."*

The principle to be extracted from the cases is that where, as here, a body or an employer is vested by statute with a jurisdiction of disciplinary action, a quasi-judicial function is vested which must be exercised in accordance with the statutory procedures and in compliance with the principles of natural justice. Obviously the former often embody the latter. To the extent that these requirements precondition the jurisdiction and are not complied with, the action is ultra vires and thus invalid or void ab initio: Ridge v Baldwin, per Lord Reid (at 66, 68, 72-73, 79-80); per Lord Morris of Borth-y-Gest (at 113-114, 117, 121, 122-123); Lord Hodson (at 132, 135-136); Lord Devlin (at 139); cf Lord Evershed (at 86, 91-92) and Lord Devlin (at 138, 140)."

37 It is also the case that where the repository of a statutory power proposes to exercise it and in doing so may affect the rights and interests of the person the subject of the proposed exercise of the power, the principles of natural justice apply. In *F.A.I. Insurances Ltd v Winneke* (1982) 151 CLR 342 Mason J said at 360—

"The fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power (Twist v. Randwick Municipal Council ((1976)136 CLR 106, at p 109); Heatley v. Tasmanian Racing and Gaming Commission ((1977) 137 CLR 487, at p 499)). The application of the rules is not limited to cases where the exercise of the power affects rights in the strict sense. It extends to the exercise of a power which affects an interest or a privilege (Banks v. Transport Regulation Board (Vict.) ((1968) 119 CLR 222)) or which deprives a person of a legitimate expectation', to borrow the expression of Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs ((1969) 2 Ch 149, at p 170), in circumstances where it would not be fair to deprive him of that expectation without a hearing (Salemi v. MacKellar (No. 2) ((1977) 137 CLR 396, at p 419))."

38 These principles were restated and affirmed in *Kioa v West* (1985) 159 CLR 550 and in *Annetts v McCann* (1990) 170 CLR 596. In *Kioa,* when dealing with this issue, Mason J said at 584—

> *"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."*

The Statutory Scheme

39 It seems that by s 80 of the PSM Act, the parameters of a "breach of discipline", for the purposes of Division 3 are set out. It is to be noted however, that pursuant to s 239(3) of the SE Act, a contravention of that Act, for a member of the teaching staff of a school, is taken to be a breach of discipline for the purposes of s 80 of the PSM Act.

40 By s 81(1) of the PSM Act an employing authority may, on a suspicion of a breach of discipline, give notice to a person in the form prescribed by regs 15 and 16 of the Public Sector Management (General) Regulations 1994 ("the Regulations") of the suspected breach of discipline and provide that person with an opportunity to explain by way of a response. If the relevant employing authority determines it to be appropriate, s 81(2) empowers it, if not the responsible Minister, to either investigate the suspected breach of discipline or direct another person to so investigate. It seems clear that the investigation undertaken is into *the* suspected breach of discipline, in relation to which notice has been given to the relevant person, pursuant to s 81(1).

41 By s 83(1) if after such an investigation the employing authority considers that a serious breach of discipline may have been committed by the person, the employing authority is required to charge the person in accordance with the Regulations, with having committed *that* alleged breach of discipline. From the relationship between ss 81 and 83, it appears that the breach of discipline that must be the subject of a charge pursuant to s 83(1)(b) is *the* alleged breach of discipline that was the subject of the investigation pursuant to s 81(2) that has been the subject of notification to the person concerned, pursuant to s 81(1) and in relation to which, a "finding" pursuant to s 83(1) has been made. This must be so because it is the investigation that is the basis upon which the decision to lay disciplinary charges is based.

42 In my opinion, from this statutory scheme, it is not open for an employer to lay charges purportedly pursuant to s 83(1)(b), unrelated to *the* alleged breach or breaches of discipline in relation to which an investigation has been conducted pursuant to s 81(2) and to which the relevant person has been given an opportunity to respond. In my opinion, there is a linkage, as part of the disciplinary scheme contained in Division 3 of the PSM Act, between ss 81, 83 and 86.

43 By s 86(1), a charge under s 83(1)(b) must be put to the relevant person and they must either admit or deny the charges as "laid": s 86(2). Once denied by the relevant person, the employer may hold a disciplinary inquiry: s 86(4)(a). This is a separate and distinct process to an investigation and must proceed in accordance with the requirements of the PSM Act, the Regulations and the common law requirements of natural justice. There is nothing express or implied, contained within Division 3, to suggest that the requirement to afford natural justice is in some way excluded. On the contrary, the respondent's own discipline policy, a copy of which was annexed to the applicant's witness statement, at para 3.2.3 clearly recognises and affirms the requirement for employees to be dealt with equitably, "in accordance with the principles of natural justice and that any sanctions imposed are appropriate". These principles are further explained at para 3.2.4 of these same policy guidelines.

44 In my view, from all of the evidence before the Commission, and in light of the relevant principles and the statutory scheme outlined above, the respondent has a number of difficulties in respect of this matter.

45 The first difficulty the respondent faces is that the allegations against the applicant that were initially made against him, were quite different to the charges he subsequently faced, and in relation to which the inquiry was held and the penalty imposed. The letter to the applicant from the respondent dated 12 March 2001 set out a number of alleged breaches of discipline. Again, by letter dated 3 April 2001, set out above, the respondent notified the applicant following his response to the allegations, that it intended authorising an independent inquirer to investigate the alleged breaches of discipline, which were then set out and were consistent with the alleged breaches of discipline contained in the respondent's letter of 12 March 2001. It seems thereafter, that matters went somewhat awry.

46 Following the Dodd Report, in relation to which I say further about below, the applicant was then charged with alleged serious breaches of discipline. Those are set out above in the letter from the respondent to the applicant dated 4 July 2001. It is clear when one compares the allegations initially raised with the applicant pursuant to s 81 of the PSM Act, and his response, and the subsequent charges laid pursuant to s 86 of the PSM Act, that they are materially different. Furthermore, and notably, despite being informed by Mr Dodd, that the allegations in relation to C K, were not to be pursued in his investigation, and in relation to which the applicant made no further comment, and in relation to which no findings were made in the Dodd Report, for the purposes of s 83(1), those matters were then the subject of charges against the applicant.

47 In my opinion, for the purposes of s 83(1), the reference to "the investigation" (whether as a result of its own investigation or that of a person directed under s 81(2)(a)) is a reference to the matters the subject of investigation prescribed by s 81(2). That is, if an employing authority has issued a direction pursuant to s 81(2)(a) to a person other than itself to investigate alleged suspected breaches of discipline, it is that process and findings from that process, which must be the basis of any subsequent charges. That this is so, is plain from the basic proposition that if an employing authority was free to simply lay charges as it considered fit, of its own volition notwithstanding the findings of an investigator, then plainly, by the process contemplated by the scheme of Division 3, those matters would not have been adequately ventilated with the person the subject of the investigation as they would not have been the subject of the investigator's inquiries, including of course, a full opportunity for the relevant person to respond.

48 The terms of the Regulations, in particular those contained in regulations 15 to 20, only serve to confirm the requirement for there to be not only particularity of the allegations at each stage of the process, but also that the relevant person is to be clearly afforded an opportunity of answering the allegations at each stage of the process. This was clearly not done in this case.

49 I am therefore satisfied and I find that there has not been strict compliance with the statutory scheme as his required in such matters: *Re Railways Appeal Board* at pp 20 - 21 per Malcolm CJ.

50 Furthermore, in my opinion, consistent with the principles discussed in *Re Railways Appeal Board* in particular at paras 39 and 40, and in *F.A.I., Kioa and Annetts,* the process undertaken by the respondent, as reflected in the Dodd Report and the Archibald Report, constituted a denial of natural justice to the applicant. I have already referred to various parts of the Dodd Report, containing highly prejudicial material to the applicant, which it was common ground, was never put to the applicant and indeed, it is open to infer in part at least, of which the applicant was not even aware. In particular, I refer to the "conclusion and findings" section of the Dodd Report, in particular at page 14 that I have set out above. It is quite plain, from this passage in the report, that Mr Dodd had regard to the materials contained in appendix C, and other information provided by various witnesses, never raised with the applicant, in reaching his conclusions in relation to the J L allegations. In my opinion, this approach was fundamentally unfair to the applicant and fundamentally tainted the process thereafter.

51 In my opinion, similar criticisms may be levelled against the Archibald Report, as clearly, and on her evidence, Ms Archibald had regard to the content of the Dodd Report, as a part of the materials provided to her for the purposes of her own

investigation. I also note, that somewhat startlingly, at pages 4, 7, 14 and 17 of the Archibald Report, there appears extremely prejudicial material about the applicant, including an alleged history of informal complaints and a range of other matters, that the applicant clearly had no knowledge would be contained in the report to be submitted to the respondent. It is quite plain from the conclusions reached by Ms Archibald, and indeed comments commencing on page 17 and her conclusions at pages 18 to 19 of the report, that she had regard to this other material in making her findings and recommendations. That all this material was included, and formed a basis for Ms Archibald's findings and recommendations, without any regard to the interests of the applicant, was in my opinion, a denial of natural justice.

52 Whilst I accept on the evidence, that Ms Archibald made contact with the applicant and told him she wished to interview him for the purposes of her inquiry, it is important to observe that at all material times, she was aware that the union was representing the applicant, as it was entitled to do, consistent with the respondent's disciplinary policy. Furthermore, Ms Archibald was also aware, through telephone discussions with Mr Farrell and correspondence from him, that there were outstanding issues regarded by the union as important, in terms of the allegations against the applicant. I am also satisfied that at no stage did the applicant refuse to co-operate with the inquiry but wished to be interviewed once these matters were resolved. Whilst it may be said on the one hand, that merely affording Mr Johnston the opportunity of being interviewed would be sufficient to satisfy the requirement that he be heard, in the context of the circumstances of this case, in my opinion, it was unreasonable for Ms Archibald to complete and submit her report according to her own timetable, in light of all of the circumstances. Whilst it is appreciated that these matters must proceed with all reasonable expedition, in my opinion, it is quite wrong for the principles of natural justice to be sacrificed on the altar of expediency.

53 Moreover, even if it could be said that the offer of an interview with the applicant was sufficient and reasonable in the circumstances, then because of all of the extensively prejudicial material contained in both the Dodd Report and the Archibald Report, the applicant should have been given a copy of those reports in order for him to comment before they were submitted to the respondent for its final decision making.

54 Whilst it is not necessary for me to make any findings as to the merits and they were not substantively argued or the subject of any evidence before the Commission, I pause to note the submission of Mr Cox that he had instructions from the applicant contesting much of the material outside of the specific complaints made against him, and contained in the Dodd and Archibald Reports.

55 Additionally, I do not accept on all of the evidence, that the respondent took no account of the highly prejudicial materials contained in both the Dodd Report and the Archibald Report, in coming to its conclusions. At least on the evidence of Mr Ayling, regard was clearly had to this sort of material, when he testified that it was taken into account for the purposes of "mitigation". In my view, such material should not have been taken into account to any extent whatsoever. Most importantly however, the material should have been put to the applicant so he could be given the opportunity to answer it. He was not given such an opportunity.

56 Furthermore, the failure by the respondent to afford the applicant an opportunity of being heard on the issue of penalty, following its findings of guilt in relation to the charges, is also a denial of natural justice: *Hall v New South Wales Trotting Club Ltd* (1977) 1 NSWLR 378; (1977) 2 NSWLR 308 at 337; *Re Railway Appeal Board* at 21. It is to be observed that this failure of itself however, would ordinarily not vitiate the whole disciplinary process and would require the matter of penalty to be put to the person concerned.

57 It would also appear that at least to a large extent, as set out in the letter from the respondent to the applicant dated 4 July 2001, and in the second paragraph, that the respondent had pre-judged the applicant's conduct when the Acting Director-General, made a "finding" that the applicant had committed a serious act of misconduct. This was of course, even before the inquiry by Ms Archibald had taken place: *Re Railway Appeal Board* per Malcolm CJ at para 85.

Duplicity and Double Jeopardy

58 Mr Cox also submitted that the principles of duplicity and double jeopardy have application to matters such as these and in the present circumstances the respondent fell foul of them. In light of the conclusions I have reached in relation to the primary issues raised, it is unnecessary for me to conclusively determine these matters. There is however, something to be said for the proposition that Ms Archibald, in making one finding only in relation to each of charges one, two and three, and four and five respectively, did not comply with the statutory scheme, in that there were not findings in relation to each of the charges against the applicant. It is by no means clear, which of the "offences" the applicant had been found "guilty" of.

59 As to the principle of duplicity, as it is known to the criminal law, doubts have been expressed as to its application to disciplinary proceedings of the present kind: *R v White Ex parte Byrnes* (1963) 109 CLR 665 at 670; *Hardcastle v Commissioner of Police* (1984) 53 ALR 593 at 602. I say nothing further about the matter on this occasion.

Conclusions

60 For all of the above reasons, and without making any observations as to the merits of the matter, I am of the view that the respondent's decision to impose the penalty on the applicant ought to be quashed. It is ordered accordingly.

2003 WAIRC 08364

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY JOHNSTON, APPLICANT *v.* MR RON MANCE, ACTING DIRECTOR GENERAL DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 21 MAY 2003
FILE NO/S.	APPLICATION 2302 OF 2001
CITATION NO.	2003 WAIRC 08364

Result	Application upheld. Order issued
Representation	
Applicant	Mr M Cox Of Counsel
Respondent	Mr D Newman

Order

HAVING heard Mr M Cox of counsel on behalf of the applicant and Mr D Newman on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the respondent's decision to transfer and reprimand the applicant be and is hereby quashed.

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

COAL INDUSTRY TRIBUNAL—Disputes—Matters referred—

BEFORE THE WESTERN AUSTRALIAN
COAL INDUSTRY TRIBUNAL

Held at Collie on 10 April 2003 and at Perth on 14 April and 23 May 2003

Application No. 1 of 2003

Between:

Wesfarmers Premier Coal Limited, Applicant

and

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, Respondent

In the matter of: The performance of incidental duties by maintenance tradespersons

Decision of the Tribunal

1. THE CHAIRMAN: The present matter before the Tribunal arises from what is essentially a demarcation dispute between the applicant and the respondent, as to the performance of ancillary tasks by tradespersons specifically in the circumstances leading to this referral to the Tribunal, to assist a millwright, to undertake a small concreting job by way of assistance. The application raises the broader issue of the ability of the applicant to direct tradespersons to perform duties incidental to their core trades skills.

2. The dispute arose as a consequence of the respondent's view that the requested duties do not fall within the scope of those of a tradesperson, contrary to the view held by the applicant. Conciliation proceedings were unavailing in the resolution of the matter. Accordingly the dispute has been referred to the Tribunal for determination.

3. The matter referred for hearing and determination is as follows:

> *"That Wesfarmers Premier Coal has the right to direct its maintenance employees to perform duties within its maintenance operations outside their core training skills to assist another trades employee where it is efficient, safe and logical to do so."*

Contentions of the Parties

4. Mr Bull, on behalf of the applicant, submitted to the Tribunal that what is being sought is consistent with the principle of structural efficiency, and is not precluded by the common law or any award or agreement of the Tribunal between the parties to these proceedings. It was submitted by the applicant that the work in question was relatively minor and in any event, it was not anticipated that tradespersons would be required to assist millwrights beyond a very limited extent. The submission of Mr Bull was that the applicant denied any suggestion that the present matter involved seeking a determination from the Tribunal, which would have the effect of "opening the floodgate" to enable the applicant to direct tradespersons to perform any task whatsoever on the mine site.

5. The applicant in submissions canvassed the history of structural efficiency initiatives in the coal mining industry in this State, to the effect that the determination now sought from the Tribunal, was entirely consistent with that history of structural reform and as a matter of equity and merit, the orders sought ought to be granted.

6. For the respondent union, Mr Edmonds submitted that whilst supportive of the need for ongoing structural efficiency change and the removal of archaic practices, the respondent considered that the issue the subject of these proceedings turned upon the interpretation of various industrial instruments, most particularly, the Wesfarmers Coal Limited (Maintenance) Progress 2000 Agreement ("the Progress Agreement"), in particular, clause 7 thereof. In tracing the history of the Progress Agreement, Mr Edmonds submitted to the Tribunal that the parties have by their agreement, determined the extent of flexibility to be exercised by tradespersons employed by the applicant. If those flexibilities are now not regarded as being satisfactory, the appropriate course is to resolve the issue by further negotiations due later this year, with the expiry of the Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001 ("the Maintenance Agreement") : (2001) 81 WAIG 1069.

The Evidence

7. Evidence was led by both the applicant and the respondent. For the applicant, Mr Kelly, the general manager business and marketing informed the Tribunal about competitive pressures placed upon the applicant by reason of a loss of a contract in June - July 2002, leading to a requirement to significantly reduce numbers of employees. Mr Kelly also testified in relation to pressures placed upon the industry generally, by reason of competition from gas as a fuel supply and impending closures of power station units, leading to the applicant having to significantly increase its efficiencies and reduce its costs to remain competitive.

8. Mr Garrick is the applicant's maintenance manager. Mr Garrick gave evidence about manning level reductions and the interaction between tradespersons and tyre fitters on the job, to the effect that tradespersons assist tyre fitters in the performance of their duties, as a daily occurrence. Additionally, Mr Garrick informed the Tribunal, that as there are no longer trades assistants employed, tradespersons do all of the work duties formerly performed by them. He also gave evidence about the incident leading to the present proceedings. In or about late January 2003, the applicant arranged for a concrete pour on site. The millwright, who was performing the particular job required, needed assistance in this regard and a request was made of two tradespersons for these purposes. According to Mr Garrick, the tradespersons were willing to

assist but one of them considered there might be a difficulty and sought assistance from the respondent. As a consequence, the work did not proceed and the matter has ultimately come before the Tribunal for resolution.

9. Mr Garrick gave evidence about the predecessor to the Progress Agreement, the Western Collieries Ltd Tradespersons Career Path Document 1994 ("the Career Path Agreement"), tendered as exhibit R1. He testified that this agreement was for the purposes of developing career paths at the applicant for tradespersons, and the "80/20 rule" was for this purpose. Mr Garrick testified that he understood this principle to be such that tradespersons would generally perform no more than 20 per cent of their working time each day, on multi-skilling or ancillary tasks. Difficulties apparently arose in the application of this provision, in terms of determining time spent by tradespersons and the consequent difficulties in managing this provision.

10. Accordingly, Mr Garrick testified that the Progress Agreement was then negotiated and registered with the Tribunal. Mr Garrick understood that the intention was for the Progress Agreement to replace the earlier Career Path Agreement but additionally, it was intended to remove the 80/20 cross skilling limitation previously applying, such that if a tradesperson was allocated a job, he or she could use multi-skilling without any time limitation. It was Mr Garrick's understanding that the intention of the Progress Agreement was not to abandon the principles outlined in the earlier Career Path Agreement.

11. Mr Kearney was called to testify on behalf of the respondent. He is a shop steward on the applicant's site. It was Mr Kearney's evidence that given his involvement and understanding of the Career Path Agreement, under the 80/20 rule, the tradespersons would be required to perform the work presently in dispute, as long as it did not exceed 20 per cent of their allocated work for the day.

12. It was Mr Kearney's evidence that as he was involved in negotiating the Progress Agreement, there was effectively a trade-off for the abolition of the 80/20 rule, such that tradespersons would now be required to undertake multi-skilling, irrespective of the proportion of it, to complete "the job at hand". It was Mr Kearney's evidence, that this did not enable the applicant to allocate work to tradespersons at large, beyond the "job at hand".

13. Mr Kearney was pressed on these issues in cross-examination. As to the duties of fitters, Mr Kearney accepted that they are trained and regularly do assist tyre fitters in the maintenance department. Additionally, fitters are trained in boiler making duties and are able to assist in this area as well. Mr Kearney also accepted that the SELL (Safe, Efficient, Logical and Legal) principle equally applied to the Progress Agreement as it did to the former Career Path Agreement. Mr Kearney also accepted that in that agreement, it was the case that the parties determined there would be no artificial barriers or demarcations to the scope of work for tradespersons at the former Western Collieries, after completing relevant multi-skilling modules.

Consideration

14. At the outset, with respect, I agree with and restate the observations previously made by the immediate past Chairman of the Tribunal, Senior Commissioner Fielding (as he then was), as to the requirement for the coal mining industry in this State to be competitive. In my opinion, such observations are ever the more relevant now in 2003, than they were in the earlier part of the last decade. It is indisputable that competitive pressures caused by alternative fuel sources, and the requirement for industry to be and remain competitive generally, must mean that the parties in the coal mining industry in this State be constantly aware of the need for efficiency and the removal of restrictive and archaic practices, which hitherto may have been accepted in times gone by. Having said that however, it must also be recognised that the employers, employees and their unions have cooperated on very significant change that has occurred in the industry to date, by the terms of their various agreements, and as a consequence also, of determinations of this Tribunal.

15. Having made those preliminary observations, I now turn to the consideration of the issue before the Tribunal. As the present matter to a significant extent involves the interpretation of the various industrial instruments between the parties, the usual principles as to construction apply. That is, one looks at the language of the instrument concerned, and interprets it in its ordinary and natural sense: *Norwest Beef Industry's Ltd & Anor v AMIEU* 1995 AILR 73. Additionally, in the case of industrial agreements, given that they are a consequence of consensus between parties, a more flexible and generous approach to interpretation is required: *AITCO v FLAIEU* 1988 AILR 382. It is also trite to observe that the interpretation of a provision of an award or industrial agreement is to be considered within the context of the award or industrial agreement as a whole, and not in isolation.

16. At issue between the parties in this matter, are the relevant provisions of the Career Path Agreement and the Progress Agreement. In particular, clauses 5.21 and 5.22 of the Career Path Agreement provided as follows:

> ***5.21 THE S.E.L.L. PRINCIPLE***
>
> *The Training Committee believe that applying the S.E.L.L. principle will resolve many issues confronting maintenance people doing their normal job and whether they should perform the task or contact another person for assistance.*
>
> *The S.E.L.L. principle requires you to ask yourself the following questions. Your response will help you determine if you should attempt the task.*
>
> *S Is it SAFE for me to do the task?*
>
> *E Will it be EFFICIENT if I do this task?*
>
> *L Is it LOGICAL for me to do this task?*
>
> *L Are there any LEGAL reasons I shouldn't do this task?*
>
> ***5.22 JOB ALLOCATION and THE 80/20 GUIDLEINE***
>
> *When supervisors are requesting tradespersons to perform multi-skilling or I & P tasks a guideline of 80/20 should be used in conjunction with the S.E.L.L. principle.*
>
> *The 80/20 guideline is intended to ensure that any one tradesperson should be employed in his core trade for at lease 80% of their working day, it is intended a maximum of 20% of their working day will be of the multi-skilling or I & P nature.*
>
> *However it is also intended not to restrict those tradespersons who wish to exceed this guideline from doing so, the S.E.L.L. principle will always be their guideline, this will be the tradespersons choice.*
>
> *When supervisors are requesting tradespersons to perform multi-skilling or I & P tasks the following guidelines are recommended:*
>
> *Consider:*
>
> - *work demands of individuals*

- *equipment priorities*
- *availability of labour*
- *technical knowledge required*
- *individual competence*
- *tolling and/or equipment required*
- *skill retention required."*

17. It is also important in my opinion, to observe that in terms of objectives, the Career Path Agreement appeared to have as its primary aim, the elimination of artificial barriers or demarcations for tradespersons, once having completed the respective multi-skilling modules. It was intended that tradespersons would work to their level of competency, within their trade and across other trades, to enable Western Collieries as it then was, to deploy maintenance employees in any areas and on any priority, as the business required. It is also significant to note, that the implementation of the Career Path Agreement, was also accompanied by significant wage increases. It is also not insignificant to observe in my opinion that the operative parts of the Career Path Agreement, are referred to as "guidelines". Additionally, the implementation of this agreement was at least in part, as expressly provided in the preamble to the agreement itself, recognition that previous wage increases awarded to tradespersons, had not led to the desired degree of cross skilling and multi-skilling originally intended.

18. The fact that the Career Path Agreement operative parts were intended as a guide, is clearly illustrated from the terms of clause 5.22, set out above, which explicitly recognises this and provides that the SELL concept would be the dominant guiding principle.

19. Turning to the Progress Agreement, that part of the agreement most contentious for present purposes is clause 7 - Flexibility Provisions which provides as follows:

> *"FLEXIBILITY PROVISIONS*
>
> *Maintenance Department employees will work to their level of competency within their mainstream trade classification, while utilising multi-skilling to complete the job at hand. This will result in the 80:20 cross-skilling rule from the Career Path 1994 Agreement no longer applying."*

20. Importantly also, by clause 3 - Objects of the Progress Agreement, it is variously provided that the intention of the agreement is to provide employees (tradespersons and tyre fitters) and the applicant, with sustainable improvements in their manner of working. This includes a commitment to maintenance employees having greater scope to exploit their trade competencies, a more flexible and motivated workforce, and a commitment to a high level of endeavour and co-operation. Additionally, also contained in the objects clause of the Progress Agreement, is the commitment to as a foundation, the SELL principle, referred to above from the Career Path Agreement.

21. The Progress Agreement also contains commitments in relation to future training, significantly, a requirement that upon completion of training, maintenance employees are required to willingly utilise all skills for which they have been trained.

22. In my opinion, taken as a whole, the Progress Agreement should be seen as a continuation of the type of agreement provided for in the Career Path Agreement. That is, the focus of both agreements was and is clearly upon the development and continuation of career path and flexibility opportunities, which appears on the evidence before the Tribunal, to have had its origins at least since about 1991. Whilst by clause 6 of the Progress Agreement, it is provided that the Progress Agreement supersedes the Career Path Agreement, the Progress Agreement, when taken in context of the entire history, in my opinion, must be seen as a continuation of this broad theme. That is on the one hand, improvements in remuneration for tradesperson employees, and on the other, a return by way of a commitment and agreement to more flexible working practices to achieve workplace improvements.

23. It is significant to observe also in my view, and as noted above, that clause 5.32 of the Career Path Agreement, was to be seen and applied as a guideline only. It clearly was not intended, from the plain language of that clause, when read within the terms of the Career Path Agreement as a whole, to be binding and prescriptive. Indeed, from the tenor of that agreement, such an interpretation would be entirely inconsistent with the terms of that agreement, when read as a whole

24. The plain thrust of the Career Path Agreement, from its terms, seems to me to have been based upon the acquisition of broader trade skills by maintenance tradespersons, and those persons being able to be called upon to exercise those broader trade skills, as the circumstances required it.

25. Given the objects and scope of the Progress Agreement, in particular its origins and history, I do not consider that a restrictive interpretation should be placed on clause 7 - Flexibility Provisions, as seems to be contended by the respondent. In my opinion, this provision also, as was the case with the Career Path Agreement, should be seen as a guideline for the parties, but otherwise not limit the ability of a tradesperson, properly trained and competent in broader trade skills, to be called upon to exercise those trade skills from time to time.

26. Given the purpose and object of both agreements, in enhancing flexibility and job opportunities, I do not consider that it could be said that it was the intention that the parties would restrict the scope of duties that a tradesperson would be able to undertake. Not only would that be generally inconsistent with the history of both of the agreements in question, equally, such an interpretation is inconsistent with the evidence before the Tribunal, that tradespersons presently assist others outside of their "job at hand", as a matter of custom and practice. Whilst as a matter of general principle custom and practice cannot be the entire consideration, examples of fitters providing assistance to tyre fitters on a regular basis, as was the evidence, clearly not within their "job at hand" is in my view, evidence of the fact that a broader view should be taken to the terms of the Progress Agreement, than that contended by the respondent.

27. In any event, it would also appear to be the case the reference to "job at hand" is more a reference to the particular requirements of the applicant, at any given point in time, as opposed to the specific tasks to be performed by a tradesperson. If this were not the case, it would be difficult to see how multi-skilling and cross-skilling could ever occur.

28. If anything, it appears that the new provision contained in cl 7 of the Progress Agreement, was intended to remove the restrictions previously imposed by the "80/20 rule". This view is entirely consistent with the tenor of the agreement read as a whole, and the history of both agreements taken together. Additionally, given that the Progress Agreement has no finite term, it is inconceivable in my opinion, that there would have been an intention to introduce what in essence, on the respondent's interpretation, is a considerable restriction on the possible scope of a tradesperson's duties at the applicant. Moreover, support for this broader construction of the Progress Agreement can be gained from the fact that the SELL principle has been agreed by the parties as still being the fundamental guiding principle to be applied by supervision and tradespersons alike in the performance of duties.

29. That is not to say however, that such a provision can be applied carte blanche. It clearly cannot be so. What in my opinion, when taken as a whole, the Progress Agreement permits, is maintenance tradespersons being able to perform duties outside of their core skills, but for which they have the skill, competency and training to perform.

30. I would not regard a mechanical tradesperson, providing limited assistance to a millwright in a concreting task for some hours only, as being in contravention of this broad principle.

31. Therefore, I am of the view that the applicant should be able to direct its maintenance tradespersons to undertake the sort of work in issue before the Tribunal in this matter, as long as they are skilled, competent and appropriately trained for these tasks.

32. Whilst I apprehend some concern by the respondent that the applicant may seek to deploy maintenance tradespersons without any restriction or consideration for trades training and competencies whatsoever, the decision of the Tribunal in this matter, could not be regarded as supporting such a broad proposition and indeed, that right has not been sought on the case as put by the applicant in these proceedings.

BEFORE THE WESTERN AUSTRALIAN
COAL INDUSTRY TRIBUNAL

Held at Collie on 10 April 2003 and at Perth on 14 April and 23 May 2003

Application No. 1 of 2003

Between:

Wesfarmers Premier Coal Limited, Applicant

and

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, Respondent

In the matter of: The performance of incidental duties by maintenance tradespersons

Declaration

HAVING heard Mr G Bull of counsel on behalf of the applicant and Mr L Edmonds of counsel on behalf of the respondent, the Tribunal, doth hereby declare –

THAT Wesfarmers Premier Coal Limited should have the right to direct its maintenance employees to perform duties within its maintenance operations outside of their core trade skills, and for which they are skilled, competent and trained, to assist other trades employees where it is efficient, safe and logical to do so.

COMMISSIONER S J KENNER

Chairman,

Western Australian Coal Industry Tribunal.