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GENERAL ORDERS—

2003 WAIRC 09877

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA, APPLICANT *v.* MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION, TRADES & LABOR COUNCIL OF WESTERN AUSTRALIA AND THE AUSTRALIAN MINES & METALS ASSOCIATION INC., RESPONDENTS
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 1197 OF 2003
CITATION NO.	2003 WAIRC 09877

Catchwords	General Order varied - Section 50(2) of the Act - 21 year old and above apprentice wage rate determined pursuant to the June 2003 State Wage Case varied to phase in increase previously ordered
Result	Order issued
Representation	
Applicant	Mr G Blyth on behalf of the Chamber of Commerce & Industry WA Inc.
Respondents	Mr P Wilding on behalf of the Minister for Consumer & Employment Protection Mr A Cameron on behalf of the Australian Mines & Metals Association Inc. Ms Mayman and with her Mr T Kucera (of counsel) on behalf of the Trades & Labor Council of WA
Intervenors	Mr D Foreman on his own behalf Mr K Richardson on behalf of the Master Builders Association Mr J Nicholas on behalf of the Australian Liquor, Hospitality & Miscellaneous Workers' Union, WA Branch

Reasons for Decision

1 By General Order dated the 5th June 2003 under sections 51(2), (3) & (5) of the Act, the Commission adjusted awards of the Commission in accordance with decisions made in the June 2003 State Wage Case ((2003) 83 WAIG 1906).

2 Provision was made in the General Order for a minimum wage rate to be paid to an adult apprentice under an award. The relevant terms of the General Order were—

"(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $406.70 per week.

(b) The rate paid in paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.

(c) Where in an Award an additional rate is expressed as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of apprenticeship.

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003."

3 By this application under section 50 of the Act, the Chamber now seeks to vary the General Order dated 5th June 2003 thereby phasing in the minimum rate established for adult apprentices under awards of the Commission. The General Order being varied would then provide—

"(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than the following amounts—

(i) $285.00 per week from …(date of General Order) …;

(ii) $315.00 per week from 31 January 2004;

(iii) $406.70 per week from 5 June 2004.

(b) The rate paid in paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.

(c) Where in an Award an additional rate is expressed as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of apprenticeship.

(d) Nothing in this sub-clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003."

In the grounds for the application the Chamber states—

"10. The adult apprentice minimum introduced in the 2003 SWC Decision was not a matter discussed or agreed to by the "section 50 parties" prior to the hearing. The effect on industry was not canvassed at all in the proceedings.

11. The 2003 SWC Decision increases the minimum rate payable to an adult apprentice in most awards from $272.50 to $406.70 per week; an increase of $131.20 per week or 47.6 per cent. In awards, where the previous General Order minimum rate did not apply (see for example the Building Trades (Construction) Award, 1987) the increase under the 2003 SWC Decision is in excess of $180.00 per week or nearly 82 per cent.

12. The above increase in the base rate payable to adult apprentices results in further and substantial overall employment cost increases when consideration is included for any penalty rates, superannuation, workers' compensation and other on costs.

13. It is estimated there are some 300 to 400 adult apprentices affected by the 2003 SWC Decision. In the building and construction industry group training schemes approximately 150 adult apprentices are affected and the direct cost increases for those employees is assessed to be in excess of $1million.

14. Such an overnight increase in the employment costs of adult apprentices is unsustainable and it will adversely affect the continuing employment of adult apprentices already employed and reduce the likelihood of employment of adult apprentices in the immediate term.

15. Further, it is critical that existing skills shortages in industries are not adversely affected by the loss of adult apprentices due to the employment cost increases.

16. In order to minimise the adverse effect on skills shortages in industry and the employment of adult apprentices arising from the 2003 SWC Decision it is necessary to provide for a phase-in of the increase in accordance with the following—

(a) $285.00 per week from …(date of General Order) …;

(b) $315.00 per week from 31 January 2004;

(c) $406.70 per week from 5 June 2004.

4 In accordance with the terms of section 50(10) of the Act, a notice was published in the daily press inviting any person who desired to be heard and having a sufficient interest in the matter to make a submission to the Commission.

5 In addition to the section 50 parties the Commission received notification of interest from a member of the public and the Australian Liquor, Hospitality and Miscellaneous Workers' Union, WA Branch.

6 The notice in the daily newspaper elicited a response from Mr Foreman, a member of the public. He is 36 years of age and has recently completed a pre-apprenticeship training course with the Master Painters Association ("the MPA"). The course was undertaken over a period of four months during which time Mr Foreman received payments under Austudy. After completing the training course he was gaining work experience but had been informed by the MPA that at this time there are no prospects of getting a mature age apprenticeship in painting. This was because of the current rate of pay for an apprentice 21 years and over. Mr Foreman understands that there are opportunities for apprenticeships for 17 and 18 year olds and while it was suggested that there may be something for him in 18 months' time, he is not optimistic that it will eventuate. Mr Foreman sees wage increases for mature age apprentices effectively removing any incentive for employers to make such appointments. Mr Foreman states that he would be content to accept a significantly reduced wage rate in order to secure his entry into the vocation he has set his sights on. He is prepared to take on part time work in addition to his apprenticeship to sustain himself. In this respect Mr Foreman sees the situation as being similar to university students undertaking part time work while they are studying.

7 Mr Richardson on behalf of the Master Builders' Association ("the MBA") presented a submission supporting the application of the Chamber of Commerce and Industry of Western Australia ("the Chamber"). This submission focused exclusively on the needs of the building and construction industry in Western Australia.

8 At present this industry is experiencing difficulties in attracting young people to take up apprenticeships in its traditional trades. The State Government has joined with builders and training organisations to ensure "…a steady flow of apprentices and trainees … (for the) … well being of the building industry". (Media Statement, Minister for Consumer and Employment Protection; Training, September 27, 2002, "Building Industry Apprenticeship Programme - an Investment in the Future" (Exhibit MBA 3)). Mature age apprenticeships are an important element of fulfilling current and future skill needs. The

experience within the building industry with these apprentices has been positive. Adult apprentices generally complete their trade training "very quickly".

9 The MBA recognises difficulties being experienced by mature age apprentices coping with lower earnings in the first two years of their training; however, the MBA submits that this needs to be balanced against the decision of the adult apprentice to invest in training for the opportunities that present in the industry. Employers have to balance the additional cost of taking on a mature age apprentice against that of a younger person. Group training schemes have now become an important part of apprentice training in this State. The increased wage for adult apprentices has according to the MBA "severely affected the employability of a number of current adult apprentices – especially those in the first and second year of training." A disincentive to take on mature age apprentices will affect the availability of skills in the industry in the medium and long term.

10 While supporting the Chamber's proposal for phasing in the increase to the current wage level, the MBA in expressing the views of member companies running group apprenticeship training sees further increases as being phased in over "at least" a period of 18 months in order to sustain the employability of current adult apprenticeships.

11 Mr Nicholas, representing the Australian Liquor, Hospitality and Miscellaneous Workers' Union ("the ALHMWU") made a submission opposing the application to phase in the introduction of the adult apprentice minimum wage. In these proceedings the ALHMWU focused on the bread making and pastry cooking industries. The thrust of the submission is that there is no evidence that the increase to bring parity with the rate established for the 3rd year apprentice under the Metal Trades (General) Award will impact adversely in these industries by creating a skills shortage and adding an unreasonable amount to employment costs.

12 Mr Wilding on behalf of the Minister for Consumer and Employment Protection ("the Minister") stated that the guiding principle with respect to adult apprentices is that they "should be provided with fair and up to date wage rates that reflect a balance between the training nature of their employment and the financial needs of any adult employee." The Minister considers that this has been achieved following the Commission's adoption of the position put forward by the Minister in the June 2003 State Wage Case ((2003) 83 WAIG 1899).

13 That position, it was pointed out, was developed after consultation with industry bodies and the availability of a discussion paper for public comment (Attachment F in Minister's Exhibit 1 submitted in Application 569 of 2003). The Minister makes it clear that in the long term the policy objective is to align the wage rate of an adult apprentice with that set down in the National Training Wage Award.

14 Having stated this position, the Minister has been made aware that some employers in the building and construction industry have been experiencing short term financial difficulties as a result of the increase to the adult apprentices' rate of $406.70 per week with effect from 5 June 2003. In formulating the position to support the phasing in of the increase, the Minister had caused the following information to be collected and submitted to the Commission.

(1) The compilation of apprenticeships in WA by industry, together with the numbers of apprentices in each year of their apprenticeship and numbers of apprentices 21 years and over and those under 21 years of age.

(*Refer to Attachment 1 – Extract from Minister's Exhibit 1*)

(2) A summary of the numbers of apprentices employed in Group Training Schemes.

(*Refer to Attachment 2 – Extract from Minister's Exhibit* 1).

(3) A compilation of the numbers of apprentices turning 21 years of age by June 2004.

(*Refer to Attachment 3 – Extract from Minister's Exhibit 2*).

Information on the State Government's support for joint group training programmes through the Australian National Training Authority and the Building and Construction Industry Training Fund was also provided.

15 In reviewing the development of apprenticeship wage rates the Minister noted movements in the 1st year apprentice plumbers' rate under the Building Trades (Construction) Award, the adult minimum wage established in 1992 (which continued to have application to adult apprentices under some awards immediately prior to June 2003), the adult apprentice rate under the Metal Trades (General) Award, the Minimum Adult Award Wage and the Adult Minimum Wage under the Minimum Conditions of Employment Act. These comparisons are set out below.

ADULT APPRENTICE WAGE COMPARISONS 1992-2003

YEAR	Building Trades (Construction) Award – 1st year Plumber	$275.50 Awards	Metal Trades Adult Apprentice Rate	Minimum Award Wage	MCE Act Minimum Wage
1992	$176.44	$275.50	$268.80	$275.50	-
1993	$179.80	$275.50	Award consol	-	$275.50
1994	$179.80	$275.50	Award consol	-	$301.10
1995	$183.16	$275.50	Award consol	-	$317.10
1996	$186.52	$275.50	Award consol	-	$332.00
1997	$190.72	$275.50	$317.10	$359.40	$335.00
1998	$196.60	$275.50	$348.90	$373.40	$346.70
1999	$201.64	$275.50	$357.90	$385.40	$346.70
2000	$207.94	$275.50	$369.15	$400.40	$368.00
2001	$214.24	$275.50	$380.40	$413.40	$400.40
2002	$225.04	$275.50	$393.90	$413.40/$431.40	$431.40
2003	$228.94	$275.50	$406.72	$448.40	$448.40
Total Increase	**$52.50**	**$0.00**	**$137.92**	**$172.90**	**$172.90**

(*Ministers Exhibit 4*)

16 From information compiled by officers of the Registry on all awards of the Commission making provision for the employment of apprentices, the Minister concludes that there are broadly four categories into which these employees can be classified. First, awards that do not make provision for adult apprentices. Next are those awards for which provision is made for the wage rate of an adult apprentice but which generally have not been varied (save and except for the increase which had effect from 5th June 2003). There is that category of awards which specifies that the minimum adult wage shall apply generally (and this includes application to adult apprentices). Finally, there are those awards which make specific provision for wage rates for adult apprentices at amounts higher than $406.70 per week. The following table is submitted by the Minister. It includes the number of adult apprentices currently employed under the relevant awards who are in the 1st or 2nd year of their apprenticeships.

Award	Award-No	Award-ID	Subject to provision in Order No. 415A/92	Minimum Adult Apprentice Rate $	Effective Date of last variation to apprentices rates	Order No. varying apprentices rates	No of Adult Apprentices Indicative 1st & 2nd Years
AWARDS WITH "JUNIOR" APPRENTICE RATES - 1st Year Rates							
Aged and Disabled Persons Hostels Award, 1987	A 6/1987	AGE001		Junior Rates	1/08/2002	797/02	
Bakers' (Metropolitan) Award No.13 of 1987	A 13/1987	BAK003		214.20	1/08/2002	797/02	10 & 21
Building Trades (Construction) Award 1987, No. R 14 of 1978	R 14/1978	BUI003		225.04	14/10/2002	1207/02	122 & 179
Building Trades (Government) Award 1968	31A/1966	BUI006		Junior Rates	1/08/2002	797/02	
Burswood Hotel (Maintenance Employees') Award, 1990	A 6/1989(R)	BUR001		Junior Rates	1/08/2002	797/02	
Burswood International Resort Casino Employees' Award 2002	A 4/02	BUR013		Junior Rates	10/07/2002	A 4/02	
Burswood Island Resort Employees Award	A 23/1985 & A 25/1985	BUR003		Junior Rates	1/08/2002	797/02	
CSBP and Farmers Award 1990	A 19/1989	CSB001		Junior Rates	1/08/2002	797/02	
Dental Technicians' and Attendant/Receptionists' Award, 1982	29/1982	DEN001	provision deleted	218.33	1/08/2002	797/02	4 & 8
Electrical, Engineering and Building Trades (West Australian Newspapers Limited) Award, 1988	A 17/1985	ELE005		Junior Rates	1/08/2002	797/02	
Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962	29/1961, 30/1961, 31/1961 & 3/1962	ENG013		Junior Rates	1/08/2002	797/02	
Farm Employees' Award, 1985	A 19/1984	FAR001		Junior Rates	1/08/2002	797/02	
Gardeners (Government) 1986 Award No. 16 of 1983	A 16/1983	GAR001		Junior Rates	1/08/2002	797/02	
Gate, Fence and Frames Manufacturing Award	24/1971	GAT001		201.32	1/08/2002	797/02	
Grain Handling Maintenance Workers Award	C 477/1979	GRA001		Junior Rates	1/08/2002	797/02	

Award	Award-No	Award-ID	Subject to provision in Order No. 415A/92	Minimum Adult Apprentice Rate $	Effective Date of last variation to apprentices rates	Order No. varying apprentices rates	No of Adult Apprentices Indicative 1st & 2nd Years
Horticultural (Nursery) Industry Award, No. 30 of 1980 - The	A 30/1980	HOR001		207.61	1/08/2002	797/02	8 & 14
Hospital Workers (Government) Award No. 21 of 1966	21/1966	HOS019		Junior Rates	1/08/2002	797/02	
Lift Industry (Electrical and Metal Trades) Award 1973	No. 9 of 1973	LIF001	provision deleted	Junior Rates	1/08/2002	797/02	
Monumental Masonry Industry Award 1989	A 36/1987	MON001		Junior Rates	1/08/2002	797/02	
Parliamentary Employees Award 1989	A 15/1987, A 4/1988, A 7/1988 & A 7/1989	PAR001		Junior Rates	28/01/2003	967/02	
Plaster, Plasterglass and Cement Workers' Award No. A 29 of 1989	A 29/1989	PLA002		216.85	16/12/2002	1626/02	As per Bldg Trades
Plastic Manufacturing Award 1977	No. 5 of 1977	PLA003	provision deleted	Junior Rates	1/08/2002	797/02	
Printing (Newspaper) Award 1979 - The	R 23/1979	PRI006		Junior Rates	1/08/2002	797/02	
RAC Road, Mechanical and Fleet Services Award 1999 No. A 14 and 1235 of 1988	A 14 & 1235/1988	RAC001		Junior Rates	1/08/2002	797/02	
Sheet Metal Workers' Award No. 10 of 1973	No. 10 of 1973	SHE002		210.08	1/08/2002	797/02	As per Metal Trades
Vehicle Builders' Award 1971	No. 9 of 1971	VEH002	provision deleted	220.58	1/08/2002	797/02	As per Metal Trades
Watchmakers' and Jewellers' Award 1970	No. 10 of 1970	WAT001	provision deleted	Junior Rates	1/08/2002	797/02	
SPECIFIED ADULT APPRENTICE RATES							
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	R 10/1979	AIR001	yes	275.50	30/11/1992	415A/92	
Bakers' (Country) Award No. 18 of 1977	R 18/1977	BAK002	yes	275.50	30/11/1992	415A/92	As per Metro
Bespoke Bootmakers' and Repairers' Award No. 4 of 1946	A 4/1946	BES001	yes	275.50	30/11/1992	415A/92	
Building Trades (Goldmining Industry) Award	29 & 32/1965 & 4/1966	BUI005	yes	275.50	30/11/1992	415A/92	
Case and Box Makers' Award, 1952	48/1951	CAS001	yes	275.50	30/11/1992	415A/92	
Electronics Industry Award No. A 22 of 1985	A 22/1985	ELE007	yes	275.50	30/11/1992	415A/92	

Award	Award-No	Award-ID	Subject to provision in Order No. 415A/92	Minimum Adult Apprentice Rate $	Effective Date of last variation to apprentices rates	Order No. varying apprentices rates	No of Adult Apprentices Indicative 1st & 2nd Years
Gold Mining Engineering and Maintenance Award	26/1947	GOL004	yes	275.50	30/11/1992	415A/92	
Golf Link and Bowling Green Employees' Award, 1993	16/1967	GOL003		275.50	1/08/2002	797/02	
Industrial Catering Workers' Award, 1977	29A/1974	IND005	yes	275.50	30/11/1992	415A/92	
Landscape Gardening Industry Award	R 18/1978	LAN001	yes	275.50	30/11/1992	415A/92	
Mineral Sands Mining and Processing (Engineering and Building Trades) Award, 1977	No. 6 of 1977	MIN003	yes	275.50	30/11/1992	415A/92	
Pastrycooks' Award No. 24 of 1981	A 24/1981	PAS001	yes	275.50	30/11/1992	415A/92	3 & 1
Private Hospital Employees' Award, 1972	27/1971	PRI012	yes	275.50	30/11/1992	415A/92	
Radio and Television Employees' Award	R 3/1980	RAD002	yes	275.50	30/11/1992	415A/92	
Railway Employees' Award No. 18 of 1969	18/1969	RAI001	yes	275.50	30/11/1992	415A/92	
Saw Servicing Establishments Award No. 17 of 1977	17/1977	SAW001	yes	275.50	30/11/1992	415A/92	
Timber Yard Workers Award No. 11 of 1951	No. 11 of 1951	TIM003	yes	275.50	30/11/1992	415A/92	
Wire Manufacturing (Australian Wire Industries Pty. Ltd.) Award No. 24 of 1970	24/1970	WIR001	yes	275.50	30/11/1992	415A/92	
Wundowie Foundry Award 1986	A 8/1986	WUN001	yes	275.50	30/11/1992	415A/92	
Bag, Sack and Textile Award	3 1960	BAG001	yes	317.10	21/05/1996	312/96	
Building Trades Award 1968	31/1966	BUI008	yes	317.10	11/12/1996	25/96	As per Bldg Trades
Furniture Trades Industry Award	A 6/1984	FUR002	yes	317.10	13/06/1996	568/96	4 & 4
Meat Industry (State) Award, 1980	R 9/1979	MEA004	yes	317.10	8/12/1995	1086/95	7 & 10
Optical Mechanics' Award, 1971	No. 9 of 1970	OPT001	yes	317.10	21/05/1996	364/96	
Saddlers and Leatherworkers' Award	No. 7 of 1962	SAD001	yes	317.10	21/05/1996	377/96	
Timber Workers Award No 36 of 1950	36/1950	TIM002	yes	317.10	2/09/1996	936/96	
Building and Engineering Trades (Nickel Mining and Processing) Award, 1968	20/1968	BUI001	yes	332.00	16/06/1997	1692/96	

Award	Award-No	Award-ID	Subject to provision in Order No. 415A/92	Minimum Adult Apprentice Rate $	Effective Date of last variation to apprentices rates	Order No. varying apprentices rates	No of Adult Apprentices Indicative 1st & 2nd Years
Engineering and Engine Drivers' (Nickel Smelting) Award, 1973	No. 4 of 1973	ENG012	yes	332.00	16/06/1997	1748/96	
Engineering Trades and Engine Drivers (Nickel Refining) Award, 1971	10 of 1971	ENG014	yes	332.00	16/06/1997	1691/96	
Sugar Refining Award - The	A 41/1982	SUG001	yes	332.00	10/06/1997	1294/96	
Soft Furnishings Award	A 23/1982	SOF001	yes	373.40	13/08/1998	1245/98	
Electrical Contracting Industry Award R 22 of 1978	R 22/1978	ELE002	yes	Yrs 1-3 $384.11 & yr 4 $452.91	1/04/2003	284/01	112 & 115
Metal Trades (General) Award 1966	**13/1965**	**MET001**	**yes**	**393.90**	**1/08/2002**	**797/02**	150 & 161
						***Auto**	82 & 108
Printing Award	No. 9 of 1969	PRI003		417.54	1/08/2002	797/02	
SPECIFIED AT ADULT AWARD MINIMUM WAGE							
Burswood Catering and Entertainment Pty Ltd Employees Award 2001	A 4/01	BUR012		431.40	29/04/2002	As per the M.C.E. Act, 1993*	
Club Workers' Award, 1976	12/1976	CLU001		431.40	29/04/2002	As per the M.C.E. Act, 1993*	As per RTC
Dampier Salt Award 1990	A 23/1990	DAM002	yes	431.40	1/08/2002	797/02	
Hairdressers Award 1989	A 32/1988	HAI001	yes	431.40	1/08/2002	797/02	23 & 19
Hotel and Tavern Workers' Award, 1978	R 31/1977	HOT001		431.40	29/04/2002	As per the M.C.E. Act, 1993*	As per RTC
Metropolitan Health Service Engineering and Building Services Enterprise Award 1999	A 1/99	MET025		431.40	29/04/2002	As per the M.C.E. Act, 1993*	
Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976	29/1974	MOT001		431.40	29/04/2002	As per the M.C.E. Act, 1993*	
Restaurant, Tearoom and Catering Workers' Award, 1979	R 48/1978	RES002		431.40	29/04/2002	As per the M.C.E. Act, 1993*	44 & 85
SPECIFIED ADULT APPRENTICE OR HIGHER RATES THAN $406.70							
Printing (Community Newspaper Group) Award No. A 21 of 1989	A 21/1989	PRI002		458.05	1/08/2002	797/02	
Printing (Government) Award, 1990	A 8/1990	PRI004		461.50	1/08/2002	797/02	
Telfer Gold Mine Fly In/Fly Out	A 9/1987	TEL001		472.17	1/08/2002	797/02	
Iron Ore Production and Processing (Hamersley Iron Pty Ltd) Award 1987	A 20/1987	IRO005		511.90	1/08/2002	797/02	

Award	Award-No	Award-ID	Subject to provision in Order No. 415A/92	Minimum Adult Apprentice Rate $	Effective Date of last variation to apprentices rates	Order No. varying apprentices rates	No of Adult Apprentices Indicative 1st & 2nd Years
Mineral Sands Industry Award 1991	A 3/1991	MIN002		545.20	1/08/2002	797/02	
Cockburn Cement Limited Award 1991	A 14/1991	COC003		594.85	1/08/2002	797/02	
Kalgoorlie Consolidated Gold Mines Award 2002	A 5/02	KAL009		593.68 (curre nt rate)	7/01/2003	as delivered	
Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002	A 2/01	IRO010		Lowest adult apprentice rate $923.51	19/07/2002	as delivered	
REMOVED AS ASSESSED AS EITHER NOT USED OR MINOR							
ANI Engineering Bassendean (WA) Way Forward Enterprise Award 1998	A 2/98	ANI010			1/08/2001	752/01	
Argyle Diamonds Production Award 1996	A 7/96	ARG005			1/08/2002	797/02	
BRADKEN Bassendean (WA) Way Forward Enterprise Award 2001	A 6/01	BRA013			25/11/2002	A6/01	
Cargill Australia Limited - Salt Production and Processing Award 1988	A 34/1988	CAR002			1/08/2002	797/02	
Engineering (Government Printing Office) Award 1986	12 1984	ENG011			1/08/2002	797/02	
Iron and Steel Industry Workers' (B.H.P. Steel International - Rod & Bar Division) Award	No. 1 of 1968	IRO002			1/08/2002	797/02	
Printing (Western Mail) Award, No 39 of 1982	A 39/1982	PRI010			1/08/2002	797/02	
State Energy Commission of Western Australia Wages and Conditions Award 1988	A 1/1989	STA012			1/08/2002	797/02	
Engineering Trades, (Fremantle Port Authority) Award, 1968	42/1968 & 48/1968	ENG015			4/03/2003	2007/02	
Furniture Trades (Government) Award 1979	R 34/1979	FUR001			1/08/2002	797/02	
Government Water Supply, Sewerage and Drainage Employees Award 1981	No. 2 of 1980	GOV013		275.50	1/08/2002	797/02	
State Research Stations, Agricultural Schools and College Workers Award 1971	23/1971	STA002	yes	275.50	30/11/1992	415A/92	

Award	Award-No	Award-ID	Subject to provision in Order No. 415A/92	Minimum Adult Apprentice Rate $	Effective Date of last variation to apprentices rates	Order No. varying apprentices rates	No of Adult Apprentices Indicative 1st & 2nd Years
Hospital Employees' (Perth Dental Hospital) Award 1971	No. 4 of 1970	HOS003			1/08/2002	797/02	

NOTES
All numbers of indicative apprentices have been placed in appropriate common rule industry award. Many will be covered by enterprise specific awards and agreements.

(*Ministers Exhibit 3*)

17 The Minister notes that the above information is qualified to the extent that some adult apprentices, although identified as being covered by an award, may in fact have their wage rate determined under an Industrial Agreement, an individual agreement or under an instrument registered with the Australian Industrial Relations Commission.

18 From an analysis of apprenticeship rates under awards the Minister has concluded that the increase to the adult apprentice wage from 5th June 2003 impacts most noticeably in the building and construction industry (which includes the electrical industry), the meat industry, bakeries and in horticulture nurseries.

19 In supporting the position for phasing in the increase to $406.70 per week, the Minister unequivocally states that "…adult apprentices need to be provided with fair and up to date wage rates that reflect that balance between the training nature of their employment and the financial needs of any adult employee. These needs cannot be denied with simple statements that lesser rates are a trade off for receiving training or represents some form of under rate worker status." To retain apprentices in an industry up to date rates need to be paid. Without the retention of adult trainees, the skills base will diminish. Many industries already recognise the advantages that mature age apprentices bring to the workplace. The Minister notes that the numbers of these apprentices is likely to increase in future, particularly as the school leaving age increases from 15 to 17 years of age.

20 Information obtained by the Minister shows that notwithstanding the increase in the adult apprentice wage rate from 5th June 2003, there has not been an increase in the number of suspensions of apprenticeships generally nor for those at 21 years of age and above.

21 While supporting the phasing in application the Minister submits that the transitional rates proposed by the Chamber should be completed by 31st March 2004 and not the 5th June 2004 as set out in the application. This position is taken on the basis of the likelihood of the 2004 State Wage Case being concluded in June 2004 and with that the possibility that the Metal Trades (General) Award benchmark will then be moved anyway. To have an increase so close to the operative date of the next State Wage Case could cause unintended complications. Furthermore, in the likely event of a State Wage Case being determined in June 2004 there would be the complication of two wage increases within a matter of days.

22 Mr Cameron acknowledged that his organisation the Australian Mines and Metals Association ("the Association") does not have a direct interest in this matter as the increase in the adult apprenticeship rate has in no way impacted on the mining or hydrocarbon industries. However, as a "Section 50" party the Association supports the phasing in of the increase in the terms proposed by the Chamber in the interests of preserving jobs.

23 Mr Blyth for the Chamber pointed out that the applicant does not seek to create a new entitlement or obligation neither does it seek to remove an existing or long standing entitlement. From the Chamber's perspective the new entitlement created by the 2003 State Wage Case is causing problems for employers and for adult apprentices. That is for those adult apprentices whose employment is in jeopardy as a result of wage cost increases. These problems were not anticipated or identified previously by the section 50 parties. Therefore, the Commission was not properly informed at the time the adult apprentice wage rate was determined in the State Wage Decision.

24 In the present proceedings the Commission has for the first time, information on the numbers of adult apprentices, the industries in which they work and the awards that apply to them. In the light of this information it is submitted that the Commission is in a position to now assess the one-off effect of this application. The consequences of the misunderstanding that is now apparent which arose between consideration of the Metal Trades (General) Award benchmark rate being applied to award-free adult apprentices and those covered by awards during the State Wage Case can now be properly addressed.

25 From information compiled and presented by the Minister, the Chamber notes that the increase from $275.50 to $406.70 for some adult apprentices is an increase of 47.6% in the base rate of pay. For adult apprentices under the Building Trades (Construction) Award, the increase is $180.00 per week or nearly 82% on the base rate of pay. Further increases in employment costs result from this adjustment when applied to penalty rates, superannuation, workers' compensation and other employment on-costs.

26 From details of the numbers of apprentices 21 years and over employed in their first or second year of their apprenticeship, supplied by the Minister, the increase would impact upon employers of approximately 500 adult apprentices in the building and construction industry (including the electrical industry) alone. This exceeds the estimate made by the Chamber when it lodged the application to phase in the increase.

27 On information available to the Chamber through members engaged in building and construction industry group training schemes with placements for 150 adult apprentices, the direct cost of the increase in the first two years is $1million. The additional training expense for an adult apprentice is estimated to be $18,300 over a two year period. Eighty percent of adult apprenticeship placements are with small business and these employers would not otherwise participate in apprenticeship training. There is no opportunity to recover the increased costs and many employers are considering their options pending the outcome of these proceedings.

28 The Chamber submits that the overnight increase in employment costs of adult apprentices is unsustainable and will adversely impact on the continuing employment of adult apprentices. It will also reduce the likelihood of employment for this category of appointees in the immediate future. The experiences of Mr Foreman and the submission from the MBA makes this clear. Furthermore, it is submitted that it is within the direct knowledge of the Commission that there are currently skills shortages in industries in this State. The curtailment of adult apprenticeship training will exacerbate this situation. The Commission should also have regard to the position of adult apprentices themselves. In implementing a phasing in of the increase the Commission would thereby assist in creating an environment for greater employment security and the availability of future placements for adult apprentices.

29 The Chamber emphasises that the order sought under this application does not attempt to return wage rates to pre-State Wage Case levels; it merely seeks to give employers time to re-arrange their affairs so that the employment of adult apprentices can continue uninterrupted. An opportune date for re-establishing the rate of $406.70 is 5th June 2004. In the Chamber's view this does not impose a complication due to the possibility of the next State Wage Case. There is no statutory requirement for the National Wage Decision to be handed down in May next year. Moreover, it is not conceded by the Chamber that any future increases arising from a State Wage Case will necessarily flow to the minimum adult apprentice rate. The time frame provided for phasing in the increase will afford employers a reasonable period of relief in order for them to accommodate the new wage structure.

30 It is submitted that the Commission should exercise its powers pursuant to section 51(4) of the Act to add to or vary the General Order made in the State Wage Case. Alternatively, there is power pursuant to section 50(2) of the Act to make a General Order, the nature of which addresses the industrial matter of wage rates for adult apprentices.

31 Consistent with the requirements of section 26 of the Act it is submitted that it is appropriate for the Commission to give relief in terms of the order sought for employers and thereby contribute to the on-going employment prospects of adult apprentices.

32 Mr Kucera for the Trades and Labor Council of WA ("the TLC") submitted that the application for the General Order was "primarily and principally" grounded on the adverse economic consequences of an increase in the adult apprentices' rate. In the TLC's view this is plainly an "incapacity to pay" argument and should be approached in a manner consistent with the Wage Fixing Principle, in particular Principle 12. The evidence provided by the Minister in these proceedings about the implications of the wage increase and the extent to which concerns have been expressed to him by representatives of various industries, justified that approach being followed. Furthermore the evidence is particular to the building and construction industry and the baking industry.

33 Consistent with the Wage Fixing Principles, the TLC submits that it is encumbent upon particular respondents in these industries to make applications and to provide information about their particular operations to justify the postponement of the wage increase.

34 The TLC notes that much of the force for phasing in the adult apprentices increase has come from operators of group training schemes in the building and construction industry. On information available to the TLC, the hourly charge out rate for a first year adult apprentice is $16.08. For a second year adult apprentice it is $18.36 per hour. In addition to the hourly charge out rate, the TLC submits that the host employer also picks up the costs of the apprentices' fares and travelling entitlements. In many respects the group training schemes operate as labour hire agencies. However, according to the TLC there is a significant difference; the group training schemes attract government training subsidies and payroll tax exemptions. In assessing an "incapacity to pay" application all of these factors should be taken into account. For adult apprentices working under a traditional indentured arrangement, the demands of Principle 12 would require an examination of a principal contractors' ability or inability to meet the additional costs associated with the adult apprentices' increase. The TLC notes that there has been no information on the economic impact of the wage increase in the baking and meat industries.

35 The TLC drew the Commission's attention to a decision which issued from an application for a General Order in 1985 to reduce junior rates (1985) 65 WAIG 1331. It is submitted that the circumstances of that matter are comparable with the instant application. In that matter the application was dismissed.

36 According to the TLC the concern about a shortage of skills in the building and construction industry is a distraction in addressing the claim for phasing in. The metals industry in which adult apprentice rates are the bench mark is experiencing the same shortage. However, it is submitted that a failure to adequately remunerate adult apprentices will result in a failure to attract these people to the building and construction industry. For young people in the industry the wage structure with depressed adult apprenticeship rates will act as an incentive to develop their skills base through placement as a higher paid builder's labourer.

37 The TLC supports and adopts submissions made by the Minister with respect to the following—

> "4.7 The CICS and award parties have therefore given recognition in the past, to the need for a special adult apprentice rate. The Minister argues that then, as now, the following factors led inexorably to the setting of a special award adult apprentice minimum wage—
>
> 4.7.1 Adult apprentices need to be provided with fair and up to date wage rates that reflect a balance between the training nature of their employment, and the financial needs of any adult employee. These needs cannot be denied with simple statements that significantly lesser rates are a trade off for receiving training, or represent an "under-rate" worker status;
>
> 4.7.2 It is grossly inequitable in an industrial and training sense to suggest that an unskilled labourer in an industry is worth over $200.00 a week more (award minimum wage $448.40) than an individual who is learning a trade and expanding the skills base of that industry, and ostensibly keeping the labourer in future employment;
>
> 4.7.3 To retain adult apprentices in an industry, appropriate up to date rates need to be paid; and
>
> 4.7.4 The number of mature age apprentices is increasing, and will accelerate in the future, particularly with moves to keep young people at school longer.
>
> 4.8 The Metal Trades (General) Award third year apprentice rate is an appropriate benchmark for a universal minimum award adult apprentice rate. It represents the outcome of federal and State arbitrated safety net processes. It has a mechanism where it is automatically updated each year as part of the safety net review.
>
> 4.9 The benchmark rate for 2003 of $406.70 remains $41.70 behind the rate set for all other award and non-award adult employees in WA- $448.40. The Minister contends that this difference reflects a balance between the training nature of an apprentice's employment, and the financial needs of an adult employee."

38 In concluding the TLC submits that it is not in principle opposed to phasing in. However, it must be justified on the basis required under the Wage Fixing Principles. As to the method of phasing in, that would depend on the case that would be met in an incapacity to pay argument. For the purposes of this application the claim should be dismissed.

39 The initiative to include the minimum weekly wage for adult apprentices under awards came from the statutory requirement under section 51E of the Act for the Commission to consider other minimum weekly rates for application under the Minimum Conditions of Employment Act when the State Wage Case was determined (see sections 51D and 51F of the Act and (2003) 83 WAIG 1918).

40 The Commission accepted what was thought to have been agreement at that time between the section 50 parties that, for the purpose of section 51F of the Act, the minimum weekly rate of pay for award free adult apprentices would be that determined by reference to the rate contained in the Metal Trades (General) Award. The application of the minimum rate to adult

employees under awards was thought to have been consistent with what was agreed to and was going to be determined for the purposes of the Minimum Conditions of Employment Act under section 51F of the Act.

41 A realisation that there had been some misunderstanding about the application of the adult apprentice rate of pay to award employees became apparent after the General Order in matter number 569 of 2003 issued. When the Commission then considered establishing a minimum rate for award free adult apprentices there was insufficient before it to determine the matter.

42 In the reasons for decision pursuant to section 50F of the Act the Commission stated—

> "There is insufficient before the Commission at this time to set a rate under the Minimum Conditions of Employment Act, 1993 for apprentices who have reached 21 years of age that is different from apprentices who are under 21 years of age: ((2003) 83 WAIG 1920).

43 Just as the Chamber now asserts, there was nothing before the Commission to support the establishment of a minimum wage rate for adult apprentices covered by awards in the State Wage Case except an implied acceptance that it was inequitable to have some adult employees being paid $275.50 per week or less. It is noted that under section 51 of the Act, the provision through which the General Order in the State Wage Case was formulated, the Commission was charged with the statutory duty to ensure, to the extent possible, that there was consistency and equity in relation to the variation of awards and in relation to when they have effect. The plight of the adult apprentice under awards had, except in those limited numbers of cases where unions had pursued award variations, been left at rates going back to 1992 and beyond. Many apprentices had not even received increases based on arbitrated safety net adjustments.

44 It is common ground among the section 50 parties that for the purpose of these proceedings that $406.70 per week is an equitable wage rate for a 21 year old apprentice. It is only the timing under which that level of income is to be achieved that is in question.

45 We consider that in the circumstance of this matter the outcome cannot be directed by recourse to the technical application of the wage fixing principles but by endeavouring to establish a situation which could reasonably have been achieved in June 2003 in the light of all of the information that is now available. We have no doubt that the significant increase to bring the adult apprentices' minimum wage rate up to an appropriate level would have been phased in, just as the parties agreed to the way traineeship rates were to be implemented.

46 Apart from concern over the way in which apprenticeship rates have generally been ignored for many years, the absence of appearances in the Commission of industry groups and group training scheme operators with particular interests and information stands as a glaring indictment of their professed concerns. The Chamber and the Minister have, to a large extent, carried the burden of the case. The TLC, to its credit, has acknowledged that it does not oppose phasing in in principle. It has faced the issue on the basis which its affiliates are always required to confront, by addressing the wage fixing principles.

47 There is sufficient before us to appreciate the concerns within government and industry about developing the skills base in our community. The initiatives that are taking place within the building and construction industry were the subject of specific reference. It is within the knowledge of the Commission that apprenticeship recruitment and retention is particularly sensitive to downturns in the economy and wage variations. The experience in this State in 1993 when the determination of junior rates under the Minimum Conditions of Employment Act inadvertently affected apprentices' wages and caused a dislocation in trade training until the matter was rectified, shows the impact that inadequate planning can have in the development of trade training. As the Commission has noted a number of times in the course of State Wage Cases and in proceedings associated with the determination of wage rates for apprentices and trainees, there needs to be a cautious approach. The advent of group training schemes, the continuing importance of indentured apprenticeships particularly in small businesses and the availability of traineeships add to the complexity of wage determination in this important area of employment. The availability of government subsidies, payroll tax relief, the investment that individuals, many of whom are mature age participants, make in pre-apprenticeship training and the move from time based programmes to skills acquisition schemes, are just some of the facets of what has become a training industry.

48 The Commission has received some information on the operation of group training schemes, the incidents of apprenticeship training in various industries, the age of apprentices and the numbers of mature age apprentices. The determination of a minimum wage for apprentices 21 years and over is not intended to derogate from parties to an award the ability to establish a wage regime for apprentices operating in their particular industry. Indeed, that opportunity has always been open to parties. It remains so. This also includes the meat and baking industries.

49 After anxious consideration the Commission is prepared to accept the necessity at this time to phase in the increase determined initially with effect from 5th June 2003. However, we consider that on the basis of equity the relief to employers should extend for a six months period. The phasing in would operate in the following manner—

(a) $285.00 per week from the beginning of the first pay period commencing on or after 1st November 2003;

(b) $315.00 per week from the beginning of the first pay period commencing on or after 31st January 2004; and

(c) $406.70 per week from the beginning of the first pay period on or after 30th April 2004.

We consider that the re-establishment of the minimum rate at $406.70 per week with effect after the end of April 2004 is justified on equity grounds. The period of phasing in will afford mature age apprentices a reasonable time to secure their on-going training and enable employers to plan for the future. While the cut-off date for phasing in is before the likely date of the 2004 State Wage Case, it is recognised from what has been submitted in these proceedings that an acceptance of the $406.70 per week is "without prejudice" to the position that parties may adopt in the next State Wage Case or proceedings arising from the determination in that matter.

50 The Commission's attention was drawn to problems with the application of the adult apprentice minimum wage under the Metal Trades (General) Award and the Club Workers' Award. These matters will be addressed by the Commission as separate issues under Section 40B of the Act.

51 The Minutes of the Proposed Order will now issue.

Attachment 1 – Extract from Minister's Exhibit 1

In Training
Jul, 2003

TOTAL APPRENTICES - WA

	21 & Over					Under 21 years					Total All Ages				
	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total
Total	**572**	**733**	**867**	**1525**	**3697**	**3172**	**2539**	**1956**	**1329**	**8996**	**3744**	**3272**	**2823**	**2854**	**12693**
Automotive	82	108	125	253	568	570	472	381	246	1669	652	580	506	499	2237
AUTOBODY REFINISHER [Painting (Vehicle Building)]	8	14	8	31	61	36	34	36	28	134	44	48	44	59	195
AUTOBODY REPAIRER [Panelbeating]	7	4	13	13	37	43	40	32	29	144	50	44	45	42	181
AUTOMOTIVE ELECTRICAL FITTING	2	7	12	25	46	43	32	29	12	116	45	39	41	37	162
ENGINEERING TRADESPERSON (AUTOMOTIVE)	0	2	2	1	5	8	8	8	3	27	8	10	10	4	32
ENGINEERING TRADESPERSON (AUTOMOTIVE)	0	0	3	4	7	5	10	11	2	28	5	10	14	6	35
ENGINEERING TRADESPERSON (AUTOMOTIVE) [HEAVY]	27	29	17	33	106	139	107	65	47	358	166	136	82	80	464
ENGINEERING TRADESPERSON (AUTOMOTIVE) [LIGHT]	35	50	69	138	292	274	223	182	115	794	309	273	251	253	1086
ENGINEERING TRADESPERSON (AUTOMOTIVE) [Motor Mechanics (Small Engines)]	1	0	1	6	8	14	10	13	5	42	15	10	14	11	50
FUEL INJECTION FITTING	0	1	0	1	2	0	1	2	0	3	0	2	2	1	5
TRIMMING	2	1	0	1	4	8	7	3	5	23	10	8	3	6	27
Building & Construction	122	179	193	266	760	640	476	321	235	1672	762	655	514	501	2432
BRICKLAYING	13	23	13	20	69	95	38	33	19	185	108	61	46	39	254
CARPENTRY AND JOINERY	28	54	49	89	220	206	178	101	85	570	234	232	150	174	790
ENGINEERING TRADESPERSON (FABRICATION) [SHEETMETAL]	8	10	17	21	56	48	37	38	20	143	56	47	55	41	199
PAINTING AND DECORATING	19	18	31	38	106	40	50	31	31	152	59	68	62	69	258
PLASTERING	3	4	9	12	28	25	21	15	11	72	28	25	24	23	100
PLUMBING AND GASFITTING	33	46	50	44	173	123	97	48	35	303	156	143	98	79	476
ROOF PLUMBING	1	2	4	4	11	11	3	1	5	20	12	5	5	9	31
SIGNWRITING	1	2	4	4	11	5	3	6	3	17	6	5	10	7	28
SPRINKLER FITTING	1	1	3	2	7	1	1	1	0	3	2	2	4	2	10
STONEMASONRY [NO MONUMENTAL]	1	1	2	5	9	7	2	7	0	16	8	3	9	5	25
STONEMASONRY [WITH MONUMENTAL]	3	3	0	2	8	7	4	2	1	14	10	7	2	3	22
TILELAYING	6	11	9	11	37	31	16	19	11	77	37	27	28	22	114
WALL AND CEILING FIXING	5	4	2	14	25	41	26	19	14	100	46	30	21	28	125

In Training
Jul, 2003

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	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total
Community Services, Health & Education	4	8	8	9	29	7	7	5	3	22	11	15	13	12	51
DENTAL TECHNICIAN	4	8	7	6	25	7	7	4	3	21	11	15	11	9	46
OPTICAL MECHANICS	0	0	1	3	4	0	0	1	0	1	0	0	2	3	5
Electrical	112	115	148	295	670	372	277	235	124	1008	484	392	383	419	1678
ELECTRICAL MECHANICS	77	93	109	222	501	275	220	163	99	757	352	313	272	321	1258
ELECTRONIC SERVICING	6	0	0	1	7	9	0	0	0	9	15	0	0	1	16
ELECTRONIC SERVICING [AUDIO/T.V./VIDEO]	0	0	0	0	0	0	0	0	1	1	0	0	0	1	1
ELECTRONIC SERVICING [CONSUMER ELECTRONICS]	0	2	0	0	2	0	4	3	0	7	0	6	3	0	9
ELECTRONIC SERVICING [CONSUMER TELEVISION/VIDEO]	0	2	1	3	6	2	4	4	1	11	2	6	5	4	17
ELECTRONIC SERVICING [DIGITAL EQUIPMENT]	0	0	0	1	1	0	0	0	0	0	0	0	0	1	1
ELECTRONIC SERVICING [DIGITAL/COMPUTER]	1	1	3	3	8	3	6	1	0	10	4	7	4	3	18
ELECTRONIC SERVICING [RADIO COMMUNICATIONS]	0	1	4	6	11	0	3	5	2	10	0	4	9	8	21
ENGINEERING TRADESPERSON (ELECTRICAL) [Electrical Fitting]	19	10	23	43	95	53	26	44	17	140	72	36	67	60	235
ENGINEERING TRADESPERSON (ELECTRICAL) [Instrument Electrical Fitting]	8	6	5	16	35	28	14	13	4	59	36	20	18	20	94
ENGINEERING TRADESPERSON (ELECTRICAL) [Instrument Fitting]	1	0	3	0	4	2	0	2	0	4	3	0	5	0	8
Food	7	10	8	19	44	60	66	45	32	203	67	76	53	51	247
GENERAL BUTCHERING	7	10	8	19	44	60	66	45	32	203	67	76	53	51	247
Hospitality & Tourism	44	85	98	152	379	363	253	186	128	930	407	338	284	280	1309
BAKING (COMBINED PASTRYCOOKING AND BREADMAKING)	3	6	17	15	41	37	31	25	18	111	40	37	42	33	152
BREADMAKING	7	15	9	6	37	53	32	17	17	119	60	47	26	23	156
COOKING	31	63	68	126	288	260	181	138	93	672	291	244	206	219	960
PASTRYCOOKING	3	1	4	5	13	13	9	6	0	28	16	10	10	5	41

In Training
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Light Manufacturing	17	25	22	78	142	194	183	131	103	611	211	208	153	181	753
CABINETMAKING	0	1	0	0	1	0	0	4	2	6	0	1	4	2	7
CABINETMAKING [CHAIRMAKING]	1	0	0	0	1	9	7	2	0	18	10	7	2	0	19
CABINETMAKING [NO WOODCARVING]	6	15	11	57	89	120	119	96	86	421	126	134	107	143	510
CABINETMAKING [WOODCARVING]	0	0	0	0	0	12	5	0	0	17	12	5	0	0	17
FLOORCOVERING	3	3	1	0	7	9	10	4	1	24	12	13	5	1	31
FRENCH POLISHING (INCLUDING ALL WOOD FINISHING)	1	0	1	5	7	4	4	5	2	15	5	4	6	7	22
FURNITURE MAKING [FURNITURE MAKING]	0	1	0	1	2	16	14	2	0	32	16	15	2	1	34
GLAZING- BEVELLING [NO SILVERING]	2	4	1	8	15	12	11	8	7	38	14	15	9	15	53
GLAZING- BEVELLING [SILVERING]	0	0	0	0	0	2	0	0	0	2	2	0	0	0	2
MACHINE WOODWORKING	2	1	5	6	14	7	8	3	3	21	9	9	8	9	35
METAL FURNITURE MAKING	0	0	0	0	0	0	0	0	1	1	0	0	0	1	1
TOOLMAKING AND JIGMAKING (METAL FURNITURE)	0	0	0	0	0	1	0	1	0	2	1	0	1	0	2
UPHOLSTERING	2	0	3	1	6	2	5	6	1	14	4	5	9	2	20
Metals, Manufacturing & Services	150	161	195	326	832	606	458	369	234	1667	756	619	564	560	2499
AIRCRAFT MAINTENANCE ENGINEER - AVIONICS	1	0	3	2	6	0	0	0	1	1	1	0	3	3	7
AIRCRAFT MAINTENANCE ENGINEER - MECHANICAL	2	7	4	7	20	11	9	5	0	25	13	16	9	7	45
ENGINEERING TRADESPERSON (FABRICATION) [Boilermaking-Metal Const 1st Cl Welding]	27	35	32	57	151	137	89	70	67	363	164	124	102	124	514
ENGINEERING TRADESPERSON (FABRICATION) [Boilermaking - Metal Construction]	4	5	8	9	26	28	20	28	13	89	32	25	36	22	115
ENGINEERING TRADESPERSON (FABRICATION) [First Class Welding]	2	3	0	5	10	10	11	7	0	28	12	14	7	5	38
ENGINEERING TRADESPERSON (FABRICATION) [Jobbing, Moulding and Coremaking]	2	1	0	3	6	2	3	1	0	6	4	4	1	3	12
ENGINEERING TRADESPERSON (FABRICATION) [Marine Aluminium Welding]	0	0	0	4	4	5	0	0	0	5	5	0	0	4	9
ENGINEERING TRADESPERSON (FABRICATION) [Marine Fabrication/Aluminium]	3	4	16	23	46	27	17	29	13	86	30	21	45	36	132
ENGINEERING TRADESPERSON (FABRICATION) [Marine Fitout]	0	1	1	4	6	14	7	9	4	34	14	8	10	8	40

In Training
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	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total
ENGINEERING TRADESPERSON (FABRICATION) [Patternmaking]	0	0	2	1	3	0	2	2	0	4	0	2	4	1	7
ENGINEERING TRADESPERSON (FABRICATION) [Vehicle Bodybuilding]	2	2	5	10	19	23	15	13	9	60	25	17	18	19	79
ENGINEERING TRADESPERSON (MECHANICAL) [Electroplating]	0	1	0	0	1	0	4	0	0	4	0	5	0	0	5
ENGINEERING TRADESPERSON (MECHANICAL) [Engine Reconditioning]	0	1	2	3	6	5	4	4	1	14	5	5	6	4	20
ENGINEERING TRADESPERSON (MECHANICAL) [First Class Machining]	2	5	5	7	19	10	13	5	5	33	12	18	10	12	52
ENGINEERING TRADESPERSON (MECHANICAL) [FITTING and FIRST CLASS MACHINING]	12	10	16	28	66	62	44	42	26	174	74	54	58	54	240
ENGINEERING TRADESPERSON (MECHANICAL) [Fitting and Turning]	2	5	3	10	20	15	12	9	6	42	17	17	12	16	62
ENGINEERING TRADESPERSON (MECHANICAL) [Marine Fitting]	2	0	2	2	6	11	12	2	4	29	13	12	4	6	35
ENGINEERING TRADESPERSON (MECHANICAL) [Mechanical Fitting]	31	37	31	37	136	71	58	53	26	208	102	95	84	63	344
ENGINEERING TRADESPERSON (MECHANICAL) [Plant Mechanics (Agriculture)]	3	1	7	12	23	27	23	10	9	69	30	24	17	21	92
ENGINEERING TRADESPERSON (MECHANICAL) [Plant Mechanics (Industrial)]	34	24	32	47	137	91	56	42	25	214	125	80	74	72	351
ENGINEERING TRADESPERSON (MECHANICAL) [Refrigeration Fitting]	17	13	17	44	91	38	40	27	16	121	55	53	44	60	212
JEWELLERY	1	3	3	5	12	4	3	1	2	10	5	6	4	7	22
LOCKSMITHING	2	2	3	1	8	6	6	7	0	19	8	8	10	1	27
SAW DOCTORING	0	0	0	3	3	0	0	0	0	0	0	0	0	3	3
SHIPWRIGHTING AND BOATBUILDING	1	1	3	1	6	7	10	3	7	27	8	11	6	8	33
WATCH AND CLOCK REPAIRING	0	0	0	1	1	2	0	0	0	2	2	0	0	1	3
Primary Industry	8	14	16	33	71	47	54	41	26	168	55	68	57	59	239
HORTICULTURE (GARDENING) [GARDENING]	4	4	4	11	23	9	8	6	4	27	13	12	10	15	50
HORTICULTURE (LANDSCAPE GARDENING)	1	7	7	5	20	8	10	7	5	30	9	17	14	10	50
HORTICULTURE (NURSERYPERSON)	1	2	1	5	9	9	4	6	3	22	10	6	7	8	31
HORTICULTURE (TURF MANAGEMENT)	2	1	4	12	19	21	32	22	14	89	23	33	26	26	108

In Training
Jul, 2003

TOTAL APPRENTICES - WA

	21 & Over					Under 21 years					Total All Ages				
	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total
Utilities, Electrotechnology & Printing	3	9	11	14	37	7	9	8	6	30	10	18	19	20	67
BINDING AND FINISHING	0	0	0	1	1	0	0	1	1	2	0	0	1	2	3
COMPOSITION	0	0	0	1	1	0	0	0	0	0	0	0	0	1	1
GRAPHIC PRE-PRESS [GRAPHIC PRE-PRESS]	0	0	0	0	0	1	3	0	0	4	1	3	0	0	4
GRAPHIC REPRODUCTION	0	0	1	2	3	0	0	0	1	1	0	0	1	3	4
PRINTING MACHINING	3	8	10	8	29	6	4	6	3	19	9	12	16	11	48
SCREEN PRINTING STENCIL PREPARATION	0	1	0	2	3	0	2	1	1	4	0	3	1	3	7
Wholesale, Retail & Personal Services	23	19	43	80	165	305	284	234	192	1015	328	303	277	272	1180
HAIRDRESSING	12	2	0	0	14	146	6	3	5	160	158	8	3	5	174
HAIRDRESSING [LADIES/COMBINED]	11	17	43	80	151	159	278	231	187	855	170	295	274	267	1006
Trade Category Missing	0	0	0	0	0	1	0	0	0	1	1	0	0	0	1

Attachment 2 – Extract from Minister's Exhibit 1

In Training
Jul, 2003

Group Training Scheme

APPRENTICES EMPLOYED IN GROUP TRAINING SCHEMES

		21 & Over					Under 21 years					Total All Ages				
		1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total	1st year	2nd year	3rd year	Other Years	Total
Total	**Apprenticeship**	**112**	**145**	**193**	**400**	**850**	**794**	**564**	**402**	**289**	**2049**	**906**	**709**	**595**	**689**	**2899**
Automotive	Apprenticeship	12	14	29	65	120	147	111	83	60	401	159	125	112	125	521
Building & Construction	Apprenticeship	55	71	65	112	303	294	202	109	111	716	349	273	174	223	1019
Electrical	Apprenticeship	23	37	59	119	238	115	91	83	37	326	138	128	142	156	564
Food	Apprenticeship	0	0	0	1	1	4	2	5	1	12	4	2	5	2	13
Hospitality & Tourism	Apprenticeship	2	4	9	32	47	46	38	26	17	127	48	42	35	49	174
Light Manufacturing	Apprenticeship	1	2	1	17	21	38	33	22	10	103	39	35	23	27	124
Metals, Manufacturing & Services	Apprenticeship	17	14	25	40	96	127	67	56	36	286	144	81	81	76	382
Primary Industry	Apprenticeship	1	1	1	6	9	7	9	0	2	18	8	10	1	8	27
Wholesale, Retail & Personal Services	Apprenticeship	1	2	4	8	15	15	11	18	15	59	16	13	22	23	74
Trade Category Missing	Apprenticeship	0	0	0	0	0	1	0	0	0	1	1	0	0	0	1

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Attachment 3 – Extract from Minister's Exhibit 2

In Training (National) **20 Year Old Apprentices turning 21 by June 2004**

Sep, 2003

20 years as of 8 September 2003

		Year of Contract		
	Total	**1st year**	**2nd year**	**Other Years**
Trade Category	**2060**	**237**	**438**	**1385**
Automotive	**400**	**35**	**92**	**273**
AUTOBODY REFINISHER [Painting (Vehicle Building)]	36	1	14	21
AUTOBODY REPAIRER [Panelbeating]	35	3	5	27
AUTOMOTIVE ELECTRICAL FITTING	23	3	2	18
ENGINEERING TRADESPERSON (AUTOMOTIVE)	4	0	1	3
ENGINEERING TRADESPERSON (AUTOMOTIVE)	8	0	3	5
ENGINEERING TRADESPERSON (AUTOMOTIVE) [HEAVY]	86	7	21	58
ENGINEERING TRADESPERSON (AUTOMOTIVE) [LIGHT]	191	18	43	130
ENGINEERING TRADESPERSON (AUTOMOTIVE) [Motor Mechanics (Small Engines)]	9	1	2	6
FUEL INJECTION FITTING	1	0	0	1
TRIMMING	7	2	1	4
Building & Construction	**356**	**57**	**77**	**222**
BRICKLAYING	28	7	4	17
CARPENTRY AND JOINERY	115	19	22	74
ENGINEERING TRADESPERSON (FABRICATION) [SHEETMETAL]	32	3	5	24
PAINTING AND DECORATING	36	6	6	24
PLASTERING	12	2	2	8
PLUMBING AND GASFITTING	72	11	24	37
ROOF PLUMBING	4	0	1	3
SIGNWRITING	9	1	1	7
SPRINKLER FITTING	2	1	0	1
STONEMASONRY [NO MONUMENTAL]	5	1	0	4
STONEMASONRY [WITH MONUMENTAL]	4	1	2	1
TILELAYING	18	3	4	11
WALL AND CEILING FIXING	19	2	6	11
Community Services, Health & Education	**7**	**2**	**2**	**3**
DENTAL TECHNICIAN	7	2	2	3
Electrical	**314**	**33**	**74**	**207**
ELECTRICAL MECHANICS	232	22	54	156
ELECTRONIC SERVICING	3	3	0	0
ELECTRONIC SERVICING [CONSUMER ELECTRONICS]	1	0	0	1
ELECTRONIC SERVICING [CONSUMER TELEVISION/VIDEO]	2	0	1	1
ELECTRONIC SERVICING [RADIO COMMUNICATIONS]	5	0	1	4
ENGINEERING TRADESPERSON (ELECTRICAL) [Electrical Fitting]	43	3	10	30
ENGINEERING TRADESPERSON (ELECTRICAL) [Instrument Electrical Fitting]	27	5	8	14
ENGINEERING TRADESPERSON (ELECTRICAL) [Instrument Fitting]	1	0	0	1
Food	**32**	**7**	**8**	**17**
GENERAL BUTCHERING	32	7	8	17
Hospitality & Tourism	**201**	**30**	**44**	**127**
BAKING (COMBINED PASTRYCOOKING AND BREADMAKING)	27	3	8	16

		Year of Contract		
	Total	**1st year**	**2nd year**	**Other Years**
BREADMAKING	24	6	7	11
COOKING	144	20	27	97
PASTRYCOOKING	6	1	2	3
Light Manufacturing	**114**	**10**	**21**	**83**
CABINETMAKING	1	0	0	1
CABINETMAKING [CHAIRMAKING]	4	0	3	1
CABINETMAKING [NO WOODCARVING]	79	6	10	63
FLOORCOVERING	4	0	2	2
FRENCH POLISHING (INCLUDING ALL WOOD FINISHING)	5	1	0	4
FURNITURE MAKING [FURNITURE MAKING]	5	3	0	2
GLAZING- BEVELLING [NO SILVERING]	7	0	1	6
MACHINE WOODWORKING	4	0	2	2
METAL FURNITURE MAKING	1	0	0	1
TOOLMAKING AND JIGMAKING (METAL FURNITURE)	2	0	2	0
UPHOLSTERING	2	0	1	1
Metals, Manufacturing & Services	**415**	**52**	**78**	**285**
AIRCRAFT MAINTENANCE ENGINEER - MECHANICAL	9	0	6	3
ENGINEERING TRADESPERSON (FABRICATION) [Boilermaking-Metal Const 1st Cl Welding]	86	13	11	62
ENGINEERING TRADESPERSON (FABRICATION) [Boilermaking - Metal Construction]	23	1	3	19
ENGINEERING TRADESPERSON (FABRICATION) [First Class Welding]	5	1	2	2
ENGINEERING TRADESPERSON (FABRICATION) [Jobbing, Moulding and Coremaking]	1	1	0	0
ENGINEERING TRADESPERSON (FABRICATION) [Marine Aluminium Welding]	1	1	0	0
ENGINEERING TRADESPERSON (FABRICATION) [Marine Fabrication/Aluminium]	19	1	3	15
ENGINEERING TRADESPERSON (FABRICATION) [Marine Fitout]	9	0	1	8
ENGINEERING TRADESPERSON (FABRICATION) [Patternmaking]	1	0	1	0
ENGINEERING TRADESPERSON (FABRICATION) [Vehicle Bodybuilding]	11	1	2	8
ENGINEERING TRADESPERSON (MECHANICAL) [Engine Reconditioning]	3	1	1	1
ENGINEERING TRADESPERSON (MECHANICAL) [First Class Machining]	9	1	1	7
ENGINEERING TRADESPERSON (MECHANICAL) [FITTING and FIRST CLASS MACHINING]	44	7	4	33
ENGINEERING TRADESPERSON (MECHANICAL) [Fitting and Turning]	13	0	4	9
ENGINEERING TRADESPERSON (MECHANICAL) [Marine Fitting]	8	2	2	4
ENGINEERING TRADESPERSON (MECHANICAL) [Mechanical Fitting]	62	7	14	41
ENGINEERING TRADESPERSON (MECHANICAL) [Plant Mechanics (Agriculture)]	12	2	1	9
ENGINEERING TRADESPERSON (MECHANICAL) [Plant Mechanics (Industrial)]	47	6	8	33
ENGINEERING TRADESPERSON (MECHANICAL) [Refrigeration Fitting]	35	5	10	20
JEWELLERY	4	1	2	1
LOCKSMITHING	6	0	1	5

		Year of Contract		
	Total	**1st year**	**2nd year**	**Other Years**
SHIPWRIGHTING AND BOATBUILDING	6	0	1	5
WATCH AND CLOCK REPAIRING	1	1	0	0
Primary Industry	**45**	**5**	**8**	**32**
HORTICULTURE (GARDENING) [GARDENING]	9	2	1	6
HORTICULTURE (LANDSCAPE GARDENING)	8	1	3	4
HORTICULTURE (NURSERYPERSON)	3	1	0	2
HORTICULTURE (TURF MANAGEMENT)	25	1	4	20
Utilities, Electrotechnology & Printing	**16**	**1**	**5**	**10**
BINDING AND FINISHING	2	0	0	2
GRAPHIC PRE-PRESS [GRAPHIC PRE-PRESS]	1	0	1	0
GRAPHIC REPRODUCTION	1	0	0	1
PRINTING MACHINING	11	1	4	6
SCREEN PRINTING STENCIL PREPARATION	1	0	0	1
Wholesale, Retail & Personal Services	**159**	**5**	**28**	**126**
HAIRDRESSING	6	2	1	3
HAIRDRESSING [LADIES/COMBINED]	153	3	27	123
Trade Category Missing	1	0	1	0

2003 WAIRC 09879

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA INC, APPLICANT

v.

MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION, TRADES & LABOR COUNCIL OF WESTERN AUSTRALIA & THE AUSTRALIAN MINES & METALS ASSOCIATION INC, RESPONDENTS

CORAM COMMISSION IN COURT SESSION

CHIEF COMMISSIONER W S COLEMAN

COMMISSIONER J F GREGOR

COMMISSIONER P E SCOTT

DATE TUESDAY, 28 OCTOBER 2003

FILE NO/S. APPLICATION 1197 OF 2003

CITATION NO. 2003 WAIRC 09879

Result General Order in Appl 569 of 2003 varied

Representation

Applicant Mr G Blyth on behalf of the Chamber of Commerce & Industry WA Inc.

Respondents Mr P Wilding on behalf of the Minister for Consumer & Employment Protection

Mr A Cameron on behalf of the Australian Mines & Metals Association Inc.

Ms S Mayman and with her Mr T Kucera (of counsel) on behalf of the Trades & Labor Council of WA

Intervenors Mr D Foreman on his own behalf

Mr K Richardson on behalf of the Master Builders Association

Mr J Nicholas on behalf of the Australian Liquor, Hospitality & Miscellaneous Workers' Union, WA Branch

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General Order

THE COMMISSION IN COURT SESSION having heard from Mr G Blyth on behalf of the Chamber of Commerce & Industry WA Inc., Mr P Wilding on behalf of the Minister for Consumer & Employment Protection, Mr A Cameron on behalf of the Australian Mines & Metals Association Inc., Ms S Mayman and with her Mr T Kucera (of counsel) on behalf of the Trades & Labor Council of WA, Mr D Foreman on his own behalf, Mr K Richardson on behalf of the Master Builders Association and Mr J Nicholas on behalf of the Australian Liquor, Hospitality & Miscellaneous Workers' Union, WA Branch;

NOW THERFORE the Commission in Court Session hereby orders—

1. THAT pursuant to section 50(2) of the Act the General Order issued in Application 569 of 2003 ((2003) 83 WAIG 1906) insofar as it relates to setting a minimum weekly wage rate in Awards for apprentices 21 years of age or over, shall be varied.

2. THAT the variations to Awards effected by the General Order in Application 569 of 2003 ((2003) 83 WAIG 1907), that inserted a new sub-clause (9) in clause 1B. – Minimum Adult Award Wage of Awards (or another clause containing text identical to that said clause) shall be deleted with effect from the 1st November 2003.

3. THAT in lieu of the provisions in awards referred to in clause 2 of this General Order, the following sub-clause shall be inserted –

"(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than the following amounts –

(i) $285.00 per week from the beginning of the first pay period commencing on or after 1st November 2003;

(ii) $315.00 per week from the beginning of the first pay period commencing on or after 31st January 2004; and

(iii) $406.70 per week from the beginning of the first pay period commencing on or after 30th April 2004.

(b) The rate paid at paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.

(c) Where in an Award an additional rate is expressed as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of the apprenticeship.

(d) Nothing in this sub-clause shall operate to reduce the rate of pay fixed by the Award for an adult apprentice in force immediately prior to 5 June 2003."

4. THAT the provisions in clause 3 of this General Order shall have effect from the 1st November 2003.

(Sgd.) W. S. COLEMAN,
[L.S.] Commission in Court Session.

FULL BENCH—Appeals against decision of Commission—

2003 WAIRC 09968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BURSWOOD RESORT (MANAGEMENT) LTD, APPELLANT - and - AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 6 NOVEMBER 2003
FILE NO/S.	FBA 30 OF 2003
CITATION NO.	2003 WAIRC 09968

Catchwords	Industrial Law (WA) – Appeal to the Full Bench against an interim order made pursuant to a s44 conference – Respondent ordered to provide full-time employment to employee pending arbitration of the dispute – Interim order to redeploy employee was competent and within power – No failure to comply with s35 of *the Industrial Relations Act* 1979 (as amended) – Adequate reasons for decision provided – Appeal not of sufficient importance in the public interest s.49(2a) – *Industrial Relations Act* 1979 (as amended) s6(ag), (b), (c) and (d), s26(1)(a), (c) and (d), s26(2), s35, s44, s44(6), s44(6)(ba), s44(6)(bb), s49(2a)
Decision	Appeal dismissed
Appearances	
Appellant	Mr G Blyth, as agent
Respondent	Ms S Northcott, Industrial Officer

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the above-named appellant employer, Burswood Resort (Management) Ltd (hereinafter called "Burswood"), against the decision of a single Commissioner made on 18 September 2003 in matter No CR 101 of 2003, brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*").

2 At all material times, Burswood was an employer, and, at all material times, the respondent was an "organisation" as that is defined in s7 of *the Act*.

THE DECISION APPEALED AGAINST

3 The appeal is against a decision, constituted by an order (hereinafter called "the second order"), made by the Commissioner pursuant to s44 of *the Act*, and which I now produce hereunder in full, together with the recitals, for convenience (see pages 8-11 of the appeal book (hereinafter referred to as "AB")):-

> "WHEREAS on 26 May 2003 the applicant applied to the Commission for a conference pursuant to Section 44 of the *Industrial Relations Act 1979* ("the Act");
>
> AND WHEREAS on 10 June 2003 the Commission convened a conference pursuant to s44 of the Act for the purpose of conciliating between the parties in relation to back pay owing to one of the applicant's members, Mr Kieran Neal, and the possibility of re-deploying Mr Neal to suitable alternative employment with the respondent and the parties undertook to negotiate about the issues in dispute;
>
> AND WHEREAS a report back conference was held on 16 July 2003 and the Commission was advised that the issues in dispute remained unresolved and the parties undertook to hold further discussions;
>
> AND WHEREAS a further report back conference was held on 31 July 2003;
>
> AND WHEREAS at the conferences held on 10 June 2003, 16 July 2003 and 31 July 2003 the Commission was informed that—
>
> a) Mr Neal has been employed by the respondent for approximately 15 years. From November 2000 to December 2002 Mr Neal was unable to perform his full duties as a croupier due to a work related injury. As a result of Mr Neal's workers' compensation claim being settled in March 2003 the respondent has endeavoured to place Mr Neal into suitable alternative employment.
>
> b) On 23 June 2003 the respondent offered Mr Neal a position of Electronic Gaming Assistant and Mr Neal accepted this position however, the applicant and the respondent were in dispute about the terms and conditions of employment being offered to Mr Neal in relation to this position.
>
> c) On 31 July 2003 the applicant was advised by the respondent that if Mr Neal did not accept the Electronic Gaming Assistant position which had been created by the respondent and offered to Mr Neal on the respondent's terms and conditions then his services would be terminated and that the respondent would not take such action without giving seven days notice of its intention to terminate Mr Neal.
>
> d) The applicant and the respondent remained in dispute about back pay owing to Mr Neal for hours that he was available to work and was not required by the respondent to work.
>
> AND WHEREAS a further conference was convened on 1 August 2003 to hear from the parties in relation to whether or not the issues in dispute should be set down for hearing and determination;
>
> AND WHEREAS having heard from the parties the Commission formed the view that in the circumstances the issues in dispute should be set down for hearing and determination and an interim order should issue to deal with Mr Neal's employment status pending the outcome of arbitration of the issues in dispute;
>
> AND WHEREAS the Commission formed the view that Mr Neal should be redeployed to the position of electronic gaming assistant on an interim basis and an order issued on 4 August 2003 in the following terms—
>
> 1. THAT Burswood Resort (Management) Ltd redeploy Mr Kieran Neal forthwith to the full-time position of Electronic Gaming Assistant under the terms and conditions as detailed in correspondence from Ms Kathleen Drimatis to the applicant dated 23 June 2003.
>
> 2. THAT Mr Neal shall remain employed in this position under these terms and conditions whilst the Commission hears and determines the following—
>
> a) Whether or not Mr Neal is owed wages for the hours that he has been fit to work but has not been offered work by the respondent.
>
> b) The terms and conditions of employment that should apply to the work that Mr Neal is undertaking in his role as an Electronic Gaming Assistant.
>
> AND WHEREAS on 6 August 2003 the respondent lodged an appeal against the decision of the Commission in relation to the order that issued in matter C101 of 2003 on 4 August 2003;
>
> AND WHEREAS the Commission convened further conferences on 3 and 5 September 2003 and the respondent argued that the issue of whether or not the respondent had an obligation to transfer Mr Neal to an alternative position should be included in the memorandum of matters for hearing and determination and as this was a matter initially raised by the applicant as an issue in relation to this dispute this issue was included in an amended memorandum of matters for hearing and determination which was issued to the parties on 8 September 2003;
>
> AND WHEREAS at a hearing on 15 September 2003 the Full Bench of the Commission upheld the respondent's appeal and the interim order was quashed;
>
> AND WHEREAS on 17 September 2003 the Commission convened an urgent conference and was informed that Mr Neal was no longer undertaking the duties of the position of electronic gaming assistant and that he was currently not undertaking work related duties and therefore not receiving wages;
>
> AND WHEREAS the respondent sought to adjourn the hearing in relation to the issues in dispute given that the Full Bench had not yet issued its reasons for decision in FBA 19 of 2003;
>
> AND WHEREAS the Commission is of the opinion that an interim order is necessary to deal with Mr Neal's current employment status pending the hearing and determination of the issues in dispute and that the hearing set down for 18 September 2003 be vacated as a result of further discussions of the issues in dispute and that the hearing should be re-convened as a matter of urgency;
>
> AND WHEREAS a Speaking to the Minutes was held on 18 September 2003 in respect to the Minutes of Proposed Order that issued on 17 September 2003 and after hearing from the parties the Commission formed the view that amendments should be made to the proposed order;

NOW THEREFORE, the Commission having formed the view that in order for arbitration to occur to resolve the matters in dispute, and pursuant to the powers conferred on it under the Act, in particular s.44(6)(ba)(ii), hereby orders:

1. THAT on an interim basis the respondent continue to employ Mr Kieran Neal on a full-time basis under his existing terms and conditions of employment undertaking meaningful and appropriate duties which may include TAB duties and assisting with electronic gaming functions pending the outcome of arbitration in relation to this matter.
2. THAT Mr Neal shall remain undertaking these duties until the Commission hears and determines the issues in dispute relating to the following—
   a) If the Electronic Gaming Assistant position offered to Mr Neal and accepted by him remains available and is to be performed by Mr Neal, the terms and conditions of employment that should apply to the duties of this position.
   b) Whether or not Mr Neal is owed wages for the hours that he has been fit to work but has not been offered work by the respondent.
3) The terms and conditions in Clause 17. – Meal and Rest Breaks of the Burswood International Resort Casino Employees Award 2002 No A4 of 2003 applicable to a Croupier/Dealer shall not apply to Mr Neal whilst performing duties other than those of a Croupier/Dealer.
4) Nothing in this order prevents the respondent from dismissing Mr Neal for misconduct.
5) A liberty to apply is reserved to the parties in the event of changed circumstances."

There were no reasons for decision separate from the recitals to the order given by the Commission.

GROUNDS OF APPEAL

4 It is against that decision that Burswood now appeals on the following grounds, as amended (see pages 2-4 (AB)):-

"1. The Commissioner erred in law in making the order on 18 September 2003 [2003 WAIRC 09414] ("the Second Order") when that order is, in substance, an order having the same effect as the order made by the Commissioner on 4 August 2003 [2003 WAIRC 08920] ("the First Order") that was quashed on appeal by the Full Bench on 15 September 2003 [2003 WAIRC 09372] ("the Appeal").

Particulars

(a) The First Order obliged the Appellant to re-deploy Mr Kieran Neal forthwith to the position of *Electronic Gaming Assistant*. Mr Neal is employed as a Croupier/Dealer but is not fit to fully perform that work due to a work related injury.

(b) There is no position of an *Electronic Gaming Assistant* in the Appellant's business.

(c) The Second Order obliges that on an interim basis the Appellant continue to employ Mr Kieran Neal on a full-time basis under his existing terms and conditions of employment undertaking meaningful and appropriate duties which may include TAB duties and assisting with electronic gaining functions pending the outcome of arbitration in relation to the matter.

(d) The said "TAB duties and assisting with electronic gaining functions" are the same duties as those previously identified for the proposed *Electronic Gaming Assistant* position.

2. The Commissioner erred in law in making the Second Order pursuant to section 44(6)(ba)(ii) of the *Industrial Relations Act 1979* (WA) ("the Act") without making a finding that the order enabled conciliation or arbitration of the matters in question and, therefore, the order was made without power.

Particulars

(a) The preamble to the Second Order records the Commissioner formed an opinion that an interim order was necessary to deal with Mr Neal's employment status pending the hearing and determination of the matters in dispute.

(b) The Second Order does not affect Mr Neal's employment status.

(c) The Second Order interferes with the *status quo* that was re-established by the Full Bench in the Appeal.

(d) The making of the Second Order does not advance the matters in dispute and those matters can be arbitrated without the Second Order.

(e) There was no evidence to support a finding nor is it apparent how the Second Order would enable conciliation or arbitration to resolve the matters in dispute.

4. The Commissioner erred in law by failing to give any reasons for decision as required by section 35 of the Act. In the alternative, the reasons for decision contained in the preamble to the Second Order are so manifestly inadequate as to constitute a failure by the Commissioner to properly exercise the Commission's jurisdiction.

5. Such other grounds as the Commission deems just.

Public Interest

6. The appeal raises matters that are of such importance that a Full Bench can form an opinion that, in the public interest, an appeal should lie.

Particulars

(a) The Second Order is an order that, in substance, has the same effect as the First Order quashed on appeal by the Full Bench.

(b) The question of the Commission's power to require an employer to create a position that meets the abilities of an employee was directly raised in the Appeal and the Full Bench has determined its reasons for decision will issue at a future date. The Commissioner was required to await those reasons for decision.

(c) The Second Order is not connected to enabling conciliation or arbitration of the matters in question and, therefore, was made without power.

(d) The Commissioner failed to comply with the requirement of section 35 of the Act to give any reasons, or adequate reasons, for decision.

Order Sought on Appeal

7. The Appellant says the Second Order made by the Commissioner should be quashed."

(Ground 3 was withdrawn, so I have deleted it from the grounds of appeal reproduced above).

BACKGROUND

5 Mr Kieran Neal is and was, at all material times, employed at Burswood's casino premises in Perth. He was and is a member of the respondent organisation which is a party to this appeal and which was the applicant in proceedings at first instance. The history prior to the first order being made of this matter is set out in detail in this Commission in *Burswood Resort (Management) Ltd v ALHMWU* (2003) 83 WAIG 3314 (FB) ("the first appeal"). The history of this matter, including the full factual background to the matter, insofar as it relates to Mr Neal and the actions of Burswood, and to the previous proceedings and conferences, appear in detail in those reasons for decision.

6 He had been employed as a croupier/dealer, but became unfit to perform the duties of a croupier/dealer because of an injury for which he received workers compensation. There was a likelihood that he might be dismissed.

7 As a result, the respondent organisation, the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch, made application in matter No CR 101 of 2003, filed in this Commission on 26 May 2003 (see pages 6-7 (AB)), for a compulsory conference in the Commission pursuant to s44 of *the Act*. The main issue in the matter was the threat of Mr Neal's dismissal. There were a number of conferences held in the Commission involving the parties and the Commissioner at first instance issued a decision in the form of an order (see pages 18-19 (AB)) dated 4 August 2003 (hereinafter called "the first order"), the order appealed against and quashed in *Burswood Resort (Management) Ltd v ALHMWU* (FB) (op cit). By that order, the Commissioner, purporting to act pursuant to s44(6) of *the Act,* ordered as follows:-

> "WHEREAS on 26 May 2003 the applicant applied to the Commission for a conference pursuant to Section 44 of the *Industrial Relations Act 1979* ("the Act"); and
>
> WHEREAS on 10 June 2003 the Commission convened a conference for the purpose of conciliating between the parties in relation to Mr Kieran Neal, a member of the applicant union, and the parties undertook to negotiate about the issues; and
>
> WHEREAS a report back conference was held on 16 July 2003 and the Commission was advised that the issues in dispute remained unresolved and the parties undertook to hold further discussions; and
>
> WHEREAS a report back conference was held on 31 July 2003 and the Commission was informed that the applicant and the respondent remained in dispute in relation to the terms and conditions of employment being offered to Mr Neal and back pay owing to Mr Neal, and at the conference Mr Neal was advised that if he did not accept the respondent's offer of alternative employment that he would be terminated; and
>
> WHEREAS a further conference was convened for 1 August 2003 to hear from the parties in relation to whether or not the issues in dispute should be set down for hearing and determination and having heard from the parties the Commission formed the view that in the circumstances the issues in dispute should be set down for hearing and determination and that Mr Neal should be redeployed to the position of Electronic Gaming Assistant;
>
> NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, and in particular s.44(6)(ba)(ii), hereby orders:
>
> 1. THAT Burswood Resort (Management) Ltd redeploy Mr Kieran Neal forthwith to the full-time position of Electronic Gaming Assistant under the terms and conditions as detailed in correspondence from Ms Kathleen Drimatis to the applicant dated 23 June 2003.
> 2. THAT Mr Neal shall remain employed in this position under these terms and conditions whilst the Commission hears and determines the following—
>
> a) Whether or not Mr Neal is owed wages for the hours that he has been fit to work but has not been offered work by the respondent.
>
> b) The terms and conditions of employment that should apply to the work that Mr Neal is undertaking in his role as an Electronic Gaming Assistant."

8 Burswood appealed against that order, as I have said. That order was quashed by the Full Bench by order dated 15 September 2003, the appeal having been upheld. The reasons for decision of the Full Bench for so finding issued on 2 October 2003 (see *Burswood Resort (Management) Ltd v ALHMWU* (FB) (op cit)).

9 The application at first instance had been listed for hearing and determination on 18 September 2003. The matter was then listed for a further conference by the Commissioner on 17 September 2003, after the issuing of the order of the Full Bench quashing the order of the Commissioner dated 4 August 2003 (the first order). At the conference, Burswood sought a similar order or the same order to that appealed against in the first appeal (the first order).

10 For Burswood, it was then submitted to the Commissioner at first instance that the matter should be adjourned until reasons for decision were issued by the Full Bench. The Commissioner, at the end of the conference, provided the parties with a draft of the revised schedule to the memorandum of matters for determination.

11 At the conference of 17 September 2003, which was convened urgently, the parties informed the Commissioner that Mr Neal was not being used in any work by Burswood or being paid any wages.

12 On 18 September 2003, the next day, the Commissioner made the further order ("the second order") reproduced above, which is the subject of this appeal. This order, it was submitted, wrongly provides again that Burswood's offer to Mr Neal of a position of electronic gaming assistant was accepted by him and that the only matter in dispute was the terms and conditions which might apply to that position.

13 It was submitted that this was in accordance with the finding of the Full Bench in *Burswood Resort (Management) v ALHMWU* (FB) (op cit), paragraph 32.

14 On 18 September 2003, after a speaking to the minutes, the second order, the order appealed against in this appeal, was issued and the hearing of application No CR 101 of 2003 was adjourned.

15 On 19 September 2003, the notice of appeal, which is the appeal herein, was filed in the Commission.

16 On 22 September 2003, Burswood objected to the hearing of application No CR 101 of 2003 by the Commission as currently constituted at that time.

17 On 2 October 2003, the reasons for the decision of the Full Bench in appeal No FBA 19 of 2003 (*Burswood Resort (Management) v ALHMWU* (FB) (op cit)) issued.

18 On 6 October 2003, application No CR 101 of 2003 was reallocated to a differently constituted Commission, that is one constituted by another single Commissioner, and listed for hearing and determination on 23 October 2003.

19 It is now over five months since the application at first instance was made.

ISSUES AND CONCLUSIONS

20 It is necessary to consider the order constituting the decision of the Commissioner at first instance and appealed against in this matter, including the recitals which purport to contain the reasons for that decision (see pages 8-11 (AB)).

21 I propose to make a number of observations.

22 The recitals recite the history of the matter with reference to the number of conferences held, of which there have been to date and to the knowledge of the Full Bench, seven.

23 The decision also recites as findings the facts which were not in dispute before us and already generally found as facts by the Full Bench on the first appeal, including the findings that Mr Neal was an employee of Burswood as a croupier/dealer, and that from November 2000 to December 2002 he was unable to perform his duties as a croupier/dealer due to a work related injury. It is also the case that he is still unable to perform those duties, or at least all of the duties of a croupier/dealer. No one has said otherwise.

24 The Commissioner at first instance also found that Burswood endeavoured to place Mr Neal into suitable employment, the Full Bench having previously found that he was prevented from continuing as a croupier/dealer because of his injury.

25 The Commissioner went on to find as a fact, as the recital to the second order also expresses, that Burswood, by letter dated 23 June 2003, offered a position as an electronic gaming assistant to Mr Neal, which he accepted. That finding, as Mr Blyth correctly submitted, was in error, and was contrary to the finding of the Full Bench in the first appeal. We were not taken to any evidence that anything different had occurred since the Full Bench's reasons for decision issued in the first appeal, appeal No FBA 19 of 2003, to justify that finding by the Commissioner. The finding was, therefore, clearly erroneous and could not and cannot be relied upon, the contrary having been found in the first appeal (see *Burswood Resort (Management) v ALHMWU* (FB) (op cit), paragraph 32).

26 The Commissioner was correct in finding (see paragraph (b), page 9 (AB)) that the terms and conditions of employment being offered to Mr Neal in relation to the electronic gaming assistant position, a new position, were in dispute and not accepted. The fact that those conditions were in dispute between the parties meant that the offer of that position had clearly not been accepted, and, in any event, as the Full Bench found on the first appeal, the offer was not accepted before 24 June 2003 by which time it had lapsed because it expressly remained open only to that date.

27 Further, as the Commissioner currently found, (see paragraph (c), page 9 (AB)), and as the evidence of the finding in paragraph (b) provides, that on 31 July 2003, the respondent organisation was advised by Burswood that if Mr Neal did not accept that position which had been created for him on the terms and conditions offered, then his services would be terminated. However, there, was in addition, as was correctly found by the Commissioner at first instance, an undertaking given by Burswood on that date that Mr Neal would not be dismissed without seven days notice having first been given by Burswood of that dismissal. It was not submitted that that is not still the case. Indeed, it is fair to say that the main complaint from the beginning of this matter by the respondent organisation, and what it has sought to prevent occurring, was the dismissal of Mr Neal. That still, one infers, remains the case, and no one has denied that it is the case.

28 There remains a dispute, too, about the arrears of wages alleged not to have been paid to Mr Neal. The Commissioner at first instance correctly held so (paragraph (d), page 9 (AB)).

29 The Commissioner then went on to recite what had been expressed in the first order and the fact and result of the first appeal (see pages 9-10 (AB)), and the fact of further conferences on 3 and 5 September 2003 having occurred.

30 On 17 September 2003, as the order recites, and which was not denied, the Commissioner was informed that Mr Neal was not undertaking work related duties, and was therefore not being paid wages. The Commissioner also referred to the application for an adjournment of the hearing because the Full Bench's reasons in *Burswood Resort (Management) v ALHMWU* (FB) (op cit) had not yet issued. The Commissioner then recited that she had reached the opinion that an interim order was necessary "to deal with Mr Neal's current employment status pending the hearing and determination of the issues in dispute". She also recited that she had formed the opinion that the date for the hearing and determination of the "issues in dispute" should be vacated, "as a result of further discussions of the issues in dispute", but that the hearing should be reconvened as a matter of urgency. There is no further reference to any discussions of matters in dispute, nor to the result of any such discussions if they occurred.

31 The order goes on to say that the Commissioner had formed the opinion that the orders referred to afterwards should be made, in the opinion of the Commissioner. The reasons are expressed as follows:-

> "… that in order for arbitration to occur to resolve the matters in dispute, and pursuant to the powers conferred on it under the Act, in particular s.44(6)(ba)(ii), hereby orders …"

32 That, of course was in addition to the reason already expressed and referred to above as a basis for an interim order, namely that it was necessary to deal with Mr Neal's current employment status pending the hearing and determination of the issues in dispute. Those reasons then purported to found the making of the orders which were made (see pages 10-11 (AB) as expressed above).

33 In particular, there was an order on an interim basis that Burswood continue to employ Mr Neal on a full-time basis under his existing terms and conditions of employment undertaking meaningful and appropriate duties which "may include TAB duties and assisting with electronic gaming functions pending the outcome of arbitration in relation to this matter". The order goes on to prescribe that Mr Neal shall "remain undertaking these duties until the Commission hears and determines the issues in dispute relating to the following".

34 The order then identifies the issues in dispute which are said to relate to:-

> "If the Electronic Gaming Assistant position offered to Mr Neal and accepted by him remains available and is to be performed by Mr Neal, the terms and conditions of employment that should apply to the duties of this position".

35 It is quite clear that that position offered was not accepted by Mr Neal, as I have observed above, and as the Full Bench found in the first appeal (see *Burswood Resort (Management) v ALHMWU* (FB) (op cit), paragraph 32). Paragraph 2(a) of the order is therefore incorrect and erroneous.

36 Whether a question arises as to whether Mr Neal should be redeployed to that or some other position or not and/or what terms and conditions should apply to any such position is, of course, another matter, and, in my opinion, is a question which properly arises and properly describes the dispute in this matter. That is why that error is not fatal to the order.

37 The second question, whether Mr Neal is owed wages, clearly arises and is properly expressed as a matter to be resolved, as are the references to the issues referred to in orders 3, 4 and 5 which were not challenged upon this appeal.

38 I now deal with the grounds of appeal.

Ground 1

39 By this ground, Burswood attacks the decision on the basis that the order of 18 September 2003 has the same effect as the order of 4 August 2003, which was quashed by the Full Bench.

40 The attack on the decision is based on a number of propositions. The first is that the first order obliged Burswood to redeploy Mr Neal forthwith to the position of electronic gaming assistant.

41 It was submitted that Mr Neal is employed as a croupier/dealer but is not fit to fully perform that work which is a matter not in dispute. That, of course, is the case and has been since he was injured. There is, it is said, no such position as an electronic gaming assistant in Burswood's business.

42 It is also submitted that, on an interim basis, the order requires that Burswood should continue to employ Mr Neal on a full-time basis under his existing terms and conditions of employment, undertaking meaningful and appropriate duties which may include TAB duties and assisting with electronic gaming functions, pending the outcome of arbitration in this matter. It is also submitted that "TAB duties and assisting with electronic gaming functions" are the same duties as those previously identified for the proposed electronic gaming assistant position.

43 For the respondent, it was submitted that the order appealed against is not an order having the same effect as the first order.

44 Next, it was submitted that the second order was not the same, in particular, because it does not allocate TAB duties or duties assisting with electronic gaming functions to Mr Neal.

45 Next, it was submitted that this ground was alleged in the earlier appeal and not upheld; further, that the Full Bench cannot deal with the matter without hearing evidence.

46 Next, it was submitted that even if the two orders do have the same effect, then there is no error where the Commission has power to make interim orders.

47 In short, this ground, it was submitted, identifies no error.

48 It should be observed, and I am satisfied, that on a fair reading, the first order, inter alia, ordered the redeployment of Mr Neal forthwith to the full-time position of electronic gaming assistant under the terms and conditions as detailed in the correspondence from Ms Kathleen Drimatis on behalf of Burswood to the respondent dated 23 June 2003.

49 This second order is different. It is clearly an order on an interim basis that Burswood continue to employ Mr Neal on a full-time basis under his existing terms and conditions of employment. Next, and as well, it requires that he undertake meaningful and appropriate duties which may include TAB duties and assisting with electronic gaming functions until arbitration in the matter is completed.

50 Accordingly, that part of the order is not the same at all, in effect. It does not require Mr Neal to be redeployed to the position of electronic gaming assistant or to perform the same duties (or if it does it has not been so established), but merely requires him to occupy, in effect, his current position and to perform duties which may include some duties which are part of the proposed position of electronic gaming assistant. It is noteworthy that even Burswood in its grounds of appeal, (ground 1(a)), only alleges that Mr Neal is not fully fit to perform his duties.

51 It matters not that there is no current electronic gaming assistant position. That is not the position which Mr Neal is ordered to fill by the second order. The duties are not the same.

52 The order does not require Mr Neal to be redeployed to the position of electronic gaming assistant, but to a position on his existing terms and conditions of employment which requires him to perform meaningful duties and to be paid and which deals with the undisputed fact that he was not being paid. When the order was made there was no evidence either that he would be paid. It will be quite clear, too, from my consideration of the terms of the second order that, whilst similar to the first order which was quashed, it has not the same effect and is not defective, for that reason.

53 For the reasons which I have expressed above, it was erroneous to use as a basis for the orders the erroneous finding that the position of croupier/dealer had been accepted by or on behalf of Mr Neal, but that is not fatal to the orders. There is adequate basis in the recitals for the orders made. However, the more general issue of dispute about his remaining in employment and any redeployment of him could and should have been expressed as an issue to be determined upon arbitration, although s26(2) might permit it to be determined if necessary.

54 It is not a redeployment to the position of electronic gaming assistant which is contemplated by the first order, on a fair reading. In any event, I have not heard anything upon this appeal or on the first appeal which would persuade me that such an order for redeployment would not be competent whether the position currently exists or has to be created for Mr Neal, on a temporary or permanent basis.

55 In any event, the Commission is empowered by virtue of s44(6)(bb) of *the Act* with respect to industrial matters to, inter alia, give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under *the Act*, which in my opinion, includes an interim order which the Commission considers appropriate in the circumstances pending the resolution of the claim.

56 Order 2 is, however, misconceived in that it clearly repeats an error found to exist in the earlier order in that it purports to leave open the question whether the position of electronic gaming assistant offered to him was accepted by Mr Neal when the Full Bench found that it was not so accepted. Accordingly, for those reasons, in my opinion, ground 1 would, but for what I say hereinafter, be made out to that limited extent. However, that has no effect on the validity or correctness of the orders made, and therefore cannot be made out as a ground of appeal. In any event, and cogently, the order in that respect is simply not challenged on appeal in ground 1 or elsewhere. Ground 1 is not made out.

Ground 2 – Is the Order Beyond Power?

57 The complaint in this ground was that the order which was made was made beyond power because the order was made pursuant to s44(6)(ba)(ii) of *the Act* without making a finding that the order enabled arbitration or conciliation of the matter in question. It was submitted for Burswood that the recital to the second order records that the Commissioner at first instance formed an opinion that an interim order was necessary to deal with Mr Neal's employment status pending the hearing and determination of the matters in dispute.

58 It was also submitted that the order does not affect Mr Neal's employment status because Mr Neal remains as a full-time croupier but is unfit to perform that work.

59 That was slightly different from the earlier submission in the matter that he was not fully unfit to perform that work, or all of it. This order, it was submitted, too, interferes with the status quo established by the Full Bench in the first appeal.

60 The making of the order does not advance the matters in dispute and those matters can be arbitrated without the second order, so the submission went. The order in short, it was submitted, does not enable conciliation and arbitration. For the respondent, it was submitted that Burswood seeks to deprive a full-time employee of wages whilst the dispute squarely concerning that employee's wages is determined. Thus, the order clearly affects Mr Neal's employment. In making the order, so the submission went, Mr Neal was not currently undertaking work related duties and therefore not receiving wages, so that a further adjournment of the matter was necessary at the request of Burswood. Thus, an interim order was necessary to deal with Mr Neal's current employment status, and interim orders were also required to be made in order for arbitration to occur to resolve the matters in dispute.

61 It was submitted that it was clear from the terms of the order, including the recital, that the order made was necessary to enable arbitration of the matters in question, and it was therefore made within power. It was also submitted that this order was distinguishable from the first order, and therefore the criticism of the first order by the Full Bench, in paragraph 5 of its reasons, to the effect that:-

(a) The first orders were not expressed to prevent the deterioration of industrial relations

(b) Those orders were not expressed to enable conciliation or arbitration

(c) The orders purported to finally resolve the matter—

did not apply.

62 This order can be distinguished, it was submitted, because it was clearly an interim order for a limited purpose. Accordingly, it was submitted, ground 2(d) and (e), arguing that the order does not advance the matters in dispute, that the matters can be arbitrated without the order and that there was no evidence to support a finding that the order would enable arbitration to resolve the matters in dispute, were without merit. That submission went further. It was the submission too, that Mr Neal's employment should continue whilst the matter is determined and that the fact that he is being employed without being provided work and/or paid wages, makes his employment meaningless. For this reason, ground 2(d) and (e) are not made out, it was submitted.

63 There has also, it has been submitted, been a delay of five months with this matter which means Mr Neal has not been paid for five months and that is a clear deterioration in industrial relations.

64 Burswood's reference to the status quo, it was submitted, has no merit therefore. In my opinion, the reasons for making the order were not confined to s44(6)(ba)(ii) of *the Act*. The Commissioner at first instance expressed itself in this way (see page 10 (AB)):-

> "NOW THEREFORE, the Commission having formed the view that in order for arbitration to occur to resolve the matters in dispute, and pursuant to the powers conferred on it under the Act, in particular s.44(6)(ba)(ii), hereby orders:"

65 As I have said above, the reasons for making the order were clearly expressed. They were clearly expressed to be for the purposes of enabling arbitration to occur and to deal with the question of Mr Neal's employment. After all, the real jeopardy to his continued employment and the fact that he was not being paid are central matters in this dispute. The order is within power pursuant to s44(6)(ba)(ii) of *the Act*, for that reason.

66 Translated in terms of s44 of *the Act*, the Commissioner at first instance did not limit her opinion of the necessity for the order to the powers conferred by s44(6)(ba)(ii). She based her opinion on the whole of s44. The power conferred by s44(6)(ba) was considered by the Full Bench in *Burswood Resort (Management) v ALHMWU* (FB) (op cit) at pages 3317-3318 in a unanimous decision, and the cases cited therein also apply.

67 First, even though she did not express it, and, for the sake of prudence she should have, the power was plainly used for the purpose of preventing the deterioration of industrial relations. I say that because not only was there the on-going threat of dismissal of Mr Neal, but there were the allegations of failure to pay him and allegations that he was no longer employed with the matter having at that stage dragged on for five months.

68 The inference available from those reasons, which were expressed, having regard to the invocation and the powers available generally under s44, is quite clear, and I deal with it in a moment.

69 S44(6)(bb)(i) of *the Act* was invoked by implication. In any event, s44(6)(bb) provides that the Commission may "with respect to industrial matters":-

> "(i) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act;"

70 In other words, s44(6)(bb) does not confer a narrow power which merely enables the making of procedural orders. In particular, s44(6)(ba)(ii) of *the Act*, which confers the power to make orders pending arbitration does not either. To so interpret s44(6)(ba)(ii) would be inconsonant with *the Act* read as a whole, and, in particular, s6(ag), (b) and (c) of *the Act*. In other words, the power conferred by s44(6)(ba)(ii) to make orders which will, in the opinion of the Commission, enable conciliation or arbitration to resolve the matter in question, is not confined to mere procedural orders, but to orders which are capable, for example, of preserving the status quo. Further, s44(6)(bb) enables the making of orders to preserve the status quo (see *SSTUWA v Honourable Minister for Education* (1990) 70 WAIG 21 at 27 per Sharkey P, Salmon and Kennedy CC).

71 Next, of course, by having recourse to the whole of the section, and having regard to the first reason expressed for making the order, namely to deal with Mr Neal's current employment status pending the hearing and determination of the matters in dispute, the Commissioner, inter alia, and by implication, also invoked s44(6)(bb)(i), which provides as I have expressed it above that the Commission has power, inter alia, to give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under *the Act*. That confers a power unlimited, except by the four corners of *the Act* and enables the Commission at or in relation to any conference under s44 to make such wide orders. Quite clearly, the orders made were within that power ((ie) they purported to deal with the questions of employment which were required to be dealt with there and then as matters of equity, good conscience and the substantial merits of the case) (see s26(1)(a) of *the Act*).

72 It is to be noted, too, that this wide power has its genesis in s44(6) which empowers the Commission to make s44(6)(a), (b), (ba) and (bb) orders without limiting its power to "make such suggestions and give such directions as it considers appropriate". Given the context of s44(6) and its reference to orders, the word "directions" in the second line of s44(6) should be read to include "orders", reading s44(6) as a whole. Cogently, too, the second orders are different from the first because they are short term and "interim" only.

73 For all of those reasons, the exercise of the power, although based upon a factual error which ought to be corrected, was entirely competent and was entirely competent, notwithstanding the factual error, namely the finding that the position of electronic gaming assistant had been offered and accepted when it had not. Ground 2 is not made out.

Ground 4

74 It is submitted that the Commissioner at first instance erred in law in failing to provide reasons for decision as required by s35 of *the Act*. The submission was that s35 imposes a mandatory duty to provide reasons for decision and that such a duty applies to an order made under s44 of *the Act* (see *AMWSU and Others v RRIA* (1989) 69 WAIG 990).

75 The recitals may satisfy that obligation providing that they enable a court on review to consider whether or a not an error of law has been made.

76 A substantial failure to state reasons for decision constitutes an error of law (see *Ruane v Woodside Offshore Petroleum Pty Ltd* (1990) 71 WAIG 913 (FB)).

77 It was submitted that, if the reasons for decision are the words contained in the preamble to the order, they are so manifestly inadequate as to constitute a failure by the Commission to properly exercise the Commission's jurisdiction. For the respondent, it was submitted that the reasons are contained in the recitals and that they adequately explain why the order was made in principle. The Commissioner set out the relevant law and the facts in considerable detail as well as the reasoning and the processes of reasoning.

78 Thus, it was submitted, it is clear from the reasoning of the Commissioner and on a fair reading that the reasons for the orders were as follows:-

a) To deal with Mr Neal's current employment status in the interim.

b) To permit a further adjournment of the hearing.

c) To enable arbitration to occur to resolve the matters in dispute.

And for the reasons otherwise expressed above.

79 The reasoning process in this matter, too, it was submitted, is vastly different from the reasoning in the first order. Therefore, it was submitted, adequate reasons were given.

80 In my opinion, the recital states clearly and sufficiently the reasoning process for the making of the order, and that will be clear from my analysis of the reasons for the making of the orders expressed as recitals to the order and the exercise of the power generally, above. That ground is not made out.

Ground 5

81 There is no allegation in ground 5 which can be at all dealt with. It contains no allegation of error. The ground is embarrassing and should be struck out.

Public Interest

82 Ground 6 is the ground by which it is alleged that the appeal raises matters which are of such importance that in the public interest an appeal should lie. By s49(2a) of *the Act* an appeal against a finding, as defined, cannot lie unless the Full Bench forms that opinion.

83 The submissions in support of that ground are as follows.

84 The second order is an order which is in substance the same as the first which was found to be defective. Thus, implicitly, as I understand that argument, it follows that similar errors should, as a matter of principle, be corrected.

85 The question of the Commission's power to require an employer to create a position that meets the abilities of an employee was directly raised in the first appeal and the Full Bench had determined that its reasons for decision would issue at a future date, it was submitted.

86 It was also submitted that the second order is beyond power in that it is not connected to enabling conciliation or arbitration of the matters in question and therefore was made without power. I have already answered that above. Further, it was submitted that the Commissioner at first instance failed to comply with the requirements of s35 of *the Act* to give reasons or adequate reasons for the decision. I have already answered that above. For the respondent, it was submitted, too, that there was no question of such importance that in the public interest the appeal should lie (see *RRIA v AMWSU and Others* (1989) 69 WAIG 1873 at 1878-1879 (FB)).

87 It was submitted that the point in ground 6(b) had been decided in the first appeal, and that to permit an appeal further on that same point was contrary to public interest; nor, so the submission went, is it in the public interest that an appeal should lie against the interim order made on these facts.

88 It was also submitted that there is nothing in the legislation which prevents the Commission from taking any further interim action until the Full Bench's reasons for decision issued. The factual circumstances before the Commissioner had changed. In particular, there was no public interest either in grounds 6(c) or (d).

89 It should be remembered that pursuant s49(2a) of *the Act* an appeal lies, only if in the opinion of the Full Bench, the matter is of such importance that the appeal should lie.

90 The opinion therefore required to be formed is an opinion that the matter is of sufficient importance that in the public interest the appeal should lie. It cannot be of public interest if the matter is of no or insufficient importance. In this case, first, there was insufficient merit in the appeal. Second, even if the Commission acts beyond power in making interim orders purporting to lie under s44 of *the Act*, the alleged error being an error that does not affect the final disposition of the matter but in fact delays it, may for that latter reason render the appeal of insufficient importance, having particular regard to s6(c) and s26(1)(c) and (d) of *the Act*. Further, I do not agree that a mere allegation that the Commission is acting beyond power under s44(6) is at all evidence that the matter is of such importance that in the public interest an appeal should lie in the opinion of the Full Bench.

91 The question of importance may not be such that it should be allowed to prevent the prompt disposition of the matter. In this case, the question which arises for determination is not new. In any event, the importance of the matter is not confined to the actual question which arises on appeal. Importance may be determined by reference to other factors such as s6(c), s26(1)(c), s26(1)(d) and s26(1)(a) of *the Act*.

92 Importance is not restricted to the question of law before the Commission or the question of power exercised. To say otherwise would be to interpret s49(2a) of *the Act* in a restrictive manner and not at all as I read it to be intended to be expressed and operate. Indeed, s49(2a), inter alia, in my opinion, exists to prevent premature and unnecessary appeals which might inhibit or delay the resolution of disputes by conciliation and/or arbitration. In this case, the public interest duly requires that a dispute which has been protracted for five months should be resolved. Then, if there are remedies available upon appeal on the substance of the matter then the matter can be resolved as a whole. The importance in this matter lies not in this appeal, but in the need to have it determined on the merits as soon as possible. Indeed, s26(1)(c) and (d) of *the Act* require it and s6 of *the Act*, in the relevant parts to which I have referred above, points a signpost to that occurring.

93 I would also add what a unanimous Full Bench said in *RRIA v AMWSU and Others* (FB) (op cit) at pages 1878-1879, which in its general import supports the view which I take:-

> "Firstly, let us observe that section 32 and section 44 powers have been extensively explored by the Full Bench and the Industrial Appeal Court in recent times, and, in particularly, in relation to application A4 of 1987 (see for example a number of the authorities to which we were referred and those referred to herein).
>
> The importance of this appeal in the public interest is therefore slight in the context of the delineation and definition of powers under those sanctions (sic), because of the substantial consideration by the Full Bench, and more particularly, the Industrial Appeal Court of section 32 and section 44 and the powers thereunder.
>
> Further, as far as importance alone is concerned, because of those decisions, all of which were cited to us, the importance of this appeal is not great. This is merely another of at least three appeals relating to orders made along the path, or on parallel paths, to the determination of A4 of 1987. It is fair, indeed, to say that it is more, in the public interest, that findings related to A4 of 1987 matters not be appealed against unless there is clear importance as matters of principle, or otherwise, attachable to them."

94 Further, this appeal has resulted in this matter being delayed in the final disposition when it has already been inordinately delayed, and indeed has been listed twice for arbitration, without that proceeding. It is not in the interests of the community, s26(1)(d), or the parties (see s26(1)(c)), that this matter is further delayed. In any event, if there were an error and it still required to be corrected, then it could be corrected on any appeal brought at the end of the matter without the barrier of s49(2a), against the final decision.

95 In this matter, also, I would add further, for the reasons which I have expressed, that the appeal lacks merit and that is another reason why the appeal should not lie.

96 For those reasons, I did not form the requisite opinion that in the public interest an appeal should lie. I hold that the appeal should not lie. I would dismiss the appeal for that reason alone.

Finally

97 The appeal should not lie within the meaning of s49(2a) of *the Act*. The appeal should be dismissed, even if that finding were wrong.

98 For all of those reasons, I would dismiss the appeal.

COMMISSIONER P E SCOTT—

99 I have had the benefit of reading the Reasons for Decision of His Honour, the President which set out the background to this matter and the grounds of appeal.

Ground 1

100 In respect of ground no. 1, I respectfully agree with His Honour that this ground is not made out. I note that the second order i.e. the order of 18 September 2003 does not suffer from the same deficiencies as the first order, the order of 4 August 2003. Order no. 2(a) of the second order contains an error for the reasons noted by His Honour but that error is of no real effect in the circumstances. I would dismiss ground no. 1.

Ground 2

101 As to the second ground of appeal, the recitals to the second order set out the background to the matter, and the Commissioner's decision. One particular recital and the preamble to the orders set out the reasons therefore as—

> "AND WHEREAS the Commission is of the opinion that an interim order is necessary to deal with Mr Neal's current employment status pending the hearing and determination of the issues in dispute and that the hearing set down for 18 September 2003 be vacated as a result of further discussions of the issues in dispute and that the hearing should be re-convened as a matter of urgency;
>
> …
>
> NOW THEREFORE, the Commission having formed the view that in order for arbitration to occur to resolve the matters in dispute, and pursuant to the powers conferred on it under the Act, in particular s.44(6)(ba)(ii), hereby orders:
>
> 1. THAT on an interim basis the respondent continue to employ Mr Kieran Neal on a full-time basis under his existing terms and conditions of employment undertaking meaningful and appropriate duties which may include TAB duties and assisting with electronic gaming functions pending the outcome of arbitration in relation to this matter.
> 2. THAT Mr Neal shall remain undertaking these duties until the Commission hears and determines the issues in dispute relating to the following—
>   a) If the Electronic Gaming Assistant position offered to Mr Neal and accepted by him remains available and is to be performed by Mr Neal, the terms and conditions of employment that should apply to the duties of this position.
>   b) Whether or not Mr Neal is owed wages for the hours that he has been fit to work but has not been offered work by the respondent.
> 3) The terms and conditions in Clause 17. – Meal and Rest Breaks of the Burswood International Resort Casino Employees Award 2002 No A4 of 2003 applicable to a Croupier/Dealer shall not apply to Mr Neal whilst performing duties other than those of a Croupier/Dealer.
> 4) Nothing in this order prevents the respondent from dismissing Mr Neal for misconduct.
> 5) A liberty to apply is reserved to the parties in the event of changed circumstances."

102 Order no. 1 is the substance of the order, and order no. 2 sets out the matter to be heard and determined. Therefore, at 18 September 2003, the matter in dispute involved whether or not Mr Neal was owed wages for the hours he had been fit to work but had not been offered work by the respondent, and the terms and conditions to apply to the work to which he was to be allocated. The orders deal with the employment of Mr Neal on an interim basis pending the hearing and determination of the matters in dispute between the parties and an identification of those issues. As His Honour has noted order no. 2(a) is incorrect but of no consequence. Order 2(b) constitutes the significant aspect of the dispute between the parties, as to whether or not Mr Neal is owed wages for the hours that he has been fit to work but has not been offered work by the respondent. Order no. 1 requires the respondent to actually provide work to Mr Neal not merely to offer him employment.

103 The Commissioner has clearly identified that the power which has been utilised, in particular, is s.44(6)(ba)(ii). That section of the Act provides that—

> "(6) The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may—
>
> …
>
> (ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —
>
> (i) … ;
>
> (ii) enable conciliation or arbitration to resolve the matter in question; or
>
> (iii) … "

104 While the first part of subsection (6) of s.44 gives the Commission power to make suggestions and give such directions as it considers appropriate, and without limiting the generality of such directions, paragraph (ba)(ii) specifically provides for the Commission to give such directions and make such orders as will in the opinion of the Commission *enable* conciliation or arbitration to resolve the matter in question. In this matter, the Commissioner has identified that in particular s.44(6)(ba)(ii) has been utilised. The key is whether the order will enable arbitration to resolve the dispute. Enable is defined as—

> **"enable** *verb (t)* **1.** to make able; give power, means or ability to; make competent; authorise: *this will enable him to do it*. **2.** to make possible or easy. *Macquarie Dictionary*, 3rd ed, 2001, The Macquarie University Library Pty Ltd, Sydney, p.699
>
> **enable** *v* **1.** to invest with legal status. **2.** to empower; to give legal power or licence. **3.** to make able (to be or to do something); to strengthen; to supply with means, opportunities or the like. **4.** to make possible; also to make effective. *The Shorter Oxford University Dictionary*, 3rd ed, 1973, Oxford University Press, London, Vol 1, p.651."

105 An examination of the orders issued does not identify how those orders will *enable* arbitration to resolve the matter in question. The orders seem not to be necessary to enable arbitration. They deal with the merits of the situation and do nothing to make able or provide the means or the ability, or to make competent or authorise arbitration. They do not invest arbitration with legal status nor give legal power or licence in that regard, strengthen or supply with means, opportunity or the like or make arbitration possible or effective. What they do is resolve to some extent, on an interim basis, part of the dispute by requiring the respondent to employ Mr Neal on particular work and thus pay him. I say this on the basis that part of the dispute between the parties includes whether or not he is owed wages for hours that he has been fit to work but not been offered work by the respondent. In that regard it deals with the merits of the situation but does not enable, in this case, arbitration of the matters in dispute. Arbitration can resolve the matter without such an order. Nothing within the order assists in arbitration resolving the matter in dispute. As the recitals and the order indicate that the Commissioner had formed the view that interim orders were necessary to enable arbitration, where those orders do not so enable arbitration, they are without power.

106 One further aspect of the appellant's case is that there was no real jeopardy to Mr Neal's employment. As His Honour notes and as the recitals record, the appellant had given an undertaking to not terminate Mr Neal's employment without 7 days notice. There was no indication that that situation had changed. Accordingly, there was no immediate jeopardy to Mr Neal's employment at the time the order was made such as to warrant the orders at that time. One might imagine that had the respondent given notice of an intention to terminate Mr Neal's employment then some order might have been considered. Rather than simply prevent the termination of employment, the orders require the provision of particular work.

107 I note that s.44(6) also provides in paragraph (ba)(i) that an order can be made or direction given where the Commission is of the opinion that it will "prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter". Whether there was deterioration in industrial relations or whether an order was necessary to prevent such deterioration is not a matter addressed by the Commissioner at first instance. The Commissioner relied on the power in 44(6)(ba)(ii). The Commissioner did not say that the order was issued to prevent the deterioration of industrial relations and accordingly it is not appropriate to assume what power she intended to use in the absence of her express intention, and where a different intention is specifically referred to.

108 I would uphold ground no. 2.

Ground 4

109 Ground no. 4 argues that the Commissioner erred by failing to give reasons for decision as required by s.35. The context in which an order is issued from a conference convened pursuant to s.44 is relevant in considering whether, and to what extent, reasons are given. That context is that conferences are relatively informal, interim orders are usually necessary at short notice, and, accordingly, there is little time, or perhaps necessity, for lengthy and detailed reasons. The recitals to the order provide an opportunity for the Commission to meet the obligation to provide reasons, albeit brief ones. Those recitals should still convey the reasons why the order is issued, not merely that a decision has been made to issue the order.

110 As noted, the Commissioner had reached the conclusion which she identified i.e. that an interim order was necessary to deal with Mr Neal's current employment status pending hearing and determination, and in order for arbitration to occur to resolve the dispute. However, she does not indicate why she reached those conclusions.

111 I think it can be fairly said that the recitals in this case enable the reader to discern that the Commissioner believed that as Mr Neal was no longer undertaking duties and therefore not receiving wages that it was appropriate to require the respondent to provide him with work, and thus he would be entitled to payment, pending hearing and determination of the matter. I am unable to discern though how that justified the use of s.44(b)(ba)(ii), i.e. to enable arbitration. In this context while the recitals enable a conclusion that reasons have been given, those reasons do not correlate with the power utilised. I would uphold this ground of appeal on the basis that the reasons given are inadequate to explain the reasons for the orders made.

Ground 5

112 I agree with His Honour the President as to this ground.

Ground 6 – Public Interest

113 As to the issue of public interest, it is a matter of importance that orders of the Commission are issued within power and that reasons for decision in respect of those orders identify the justification for those orders. It seems that the appeal itself may have little practical effect given that the prospect is that the dispute will be determined in the near future if it has not already been determined. However, it is still a matter of significance that the Commission should not be seen to and should not issue orders beyond power. The Commission should not be able to issue orders beyond power without the prospect of those orders being subject to appeal merely because they are interim. I would find that the matter is of sufficient public interest that an appeal should lie.

COMMISSIONER J H SMITH—

114 The grounds of appeal and the full text of the orders made by the Commission on 4 August 2003 ("first order") and 15 September 2003 ("second order") are set out in the President's reasons for decision.

115 Having considered the appellant's grounds of appeal and the submissions made on behalf of both parties I am of the view that the appeal should be dismissed.

Ground 1

116 In Ground 1, the appellant argues that the Commissioner erred in law in making the second order as the second order has the same effect as the first order which was quashed on appeal by the Full Bench on 15 September 2003.

117 The relevant part of the first order was expressed to have been made under s 44(6)(ba)(ii) of the *Industrial Relations Act 1979* ("the Act") as follows—

> "1. THAT Burswood Resort (Management) Ltd redeploy Mr Kieran Neal forthwith to the full-time position of Electronic Gaming Assistant under the terms and conditions as detailed in correspondence from Ms Kathleen Drimatis to the applicant dated 23 June 2003."

118 The second order is also expressed to have been made under s 44(6)(ba)(ii) of the Act as follows—

> "1. THAT on an interim basis the respondent continue to employ Mr Kieran Neal on a full-time basis under his existing terms and conditions of employment undertaking meaningful and appropriate duties which may include TAB duties and assisting with electronic gaming functions pending the outcome of arbitration in relation to this matter."

119 Section 44(6)(ba) provides—

> "(6) The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may —
>
> (ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —
>
> (i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter;
>
> (ii) enable conciliation or arbitration to resolve the matter in question; or
>
> (iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question;"

120 The Full Bench decision in *Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch* (2003) 83 WAIG 3314 ("the first Full Bench decision") in unanimous reasons held the first order was without power and was invalid because there was nothing in the order or recitals, express or implied, which would establish that the order was made because of the requisite opinion founded on s 44(6)(ba) or that the power was validly exercised to and within the prescription of s 44(6)(ba).

121 In particular the Full Bench found—

(a) there was no declaration or assertion or expression that the orders were made for the purposes set out in s 44(6)(ba)(i) or (ii);

(b) the first order was not temporary or interim but purported to finally determine a matter not agreed, that is the Commission purported to order a redeployment in employment when the question of any employment in the future by Burswood was entirely part of and the essence of the matter in dispute.

122 Following a number of conferences the issues in dispute were defined in paragraph 2. of the second order in the following terms as relating to the following—

> "a) If the Electronic Gaming Assistant position offered to Mr Neal and accepted by him remains available and is to be performed by Mr Neal, the terms and conditions of employment that should apply to the duties of this position.
>
> b) Whether or not Mr Neal is owed wages for the hours that he has been fit to work but has not been offered work by the respondent."

123 The appellant says that Mr Neal did not accept the position and that such a finding is contrary to findings made by the first Full Bench decision. Whilst this was a submission made on behalf of the appellant a challenge to that finding is not raised in the grounds of appeal. This submission was made by the appellant in the course of setting out the background to the appeal and in support of a submission that the Commissioner erred in setting down for hearing "the issues in dispute relating to the following: a) If the Electronic Gaming Assistant position offered to Mr Neal and accepted by him remains available" in paragraph 2. of the second order (see paragraph 14. of the appellant's submissions and page 13 of the transcript). This submission in my view raises a different issue to matters raised in Ground 1 of the appeal. In any event the use of the words "accepted by him" by the Commissioner in paragraph 2. of the second order do not appear to be used in the context of a conclusive opinion that a formal acceptance of the appellant's/respondent's offer was effective at law so as to form a binding contract because the Commissioner in paragraphs b) and c) of the fourth "AND WHEREAS" in the preamble of the second order found—

> "AND WHEREAS at the conferences held on 10 June 2003, 16 July 2003 and 31 July 2003 the Commission was informed that—
>
> b) On 23 June 2003 the respondent offered Mr Neal a position of Electronic Gaming Assistant and Mr Neal accepted this position however, the applicant and the respondent were in dispute about the terms and conditions of employment being offered to Mr Neal in relation to this position.
>
> c) On 31 July 2003 the applicant was advised by the respondent that if Mr Neal did not accept the Electronic Gaming Assistant position which had been created by the respondent and offered to Mr Neal on the respondent's terms and conditions then his services would be terminated and that the respondent would not take such action without giving seven days notice of its intention to terminate Mr Neal."

124 The conclusion that one can only reach when paragraphs b) and c) are read is that there was no acceptance at law of the respondent's offer.

125 The terms of paragraph 1. of the second order is clearly a temporary or interim order and is not an order to redeploy Mr Neal to the position of Electronic Gaming Assistant. The nature of an order to "redeploy" often carries with it not only a change in

employment duties but also a change in conditions of employment, such as changes in title and wages or salary. The terms of the second order are different. But for the terms of the first order (which was quashed) at all material times Mr Neal was employed as a croupier/dealer. The terms of paragraph 1. of the second order are clear—

(a) Mr Neal is to be provided with duties other than croupier/dealer, the type of duties are restricted only by the qualification that they are meaningful and appropriate but may include TAB duties and assisting with electronic gaming functions.

(b) Except for the application of Clause 17 – Meal and Rest Breaks of the Burswood International Resort Casino Award 2002 Mr Neal is to be paid and is entitled to the same conditions of employment as if he is only provided with full-time croupier/dealer work.

(c) The order is temporary or interim in nature and will cease to have effect once arbitration of the issues in dispute is complete.

(d) The second order is expressed to be pursuant to s 44(6)(ba)(ii) and that the Commission had formed the view that the order should be made in order for arbitration to occur.

126 Consequently the second order is in terms different in substance and form to the terms of the first order and Ground 1 fails.

Ground 2

127 The appellant contends in Ground 2 that the Commissioner erred in law in making the second order in that she failed to make a finding that the second order enabled conciliation or arbitration of the matters in question, and therefore the order was made without power. In support of its argument it is contended—

(a) The Commissioner erred in law by making an order pursuant to section 44(6)(ba)(ii) when the second order does not enable conciliation or arbitration and no relevant finding was made.

(b) The preamble to the second order records only that the Commissioner formed an opinion that an interim order was necessary to deal with Mr Neal's employment status pending the hearing and determination of the matters in dispute.

(c) The second order does not affect Mr Neal's employment status. Mr Neal remains as a full-time croupier but is unfit to perform that work.

(d) The making of the second order does not advance the matters in dispute and those matters can be arbitrated without the second order.

(e) There was no evidence to support a finding nor is it apparent how the second order would enable conciliation or arbitration to resolve the matters in dispute. The word "enable" means, "make possible": the *Concise Oxford Dictionary (Seventh Edition)*. The matters in dispute can be arbitrated without the second order.

128 The Schedule to the application for a s 44 conference in this matter states—

> "Mr Kieren Neal, a member of the Australian Liquor, Hospitality and Miscellaneous Workers Union ("ALHMWU') is employed by Burswood Resort (Management) Ltd ("BRML"). Mr Neal previously worked as a Croupier, however suffered an injury at work and as a result of that injury was unable to continue in his position as a Croupier. Mr Neal had a workers (sic) compensation claim and that claim was settled. A condition of the settlement was that Mr Neal was not to work in his old role as a Croupier.
>
> Since Mr Neal's return to work at BRML, he has not been provided with any suitable alternative employment. He has not been required to work on a full time basis, despite still being a full time employee.
>
> Mr Neal is a long service employee at Burswood and has worked there in excess of fifteen (15) years. He has numerous financial commitments and, due to Mr Neal not being provided work, he is unable to meet those commitments. Mr Neal has worked one (1) shift in the past 2 ½ weeks and for all intents and purposes, is still a full time employee.
>
> BRML has not found Mr Neal suitable alternative full time employment, despite the efforts of Mr Neal applying for numerous positions of BRML. It is the Union's belief that BRML intends to sack Mr Neal.
>
> The Union seeks the assistance of the Commission in resolving the issues of redeployment of Mr Neal to a suitable position within Burswood, compensate Mr Neal for the hours that he has not been paid for, given he is a full time employee, and ensure Mr Neal is not unfairly dismissed.
>
> …"

129 Prior to making the second order the Commissioner stated—

> "AND WHEREAS on 17 September 2003 the Commission convened an urgent conference and was informed that Mr Neal was no longer undertaking the duties of the position of electronic gaming assistant and that he was currently not undertaking work-related duties and therefore not receiving wages;
>
> AND WHEREAS the respondent sought to adjourn the hearing in relation to the issues in dispute given that the Full Bench had not yet issued its reasons for decision in FBA 19 of 2003;
>
> AND WHEREAS the Commission is of the opinion that an interim order is necessary to deal with Mr Neal's current employment status pending the hearing and determination of the issues in dispute and that the hearing set down for 18 September 2003 be vacated as a result of further discussions of the issues in dispute and that the hearing should be re-convened as a matter of urgency;
>
> AND WHEREAS a Speaking to the Minutes was held on 18 September 2003 in respect to the Minutes of Proposed order that issued on 17 September 2003 and after hearing from the parties the Commission formed the view that amendments should be made to the proposed order;
>
> NOW THEREFORE, the Commission having formed the view that in order for arbitration to occur to resolve the matters in dispute,"

130 By using the words "having formed the view that in order for arbitration to occur to resolve the matters in dispute," it is apparent from the face of the second order that the Commissioner made the second order to "enable arbitration to resolve the matter in question" within the meaning of s 44(6)(ba)(ii). Further in my opinion she clearly reached the requisite opinion that the second order enabled arbitration to resolve the matter in question. The terms of the second order deal only with the position of Mr Neal in the interim until arbitration is complete. The second order records that on 17 September 2003 the Commission was informed that Mr Neal was not undertaking any work-related duties and therefore was not receiving wages. The Union says that without work and wages Mr Neal must seek work elsewhere and to do so would bring the employment relationship to

an end. It follows therefore that without the second order Mr Neal's employment would come to an end so as to render nugatory arbitration of this issue. For this reason ground 2 fails.

Ground 4

131 For the reasons given by the President I agree Ground 4 is not made out. In Ground 4 the appellant contends the Commissioner erred in law by failing to give any reasons for decision as required by s 35 of the Act or alternatively that the reasons given are so manifestly inadequate as to constitute a failure to properly exercise the Commission's jurisdiction.

132 In *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union and ors* (1989) 69 WAIG 990 Nicholson J, with whom Kennedy and Pidgeon JJ agreed, held at 999 that the duty to provide reasons will be satisfied if the reasons given enable a court in review to consider whether no error was made in making the order. In particular he observed—

> "The duty to give reasons must be construed in relation to the proceedings to which the reasons relate. As has been seen, the section 44 conference procedure is one characterised by great informality. The reasons are formulated in a setting in which, in my opinion, there is no obligation to maintain a record and in which the taking of evidence is either inappropriate or unlikely. ... They are not inadequate merely because every process of reasoning is not set out (Mountview [*supra*] at p. 692). The words used are not vague general words which are insufficient to bring to the mind of the reader a clear understanding of why the order was made (c.f. Elliott [*supra*]). It is sufficient that the reasons are brief (c.f. Great Portland Estates, [*supra*])."

133 Whilst the reasons for making the second order are very brief the Union says the following can be distilled from the reasons given by the Commissioner—

(a) that Mr Neal was again not currently undertaking work-related duties and therefore not receiving wages;

(b) that a further adjournment of the arbitration was necessary;

(c) that an interim order was necessary to deal with Mr Neal's current employment status;

(d) that interim orders should be made in order for arbitration to occur to resolve the matters in dispute.

134 I accept the Union's submission, for the reasons set out in relation to Ground 2 it is apparent from the recited reasons that on review the Full Bench is able to ascertain that the second order was within power. Consequently the duty to provide reasons is satisfied as the Commissioner set out sufficient facts upon which to rationally base a decision and the reasoning of that decision is exposed.

Ground 5

135 I agree for the reasons given by the President that Ground 5 should be struck out.

Ground 6

136 I agree for the reasons given by the President that in the public interest the appeal should not lie.

THE PRESIDENT—

137 For those reasons the Full Bench dismissed the appeal.

2003 WAIRC 09964

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BURSWOOD RESORT (MANAGEMENT) LTD, APPELLANT
	- and -
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER P E SCOTT
	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 6 NOVEMBER 2003
FILE NO/S.	FBA 30 OF 2003
CITATION NO.	2003 WAIRC 09964

Decision	Appeal dismissed
Appearances	
Appellant	Mr G Blyth, as agent
Respondent	Ms S Northcott, as agent

Order

This matter having come on for hearing before the Full Bench on the 20th day of October 2003, and having heard Mr G Blyth, as agent, on behalf of the appellant, and Ms S Northcott, Industrial Officer, on behalf of the respondent organisation, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 6th day of November 2003, it is this day, the 6th day of November 2003 ordered that appeal No. FBA 30 of 2003 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

FULL BENCH—Procedural Directions and Orders—

2003 WAIRC 09838

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	IDA MARY CURTOIS, APPELLANT
	- and -
	WONTHELLA HOUSE INC, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 24 OCTOBER 2003
FILE NO/S.	FBA 12 OF 2003
CITATION NO.	2003 WAIRC 09838

Decision	Appeal dismissed by consent
Appearances	
Appellant	Mr D Armstrong (of Counsel)
Respondent	Mr E Rea, as agent

Order

This appeal having been listed for hearing before the Full Bench on the 24th day of October 2003, and the parties herein, on the 22nd day of October 2003, having filed in the Commission a minute of proposed consent orders signed by the parties herein, and the Full Bench having determined that the proposed orders should be made, 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 24th day of October 2003, ordered by consent, as follows:-

(1) The Respondent do pay to the Appellant remuneration lost in the sum of $6,500.00 gross for the period of the dismissal, namely the 14th October 2002 – 28th April 2003.

(2) The Respondent do deduct and pay the Australian Taxation Office the prescribed income tax on the said sum of $6,500.00 calculated over each fortnightly pay period for the period of the dismissal totalling $588.00.

(3) The Respondent do pay to the Appellant the net amount after deduction of tax of $5,912.00 in full within fourteen (14) days of the date of this order.

(4) That the appeal herein and the applications to extend time be and are hereby dismissed on and from the 8th day of November 2003.

(5) That there be liberty to either party to apply in the event that order (3) is not complied with.

By the Full Bench

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

[L.S.]

2003 WAIRC 09907

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	MILLENNIUM INORGANIC CHEMICALS LIMITED, APPELLANT
	- and -
	DAVID CHARLES TRIMBLE, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 31 OCTOBER 2003
FILE NO/S.	FBA 20 OF 2003
CITATION NO.	2003 WAIRC 09907

Decision	Appeal discontinued by consent
Appearances	
Appellant	Mr H Downes (of Counsel)
Respondent	Mr M Devlin (of Counsel)

Order

The Notice of Appeal herein, having been filed herein on the 14th day of August 2003, and the above-named appellant, on the 22nd day of October 2003, having filed a notice of discontinuance in the Registry of the Commission, and the parties herein having filed a minute of proposed order on the 22nd day of October 2003 in which the parties seek leave to discontinue the appeal herein, and the

Full Bench having determined that the filing of the notice of discontinuance and the minute of proposed order constitute special circumstances so as to exempt the parties from further compliance with regulation 29 of the *Industrial Relations Commission Regulations* 1985 (as amended), and the parties herein having waived the rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), and the Full Bench having so exempted them, it is this day, the 31st day of October 2003, ordered and declared as follows:-

(1) THAT there be leave granted and leave is hereby granted for appeal No. FBA 20 of 2003 to be discontinued.

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

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

[L.S.]

2003 WAIRC 09791

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JO-ANN MORRISON, APPELLANT
	- and -
	SUZANNE GRAE CORPORATION PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J L HARRISON
DELIVERED	THURSDAY, 23 OCTOBER 2003
FILE NO/S.	FBA 43 OF 2002
CITATION NO.	2003 WAIRC 09791

Decision	Appeal discontinued by consent
Appearances	
Appellant	Mr B Stokes, as agent
Respondent	Mr J Uphill, as agent

Order

This matter having been listed for a want of prosecution hearing before the Full Bench on the 23rd day of October 2003, and the parties herein, on the 21st day of October 2003, having forwarded a minute of consent orders to the Full Bench, and the Full Bench having determined that the orders proposed by the parties should be made, 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 23rd day of October 2003, ordered by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No. FBA 43 of 2002 to be discontinued.

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

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

[L.S.]

COMMISSION IN COURT SESSION—Matters dealt with—

2003 WAIRC 09894

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH & OTHERS; CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS, APPLICANTS *v.* BHP BILLITON IRON ORE PTY LTD & ANOTHER; BHP BILLITON IRON ORE PTY LTD & OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH COMMISSIONER S WOOD
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO/S.	APPLICATION 1246 OF 2003, APPLICATION 157 OF 2003
CITATION NO.	2003 WAIRC 09894

Result	Order issued
Representation	
Applicant	Mr D Schapper of counsel on behalf of the applicants
Respondent	Mr R Lilburne of counsel and with him Mr R Kelly of counsel on behalf of the first named respondents Mr M Llewellyn on behalf of the second name respondent

Order

THE COMMISSION IN COURT SESSION having Application 1246 of 2003 and Application 157 of 2003 before it and having held a conference on Wednesday, 29th October 2003, hereby advises the parties that the following dates have been set aside for a hearing in Port Hedland—

16th February 2004 to 28th February 2004, (inclusive)

FURTHERMORE to facilitate the hearing the Commission hereby orders—

1. THAT the evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the witness. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
2. THAT the applicants and the respondents file and serve upon each other the signed witness statements, together with documents upon which they intend to rely, in respect of their claims and counterclaims respectively by close of business Friday, 19th December 2003.
3. THAT the parties file and serve upon the other party the signed witness statements, together with documents upon which they intend to rely in reply by close of business Friday, 23rd January 2004.
4. THAT all matters involving requests or exchanges of information, production of documents and discovery be completed by no later than close of business Friday, 30th January 2004.
5. Liberty is reserved to the parties upon 24 hours' notice to the Commission and to the other parties to vary the terms of this Order.

THE parties are hereby informed that a member of the Commission in Court Session will convene a conference with a view to conciliating the claims. The Commissioner will advise the parties as to the date of the conference.

(Sgd.) W. S. COLEMAN,
[L.S.] Commission in Court Session.

PRESIDENT—Matters dealt with—

2003 WAIRC 09754

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ACE REMOVALISTS PTY LTD, APPLICANT - and - KEITH McROBERT, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 20 OCTOBER 2003
FILE NO/S.	PRES 15 OF 2003
CITATION NO.	2003 WAIRC 09754

Catchwords	Industrial Law (WA) – Stay of operation of decision – General principles relating to stays – No exceptional circumstances – Application dismissed – S49(11) – *Industrial Relations Act* 1979 (as amended)
Decision	Application dismissed
Appearances	
Applicant	Mr G M Slattery (of Counsel), by leave
Respondent	Mr P E Mullally, as agent

Reasons for Decision

INTRODUCTION

1 This is an application by the above-named applicant employer company for a stay of operation of the decision of the Commission made on 12 September 2003 in application No 1656 of 2002 until the hearing and determination of appeal No FBA 34 of 2003.

2 The application is made pursuant to s49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*") and seeks a stay of operation of the decision pending the hearing and determination of that appeal.

3 The order appealed against, formal parts omitted, reads as follows, and was deposited in the registry on 15 September 2003:-

> "(1) DECLARES that the applicant, Keith McRobert, was harshly and unfairly dismissed by the respondent on the 3rd day of September 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 $16,192.10 to Keith McRobert less any taxation that may be payable to the Commissioner of Taxation."

4 The notice of appeal was filed herein on 26 September 2003 and served, according to the declaration of service, on 3 October 2003.

5 The application for a stay was filed on 3 October 2003, and it would appear from the stamp on it that it was filed some minutes after the filing of the declaration of service of the notice of appeal.

6 This matter arose from an application made at first instance by the above-named respondent employee pursuant to s29(1)(b)(i) of *the Act*, which was opposed by the applicant employer. It was heard and determined and the orders to which I have referred above were made.

7 The question arises whether the applicant, who was a party to the proceedings at first instance, is competent, and whether the application was filed after the appeal had been instituted, and is competent in that respect (see s49(3) and s49(11) of *the Act*). It is clear that that is the case, and I so find.

GROUNDS OF APPLICATION

8 The grounds of this application are as follows:-

> "(1) The Appeal raises serious questions of law and fact, namely—
>
> a. Whether it was open for the Commission to make a finding of constructive dismissal in the circumstances of the Applicant remaining in the employment of the Respondent for 2 months; and
>
> b. Whether it was open for the Commission to find in the Applicants favour when it lacked confidence in the Applicant's evidence.
>
> (2) The balance of convenience favours the granting of a stay of the orders—
>
> a. As there was no order for reinstatement the stay will not cause the Applicant any detriment;
>
> b. The amount of the order is not insignificant and would impact the short term financial activities of the Respondent;
>
> c. As the Applicant is unemployed his ability to repay the amount of the order should the appeal be successful is unclear; and
>
> d. The appeal in part relates to the calculation of the amount payable by the Respondent."

9 The application is opposed.

GROUNDS OF APPEAL

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

> "There be substituted in lieu of the orders of Commissioner S Wood dated 12 September 2003 that the Application dated 2 October 2002 be dismissed.
>
> **GROUNDS OF APPEAL**
>
> 1. The Commission erred in finding that the Applicant had been constructively dismissed in that—
>
> 1.1 The Applicant's conduct and decision to remain in the employ of the Respondent constituted an acceptance of the very terms of employment on 3 July 2002.
>
> **Particulars**
>
> (a) On 3 July 2002 when he was handed a Memorandum containing the varied terms of employment, the Applicant acquiesced to the varied terms of employment;
>
> (b) The Applicant continued in the Respondent's employ for a further period of two months without protest or objection to the varied terms;
>
> (c) The Commission found that the Applicant elected to take holiday pay upon the varied terms; and
>
> (d) On his return from an overseas holiday, the Applicant presented for work and by his conduct implicitly consented to the varied terms of the employment contract.
>
> 2. The Commission erred in finding that the Applicant had been constructively dismissed in finding that—
>
> 2.1 The withholding of the motor vehicle for the Applicant's personal use was a fundamental variation to the employment contract constituting a repudiation of the contract.

Particulars

(a) The use of the car for private use was not in any event a term of the Applicant's contract of employment;

(b) The request that the Applicant's use of the car be confined to business was in accord with the terms of the employment contract; and

(c) The restriction on the use of the car for business purposes was, in any event, not a repudiation of a material or fundamental term of the contract of employment.

3. The Commission erred in finding that varied terms of the Applicant's employment were imposed, without consultation or agreement, in that—

3.1 The weight of evidence supports the finding that the Applicant had been made aware that his sales performance was unacceptable and his current level of remuneration could not continue without a substantial improvement in the level of performance; and

3.2 The Applicant acknowledged in evidence that he did not achieve the performance levels expected by the Respondent.

4. The Learned Commission erred in granting the relief claimed by the Applicant given that—

4.1 It was the finding of the Learned Commissioner that he did not have sufficient confidence in the evidence given by the Applicant or on behalf of the Respondent to accept the evidence of either unreservedly;

4.2 The weight of evidence was against the finding that the Applicant had been dismissed or that his dismissal was harsh, oppressive or unfair.

5. The Commission erred in assessing the award of compensation at $16,192.10 in that the Commission failed to limit the assessment to 6 months remuneration and then credit the sum of $6,700.00 being the amount it was acknowledged by the Respondent that he had earned in the period subsequent to the termination of the employment contract."

Ground 5 was not pressed upon this application and I therefore do not refer to it.

PRINCIPLES

11 The principles which are applicable to these proceedings are set out in detail in a large number of cases, decided by the Commission, constituted by the President, one of which is *Epath WA Pty Ltd v Adriansz* (2002) 82 WAIG 2885 at 2886-2887:-

> "The principles applicable to applications such as this are as follows and have been most recently expressed in *DVG Morley City Hyundai v Fabbri* 2002 82 WAIG 2440 at paragraph 19—
>
> > "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81WAIG 406 properly expresses them at pages 407-408:-
> >
> > I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-
> >
> > > These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
> > >
> > > It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
> > >
> > > For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(l)(c) of the Act, if they exist, require that the application be granted.
> > >
> > > If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)
> > >
> > > The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Exparte Pillar* [1991] 65 AIJR 683 at 685 (HC)).
> > >
> > > I would add the following further observations.
> > >
> > > Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).
> > >
> > > If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.
> > >
> > > An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).
> > >
> > > Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).
> > >
> > > The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).
> > >
> > > The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (PC)).
> > >
> > > Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 315) and, as I have observed, an appeal will be nugatory when, because of the respondent's

financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223)."

BALANCE OF CONVENIENCE

12 The balance of convenience in this matter pivoted on one issue.

13 For the applicant, it was submitted that the balance of convenience favoured the applicant because:-

(a) The respondent advises that he is now in paid employment and there is therefore no financial or other prejudice to the respondent in the granting of a stay of the order until the determination of the appeal.

(b) Only short delay will flow from the stay in that the appeal is likely to be determined before the end of the year.

(c) It is manifestly unjust to require payment by the applicant in such circumstances.

14 There was no evidence that the monies would not be recovered if they were paid, in accordance with the Commissioner's order. Their payment has been delayed for over a year. It is accepted by the applicant that the respondent is in paid employment. The fact that the respondent is in paid employment is evidence of some ability to repay the monies if the appeal is successful. In any event, there is no evidence that any attempt to recover the monies from Mr McRobert would be fruitless.

15 Notwithstanding that he is in paid employment, that does not detract from the fact that Mr McRobert has suffered disadvantage for over a year in not having the fruits of his order in circumstances where it has not been established, as I have said, that to require them to be paid does not run the risk of their not being paid back.

16 There is no exceptional circumstance established by the applicant in this respect. Further, there is nothing established which would justify Mr McRobert being denied the fruits of his order.

SERIOUS ISSUES TO BE TRIED

17 The crucial issue in this matter was whether there was a dismissal by way of termination of the contract of employment unilaterally or whether it was acquiesced in by Mr McRobert, as was submitted.

18 That submission was made against the background of a substantial reduction in remuneration unilaterally effected by the applicant employer. Mr McRobert's remuneration was changed from salary and commission to commission only. In this case it was submitted for the applicant that Mr McRobert had elected to affirm the variation or new contract, and on an objective consideration of the conduct of the parties to ascertain their intentions, there was no constructive dismissal. Indeed, it was submitted that it took Mr McRobert two months, including four weeks holiday and an acceptance of holiday pay at the new rate of remuneration, before he resigned. Further, he resigned the day after the removal of his use of a serviced company vehicle. Following that Mr McRobert regarded the contract as repudiated, according to his case, and was constructively dismissed.

19 The facts were that the respondent was informed that the terms of his employment would be varied so that he was no longer paid a salary but was to be paid commission only which meant, and it was not disputed, that he was out of pocket to the extent of over three hundred dollars a week compared to his remuneration before this unilateral variation was effected.

20 The fact that Mr McRobert then went on holidays after that and accepted holiday pay at the changed rate of pay is not necessarily evidence of his acceptance of the new unilaterally prescribed remuneration (see *Byrne v Twaddle* (2003) 83 WAIG 5 (FB) and see *Belo Fisheries v Froggett* 63 WAIG 2394 (IAC)).

21 In any event, on Mr McRobert's return, another term of his employment, the provision of a car and car maintenance of $70.00 per week, was unilaterally removed by the employer which further reduced his remuneration. That caused him to regard the contract as repudiated, arguably correctly so, and he terminated his employment as a constructive dismissal, so his case went.

22 Mr McRobert's case was that there was a course of conduct on the part of his employer from which it could be found that he was "pushed" and did not jump ((ie) he was dismissed) (see *The Attorney-General v WA Prison Officers' Union* 75 WAIG 3166 (IAC)).

23 What occurred in fact was a matter to be determined on all of the circumstances of the case, but, on a fair reading of the evidence, the argument available to the applicant that Mr McRobert was not constructively dismissed is not so strong, for the above expressed reasons, as to constitute a ground for finding exceptional circumstances such as to support making an order for a stay, within the principles outlined above.

FINALLY

24 Accordingly, the equity, good conscience and substantial merits of the case have not been established to lie with the applicant. No exceptional circumstances have been established to exist to warrant the making of an order to stay the operation of the order of the Commissioner at first instance. Having regard to s26(1)(c) of *the Act*, it has not been established that the interests of the applicant should be advanced in preference to those of the respondent. Further, it has not been established that the equity, good conscience and substantial merits of the application lie with the applicant. For those reasons, I dismissed the application.

2003 WAIRC 09692

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ACE REMOVALISTS PTY LTD., APPLICANT
	- and -
	KEITH MCROBERT, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 15 OCTOBER 2003
FILE NO/S.	PRES 15 OF 2003
CITATION NO.	2003 WAIRC 09692

Decision	Application dismissed
Appearances	
Applicant	Mr G M Slattery (of Counsel), by leave
Respondent	Mr P E Mullally, as agent

Order

This matter having come on for hearing before me on the 15th day of October 2003, and having heard Mr G M Slattery (of Counsel), by leave, on behalf of the applicant, and Mr P E Mullally, as agent, on behalf of the respondent, and I having determined that that the application herein should be dismissed, and having determined that reasons for decision will issue at future date, it is this day, the 15th day of October 2003, ordered that application No. PRES 15 of 2003 be and is hereby dismissed.

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

[L.S.]

2003 WAIRC 09783

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BELL POTTER SECURITIES LIMITED, APPLICANT
	- and -
	ROBERT GERALD CATENA, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 22 OCTOBER 2003
FILE NO/S.	PRES 16 OF 2003
CITATION NO.	2003 WAIRC 09783

Catchwords	Industrial law (WA) – Stay of operation of decision – General principles relating to stays – No exceptional circumstances – Application dismissed – s49(11) – *Industrial Relations Act* 1979 (as amended)
Decision	Application dismissed
Appearances	
Applicant	Mr D K Barker (of Counsel), by leave
Respondent	Mr T J Carmady (of Counsel), by leave

Reasons for Decision

INTRODUCTION

1 This is an application by the above-named applicant employer (hereinafter called "Bell Potter") made pursuant to s49(11) of *the Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*"). I will refer to the above-named respondent hereinafter as "Mr Catena".

2 By the application, Bell Potter seeks an order that the decision, by which I assume is meant the whole of the decision delivered by Commissioner S J Kenner on 4 September 2003 in matter No 1266 of 2002, be stayed until the hearing and determination of appeal No FBA 32 of 2003.

3 That appeal was filed in the Commission on 25 September 2003, and, according to a declaration of service filed on 2 October 2003, was served on Mr Catena on 26 September 2003.

4 This application was filed on 9 October 2003 so that it was filed after the appeal was instituted.

PARTICULARS OF THIS APPLICATION

5 The particulars of this application are as follows—

"1. That the Appellant has a meritorious appeal in that—

1.1 Commissioner S I Kenner erred in fact in finding that Robert Gerald being that Robert Gerald Catena had protested a reduction in his base salary, the evidence being that Robert Gerald Catena had remained silent on this issue.

1.2 Commissioner S J Kenner erred in law in applying *Rigby v Ferodo* as in the words of Oliver J "*Mr Rigby and his fellow C.S.E.U members were, as they made it quite clear, unwilling to accept... I can for my part, see no other basis upon which it can be argued that the continued working by Mr Rigby and his acceptance for the time being and under protest of this wage, that the Appellant with full knowledge of his lack of agreement, chose to pay him is to be construed as an acceptance by him either of repudiation by the Appellant of the original continuing Contract or of the new terms which he* (sic) *Appellant was seeking to oppose"*.

1.3 The Commissioner S J Kenner erred in law in applying *Beldo Fisheries v Froggett* as the Commissioner found that the Appellant had said that Robert Gerald Catena could either stay or go such finding distinguishing this case from that of *Belo Fisheries v Froggett.*

1.4 The Commissioner S J Kenner erred in law in not applying *Hotcopper Australia Ltd v SAAB* as the evidence of Robert Gerald Catena was that the salary sought to be recovered was paid as part of the Appellant's purchase of a business from Robert Gerald Catena's former employer.

2. That there is a serious issue to be determined namely—

2.1 The effect of Robert Gerald Catena's silence on the right of the Appellant to terminate the employment of Robert Gerald Catena on proper notice taking into account the Appellant's offer to Robert Gerald Catena that he could leave with the assistance of the Appellant taking with him the clients he had introduced to the Appellant.

3. The balance of convenience favours the Appellant—

3.1 as there is a risk that if the monies ordered to be paid are paid and the appeal is successful, Robert Gerald Catena may not be able to repay those monies thus making the appeal meaningless;

3.2 if the Appellant pays to the Commission the monies ordered to be paid pending the determination of the appeal."

6 The application at first instance was an application by Mr Catena whereby he alleged that he was denied contractual benefits by Bell Potter, his employer, and brought proceedings under s29(1)(b)(ii) of *the Act* claiming an order for their payment by Bell Potter.

DECISION AT FIRST INSTANCE

7 The decision, formal parts omitted, reads as follows—

"(1) DECLARES that the applicant's claims for denied contractual benefits are industrial matters for the purposes of the Act.

(2) DECLARES that the applicant has been denied contractual benefits by the respondent by way of salary payments in the sums of $42,087.58 and $14,000.00 respectively

(3) ORDERS that the respondent pay to the applicant the total sum of $56,087.58 as denied contractual benefits less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 21 days of the date of this order."

8 The application at first instance was opposed by Bell Potter and duly heard and determined.

9 I am satisfied that the application herein was validly made in that it was filed after the appeal herein was instituted. The appeal was duly instituted and instituted within time for that reason. Bell Potter, which was a respondent in the proceedings at first instance, is and was, for that reason, at all material times, a person entitled to appeal against the decision, having sufficient interest, within the meaning of s49(11) of *the Act*, to make this application.

10 This application is opposed by Mr Catena.

PRINCIPLES

11 The principles which apply to applications for a stay are long settled and were most recently expressed by this Commission in *Millennium Inorganic Chemicals Limited v Trimble* (2003) 83 WAIG 3082 (FB) at pages 3083-3084 as follows—

"19 The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Bamboo Holdings Pty Ltd v Halligan* 82 WAIG 966 at 967-968, and are as follows—

""The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Stanley and Others t/a Communique Communications v Bryant* 82 WAIG 785 at 787 and are as follows:-

"The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission (see *Commissioner of Police v CSA* 81 WAIG 2553 at 2554):-

The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408:-

I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-

These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.

It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.

For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.

If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)

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

I would add the following further observations.

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

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

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

> Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).
>
> The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).
>
> The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (FC)).
>
> Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 375) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223).""

20 To amplify these principles I would also quote the following paragraph from the judgement of Anderson J in *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 at pages 89-90 (FC) where His Honour said:-

> "As I understand the cases, however, unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the high Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies, and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal will be futile."

21 Further, at page 91 His Honour said:-

> "So far as I can see, those cases in which the court has given consideration to such matters such as hardship, the balance of convenience, the prospect that special leave to appeal may be granted and so on are all cases in which the first hurdle has been cleared by the applicant. They are cases in which, speaking broadly, an appeal would be futile unless a stay was granted. I would include in this category of cases *Moulleux Pty Ltd v Girvan NSW Pty Ltd* (1991) 13 Leg Rep 24; *De L v Director–General, Department of Community Services* (NSW) (1997) 136 ALR 201; *Bryant v Commonwealth Bank of Australia* (1996) 70 ALJR 306.""

BACKGROUND

12 Mr Catena was employed as a sharebroker by Johnson Taylor Potter Ltd (hereinafter called "JTPL") which agreed to pay to him a salary and commission and other benefits, including $14,000.00 worth of salary sacrifice, being salary taken in shares in the company. The letter setting out the terms and conditions of employment, which Mr Catena accepted, was dated 5 January 2001, and clause 2 thereof provides for remuneration in terms set out in the reasons for decision at first instance in paragraph 4.

13 He commenced employment on 5 February 2001, as well as accepting, as offered, a share issue available to broking staff. From late April 2001 on, there was consideration of proposals made by the employer, JTPL, to brokers, that their salaries be reduced.

14 In mid July 2001, Bell Potter took a controlling interest in JTPL. There followed further confirmation of and discussion about the proposed salary reductions between brokers and representatives of the employer and representatives of the brokers and the employer also.

15 There was reference in these proceedings to there being a change in employer when Bell Potter brought a controlling interest in JTPL. However, it is not necessarily the case that that meant a change in employer. It may have been the case that the controlling interest in JTPL changed, but that the employer, that is the corporate entity, JTPL, remained the same. It is not necessary, however, to take that matter further in these reasons.

16 What is quite clear, however, is that the salary of Mr Catena, along with others, was reduced by 50%. His case is that it was unilaterally reduced. Shortly after this occurred, which was on and from 1 August 2001, he travelled overseas on a pre-arranged holiday and then when he returned said that he commenced looking for other employment. He also gave evidence that he stayed in employment up until early 2002 out of loyalty to his clients and did not commence these proceedings until he had left the applicant's employment because he felt intimidated.

17 The Commissioner at first instance actually found that there were protests on behalf of the brokers at the purported unilateral variation of the contract. The Commissioner also held that there was a purported unilateral variation, and that the repudiation of this contract was not accepted by Mr Catena (see on this point paragraphs 17-23 of the reasons for decision at first instance, and see also *Belo Fisheries v Froggett* (1983) 63 WAIG 2394 (IAC) per Kennedy J at page 2395, and see also the relevant principles expressed in some detail by a Full Bench of this Commission in *Byrne v Twaddle* (2003) 83 WAIG 5 (FB) at page 12 per Sharkey P).

18 The Commissioner at first instance also found that the claim for the amount of salary sacrificed, $14,000.00, was an "industrial matter" within the definition contained in s7 of *the Act*, and that the ratio in *Hotcopper Australia v Saab* (2002) 82 WAIG 2020 (IAC) was not authority for any proposition otherwise.

19 Accordingly, the Commissioner found that he had jurisdiction to hear and determine the matter.

SERIOUS ISSUES TO BE TRIED

20 It was submitted for the applicant that a serious issue to be tried arose because there was no rejection of the reduction in salary, notwithstanding that Mr Catena's unhappiness with this proposal was conveyed by his spokesman to Bell Potter (see page 34 of the transcript at first instance).

21 It was also submitted that that conduct at the second meeting between representatives of brokers and representatives of the employer covering the proposed unilateral pay reduction had the effect of conveying to the applicant the belief that Mr Catena had accepted the salary reduction.

22 It is difficult to understand, although I make no judgment on the point now, how that conduct could be properly construed as acceptance of the salary reduction. The offer was, in fact, ignored and not accepted, on the evidence, it is arguable, and therefore if that is the case there could not have been an agreed variation of the contract (see *Felthouse v Bindley* (1862) 142 ER 1037 and see also Carter and Harland "*Contract Law in Australia*", 4th Edition, at paragraph 229).

23 Whether estoppel or any kindred doctrine can now be argued to apply it is not necessary for me to decide. However, it is strongly arguable that there was a unilateral variation of the contract which would constitute a repudiatory breach. Accordingly, if Mr Catena did not accept the breach and elected to keep the contract afoot, he was bound to continue to work and be paid under the existing contract of service (see *Belo Fisheries v Froggett* (IAC) (op cit)).

24 In fact, Mr Catena did protest, it was open to find.

25 It was therefore correctly submitted that Bell Potter, as offeror, could not compel Mr Catena, as offeree, to take positive steps to reject an offer merely because the offeror stated that unless it heard to the contrary the offer would be deemed to have been accepted, that was the case put at first instance.

26 If the offer was ignored, which it was open to find that it was, there was no acceptance. In any event, the Commissioner at first instance found, as it is arguable, and strongly arguable, the Commissioner could have found, that there was a unilateral variation constituting a repudiation which was protested against, but not accepted. There was clearly not a strong case to be tried on this basis.

27 Next, there was a submission in relation to the other main finding of the Commissioner at first instance that Mr Catena's claim was not an "industrial matter" as defined in s7 of *the Act* and was therefore outside the Commission's jurisdiction.

28 This submission was based on the ratio in *Hotcopper Australia Ltd v Saab* (IAC) (op cit), and therefore was to the effect that the claim for $14,000.00, the amount of a salary sacrifice, required to be taken in shares allotted in Bell Potter to Mr Catena was a commercial and not an industrial matter. It was paid, in fact, as part of the acquisition of the applicant's business from Mr Catena's former employer, so the submission went, and was therefore an amount paid to Mr Catena for his bringing his clients with him. It is not clear from the evidence that was so. However, this was not properly arguable. The amount claimed was an amount to be paid as part of a contract of service in the clause headed "Remuneration", by way of salary. It was a contract between an "employer" as defined and an "employee" as defined in s7 of *the Act*. In any event, *Hotcopper Australia Ltd v Saab* (IAC) (op cit) is simply not as wide in its application as it was submitted to be.

29 S7 of *the Act* contains a definition of "industrial matter" which, in its first six lines, and in sub-paragraphs (a) and (ca) reads as follows—

> "**"industrial matter"** means, subject to section 7C, any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> …
>
> (ca) the relationship between employers and employees;"

30 It was strongly arguable, for those reasons, that the question of the $14,000.00 related to the right of an employee, the duties of an employer in an industry, and also to wages, salaries, allowances or other remuneration of an employee, and, in any event, the relationship between employer and employees.

31 From the contract it therefore might be strongly argued that this was a salary payment, even though it was to be sacrificed by way of the purchase of shares. Nonetheless, its essential character was as salary or a remuneration for work done, and it was quite clearly, for all of those reasons, within the definition of an "industrial matter" as being a right of Mr Catena qua employee in an industry.

32 In any event, it is clearly a "contractual benefit" as defined in s29(1)(b)(ii) of *the Act*, being a contractual benefit claimed under a contract between an employer and an employee.

33 It was not established that there were any serious issues to be tried in this matter.

BALANCE OF CONVENIENCE

34 As with the whole of its case, the onus lay at all times upon the applicant to establish its case (see the principles outlined above).

35 There is no evidence of any inability or unwillingness on the part of Mr Catena to repay the monies ordered to be paid to him. That is of course in the event that the appeal is successful.

36 It is, of course, no answer to the burden which lies upon the applicant to boldly state that it is procedurally unfair to expect the applicant to adduce evidence of Mr Catena's inability to repay the ordered amount should the appeal be successful. Such a submission misunderstands the concept of natural justice or procedural fairness. Further, to submit that Mr Catena's right to privacy prevents the applicant from accessing data that would be relevant to his inability to repay those monies, in the absence of any authority to support the proposition proper, does not seem to me to be a tenable proposition at all. Instead, it represents an attempt to place the onus of establishing the applicant's case on the respondent, which is, of course, contrary to what this Commission has decided.

37 Further, from the point of view of inconvenience, it should be added that the respondent should not be deprived of the fruits of his order unless there are exceptional circumstances of which the balance of convenience is one circumstance, and it is not for the respondent to establish that those exceptional circumstances do not exist (see *Millennium Inorganic Chemicals Limited v Trimble* (FB) (op cit) and the principles that that is authority for cited above).

38 In this case, too, there has been no attempt to establish that the balance of convenience does not lie with the respondent, Mr Catena, who has not been paid the amount which he was adjudged entitled to since early 2002 when he left employment, and, indeed, before that. That means that he has waited for a period in excess of two years. It is quite clear that the balance of convenience has not been established to lie with the applicant, and, indeed, that it probably lies with the respondent, for that reason above.

FINALLY

39 It is necessary, I think, to say that the findings and conclusions which I make and reach here cannot bind me in any way as a member of the Full Bench hearing the appeal.

40 The equity, good conscience and substantial merits of the case therefore have not been established by Bell Potter to lie with it. Further, Bell Potter has not established within the meaning of s26(1)(c) of *the Act* that its interests should be served in preference to the interests of Mr Catena, for the reasons which I have expressed.

41 For those reasons, therefore, I dismissed the application.

2003 WAIRC 09737

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BELL POTTER SECURITIES LIMITED, APPLICANT
	- and -
	ROBERT GERALD CATENA, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 17 OCTOBER 2003
FILE NO/S.	PRES 16 OF 2003
CITATION NO.	2003 WAIRC 09737

Decision	Application dismissed
Appearances	
Applicant	Mr D K Barker (of Counsel), by leave
Respondent	Mr T J Carmady (of Counsel), by leave

Order

This matter having come on for hearing before me on the 17th day of October 2003, and having heard Mr D K Barker (of Counsel), by leave, on behalf of the applicant, and Mr T J Carmady (of Counsel), by leave, on behalf of the respondent, and I having determined that the application herein should be dismissed, and having determined that reasons for decision will issue at future date, it is this day, the 17th day of October 2003, ordered that application No. PRES 16 of 2003 be and is hereby dismissed.

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

2003 WAIRC 10011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN G MAY T/A LITTLE MUPPETS CHILD CARE CENTRE, APPLICANT
	- and -
	CARA SAMANTHA HEDLEY, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 11 NOVEMBER 2003
FILE NO/S.	PRES 18 OF 2003
CITATION NO.	2003 WAIRC 10011

Catchwords	Industrial Law (WA) – Application for a stay of the order pending appeal – General principles relating to stays – Order for a stay – *Industrial Relations Act* 1979 (as amended), s26(1)(a) and (c), s27(1)(d), s49(11)
Decision	Order for a stay
Appearances	
Applicant	Mr S G May, on his own behalf
Respondent	No appearance

Reasons for Decision

INTRODUCTION

1 This is an application by the above-named applicant, Stephen G May trading as Little Muppets Child Care Centre, made pursuant to s49(11) of *the Industrial Relations Act* 1979 (hereinafter called "*the Act*").

2 The application seeks a stay of the operation only of order (3) of the order of Commissioner Wood made in application No 580 of 2003 on 30 September 2003. Order (3) reads as follows—

> "(3) ORDERS that the respondent do hereby pay within 7 days of this order, as and by way of compensation the amount of $1,680.42 to Cara Samantha Hedley, less any taxation that may be payable to the Commissioner of Taxation."

3 The respondent is not named as "Cara Samantha Hedley" in the application, and I will amend the application and all other documents so that her name reads "Cara Samantha Hedley". That was the name referred to in the orders at first instance.

4 Mr May, was, of course, the respondent at first instance, and filed an appeal against the decision of the Commissioner on 20 October 2003. The declaration of service reveals that it was filed on 23 October 2003 and this application was filed on 30 October 2003.

5 Mr May appeared for himself on this application. There was no appearance by or on behalf of the respondent. I was satisfied that the respondent had been duly served with a copy of the application herein, on which was, inter alia, endorsed the date of hearing of this application. There is a declaration of service by letter filed, such service having been declared to have been effected by pre-paid post on 31 October 2003.

6 I am therefore satisfied pursuant to s27(1)(d) of *the Act*, also, that the notice of proceedings was duly served and that, in the absence of the respondent therefore, the Commission, constituted by the President, is empowered to hear and determine the application.

GROUNDS OF THIS APPLICATION

7 The grounds of this application are as follows—

> "The appeal lodged before the Full Bench will show the Commissioner erred on numerous grounds during the hearing and that his decision to find the employee had been unfairly dismissed, and as a consequence award a payment of compensation to her, was therefore wrong.
>
> 1. The Commissioner's erroneous interpretation of documents relating to the employee's terms of employment resulted in a serious flaw in the Commissioner's reasons for his decision to find in favour of the employee.
> 2. The Commissioner failed to adhere to provisions of both the Workplace Relations Act and the Industrial Relations Act in as much as I believe, there is sufficient cause to have his decision overturned under appeal on the grounds that—
>   a. My right to terminate employment as per the Industrial Relations Act 1979 Part 11 Div 2 s26 (vi) due to restructuring within the workplace was denied me. And, this was despite substantial evidence showing the need for it, that Commonwealth Accreditation guidelines governing the child care industry required it, and the fact that the position the employee had been employed for had been in operation for less than four weeks.
>   b. My right to vary contract terms and conditions with the prior consent of the employee as per the Workplace Relations Act Part V1A Div 3 Section 17OCE (5B) (c) was not only denied me, but used against me by the Commissioner.
>   c. My right to an impartial hearing as per the Industrial Relations Act Part 11 Division 2 s26(1)(a) was denied me.
>   d. My right to 'a fair go all round' as per the Workplace Relations Act Part VIA Div 3 Section 17OCA (2) was denied me.
> 3. The balance of the evidence presented at the hearing is clearly in favour of the appellant and the Full Bench will be shown how substantial amounts of relevant evidence was discarded by the Commissioner without any justification for such actions.
> 4. The Commissioner erred in that he both awarded, and calculated, compensation based on the employees 'expectation of six months employment' when there is no provision within the Children Services (Private) Award for any such contractual arrangement. The employee's expectation is not therefore valid, and I cannot be held liable for compensation on those grounds.
> 5. The Commissioner erred on two occasions in his calculations relating to the employee's earnings and anticipated earnings, thus, the amount of compensation he ordered the appellant pay, was incorrect. As a consequence, even in the unlikely event of the appeal failing, there can be no doubt the order relating to the amount of compensation payable, will not only be amended, but will be reduced quite substantially.
>
> I submit that should this stay not be granted, and the Full Bench subsequently reduce, or overturn entirely the amount of compensation due, it will result in an unnecessary amount of inconvenience both to myself and to the respondent. Denying the stay would not serve the interests of either party in the short term, and should my appeal be upheld, with me thereafter requiring to seek recourse for monies already paid, could prove to be both a costly, and time consuming exercise for me to conclude."

PRINCIPLES

8 The principles in relation to stays are now well settled and are set out in such cases as *Millenium Inorganic Chemicals Ltd v Trimble* (2003) 83 WAIG 3082 at 3083-3084 per Sharkey P and *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440 per Sharkey P. I apply those principles in this case.

BACKGROUND

9 The respondent made application to the Commission on 8 May 2003 pursuant to s29(1)(b)(i) of *the Act* alleging that she had been harshly, oppressively or unfairly dismissed and denied contractual benefits. She was employed as a day care worker at the Little Muppets Child Care Centre from 17 March 2003 to 18 April 2003, having earlier worked for the respondent before the birth of her son. Little Muppets Child Care Centre is a business which is and was conducted by the applicant, Mr Stephen May. She was offered a contract when she returned to work on 17 March 2003, for a fixed term of six months (and on probation it was alleged). She was advised of her termination by Mr May on 10 April 2003. Then she was handed the letter of termination on 11 April 2003. She finished her employment then, not being required to work out her notice. She alleged that she was unfairly dismissed because Mr May claimed staff restructure was the reason for dismissal, then immediately employed a junior staff member in a similar position. She claimed the amount of any difference in income for the duration of the six months fixed term contract which she entered into.

10 The Commissioner at first instance found that the contract was a fixed term contract, that he regarded the evidence of Mr May as unsatisfactory, and found as follows—

(a) She was not on probation.

(b) She was on a six month contract which by virtue of the award had a provision for termination of one week's notice.

(c) She was advised of her termination on 10 April 2003 and formally handed her letter of termination on 11 April 2003, since Mr May did not wish Ms Hedley to continue with her part-time work.

(d) She offered to work full-time and this was rejected.

11 The Commissioner held that the termination was patently unfair because, having created the expectation of six months employment on a part-time basis, he terminated her services at short notice simply because they were part-time.

SERIOUS ISSUES TO BE TRIED

12 There were a number of serious issues to be tried, it was submitted.

13 A serious issue does arise concerning the operation of a federal award, the Child Care (Long Day Care) WA Award 2003 to which the applicant is a named respondent, on the contract of service. Not the least consideration is whether the award applied at the time of the dismissal, which was found to be 18 April 2003, when the award was made on 30 July 2003.

14 A serious issue also arises whether the compensation awarded was correct, having regard to whether the contract was a fixed term contract or not.

15 Another issue arises on the evidence concerning whether the respondent was able or willing to undertake full-time work or more hours of work (see, in particular, the evidence of Ms Susan Boardman (page 50 of the transcript at first instance) and Ms Janet Turner (page 45 of the transcript at first instance).

16 There are a number of other issues which have been raised, but it is not necessary to consider them, particularly having regard to my findings concerning the question of the balance of convenience.

BALANCE OF CONVENIENCE

17 This ground relied on sworn evidence which was given by the applicant, Mr Stephen May, upon the hearing of this application. That evidence, which was uncontradicted and unchallenged, and which I accept, was that Mr May sued Ms Hedley, the respondent, in the Local Court at Joondalup in this state for a sum of money claimed to be owing for care of her child at the applicant's child care centre, Little Muppets Child Care Centre in plaint No JO/2003-002039.

18 In a pre-trial conference before the Clerk of the Court at Joondalup, the parties signed a consent to judgment dated 10 July 2003 in the sum of $70.15 which amount Ms Hedley agreed would be paid on or before 7 October 2003 (see exhibit 2). Judgment was given accordingly. That amount was paid in early October 2003, as I was informed by Mr May.

19 There was evidence at first instance, too, that Ms Hedley was bound by "financial constraints". On that evidence, I infer and I find and am satisfied that it is unlikely that the respondent would be able to repay the amount of the order in the foreseeable future in the event that the appeal was successful.

20 The amount of the order is $1680.42, which is a very substantial amount given Ms Hedley was unable to pay an amount of $70.15 which she acknowledged to be owing, for a period of three months at least.

21 Thus, I am satisfied that, for that reason, the subject matter of the appeal would not be preserved if I did not stay the proceedings. As I read the authorities, including those cited by Anderson J in *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at 80 and 88 (FC) (and see also *DVG Morley City Hyundai v Fabbri* (op cit) at pages 2441-2442 per Sharkey P and the cases cited therein), such an order is required in these circumstances, even where prospects of success on appeal are not established.

22 In this case, however, there is, for the reasons I have expressed above, also a serious issue to be tried also.

FINALLY

23 The equity, good conscience and the substantial merits of the case have been established to lie with the applicant (see s.26(1)(a) of *the Act*). The applicant has therefore established, within the meaning of s.26(1)(c), that his interests should be served by granting the application, in preference to the interests of the respondent.

24 I would also add that if the appeal is not brought to hearing expeditiously by the applicant, it is open to the respondent in these proceedings, Ms Hedley, to apply to discharge this order.

25 For those reasons, I made an order that the operation of the decision at first instance, constituted by the order appealed against, be stayed in its operation until the hearing and determination of the appeal, or until further order.

2003 WAIRC 09976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN G MAY T/A LITTLE MUPPETS CHILD CARE CENTRE , APPLICANT
	- and -
	CARA HEDLEY, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 7 NOVEMBER 2003
FILE NO/S.	PRES 18 OF 2003
CITATION NO.	2003 WAIRC 09976

Decision	Order for a stay
Appearances	
Applicant	Mr S G May, on his own behalf
Respondent	No appearance

Order

This matter having come on for hearing before me on the 7th day of November 2003, and having heard Mr S G May, on his own behalf as applicant, and there being no appearance by or on behalf of the respondent, and I having determined that the application for a stay should be granted, and that reasons for decision will issue at a future date, and the applicant having waived his rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 7th day of November 2003, ordered and declared as follows—

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

(2) THAT the appeal No. FBA 36 of 2003 has been instituted within the meaning of s49(11) of *the Act*.

(3) THAT the order of the Commissioner in application No. 580 of 2003 given on the 30th day of September 2003 be and is hereby wholly stayed pending the hearing and determination of appeal No. FBA 36 of 2003 or until further order.

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2003 WAIRC 09982

CLERKS (PUBLIC AUTHORITIES) AWARD 1987

No. PSAA 7A of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH, APPLICANT
	v.
	LOTTERIES COMMISSION OF WA AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO.	P 54 OF 2002
CITATION NO.	2003 WAIRC 09982

Result Award varied

Order

HAVING heard Mr M Kane on behalf of the applicant and Mr R Heaperman and with him Ms L Williamson on behalf of the Lotteries Commission of WA, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Clerks (Public Authorities) Award 1987 (No. PSAA 7A of 1987) 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 7th day of November 2003.

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

SCHEDULE

1. Clause 3. – Area and Scope: Delete this clause and insert the following in lieu thereof—

This Award shall apply throughout the State of Western Australia to all Government Officers eligible for membership of the Federated Clerks' Union of Australia, Industrial Union of Workers, W.A. Branch employed by the Public Authorities in the following specified callings—

Fremantle Port Authority - all clerical officers (permanent and temporary) engaged in positions up to and including level 5 as contained in clause 9 of the Award and not covered by any other existing Award or Agreement or engaged in callings named in a determination of the Fremantle Port Authority on 10th day of March 1976.

Hon. Minister for Transport (Department of Marine and Harbours) - All Wharfingers, Assistant Wharfingers, Clerks, Typists and Clerk Typists employed in or in connection with the mooring of vessels and handling of cargo pursuant to the provision of the Jetties Act 1926, in positions as contained in clause 9 of the Award.

Western Australian Coastal Shipping Commission - All clerical officers except those whose position is classified on a salary equivalent to or exceeding that prescribed from time to time for the maximum of level 5 as contained in clause 9 of the Award or whose position was classified on a salary higher than $33,349 per annum as at the 31st day of October, 1985.

State Engineering Works - all clerical officers, who are covered by the State Engineering Works Clerical Officers Award, 1980 in positions up to and including level 3 as contained in clause 9 of the Award and the position of Chief Clerk.

Western Australian Meat Commission - all clerical officers in positions up to and including level 3 as contained in clause 9 of the Award or whose position was classified on a salary equal to or less than $26,691 (C-II-6 maximum) per annum as at the 31st day of October, 1985.

Egg Marketing Board - all clerical officers with the exception of the General Manager, Secretary, Accountant, Factory Manager, Marketing Manager, Grading Floor Manager, and Pulping Plant Manager.

Hon. Minister for Works, Hon. Minister for Water Resources and Hon. Minister for Transport - all clerical officers employed on or in connection with Government construction and maintenance work in the field, on the job, or elsewhere away from head office and whose positions are not covered by another Award or registered industrial agreement as at the 3rd of September, 1971.

2. Schedule I – Respondents: Delete this Schedule and insert the following in lieu thereof—

Western Australian Coastal Shipping Commission
Western Australian Egg Marketing Board
Fremantle Port Authority
Hon. Minister for Works
Hon. Minister for Transport
Water Authority of Western Australia

2003 WAIRC 09995

DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990.

No. PSA A1 of 1989.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF COMMUNITY DEVELOPMENT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO.	P 16 OF 2003
CITATION NO.	2003 WAIRC 09995

Result Award Varied

Order

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

THAT the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 (No. PSAA 1 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of November 2003.

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

[L.S.]

SCHEDULE

Schedule C – Travelling Allowances: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 35(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.75		
(2)	WA - North of 26° Latitude	13.65		
(3)	Interstate	13.65		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 35(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	71.95		
(10)	WA - North of 26° South Latitude	85.25		
(11)	Interstate	85.25		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 35(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b))
		$	$	$
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude			
	Breakfast	12.70		
	Lunch	12.70		
	Dinner	35.80		
(13)	WA - North of 26° South Latitude			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
(14)	Interstate			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 25(3)(e)(i))				
(15)	Each Adult	20.45		
(16)	Each Child	3.50		
MIDDAY MEAL (CLAUSE 25(2)(j))				
(17)	Rate per meal	4.95		
(18)	Maximum reimbursement per payperiod.	24.75		

2003 WAIRC 09601

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSAA 3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, LOTTERIES COMMISSION WESTERN AUSTRALIA AND OTHERS , RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 9 OCTOBER 2003
FILE NO.	P 19 OF 2003
CITATION NO.	2003 WAIRC 09601

Result	Award varied

Order

HAVING heard Mr M Finnegan on behalf of the applicant and Mr R Heaperman and with him Ms A Vandeleur on behalf of the respondents and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSAA 3 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of October 2003.

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

SCHEDULE

1. Schedule B. Government Officers Not Covered by the Scope of this Award: Delete this Schedule and insert the following in lieu thereof—

Social Trainers employed by the Authority for the Intellectually Handicapped Persons.

Group Workers and Senior Group Workers employed by the Hon Minister for Community Services.

Supervisory Staff employed by the Country High Schools Hostels Authority and employed in accordance with the provisions of Agreement No. 15 of 1980.

Salaried Officers of the Hon. Minister for Education employed as School Assistants and who are covered by the provisions of the Education Department Ministerial Officers Salaries Allowances and Conditions Award No. 5 of 1983.

Salaried Officers of any Public Authority, excluding the Lotteries Commission of Western Australia or however so named, covered by an Award to which the Federated Clerks Union of Australia, W.A. Branch is a party as at March 1, 1985.

Salaried Officers of any Public Authority or Hospital covered by an Award to which the Hospital Salaried Officers Association of Western Australia is a party as at March 1, 1985.

Salaried Officers of any Public Authority covered by an Award of the Australian Industrial Relations Commission.

Salaried Officers employed by the Metropolitan Transport Trust covered by an award to which the MTT Salaried Officers Association is a party as at March 1, 1985.

Salaried Officers employed by the Commissioner for Railways.

Salaried Officers of the Perth Dental Hospital other than Dentists, Dental Therapists and Dental Clinic Assistants.

Managerial Staff, Group Workers and Child Care Staff employed in hostels of the Department for Community Services.

Group Leaders and Peer Group Leaders employed by the Director General, Department for Community Services.

Workmen's Inspectors of Mines appointed pursuant to the provisions of the Mines Regulation Act 1946 - 1974 and the Coal Mines Regulation Act 1946 - 1976.

Salaried employees of the Western Australian Centre for Pathology and Medical Research who are eligible for membership of the Western Australian Branch of the Australian Medical Association Incorporated.

2003 WAIRC 09990

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSA A3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ALBANY PORT AUTHORITY AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO.	P 7 OF 2003
CITATION NO.	2003 WAIRC 09990

Result Award Varied

Order

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

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSAA 3 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of November 2003.

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

SCHEDULE

1. Schedule F. – Clause 30 – Camping Allowance: Delete this Schedule and insert the following in lieu thereof—

South of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	31.45
2	Permanent Camp	No cook provided by the Department	41.95
3	Other Camping	Cook provided by the Department	52.45
4	Other Camping	No cook provided	62.90

North of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	37.55
2	Permanent Camp	No cook provided by the Department	48.00
3	Other Camping	Cook provided by the Department	58.50
4	Other Camping	No cook provided	69.00

2. Schedule J – Travelling, Transfer and Relieving Allowance: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (1)(b) (ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.75		
(2)	WA - North of 26° Latitude	13.65		
(3)	Interstate	13.65		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (1)(b) (ii))
		$	$	$
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26^{o} South Latitude	71.95		
(10)	WA - North of 26^{o} South Latitude	85.25		
(11)	Interstate	85.25		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26^{o} South Latitude			
	Breakfast	12.70		
	Lunch	12.70		
	Dinner	35.80		
(13)	WA - North of 26^{o} South Latitude			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
(14)	Interstate			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
DEDUCTION FOR NORMAL LIVING EXPENSES				
(15)	Each Adult	20.45		
(16)	Each Child	3.50		
MIDDAY MEAL				
(17)	Rate per meal	4.95		
(18)	Maximum reimbursement per pay period.	24.75		

2003 WAIRC 09994

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

No. PSAA 20 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO.	P 15 OF 2003
CITATION NO.	2003 WAIRC 09994

Result Award Varied

Order

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

THAT the Government Officers (Social Trainers) Award 1988 (No. PSAA 20 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of November 2003.

[L.S.]

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

SCHEDULE

Schedule D – Clause 25 – Miscellaneous Allowances: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25 (6) (b) (ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 25 (3) (c))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25 (6) (b) (ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.75		
(2)	WA - North of 26° Latitude	13.65		
(3)	Interstate	13.65		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25 (6) (b) (ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 25 (3) (c))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25 (6) (b) (ii))
		$	$	$
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	71.95		
(10)	WA - North of 26° South Latitude	85.25		
(11)	Interstate	85.25		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude			
	Breakfast	12.70		
	Lunch	12.70		
	Dinner	35.80		
(13)	WA - North of 26° South Latitude			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
(14)	Interstate			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 25 (3) (e) (i))				
(15)	Each Adult	20.45		
(16)	Each Child	3.50		
MIDDAY MEAL (CLAUSE 25 (2) (j))				
(17)	Rate per meal	4.95		
(18)	Maximum reimbursement per pay period.	24.75		

2003 WAIRC 09993

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

No. PSAA 1 of 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, NORTH METROPOLITAN HEALTH SERVICE, C/- SIR CHARLES GARDINER HOSPITAL, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO.	P 14 OF 2003
CITATION NO.	2003 WAIRC 09993

Result Award Varied

Order

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

THAT the Graylands Selby-Lemnos and Special Care Health Service Award 1999 (No. PSAA 1 of 1999) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of November 2003.

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

[L.S.]

SCHEDULE

Schedule I – Travelling, Transfer and Relieving Allowance: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.75		
(2)	WA - North of 26° Latitude	13.65		
(3)	Interstate	13.65		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b))
		$	$	$
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26^{o} South Latitude	71.95		
(10)	WA - North of 26^{o} South Latitude	85.25		
(11)	Interstate	85.25		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26^{o} South Latitude			
	Breakfast	12.70		
	Lunch	12.70		
	Dinner	35.80		
(13)	WA - North of 26^{o} South Latitude			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
(14)	Interstate			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 41(5)(a))				
(15)	Each Adult	20.45		
(16)	Each Child	3.50		
MIDDAY MEAL (CLAUSE 42(11))				
(17)	Rate per meal	4.95		
(18)	Maximum reimbursement per pay period.	24.75		

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

2003 WAIRC 09992

PUBLIC SERVICE AWARD 1992

No. PSA A4 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	COMMISSIONER, ABORIGINAL AFFAIRS AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO.	P 8 OF 2003
CITATION NO.	2003 WAIRC 09992

Result Award Varied

Order

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

THAT the Public Service Award 1992 (No. PSAA 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of November 2003.

[L.S.]

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

SCHEDULE

1. Schedule C – Camping Allowance: Delete this Schedule and insert the following in lieu thereof—

South of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	31.45
2	Permanent Camp	No cook provided by the Department	41.95
3	Other Camping	Cook provided by the Department	52.45
4	Other Camping	No cook provided	62.90

North of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	37.55
2	Permanent Camp	No cook provided by the Department	48.00
3	Other Camping	Cook provided by the Department	58.50
4	Other Camping	No cook provided	69.00

2. Schedule I – Travelling, Transfer and Relieving Allowance: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFCERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.75		
(2)	WA - North of 26° Latitude	13.65		
(3)	Interstate	13.65		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFCERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	73.1		
(10)	WA - North of 26° South Latitude	85.25		
(11)	Interstate	85.25		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFCERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
		$	$	$
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude			
	Breakfast	13.30		
	Lunch	13.30		
	Dinner	35.80		
(13)	WA - North of 26° South Latitude			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
(14)	Interstate			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 41(5)(a))				
(15)	Each Adult	21.40		
(16)	Each Child	3.65		
MIDDAY MEAL (CLAUSE 42(11))				
(17)	Rate per meal	5.20		
(18)	Maximum reimbursement per pay period.	26.00		

AWARDS/AGREEMENTS—Variation of—

2003 WAIRC 09767

ARTWORKERS AWARD

No. A3 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, APPLICANT
	v.
	TOWN OF NARROGIN, AVON VALLEY ARTS SOCIETY INC, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 1153 OF 2003
CITATION NO.	2003 WAIRC 09767

Result Award varied

Order

HAVING heard Ms K. Scoble (of Counsel) on behalf of the Applicant and there being no appearance for the Respondents, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Artworkers Award be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 October 2003.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 6. – Wages: Delete paragraph (c) of subclause (3) of this clause and insert in lieu the following—

(c) Construction Allowance $17.84

An employee shall not be entitled to this construction allowance except when required to work "on site" or any work in connection with the erection of a building or to carry out work which the employer and the union agree is construction work or in default of agreement, that is so declared by a Board of Reference.

2. Clause 7. – Special Rates and Provisions: Delete subclauses (1) – (7) inclusive of this clause and insert in lieu the following—

(1) Confined Space

An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 53 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(2) Toxic Substances

(a) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate government Authority or in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the union and the employer.

(c) An employee using toxic substances or materials of a like nature shall be paid 53 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 41 cents per hour extra.

(d) For the purpose of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(3) Wet Work

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 43 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(4) Dirty Work

An employee engaged on dirty work shall be paid 43 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(5) Spray Application - Painters

A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Labour and Industry, shall be paid 43 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Height Money

An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds fifteen metres in height shall be paid for all work above fifteen metres, 43 cents per hour or part thereof, with an additional 43 cents per hour or part thereof for work above each further fifteen metres in addition to the rates otherwise prescribed in this award.

(7) Swing Scaffold

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable, or bosun's chair or cantilever scaffold; or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height twenty feet or more above the nearest horizontal plane,

shall be paid $3.10 for the first four hours or part thereof and 64 cents for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

(b) A solid plasterer when working off a swing scaffold shall be paid an additional 9 cents per hour.

Editor's Note: The order in this matter was published in March WAIG, Vol. 83, Part 1, Sub-Part 4 at page 482

2002 WAIRC 07037

AWU GOLD (MINING AND PROCESSING) AWARD

NO A 1 OF 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD & OTHERS, RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 19 NOVEMBER 2002
FILE NO/S.	APPLICATION 899A OF 2002
CITATION NO.	2002 WAIRC 07037

Result	Award varied
Representation	
Applicant	Mr C Young
Respondents	Mr R Gifford and Mr K Dwyer as agents

Reasons for Decision

1 The original application 899 of 2002 as filed seeks to amend the AWU Gold (Mining and Processing) Award No A 1 of 1992 ("the Award") in a number of respects, as described in the schedule to the variations sought to include "modernising and upgrading the Award" to reflect community and legislative standards. Whilst at the time the application was made s 40B of the Industrial Relations Act 1979 ("the Act") was not operative, it was common ground that at least in large part, the present application was made to vary the Award, in anticipation of the commencement of this provision in the Act.

2 Mr Young appeared as agent for the applicant. Mr Gifford appeared as agent for a number of named respondent's including Ausdrill Ltd; Henry Walker Constructing Pty Ltd; Kalgoorlie Consolidated Gold Mines; Newcrest Mining Ltd; and Sons of Gwalia. Mr Dwyer appeared as agent on behalf of Cardinal Contractors Pty Ltd and Leighton Contractors Pty Ltd. The remaining respondents did not appear in these proceedings.

3 There is very considerable common ground between the parties to these proceedings, with most of the proposed variations agreed by the parties. However, there are two matters in relation to which there is fundamental disagreement in principle between the parties, they being proposed variations to the Award in relation to parental leave and superannuation. As these matters were fundamentally in dispute, the present proceedings were divided such that those two matters will be determined by the Commission on a date to be fixed and will proceed as application 899B of 2002.

4 In relation to the remainder of the proposed claimed variations, whilst in large part the respondents consent to the variations sought, there remain four matters in dispute that relate to threshold issues, the outcome of which will enable the parties to finalise the proposed variations to the Award. It is those four threshold matters which the Commission deals with in these reasons for decision and they are—

(a) Whether casual employees should be entitled to bereavement leave based upon the relevant provisions of the Minimum Conditions of Employment Act 1993 ("MCE Act");

(b) Whether the industry allowance prescribed in clause 17(1) and referred to in clause 16 - Wage Rates of the Award is properly to be regarded as an allowance or is to be included in the wage rates prescribed in the Award for the purposes of adjustment of allowances pursuant to Principle 5 of the Commissions Wage Fixing Principles;

(c) Whether the first eight dollar arbitrated safety net adjustment should be included in the "rate of pay" for the purposes of adjustment to allowances pursuant to Principle 5 of the Principles; and

(d) How adjustments to money amounts under the Award should be rounded.

5 There is also a minor matter to be dealt with in relation to the proposed cl 21(9) in relation to annual leave.

Casual Employees and Bereavement Leave

6 The applicant submitted that the terms of the MCE Act in relation to this issue are not entirely clear. It was submitted that s 27 of the MCE Act, dealing with an entitlement to bereavement leave, does not contain the express exclusion for casual employees, as do ss 19, 23, 30 and 33 of the MCE Act in relation to other leave and holiday entitlements. Having regard to the definition of "casual employee" in s 3 of the MCE Act, it was submitted that it could be concluded that the omission of such exclusion for casual employees from the entitlement to bereavement leave under s 27 was intentional.

7 Mr Gifford submitted that given the definition of "casual employee" in s 3(1) of the MCE Act, it was the case the parliament intended, as with other leave entitlements, to exclude casual employees from the bereavement leave provisions.

8 This issue turns on the construction of the relevant provisions of the MCE Act as an entitlement to bereavement leave in Division 4 of the MCE Act is, by the combined effect of ss 3 and 5 of the MCE Act, implied into the Award.

9 The MCE Act relevantly provides as follows—

3. Interpretation

(1) In this Act, unless the contrary intention appears —

***"apprentice"** has the same meaning as in the IR Act;*

***"award"** means an award made under the IR Act and includes any industrial agreement or order of the Commission under that Act;*

***"casual employee"** means an employee who is employed on the basis that —*

(a) the employment is casual; and

(b) there is no entitlement to paid leave,

and who is informed of those conditions of employment before he or she is engaged;

***"de facto spouse"** means a person who is co-habiting with another person as that person's spouse, although not actually married to that person;*

***"employee"** means —*

(a) a person who is an employee within the meaning of the IR Act, but for the purposes of this Act section 7B of that Act is to be disregarded;

(b) a person to whom section 43(1) of the Workplace Agreements Act 1993 applies;

but does not include a person who belongs to a class of persons prescribed by the regulations as persons not to be treated as employees for the purposes of this Act;

***"employer"** has the same meaning as in the IR Act, but for the purposes of this Act section 7B of that Act is to be disregarded;*

***"employer-employee agreement"** means an employer-employee agreement under Part VID of the IR Act;*

***"IR Act"** means the Industrial Relations Act 1979;*

***"medical practitioner"** means a person who is registered under the Medical Act 1894 and who has a current entitlement to practise under that Act;*

"minimum condition of employment" *means —*

(a) a rate of pay prescribed by this Act;

(b) a requirement as to pay, other than a rate of pay, prescribed by this Act;

(c) a condition for leave prescribed by this Act;

(d) the use, in manner prescribed by this Act, of a condition for leave prescribed by this Act; or

(e) a condition prescribed by Part 5;

"trainee" *has the same meaning as in the IR Act;*

"workplace agreement" *means a workplace agreement that is in force under the Workplace Agreements Act 1993.*

...

5. Minimum conditions implied in awards etc.

(1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied —

(a) in any workplace agreement;

(aa) in any employer-employee agreement;

(b) in any award; or

(c) if a contract of employment is not governed by a workplace agreement, an employer-employee agreement or an award, in that contract.

...

23. Paid annual leave, entitlement to

(1) An employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 152 hours.

...

27. Paid bereavement leave, entitlement to

(1) Subject to section 28, on the death of —

(a) the spouse or de facto spouse of an employee;

(b) the child or step-child of an employee;

(c) the parent or step-parent of an employee; or

(d) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,

the employee is entitled to paid bereavement leave of up to 2 days.

...

30. Public holidays, entitlement to pay for

An employee, other than a casual employee, who in any area of the State is not required to work on a day solely because that day is a public holiday in that area, is entitled to be paid as if he or she were required to work on that day.

...

33. Unpaid parental leave, entitlement to

(1) Subject to sections 35, 36(1) and 37(1), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of —

(a) the birth of a child to the employee or the employee's spouse; or

(b) the placement of a child with the employee with a view to the adoption of the child by the employee.

..."

10 By s 3 "unless the contrary intention appears" a casual employee is one employed casually and has no entitlement to paid leave. Additionally, to be a casual employee for the purposes of the MCE Act, an employee needs to be informed of those two conditions prior to his or her engagement. Manifestly also, a casual employee is a species of "employee" as defined for the purposes of the MCE Act, unless the relevant provision otherwise specifically refers to a casual employee. In my opinion, it flows from this construction that if an employee is not informed of the matters prescribed in s 3(1) in paras (a) and (b) of the definition of "casual employee" prior to engagement, then he or she is not a casual employee for the purposes of the MCE Act and the exclusions from leave and other benefits would arguably not apply to such an employee.

11 By the combined effects of ss 3 and 5 of the MCE Act, dealing with the definition of "minimum condition of employment" and the implied terms, if the applicant's submission is correct then the Award should be varied to be consistent with the terms of the MCE Act.

12 As set out above, Divisions 2, 3, 4, 5 and also 6, prescribe minimum conditions as to various types of leave and holidays. All of these Divisions of the MCE Act contain the express exclusion for casual employees from their terms. The only exception in this regard, is that in Division 4, specifically s 27, prescribing an entitlement to bereavement leave.

13 Similarly, in Part 5 dealing with minimum conditions for employment changes with significant effects and redundancy, the same exclusion for casual employees is found in s 40(1). It seems clear that parliament has turned its mind to these particular provisions dealing with paid and unpaid leave, holidays and consultation obligations, and has expressly excluded casual employees, as defined in s 3 of the MCE Act, from their operation and effect.

14 The question that requires answering is whether the terms of s 27, dealing with bereavement leave, containing no reference to this exclusion was intentional or whether it was a drafting omission.

15 It is the case that courts and tribunals are generally very reluctant to read words into legislation. Modification of the text of an Act of parliament by inserting words is a different matter from correcting errors. In *Cooper Brookes Wollongong Pty Ltd v FCT* (1981) 35 ALR 151 the High Court however, did read words into legislation to avoid results that were described by Gibbs

CJ as "incongruous" at 157, "contrary to the objects of the Act" per Stephen J at 162 and "capricious and irrational" per Mason and Wilson JJ at 170.

16 Furthermore, in *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 Mahoney J, (McHugh and Clarke JJA agreeing) said at 283—

> *"Legislative inadvertence may consist, inter alia, of either of two things. The draftsman may have failed to consider what should be provided in respect of a particular matter and so fail to provide for it. In such a case, though it may be possible to conjecture what, had he adverted to it, he would have provided, the court may not, in my opinion, supply the deficiency. In the other case, the legislative inadvertence consists, not in a failure to address the problem and determine what should be done, but in the failure to provide in the instrument express words appropriate to give effect to it. In the second case, it may be possible for the court, in the process of construction, to remedy the omission."*

17 A contrary approach was adopted by Stephen J in *Marshall v Watson* (1972) 124 CLR 604 at 649 where His Honour concluded, in applying the observations of Lord Simonds in *Magor and St Mellons RDC v Newport Corp* (1952) AC 189 at 191, to the effect that a gap in legislation is to be remedied by parliament and not the courts. (See also *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 12).

18 The MCE Act was enacted against a background of a system of awards and industrial agreements in this State. The long title to the MCE Act provides that it is "an Act to provide for minimum conditions of employment for employees in Western Australia and for related purposes." Furthermore, pursuant to s 18 of the Interpretation Act 1984, a construction that would promote the purpose or object underlying the written law is to be preferred to one that would not. In ascertaining the purpose of the MCE Act, where there may be some doubt or ambiguity, it is permissible by section 19 of the Interpretation Act 1984, to have regard to extrinsic materials.

19 In the second reading speech introducing the Minimum Conditions of Employment Bill into the Legislative Assembly (Hansard 8 July 1993 at 1456) the then responsible Minister said—

> *"Our Bill establishes a safety net of core minimum conditions which will extend to and bind all employees and employers and will be taken to be implied in any contract of employment including those governed by a workplace agreement, an award or an industrial agreement. It is with some pride that I bring forward this Bill. It is a pacesetter in the Australia and precedes the Federal legislation, foreshadowed by the Federal Minister for Industrial Relations, which will lay down certain minimum conditions of employment.*
>
> *The legislation will provide for a minimum weekly rate of pay, and for various minimum leave conditions – specifically for sick leave, annual leave, public holidays and parental leave. As well there are provisions referring to employment change likely to have significant effect upon an employee or employees, and to redundancy. I repeat, these are minimum – not maximum – conditions of employment. Most workers will have conditions in excess of these. However, none will have less. Apart from the Public and Bank Holidays Act and the Long Service Leave Act, the key minima in this State are established by general orders under section 50 of the Industrial Relations Act. A general order can be made to apply to award and/or non-award employees. General orders have been issued and are current in regard to a limited number of matters. Specifically and notably, orders have been issued in relation to the provision of a minimum rate of wages for adult employees, the provision of four weeks' annual leave for non-award workers. While there is a degree of standardisation throughout awards in relation to some leave conditions such as annual leave, sick leave, maternity leave, public holidays and bereavement leave, the non-award worker who represents some 21.3 per cent of wage and salary earners in Western Australia – or, as at December 1992, roughly 110 000 of those earners – has no such degree of protection. It is notable, for instance, that there is no general entitlement to sick leave for all workers.*
>
> *This legislation will provide a universal, comprehensive and standard set of minimum conditions for all employees. Any provisions of an agreement, award or contract of employment which is less favourable to the employee than these minimum conditions will be to no effect."*

20 At the time of the enactment of the MCE Act, and historically, awards in this State have generally excluded casual employees from most paid leave entitlements. Casual employees traditionally receive a loading on their rate of pay to compensate for the nature of the engagement and the absence of such leave benefits. However, in relation to at least this jurisdiction, the exclusion of casual employees from bereavement leave is not universal. Some awards include casual employees and some do not.

21 The concept of casual employees in this context, appears to have been reflected in the definition of "casual employee" in s 3(1) of the MCE Act, set out above. That is, a casual employee is defined to be one who has no entitlement to paid leave. As I have noted above however, that definition is subject to the qualification that the employee be informed of the two prescribed preconditions. Additionally, all other leave entitlements prescribed in the MCE Act, also set out above, except bereavement leave in s 27, reflect this same principle and may be regarded as part of the statutory scheme of this piece of legislation in my view. To the extent that paid leave other than bereavement leave is excluded, the terms of the MCE Act reflect longstanding industrial practice.

22 From the long title to the MCE Act, and from the second reading speech, it seems clear enough that the purpose of the legislation was to provide minimum conditions of employment for all employees throughout the State, whether regulated by awards or not. Whilst by s 5(1) it is the case that minimum conditions prescribed are implied into all awards, in many cases, and as recognised by the then responsible Minister in introducing the legislation, employees under awards in this State may enjoy more favourable minimum conditions.

23 As I have noted the terms of s 3 of the MCE Act set out above are subject to the introductory qualifying words "unless the contrary intention appears" In my opinion, given the definition of "casual employee" contained in s 3(1) of the MCE Act, and given the scheme of the legislation as a whole in relation to excluding casual employees generally from leave and holiday entitlements, the plain and ordinary meaning of the words used in s 27 of the MCE Act, read with s 3, appear to constitute an exception that parliament has made in relation to bereavement leave. It is notable that the structure of s 27 is quite different to other sections of the MCE Act dealing with other benefits. It is notable that ss 27(1)(a)-(d) refer to "employee" in an unqualified sense. This is not a case of a simple drafting omission.

24 To exclude casual employees requires the insertion of a whole phrase into the section that presently does not exist and moreover, some redrafting of the section would probably be required given that it is structured quite differently. The Commission is of the opinion that it is obliged to interpret the MCE Act as it is to be found, in accordance with the ordinary and natural meaning of the language used in s 27. This construction is not one that leads to a result that is manifestly "capricious and irrational" or "incongruous": *Cooper Brookes*.

25 I therefore uphold the applicant's claim in relation to this matter.

Industry Allowance

26 The question arising in relation to this issue is whether the industry allowance prescribed in cl 17 - Allowances of the Award should be included as a part of the "rate of pay" for the purposes of adjusting allowances under Principle 5 of the Wage Fixing Principles ("the Principles").

27 The applicant submitted that the industry allowance should not be incorporated in the "rate of pay" for these purposes, because the payment is truly an allowance and is not a component of the wage rate.

28 On the other hand, the respondents' submitted that the industry allowance under the Award is a hybrid payment, because although it is specified as an allowance under cl 17 - Allowances, it also appears in cl 16 - Wage Rates of the Award. There was a submission from the bar table, that historically the industry allowance was previously understood in this industry as an over award payment. The submission therefore was that the industry allowance should be included for the purposes of the allowances formula adjustment under Principle 5.

29 Cl 17 (1) of the Award provides as follows—

> *"(1)* ***Industry Allowance***
>
> *(a) Each employee shall be paid the all purpose allowance of $66.30 per week, shown in the Wage Schedule of Clause 16. - Wage Rates of this award.*
>
> *(b) The allowance recognises, and is in payment for all aspects of work in the industry including the location and nature of individual operations within it."*

30 Additionally, the industry allowance appears as a column in the wages clause of the Award, which comprises a base rate, industry allowance, and an arbitrated safety net adjustment to lead to a rate expressed as "total weekly minimum rate".

31 The history of this provision of the Award is not entirely clear. The Award was delivered by the Commission on 27 October 1993: (1993) 73 WAIG 2941. The Award was made by consent. There is little on the record as to the terms of the industry allowance provision although, there is some oblique reference to it in the transcript of the award making proceedings at 11, by the then representative of the AWU. This was again a submission from the bar table briefly referring to the industry allowance as contained in the wages clause as the "gold over award payment". Nothing further was said about this at the time. There was some suggestion that the allowance be described as a supplementary payment.

32 The concept of an allowance in industrial law is well known. The payment to an employee of an allowance in addition to an employee's ordinary rate of wage is usually paid as compensation for a particular disability or aspect of work. Allowances are usually expressed to be paid as hourly, daily or weekly amounts. An "industry allowance", usually paid at a fixed rate over and above the minimum award wage, has historically been designed to compensate for special features of work in a particular industry, which features are common to all employees in that industry: Re *Artificial Fertiliser and Chemical Workers Award* (1964) AILR 43*; Re Municipal Employees (Tas) Award* (1964) AILR 510.

33 In the present matter, I am not persuaded on what is before the Commission, that the industry allowance is other than an allowance as prescribed by cl 17 of the Award. This is so despite its inclusion as a column in the wages clause. I note that the industry allowance is by cl 17(1)(a) paid as an all purpose allowance. Perhaps this is why it is expressed as it is in the wages clause. It is also the case that conceptually "rates of pay" or "wage rates" are payments traditionally attached to an individual job and not an individual employee and recognise the degree of skill and other factors associated with a particular classification. The recognition of conditions under which work is performed, is historically accommodated by the prescription of allowances, separate to rates of pay for particular classifications. Also in my opinion, it would be somewhat incongruous to adjust the industry allowance rate pursuant to Principle 5, by reference to a rate of pay which includes that allowance itself.

34 I therefore do not accept the respondents' submissions that the industry allowance should be regarded as part of the "rate of pay" for the purposes of Principle 5 of the Principles.

First Eight Dollar Adjustment

35 This issue concerns whether or not the first eight dollar arbitrated safety net adjustment ought to be included for the purposes of applying the "furnishing trades formula" in accordance with Principle 5. The "furnishing trades formula" as it has become colloquially known, arises from a decision of the AIRC in print M 9675.

36 The Commission in Court Session determined in December 1993 to award an eight dollar safety net wage adjustment: (1993) 74 WAIG 198. In doing so, the Commission promulgated wage fixing principles which included reference to the adjustment of allowances. In relation to existing allowances, the then principles provided as follows—

> *1. Existing allowances*
>
> *(A)...*
>
> *(B) Existing allowances which relate to work or conditions which have not changed may be adjusted from time to time to reflect State Wage Case Decisions, except where a flat money amount has been awarded, provided that shift allowances expressed in awards as money amounts may be adjusted for flat money amount State Wage Case Decision increases."*

37 In the December 1994 State wage case (1994) 75 WAIG 23, the Commission in Court Session considered the flow on of the AIRC Safety Net Adjustments and Review September 1994 decision (print L 5300). The matter of the adjustment of allowances was raised and the Commission in Court Session observed at 29—

> *"Adjustment of Allowances and Service Increments*
>
> *The only aspects of the Principle by which allowances are to be adjusted under the wage fixing system that needs consideration by us are those which are related to work or conditions which have not changed and service increments. The Chamber has drawn our attention to the Australian Commission's statement in the September, 1994 Review (Print L5300 at p43) where it indicated that it does not propose to determine the issue of the adjustment of allowances, service increments and weekend penalties expressed as flat dollar amounts for the first arbitrated safety net adjustment provided by the National Wage Decision.*
>
> *The Australian Commission goes on to advise that with respect to the second arbitrated safety net adjustment, allowances, service increments and weekend penalties expressed as flat dollar amounts are to be adjusted for the second $8.00 per week increase. Finally, the question of whether or not any similar increase will flow from the third arbitrated safety net adjustment will be determined by the Australian Commission following proceedings scheduled for August, 1995.*

In effect to this position under the "Statement of Principles" the Australian Commission has provided—

> *"Adjustments of existing allowances which relate to work or conditions which have not changed and of service increments for monetary safety net increases will be determined in each case by the Full Bench dealing with the Safety Net Adjustment"*

38 The then Principle 5 - Adjustment of Allowances and Service Increments relevantly provided as follows—

> *"Adjustment of existing allowances which relate to work or conditions which have not changed and of service increments will be determined in each case in accordance with State Wage Decisions."*

39 In March 1996 the Commission in the State Wage Case continued this principle in the same terms: (1996) 76 WAIG 911 and also in the August 1996 review: (1996) 76 WAIG 3368.

40 In October 1997, in the State Wage Case, the Commission in Court Session, for the first time, made reference to the adjustment of allowances having regard to the "furnishing trades formula": (1997) 77 WAIG 3177 at 3182. Principle 5 was amended to provide as follows—

> *"In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the rate and multiplied by 100."*

41 The Principles, as promulgated by the Commission in the July 2002 State Wage Case contain the same provision: (2002) 82 WAIG 1369 at 1387.

42 Given the history in this jurisdiction of the adoption of the allowances adjustment principle, I do not consider that it was the intention of the Commission in Court Session or the effect of the December 1997 State Wage Case decision, to provide the ability to retrospectively apply the first eight dollar safety net adjustment to allowances. Whilst it is of course the case that the November 1997 general order repealed the earlier general order arising from the previous State Wage Case, given that the Commission in Court Session did not refer to the retrospective operation of the "furnishing trades formula", and given that the presumption must be that the general order has prospective effect, the applicant's claim in this regard is rejected.

Rounding

43 The final substantive matter to be determined is the question of rounding. The applicant submitted that there was no custom and practice in relation to this industry, in relation to rounding. This appeared to be common ground between the parties. The applicant's primary submission was that there should be no rounding and present adjustments should be applied to the rates of pay and allowances. Alternatively, if there was to be rounding, then it should be to the nearest five cents.

44 The respondents' submitted that the question of rounding should be approached on three levels. The first level is those allowances paid weekly or fortnightly in the nature of wages which should be treated in the same way and rounded to the nearest 10 cents. Examples were cited such as leading hand allowances, industry allowances, tool allowances etc. Secondly, those allowances paid daily for each shift, should be rounded to the nearest five cents. This would include for example, meal allowances. All other allowance payments such as those expressed to be paid on an hourly basis, should be paid to the nearest one cent.

45 In reply, the applicant submitted that the respondents' proposal was administratively complex and it would be easier, from and administration point of view, to simply round to the nearest five cents, for example.

46 I have given this matter careful consideration. In my opinion, the respondents' proposal has merit in part. I consider that there should be some distinction between those allowances that are paid in the nature of weekly wages and those that are not. In my opinion, given the allowances structure of the Award, and it is only that matter that the Commission is presently dealing with, those paid weekly or per day/shift in the nature of weekly wages, such as industry, leading hand and shift allowances etc should be rounded to the nearest ten cents on the same basis as wage rates. All other allowances, such as those paid to recognise particular disabilities and others such as meal and first aid allowances etc should be rounded to the nearest five cents. This will in my view strike a fair balance between the two broad classes of allowances in a relatively low inflationary environment such as the present.

47 As noted above, one other minor matter requires consideration. There was some disagreement as to the wording of the proposed cl 21(9) dealing with the accrual of annual leave. The applicant proposed the inclusion of a short description of the exclusion of all absences from work without pay. This was in large part based on the inclusion of a similar provision by the Commission in Court Session in the minimum adult award wage clause arising from the July 2002 State Wage Case at 1376. The respondents' acknowledged that bereavement leave should be included in the proposed clause, but objected to the change of structure to the clause as a whole.

48 The inclusion of bereavement leave is clearly required given the terms of s 23 of the MCE Act. However, the Commission is not persuaded to vary the structure of the clause on the basis of the submissions in these proceedings alone. The terms of the respondents' proposed cl 21(9) reflects the structure of an annual leave clause of longstanding and broad application in this jurisdiction.

49 In all other respects, the Commission is prepared to vary the Award in the terms as agreed between the parties. The Commission records the assistance of the parties in the process of the review of this award and the co-operative approach adopted by them.

50 The parties are now directed to confer as to the detail of the variations consequent upon these reasons as to the matters of principle, and to file a draft minute of proposed order within 14 days.

2003 WAIRC 09765

BUILDING TRADES AWARD 1968

No. 31 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, APPLICANT *v.* CRYSTAL SOFTDRINKS, ROYAL AGRICULTURAL SOCIETY OF WESTERN AUSTRALIA INC, WALSH'S GLASS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 1133 OF 2003
CITATION NO.	2003 WAIRC 09765

Result Award varied

Order

HAVING heard Ms K. Scoble (of Counsel) on behalf of the Applicant and Mr K. Dwyer for the Respondent members of the Chamber of Commerce and Industry Western Australia, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Building Trades Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 10. – Wages: Delete subclause (5) of this clause and insert in lieu the following—

(5) Construction Allowance: (per week) $20.31. An employee shall not be entitled to this construction allowance except when required to work "on site" on any work in connection with the erection or demolition of a building or to carry out work which the employer and the union agree is construction work or in default of agreement, that is so declared by the Board of Reference.

2. Clause 12. – Leading Hands: Delete subclause (1) of this clause and insert in lieu the following—

(1) An employee specifically appointed to be a leading hand who is placed in charge of—

		Per Week $
(a)	not more than one employee, other than an apprentice, shall be paid	13.03
(b)	more than one and not more than five other employees shall be paid	29.08
(c)	more than five and not more than ten other employees shall be paid	36.90
(d)	more than ten other employees shall be paid	49.14

In each case, in addition to the rate prescribed for the highest classification or employee supervised, or his/her own rate, whichever is the highest.

3. Clause 13. – Special Rates and Provisions: Delete subclauses (2) – (31) inclusive of this clause and insert in lieu the following—

(2) Insulation: An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof shall be paid $0.58 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(3) Hot Work—

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this Award or in excess of 54 degrees Celsius shall be paid $0.58 per hour or part thereof in addition to the said rates.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of 20 minutes after every two hours work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(4) Cold Work—

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of 20 minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(5) Confined Space: An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation shall be paid $0.58 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Toxic Substances—

(a) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate Government Authority or in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the Union and the employer.

(c) An employee using toxic substances or materials of a like nature shall be paid $0.58 per hour extra. Employees working in close proximity to employees so engaged shall be paid $0.46 per hour extra.

(d) For the purpose of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(7) Asbestos: Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) such employees shall be paid $0.58 per hour extra whilst so engaged.

(8) Dry Polishing or Cutting of Tiles: An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid $0.58 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(9) Bitumen Work: An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid $0.58 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(10) Roof Repairs: An employee engaged on repairs to roofs shall be paid $0.58 per hour or part thereof in addition to the rates otherwise provided in this award.

(11) Wet Work: An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(12) Dirty Work: An employee engaged on dirty work shall be paid $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(13) An employee engaged in repairs to sewers shall be paid at the rate of $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(14) An employee working in a dust-laden atmosphere in a joiners' shop where dust extractors are not provided or in such atmosphere caused by the use of materials for insulating, deafening or pugging work (as, for instance, pumice, charcoal, silicate of cotton or any other substitute), shall be paid at the rate of $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(15) Scaffolding Certificate Allowance: A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Occupational Health, Safety and Welfare and is required to act on that certificate whilst engaged on work requiring a certificated person shall be paid $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(16) Spray Application - Painters: A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Occupational Health, Safety and Welfare, shall be paid $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(17) Cleaning Down Brickwork: An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid $0.42 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(18) Bagging: An employee engaged upon bagging brick or concrete structures shall be paid $0.42 per hour thereof in addition to the rates otherwise prescribed in this award.

(19) Furnace Work: An employee engaged in the construction or alternation or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.24 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(20) Acid Work: An employee required to work on acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.24 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(21) Plasterers using flintcote shall be paid $0.31 per hour extra except where flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be $0.58 per hour extra.

(22) Chemical and Manure Works and Oil Refineries: Journeymen and builders' labourers working on chemical and manure works or oil refineries shall receive $0.20 per hour in addition to the prescribed rate.

(23) Height Money: An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds 15 metres in height shall be paid for all work above 15 metres, $0.46 per hour or part thereof, with an additional $0.46 per hour or part thereof for work above each further 15 metres in addition to the rates otherwise prescribed in this award.

(24) Swing Scaffold—

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable, or bosun's chair cantilever scaffold; or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height of 20 feet or more above the nearest horizontal plane.

shall be paid $3.36 for the first four hours or part thereof and $0.68 for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

(b) A solid plasterer when working off a swing scaffold shall be paid an additional $0.11 per hour.

(c) No apprentice with less than two years' experience shall use a swing scaffold or bosun's chair.

(25) Plumbing—

(a) A plumber doing sanitary plumbing work on repairs to sewer drainage or wastepipe services in any of the following places—

(i) Infectious and contagious diseases hospitals or any block or portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease.

(ii) Morgues, shall be paid $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(b) A plumber doing work on a ship of any class—

(i) whilst under way; or

(ii) in a wet place, being one in which the clothing of an employee necessarily becomes wet to an uncomfortable degree or one in which water accumulates underfoot; or

(iii) in a confined space; or

(iv) in a ship which has done one trip or more in a fume or dust-laden atmosphere, in bilges, or when cleaning blockages in soil pipes or waste pipes or repairing brine pipes; shall be paid $0.57 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(c) A plumber carrying out pipework in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.21 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(d) A plumber required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.39 for such examination and $0.86 per hour thereafter for fixing renewing or repairing such work.

(e) Permit Work: Any licenced plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $31.69 for that week, in addition to the rates otherwise prescribed in this award.

(f) Plumbers on Sewerage Work: Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up on house drains or wastepipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.50 per day in addition to the prescribed rate whilst so employed.

(26) Explosive Powered Tools: An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools is required to use an explosive powered tool shall be paid $1.09 for each day on which he uses such tool in addition to the rates otherwise prescribed in this award.

(27) Secondhand Timber: Where whilst working with secondhand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber, shall be entitled to an allowance of $1.82 per day on each day upon which his tools are so damaged provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(28) Computing Quantities: An employee, other than a leading hand, who is regularly required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.36 per day or part thereof in addition to the rates otherwise prescribed in this award.

(29) Setter Out: A setter out in a joiner's shop shall be paid $4.96 per day in addition to the rates otherwise prescribed by this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(30) Detail Worker: A detail worker shall be paid $4.96 per day in addition to the rates otherwise prescribed in this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(31) Spray Painting - Painters—

(a) Lead paint shall not be applied by a spray to the interior of any building.

(b) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(c) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.38 per day.

2003 WAIRC 09886

BUILDING TRADES (CONSTRUCTION) AWARD 1987

NO. R 14 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* ADSIGNS PTY LTD, ALL READY SURFACING CO PTY LTD, APOLLO CONSTRUCTION, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 30 OCTOBER 2003
FILE NO.	APPLICATION 1106 OF 2003
CITATION NO.	2003 WAIRC 09886

Result	Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr K. Dwyer for the Respondent member of the Chamber of Commerce and Industry of Western Australia and Mr K. Richardson for the Respondent members of the Master Builders Association of Western Australia (Union of Employers), and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Building Trades (Construction) Award 1987, No. R14 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after 22 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Rates of Pay—

A. Delete subclause (3) of this clause and insert in lieu the following—

(3) Industry Allowance

The industry allowance at the rate of $20.40 per week to be paid to each employee is to compensate for the following disabilities associated with construction work:-

(a) Climate conditions when working in the open on all types of work.

(b) The physical disadvantage of having to climb stairs or ladders.

(c) The disability of dust blowing in the wind, brick dust and drippings from concrete.

(d) Sloppy and muddy conditions associated with the initial stages of the erection of a building.

(e) The disability of working on all types of scaffolding or ladders other than a swing scaffold, suspended scaffold, or a bosun's chair.

(f) The lack of the usual amenities associated with factory work (e.g. meal rooms, change rooms, lockers).

B. Delete subclause (8)(a)(i) of this clause and insert in lieu the following—

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $9.97 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

C. Delete the preamble to subclause (9) of this clause and insert in lieu the following—

(9) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $16.20 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 9. - Special Rates and Provisions whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 9. - Special Rates and Provisions.

D. Delete subclauses (10) to (14) inclusive of this clause and insert in lieu the following—

(10) Leading Hands

(a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge:-

		Weekly Base Only $	Rate Per Hour $
(i)	In charge of not more than one person	17.10	0.46
(ii)	In charge of two and not more than five persons	28.70	0.78
(iii)	In charge of six and not more than ten persons	36.60	0.99
(iv)	In charge of more than ten persons	48.80	1.32

(b) The hourly rate prescribed in paragraph (a) hereof is calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the weekly base amount by 52 and dividing the result by 50.4 and by dividing the amount by 38.

(11) Licensed Plumbers Accepting Responsibility

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any week - $31.68 for that week.

(12) Plumber Acting on Welding Certificate

A plumber who is requested by his/her employer to hold the relevant qualifications and has obtained a certificate of competency pursuant to procedures as set out by the Standards Association of Australia or other relevant recognised codes, or, who may have to carry out work which is subject to other special tests but not a normal trade test, and is required by his/her employer to act on such qualifications, shall be paid an additional 42 cents per hour for oxyacetylene welding and 42 cents per hour for electric welding for every hour of his/her employment whether or not he/she has in any hour performed work relevant to those qualifications held.

(13) Lead Work

A plumber engaged in leadburning or lead work in connection therewith shall be paid an additional $1.43 per hour.

(14) Ship's Plumbing

A plumber engaged on plumbing work in connection with ships shall be paid an additional $1.00 cents per hour.

2. Clause 9. – Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following—

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award—

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 57 cents per hour or part thereof.

(b) Hotwork

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius - 46 cents per hour or part thereof, exceeding 54 degrees celsius - 57 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 46 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 57 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold—

(i) an employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours	Each Additional Hour
	$	$
0-15 storeys	3.33	0.69
16-30 storeys	4.30	0.89
31-45 storeys	5.07	1.03
46-60 storeys	8.32	1.71
Greater than 60 storeys	10.61	2.19

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 11 cents per hour.

(f) Explosive Powered Tools

An operator of explosive powered tools, as defined in this award, who is required to use an explosive powered tool, shall be paid $1.09 for each day on which he/she uses such a tool.

(g) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 46 cents per hour whilst so engaged.

(h) Dirty Work

An employee engaged on unusually dirty work shall be paid 46 cents per hour.

(i) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 46 cents per hour for all work above fifteen metres, and 46 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10. - Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(j) Toxic Substances

(i) An employee required to use toxic substances shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 29. - Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 57 cents per hour. Employees working in close proximity to employees so engaged shall be paid 46 cents per hour.

(iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(k) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(l) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 57 cents per hour extra whilst so engaged.

(m) Furnace Work

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.22 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.22 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(o) Cleaning Down Brickwork

An employee required to clean down bricks using acids or other corrosive substances shall be paid 42 cents per hour. While so employed employees will be supplied with gloves by the employer.

(p) Bagging

Employees engaged upon bagging brick or concrete structures shall be paid 42 cents per hour.

(q) Bitumen Work

An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid 57 cents per hour.

(r) Roof Repairs

Employees engaged on repairs to roofs shall be paid 57 cents per hour.

(s) Computing Quantities

Employees who are regularly required to compute or estimate quantities of materials in respect to the work performed by other employees shall be paid $3.33 per day or part thereof.

Provided that this allowance shall not apply to an employee classified as a leading hand.

(t) Underground Allowance

(i) An employee required to work underground for no more than 4 days or shifts in an ordinary week shall be paid $ 1.99 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (8) of Clause 8. - Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than 6 metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon “pot and drive” work at a depth of 3.5 metres or less.

(u) Plumbing

(i) A plumber doing sanitary plumbing work or repairs to sewer drainage or waste pipe services in any of the following places—

(aa) Infectious and contagious diseases hospitals or any block or portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease; or

(bb) Morgues—

shall be paid 42 cents per hour or part thereof.

(ii) A plumber required to enter a well 9 metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith shall be paid $1.97 for such examination and 88 cents per hour thereafter for fixing, renewing or repairing such work.

(iii) A plumber or an apprentice to plumbing, other than one in his/her first or second year of apprenticeship, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose or on work involving the cleaning out of septic tanks or dry wells shall be paid a minimum of $2.45 per day.

(v) (a) An employee who—

(i) is appointed by his or her employer to be responsible for carrying out first aid duties as they may arise; and

(ii) holds a recognised first aid qualification (as set out hereunder) from the Australian Red Cross Society, St John Ambulance Association or similar body; and

(iii) is required by his or her employer to hold a qualification at that level; and

(iv) the qualification satisfies the relevant statutory requirement pertaining to the provision of first-aid services at the particular location where the employee is engaged;

(v) those duties are in addition to his or her normal duties, recognising what first aid duties encompass by definition;

shall be paid at the following additional rates to compensate that person for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications;

(A) an employee who holds the Basic First Aid certificate or equivalent qualification recognised under the Occupational Safety and Health Act 1984 - $1.96 per day; or

(B) an employee who holds at least a Senior First Aid certificate, Industrial First Aid certificate or equivalent, or higher qualification recognised under the Occupational Safety and Health Act 1984 - $3.08 per day.

(b) In payment of an allowance under this clause, a person shall be paid only for the level of qualification required to be held, and there shall be no double counting for employees who hold more than one qualification.

(c) An employer shall be under no obligation to provide paid training leave or other payment of any kind to employees to acquire or update first aid qualifications.

(w) Heavy Blocks

(i) Employees lifting other than standard bricks

An employee required to lift blocks (other than cindcrete blocks for plugging purposes) shall be paid the following additional rates—

Where the blocks weigh over 5.5 kg and under 9 kg - 46 cents per hour.

Where the blocks weigh 9 kg or over and up to 18 kg - 83 cents per hour.

Where the blocks weigh over 18 kg –$1.17 cents per hour.

An employee shall not be required to lift a building block in excess of 20 kg in weight unless such employee is provided with a mechanical aid or with an assisting employee; provided that an employee shall not be required to manually lift any building block in excess of 20 kg in weight to a height of more than 1.2 metres above the working platform.

Provided that this subclause shall not apply to employees being paid the extra rate for refractory work.

(ii) Stonemasonry Employees

The employer of stonemasonry employees shall provide mechanical means for the handling, lifting and placing of heavy blocks or pay in lieu thereof the rates and observe the conditions prescribed in paragraph (i) herein.

(x) Plaster or Composition Spray

An employee using a plaster or composition spray shall be paid an additional 46 cents per hour whilst so engaged.

(y) Slushing

An employee engaged at “Slushing” shall be paid 46 cents per hour.

(z) Dry Polishing of Tiles

Employees engaged on dry polishing of tiles (as defined) where machines are used shall be paid 57 cents per hour or part thereof.

(aa) Cutting Tiles

An employee engaged at cutting tiles by electric saw shall be paid 57 cents per hour whilst so engaged.

(bb) Second Hand Timber

Where, whilst working with second hand timber, an employee’s tools are damaged by nails, dumps or other foreign matter on the timber he/she shall be entitled to an allowance of $1.81 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this paragraph unless it is reported immediately to the employer’s representative on the job in order that he/she may prove the claim.

(cc) Height Work - Painting Trades

An employee working on any structure at a height of more than 9 metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 42 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun’s chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (i) of this subclause.

(dd) Brewery Cylinders - Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes’ spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8. - Rates of Pay of this award.

(ee) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 46 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(ff) Spray Application - Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 46 cents per hour extra.

(gg) Bricklayer Operating Cutting Machine

One bricklayer on each site to operate the cutting machine and to be paid 57 cents per hour or part thereof whilst so engaged.

(hh) Spray Painting - Painters

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.31 per day.

(ii) Grindstone Allowance

Where a grindstone or wheel is not made available as required by Clause 32(5)(b) of the award, an allowance of $4.90 per week shall be paid in lieu of same to each Carpenter or Joiner.

3. Clause 10. – Multi-Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following—

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building - structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level - 37 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level - 45 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level - 69 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level - 88 cents per hour extra;

From Sixty-first Floor Level Onwards – $1.10 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix F. – Asbestos Eradication: Delete clause 5 of this Appendix and insert in lieu the following—

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive $1.54 per hour worked in lieu of Special Rates prescribed in Clause 9(1) with the exception of subclauses (b), (c), (e), (x), (ab) and (af).

5. Appendix G. – Laser Equipment: Delete clause 4 of this Appendix and insert in lieu the following—

Where an employee has been appointed by his employer to carry out the duties of a laser safety officer he shall be paid an allowance of $1.90 per day or part thereof whilst carrying out such duties. The allowance shall be paid as a flat amount without attracting any premium or penalty.

2003 WAIRC 09866

BUILDING TRADES (GOLDMINING INDUSTRY) AWARD

Nos 29 and 32 of 1965 and 4 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* LAKE VIEW AND STAR LIMITED, GREAT BOULDER GOLD MINES LTD, GOLD MINES OF KALGOORLIE (AUST) LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 1146 OF 2003
CITATION NO.	2003 WAIRC 09866

Result Award varied

Order

HAVING no appearance for the Applicant and Ms K. Taylor for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades (Goldmining Industry) Award Nos 29 & 32 of 1965 and 4 of 1966 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 27 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. – Leading Hands: Delete this clause and insert in lieu the following—

Leading Hands in charge of not less than three and not more than ten employees shall be paid at the rate of	$17.40
More than ten and not more than 20 other employees at the rate of	$26.00
More than 20 employees at the rate of	$33.70

2. Clause 13. – Special Rates and Provisions:

A. Delete subclause (1) of this clause and insert in lieu the following—

(1) Disabilities Allowance: An employee employed outside of his/her shop on construction work shall for the time so employed be paid a disabilities allowance at the rate of $2.08 per week in addition to the prescribed rate.

B. Delete subclause (16) of this clause and insert in lieu the following—

(16) Plumbers on Sewerage Work: Plumbers employed on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or on work involving the cleaning of septic tanks or dry wells, shall be paid 45 cents per day in addition to the prescribed rate.

2003 WAIRC 09766

BUILDING TRADES (GOVERNMENT) AWARD 1968

No. 31A of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, APPLICANT *v.* CONTRACT AND MANAGEMENT SERVICES, HEALTH DEPARTMENT OF WESTERN AUSTRALIA, ANODISERS W.A., RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 1134 OF 2003
CITATION NO.	2003 WAIRC 09766

Result Award varied

Order

HAVING heard Ms K. Scoble (of Counsel) on behalf of the Applicant and Mr R. Heaperman for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades (Government) Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 21 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 9. – Wages—

A. Delete subclause (3) of this clause and insert in lieu the following—

(3) Allowance for Lost Time: Thirteen days' sick leave and follow the job (per week)—

An employee whose employment is terminated through no fault of his/her own and who has not completed nine months' continuous service with his/her employer shall, for each week of continuous employment with that employer, immediately prior to his/her termination of employment be paid the lost time allowance prescribed hereunder less any payments made to him/her in respect of sick leave during that employment—

		$
(a)	Bricklayers, stoneworkers, carpenters, joiners, painters, glaziers, signwriters, plasterers, plumbers and stonemasons	46.25
(b)	Special Class Tradesperson (as defined)	48.57
(c)	Registered Plumbers	48.04

		$
(d)	Builders Labourers	
	(i) Classifications (i) to (iii) inclusive	45.34
	(ii) Classifications (iv) to (ix)	42.63
	(iii) Classification (x)	41.21
	(iv) Classification (xi)	38.40

NOTE: In the event of any increase or decrease in the wages and other allowances prescribed in this clause, except the tool allowances, the amounts prescribed in this subclause shall be increased or decreased by an amount equal to 9.7% of that increase or decrease.

B. Delete subclause (4) of this clause and insert in lieu the following—

(4) Disabilities Allowance (Per Week): $20.22

(a) Subject to the provisions of paragraph (b), of this subclause an allowance of $20.22 shall be paid to all employees excepting employees who are employed for the major portion of any week in or about a permanent maintenance depot or who are usually employed in or about the employer's business when an employee coming within the exception is engaged on the erection or demolition of a building exceeding 250 square feet in floor area.

(b) Employees who are directed to work temporarily in or about a permanent maintenance depot and who immediately prior to being so directed were in receipt of the allowance for a period of not less than three months shall be paid two-thirds of the allowance prescribed herein.

C. Delete subclause (7) of this clause and insert in lieu the following—

(7) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $15.60 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 13. - Special Rates and Provisions of this award whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 13. - Special Rates and Provisions.

(a) General Plumber—

(i) clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) work in wet places;

(iii) work requiring a swing scaffold, swing seat or rope;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(b) Mechanical Services Plumber—

(i) handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;

(ii) work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius or exceeding 54° Celsius;

(iii) work in a place where fumes of sulphur or other acid or other offensive fumes are present;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(c) Roof Plumber—

(i) work in the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;

(ii) use of explosive powered tools;

(iii) work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with, and shall use, all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);

(iv) dirty or offensive work;

(v) work requiring a swing scaffold, swing seat or rope;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

2. Clause 11. – Leading Hands: Delete subclause (1) of this clause and insert in lieu the following—

(1) Any employee referred to in Clause 9. - Wages of this award or a leading hand defined in paragraph (h) of subclause (3) of Clause 6. - Definitions of this award, who is placed in charge for not less than one day of—

(a) not less than three and not more than ten other employees referred to in Clause 9. - Wages shall be paid at the rate of $32.85 per week extra;

(b) more than ten and not more than twenty other employees referred to in Clause 9. - Wages shall be paid at the rate of $43.94 per week extra;

(c) more than twenty other employees referred to in Clause 9. - Wages shall be paid at the rate of $55.02 per week extra.

3. Clause 13. – Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) Conditions respecting Special Rates—

(a) The special rates prescribed in this award shall be paid irrespective of the times at which work is performed and shall not be subject to any premium or penalty conditions.

(b) Where more than one of the above rates provides payments for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(2) Swing Scaffold—

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable or bosun's chair or cantilever scaffold, or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height 6.1 metres or more above the nearest horizontal plane,

shall be paid $3.20 for the first four hours or part thereof: and 65 cents for each hour thereafter on any day in addition to the rates otherwise prescribed.

(b) A solid plasterer when working on a swing scaffold shall be paid an additional 13 cents per hour.

(c) No apprentice with less than two years' experience shall use a swing scaffold or bosun's chair.

(d) Provided that no allowance shall be payable for working on such scaffolds when used under bridges or jetties unless the height of the scaffold above the water exceeds 0.9 metres.

(3) Insulation—

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof: shall be paid 53 cents per hour part thereof: in addition to the rates otherwise prescribed.

(4) Work in Dust Laden Atmosphere

Working in a dust laden atmosphere in a joiner's shop where dust extractors are not provided in or such atmosphere caused by the use of materials for insulating, deafening or plugging work (as, for instance, pumice, charcoal, silicate of cotton, or any other substitute) or from earthworks, 53 cents per hour extra.

(5) Confined Space—

An employee required to work in a confined space, being a place the dimension or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 53 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(6) Sewer Work—

An employee engaged in repairs to sewers shall be paid 41 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(7) Sanitary Plumbing Work—

A plumber doing sanitary plumbing work on repairs to sewer drainage or waste pipe services in any of the following places—

(a) Infectious and contagious disease hospitals or any block or portion of a hospital used for the care or treatment of patients suffering from any infectious or contagious disease.

(b) Morgues—

shall be paid 44 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(8) Ship Plumbing—

A plumber doing work on a ship of any class—

(a) Whilst under way; or

(b) In a wet place being one in which the clothing of an employee necessarily becomes wet to an uncomfortable degree or one in which water accumulates underfoot; or

(c) In a confined space; or

(d) In a ship which has done one trip or more in a fume or dust laden atmosphere, in bilges, or when cleaning blockages in soil pipe or waste pipes or repairing brine pipes, shall be paid 64 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(e) A plumber carrying out pipe work in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.30 per hour or part thereof: in addition to the rates otherwise prescribed.

(9) Well Work—

A plumber or labourer required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.28 for such examination and 74 cents per hour extra thereafter for fixing, renewing or repairing such work.

(10) Permit Work—

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $13.74 for that week in addition to the rates otherwise prescribed.

(11) Plumbers on Sewerage Work—

Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.27 per day or part thereof: in addition to the prescribed rate.

(12) Height Money—

An employee required to work on a chimney stack, spire, tower, air shaft, cooling tower, water tower exceeding fifteen metres in height shall be paid for all work above fifteen metres, 44 cents per hour thereof: with an additional 44 cents per hour or part thereof: for work above each further fifteen metres in addition to the rates otherwise prescribed.

(13) Barge Work

A Main Roads Employee required to work on scaffolding which is mounted on a barge is to be paid an allowance of $4.09 per day, or majority thereof, or $2.03 per half day, or part thereof, for such work.

(14) Furnace Work—

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work or on underpinning shall be paid $1.17 per hour or part thereof: in addition to the rates otherwise prescribed.

(15) Hot Work—

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46° Celsius and 54° Celsius shall be paid 44 cents per hour or part thereof: in addition to the rates otherwise prescribed, or in excess of 54° Celsius shall be paid 53 cents per hour or part thereof: in addition to the said rates.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(16) Cold Work—

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than 0° Celsius shall be paid 44 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(17) Swanbourne and Graylands: Employees required to work at the Swanbourne and Graylands Hospitals controlled by the Mental Health Service shall be paid at the rate of 44 cents per hour in addition to the prescribed rate.

(18) Flintcote: Plasterers using flintcote shall be paid 44 cents per hour or part thereof: except when flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be 76 cents per hour extra in addition to the prescribed rate.

(19) Dirty Work—

(a) An employee employed on excessively dirty work which is more likely to render the employee or his/her clothes dirtier than the normal run of work, shall be paid 44 cents per hour extra in addition to the prescribed rate (with a minimum payment of four hours when employed on such work).

(b) This shall not apply to an employee in receipt of the allowance prescribed in subclause (4) of Clause 9. - Wages of this award nor to a worker in receipt of the allowance prescribed in subclause (27) hereof.

(20) Stonemason on Wall—

A stonemason working on the wall (cottage work and foundation work in coastal stone excepted) shall be paid 44 cents per hour thereof: in addition to the rates otherwise prescribed.

(21) Setter Out—

A setter out (other than a leading hand) in a joiner's shop shall be paid $4.28 per day in addition to the rates otherwise prescribed.

(22) Detail Employee—

A detail employee (other than a leading hand) shall be paid $4.28 in addition to the rates otherwise prescribed.

(23) Spray Painting - Painter—

(a) Lead paint shall not be applied by a spray to the interior of any building.

(b) All employees (including apprentices) applying paint by spraying, shall be provided with full overalls and head covering and respirators by the employer.

(c) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substance used by an employee in spray painting, the employee shall be paid a special allowance of $1.17 per day.

(24) Lead Paint Surfaces—

(a) No surface painted with lead paint shall be rubbed down or scraped by a dry process.

(b) Width of Brushes: All brushes shall not exceed 127 millimetres in width and no kalsomine brush shall be more than 177.8 millimetres in width.

(c) Meals not to be taken in paint shop. No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(25) Spray Application - Painters—

A painter engaged on all applications carried out in other than a properly constructed booth approved by the Department of Labour and Industry shall be paid 44 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(26) An employee who is a qualified first aid person and is appointed by his/her employer to carry out first aid duties in addition to his/her usual duties shall be paid an additional rate of $1.51 per day.

(27) Toxic Substances—

(a) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate Government Authority in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the union and the employer.

(c) An employee using toxic substances or materials of a like nature shall be paid 53 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 41 cents per hour extra.

(d) For the purposes of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(28) Abattoirs—

An employee, other than a plumber in receipt of the plumbing trade allowance, employed in an abattoir shall be paid such rate as is agreed upon between the parties, or, in default of agreement, the rate determined by the Board of Reference.

(29) Fumes—

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer.

(30) Asbestos—

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (ie. combination overalls and breathing equipment or similar apparatus) such employees shall be paid 53 cents per hour whilst so engaged.

(31) Explosive Powered Tools—

An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools, who is required to use an explosive powered tool shall be paid $1.03 for each day on which he/she used a tool in addition to the rates otherwise prescribed.

(32) Wet Work—

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 44 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(33) Cleaning Down Brickwork—

An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid 41 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(34) Bagging—

An employee engaged upon bagging brick or concrete structures shall be paid 41 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(35) Bitumen Work—

An employee handling hot bitumen or asphalt or dripping materials in creosote shall be paid 53 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(36) Scaffolding Certificate Allowance—

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Labour and Industry and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid 44 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(37) Dry Polishing or Cutting of Tiles—

An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid 53 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(38) Secondhand Timber—

Where, whilst working with second-hand timber, an employees tools are damaged by nails, dumps or other foreign matter on the timber, he/she shall be entitled to an allowance of $1.51 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(39) Roof Repairs—

An employee engaged on repairs to roofs shall be paid 48 cents per hour or part thereof: in addition to the rates otherwise provided in this award.

(40) Computing Quantities—

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.22 per day or part thereof: in addition to the rates otherwise prescribed in this award.

(41) Loads—

Where bricks are being used the employee shall not be required to carry—

(a) More than 40 bricks each load in a wheelbarrow (or a scaffold) to a height of 4.6 metres from the ground.

(b) More than 36 bricks each load in a wheelbarrow over a height of 4.6 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the union.

(42) Grinding Facilities—

The employer shall provide adequate facilities for the employees to grind tools either at the job or at the employer's premises and the employees shall be allowed time to use the same whenever reasonably necessary.

(43) First Aid Outfit—

On each job the employer shall provide sufficient supply of bandages and antiseptic dressings for use in case of accidents.

(44) Water and Soap—

Water and soap shall be provided in each shop or on each job by the employer.

(45) (a) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Construction Safety Act, 1972, an employee is required to wear such helmet.

(b) Any helmet so supplied shall remain the property of the employer and during that time it is on issue the employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(46) Provision of Boiling Water—

The employer shall, where practicable provide boiling water for the use of his/her employees on each job at lunch time.

(47) Sanitary Arrangements—

The employer shall comply with the provisions of section 102 of the Health Act, 1911.

(48) Attendants on Ladders—

No employees shall work on a ladder at a height of over 6.1 metres from the ground when such ladder is standing in any street, way or lane where traffic is passing to and fro, without an assistant on the ground.

(49) Electrical Sanding Machines—

The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions—

(a) The weight of each such machine shall not exceed 5.9 kilograms.

(b) Every employer operating any such machine shall endeavour to ensure that each such machine, together with all electrical leads and associated equipment, is kept in a safe condition and shall if requested so to do by any employee but not more often than once in any four weeks cause the same to be inspected under the provisions of the Electricity Act and the regulations made thereunder.

(c) Employers shall provide and supply respirators of a suitable type, to each employee and shall maintain same in an effective and clean state at all times.

Where respirators are used by more than one employee, each such respirator shall be sterilised or a new pad inserted after use by each such employee.

(d) Employers shall also provide and supply goggles of suitable type provided that the goggles with celluloid lenses shall not be regarded as suitable.

(e) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(50) Dam Walls—

Adequate precautions shall be taken by all employers for the safety of workers employed on the retaining walls of dams. Any dispute as to the adequacy of precautions taken shall be referred to the Board of Reference.

(51) The Secretary or any authorised officer of the union shall have the right to visit any job for the purpose of ascertaining whether work is being performed in accordance with the provisions of the Construction Safety Act, 1972, and any regulations made thereunder. Should he/she be of the opinion that the work being carried out is not in accordance with those provisions the Secretary or any authorised officer of the union shall inform the employer and the employees concerned accordingly and may report any alleged breach of Act or the regulations to the Chief Inspector of Construction Safety.

(52) Where the employer provides transport to and from the job the conveyance used for such transport shall be provided with suitable seating and weatherproof covering.

(53) An employee engaged on work at Fremantle Prison shall be paid 44 cents per hour extra.

(54) Any dispute which may arise between the parties in relation to the application of any of the foregoing special rates and provisions may be determined by the Board of Reference.

(55) Building tradespersons engaged solely on outside work at Homeswest shall be given one winter jacket per year to be replaced on a fair wear and tear basis.

4. Schedule C – Hospital Environment Allowance: Delete this schedule and insert in lieu the following—

Notwithstanding the provisions of Clause 13. - Special Rates and Provisions of this Award, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:-

1. (a) For work performed in a hospital environment - $11.85 per week.

(b) For disabilities associated with work performed in—

Difficult access areas;

Tunnel complexes;

Areas with great temperature variation: - $4.13 per week.

Princess Margaret Hospital

King Edward Memorial Hospital

Sir Charles Gairdner Hospital

Royal Perth Hospital

Fremantle Hospital

2. For work performed in a hospital environment - $7.98 per week.

Kalgoorlie Hospital

Osborne Park Hospital

Albany Hospital

Bunbury Hospital

Geraldton Hospital

Mt Henry Hospital

Northam Hospital

Swan Districts Hospital

Perth Dental Hospital

3. For work performed in a hospital environment - $5.65 per week.

Bentley Hospital
Derby Hospital
Narrogin Hospital
Port Hedland Hospital
Rockingham Hospital
Sunset Hospital
Armadale Hospital
Broome Hospital
Busselton Hospital
Carnarvon Hospital
Collie Hospital
Esperance Hospital
Katanning Hospital
Merredin Hospital
Murray Hospital
Warren Hospital
Wyndham Hospital

4. The monetary amounts prescribed in this Schedule shall be adjusted in accordance with any decision of the Commission in Court Session which alters wage rates generally following movements in the Consumer Price Index and which is subsequently reflected by amendment to the allowances contained in Clause 13. - Special Rates and Provisions of the Building Trades (Government) Award No. 31A of 1966.

5. Appendix D – Award Restructuring: Delete subclause (8)(b) of this Appendix and insert in lieu the following—

(b) (i) In addition to the rates contained in paragraph (a) of this subclause, employees designated in classification levels to 7 inclusive shall receive an all purpose industry allowance of $12.58.

(ii) This allowance shall be paid in two instalments as follows—

(aa) $6.35 of the allowance shall be paid after the first twelve months of government service; and

(bb) the remaining $6.22 shall be paid on 24 months of government service.

2003 WAIRC 09865

EARTH MOVING AND CONSTRUCTION AWARD

No. 10 of 1963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* GOLDFIELDS CONTRACTORS PTY LTD, HOT MIX LTD, RHODES, DFD PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 1151 OF 2003
CITATION NO.	2003 WAIRC 09865

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr K. Dwyer for the Respondent members of the Chamber of Commerce and Industry of Western Australia, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Earth Moving and Construction Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after 22 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 24. – Allowances and Special Provisions: Delete this clause and insert in lieu the following—

(1) Dirt Money—

A dirt allowance of $0.47 per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(2) Confined Space—

Workers working in confined space shall be paid an allowance of $0.57 per hour. "Confined space" means one of which the dimensions are such that the workman must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him.

(3) Wet Work—

(a) Any worker working in water or "wet places" shall be paid an extra allowance of $3.71 per day or part of a day.

(b) "Wet places" shall mean places where, in the performance of the work the splashing of water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to men working on surfaces made wet by rain.

(c) In exceptional cases where the work is excessively wet and which are not covered by paragraph (b) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(d) Subject to paragraph (c), the engineer in charge or the foreman shall decide whether any allowance is payable under this clause.

(e) Workers called upon to work overtime in water or in wet places shall receive an extra $3.71 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(4) A multi-storey allowance shall be paid to all employees to whom this award applies engaged on site in the construction of a multi-storey building as defined in accordance with the following:-

From commencement of building to 15th floor level - $0.36 per hour extra.

From 16th floor level to 30th floor level - $0.45 per hour extra.

From 31st floor level to 45th floor level - $0.69 per hour extra.

From 46th floor level to 60th floor level - $0.88 per hour extra.

From 61st floor level onwards - $1.12 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

2. Appendix 1:

A. Delete subclause (5) of this Appendix and insert in lieu the following—

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $20.14 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

B. Delete subclause (8) of this Appendix and insert in lieu the following—

(8) Allowances and Special Provisions

(a) Dirt Money

A dirt allowance of 47 cents per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(b) Confined Space

Workers working in confined space shall be paid an allowance of 57 cents per hour. "Confined space" means one of which the dimensions are such that the workperson must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him/her.

(c) Wet Work

(i) Any worker working in water or "wet places" shall be paid an extra allowance of $3.71 per day or part of a day.

(ii) "Wet places" shall mean places where, in the performance of the work the splashing of water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his/her clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to workers working on wet surfaces made wet by rain.

(iii) In exceptional cases where the work is excessively wet and which are not covered by paragraph (ii) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(iv) Subject to paragraph (iii), the engineer in charge or the foreperson shall decide whether any allowance is payable under this clause.

(v) Workers called upon to work overtime in water or in wet places shall receive an extra $3.71 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(d) A multi-storey allowance shall be paid to all employees to whom this Appendix applies engaged on site in the construction of a multi-storey building as defined in accordance with the following:-

From commencement of building to 15th floor level - 36 cents per hour extra.

From 16th floor level to 30th floor level - 45 cents per hour extra.

From 31st floor level to 45th floor level - 69 cents per hour extra.

From 46th floor level to 60th floor level - 88 cents per hour extra.

From 61st floor level onwards - $1.12 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

2003 WAIRC 09871

ENGINE DRIVERS' (BUILDING AND STEEL CONSTRUCTION) AWARD

No. 20 of 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* MASTER BUILDERS ASSOCIATION OF WA, CIVIL AND CIVIC PTY LTD, JO CLOUGH AND SONS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 30 OCTOBER 2003
FILE NO.	APPLICATION 1132 OF 2003
CITATION NO.	2003 WAIRC 09871

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr K. Dwyer for the Respondent member of the Chamber of Commerce and Industry of Western Australia and Mr K. Richardson for the Respondent members of the Master Builders Association of Western Australia (Union of Employers), and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after 22 October 2003

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 24. – Allowances and Special Provisions: Delete this clause and insert in lieu the following—

(1) An employee required to work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius shall be paid $0.46 per hour or part thereof in addition to the rates otherwise prescribed in this award, or in excess of 54° Celsius shall be paid $0.56 per hour or part thereof in addition to the said rates.

(2) Dirt Money: a dirt allowance of $0.46 per hour or part thereof shall be payable in connection with work deemed to be unusually dirty; cases of dispute to be settled by a Board of Reference.

(3) Height Allowance—

(a) Tower crane drivers shall be paid a height allowance in accordance with the following schedule, the height to be measured from ground level, i.e. street level to floor of crane cabin—

From ground level up to and including 30 metres - $0.36 per hour.

Over 30 metres and up to 45 metres - $0.44 per hour.

Over 45 metres and up to 60 metres - $0.75 per hour.

Over 60 metres - $0.36 per hour additional for each 15 metres over 60 metres.

(b) Mobile crane drivers, when employed for any day or part thereof on a building site where a multi storey building is being or is to be constructed shall be paid a multi-storey allowance in accordance with the following table—

From commencement of building to 15th floor level - $0.36 per hour extra.

From 16th floor level to 30th floor level - $0.44 per hour extra.

From 31st floor level to 45th floor level - $0.67 per hour extra.

From 46th floor level to 60th floor level - $0.86 per hour extra.

From 61st floor level onwards - $1.10 per hour extra.

2. Clause 27. - Wages: Delete subclause (5) of this clause and insert in lieu the following—

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $19.87 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

3. 4th Schedule – Special Site Provisions: Delete 1 of Part 1 of this Schedule and insert in lieu the following—

1.	S.E.C. Kwinana	$0.95 per hour for each hour worked and 5 cents per hour footwear allowance for each hour worked.

2003 WAIRC 09875

ENGINE DRIVERS' (GENERAL) AWARD

No. R21A of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* COCA-COLA BOTTLERS, AGCO AUST LTD, JAMES HARDIE & CO PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 30 OCTOBER 2003
FILE NO.	APPLICATION 1148 OF 2003
CITATION NO.	2003 WAIRC 09875

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr K. Dwyer for the Respondent members of the Chamber of Commerce and Industry of Western Australia, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Engine Drivers' (General) Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after 22 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

Clause 19. – Wages: Delete subclauses (2) and (3) of this clause and insert in lieu the following—

(2) Additions to Weekly Wage Rates

(a) An Engine Driver, Electric Motor Attendant or Fireperson engaged as hereinafter specified shall have his/her wage increase as follows—

		Per Week $
(i)	Attending to refrigerating and/or air compressor or compressors	$23.59
(ii)	Attending to an electric generator or dynamo exceeding 10 kw capacity	$23.59
(iii)	Attending to switchboard where the generating capacity is 350 kw or over	$7.51
(iv)	An Engine Driver who attends a boiler or boilers	$23.59

(b) Employees employed on boiler cleaning inside the boiler of flues of combustion chamber shall be paid an additional rate of $1.16 per hour whilst so engaged.

(3) Industry Allowance

(a) In addition to the rates prescribed in this clause an amount of $20.54 per week shall be paid to employees engaged under this award in rock quarries, limestone quarries and sand pits to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilitates. Provided that employees in the limestone quarries of Cockburn Cement Ltd shall be paid an amount of $0.50 per hour in lieu of the $20.54 referred to in this subclause.

(b) (i) In addition to the rates prescribed in this clause a driver of an overhead electric crane, mobile crane, front end loader or tractor, employed by Cockburn Cement Limited shall, subject to as hereinafter provided, be paid an allowance of $0.20 per hour.

(ii) The allowance prescribed in this paragraph is to compensate for the extra duties, including servicing and re-fuelling of machines, associated with the work practices of Cockburn Cement Limited and shall be paid for each hour worked in a quarry, or for each hour worked elsewhere on shifts other than day shift Monday to Friday.

2003 WAIRC 09867

ENGINE DRIVERS (GOVERNMENT) AWARD 1983

No. A5 of 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* BOARD OF MANAGEMENT-FREMANTLE HOSPITAL, BOARD OF MANAGEMENT, PRINCESS MARGARET HOSPITAL, BOARD OF MANAGEMENT, ROYAL PERTH HOSPITAL, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 1147 OF 2003
CITATION NO.	2003 WAIRC 09867

Result Award varied

Order

HAVING no appearance for the Applicant and Mr R. Heaperman for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Engine Drivers (Government) Award 1983 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 27 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

Clause 24. – Wages—

A. Delete subclause (2)(b) of this clause and insert in lieu the following—

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chamber shall be paid $1.05 per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction work allowance prescribed in subclause (1) of Clause 19. - Special Provisions of this Award.

B. Delete subclause (3) of this clause and insert in lieu the following—

(3) Additions to Wage Rates		Per Week $
(a) A classified employee engaged as hereinafter specified shall have his/her wage rate increased as follows:		
(i)	Attending to refrigerator and/or air compressor or compressors	22.80
(ii)	Attending to an electric generator or dynamo exceeding 10 watt capacity	22.80
(iii)	Attending to a switchboard where the generating capacity is 350kw or more	7.33
(iv)	In charge of plant as defined	22.80
(v)	Leading Fireperson, where two or more Firepersons are employed on one shift (per shift)	0.50

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chambers shall be paid $1.10 per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction allowance prescribed in subclause (1) of Clause 19. - Special Provisions of this Award.

2003 WAIRC 09609

FAST FOOD OUTLETS AWARD 1990

NO. A14 OF 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT *v.* AUSTRALIAN FAST FOODS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 9 OCTOBER 2003
FILE NO/S.	APPLICATION 1032 OF 2003
CITATION NO.	2003 WAIRC 09609

Result Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Fast Food Outlets Award 1990 No A14 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 9th day of October 2003.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

SCHEDULE

1. Clause 13. – Meal Money: Delete this clause and insert the following in lieu thereof—

13. - MEAL MONEY

Any employee who is required to work overtime for more than two hours on any day, without being notified on the previous day or earlier, that he or she will be required to work such overtime, will either be supplied with a meal by the employer or be paid $9.10 meal money.

The meal money amount prescribed in this Clause was established by way of nexus with the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1971 in application 1928 of 2002.

2. Clause 20. – Wages: Delete subclause (2) of this clause and insert the following in lieu thereof—

(2) Leading Hands—

An employee who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to the employee's normal wage per week -

		$
(a)	If placed in charge of less than 6 employees	6.75
(b)	If placed in charge of 6 to 10 employees	9.20
(c)	If placed in charge of 11 to 20 employees	10.85
(d)	If placed in charge of more than 20 employees	17.90

3. Clause 22. – Bar Work: Delete this clause and insert the following in lieu thereof—

Any employee, other than a Bar Attendant, who in addition to his or her normal duties is required to dispense liquor from a bar, shall be paid a flat rate of eighty five cents per day in addition to the rate prescribed for such normal duties.

4. Clause 24. – Uniforms and Laundering: Delete this clause and insert the following in lieu thereof—

Where uniforms are required by the employer to be worn they shall be supplied, laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, the employee shall be paid the following laundry allowance per week—

Class of Employee	Allowance per Week
	$
Employees employed on a casual basis	1.35
Employees employed on a part time basis	1.70
Employees employed on a full time basis	2.00

Provided that any employee employed as a full time Cook shall be paid $2.50 per week for laundry and/or dry cleaning. Provided further that the provisions of this clause may be altered by written agreement between the union and the employer.

5. Clause 25. – Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof—

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances shall be supplied, free of charge by the employer, with rubber gloves or be paid an allowance of $1.35 per week in lieu.

2003 WAIRC 09752

GAOL OFFICERS' AWARD 1998

NO. 12 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN PRISON OFFICERS UNION OF WORKERS, APPLICANT
	v.
	THE HONOURABLE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 20 OCTOBER 2003
FILE NO.	APPL 113A OF 2002
CITATION NO.	2003 WAIRC 09752

Result	Award varied by consent.
Representation	
Applicant	Mr J. Welch and Mr D. Seal
Respondent	Mr N. Cinquina and Mr T. Connolly

Order

HAVING HEARD Mr J. Welch and Mr D. Seal on behalf of the applicant and Mr N. Cinquina and Mr T. Connolly 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 *Gaol Officers' Award 1998 No. 12 of 1968* be varied in accordance with the following schedule and that such variations shall have effect on and from the 20th day of October 2003.

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

SCHEDULE

1. Clause 3. – Arrangement: Delete this clause and insert in lieu thereof the following—

3. - ARRANGEMENT

2. Clause 8. – Public Holidays: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) Prison Officers (Vocational and Support) who work Monday to Friday and are not required to work public holidays will not receive the public holiday portion in their annualised salary, however, if a public holiday falls during such an Officer's annual leave, the Officer will receive a paid day in lieu which will be taken immediately following the annual leave or at a time mutually acceptable to the employer and employee. Such a day in lieu shall be clearly shown on the duty board.

3. Clause 11. - Prepaid Hours/Shifts: Delete subclause (9) of this clause and insert in lieu thereof the following—

(9) (a) Subclause (6) and (7) shall not apply to Prison Officers (Vocational and Support) or Officers who permanently work day shift, Monday to Friday.

(b) Prison Officers (Vocational and Support) who combine to cover a position 7 days per week may be required to work up to 40 hours per annum. Payment for such prepaid shifts or hours will be included in their annualised salary.

(c) With the exception of Officers referred to in subclause (9)(b) above, Prison Officers (Vocational and Support) are not required to work more than 40 hours per week. In the event that Prison Officers (Vocational and Support) work more than 40 hours per week they will receive time off in lieu.

4. Clause 12. – Special Hours/Shifts: Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) An Officer, including a Prison Officer (Vocational and Support), may be offered and agree to work Special Shifts outside his/her ordinary working hours, where upon he/she shall be paid at the ordinary rate for that position in addition to the Officer's annualised salary. Special Shifts shall be utilised to cover for Officers absent due to vacancies, secondments, special projects, workers compensation training, trade union training, trade union business, maternity leave or due to prison overcrowding.

5. Clause 13. – Emergency and Exceptional Hour/Shifts:

(A) Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) Prison Officers (Vocational and Support) may be required to respond to exceptional circumstances.

(B) Delete subclause (7) of this clause and insert in lieu thereof the following—

(7) A Prison Officer (Vocational and Support) who has appropriate qualifications and is called out to effect urgent emergency repairs or maintenance to prison property shall be paid for all time including travelling time at time and a half the officer's normal annualised rate.

6. Clause 31. – Special Provisions:

(A) Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) Officers other than Prison Officer (Vocational and Support) whose duties may include driving vehicles, engaged in driving duties for more than two hours per shift, shall be paid an allowance of $2.70 for each shift so worked.

(B) Delete subclause (7) of this clause and insert in lieu thereof the following—

(7) Officers appointed to a Prison Officer (Vocational and Support) position who have completed 12 months or more service since the end of their probationary period shall be paid the Prison Officer (Vocational and Support) rate which is equal to if no comparative rate exists the next higher rate from the date of appointment to that Prison Officer (Vocational and Support) position. Where the officers' rate exceeds the "thereafter rate" for the Prison Officer (Vocational and Support) position the officer shall be paid the "thereafter rate" from the date of taking up duty in that Prison Officer (Vocational and Support) position.

7. Clause 32. – Transfers: Delete subclauses (1), (2) and (3) of this clause and insert in lieu thereof the following—

(1) Definitions

For the purposes of this clause the following expressions shall have the following meanings—

"Transfer" means the movement of an employee from one location to another location at the same, or lesser rank. This includes Senior Officers, Prison Officers (General), Prison Officers (Vocational and Support) and Hospital Officers.

First Class Prison Officers will only be considered for a transfer if there is a vacancy of the same level at the receiving prison.

Where a vacancy does not exist at the officer's rank, the officer may choose to nominate for the transfer list of a lower rank and regress to that rank on the date a transfer is effected.

There are two main categories of transfer, these being—

(a) Voluntary: A transfer initiated by an officer and effected through the transfer lists, mutual swap or a compassionate transfer.

(b) Compulsory: A Ministry directive to an officer to relocate from one location to another in accordance with Prison Regulations.

"Transfer List" is the list of Prison Officers (General) who have expressed an interest for a transfer ranked in seniority order at the time of application for placement on a transfer list.

Senior Officers, Prison Officers (Vocational and Support) and Hospital Officers can apply to be placed on a Transfer List at any time. If there is nobody on the Transfer List an officer may submit an expression of interest for transfer to a like for like position at the time a position becomes vacant.

"Compassionate Transfer" means a transfer effected outside the normal Transfer Lists in response to personal circumstances which warrant relocation of an officer.

"Mutual Swap" is a voluntary exchange of positions between officers of the same rank at different locations.

"Executive Director" means the Executive Director Offender Management and successors.

"Permanent Posting": means the placement of an officer to a permanent position at a prison, on the completion of the trainee prison officers course.

"Temporary Posting" means the agreed temporary placement of an officer to a prison on the completion of the trainee prison officer course, pending a permanent posting.

"Local Recruit" means an officer who is specifically recruited for a position in an identified prison or region and who resides in that location or region.

"Gender Ratio" means the agreed ratio which governs the percentage of female to male officers at the prison.

"Agreed Establishment Levels" means the number of officers required to fill the permanent substantive positions within a prison.

"Redeployed Prison Officer" means an officer who, as a result of a prison closure or abolition of their substantive position as a result of a restructure, does not have a permanent substantive position at any prison.

(2) Special Rules

(a) Initial Posting

Prison Officers (General) will be required to serve a minimum of twelve months at their initial posting (Prison) from the trainee prison officer course

Where a vacancy is unable to be filled through the normal transfer process the twelve month requirement may be waived by the Ministry after consultation with WAPOU.

(b) Two Year Rule

An officer who receives a transfer, whether it be through the Transfer Lists, mutual swap or a compassionate transfer, will be ineligible to be considered for a transfer within two years of their last, unless they are granted a further compassionate transfer.

Where a vacancy is unable to be filled through the normal transfer process the two year rule may be waived by the Ministry after consultation with WAPOU.

(c) New Recruits

Trainee Prison Officers will take up vacancies after transfers based on the transfer list have been effected except where the position is filled by a local recruit.

(3) Transfer process

(a) Transfer lists

To enable a transfer from a Transfer List to be effective there must be an identified vacancy at a prison which resulted or will result in the staffing level being below the approved establishment level

The Transfer List process will work as follows—

(i) Applications for expressions of interest from Prison Officers (General) and First Class Prison Officers wishing to transfer to shift officer positions in prisons other than their own will be advertised in the Employment Notices as required. First Class Prison Officers who are transferred in this way will revert to the rank of Prison Officer (General).

Applications for expressions of interest from Senior Officers, First Class Prison Officers, Prison Officers (Vocational and Support) and Hospital Officers to be placed on the relevant Transfer List can be submitted at any time.

(ii) Officers will be eligible to express an interest for transfer to a maximum of three prisons.

(iii) Applications for the Prison Officer (General) Transfer List will be placed in seniority order at time of application when requested in the Employment Notices.

(iv) All other Transfer Lists will be compiled as applications are received.

(v) Officers who appear on a Transfer List for a particular prison will not have to reapply each time expressions of interest are called.

(vi) Officers accepting a transfer will be subject to the two year rule and will be removed from all other Transfer Lists.

(vii) Officers who are offered a transfer and decline the offer will be removed from the Transfer List for that particular prison, (with the exception of those officers who are redeployees).

(viii) Officers on the Transfer List who wish to transfer with a partner, will take a position on the Transfer List equivalent to the position of the partner with the least seniority.

(ix) In effecting the Transfer Lists the Ministry will take into account the following factors—

Officers subject to redeployment;

Gender ratio;

Availability of accommodation at Broome, Eastern Goldfields and Roebourne;

(x) Transfer Lists will be published in Employment Notices in March and September each year.

(b) Compassionate Transfers

The Ministry, for the purpose of effecting a compassionate transfer, are not obligated to consider the effects on the approved establishment levels of the particular prison.

Compassionate transfers will be considered by the Ministry on the following grounds—

Medical reasons

Personal/Family reasons

Work related (conflict)

Officers seeking a compassionate transfer on one of the above grounds should make application to the Executive Director Offender Management stating the reason and where possible provide supporting evidence (ie advice from doctor).

Costs associated with a compassionate transfer will be met by the officer unless otherwise approved.

(c) Mutual Swap

A mutual swap will not impact on the approved establishment level of any prison.

In instances where a mutual swap is approved the officers concerned will be responsible for all costs associated with the transfer unless otherwise approved.

Officers seeking a mutual swap are required to adhere to the following procedures—

Contact officers on the Transfer List who have nominated the officers current prison for transfer.

Should a mutual swap not be achieved through this action the officer will place a notice at the prison to which they wish to transfer.

Once the mutual swap has been arranged both officers are required to seek the recommendation of the Superintendents of both prisons.

A request in writing on how the mutual swap is to occur with the recommendations from the Superintendents is to be forwarded to the Executive Director Offender Management.

Officers may be required to return to their original substantive positions held prior to the swap in the event of one of the parties involved in the swap not fulfilling their obligations in the mutual swap process.

(d) Redeployed Prison Officers

Officers who have been identified as being subject to redeployment will be given the opportunity to nominate one or more prisons where they wish to gain a permanent position.

At the first opportunity the officer will be placed at the preferred prison in a substantive position.

Should a substantive position not be available the officer may be placed at the preferred prison or another prison (as agreed) pending the availability of a substantive position.

Redeployed officers who have been placed through this means will not be subject to the two year rule.

8. Clause 42. – Re-engagement in Employment: Delete this clause and insert in lieu thereof the following—

42. - RE-ENGAGEMENT IN EMPLOYMENT

Where an officer is re-engaged in employment the Ministry has the discretion to

(i) exempt the officer from all or part of the trainee program;

(ii) waive the period of probation;

(iii) appoint the officer to a point within the range for the rank of Prison Officers (General) above the minimum that accounts for the officers previous relevant prison service.

9. Clause 43. – Salary Packaging: Immediately following this clause insert a new Clause 44. – Prison Officers (Vocational and Support) Training as follows—

44. – PRISON OFFICERS (VOCATIONAL AND SUPPORT) TRAINING

(1) The parties to this award recognise and accept the area of training of Prison Officers (Vocational and Support) is the responsibility of the employer and the employer is committed to the design, provision and implementation of training programs to extend the knowledge and skills of its employees.

(a) The overriding objective is to enable each Prison Officer (Vocational and Support) to gain the competence to perform, consistent with operational needs, all of the tasks and activities associated with the job.

(b) Training will be designed in consultation with the Union, and made available to Prison Officers (Vocational and Support) by the employer. Prison Officers (Vocational and Support) have an obligation to participate in the training programs that develop the skills and knowledge in respect of the competencies necessary to fulfil the role of Prison Officer (Vocational and Support).

(2) All new Prison Officers (Vocational and Support) will be provided one week's Induction Training and three weeks' full time essential training similar to the training undertaken by Prison Officers (General).

(a) All current Prison Officers (Vocational and Support) will be provided three weeks' full time essential training similar to the training undertaken by Prison Officers (General).

(b) The parties to this award agree that current Prison Officers (Vocational and Support) will be required to undertake the essential training mentioned in paragraph (a) above.

(c) All current Prison Officers (Vocational and Support) who have previously qualified as Prison Officers (General) may elect in writing to undertake the essential training mentioned in paragraph (a) above.

(3) (a) Prison Officers (Vocational and Support) will have the opportunity to complete the training similar to the training undertaken by Prison Officers (General) by combination of skills recognition, attendance at formal training programs during normal working hours, and or interactive online training.

(b) Prison Officers (Vocational and Support) shall have access to training towards Certificate IV in Correctional Practice (Custodial) or Diploma of Correctional Administration on the same basis as other Prison Officers (General) whose employment is governed by this award.

(4) The employer shall maintain an individual record of the training received by each Prison Officers (Vocational and Support).

(5) Prison Officers (Vocational and Support) may be directed to carry out duties within other areas of the prison where the officer has obtained the knowledge and skill for the safe and competent performance of that function through training provided by the employer.

(6) Any dispute arising in relation to this clause shall be processed through the dispute resolution procedure contained in Clause 38 of this Award.

10. Schedule A – Rates of Pay: Delete subclause (2) Rates of Pay of this clause and insert in lieu thereof the following—

(2) RATES OF PAY

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.

	TITLE RANK			ANNUAL RATE	WEEKLY RATE
(a)	**Probationary Prison Officers (Training School)**			30699.00	588.47
(b)	**Prison Officers (General)**				
	Mon-Fri	1st year		34762.00	666.36
		2nd Year		35987.00	689.84
		3-7 Year		37530.00	719.41
		Thereafter		38437.00	736.80
	Shifts	1st Year		43853.00	840.64
		2nd Year		45550.00	873.16
		3-7 Years		47612.00	912.69
		Thereafter		48832.00	936.09
	Shifts – No Additional Shift Component				
		1st Year		42748.00	819.46
		2nd Year		44360.00	850.37
		3-7 Year		46321.00	887.96
		Thereafter		47481.00	910.20
		(i) First Class Prison Officers			
		Monday to Friday		40043.00	767.61
		Shift		50765.00	973.15
		(ii) Senior Officers			
		Mon-Fri	1st Year	41268.00	791.10
			2nd Year	42176.00	808.50
			3rd Year	43083.00	825.88
			Thereafter	44013.00	843.71
		Shift	1st Year	52227.00	1001.18
			2nd Year	53538.00	1026.31
			3rd Year	54746.00	1049.46
			Thereafter	55956.00	1072.65
		Security	Albany Canning Vale Prison		
			1st Year	48747.00	934.46
			2nd Year	49861.00	955.82
			3rd Year	50976.00	977.20
			Thereafter	52091.00	998.56
		Reception	Canning Vale Prison CW Campbell Remand Centre		
			1st Year	46793.00	897.00
			2nd Year	47855.00	917.37
			3rd Year	48947.00	938.29
			Thereafter	49983.00	958.15
		Senior Officer Training			
			1st Year	49965.00	957.82
			2nd Year	51212.00	981.72
			3rd Year	52360.00	1003.72
			Thereafter	53510.00	1025.77
(c)	**Prison Officers (Vocational and Support)**				
	Prison Officers (Vocational and Support) Group 1				
	Canteen Officer				
	Bunbury/Casuarina			44389.00	850.92
	Canning Vale Prison			43052.00	825.30
	Wooroloo			42049.00	806.06
	Metropolitan Security Unit – Dog Unit			48859.00	936.61
	Activities Officer				
	Albany			43553.00	834.90
	Bandyup			47034.00	901.62
	Bunbury			46060.00	882.96
	EAGO			47563.00	911.77
	Greenough			48208.00	924.14
	Karnet			47895.00	918.14
	Wooroloo			47078.00	902.48
	Reception Officer				
	Canning Vale Prison			44689.00	856.67
	CW Campbell Remand Centre			46232.00	886.25

TITLE RANK	ANNUAL RATE	WEEKLY RATE
Prison Officers (Vocational and Support) Group 2		
East Perth Lock Up		
1st Year	45016.00	862.94
2nd Year	46033.00	882.43
3rd Year	47049.00	901.91
Thereafter	48065.00	921.39
Metropolitan Security Unit – Dog Unit		
1st Year	50404.00	966.22
2nd Year	51562.00	988.43
3rd Year	52722.00	1010.67
Thereafter	53879.00	1032.85
Bunbury Cook Instructors		
1st Year	49901.00	956.59
2nd Year	51046.00	978.53
3rd Year	52191.00	1000.49
Thereafter	53337.00	1022.46
Kitchen - Canning Vale Prison		
1st Year	45460.00	871.45
2nd Year	46488.00	891.16
3rd Year	47516.00	910.87
Thereafter	48545.00	930.59
Hospital Officers		
1st Year	60435.00	1158.52
2nd Year	61669.00	1182.17
Thereafter	63306.00	1213.56
Senior Hospital Officer	58269.00	1117.00

(d) New Prison Officers (Vocational and Support)

Level 1	**Annual Rate**	**Weekly Rate**	**Annual Rate**	**Weekly Rate**
	7 July 2000		**5 June 2003**	
Drivers - Casuarina				
1st Year	36668	702.92	40842.00	782.92
2nd Year	38154	731.39	42327.00	811.39
3-7 Year	40010	766.98	44184.00	846.98
Thereafter	41125	788.34	45298.00	868.34
Drivers – Hakea				
1st Year	33972	651.22	38250.00	733.22
2nd Year	35344	677.53	39517.00	757.53
3-7 Year	37057	710.36	41230.00	790.36
Thereafter	38086	730.10	42260.00	810.10
Drivers - Alternate Weekends				
1st year	35233	675.39	39406.00	755.39
2nd Year	36800	705.44	40973.00	785.44
3-7 Year	38482	737.67	42655.00	817.67
Thereafter	39508	757.35	43681.00	837.35

Level 2	**Annual Rate**	**Weekly Rate**	**Annual Rate**	**Weekly Rate**
	7 July 2000		**5 June 2003**	
Monday to Friday	35088	672.61	39261.00	752.61
Monday to Friday + Public Holidays	36092	691.85	40265.00	771.85
Alternate Weekends	40407	774.57	44580.00	854.57

Level 3	**Annual Rate**	**Weekly Rate**	**Annual Rate**	**Weekly Rate**
	7 July 2000		**5 June 2003**	
Monday to Friday				
1st Year	36313	696.10	40486.00	776.10
2nd Year	37221	713.50	41394.00	793.50
3rd Year	38128	730.88	42301.00	810.88
Thereafter	39058	748.71	43231.00	828.71

Monday to Friday				
+ Public Holidays				
1st Year	37352	716.02	41525.00	796.02
2nd Year	38297	734.13	42470.00	814.13
3rd Year	39243	752.26	43416.00	832.26
Thereafter	40189	770.39	44362.00	850.39
Alternate Weekends				
1st Year	42044	805.96	46217.00	885.96
2nd Year	43071	825.64	47244.00	905.64
3rd Year	44127	845.88	48300.00	925.88
Thereafter	45216	866.76	49389.00	946.76

Level 4	**Annual Rate**	**Weekly Rate**	**Annual Rate**	**Weekly Rate**
	7 July 2000		**5 June 2003**	
Monday to Friday				
1st Year	37313	715.27	41486.00	795.26
2nd Year	38221	732.68	42394.00	812.67
3rd Year	39128	750.07	43301.00	830.06
Thereafter	40058	767.89	44231.00	847.89
Monday to Friday				
+ Public Holidays				
1st Year	38393	735.98	42566.00	815.97
2nd Year	39328	753.90	43501.00	833.89
3rd Year	40261	771.79	44434.00	851.78
Thereafter	41218	790.13	45391.00	870.12

Level 5	**Annual Rate**	**Weekly Rate**	**Annual Rate**	**Weekly Rate**
	7 July 2000		**5 June 2003**	
Monday to Friday				
1st Year	38313	734.44	42486.00	814.43
2nd Year	39221	751.85	43394.00	831.84
3rd Year	40128	769.24	44301.00	849.23
Thereafter	41058	787.06	45231.00	867.05
Monday to Friday				
+ Public Holidays				
1st Year	39505	757.29	43678.00	840.28
2nd Year	40357	773.63	44530.00	853.62
3rd Year	41290	791.51	45463.00	871.50
Thereafter	42247	809.86	46420.00	889.85

In addition to the rates prescribed above, any Officer or Industrial Officer attaining First Class status prior to 12 November, 1987 shall be paid an additional $8.00 per week.

2003 WAIRC 09876

INDUSTRIAL SPRAYPAINTING AND SANDBLASTING AWARD 1991

No. A33 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* ABRASIVE BLASTING SERVICES PTY LTD, BLASTWORKS PTY LTD, DALLA RIVA & ASSOCIATES PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 30 OCTOBER 2003
FILE NO.	APPLICATION 1150 OF 2003
CITATION NO.	2003 WAIRC 09876

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr K. Dwyer for the Respondent members of the Chamber of Commerce and Industry of Western Australia, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Industrial Spraypainting and Sandblasting Award 1991 No. A33 of 1987 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after 22 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Rates of Pay:

A. Delete subclause (4)(a)(i) of this clause and insert in lieu the following—

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $9.84 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

B. Delete subclause (5) of this clause and insert in lieu the following—

(5) Leading Hands

(a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge:-

		Weekly Base Only $	Rate Per Hour $
(i)	In charge of not more than one person	12.70	0.35
(ii)	In charge of two and not more than five persons	28.30	0.77
(iii)	In charge of six and not more than ten persons	36.10	0.98
(iv)	In charge of more than ten persons	47.90	1.30

(b) The hourly rate prescribed in paragraph (a) hereof is calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the weekly base amount by 52 and dividing the result by 50.4 and by dividing the amount by 38.

2. Clause 9. – Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following—

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award—

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 56 cents per hour or part thereof.

(b) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius - 45 cents per hour or part thereof, exceeding 54 degrees Celsius - 56 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 45 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 56 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold

(i) An employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours	Each Additional Hour
0-15 storeys	3.29	0.68
16-30 storeys	4.21	0.89

Height of Bracing	First Four Hours	Each Additional Hour
31-45 storeys	4.97	1.02
46-60 storeys	8.17	1.69
Greater than 60 storeys	10.40	2.15

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 14 cents per hour.

(ii) Payments contained in this subclause are in recognition of the disabilities associated with the use of swing scaffolds.

(iii) For the purpose of Clause 9(1)(e)(i) hereof—

"Completed" means the building is fully functioning and all work which was part of the principle contract is complete.

"Storeys" shall be given the same meaning as the storey level in Clause 10(2) of this Award.

(f) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 45 cents per hour whilst so engaged.

(g) Dirty Work

An employee engaged on unusually dirty work shall be paid 45 cents per hour.

(h) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 45 cents per hour for all work above fifteen metres, and 45 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10. - Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(i) Toxic Substances

(i) An employee required to use toxic substances shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 27. - Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 56 cents per hour. Employees working in close proximity to employees so engaged shall be paid 45 cents per hour.

(iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(j) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(k) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 56 cents per hour extra whilst so engaged.

(l) Furnace Work

An employee required to work on the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.22 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(m) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.22 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Roof Repairs

Employees engaged on repairs to roofs shall be paid 56 cents per hour.

(o) Underground Allowance

(i) An employee required to work underground for no more than four days or shifts in an ordinary week shall be paid $1.96 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (3) of Clause 8. - Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(p) First Aid

An employee who is qualified to provide first aid and who is appointed by his/her employer to carry out first aid duties shall be paid $1.94 per day.

(q) Fireproofing Spray: An employee using a fireproof or composition spray shall be paid an additional 45 cents per hour whilst so engaged.

(r) Height Work: An employee working on any structure at a height of more than nine metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 43 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun's chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (h) of this subclause.

(s) Brewery Cylinders - Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8. - Rates of Pay of this award.

(t) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 45 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(u) Spray Application - Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 45 cents per hour extra.

(v) Spray Painting—

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.28 per day.

3. Clause 10. – Multi-Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following—

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building - structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level - 35 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level - 44 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level – 68 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level - 87 cents per hour extra;

From Sixty-first Floor Level Onwards – $1.07 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix B – Asbestos Eradication: Delete clause 5 of this appendix and insert in lieu the following—

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive $1.49 per hour worked in lieu of Special Rates prescribed in Clause 9(1) of this award with the exception of subclauses (b), (c) and (e).

2003 WAIRC 09607

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979

No. R 23 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	COMO LIQUOR STORE AND OTHERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 9 OCTOBER 2003
FILE NO/S.	APPLICATION 1014 OF 2003
CITATION NO.	2003 WAIRC 09607

Result Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant and Ms L Foster on behalf of some of the respondents and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Licensed Establishments (Retail and Wholesale) Award 1979 (No R23 of 1977) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of October 2003.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

SCHEDULE

1. Clause 10. – Meal Times and Meal Allowance:

A. In Part 1 – Retail Establishments of this clause delete subclause (2) of this part and insert the following in lieu thereof—

(2) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $9.10 for the purchase of any meal required.

B. In Part II - Wholesale Establishments of this clause delete subclause (3) of this part and insert the following in lieu thereof—

(3) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $9.10 for the purchase of any meal required.

2. Clause 21. – Wages: Delete Part IV – Additional Payments of this clause and insert the following in lieu thereof—

PART IV - ADDITIONAL PAYMENTS

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable.

(1) (a) An employee required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 44 cents per hour whilst so engaged.

(b) An employee required to operate a ride-on operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 61 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade I" or a "Storeman Operator Grade II".

(2) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following—

In a cold chamber in which the temperature is—

(i) Below 0 degrees Celsius to - 20 degrees Celsius 66 cents per hour.

(ii) Below - 20 degrees Celsius to - 25 degrees Celsius 77 cents per hour

(iii) Below - 25 degrees Celsius, 88 cents per hour.

(b) Employees required to work in temperatures less than - 18.9 degrees Celsius shall be medically examined at the employer's expense.

2003 WAIRC 09872

MONUMENTAL MASONRY INDUSTRY AWARD 1989

No. A36 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* BELLEVUE MONUMENTAL WORKS PTY LTD, CATHOLIC MONUMENTAL WORKS, CLAREMONT MONUMENTAL WORKS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 30 OCTOBER 2003
FILE NO.	APPLICATION 1149 OF 2003
CITATION NO.	2003 WAIRC 09872

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Monumental Masonry Industry Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after 22 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 7. - Wages: Delete subclauses (2) and (3) of this clause and insert in lieu the following—

(2) Industry Allowance—

An industry allowance at the rate of $14.20 per week shall be paid for all purposes to each adult employed in the workshop to compensate for the following disabilities associated with monumental masonry—

(a) Working in wet conditions with water underfoot.

(b) Working on dirty work.

(c) The use of acid or other corrosive substances when cleaning down stone.

(d) Working in a dusty atmosphere.

Before exercising a power of inspection the representative shall give notice of not less than 24 hours to the employer.

(3) Leading Hands—

(a) An employee specifically appointed to be a leading hand who is placed in charge of—

(i) not more than one employee, other than an apprentice, shall be paid $13.50 per week; or

(ii) more than one and not more than five other employees shall be paid $30.00 per week; or

(iii) more than five and not more than ten other employees shall be paid $39.00 per week; or

(iv) more than ten other employees shall be paid $50.80 per week in each case, in addition to the rate prescribed for the highest classification of employee supervised or his/her own rate, whichever is the highest.

2. Clause 9. – Special Rates and Conditions:

A. Delete subclause (3) of this clause and insert in lieu the following—

(3) Computing Quantities—

An employee, other than a leading hand, who is regularly required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.16 per day or part thereof in addition to the rates otherwise prescribed in this Award.

B. Delete subclause (8) of this clause and insert in lieu the following—

(8) An employee holding a Third Year First Aid Medallion of the St. John Ambulance Association, appointed by the employer to perform first aid duties, shall be paid at the rate of $8.51 per week in addition to the prescribed rate.

2003 WAIRC 09770

PRINTING (COMMUNITY NEWSPAPER GROUP) AWARD
NO. A 21 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COMMUNITY NEWSPAPER GROUP (1985) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	WEDNESDAY, 22 OCTOBER 2003
FILE NO.	APPLICATION 991 OF 2003
CITATION NO.	2003 WAIRC 09770

Result	Award varied
Representation	
Applicant	Mr D Hicks and with him Ms K Grove
Respondent	Mr P Moss

Order

HAVING heard Mr D Hicks on behalf of the applicant and Mr P Moss on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Printing (Community Newspaper Group) Award No A 21 of 1989, be further varied, by consent in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

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

SCHEDULE

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

(1) CLASSIFICATION

	Base Rate	Arbitrated Safety Net Adjustment	Total Rate Per Week
	$	$	$
Compositor	488.60	123.00	611.60
Photolithographer	488.60	123.00	611.60
Proof Reader	488.60	123.00	611.60
Keyboard Operator	483.50	123.00	606.50
Artist Designer	488.60	123.00	611.60
General Hand	368.60	123.00	491.60

2. Clause 18. Meal Money: Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) Where an employee is required to continue work in accordance with the provisions of subclause (5) of Clause 16. – Overtime of this award, the prescribed meal allowance shall be $7.20.

2003 WAIRC 09833

RAC ROAD, MECHANICAL AND FLEET SERVICES AWARD 1999
No. A14 and 1235 of 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ROYAL AUTOMOBILE CLUB OF WA (INC), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 27 OCTOBER 2003
FILE NO.	APPLICATION 1158 OF 2003
CITATION NO.	2003 WAIRC 09833

Result	Award varied

Order

HAVING heard Mr D. Hicks on behalf of the Applicant and Mr P. Moss for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the RAC Road, Mechanical and Fleet Services Award 1999 No. A14 & 1235 of 1988 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after 27 October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

1. Clause 23. – Wages: Delete subclause (1) of this clause and insert in lieu the following—

(1) The weekly base rate for Road Service Employees shall be—

Title	Classification	Base Rate $	Arbitrated Safety Net Adjustment	Award Rate
RAC Level 2 (100%)	Road Service Employee - Introductory	417.20	125.00	542.20
RAC Level 3 (106.1%)	Road Service Employee	442.50	125.00	567.50
RAC Level 3(i) (109.1%)	Road Service Employee (i)	455.16	125.00	580.16
RAC Level 4 (115%)	Senior Patrol	479.78	123.00	602.78
RAC Level 4(i) (118%)	Senior Patrol (i)	492.30	123.00	615.30

2. Clause 26. – Meals: Delete subclause (6)(a) of this clause and insert in lieu the following—

(6) (a) A Road Service Employee shall be paid $8.40 for a meal necessitated by two hours or more of overtime immediately following a rostered shift or the ordinary hours of work, and further meals at the rate of $5.70.

2003 WAIRC 09845

SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

NO R32 OF 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	MYER STORES LIMITED, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY 28 OCTOBER 2003
FILE NO.	APPLICATION 1007 OF 2003
CITATION NO.	2003 WAIRC 09845
Result	Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant and Ms N Thomson on behalf of some of the respondents and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (No R32 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 28th day of October 2003.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

SCHEDULE

1. Clause 7A. – Nightfill Duty: Delete subclause (9) of this clause and insert the following in lieu thereof—

(9) (a) A full-time, part-time or casual worker employed in a "General Retail Shop" or "Special Retail Shop" pursuant to this clause shall be paid an additional loading as prescribed hereunder—

(i) Monday to Saturday prior to 7.00 am

(aa) Full-time and Part-time Workers

- a loading of $2.53 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(bb) Casual Workers

- a loading of $2.53 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(ii) Saturday between 5.00 pm and Midnight

(aa) Full-time and Part-time Workers

- a loading of $3.59 per hour in addition to the ordinary hourly rate of a full-time worker as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(bb) Part-time Workers

- a loading of $7.80 per hour in addition to the ordinary hourly rate of a full-time shop assistant as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(cc) Casual Workers

- a loading of $9.34 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(b) Junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.

(c) The loadings referred to in (i) and (ii) above shall be paid for the purpose of superannuation calculations.

2. Clause 12. – Meal Money: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof—

(1) When a worker is required to continue working after the usual finishing time for more than one hour he/she shall be paid $9.10 for the purchase of any meal required.

(2) Late Night Trading Meal Allowance—

A worker who commences work at or prior to 1.00pm on the day of late night trading and is required to work beyond 7.00pm on that day shall be paid a meal allowance of $9.10.

3. Clause 28. – Wages: Delete Part III of this clause and insert the following in lieu thereof—

Part III—

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable—

(1) (a) A worker required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his duties shall be paid an additional 54 cents per hour whilst so engaged.

(b) A worker required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his duties shall be paid an additional 61 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade 1" or a "Storeman Operator Grade 2".

(2) Any workers, whether a junior or adult, employed as a canvasser and/or collector shall be paid the adult male wage.

(3) Where a canvasser provides his own bicycle he shall be paid an allowance of $1.15 per week.

(4) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following—

In a cold chamber in which the temperature is—

(i) Below 0° Celsius to -20° Celsius - 66 cents per hour

(ii) Below -20° Celsius to -25° Celsius - 77 cents per hour

(iii) Below -25° Celsius - 88 cents per hour.

(b) Workers required to work in temperatures less than -18.9° Celsius shall be medically examined at the employer's expense.

(5) (a) A worker (full time, part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. Monday to Friday inclusive in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

For casual workers such loading shall be paid in addition to the rates prescribed in Clause 7 (4) of this award.

(b) A worker (part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. on Saturday in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

(i) A casual worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A part time worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part Time Workers.

(6) (a) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight Monday to Friday inclusive shall be paid a loading of 20% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(b) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight on Saturday shall be paid a loading of 20% for each hour worked after 6.00pm.

(i) A casual employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A full or part-time employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part-Time Workers.

(c) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours before 7.00am on any day Monday to Saturday inclusive shall be paid a loading of 30% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(7) An automotive spare parts or accessories salesman qualified (i.e. one who has passed the appropriate course of technical training) shall be paid the sum of $20.45 per week in addition to the rates prescribed herein.

4. Clause 28A. – Structural Efficiency Agreement – Cold Storage Industry: Delete this clause and insert the following in lieu thereof—

P. & O. Cold Stores and Clelands Cold Stores shall pay $19.80 per week in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 November 1989 and $3.30 in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 December 1989 on account of agreement reached for a structural efficiency package which the parties anticipate will result in the creation of a Cold Storage Award being negotiated in accordance with the objectives and content of the Structural Efficiency Principle.

5. Clause 46. – First Aid Allowance: Delete this clause and insert the following in lieu thereof—

A worker holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $7.90 per week in addition to the worker's ordinary rate.

6. Clause 48. – Additional Loading for Late Night Trading Establishments: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof—

(1) A full-time or part-time worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid a loading of $3.16 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(2) A casual worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid the amount of $3.16 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

2003 WAIRC 09604

STOREMEN INDEPENDENT WOOLDUMPERS PTY LTD AWARD 1982

NO. A36 OF 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IWD PTY LTD, APPLICANT
	v.
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 9 OCTOBER 2003
FILE NO/S.	APPLICATION 954 OF 2003
CITATION NO.	2003 WAIRC 09604

Result Award varied.

Order

HAVING heard Mr P Robertson on behalf of the applicant and Mr T Pope 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 Storemen Independent Wooldumpers Pty Ltd Award 1982 (No A36 of 1982) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 9 October 2003.

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

[L.S.]

SCHEDULE

1. Clause 1.- Title: Delete this clause and insert the following in lieu thereof—

This consent Award shall be known as the Storemen IWD Pty Ltd Award 1982.

2. Clause 3.- Area and Scope: Delete this clause and insert the following in lieu thereof—

This award shall apply to workers in the callings designated herein who are employed at the North Fremantle premises of IWD Pty Ltd and to this extent shall replace the Wool Hide and Skin Store Employees' Award No. 8 of 1966.

2003 WAIRC 09605

STOREMEN INDEPENDENT WOOLDUMPERS PTY LTD AWARD 1982

No. A 36 of 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	INDEPENDENT WOOLDUMPERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 9 OCTOBER 2003
FILE NO/S.	APPLICATION 1008 OF 2003
CITATION NO.	2003 WAIRC 09605

Result Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant and Ms L Foster 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 Storeman Independent Wooldumpers Pty Ltd Award 1982 (No. A 36 of 1982) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of October 2003.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

SCHEDULE

1. Clause 10. – Wages: Delete subclause (4) and (5) of this clause and insert the following in lieu thereof—

(4) Sixty seven cents per hour in addition to the above rates shall be paid to any employee who actually handles "dead" wool.

(5) If an employee is required by the employer to act as a first aid attendant in any store, for so acting he/she shall be paid in addition to his/her ordinary rate of pay the sum of $1.50 per day.

2. Clause 12. – Meal Hours and Meal Money: Delete sub clause (2)(a) of this clause and insert the following in lieu thereof—

(2) (a) An employee shall be entitled to meal money of $9.00 in the following circumstances—

(i) where he is required to work for more than one hour before his normal commencing time or to continue to work for more than one hour after his normal ceasing time; or

(ii) where he is required to continue working after 12.00 o'clock midnight for more than one hour; or

(iii) where he is required to continue working after midday on Saturday, Sunday or public holiday for more than one hour; or

(iv) where he is required to continue overtime after 5.00 p.m. on a Saturday, Sunday or public holiday for not less than one hour.

2003 WAIRC 09560

THERMAL INSULATION CONTRACTING INDUSTRY AWARD

No. 1 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	AUSTRAL INSULATION PTY LTD, BAINS HARDING INDUSTRIES PTY LTD, UNITED INSULATION CO, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 3 OCTOBER 2003
FILE NO.	APPLICATION 1159 OF 2003
CITATION NO.	2003 WAIRC 09560

Result Award varied

Order

HAVING heard Ms K. Grove on behalf of the Applicant and there being no appearance for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Thermal Insulation Contracting Industry Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 3rd October 2003.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SCHEDULE

Clause 6. – Wages: Delete this clause and insert in lieu the following—

(1) (a) Subject to Clause 7. - Special Rates and Provisions of this Award, the ordinary weekly wage shall be as set out hereunder and shall be inclusive of all special rates and allowances and be paid as an "all purpose" rate.

(b) The ordinary weekly wage of an employee (other than an apprentice) shall consist of the base rate, the special payment and the Safety Net Adjustment, as set out in subclause (2) of this clause.

(c) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(2) Wage Rates—

		Base Rate $	Special Payment $	Safety Net Adjustments $	Total Wage Per Week $
(a)	Sheetmetal Employee - 1st Class	362.80	80.00	125.00	567.80
(b)	Sheetmetal Employee - 2nd Class	327.20	66.80	123.00	517.00
(c)	Lagger -				
	1st six months' experience	310.20	63.40	123.00	496.60
	2nd & 3rd six months' experience	311.70	65.40	123.00	500.10
	4th & 5th six months' experience	315.90	65.60	123.00	504.50
	Thereafter	317.40	66.60	123.00	507.00

2003 WAIRC 09608

WOOL, HIDE AND SKIN STORE EMPLOYEES' AWARD

No. 8 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	WESTRALIAN FARMERS CO-OPERATIVE LTD AND OTHERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 9 OCTOBER 2003
FILE NO.	APPLICATION 1022 OF 2003
CITATION NO.	2003 WAIRC 09608
Result	Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant and Ms L Foster on behalf of one of the respondents and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Wool, Hide and Skin Store Employees' Award No. 8 of 1966 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 9th day of October 2003.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

SCHEDULE

1. Clause 13 – Wages and Classification Structure: Delete subclauses (7) and (8) of this clause and insert the following in lieu thereof—

(7) Seventy four cents per hour in addition to the above rates shall be paid to any worker who actually handles "dead" wool.

(8) If a worker is required by his/her employer to act as a first aid attendant in any store, for so acting he shall be paid in addition to his/her ordinary rate of pay the sum of $1.66 cents per day.

2. Clause 15. – Meal Hours and Meal Money: Delete subclause (2)(a) of this clause and insert the following in lieu thereof—

(2) (a) An employee shall be entitled to meal money of $9.10 in the following circumstances.

(i) Where he is required to work for more than one hour before his normal commencing time or to continue to work for more than one hour after his normal ceasing time; or

(ii) Where he is required to continue working after 12.00 midnight for more than one hour; or

(iii) Where he is required to continue working after midday on Saturday, Sunday or public holiday for more than one hour; or

(iv) Where he is required to continue overtime after 5.00pm on a Saturday, Sunday or public holiday for not less than one hour.

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

2003 WAIRC 09967

BURSWOOD ISLAND RESORT EMPLOYEES AWARD

NOS. A 23 & A 25 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LIMITED, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	THURSDAY, 6 NOVEMBER 2003
FILE NO.	APPLICATION 1006 OF 2002
CITATION NO.	2003 WAIRC 09967

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on the 12th December 2002 the applicant lodged a claim in the Western Australian Industrial Relations Commission to vary the Burswood Island Resort Employees Award;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 8th August 2003;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders—

THAT the application be and is hereby discontinued by leave.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

2003 WAIRC 09647

ENGINEERING AND ENGINE DRIVERS' (NICKEL SMELTING) AWARD 1973
NO. 4 OF 1973

ENGINEERING TRADES AND ENGINE DRIVERS (NICKEL REFINING) AWARD 1971
NO. 10 OF 1971

BUILDING AND ENGINEERING TRADES (NICKEL MINING AND PROCESSING) AWARD 1968
NO. 20 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	WESTERN MINING CORPORATION RESOURCES LIMITED, RESPONDENT
	VARIATION TO ENGINEERING AND ENGINE DRIVERS' (NICKEL SMELTING) AWARD 1973
PARTIES	THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	WESTERN MINING CORPORATION RESOURCES LIMITED, RESPONDENT
	VARIATION TO ENGINEERING TRADES AND ENGINE DRIVERS (NICKEL REFINING) AWARD 1971
PARTIES	THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	WESTERN MINING CORPORATION RESOURCES LIMITED, RESPONDENT
	VARIATION TO BUILDING AND ENGINEERING TRADES (NICKEL MINING AND PROCESSING) AWARD 1968
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 14 OCTOBER 2003
FILE NOS	APPLICATIONS 718 OF 2003, 719 OF 2003, 720 OF 2003
CITATION NO.	2003 WAIRC 09647

Result	Dismissed
Representation	
Applicant	Mr C. Young appeared on behalf of the Applicant
Respondent	Mr A. Caccamo appeared on behalf of the Respondent

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Reasons for Decision

1 These applications were all filed on 19th May 2003. They all seek variations to the relevant award on the grounds that the wages contained in the wage clauses 'should be brought into line with the Minimum Conditions of Employment (sic)'. It is clear from the Answer and Counterproposal that Western Mining Corporation Resources Limited (the Respondent) took the applications to mean that The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Western Australian Branch (the CEPU) sought to vary the awards to reflect the minimum weekly rates of pay set pursuant to Part 3 of the Minimum Conditions of Employment Act 1993 (WA) (the MCE Act).

2 By consent of the parties the applications were heard concurrently on 5th September 2003 at which time Mr C. Young appeared for the Applicant and Mr A. Caccamo appeared for the Respondent.

3 According to Mr Young the applications can be succinctly described in the following way. Each of the awards in the Rates of Pay and Classification Definitions clause sets out a rate of pay per week, an industry allowance and an arbitrated safety net adjustment to produce a total rate per week. It is argued that the industry allowance should be disaggrated from the total and when the disaggration takes place the total rate per week is less than the Minimum Wage which has been declared under Part 3 of the MCE Act.

4 The raison d'etre for Mr Young's argument is that the MCE Act does not define anywhere what the minimum weekly rate of wage is, so the question becomes what is that wage? Mr Young says the answer is to be found in Principle 9 of Statement of Principles declared in the 2003 State Wage Case (2003 83 WAIG 2960) which reads "A minimum adult wage clause will be required to be inserted into any new award and it shall be as follows" then Principle 9(3) provides that the minimum weekly wage $448.40 is deemed to include all arbitrated net safety adjustments from the preceding State Wage Case decisions." It is argued by Mr Young that if there is a definition of minimum wage it effectively is the minimum wage is a base rate plus arbitrated safety net adjustment, but does not include allowances.

5 Mr Young placed some reliance on the decision of Kenner C when examining adjustments to the Industry Allowance clause in the Australian Workers Union Gold Award where the learned Commissioner held generally that allowances are traditionally attached to the individual job and not the individual employee and recognise the degree of skill and other factors associated with the particular classification. The recognition of conditions under which the work is performed is historically accommodated by the prescription of an allowance separate to rates of pay for particular classifications. It is upon this concept that Mr Young relies to underpin his contentions.

6 The Respondent's argument is that if the Commission determines that there are wages in the awards which are lower than the minimum adult award wage then the applications might have substance. In reaching that conclusion it should look at the meaning of the term wages in s.40B(1)(a) of the *Industrial Relations Act, 1979* (the Act) whether, as the awards currently stand any adult employee would receive less than the minimum adult weekly wage, or whether as the awards currently stand an adult employee would receive for each hour worked at least a minimum rate of pay applicable under s.12 of the MCE Act divided by 38.

7 In view of comments the Commission made during the proceedings and recorded on the transcript I have no need to canvass the arguments led concerning s.40B of the Act. The argument proceeds upon the contention that the term 'wages' is not defined in the Act even though it is mentioned in a number of sections. Therefore it is appropriate to apply the ordinary meaning of the dictionary. The Concise Oxford Dictionary defines 'wage' as 'an amount paid periodically especially by the day, week or month for time during which a workman served in his act the employer's disposal'.

8 Mr Caccamo argues that the term should be given its common well understood meaning which supports a broad definition. The term cannot be said to only include the classification rate of pay in the wages clause of an award it must include what an employee would normally get paid for working for the employer. When this is applied to any of the Awards none of them contain wages which are less than the minimum adult award wage as ordered by the Commission under s.51 which currently stands at $448.00. No employee under any of the Awards is paid less than $448.00 they receive a total rate per week specified in the Wages clause which includes an industry allowance.

9 It is argued that the industry allowance should be included because in the calculation of wages to determine whether the Award meets the minimum adult weekly wage cut off because it is an all purpose payment and it is part of an employee's normal wage. It was originally an over award payment that existed in the gold mining industry and was inserted into the gold industry award in 1987 (67 WAIG 2051) and the nickel industry awards in 1991. The allowance is specified in the Awards which state the allowance recognises and is payment for aspects of the nickel industry including the location and nature of individual operations within it.

10 Mr Caccamo went on to detail the history of the various awards starting with the insertion of industry allowance for the first time in the gold mining awards and tracing its history through flow into the nickel awards. There is no need for the Commission to summarise that information.

11 The Commission also heard evidence from Mr Christopher Mitchell who was able to tell the Commission from his long involvement in the mining industry the source of the allowance and how and why it had been inserted into the Awards.

12 I have considered the arguments and have reached the conclusion that the answer to the questions posed by each of the applications is simple because the allowance that has found its way into the wages clauses of the three awards can be distinguished from the normal run of allowances that were, with respect, properly categorised by Kenner C in his decision in the gold mining award.

13 The amount of money which is contained in the Wages clause of each of the awards and which is labelled 'industry allowance' is in reality not an industry allowance of the nature normally contemplated by that title. As Mr Mitchell attested and in accordance with the discussion that the Commission had with the parties during the proceedings the origin of the sum of money is an over award payment. The nomenclature of industry allowance was given to the sum of money as a convenient identifier when it was incorporated in the Wages clause of the Awards, as it had to be, to maintain its previous nature as an all purpose over award payment.

14 It would be ignoring the historical antecedence of this payment to not include it in the calculation of the usual weekly payment of employees who are covered by these awards. In my view, and I so find, that in calculating the amount of wage per week of employees under these Awards for purposes of ascertaining whether they receive at least the minimum weekly rate of pay applicable under s.12 of the MCE Act that the amount must be taken into account. On that basis the applications must be dismissed and orders to that end will issue.

2003 WAIRC 09650

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

WESTERN MINING CORPORATION RESOURCES LIMITED, RESPONDENT

VARIATION TO ENGINEERING AND ENGINE DRIVERS' (NICKEL SMELTING) AWARD 1973

PARTIES THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

WESTERN MINING CORPORATION RESOURCES LIMITED, RESPONDENT

VARIATION TO ENGINEERING TRADES AND ENGINE DRIVERS (NICKEL REFINING) AWARD 1971

PARTIES THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

WESTERN MINING CORPORATION RESOURCES LIMITED, RESPONDENT

VARIATION TO BUILDING AND ENGINEERING TRADES (NICKEL MINING AND PROCESSING) AWARD 1968

CORAM COMMISSIONER J F GREGOR

DATE TUESDAY, 14 OCTOBER 2003

FILE NOS	APPLICATIONS 718 OF 2003, 719 OF 2003, 720 OF 2003
CITATION NO.	2003 WAIRC 09650
Result	Dismissed

Order

HAVING heard Mr C. Young who appeared on behalf of the Applicant and Mr A. Caccamo 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 applications be, and are hereby dismissed.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

2003 WAIRC 09880

HOSPITAL SALARIED OFFICERS' AWARD 1968

No. 39 of 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	HON MIN FOR HEALTH AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	THURSDAY, 30 OCTOBER 2003
FILE NO.	P 48 OF 2002
CITATION NO.	2003 WAIRC 09880
Result	Application dismissed
Representation	
Applicant	Mr G Bucknall and with him Ms C Thomas
Respondents	Mr J Lange and with him Mr G Edwards

Reasons for Decision

1 This application seeks to vary clause 31. – Child Allowance ("the Allowance") of the Hospital Salaried Officers' Award 1968 (No. 39 of 1968) ("the Award") which currently provides—

> "(1) A worker whose permanent headquarters are located north of 26° South latitude, including Shark Bay, shall be paid an allowance at the rate of $100.00 per annum in respect of each one of his children of school age who is resident in the North: Provided that the total reimbursement per family unit under this clause shall not exceed $400.00 per annum.
>
> (2) An allowance under this clause shall continue to be paid to a worker when he is absent from his headquarters on long service leave, annual leave or other leave as approved by the employer."

2 The applicant wants the quantum of the Allowance increased by applying Consumer Price Index increases from September 1961 to March 2002 as the Allowance has not been increased since its inception. The applicant says that this application meets the requirements of Principle 5 of the Statement of Principles and is allowable pursuant to clause 6. – No Extra Claims / Rights Reserved, subclause (2) of the Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001.

3 Both parties have relied on documents and correspondence from government files, and awards and agreements, to establish the history of the Child Allowance. No evidence was called.

The Applicant's Case

4 The applicant says that the Allowance constitutes a reimbursement of expenses and according to a number of authorities, the application of the Consumer Price Index is an acceptable tool for the purpose of dealing with increases in those expenses. Alternatively, the applicant says that the Allowance can be increased as it relates to work or conditions which have not changed.

5 The applicant says that Public Service Circular No. 3 of 1962 ("the Circular") makes reference to the allowance becoming a condition of service for employees who have children and raise them in the north west. However, the applicant says that employees covered by the predecessor to the Award were already receiving a Child Allowance in the same terms as contained in the Award in accordance with the conditions applicable to public servants at the time the allowance was introduced which was payable to all public servants at or prior to the Public Service Allowance Agreement, 1961 (41 WAIG 378) being entered into. This applied from 1958, prior to there being an incentive specifically aimed at engineers for them to take their families to the north west. Although the respondents claimed that the intention was that the concession would not form any part of an award or an agreement nor would it apply to wages employees generally, the applicant says that by the time the Circular was published, the provision had already been written into the Award. In his Reasons for Decision on the making of the Hospital Salaried Officers' Award No. 36 of 1960, Commissioner Schnaars did not make reference to the allowance although it was

included in that award for the first time. There was no attempt to have the allowance removed either at that point or subsequently. In 1980, Circular No. 9 of 1980 makes reference to there having been many attempts to remove the Child Allowance but notes that instead, it was decided by the Government to maintain the status quo.

6 The applicant says that this is a reimbursement of expenses according to Principle 5 of the Statement of Principles (83 WAIG 1899 at 1912). The applicant says that the costs associated with raising children which constitute the reimbursement of expenses are set out in Exhibit A5, a report commissioned by AMP and undertaken by the National Centre for Social Economic Modelling Pty Ltd. This sets out a range of costs incurred in raising children, including education and child care, food, transport, accommodation and other matters. The applicant acknowledges that this report does not differentiate between the costs incurred in the metropolitan area and those outside the metropolitan area. The applicant says that the introduction of the child allowance was recognition and acknowledgement by the employer at the time of the additional burden of raising children in the north west of the State.

7 The applicant also refers to recent developments in the metropolitan area which benefit employees with managing their work and family commitments by the provision of facilities in a number of hospitals, which it says make those responsibilities easier in the metropolitan area than they are in the north west.

8 The applicant has reported to the Commission comments received from its members as to the facilities available and the costs associated with raising children in the north west. These include the percentage of doctors in the north west who do not bulk bill as compared with those in the metropolitan area; costs associated with birth and post-natal care, with some parents choosing to travel to Perth for the birth of a child; the additional cost of food, clothing and other nursery items due to freight costs; and air fares costs. These members of the applicant also reported to the applicant that the availability of day care is less in the north west than elsewhere.

9 The applicant refers to those decisions of the Commission which recognise the Consumer Price Index as being the appropriate mechanism for adjusting allowances associated with the cost of living, including the Location Allowance General Order which contains a consideration for the cost of living being adjusted by the Consumer Price Index.

10 Reference was also made to the Commonwealth Bank Officers Award 1990 where the Australian Industrial Relations Commission has adjusted District Allowances taking account of different locations and the requirements in respect of dependent children.

11 As to the flow-on implications, the applicant says that there is no issue in that regard in that this is the only award that contains the Allowance. However, the applicant is mindful that the Government applies the Child Allowance to other government employees administratively. The applicant says that the Commission can only determine the issue of flow-on in regard to other awards, and in that regime there is no prospect of flow-on.

12 The applicant seeks an operative date of 26 June 2003 being the first time the matter came before the Commission by way of conference. The applicant says that the special circumstances which apply are the delay from that time as the Department of Consumer and Employment Protection became involved and that the Commission asked the parties to enter into further discussions.

The Respondents' Case

13 The respondents say that the Public Service Allowances Agreement 1955 (Government Gazette of 28 October 1955 at page 2693), indicates that at that point there was no clause relating to a child allowance. The respondents say that the allowance did not apply to public servants by award provision earlier than 1961. It applied administratively in accordance with the Circular to Permanent Heads No. 136 from the Public Service Commissioner dated 19 January 1960. This stated—

> "1. For some time now it has been difficult to obtain key personnel for responsible positions in the north-west.
>
> 2. Recently the Government gave special consideration to the problem and in recognition of the special disabilities of those located in the north-west and in an effort to induce staff into the area, decided to make conditions of service more attractive.
>
> 3. Approval has already been given to a substantial increase in the scale of district allowances payable in the north-west – vide (sic) Administrative Instruction No. 134, dated the 18th December, 1959.
>
> 4. Approval has also been given to the principle of three week's annual leave (in lieu of biennial leave) for officers stationed in the north-west – with free passes south each year for the officer, his wife and dependent family. Action is being taken to amend Public Service Regulations accordingly.
>
> 5. It has also been decided that in future no term of duty in the north will exceed four years unless the officer himself desires to remain for a further period.
>
> 6. The Government is also impressed with the need for amenities in the north and intends to make every effort to provide adequate housing, electric light, refrigeration and cooling units. However, no hard and fast rule has been laid down and each case will be considered on its merits, having regard to economics and practicability.
>
> 7. As the greatest difficulty is being experienced in obtaining engineering personnel for projects in the north-west, the Government has decided to make a special endeavour to attract engineers and other specialists employed by the Public Works Department into the north. In future an officer of the Public Works Department in this category who is stationed in the north-west will be paid a child allowance of £50 per annum (with a limit of £200 per annum per family unit) for each one of his children of school age who is resident in the north. In addition favourable consideration will be given to the payment of special responsibility allowances to engineers working in remote places where it can be shown that a classification does not recognise the extra responsibility carried because of the absence of executive advice and direction.
>
> 8. The special considerations mentioned in paragraph 7 have only been approved for officers employed in the Public Works Department. If other departments consider there is a claim for similar treatment to be extended to their officers in special cases, submissions should be made to their respective Ministers for a determination on policy.
>
> 9. The concessions outlined in this Circular will only apply to officers stationed north of 26 degrees south latitude (including Shark Bay) and, with the exception of district allowances, will apply on and from the 1st January, 1960. As advised in Administrative Instruction 134, the increased rates of district allowances operated from the 2nd January, 1959."

(Exhibit A2)

14 The provision was then included in the Public Service Allowances Agreement, 1961 at clause 14, from 1 March 1961. It was subsequently included in the Hospital Salaried Officers' Award No. 36 of 1960 which applied from 14 September 1961. Clause 52 of that award provided that certain clauses which were based on similar provisions in the state public service were to

be varied from time to time in accordance with variations of similar provisions applicable to the state public service. Clause 32 – Child Allowance, of the Hospital Salaried Officers' Award No. 36 of 1960 was such a clause and flowed on from the state Public Service Allowances Agreement, 1961. There was nothing contained within the Reasons for Decision when the clause was included in the Hospital Salaried Officers Award No. 36 of 1960 for the first time to explain the basis of its inclusion.

15 The respondents note that Circular No. 3 of 1962 dated 26 March 1962, (Exhibit A2(a)) from the Secretary for Labour stated that a special committee had been appointed by the Premier to report on the question of child allowances to officers in the north west who are not covered under the Public Service Act. Anomalies were found to exist in that certain officers did not receive the Allowance. State Cabinet agreed with the recommendation that the Allowance be paid to those employees in the north west who qualified for permanent employment, and each case was to be considered on its merits and approved by the Secretary for Labour. It was noted that the "concession" would not to be written into any award or agreement nor would it apply to wages employees generally.

16 When the Public Service Allowances Miscellaneous Agreement of 1967 issued, replacing the Public Service Allowances Agreement 1961 which had contained clause 14 – Child Allowance, the Child Allowance was removed.

17 The respondents say that in a series of awards and orders of the Commission from the 1960s onwards many Hospital Salaried Officers' conditions of employment were based on those applicable to the Public Service. This was in accordance with a principle agreed between the parties in the early 1960s and continued for many years. The various agreements dealing with allowances in the Public Service such as for miscellaneous allowances, motor car hire, district allowances, travelling allowance, transfer allowance etc. were reflected in the Hospital Salaried Officers' employment conditions. With the establishment of the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSAA 3 of 1989), which evolved from the Public Service Award, the link continued.

18 The respondents refer to a range of reports and correspondence from 1979 through to 1991 which they say confirmed the original intention and the history of the Child Allowance as being an "inducement for married men to accept north west appointments as it was considered that a married man with his family resident with him could play an important part in the development of the north of the state" (Exhibit R3). A letter from the Chairman of the Public Service Board to the General Secretary of the Civil Service Association of Western Australia (Inc.) of 8 June 1979 also noted that the Child Allowance provisions were no longer contained in any award or agreement but were still applied by the Public Service Board administratively on the same basis as was originally approved. It seems that this statement contained an error in that the Allowance was still contained in the Hospital Salaried Officers Award applicable at the time.

19 A Circular to Departments and Authorities No. 9 of 1980 (Exhibit A2(b)) indicated that government wages employees in the north of the state would receive the Child Allowance on the same basis that it applied to public servants and other salaried employees.

20 In a letter from Peter Dowding, Minister for Employment and Training, Industrial Relations, Consumer Affairs (Exhibit R4) which appears to have been written in 1985, the then Minister noted that—

> "The North West Child Allowance was reviewed at the direction of the Minister for Labour, Hon A. D. Taylor, in 1972. A Review Committee established for that purpose concluded that the initial reason for the Child Allowance as an incentive was no longer valid and that there was probably justification for phasing it out. The Minister, however, declined to act on the Review Committee's advice and decided that the status quo should remain. That position still applies.
>
> Allowances for disabilities associated with working and residing in the North West of Western Australia are provided from a number of sources including district allowance, travel allowance, tax zone allowance and a range of other benefits referred to in the attached booklet entitled "Subsides, Allowances and General Information for Residents of Remote Regions"."

21 At that point the Minister indicated that he was not able to support an increase in the North West Child Allowance.

22 Yvonne Henderson, Minister for Productivity and Labour Relations wrote a letter on 13 September 1991 in which she noted that—

> "It has however, been the policy of successive Governments since 1971 not to raise or extend the allowance which was originally provided to help overcome staff shortages in the North West."
>
> (Exhibit R5)

23 Mr Lange for the respondents noted that in 1997, the then Department of Productivity and Labour Relations did a review of existing allowances and a number were replaced or cancelled. However, the Government determined that the North West Child Allowance would not cease or be phased out but would be maintained in its existing format.

24 The respondents say that the Commonwealth Bank arrangement referred to by the applicant in its case is not a useful comparison, the methodology used is quite distinctive and uses entirely different principles to those which apply for government district allowances. The respondents say that public sector employees receive other reimbursements relating to the costs of air-conditioning and gas hot water by administrative arrangements. There are a variety of government policies which deal with these matters and provide different benefits to those applicable to Commonwealth Bank employees.

25 As to the Wage Fixation Principles, the respondents say that the claim does not satisfy the requirements of Principle 5 - Adjustment of Allowances and Service Increments because this is not an allowance which constitutes reimbursement of expenses incurred.

26 In summary, the respondents say that the Child Allowance has not been increased since it was introduced specifically for engineers in the Public Works Department in 1960. The Government has repeatedly decided not to remove the Child Allowance but has acted to allow the Allowance to diminish with time. The fact that this Award maintains the Allowance appears to have been explainable only on the basis that it was an oversight and was not deleted in 1968 to mirror the public service provisions.

27 As to the word "reimbursement" contained within the second sentence of subclause (1) of clause 31. – Child Allowance of the Award, Mr Lange says that that was the word agreed to between the Public Service Commission and the Civil Service Association at the time the clause was established and that it should not be read as relating to a reimbursement of expenses as contained within Principle 5 of the Wage Principles.

28 In reply the applicant says that although the respondent asserts that the North West Child Allowance was not in place in 1955, Exhibit A7 being a decision of the Public Service Arbitrator in respect of the Public Service District Allowances Award No. 21 of 1968, makes reference to such conditions.

Conclusions

29 The first question which really needs to be answered is what is the nature of the Allowance? The only way this question can be answered more than 40 years after the allowance was established is to look at the records. The first record which unequivocally

sets out any reference to the allowance is the Circular to Permanent Heads No. 136 dated 19 January 1960. (Exhibit A2) This demonstrates that its intention was as an inducement to attract to and retain in the north west of the State men, the wage earners at the time, and their wives and children to aid in the development of that region. While that may have included a consideration of additional costs associated with raising children in the north west, it specifically related to the times and circumstances, and the need to make conditions of service more attractive because of the special disabilities which applied in the north-west.

30 The documents presented to the Commission do not demonstrate that the Child Allowance existed prior to 1960. I have considered the decision of the Public Service Arbitrator of 19 July 1968 (48 WAIG 468) in respect of District Allowances. In that decision, the Arbitrator makes reference to the decision of the President of the Court in the Local Government Officers' case in 1961 (41 WAIG 750). In examining that decision I am unable to discern anything other than that Public Works Department officers received the Allowance at the time the President wrote his decision in 1961. I do not read that decision to mean more than that, at that time, the Commonwealth Public Service and others including State Public Servants received an allowance of $100 per annum for each child with a maximum of $400 per family.

31 Therefore, based on the evidence before me I am unable to find any reference in awards, agreements or administrative arrangements of the payment of A Child Allowance earlier than January 1960. This is confirmed in a memorandum to the Hon Premier from the Public Service Commissioner of 30 January 1962 in which he referred to the "government approving a Special Child Allowance to engineers and other Public Works Department employees of £50 per annum (with a limit of £200 per annum per family unit) for each child of school age who is resident in the North," in January 1960. This memorandum clearly indicates that this was an inducement to married men to accept north-west appointments on the basis that "it was considered that a married man with his family resident with him could play an important part in the development of the North." Although it was intended that a child allowance would be a "concession" and would not be written into awards, clearly it was written into the Hospital Salaried Officers Award No. 36 of 1060 and this, in accordance with arrangements agreed between the parties was reflective of what was provided for public servants. I conclude that it was never intended that the Child Allowance would be more than an inducement to married men to take their families with them in the north of the State for the purpose of developing that isolated area of the State in the early 1960s.

32 The fact that the provision is still contained within the Award does not mean that it was intended to remain there or be updated with the passage of time and the increases in costs that have occurred since then. The Child Allowance has been reviewed over the years by Government and has not been increased. The failure to increase the amount for some 42 years demonstrates that it was not intended to be increased nor intended to be maintained at its 1960 level. It has not been removed but has remained static and, with increases in costs over time, has effectively been significantly eroded. The Child Allowance was in addition to district allowances, and such allowances are broad based and aimed at compensating employees for the various disabilities associated with working in particular areas, including the costs incurred in living in those areas. There is no evidence that there has been any real or sustained protest at the failure to adjust the Allowance for over 40 years until this application was filed.

33 In all these circumstances, it seems that the purpose of the Allowance has been achieved and that its erosion over time was intended.

34 Accordingly, I conclude that it is not appropriate to increase the Allowance.

35 If I am wrong and an increase were appropriate, it would require consideration in accordance with the Statement of Principles. The applicant relies on the first two aspects of Principle 5 which says—

> **"5. <u>Adjustment of Allowances and Service Increments</u>**
>
> Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.
>
> Adjustment of existing allowances which relate to work or conditions which have not changed and of service increments will be determined in each case in accordance with State Wage Decisions.
>
> Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase in Clause 8 of this Section.
>
> In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.
>
> …"

36 Principle 5 deals with increasing allowances which relate to a reimbursement of expenses or to work or conditions which have not changed. The words used in all of the documents which reflect the establishment of the Child Allowance give clear guidance that it was an inducement, an incentive, not necessarily a reimbursement of expenses. Albeit that the clause contained within the Award refers to a "maximum reimbursement" of $400 per annum, the Public Service Commissioner's terminology in his memorandum to the Premier of 30 January 1962 and all other documentation indicate that for the purposes of the establishment of the Allowance, the term "reimbursement" contained in the Award ought be read as meaning a limit or a maximum.

37 I have noted the evidence regarding the cost of education, child care and other living expenses in raising children. However, that evidence does not differentiate between the metropolitan, southwest, north west, wheat belt and other areas of the state. In that regard all this information does is establish that it is expensive to raise children. There is no differentiation which would mean that it is of greater cost to raise children in the north west than anywhere else, for example, Esperance.

38 As to the evidence of assistance to health employees in managing work and family commitments in the metropolitan area, and that this is not available in the north west, that situation applies to employees working beyond the area surrounding those limited number of health care facilities where the assistance is provided. It takes no account of the fact that employees in the regional and rural areas, whether they are in the north west or otherwise, have those same difficulties. This is not a factor which distinguishes the north west such as to justify the claim.

39 The difficulty faced by the applicant is that I have concluded that the allowance did not constitute a reimbursement of expenses but was an inducement, an incentive. Its purpose was to attract families to the north west of the State when that region was being developed.

40 The use of the Consumer Price Index as a method of calculation may be relevant if the amount of the allowance were to be increased. However, the Consumer Price Index for Perth seems to be quite anomalous given that the applicant is arguing that the actual costs in the north west are higher than those for Perth. Further, to award the increase for the whole of the period claimed is inappropriate for a number of reasons. Firstly, there has been no attempt to increase this allowance for more than

40 years. During that period only part of the period has been taken into account in increasing other allowances, and the Principles which have existed and changed over time have not always allowed for such increases. During some periods the wage fixation system has not allowed for increases at all.

41 As an alternative to relying on Principle 5 in respect of reimbursement of expenses, the applicant says the amount of the allowance could be increased on the basis that it relates to work or conditions which have not changed. I note firstly that the Principle refers to "work or conditions which have not changed". There is nothing before the Commission to indicate whether or not the work of the employees covered by the Award who reside in the north west has changed. As to whether the conditions have or have not changed, given the obvious development of the north west of the State over the last 40 years it must surely be difficult to argue that the conditions have not changed. The development of regional centres such as Karratha in the last 25 years, the expansion of Port Hedland, the growth of Broome and Kununurra, and the increase in population and services since 1960 are all matters within the knowledge of the Commission. Without evidence, it would be somewhat difficult to assume that there had been no change in conditions as required by Principle 5.

42 Accordingly, were this an allowance which is appropriate to be increased, based on the evidence, it does not meet the requirements of the Statement of Principles for increasing allowances which are either a reimbursement of expenses or relate to work or conditions which have not changed. The application will be dismissed.

2003 WAIRC 09881

HOSPITAL SALARIED OFFICERS' AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	HON MIN FOR HEALTH AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 30 OCTOBER 2003
FILE NO.	P 48 OF 2002
CITATION NO.	2003 WAIRC 09881

Result	Application dismissed

Order

HAVING heard Mr G Bucknall and with him Ms C Thomas on behalf of the applicant and Mr J Lange and with him Mr G Edwards on behalf of the respondents, 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.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

AGREEMENTS—Industrial—Retirements from—

DIPLOMA CONSTRUCTIONS INDUSTRIAL AGREEMENT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. APPL 28 of 2003

IN THE MATTER of the Industrial Relations Act 1979

and

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

Diploma Constructions Pty Ltd will cease to be a party to the Diploma Constructions Industrial Agreement, No. AG. 8 of 2001.

DATED at Perth this 28th day of October 2003

[L.S.]

(Sgd) J. A. SPURLING,
Registrar.

CANCELLATION OF AWARDS/AGREEMENTS/ RESPONDENTS—

2003 WAIRC 09969

DAMPIER PORT AUTHORITY PORT OFFICERS AWARD 1989

No. PSA A2 of 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DAMPIER PORT AUTHORITY, APPLICANT
	v.
	THE AUSTRALIAN MARITIME OFFICERS UNION - WESTERN AREA UNION OF EMPLOYEES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 6 NOVEMBER 2003
FILE NO.	APPLICATION 1305 OF 2003
CITATION NO.	2003 WAIRC 09969

Result	Application discontinued.
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to s.40(3)(c) of the *Industrial Relations Act 1979*;

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

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

THAT the application be discontinued.

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

2003 WAIRC 10022

ENGINEERING (GOVERNMENT PRINTING OFFICE) AWARD 1986

NO. A 12 OF 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

ON THE COMMISSION'S OWN MOTION

CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 12 NOVEMBER 2003
FILE NO/S.	APPLICATION 1607 OF 2003
CITATION NO.	2003 WAIRC 10022

Result	Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 23rd day of July 2003 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 25th day of August 2003 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled—

Engineering (Government Printing Office) Award 1986 No A12 of 1984

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

2003 WAIRC 10023

HOSPITAL LAUNDRY AND LINEN SERVICES (GOVERNMENT) AWARD 1982

NO. A 36 OF 1981

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 12 NOVEMBER 2003
FILE NO/S.	APPLICATION 1610 OF 2003
CITATION NO.	2003 WAIRC 10023

Result	Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 23rd day of July 2003 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 25th day of August 2003 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled—

Hospital Laundry and Linen Services (Government) Award 1982 No A36 of 1981

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

2003 WAIRC 10021

IRON AND STEEL INDUSTRY WORKERS' (BHP STEEL INTERNATIONAL – ROD & BAR DIVISION) AWARD

NO. 1 OF 1968

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 12 NOVEMBER 2003
FILE NO/S.	APPLICATION 1605 OF 2003
CITATION NO.	2003 WAIRC 10021

Result	Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 14th day of August 2003 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 15th day of September 2003 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled—

Iron and Steel Industry Workers' (BHP Steel International – Rod & Bar Division) Award No 1 of 1968

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

2003 WAIRC 10024

MENTAL HEALTH REHABILITATION ASSISTANTS AWARD, 1965
NO. 36 OF 1965

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 12 NOVEMBER 2003
FILE NO/S.	APPLICATION 1611 OF 2003
CITATION NO.	2003 WAIRC 10024

Result Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 23rd day of July 2003 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 25th day of August 2003 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled—

Mental Health Rehabilitation Assistants Award, 1965 No 36 of 1965

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
APPLICATION No. A9 of 2003
APPLICATION FOR REGISTRATION OF AN AWARD
ENTITLED "BRADKEN BASSENDEAN (WA) WAY FORWARD ENTERPRISE AWARD 2003"

NOTICE is given that an application has been made to the Commission by The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

4 APPLICATION

(1) This Award shall apply to all employees of the Company, employed in the classifications in subclause 10(1), who are engaged to work at the Company's Bassendean facility or whose employment base is the Bassendean facility, except for:

- any site which is covered by any other form of industrial agreement (State of Federal) to which the Company is respondent, whether or not such site agreement was made before or after the making of this Award.

(2) This Award shall cover exhaustively the subject matter concerned to the exclusion of any other Awards, Agreements and Orders.

(3) The Partners agree that, where employees of the Company whose employment is covered by this Award, are required to work away from the Bassendean facility on a short-term assignment, in accordance with the requirements of subclause 8(1)(vi), inclusive of work outside of the State of Western Australia, then, except as provided in this clause and subclause 10(2), this Award shall continue to apply.

10 WAGES AND ALLOWANCES

(1) Employee Classifications
C7
C8
C9
C10
C11
C12
C13

Note: For continuity and industry consistency, the classification structure used is consistent with that contained in the Metal Trades (General) Award 1966 – Part 1 with some local modifications.

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

(Sgd) J. A. SPURLING,
Registrar.

10 November 2003.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. 417 OF 2003

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"CLERKS (COMMERCIAL, SOCIAL AND PROFESSIONAL SERVICES) AWARD NO. 14 OF 1972"

NOTICE is given that an application has been made to the Commission by The Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch under the *Industrial Relations Act 1979* for a variation of the above Award.

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

The current Award will be amended to include a new classification structure. The existing "Clause - 11A - Classification Structure - Skills Descriptors" will be replaced and updated. A new clause titled "13 - Classification and Wage rates" will replace the existing Clause 11A. The new clause will include 3 new wage levels with a corresponding set of descriptors for each of the new levels. The effect of this amendment will be to expand the existing scope of the award.

The proposed new clause "13 Classification and Wage Rates" will be in the following form:

13. - CLASSIFICATIONS AND WAGE RATES

13.1 Grading structure

13.1.1 Advising employees of grading

13.1.1(a) All employees covered by this award shall be graded according to the grading structure set out in this clause. Employers shall advise their employees in writing of their grading and of any changes to their grading.

13.1.1(b) The grading by the employer shall be according to the skill level or levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.

13.1.2 Employees disputing gradings

13.1.2(a) An employee can dispute any grading or new grading made in accordance with 13.1 hereof by advising the employer in writing.

13.1.2(b) If this dispute cannot be resolve by the employer and employee in a reasonable time it will be dealt with in accordance with the dispute resolution procedure in this award.

13.2 Classifications and wage rates

13.2.1 Grade 1 clerical assistant

Adults	**Weekly award rate**
	$
First 6 months' experience at this grade	464.80
More than 6 months and less than 12 months' experience at this grade	478.60
After 12 months' experience at this grade	490.20

13.2.1(a) Employees in this grade perform and are accountable for clerical and office tasks as directed within the skill levels set out. They work within established routines, methods and procedures. Supervision is direct.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade by means of personal instruction and demonstration.

13.2.1(b) Machine operation - skill level 1

Operate telephone/intercom systems, telephone answering machines, facsimile machines, photocopiers, franking machines and guillotines.

13.2.1(c) Information handling skills - skill level 1

Receive, sort, open, distribute incoming mail, process outgoing mail, receive incoming and dispatch outgoing courier mail, deliver messages and documents to appropriate persons/locations. Prepare and collate documents. Sort and file documents/records accurately in correct location/sequence using an established paper based filing system.

13.2.1(d) Enterprise/industry, specialist skills - skill level 1

Acquire and apply a limited knowledge of office procedures and requirements.

13.2.2 Grade 2 clerical officer

Adults	**Weekly award rates**
	$
First 6 months' experience at this grade	500.70
More than 6 months' and less than 12 months' experience at this grade	504.80
After 12 months' experience at this grade	510.70

13.2.2(a) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 1. They are responsible and accountable for their own work, which is performed within established routines, methods and procedures.

Supervision is routine.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.2(b) Machine operation - skill level 2

Operate adding machines, switchboard, paging system, telex machine, typewriter and calculator.

13.2.2(c) Computer - skill level 1

Use knowledge of keyboard and function keys to enter and retrieve data through computer terminal.

13.2.2(d) Keyboard typing - skill level 1

Copy type at 25 words per minute with 98% accuracy.

13.2.2(e) Information handling skills - skill level 2

Maintain mail register and records. Maintain established paper-based filing/records systems in accordance with set procedures including creating and indexing new files, distributing files within the organisation as requested, monitoring file locations. Transcribe information into records, complete forms, take telephone messages.

13.2.2(f) Enterprise/industry, specialist skills - skill level 2

Acquire and apply a working knowledge of office or sectional operating procedures and requirements. Acquire and apply a working knowledge of the organisation's structure and personnel in order to deal with inquiries at first instance, locate appropriate staff in different sections, relay internal information, respond to or redirect inquiries, greet visitors.

13.2.2(g) Business/financial skills - skill level 1

Keep appropriate records. Sort, process and record original source financial documents (e.g. Invoices, cheques, correspondence) on a daily basis; maintain and record petty cash; prepare bank deposits and withdrawals and do banking.

13.2.3 Grade 3 clerical officer

Adults	**Weekly award rates**
	$
First 6 months' experience at this grade	518.20
After 6 months' experience at this grade	525.20

13.2.3(a) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 2.

They are responsible and accountable for their own work, which is performed within established guidelines, they exercise limited discretion within the range of their skill and knowledge. Supervision is general.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.3(b) Machine operation - skill level 3

Operate computerised radio telephone equipment, micro/personal computer, printing devices attached to personal computer, Dictaphone equipment, typewriters.

13.2.3(c) Keyboard typing - skill level 2

Produce documents and correspondence using knowledge of standard formats, touch type at 40 words per minute with 98% accuracy, audio type.

13.2.3(d) Computer - skill level 2

Use one or more software application package(s) developed for a micro/personal computer to operate and populate a database, spreadsheet/worksheet to achieve a desired result; graph previously prepared spreadsheet; use simple menu utilities of personal computer. Following standard procedures or template for the preceding functions using existing models/fields of information. Create, maintain and generate simple reports. Use a central computer resource to an equivalent standard.

13.2.3(e) Word processing - skill level 1

Use one or more software packages to create, format, edit, proof read, spell check, correct, print and save text documents, e.g. standard correspondence and business documents. Apply additional functions such as search and replace, variable fonts, moving and merging across documents and simple maths.

13.2.3(f) Secretarial - skill level 1

Take shorthand notes at 70 words per minute and transcribe with 95% accuracy. Arrange travel bookings and itineraries, make appointments, screen telephone calls, follow visitor protocol procedures, establish telephone contact on behalf of executive.

13.2.3(g) Enterprise/industry, specialist skills - skill level 3

Apply a working knowledge of the organisation's products/services, functions, locations and clients. Respond to and act upon most internal/external inquiries in own function area.

13.2.3(h) Information handling skills - skill level 3

Use and maintain a computer-based record management system to identify, access and extract information from internal sources. Maintain circulation, indexing and filing systems for publications, review files, close files, archive files.

13.2.3(i) Business/financial skills - skill level 2

Maintain financial records and journals; collect and prepare time and wages records; prepare accounts payable for authorisation; respond to simple account queries from debtors; post transactions to ledger.

Employees holding a Certificate of Office & Secretarial Studies (TAFE) or accredited equivalent and who are required to use skills and perform tasks within the range of skills in Grade 3 shall be graded at Grade 3 or above.

13.2.4 Grade 4 clerical officer

Adults	Weekly award rate
	$
	564.60

13.2.4(a) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 3. They are responsible and accountable for their own work, and exercise discretion and initiative in the organisation of work within prescribed limits. Supervision is limited.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.4(b) Keyboard typing - skill level 3

Format complex documents including technical data, technical language, tables, graphs, text design, indexing, variable type face; produce documents requiring specified form or to comply with regulations or standards.

13.2.4(c) Computer - skill level 3

Apply knowledge of intermediate functions to manipulate data, i.e. modify fields of information, develop new basic databases or spreadsheet models; spreadsheet, perform reconciliation.

13.2.4(d) Word processing - skill level 2

Use one or more software packages to apply advanced functions such as text columns, money columns, tables, e.g. to produce financial statements, printed forms, sorting, boxes, create displays of charts or graphs in report format, select style sheets appropriate to final presentation.

13.2.4(e) Secretarial - skill level 2

Take shorthand notes at 100 words per minute and transcribe at 95% accuracy; manage executive appointments; respond to invitations; organise internal meetings on behalf of executive; establish and maintain reference lists/personal contact systems for executives.

13.2.4(f) Enterprise/industry, specialist skills - skill level 4

Provide detailed advice and information on the organisation's products and services; respond to client/public/supplier and internal organisation inquiries, within own function area, using such techniques as personal interview and liaison; explain organisation's viewpoint to clients and appropriate persons; using knowledge of internal/external regulatory requirements related to own function area. Acquire and use specialist vocabulary, i.e. technical/medical/legal within the scope of this grade.

13.2.4(g) Information handling skills - skill level 4

Create new forms of files and records as required using computer-based records systems; e.g. customer/client/supplier and subscription lists. Access, identify, and extract information as required from external sources, e.g. databases, libraries, local authorities.

13.2.4(h) Business/financial skills - skill level 3

Prepare cash payment summaries and banking reports; apply purchasing and inventory control requirements; reconcile debtors, creditors and general ledger accounts to balance; follow-up unpaid accounts by telephone liaison/interview, prepare documentation on overdue accounts for senior officers or referral to debt recovery processes; calculate wage and salary requirements including tax, superannuation and other deductions and transfer payments for authorisation; calculate stock valuations; prepare bank reconciliation; calculate costing using established formulae for all inputs and margins.

13.2.4(i) Supervisory - skill level 1

Allocate work tasks to individuals, check work progress and correct errors.

13.2.5 Grade 5 administrative officer

Adult	Weekly award rate
	$
	604.00

13.2.5(a) Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 4. They are responsible and accountable for their own work, and may have limited responsibility for the work of others. They exercise initiative, discretion and judgement within the range of their skills and knowledge. Supervision is minimal. Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels numbered set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.5(b) Computer - skill level 4

Use a variety of application software packages within a micro/personal computer network including importing data from one package to another. Evaluate usefulness or applicability of software programs (using existing software programs) and recommend preferred solutions to meet new or different application requirements. Use advanced spreadsheet functions (e.g. Macro functions etc) to enhance operation of the spreadsheet. Use a central computer resource to an equivalent standard.

13.2.5(c) Word processing - skill level 3

Use all preceding word processing functions and integrate word processing software with other application software packages to produce complex text and data documents. Apply knowledge of desktop publishing to integrate complex documents. Apply advanced functions including Macros, moving columns for complex

formatting of documents such as multi-column reports and presentations, including booklets. Apply complex maths functions.

13.2.5(d) Secretarial - skill level 3

Take shorthand notes at 120 words per minute and transcribe at 95% accuracy; attend executive/organisational meetings and take minutes; answer executive correspondence from verbal or rough hand-written instructions; organise teleconferences.

13.2.5(e) Enterprise industry, specialist skills - skill level 5

Apply detailed knowledge of the industry in which the organisation operates to complex issues/arrangements in such areas as consumer/client services, special products/service knowledge, and respond within established internal/external regulatory parameters and policies. Indicative Specialist Skills Include; apply detailed knowledge of customs law and regulations to overseas sales and ordering. Apply detailed knowledge of inventory/stock requirements to obtain competitive quotations and initiate purchasing. Apply detailed knowledge of internal/external regulatory parameters and policies relating to industrial employment law, occupational health and safety, workers compensation claims procedures, superannuation requirements.

13.2.5(f) Information handling skills - skill level 5

Develop, plan and implement new paper based/manual filing records systems for the enterprise; assist in separate undertaking research (locate/solicit, summarise/extract and interpret information) related to function areas.

13.2.5(g) Business/financial skills - skill level 4

Post transactions to ledger and prepare a trial balance; prepare end of the period adjustments and transfers using general journal; prepare financial/tax schedules for periodic tax requirements such as payroll, sales and group tax returns; reconcile general ledger accounts; determine costing by calculating input costs and margins.

Apply detailed knowledge of organisations credit terms to new accounts and to following up significant debtors, prepare periodic debtor statements.

13.2.5(h) Supervisory - skill level 2

Resolve operational problems for staff in lower grades, co-ordinate work flow within a section or unit, and counsel and advise staff who are under routine supervision.

13.2.6 Grade 6 administrative officer

Adults	Weekly award rates
	$
	643.40

13.2.6(a) Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 5. They are responsible and accountable for their own work, and may have responsibility for the work of a section or unit. They exercise initiative, discretion and judgement within the range of their skills and knowledge. Supervision is by means of reporting to more senior staff as required.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.6(b) Computer - skill level 5

Operating/co-ordinating a group of computers such as a small multi-user system or a large group of personal computers which may include operating a help desk, running and monitoring batch jobs and performing regular back-ups and restores.

13.2.6(c) Enterprise/industry, specialist skills - skill level 6

Apply knowledge of the organisation's objectives and performance, and apply specialist knowledge, in areas such as projected growth, product trends and general industry conditions, examples include: knowledge of competitors and major clients market structure in the performance of own responsibilities; import/export activities. Indicative Specialist Skills Include; Use knowledge of basic statistics to interpret data from spreadsheets, statistical tables, graphs and frequency tables in the performance of own responsibilities. Administration of workers compensation claims, insurance and disputed claims.

13.2.6(d) Supervisory - skill level 3

Plan and organise work priorities of a unit or section; re-schedule workloads as necessary and resolve operational problems for unit or section; monitor work quality of those supervised; use observations, diagnosis and intervention skills to ensure unit/section meets objectives; organise and chair necessary work meetings/conferences; assist in planning future sectional/office organisational resources and equipment needs.

13.2.6(e) Business/financial skills - skill level 5

Administer individual salary packages, travel expenses, allowances and company transport. Administer specialist salary and payroll requirements, e.g. Eligible Termination Payments, Superannuation Trust Deed Requirements, Redundancy Calculations, Maintenance Support Schemes, etc.

13.2.6(f) Secretarial - skill level 4

As well as having shorthand skills of Skill Level 3, arrange conferences and external meetings, including venues, agendas, documentation, audio-visual requirements, catering, transport and accommodation; originate executive correspondence; assist executive in preparing, attending and following up appointments, interviews, meetings, etc; assume responsibility for Designated areas of executive's work, on delegated authority.

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

(Sgd) J. A. SPURLING,
Registrar.

5 November 2003.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. 449 OF 2003

APPLICATION FOR VARIATION OF AWARD
ENTITLED
"CLERKS' WHOLESALE & RETAIL ESTABLISHMENTS) AWARD No. 38 of 1947"

NOTICE is given that an application has been made to the Commission by The Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch under the *Industrial Relations Act 1979* for a variation of the above Award.

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

The current Award will be amended to include a new classification structure. The existing "Clause - 11A - Classification Structure - Skills Descriptors" will be replaced and updated. A new clause titled "13 - Classification and Wage rates" will replace the existing Clause 11A. The new clause will include 3 new wage levels with a corresponding set of descriptors for each of the new levels. The effect of this amendment will be to expand the existing scope of the award.

The proposed new clause "13 Classification and Wage Rates" will be in the following form:

13. - CLASSIFICATIONS AND WAGE RATES

13.1 Grading structure

13.1.1 Advising employees of grading

13.1.1(a) All employees covered by this award shall be graded according to the grading structure set out in this clause. Employers shall advise their employees in writing of their grading and of any changes to their grading.

13.1.1(b) The grading by the employer shall be according to the skill level or levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.

13.1.2 Employees disputing gradings

13.1.2(a) An employee can dispute any grading or new grading made in accordance with 13.1 hereof by advising the employer in writing.

13.1.2(b) If this dispute cannot be resolve by the employer and employee in a reasonable time it will be dealt with in accordance with the dispute resolution procedure in this award.

13.2 Classifications and wage rates

13.2.1 Grade 1 clerical assistant

Adults	**Weekly award rate**
	$
First 6 months' experience at this grade	464.80
More than 6 months and less than 12 months' experience at this grade	478.60
After 12 months' experience at this grade	490.20

13.2.1(a) Employees in this grade perform and are accountable for clerical and office tasks as directed within the skill levels set out. They work within established routines, methods and procedures. Supervision is direct.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade by means of personal instruction and demonstration.

13.2.1(b) Machine operation - skill level 1

Operate telephone/intercom systems, telephone answering machines, facsimile machines, photocopiers, franking machines and guillotines.

13.2.1(c) Information handling skills - skill level 1

Receive, sort, open, distribute incoming mail, process outgoing mail, receive incoming and dispatch outgoing courier mail, deliver messages and documents to appropriate persons/locations. Prepare and collate documents. Sort and file documents/records accurately in correct location/sequence using an established paper based filing system.

13.2.1(d) Enterprise/industry, specialist skills - skill level 1

Acquire and apply a limited knowledge of office procedures and requirements.

13.2.2 Grade 2 clerical officer

Adults	**Weekly award rates**
	$
First 6 months' experience at this grade	500.70

Adults	Weekly award rates
	$
More than 6 months' and less than 12 months' experience at this grade	504.80
After 12 months' experience at this grade	510.70

13.2.2(a) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 1. They are responsible and accountable for their own work, which is performed within established routines, methods and procedures.

Supervision is routine.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.2(b) **Machine operation - skill level 2**

Operate adding machines, switchboard, paging system, telex machine, typewriter and calculator.

13.2.2(c) **Computer - skill level 1**

Use knowledge of keyboard and function keys to enter and retrieve data through computer terminal.

13.2.2(d) **Keyboard typing - skill level 1**

Copy type at 25 words per minute with 98% accuracy.

13.2.2(e) **Information handling skills - skill level 2**

Maintain mail register and records. Maintain established paper-based filing/records systems in accordance with set procedures including creating and indexing new files, distributing files within the organisation as requested, monitoring file locations. Transcribe information into records, complete forms, take telephone messages.

13.2.2(f) **Enterprise/industry, specialist skills - skill level 2**

Acquire and apply a working knowledge of office or sectional operating procedures and requirements. Acquire and apply a working knowledge of the organisation's structure and personnel in order to deal with inquiries at first instance, locate appropriate staff in different sections, relay internal information, respond to or redirect inquiries, greet visitors.

13.2.2(g) **Business/financial skills - skill level 1**

Keep appropriate records. Sort, process and record original source financial documents (e.g. Invoices, cheques, correspondence) on a daily basis; maintain and record petty cash; prepare bank deposits and withdrawals and do banking.

13.2.3 Grade 3 clerical officer

Adults	Weekly award rates
	$
First 6 months' experience at this grade	518.20
After 6 months' experience at this grade	525.20

13.2.3(a) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 2.

They are responsible and accountable for their own work, which is performed within established guidelines, they exercise limited discretion within the range of their skill and knowledge. Supervision is general.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.3(b) **Machine operation - skill level 3**

Operate computerised radio telephone equipment, micro/personal computer, printing devices attached to personal computer, Dictaphone equipment, typewriters.

13.2.3(c) **Keyboard typing - skill level 2**

Produce documents and correspondence using knowledge of standard formats, touch type at 40 words per minute with 98% accuracy, audio type.

13.2.3(d) **Computer - skill level 2**

Use one or more software application package(s) developed for a micro/personal computer to operate and populate a database, spreadsheet/worksheet to achieve a desired result; graph previously prepared spreadsheet; use simple menu utilities of personal computer. Following standard procedures or template for the preceding functions using existing models/fields of information. Create, maintain and generate simple reports. Use a central computer resource to an equivalent standard.

13.2.3(e) **Word processing - skill level 1**

Use one or more software packages to create, format, edit, proof read, spell check, correct, print and save text documents, e.g. standard correspondence and business documents. Apply additional functions such as search and replace, variable fonts, moving and merging across documents and simple maths.

13.2.3(f) **Secretarial - skill level 1**

Take shorthand notes at 70 words per minute and transcribe with 95% accuracy. Arrange travel bookings and itineraries, make appointments, screen telephone calls, follow visitor protocol procedures, establish telephone contact on behalf of executive.

13.2.3(g) **Enterprise/industry, specialist skills - skill level 3**

Apply a working knowledge of the organisation's products/services, functions, locations and clients. Respond to and act upon most internal/external inquiries in own function area.

13.2.3(h) **Information handling skills - skill level 3**

Use and maintain a computer-based record management system to identify, access and extract information from internal sources. Maintain circulation, indexing and filing systems for publications, review files, close files, archive files.

13.2.3(i) **Business/financial skills - skill level 2**

Maintain financial records and journals; collect and prepare time and wages records; prepare accounts payable for authorisation; respond to simple account queries from debtors; post transactions to ledger.

Employees holding a Certificate of Office & Secretarial Studies (TAFE) or accredited equivalent and who are required to use skills and perform tasks within the range of skills in Grade 3 shall be graded at Grade 3 or above.

13.2.4 Grade 4 clerical officer

Adults	**Weekly award rate**
	$
	564.60

13.2.4(a) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 3. They are responsible and accountable for their own work, and exercise discretion and initiative in the organisation of work within prescribed limits. Supervision is limited.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.4(b) **Keyboard typing - skill level 3**

Format complex documents including technical data, technical language, tables, graphs, text design, indexing, variable type face; produce documents requiring specified form or to comply with regulations or standards.

13.2.4(c) **Computer - skill level 3**

Apply knowledge of intermediate functions to manipulate data, i.e. modify fields of information, develop new basic databases or spreadsheet models; spreadsheet, perform reconciliation.

13.2.4(d) **Word processing - skill level 2**

Use one or more software packages to apply advanced functions such as text columns, money columns, tables, e.g. to produce financial statements, printed forms, sorting, boxes, create displays of charts or graphs in report format, select style sheets appropriate to final presentation.

13.2.4(e) **Secretarial - skill level 2**

Take shorthand notes at 100 words per minute and transcribe at 95% accuracy; manage executive appointments; respond to invitations; organise internal meetings on behalf of executive; establish and maintain reference lists/personal contact systems for executives.

13.2.4(f) **Enterprise/industry, specialist skills - skill level 4**

Provide detailed advice and information on the organisation's products and services; respond to client/public/supplier and internal organisation inquiries, within own function area, using such techniques as personal interview and liaison; explain organisation's viewpoint to clients and appropriate persons; using knowledge of internal/external regulatory requirements related to own function area. Acquire and use specialist vocabulary, i.e. technical/medical/legal within the scope of this grade.

13.2.4(g) **Information handling skills - skill level 4**

Create new forms of files and records as required using computer-based records systems; e.g. customer/client/supplier and subscription lists. Access, identify, and extract information as required from external sources, e.g. databases, libraries, local authorities.

13.2.4(h) **Business/financial skills - skill level 3**

Prepare cash payment summaries and banking reports; apply purchasing and inventory control requirements; reconcile debtors, creditors and general ledger accounts to balance; follow-up unpaid accounts by telephone liaison/interview, prepare documentation on overdue accounts for senior officers or referral to debt recovery processes; calculate wage and salary requirements including tax, superannuation and other deductions and transfer payments for authorisation; calculate stock valuations; prepare bank reconciliation; calculate costing using established formulae for all inputs and margins.

13.2.4(i) **Supervisory - skill level 1**

Allocate work tasks to individuals, check work progress and correct errors.

13.2.5 Grade 5 administrative officer

Adult	**Weekly award rate**
	$
	604.00

13.2.5(a) Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 4. They are responsible and accountable for their own work, and may have limited responsibility for the work of others. They exercise initiative, discretion and judgement within the range of their skills and knowledge. Supervision is minimal. Employees shall be

graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels numbered set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.5(b) Computer - skill level 4

Use a variety of application software packages within a micro/personal computer network including importing data from one package to another. Evaluate usefulness or applicability of software programs (using existing software programs) and recommend preferred solutions to meet new or different application requirements. Use advanced spreadsheet functions (e.g. Macro functions etc) to enhance operation of the spreadsheet. Use a central computer resource to an equivalent standard.

13.2.5(c) Word processing - skill level 3

Use all preceding word processing functions and integrate word processing software with other application software packages to produce complex text and data documents. Apply knowledge of desktop publishing to integrate complex documents. Apply advanced functions including Macros, moving columns for complex formatting of documents such as multi-column reports and presentations, including booklets. Apply complex maths functions.

13.2.5(d) Secretarial - skill level 3

Take shorthand notes at 120 words per minute and transcribe at 95% accuracy; attend executive/organisational meetings and take minutes; answer executive correspondence from verbal or rough hand-written instructions; organise teleconferences.

13.2.5(e) Enterprise industry, specialist skills - skill level 5

Apply detailed knowledge of the industry in which the organisation operates to complex issues/arrangements in such areas as consumer/client services, special products/service knowledge, and respond within established internal/external regulatory parameters and policies. Indicative Specialist Skills Include; apply detailed knowledge of customs law and regulations to overseas sales and ordering. Apply detailed knowledge of inventory/stock requirements to obtain competitive quotations and initiate purchasing. Apply detailed knowledge of internal/external regulatory parameters and policies relating to industrial employment law, occupational health and safety, workers compensation claims procedures, superannuation requirements.

13.2.5(f) Information handling skills - skill level 5

Develop, plan and implement new paper based/manual filing records systems for the enterprise; assist in separate undertaking research (locate/solicit, summarise/extract and interpret information) related to function areas.

13.2.5(g) Business/financial skills - skill level 4

Post transactions to ledger and prepare a trial balance; prepare end of the period adjustments and transfers using general journal; prepare financial/tax schedules for periodic tax requirements such as payroll, sales and group tax returns; reconcile general ledger accounts; determine costing by calculating input costs and margins.

Apply detailed knowledge of organisations credit terms to new accounts and to following up significant debtors, prepare periodic debtor statements.

13.2.5(h) Supervisory - skill level 2

Resolve operational problems for staff in lower grades, co-ordinate work flow within a section or unit, and counsel and advise staff who are under routine supervision.

13.2.6 Grade 6 administrative officer

Adults	Weekly award rates
	$
	643.40

13.2.6(a) Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 5. They are responsible and accountable for their own work, and may have responsibility for the work of a section or unit. They exercise initiative, discretion and judgement within the range of their skills and knowledge. Supervision is by means of reporting to more senior staff as required.

Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out below.

Employees may be required to train other employees in the skills of their own grade and below by means of personal instruction and demonstration.

13.2.6(b) Computer - skill level 5

Operating/co-ordinating a group of computers such as a small multi-user system or a large group of personal computers which may include operating a help desk, running and monitoring batch jobs and performing regular back-ups and restores.

13.2.6(c) Enterprise/industry, specialist skills - skill level 6

Apply knowledge of the organisation's objectives and performance, and apply specialist knowledge, in areas such as projected growth, product trends and general industry conditions, examples include: knowledge of competitors and major clients market structure in the performance of own responsibilities; import/export activities. Indicative Specialist Skills Include; Use knowledge of basic statistics to interpret data from spreadsheets, statistical tables, graphs and frequency tables in the performance of own responsibilities. Administration of workers compensation claims, insurance and disputed claims.

13.2.6(d) Supervisory - skill level 3

Plan and organise work priorities of a unit or section; re-schedule workloads as necessary and resolve operational problems for unit or section; monitor work quality of those supervised; use observations,

diagnosis and intervention skills to ensure unit/section meets objectives; organise and chair necessary work meetings/conferences; assist in planning future sectional/office organisational resources and equipment needs.

13.2.6(e) Business/financial skills - skill level 5

Administer individual salary packages, travel expenses, allowances and company transport. Administer specialist salary and payroll requirements, e.g. Eligible Termination Payments, Superannuation Trust Deed Requirements, Redundancy Calculations, Maintenance Support Schemes, etc.

13.2.6(f) Secretarial - skill level 4

As well as having shorthand skills of Skill Level 3, arrange conferences and external meetings, including venues, agendas, documentation, audio-visual requirements, catering, transport and accommodation; originate executive correspondence; assist executive in preparing, attending and following up appointments, interviews, meetings, etc; assume responsibility for Designated areas of executive's work, on delegated authority.

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

(Sgd) J. A. SPURLING,
Registrar.

5 November 2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A7 of 2003

APPLICATION FOR REGISTRATION OF AN AWARD

ENTITLED "HOSPITAL SALARIED OFFICERS (AGED CARE FACILITY) AWARD 2003" A 7 of 2003

NOTICE is given that an application has been made to the Commission by The Hospital Salaried Officers Association of Western Australia (Union of Workers) under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

3. - SCOPE

This award shall apply to employees engaged in clerical, technical, supervisory, administrative or professional employees employed by Nursing Homes, Hostels and/or Aged Care Facilities.

4. - AREA

This award shall operate throughout the state of Western Australia.

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

(Sgd) J.A. SPURLING,
Registrar.

17 July 2003.

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2003 WAIRC 09922

OVER PAYMENT OF ANNUAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	WEDNESDAY, 5 NOVEMBER 2003
FILE NO.	PSACR 35 OF 2003
CITATION NO.	2003 WAIRC 09922

Result	Application granted in part
Representation	
Applicant	Mr J Ross
Respondent	Mr D Matthews (of counsel) and with him Ms V Jabr

Reasons for Decision

1 The matter referred for hearing and determination is set out as follows—

"1. The Civil Service Association of Western Australia Incorporated ("the Applicant") says that—

(a) in January 2003 the Department of Justice ("the Respondent") advised Mr Simmons that an audit of his annual leave entitlement had discovered an alleged overpayment in 1998/99 of 21 days annual leave;

(b) the error was due to the Respondent's failure to properly maintain annual leave records during Mr Simmons's secondment to the Department of Fisheries in 1998 and 1999;

(c) the Respondent has acted harshly and unfairly to recover the alleged overpayment;

(d) the Respondent does not have the ability to deduct the overpayment from current leave entitlements without a signed authorisation from Mr Simmons; and

(e) applications for leave signed in 1998 and 1999 cannot be used to debit Mr Simmons's leave entitlement for the 2003 calendar year.

2. The Applicant seeks—

(a) a Declaration that the Respondent has breached Sections 8 and 9 of the Public Sector Management Act 1994 in its handling of this matter;

(b) a Declaration that the Respondent has breached Section 49D(2) of the Industrial Relations Act 1979 in failing to keep accurate records of Mr Simmons's leave entitlements;

(c) a Declaration that the Respondent has caused Mr Simmons to incur a debt without his knowledge or authorisation;

(d) a Declaration that the Respondent is responsible for the overpayment of leave;

(e) a Declaration that the Respondent cannot relinquish all responsibility and liability for the overpayment at the financial detriment of Mr Simmons; and

(f) an Order preventing the Respondent from recovering the overpayment or altering his leave balance to recover the overpayment from Mr Simmons.

3. The Respondent—

(a) refutes the claims of the Applicant opposes the Order and Declarations as sought; and

(b) says that the Respondent has a statutory obligation to seek recovery of all overpayments and as such will pursue all avenues available to it in doing so."

2 Notwithstanding the complexity added to this matter by reference to allegations of breaches to the Public Sector Management Act 1994 and the Industrial Relations Act 1979, this matter is quite simple. The applicant alleges that the respondent has treated Mr Simmons unfairly in that he has taken annual leave beyond his entitlement due to the respondent's failure to keep accurate records and he seeks an order which would have the effect of removing the deficit in his annual leave brought about by that failure.

3 The facts too are simple. Mr Simmons has been an employee of the respondent for some 16 years. On 9 March 1998 he commenced a secondment at the Department of Fisheries. At around that time, Tiffany Maddox, a Personnel Officer with the Ministry of Justice wrote to the Human Resources Branch of the Department of Fisheries (Exhibit R11). This letter indicates that attached to the letter was Mr Simmons' personal file and notes that he was on a 9 month secondment with the Department of Fisheries. The letter also set out the details of Mr Simmons's salary level, sick leave, long service leave and importantly, his annual leave credits. These annual leave credits were recorded as being in credit of 41.1 hours (approximately 5 days) as at 31 December 1997 and that he had accrued 30.4 hours (4 days) up to 19 March 1998. The letter bears a stamp "CLOCKWORK PROCESSED". I take this stamp to mean that these details were included in the personnel records system of the Department of Fisheries, called Clockwork, if not in the respondent's system.

4 During the period of his secondment, Mr Simmons submitted annual leave forms to cover the following periods, two weeks from 19 October 1998 to 30 October 1998, nine days from 17 December 1998 to 1 January 1999 and two days from 4 – 5 March 1999 (Exhibit R2). His annual leave forms for those periods contain endorsements approving the leave and stamps indicating "CLOCKWORK PROCESSED". According to the evidence the leave forms appear to have been placed on Mr Simmons's personal file when it was held with the Department of Fisheries. There is no indication that they were forwarded separately or specifically to the respondent. Mr Simmons completed his secondment and returned to the respondent on 6 April 1999. Joanne Jemerson, Personnel Officer for the Department of Fisheries, wrote to Personnel Services, Ministry of Justice on 17 March 1999 (Exhibit R9). Her letter indicates that she was enclosing Mr Simmons's personal file and noting that "the following entitlements are provided for you (sic) information". The annual leave accrued to 31 December 1998 was recorded as being 26.1 hours or 3.43 days and the annual leave accrued to 31 March 1999 was recorded as 38 hours or 5 days. There is no mention of Mr Simmons having taken any leave during the period.

5 There is no indication in this letter that the respondent had then updated its records in any way. The evidence suggests that when the file was returned to the Department of Justice, no checks were made by the Department of Justice of Mr Simmons's annual leave accruals and his records held in the respondent's own records system were not adjusted to take account of the annual leave taken by Mr Simmons while on secondment.

6 Mr Simmons had given evidence that in 1998 he had no access to the respondent's records system to check his annual leave entitlements. He would apply for annual leave and if approved he would take it. He relied upon his employer's human resources services for advice regarding his annual leave balance. He says that he usually takes annual leave in smaller rather than larger blocks. He does not keep his own records, relying upon advice from human resources.

7 Mr Simmons says that he was expecting the birth of his first child in March this year and had planned his financial affairs in preparation for the birth to make sure that he was clear of debt as his wife would be on maternity leave and their income would be reduced in those circumstances.

8 Mr Simmons was advised by letter dated 17 January 2003 that he had been overpaid his annual leave (Exhibit R3). This letter was from the Personnel Services – Leave Audit Team of the respondent. It advised that as part of a general review of the Concept system an audit of leave had been conducted on 22 July 2002. This audit had identified a number of discrepancies which included that all three periods of leave referred to earlier which were taken by Mr Simmons in 1998 and 1999 were not recorded in the respondent's annual leave records and that the leave applications made to the Department of Fisheries had never been debited from the Department of Justice's records system. He was therefore advised that his leave entitlement would have to be adjusted by 21 days.

9 Mr Simmons says that he was surprised and upset to discover that he had been placed in a situation where he had been overpaid for annual leave and that he had now a deficit in his annual leave entitlement. Mr Simmons says that he believed that the respondent's correspondence to him throughout the subsequent period in dealing with this matter has been threatening.

10 In the letter of 17 January 2003, the respondent advised Mr Simmons that there were three options available to him in dealing with the deficit—

1. To create an overpayment for the 21 day's annual leave which is to be repaid back to the Department; or
2. Process 1 day's annual leave from Mr Simmons's 2003 entitlements and 20 days of his long service leave entitlements; or
3. Create an over payment for one day to be repaid back to the Department and 20 days deducted from his long service leave entitlements.

11 The respondent proceeded to debit the 21 days against Mr Simmons's annual leave entitlements when the matter was not resolved. As Mr Simmons had no annual leave entitlements available to him, and as he is unable to take long service leave in small amounts, an application was made for an interim order to be issued to reinstate some of that leave until the matter was heard and determined. The order was issued on 7 August 2003 pending the hearing and determination of this matter and required the respondent to reinstate an amount of 7 days annual leave to Mr Simmons from the date that it was deducted from his records.

12 As I noted earlier, this matter is quite simple. The respondent had been informed of Mr Simmons's leave entitlements by correspondence from the Department of Fisheries when he returned from the secondment. However, the respondent did not check this letter and adjust its records accordingly. Through its administrative processes the respondent did not keep an accurate record of Mr Simmons's leave taken or owed to him. He continued to seek approval to take leave and had it approved over a period such that by the beginning of 2003, he had exceeded his annual leave entitlement by 3 weeks without being aware of it. He was not alerted to this by the respondent until after the audit because the respondent's records were incorrect.

13 On one hand then the respondent's records management system, together with a lack of the respondent checking Mr Simmons's records and updating them upon his return from secondment, has meant that Mr Simmons's records were erroneous such as to place him in a position where, through no fault of his own, Mr Simmons had been taking leave to which he had no entitlement at the time.

14 Mr Simmons had clearly planned his financial affairs and leave arrangements to take account of changes in his family circumstances. He is disadvantaged by the fact that the respondent's records have been kept in such a manner that for some years a period of more than 4 weeks leave had not been recorded as having being taken. That disadvantage is that he would be unable to take annual leave. There would be no specific financial disadvantage to him unless he were to need to take leave and annual leave would be the only way to accommodate that need. He would then have to take leave without pay or draw on other leave. That other leave may not meet the same purpose. He might also be financially disadvantaged if his employment were to terminate, and he would have a debt to repay. Conversely, Mr Simmons has had the benefit of the leave which he has taken. In the respondent's case, it has an obligation to seek to recover overpayments and to manage its finances responsibly.

15 Whether or not there has been a breach by the respondent of its obligations pursuant to the Public Sector Management Act 1994 and the Industrial Relations Act 1979, the role of the Public Service Arbitrator is to resolve disputes according to equity, good conscience and the substantial merits of the case, not merely according to breaches of law or otherwise. In these circumstances, Mr Simmons had been disadvantaged overall but also has had the benefit of having taken the leave.

16 In these particular circumstances, which are limited to Mr Simmons, I am satisfied that the fair outcome would be for the respondent to bear some of that responsibility and for Mr Simmons to take account of the fact that he has received the benefit of the leave. An appropriate arrangement would be for the respondent and Mr Simmons to share the burden of the difficulty which has arisen. Accordingly, Mr Simmons ought be credited with half of the leave that the respondent has deducted because it has failed to record leave taken by him. Therefore, I intend to order that Mr Simmons be credited with 10.5 days annual leave to his benefit.

17 Where the applicant seeks an order that the Commission, in effect, restrain the respondent from recovering the over payment or altering Mr Simmons's leave balance to recover the overpayment, it is not my intention to make such an order. I am of the view that such an order would be unnecessary if an order as referred to above is issued. That will have the effect of requiring the respondent to alter Mr Simmons's leave balance to provide him with 10.5 days annual leave entitlement. Such order shall be in substitution for, not in addition to, the leave already provided by the interim order, which ceases to have effect with the issuing of the order to finalise this matter.

2003 WAIRC 09972

OVER PAYMENT OF ANNUAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT

v.

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT

CORAM COMMISSIONER P E SCOTT

PUBLIC SERVICE ARBITRATOR

DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO.	PSACR 35 OF 2003
CITATION NO.	2003 WAIRC 09972

Result Application granted in part

Order

HAVING heard Mr J Ross on behalf of the applicant and Mr D Matthews (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the respondent shall credit Mr Warren Simmons with 10.5 days annual leave. The effective date of such credit shall be the day that the respondent adjusted Mr Simmons's annual leave records to debit such leave to take account of leave taken but not previously recorded by it.

[L.S.]

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

2003 WAIRC 09916

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	GOVERNING COUNCIL OF CENTRAL TAFE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
	PUBLIC SERVICE ARBITRATOR
DATE	MONDAY 3 NOVEMBER 2003
FILE NO.	PSACR 31 OF 2003
CITATION NO.	2003 WAIRC 09916

Result	Leave for Counsel to appear granted in part.
Representation	
Applicant	Mr J Ross
Respondent	Mr S Murphy (of counsel) and with him Ms N Wainwright

Reasons for Decision

1 The Governing Council of Central TAFE ("the respondent") advised the Western Australian Industrial Relations Commission ("the Commission") that it wishes to be represented by counsel at the hearing in relation to this matter which is listed for 13 November 2003. The Civil Service Association of Western Australia (Incorporated) ("the applicant") objects to counsel appearing at the hearing.

2 Section 31(4) of the *Industrial Relations Act 1979* ("the Act") provides as follows—

> "(4) Where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard."

This section provides that the Commission has discretion when deciding whether a legal practitioner can appear when a question of law is raised or argued or in the opinion of the Commission is likely to be raised or argued in the substantive proceedings. The discretion to permit counsel to appear is limited as it is to be exercised within the parameters of the Act and, in particular s.6(c) Objects of the Act which states—

> "(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"

3 The substantive matter before the Commission is a claim by the applicant that one of its members Mr Lewis Stevens satisfies the criteria contained in the Premier's Circular 2002/17 ("the Circular") for conversion to permanency. The applicant argues that the position Mr Stevens occupies was advertised in a manner which satisfies the requirements of "open competition" as defined in the Circular thus his employment status should be converted from that of a fixed term contract employee to a permanent employee. The applicant seeks the following Declaration and Order as set out in the schedule of the Memorandum of Matters for Hearing and Determination—

> "1. (a) A Declaration that Mr Lewis Stevens satisfies the criteria for conversion to permanency as outlined in Premier's Circular 2002/17.
>
> (b) An Order that the respondent convert Mr Lewis Stevens' employment status from contract to permanent."

Respondent's Submissions

4 The respondent submits that s.21(1)(a) of the *Public Sector Management Act 1994* ("the PSMA") provides that public sector standards setting out minimum standards of merit, equity and probity are to be complied with by public sector agencies when appointing employees to positions. The respondent maintains that the Circular is designed to deal with the resolution of fixed term contract arrangements whilst satisfying all legislative requirements and Public Sector Standards in Human Resource

Management. The respondent argues that the Applicant's interpretation of the Circular's definition of "open competition" is inconsistent with the Public Sector Standard on Recruitment, Selection and Appointment and this would render the Circular inconsistent with the standards and therefore offends s.21 of the PSMA. The respondent argues that a review of the Public Sector Standards requires that the rules of statutory interpretation be applied in relation to the proper meaning of the Public Sector Standards and accordingly counsel should be allowed to appear in these proceedings. The respondent also argues that any inconsistency between the Circular and the Public Sector Standards raises a question of law.

Applicant's Submissions

5 The applicant opposes counsel appearing in this matter on the basis that there is no serious issue of law to be argued in relation to this matter. The applicant argues that the only issue in dispute between the parties is in relation to whether Mr Stevens satisfies the requirements contained in the definition of "open competition" as outlined in the Circular. As this issue turns on the meaning of what constitutes "open competition" this is not a matter requiring significant legal argument. The applicant argues that even though the Circular deals with resolving fixed term contract arrangements whilst satisfying all legislative requirements and the Public Sector Standards in Human Resource Management, this does not mean that the Circular has to be interpreted in conjunction with any public sector standard in this case. The applicant argues that as no public sector standard relates to the ability of Mr Stevens to be converted from a fixed term contract employee to a permanent employee as provided for in the Circular then there is no issue of law before the Commission requiring determination.

Findings and Conclusions

6 In relation to this matter I respectfully adopt the observations of Beech SC in *Civil Service Association of Western Australia Incorporated v Director General, Department of Justice* (2003) 83 WAIG 503 at 504—

> "It may be able to be said that most, if not all, proceedings before the Commission may involve some question of law. This is because the Commission is a creature of a statute which operates in accordance with that statute and arguments may arise regarding the interpretation of the statute. Further, matters of employment law are frequently central to the issues which are brought to the Commission. The point to be made is that s.31 of the *Industrial Relations Act 1979* does not give a right to parties to be represented by counsel merely because a question of law is raised or argued or likely to be raised or argued. Therefore, the fact that a question of law may be raised of itself may not be sufficient justification for the Commission to exercise its discretion to permit counsel to appear. In other words, merely because the declaration and orders sought "relate or touch upon questions of law" (to quote from the respondent's letter of 21 February 2003) does not mean that counsel is to be given leave to appear.
>
> Rather, the question of law raised or argued, or likely to be raised or argued, should be a question of substance and not mere technicality. I say this because the Act provides means for settling disputes with the maximum of expedition and the minimum of legal form and technicality. The prospect of there being raised unnecessary legal form and technicality, particularly, but not solely, where it inhibits the settling of industrial disputes may well not be the sort of consideration which would justify the exercise of discretion in favour of a legal practitioner appearing in a matter (*Western Mining Corporation v. AWU*, op.cit)."

7 On the information before me I am not persuaded that the Public Sector Standard on Recruitment, Selection and Appointment is relevant to the conversion of a fixed term contract employee to permanent status as provided for in the Circular. However, as it is my view that there is a question of law arising when determining whether or not the applicant's interpretation of the definition of "open competition" in the Circular is inconsistent with the Public Sector Standard on Recruitment, Selection and Appointment I will grant counsel leave to appear and be heard in relation to this specific issue.

8 I am of the view that a decision about whether or not Mr Stevens satisfies the requirements of "open competition" as defined in the Circular involves the application of the normal rules of interpretation which are principles well settled in this jurisdiction. Accordingly, in relation to whether or not Mr Stevens has satisfied the requirements of "open competition" as defined in the Circular, counsel will not be granted leave to appear and be heard.

2003 WAIRC 09658

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TOTALISATOR AGENCY BOARD OF WESTERN AUSTRALIA, APPLICANT
	v.
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	P 21 OF 2003
CITATION NO.	2003 WAIRC 09658

Result Application for shortened time for answers granted

Order

WHEREAS an application has been made by the Totalisator Agency Board of Western Australia in accordance with the Industrial Relations Act 1979; and

WHEREAS the application was before me in Chambers, I, the undersigned Commissioner pursuant to the powers conferred on me under the Industrial Relations Act 1979, do hereby order and direct—

THAT the time for filing of answers in Application No. P 21 of 2003 shall be abridged to 14 days from the date of service.

[L.S.]

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

INDUSTRIAL MAGISTRATE—Complaints before—

2003 WAIRC 09829

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	ANTHONY HARRIS, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, CLAIMANT
	v.
	ROBIN CHARLES WILLIAM LAMMIE T/A BUNBURY FREIGHT SERVICE, RESPONDENT
CORAM	MAGISTRATE WG TARR IM
DATE	WEDNESDAY, 27 AUGUST 2003
CLAIM NO	M 279 OF 2002
CITATION NO.	2003 WAIRC 09829

Representation

Claimant	Mr A Bastow (of Counsel).
Respondent	Mr D Clarke of *Senate Pty Ltd* appeared as agent**.**

Reasons for Decision

1 The Claimant in these proceedings has filed its claim on behalf of Phillip Kiely, who was employed by the Respondent, claiming breaches of the ***Transport Workers (General) Award No 10 of 1961*** ("the Award"). In particular it is claimed that the Respondent failed to pay overtime rates and meal allowances.

2 The Respondent operates a transport business in the name of Bunbury Freight Service at 84 Strickland Street, Bunbury.

3 It is not in dispute that the Respondent employed Phillip Kiely as a full-time van and truck driver during the period 4 October 2000 to 14 September 2001.

4 There was no concession by the Respondent that the Award has application and that was because of the unusual wording of the Scope clause of the Award. That clause (clause 3) of the Award is as follows—

> *This award shall apply to all workers following the vocations referred to in the wages schedule who are eligible for membership in the applicant union and who are employed in the industries referred to in the Schedule of Respondents. Provided that this award shall not apply to bread carters, workers engaged in the timber industry within the South West Land Division nor to workers whose duties involve them in delivering goods or materials solely beyond the West Australian State border.*

5 It was necessary for the Claimant to call an officer of the Transport Workers Union to give evidence that Mr Kiely would be eligible for membership of that Union. I have no doubt on the evidence before me that Mr Kiely's duties as a driver fell within the vocations referred to in the wages schedule (clause 7) of the Award and that the Respondent's business involved the transportation of goods and materials, an industry carried on by the respondents to the Award.

6 The Award, therefore, has application in this matter and both the Respondent and the employee are bound by the Award.

7 Clause 9 of the Award makes provision for the ordinary hours of work and the basis on which they are to be worked. Subclause (5) of that clause provides—

> *(5) The ordinary hours of work shall not exceed 10 hours on any day.*
>
> *Provided that in any arrangement of ordinary working hours, where such ordinary hours are to exceed 8 hours on any day, the arrangement of hours shall be subject to the agreement between the employer and the majority of employees in the plant or section or sections concerned.*

8 It is argued , albeit not strongly, by the Claimant that because on the majority of days the hours worked were in excess of 10 I should find that subclause (5) applies for the purpose of calculating overtime.

9 There is no evidence before me that the Respondent or the employee turned their mind to any arrangement or came to an agreement as envisaged by the subclause. In the absence of such agreement any overtime to be paid for hours worked outside of the ordinary hours should be calculated on 8 ordinary hours per day.

10 Overtime payments are provided for in clause 12 of the Award as follows—

> *12. - OVERTIME*
>
> *(1) Subject to subclause (4) of this clause, all time worked—*
>
> *(a) outside the ordinary hours of work prescribed for any day in Clause 9. - Hours of this award; or*

(b) outside the ordinary hours of work prescribed for any week by Clause 9. - Hours of this award but which time would not be outside the ordinary hours for any day;

shall stand alone and be paid for at the rate of time and a half for the first two hours and double time thereafter in addition to the ordinary weekly wage. Provided that all overtime worked on Sunday and Saturday after 12 noon shall be paid for at the rate of double time and provided further that the penalty rates prescribed in Clause 10. - Saturday and Sunday Time and Clause 11. - Night Work of this award shall not be regarded as part of the ordinary rate for calculating overtime.

For the purposes of this subclause, ordinary hours shall mean the hours of work fixed in an establishment in accordance with Clauses 9. - Hours, 9A. - Implementation of 38 Hour Week and 9B. - Procedures for In-Plant Discussions of this award.

11 Weekly time sheets and pay advice slips were kept and have been produced for the period of the claim and it is apparent from them that Mr Kiely was not paid overtime as required by clause 12(1) of the Award or, in fact, any payments identified as being for overtime.

12 Subclause (4) of clause 12 is set out hereunder—

(4) (a) (i) When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that workers have at least ten consecutive hours off duty between the work of successive days.

(ii) A worker (other than a casual worker) who works so much overtime between the termination of his ordinary work on one day and the commencement of ordinary hours on the next day, that he has not at least ten consecutive hours off duty between those times, shall, subject to this subclause be released after completion of such overtime until he has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(iii) If, on the instruction of his employer, such a worker resumes or continues work without having had such ten consecutives hours off duty he shall be paid at double rates until he is released from duty for such period and he shall then be entitled to be absent until he has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

13 There is evidence in the time and wages records tendered to show that on some occasions when Mr Kiely did what has been described as the Perth run he finished work for the day after 8.00 pm and commenced work the following day at 6.00 am. As a result he became eligible for the rate of pay provided for in clause 12(4).

14 It is argued on behalf of the Respondent that Mr Kiely was not given the instruction required in subclause (4)(iii) of clause 12. In that regard Mr Kiely gave evidence that if he was not tasked to do the Perth run he would be required to pick up and do deliveries in the Bunbury area ("the Bunbury run"). When required to do the Perth run Mr Kiely would start work, he said, at 10.00 am. That start time was later changed to 11.00 am. When required to do the Bunbury run Mr Kiely would start work at 6.00 am. His evidence was that he was expected to start work at 6.00 am and no-one told him otherwise.

15 Evidence was given by Mr Mark Donovan who was the Manager of Bunbury Freight Service during Mr Kiely's employment. Mr Donovan had started with the business as a truck driver and was employed for a total of 9½ years. His evidence in relation to hours was that Mr Kiely was expected to start at 6.00 am when he was not doing the Perth run notwithstanding the fact that he may have done the Perth run the day before and got in reasonably late resulting in him not having 10 hours off duty before the next start. As far as he was aware no-one told Mr Kiely that he was not required to start work until he had 10 hours off. He went on to say that the 10 hour breaks "*were never enforced upon us*". He did not tell the drivers that they had to have a 10 hour break because "*it was just something we never really worried about*".

16 The evidence before me is that there were occasions when Mr Kiely recommenced work without having had at least 10 consecutive hours off since finishing work the day before. He did so because he understood that was expected of him and because no-one had turned their minds to the requirement to have 10 hours off. I find, therefore, that Mr Kiely is entitled to be paid overtime as provided for in clause 12(4) on those occasions he had less than 10 hours off between shifts.

17 The time and wages records tendered in evidence generally show a starting time (time in) and a finishing time (time out) without recording any time taken for a meal break. Mr Lammie gave evidence that he did not deduct time for meal breaks but paid his employees for the total hours shown each day.

18 The Award, in clause 15, provides that—

"(e)very worker shall be allowed each day a meal break of not less than thirty minutes nor more than one hour, to commence at any time between the end of the third and end of the fifth hour of the day's employment, …"

(see subclause (4))

19 The evidence before me is that there was no set time for meal breaks although those working in the Respondent's depot or on the Bunbury run would have at least one break of thirty minutes during the day when food provided by the Respondent would be consumed. It was the evidence of Mr Broome, a leading hand with the Respondent, that there were opportunities through the day for breaks to be taken including one 30 minute minimum break between 10.30 am and 11.30 am and again between about 2.30 pm and 3.30 pm while waiting for trucks to arrive.

20 It seems to me that, in the absence of any recorded evidence of time taken for meal breaks, it is not unreasonable to conclude that the Respondent's employees, where the working hours on any one day exceeded 8 hours, would have taken breaks during the day totalling at least 1 hour. Therefore, any calculation should make allowance for a one hour meal break. I cannot conclude on the balance of probabilities that a lesser period should apply.

21 When engaged on the Perth run, it is the evidence of Mr Kiely that he would have a meal as the opportunity arose and while waiting in the Perth depot. In my view he should not be debited with meal time in excess of the reasonable time it would take to eat his meal and have a break. The Award suggests thirty minutes to be the minimum time required for that. So for the purpose of calculating the hours worked on the Perth run, thirty minutes should be deducted for a meal break.

22 The next issue to be considered is the claim for meal allowance.

23 Clause 15 is set out in full hereunder—

15. - MEALS

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

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall provide such meals or pay an amount of $4.65 for each second or subsequent meal.

(3) No such payments need to be made to a worker living in the same locality as his place of work who can reasonably return home for such meals.

(4) Every worker shall be allowed each day a meal break of not less than thirty minutes nor more than one hour, to commence at any time between the end of the third and end of the fifth hour of the day's employment, except where an alternative arrangement is entered into as a result of discussions as provided for in Clause 9B. - Procedures for In-Plant Discussions of this award.

(5) When a worker is required by his employer for duty during any meal time whereby his meal time is postponed for more than one half hour, he shall be paid at overtime rates until he gets his meal.

24 As clause 15(1) provides, where a worker is required to work overtime for two hours or more he is to be supplied with a reasonable meal by the employer or paid $4.90 for a meal.

25 It follows in my view that the meal supplied is intended to be the meal the employee might miss out on because he is working the overtime. Where the driver of the Perth run starts at 10.00 am or 11.00 am it must be the evening meal which is to be provided by the employer.

26 Mr Broome gave evidence that he would go down to the Action Supermarket each morning and buy "*bread rolls, hot dogs, chooks and cold meat*" which were available for the lunch break between 10.30 am and 11.30 am. Although Mr Broome said he had used those supplies when he did the Perth run, the evidence suggests they were for those employees at the Bunbury depot at the time. Mr Donovan gave evidence that meals were not provided for those on the Perth run. He said "*when you're in the depot, there was sort of smoko and that's supplied. Bread, toast, rolls, hot dogs. Enough to make something to eat there*".

27 Mr Kiely gave evidence that he provided his own meals when on the Perth run and was not paid a meal allowance. There is no evidence to contradict his evidence on that issue.

28 When on the Perth run Mr Kiely worked overtime for two hours or more and he was entitled to be supplied with a reasonable meal or paid $4.90 for a meal. He was neither provided with a reasonable meal nor paid the allowance. He therefore succeeds in his claim and is entitled to be paid a meal allowance for each and every Perth run where he worked 10 or more hours.

29 The remaining issue is the accounting for the bonuses which, it has been agreed, were paid. It would appear that only on one of the weekly time sheets (week ending 8 November 2000) was any notation made of the weekend "food runs" times. The Claimant has included those hours in its schedule (exhibit G) and claims 2 hours for Saturday afternoon at double time and 2 hours in total for Sunday at double time and has given credit for the $50.00 bonus paid. That is a calculation which is favourable to the Respondent. It is arguable that the employee is entitled to 9 hours overtime at double time having regard to the minimum of 3 hours requirement in clause 12(2)(a) which reads—

(2) (a) A worker required for work on a day other than his ordinary working day or recalled to work after leaving his employer's business premises shall be paid for a minimum of three hours work at the appropriate rate.

30 While it is arguable that bonuses paid as such should not be later applied in reduction of underpaid wages, I believe it is appropriate in all of the circumstances of this case that the $50.00 bonus referred to should be applied the way it has been and because there is no record of the hours worked on the other occasions bonuses were paid they should be ignored for the purpose of this claim.

31 There is, it would seem, no dispute in this case in regard to the actual hours worked by the employee, the amounts he was paid and the rates used to calculate those amounts. It should not be difficult now for the parties, using copies of exhibit G and these reasons for decision to calculate the amount due to Mr Kiely and I invite the parties to do so.

32 The matter will stand adjourned for that purpose, to a date I will fix now, when I will hear the parties in relation to pre-judgment interest, penalty, costs and mitigation.

W. G. TARR

Industrial Magistrate.

2003 WAIRC 09564

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT
PARTIES	DAVID JOHN HAYMAN, CLAIMANT
	v.
	DONALD F MUNRO & ASSOCIATES PTY LTD, RESPONDENT
CORAM	MAGISTRATE WG TARR IM
DATE	THURSDAY, 28 AUGUST 2003
CLAIM NO	M 108 OF 2003
CITATION NO.	2003 WAIRC 09564

Representation	
Claimant	Mr G MacNish (of Counsel) of *Cocks Macnish.*
Respondent	Mr P Patterson (of Counsel) of *Taylor Smart.*

Reasons for Decision

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

1 This is a claim by the Claimant, who was at the time a certified practising accountant employed by the Respondent. The claim is a claim made pursuant to the provisions of the ***Long Service Leave Act 1958*** and it is a claim for an entitlement under that Act.

2 The ***Long Service Leave Act 1958*** (the Act) is an Act to provide for the granting of long service leave to certain employees whose employment is not regulated under the ***Industrial Relations Act 1979***, and for matters incidental thereto. It is not in dispute but section 4 of the Act defines "employee" and "employer" and it would seem that there cannot be any doubt that the Claimant would fall within the definition of "employee" and the respondent falls within the definition of "employer" and therefore the Act has clear application in relation to this claim.

3 Section 8 of the Act provides, inter alia, that—

> *"An employee is entitled in accordance with, and subject, to the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer ..."*

4 The same section deals with other situations which are not relevant to these proceedings.

5 It is not in dispute that the Claimant was employed by the Respondent from 12 July 1982 until 30 June 2000, and that the employment period for the purpose of calculation of any leave entitlement was a period of 17.98 years.

6 Section 9(2) of the Act makes provision for payment in lieu of the long service leave entitlement where the employment of an employee is terminated without him having taken the leave during the period of employment.

7 In my view, it is clearly the intention of the legislation that employees who come within the definition of the Act are entitled to long service leave, but the Act does provide in section 5 under the heading "Limited contracting-out of long service leave" for an employer and an employee to agree that the employee may forego his entitlement to long service leave under the Act if the employee is given an adequate benefit in lieu of that entitlement and the agreement is in writing.

8 It has been suggested to me that there are not many authorities on the term "agreement", but I would have thought that in looking at section 5(b) the ordinary meanings of the words must apply, and that is that any agreement made under section 5 must be in writing.

9 The Shorter Oxford Dictionary has a definition of "agreement" and, among other things, under the sub-heading of "law" it says—

> *"A contract duly executed and legally binding."*

10 Other words like "a coming into accord", "a mutual understanding" are also used, but it seems to me that any agreement must include the meeting of the minds of the parties, and any agreement in writing must clearly evidence that meeting of the minds, and in particular in relation to section 5, I would have thought any agreement should clearly identify it as being an agreement made pursuant to section 5, an agreement to forego the employee's long service leave entitlement, and I would have thought any agreement should include the adequate benefit to be provided in lieu of the long service leave entitlement, as provided in section 5(a).

11 The Respondent is wanting me to accept as the agreement in writing, firstly, the minutes of the meeting of the directors of the Respondent company on 29 July 1996 which, under a heading of "Succession Planning" refers back to some resolutions that were made during a meeting on 9 April 1994, and the meeting of 29 July 1996 adds to those items—

> *"1. Annual leave to be taken into consideration when calculating equity.*
>
> *2. Long Service Leave is not to be paid to retiring partners."*

12 That sentence in the minutes falls way short of what I would expect an agreement under section 5 of the Act to include, and I have mentioned those. I have been invited to add to those minutes the "Rough workout of likely equities as at 30/6/2000", which was marked as exhibit B. Because there was no mention of long service leave in that document I am asked to find that it was accepted that long service leave may or had been foregone under the provision of section 5, and I have been asked to conclude that the adequate benefit in lieu, as it is described in the section, somehow be found from those figures.

13 I had not turned my mind to section 26 of the Act, but Mr Macnish has drawn my attention to it, which would support, I believe, my view in relation to the requirements under section 5 that any agreement made under that section be kept, or the details of that agreement be kept by the employer.

14 There has been no evidence presented during the proceedings which would comply with the requirement under section 26 of the Act. In fact, it seems to me that it is after the event that there has been an attempt to prove that an agreement existed. I think that is clear on the evidence before me. More than has been done in relation to long service leave between the employee and the employer, as shown in these proceedings, would need to have been done before I could find that the employee is not entitled to long service leave.

15 I find that there was no agreement under section 5, and, therefore, the employee is entitled to long service leave as provided for in section 8 of the Act.

16 Section 8 provides for long service leave on ordinary pay. "Ordinary pay" is defined in section 4, as follows—

> ***"ordinary pay"*** *means subject to subsection (2)of this section,* (which does not have relevance to these proceedings) *remuneration for an employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to him, as at the time when any period of long service leave granted to him under this Act commences, or is deemed to commence, ... but does not include shift premiums, overtime, penalty rates, commissions, bonuses, allowances, or the like;*

17 It has been suggested in these proceedings that the additional amount paid to the employees by way of superannuation and other benefits should be classified and found to be bonuses in relation to the remuneration, but it seems to me that when one looks at the items that are mentioned under the ordinary pay definition, it contemplates those payments, for example, shift premiums, overtime, penalty rates, commissions, bonuses, allowances, or the like which an employee may normally be entitled to while he is working, but while on long service leave he is not. He is not entitled to shift bonuses, obviously because he is not working shifts, overtime for the same reason, and also penalty rates.

18 The evidence before me is that the claimant and the other directors were paid a base salary of $63,000.00 per year plus an amount annually, which has increased from $15,000.00 in 1993 to a figure of $40,000.00 over the years, and certainly over the last year of the employee's employment. While there has been an increase in the amount paid, there has been no increase in the base salary, and on the evidence I have heard, the figure of $40,000.00, it would seem, has been calculated as the maximum amount on which the respondent could obtain a tax benefit, and although, while it has been suggested the tax benefit benefits the company, it also benefits the trusts which in turn benefits the employees or partners.

19 The younger directors, I have been told, receive less than that, and that was because the taxation benefit of any superannuation paid to them was less than the amount of $40,000.00 which would be the benefit, or the maximum amount paid in relation to those longer serving employees.

20 But in any event, the most effective way, it would seem, to obtain a tax benefit in relation to the employees was to pay $63,000.00 per annum as a base figure, and then, through salary sacrificing or the payment of superannuation, pay up to an additional $40,000.00. The effect was that each director received one way or another $103,000.00 during the year.

21 There was a hypothetical directors' situation put to Mr Virgo and the answer he gave, I would have thought, was predictable. If a director was to proceed on long service leave his annual remuneration would not be affected. Whether he was on leave or not, he would still receive $103,000.00 per year.

22 There has been some evidence given to support that, and there was a letter (exhibit E) dated 3 December 1996 which was sent to the Deputy Commissioner of Taxation because of, as was explained, the need to establish a reasonable benefit limit. The letter sent by Munros to the Deputy Commissioner of Taxation showed that the value of the benefits received as part of the total remuneration package, which included the superannuation, was the equivalent at that time to $103,000.00. In fact, it was $63,000.00 plus, in 1993, $15,000.00, which was increased to $20,000.00 in 1994, and then $25,000.00 in 1995.

23 So it seems to me in that letter the Taxation Department was being advised that the total remuneration package included what the respondent is claiming today to be a bonus.

24 The Deputy Commissioner of Taxation responded to that letter by accepting the salaries for the purpose of the reasonable benefit limit as being from $99,086.00 through to $101,743.00 which, as I said, would equate to the current figure of $103,000.00.

25 I have been referred to a number of cases. The matter of ***Hall v Moran Healthcare Group (WA) Pty Ltd 79 WAIG 272*** to some extent supports the Claimant's view that where a salary is packaged it is the total remuneration which applies in relation to long service leave, including any component which has been salary sacrificed. It seems to me that would support the view the superannuation paid by an employer in the circumstances of this case must be part of the annual remuneration of the employee.

26 The other cases that I was referred to by the Respondent go towards the submission that there should be an agreement and I have dealt with that issue.

27 In conclusion, my finding is that the Claimant is entitled to long service leave under the Act and for the purpose of calculation I find that the Claimant's annual remuneration, which should be used for the calculations, to be $103,000.00 per year.

28 In relation to costs I have referred to regulation 53 of the Industrial Magistrates' Courts (General Jurisdiction) Regulations 2000 in relation to the action being frivolously or vexatiously defended but I find that there were some issues which needed deciding. It is not uncommon in a lot of cases for the case to be fought on grounds which, in hindsight, might seem to have been not worth taking on, but until the decisions are made I suppose each party has a right to argue its case. So I do not think I could find that the defence has been frivolous or vexatious. It was intended by the legislators that this Court be a no costs Court, and I realise at times that creates some financial hardship for parties, but unless it can be shown a parties' claim or defence was frivolous or vexatious costs are not awarded.

29 There will be an order that the Respondent pay to the Claimant the sum of $30,865.67 plus interest at the Supreme Court Act rate with effect from 30 June 2000, and there will be an order that the Respondent pay the Claimant's costs fixed at $40.00.

W. G. TARR

Industrial Magistrate

2003 WAIRC 09664

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	DONALD BRUCE JENSEN, CLAIMANT
	v.
	CITY OF MELVILLE, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 14 AUGUST 2003
CLAIM NO	M 295 OF 2002
CITATION NO.	2003 WAIRC 09664

Representation	
Claimant	MR DH Schapper (of Counsel) and with him Mr S Bibby (as agent)
Respondent	Mr A Power (of Counsel)

Reasons for Decision

Claim

1 The Claimant Donald Bruce Jensen filed his claim on 18 October 2002. He alleges that whilst he was employed as a Community Liaison Security Officer by the City of Melville between 14 January 2002 and 11 August 2002 his employer did not pay him in accordance with the ***Local Government Officers (Western Australia) Award*** (the Award) which governed his employment. The Claimant says that in reality he was a Law Enforcement Officer as defined by the Award and should have been paid as such. He therefore seeks to recover $11,593.13 being the amount he alleges he has been underpaid. His claim is brought pursuant to section 179 of the ***Workplace Relations Act 1996***.

Response

2 The Respondent denies that the Award applied to the employment of the Claimant and says that at all material times his employment was governed by a State Individual Workplace Agreement with respect to which it has complied. It accordingly denies the claim.

Background

3 In 1997, as part of its strategic planning process, the Respondent sought to address community concern about safety and security. It accordingly established a "Safer Cities Program" with the objective of enhancing safety and security within the City of Melville. The establishment of the Community Liaison Security Service was pivotal to the Respondent's strategy. The service was to provide security patrols within the City of Melville.

4 Initially New Breed Security from about August 1998 until about August 1999 provided the security patrols. The ending of the twelve-month contract coincided with that company going into liquidation. At that time Mr Michael Duckett, who currently holds the position of "Manager of Neighbourhood Amenity" was invited by the Chief Executive Officer of the Respondent to lead an in-house team in putting together a bid to run the service with the Respondent's own staff. The Respondent was successful with its bid and accordingly commenced providing the service on 24 December 1999. It continues to provide the service. The provision of the service is funded by a levy (currently in the amount of $32.00), which is levied against the thirty nine thousand properties within the City of Melville (the city) including the Respondent's own three hundred and twelve properties. The levy is described on rates notices as a "Property Surveillance and Security Levy".

Nature of Service

5 The service provided is in the nature of a vehicular patrol on a twenty-four hour basis each day of the year. The patrol officers, who are designated Community Liaison Security Officers (officers) carry out patrols in twelve-hour shifts. They work a combination of day shifts (6.00 am to 6.00 pm) and night shifts (6.00 pm to 6.00 am). They patrol the streets and monitor both public and private properties. The city is divided into various sectors for ease of patrol operations and up until July 2002 it was divided up into four sectors known as Alpha, Bravo, Charlie and Delta. Thereafter it has been divided into three sectors. Each officer has the responsibility of patrolling and monitoring a particular sector each shift. For most of the material period, there were four officers on patrol together with their supervisor who patrolled across the sectors. Thereafter it reduced to three plus the supervisor.

The Employment of the Claimant

6 The Claimant gained employment as a Community Liaison Security Officer by answering a newspaper advertisement placed by the Respondent in about November 2001. On 28 December 2001 the Respondent's Acting Chief Executive Officer wrote to the Claimant confirming advice previously orally given that he had been successful in his job application. The Claimant was advised that he had been appointed to the temporary position of Community Liaison Security Officer "*working 168 hours per four week period, until 30 June 2002*". The offer of employment was subject to the Claimant attaining a Security Licence. The Claimant was informed that his employment was to commence upon completion of a two-week security course and that he would be subject to a probationary period of three months. He was also advised that his employment was to be governed by an Individual Workplace Agreement.

7 The Claimant commenced his employment with the Respondent on 21 January 2002. On that day he executed the Workplace Agreement (Agreement), which was subsequently registered by the Commissioner of Workplace Agreements on 12 February 2002.

8 Relevantly, the position of Community Liaison Security Officer is described at Schedule B of the Agreement (exhibit 3). The "overall objective" for the position is outlined thereat as follows—

> *"To provide liaison and security patrol service to the residents within the City of Melville. To attend incident call outs as required and provide general security services with the aim of reducing preventable crime, anti-social behaviour and alleviate the public's fear of crime within the boundaries of the City of Melville."*

9 The particular outcomes, which need to be met by officers, are also set out in schedule B of the Agreement. It is useful to set out those required outcomes—

1. Outcome - Community Liaison

To maintain regular contact with manager, tenants and valid users of Council facilities to develop and promote the liaison/security service.

To maintain regular contact with relevant officers of City to ensure they are informed of community concerns and issues.

To maintain regular contact with other security agencies on an as needed basis, including but not limited to the WA Police Service, Community Policing and Neighbourhood Watch representatives.

To liaise with City of Melville residents and community groups to develop and promote awareness of the Community Liaison Security Service and the services it provides.

2. Outcome - Security Service

To undertake security patrols of Council buildings and reserves.

To attend to call-outs where security of Council buildings has been breached and Rangers are unavailable to attend to arrange for temporary repairs to secure the buildings.

To undertake a general security street patrol service throughout the City of Melville.

To identify and make secure any hazardous situation that may be discovered whilst on patrol.

To identify, photograph and report graffiti and other property damage.

To attend resident call outs or incidents as required when dispatched either by the duty controller, team leader or other relevant person of authority.

To provide 'back-up' support to other officers as required.

3. Outcome - Customer Service

Respond to written, verbal and telephone enquiries from residents, government agencies and internal service areas.

To act and mediate in a professional and diligent manner.

To liaise with the public to provide advice and to exercise a surveillance programme based on empathy, education and public relations.

To assist in the provision of a 24 hour service to the public.

To retain confidentiality at all times.

4. Outcome - Housekeeping

To perform specific delegated functions including assistance with courier duties.

To report the need for maintenance within the Municipality.

To maintain log books and incident reports.

To record information and to compile short reports as required.

5. Outcome - Public Safety

To undertake minor repairs/erect barricades to Council roads, footpaths and street verges where public safety is at risk and to report the matter to the relevant service area.

To assist and liaise with any staff and other public authorities in the event of civil emergencies.

To dispose of used syringes found in public places with appropriate equipment provided as required.

6. Outcome - Occupational Health and Safety

Ensures that cars and work areas are maintained in a safe, clean and tidy condition, so that risk of accidents occurring is reduced to a minimum.

Exercise a duty of care to understand the need to work in a safe and efficient manner, having regard to own safety and that of other workers.

10 The discreet outcomes were to be achieved by adherence to the Respondent's "Standing Operating Procedures for Community Liaison Security Officers" (see exhibit 14). The operating procedures are contained in a manual given to all officers, including the Claimant. That manual governs their duties, responsibilities, conduct and practice and with some degree of particularity, instructs them with respect to those matters.

The Claimant's Duties

11 Although the facts in this matter are largely uncontested, there is one matter of significant dispute that being the extent to which the Claimant was required to watch, protect or inspect all property belonging to the local authority. In short, the Claimant says that his main function was to watch, protect and inspect the Respondent's property, whereas the Respondent contends that the protection of the Respondent's property was very much incidental to the Claimant's primary duty of providing security for the community.

12 The Claimant said (at page 26 of the transcript)—

"My function would be to patrol, to check and inspect Melville property."

13 In that regard he gave evidence concerning the actual duties performed across all four sectors. He identified particular properties either owned by the Respondent or for which the Respondent has responsibility as being properties he visited for the purpose of inspection. The Claimant identified a number of differing types of facilities that fall within the class of properties that he was required to inspect. They included and not exhaustively the Civic Centre, libraries, parks and reserves, playgrounds, toilet blocks, recreation centres, aquatic centres, gymnasiums, museums and nursing homes. The Claimant identified particular facilities, which are either owned by the Respondent or for which the Respondent has responsibility across all four sectors, which he says he was required to inspect over the relevant period. I do not intend to specifically refer to any particular property except to say that some of the properties mentioned are specifically referred to in the manual.

14 The Claimant said that it was his function to check council buildings or those for which the Council had responsibility for signs of damage, particularly graffiti, smashed windows or other forms of vandalism. He was also required to ensure that the buildings were secure. For that purpose he was required to conduct foot patrols to check both the internal and external aspects of such buildings. He also had responsibility for checking for damage on jetties and play equipment. He intervened in circumstances when he observed obvious breaches of council laws or council administered laws. Particular examples cited included challenging people playing golf where golf was prohibited in recreational areas and those misusing jetties by riding or skating on the same.

15 The Claimant testified that he was required to report on all damage to council property noted during patrols. Such a report was to be in the form of a maintenance report to be actioned by the Respondent. Further, he was required to note and report upon any material incident that required his involvement occurring during his shift.

16 The Claimant maintained that his primary function was as is outlined in the manual that of protecting council assets or alternatively assets for which the Respondent has responsibility. Notwithstanding that, he readily concedes that his function went beyond just the protection of the Respondent's assets.

17 Mr Duckett on the other hand contests the contention that the protection of council's assets was the dominant feature of the Claimant's job. He said (at page 86 of the transcript) that he considered the Claimant's dominant function to be that of protecting the community. The Claimant's role was—

"To protect our community, the people who live and visit and work in our community, and properties of everybody within the community. That's certainly their priority. That is -- that is our vision for the City of Melville, to make it safer and more secure."

18 To support his contention, he said that an analysis of the running sheets for a number of officers over a week selected at random revealed that only 14.5% of the officers' time was spent visiting council properties. He maintained that the figure derived accurately reflected the amount of time officers spent dealing with Council property. However when cross-examined on the issue, Mr Duckett conceded that he had never been on patrol with the officers and was unable to say first hand what they actually did. It was also put to Mr Duckett that officers were and are mandatorily required to conduct a full physical check of each council property within their area at least once every shift. Initially Mr Duckett denied that was the case, saying he did not think it would be possible. When he was pressed on the accuracy of his answer he conceded that such a requirement is contained within the manual. When pressed further he said that although stated within the manual, officers were not required to inspect each council property in their area once every shift. He said that the manual was just a guide to their operating procedures. In that regard Mr Duckett was taken to specific duties mentioned at pages 38 and 39 of the manual. Examples of those provisions are—

"Officers must conduct at least three checks of parks and reserves in their patrol zone. ..."; and

"Where parks/reserves contain Council building (such as toilet blocks, for example) officers must conduct a full physical check of the building."

19 Notwithstanding the very clear language expressed in the relevant pages of the manual, which is obviously mandatory in nature, Mr Duckett was unwilling to concede the same, maintaining throughout his evidence that the manual is no more than a guide. In my view his stance on that issue is a matter of concern. It seems that he attempted to defend the indefensible and in doing so did himself a disservice. The responses given by him on the issue reflects poorly upon his credit.

20 In determining the pivotal factual issue in contest I have had no difficulty in preferring the evidence of Mr Jensen to that of Mr Duckett. I accept Mr Jensen's evidence that his primary function was to maintain security of council assets as outlined in the manual. I accept the work he carried out predominantly related to that. Mr Jensen gave credible evidence about what he did whilst on duty. Further the documentary evidence in the form of the manual directives supports his evidence. On the other hand, Mr Duckett is unable to give a first hand account of the duties performed by officers. The documentary evidence in the form of the manual is against him. His conclusion, based on research, relating to the amount of time spent by officers visiting council properties is totally unconvincing. That is so particularly given that the time sheets do not purport to represent a comprehensive chronology of events during each shift.

21 It appears to me that Mr Duckett has given his evidence in such a way as to best protect the Respondent's position.

22 Having resolved that issue I move to determine Award coverage in the light of the facts.

The Award – Issues

23 The parties agree that the ***Local Government Officers' (Western Australia) Award 1988*** binds the Respondent. However, the question remains whether the Award covers the employment of the Claimant. It is common ground that if the Award applies then it overrides the registered State Workplace Agreement.

24 The Claimant contends that, given that he was employed by the City of Melville and that at the material times he was an employee of the Respondent, then without anything further the Award applies. Also, and in any event, he says that he is a Law Enforcement Officer as defined in clause 3.7 of the Award, which provides—

> *"Law Enforcement Officer shall mean an employee employed to patrol, within the geographical confines of a Local Authority, for the purpose of watching, protecting or inspecting all property belonging to the Local Authority and/or to enforce one or more of the Authority's By-Laws or any Acts of Parliament which that Authority is empowered to enforce.*

25 As to the first ground, the Claimant argues as follows—

26 Clause 3.9 provides—

> ***3.9 Officer** or **Employee** shall mean a person appointed by a Local Authority to one of the classifications in this award, a person engaged by a Local Authority as a Trainee in accordance with clause 16 – Traineeships, and any person appointed by a Local Authority to a non-elective office necessary to the proper carrying out of the power and duties imposed upon the Local Authority by the Local Government Act, 1995, its successor and/or any other Act.*

27 Accordingly clause 3.9 applies to three classes of persons being—

1. A person appointed by the Local Authority to one of the classifications in the Award.
2. A person who is engaged as a trainee.
3. Any person appointed to a non-elective office.

28 The Claimant says that he fits within the first class when clause 3.9 is read with clause 5 of the Award. Clause 5 of the Award provides—

> ***5. PARTIES BOUND***
>
> *This award shall be binding on the Local Authorities named in the First Schedule in respect of all their employees whether members of the Australian Municipal, Administrative, Clerical and Services Union or The Association of Professional Engineers and Scientists, Australia, or not, whose salaries and conditions of employment are determined by this award, and on the Australian Municipal, Administrative, Clerical and Services Union or The Association of Professional Engineers and Scientists, Australia and their members.*

29 The Claimant therefore argues that because the Award binds the Respondent with respect to all its employees, it must also necessarily cover him because he is a person employed in a position described and defined in clause 15.8 of the Award.

30 Clause 15.8 does not contain a traditional list of classifications as one might find in an old style award, but rather contains a list of characteristics, requirements, responsibilities, organisational relationships and authority for each of the nine levels ascending from level one to level nine. It is apparent that the first level is the basic level. There are incremental changes from level to level characterised by increased requirements, responsibilities and authority.

31 The Claimant says that he is a person who is employed in a position which is described by one of the nine levels and that his job as Community Liaison Security Officer falls within one of them. He argues that it matters not which one. Notwithstanding that the Claimant maintains that his position is that of a level 3. I am not however called upon to determine his level.

32 The second limb of the Claimant's argument is that he is a Law Enforcement Officer as defined by the Award. He says that it is obvious that he is employed to patrol within the City of Melville for the purpose of watching, protecting or inspecting all property belonging to the City. The fact that from time to time he does other things does not mean he is not a Law Enforcement Officer. He argues, that in any event, he plays a role in enforcing by-laws by challenging people contravening those laws. He gave examples of his role in confronting people playing golf in restricted areas, stopping unauthorized activities on jetties and responding to nuisance type complaints.

33 The Respondent on the other hand submits that the definition of Law Enforcement Officer in clause 3.7 of the Award is unambiguous, clear and exhaustive. It says that the Claimant was employed for more than the purpose of watching, protecting or inspecting all property belonging to the Respondent and consequently was not, at the relevant time, a Law Enforcement Officer as defined. The Respondent argues that it does not matter if the Claimant spends say; just ten per cent of his time doing other things, the fact that he does other things takes him outside the definition contained in clause 3.7 because the definition is not an inclusive one. It is singular in expression and should be construed that way.

34 The Respondent also contends that in any event the Claimant is not someone who enforces, or is capable of enforcing the City's by-laws or any Acts, which the City is empowered to enforce.

35 Another limb of the Respondent's argument is that there are other awards that apply to and regulate the employment of employees of the City of Melville. In that context it is argued that the Award does not apply to the Claimant because he is not someone appointed by the Respondent to one of the classifications in the Award. The Respondent says clause 3.9 provides an exhaustive definition because it says—

> *"(an) **Officer** or **Employee** shall mean a person appointed by a Local Authority to one of the classifications in this award, ..."*

36 The Respondent points out that clause 15.1 of the Award is mandatory. It provides—

> *"Positions will be classified in accordance with the level definitions provided for in this award."*

37 It is clear that the provision imposes an obligation.

38 Clauses 15.2 to 15.7 inclusive of the Award dictate how the job classification or reclassification is to be achieved. However, in this matter, because an appointment has not been made, the Award cannot apply.

Determination

39 The issues between the parties are to be determined upon the construction of the Award in the light of my findings on the sole factual issue in dispute. The approach to be taken in construction has been the subject of judicial comment to which I have been referred. It is appropriate that I recite those judicial pronouncements in order to give context to my determination in this matter.

40 To assist me in my considerations I have been referred by the Respondent to the decision in ***Norwest Beef Industries Limited and An v AMIEU (1984) 64 WAIG 2124*** in which His Honour Brinsden J said at page 2127—

> *"...the meaning of a provision in an award is to be obtained by considering the terms of the award as a whole. If the terms are clear and unambiguous it is not permissible to look to extrinsic material to qualify that meaning."*

41 At page 2133, His Honour Olney J said—

> *"If it be the case that the correct approach to the interpretation of an industrial award is to read the document itself and give to words used their ordinary commonsense English meaning ... then the first task in every case will be to determine whether the words used are capable in their ordinary sense of having unambiguous meaning. If that question is answered in the affirmative then the further consideration of the expressed or supposed intention of the award making tribunal does not fall to be considered."*

42 The Claimant has referred me to two decisions, one being the decision of His Honour Street J in ***Geo A Bond & Co Ltd (In Liquidation) v McKenzie (1929) 28 AR 498*** in which he said—

> *"Now speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relations as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament.*
>
> *I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award."*

43 The other decision is that of His Honour Kennedy J in ***Robe River Iron Associates v AMWSU (1987) 67 WAIG 1097*** in which he said at page 1100—

> *"It is not in issue that, as Mr Stone for the respondent contended, in interpreting an award or industrial agreement the words used are to be given their "ordinary common sense English meaning" or their "ordinary and natural meaning". Allowance must be made for the fact that the award or industrial agreement may have been drafted by industrial rather than necessarily by skilled draftsmen, so that there should not be "too literal adherence" placed on the strict technical meaning of words, but that the matter should be viewed broadly to give the agreement a meaning consistent with the intention of the draftsman. Subject to this, the rules to be applied in interpreting an industrial agreement are those applied in the interpretation of statutes, deeds or other documents."*

44 Both parties are agreed that the Award should be construed generously having regard to the skills of the draftsperson. Indeed, in my view, that approach is the only way in which the proper construction of clause 15, as read with clause 5 and clause 3.9, can be achieved.

45 It is self-evident when one has regard for the documentary evidence that the Claimant was "*appointed*" to his position as Community Liaison Security Officer. In exhibit 2, Mr Neil Bolton, on behalf of the Respondent, informed the Claimant—

> *"This letter will confirm the verbal advice given to you, that you have been appointed to ..."*

46 Exhibits 5 and 6 demonstrate that the Claimant was appointed as an "authorized officer" for the City of Melville. His appointment it seems is made upon the same basis as that of a Ranger. That is illustrated by exhibit 15, which certifies the appointment of William Spencer as an "authorized officer." The power to appoint "authorized persons" is found in Subdivision 1 (Miscellaneous Provisions About Enforcement) of Division 2 (Enforcement and Legal Proceedings) of Part 9 (Miscellaneous Provisions) of the ***Local Government Act 1995***. There is no provision in the Act for the appointment of an "authorized officer". It seems therefore given the nature of the duties of both the Claimant and Mr Spencer that the certificate issued to the Claimant in the form of the aforementioned exhibits was so issued pursuant to section 9.10 of that Act. That provision provides—

> *9.10. Appointment of authorized persons*
>
> *(1) The local government may, in writing, appoint persons or classes of persons to be authorized for the purposes of performing particular functions.*
>
> *(2) The local government is to issue to each person so authorized a certificate stating that the person is so authorized, and the person is to produce the certificate whenever required to do so by a person who has been or is about to be affected by any exercise of authority by the authorized person.*

47 In Mr Jensen's case his authorization is not expressed to be for a particular function or functions. In Mr Spencer's case his authorization is. In each instance it appears that the appointment is made under the ***Local Government Act 1995*** relating to enforcement. Accordingly it appears that the Claimant may be authorized to perform those functions falling to him under the enforcement provisions of the Act. If that were not so then his appointment under the Act would be meaningless. Clearly his appointment must be given meaning and purpose. In so doing it follows that he is able to carry out the powers conferred upon him by the ***Local Government Act 1995*** but no other Act. It follows that his appointment was made for the purpose of enforcement.

48 However, the question remains as to whether the Claimant is a Law Enforcement Officer within the meaning of clause 3.7 of the Award. The fact that the Claimant is employed to patrol within the geographical confines of the City of Melville for the purpose of watching, protecting or inspecting property belonging to the City of Melville is incontrovertible. Indeed, I have found that is his main function and that it dominates his time and efforts. The fact that from time to time he does other things which do not fit comfortably within that description does not in my view lead to a conclusion that he is not a Law Enforcement Officer. A strict approach in construction of that provision as is suggested by the Respondent could, in my view, lead to undesirable and almost farcical results. For example if a Ranger were in the course of his employment do some minor and/or incidental task falling outside the duties referred to within the definition of Law Enforcement Officer in clause 3.7 of the

Award, then the Award would cease to have applicability to him. That approach would lead to an unworkable situation. It cannot be what the draftsperson had intended.

49 In any event it is apparent that the very appointment of the Claimant pursuant to the ***Local Government Act 1995*** is suggestive of the fact that his appointment was for the purpose of enforcement as defined by the second limb of the definition in clause 3.7 of the Award. The evidence given by Mr Jensen relating to his enforcement roles supports that finding. Part of his duty involves enforcing the City of Melville by-laws.

50 I find that the Claimant is a Law Enforcement Officer within the meaning of clause 3.7 of the Award.

51 For the sake of completeness I now move to resolve the remaining issue. In that regard it seems to me that, even on a narrow construction, the Claimant is entitled to a determination that the Award applies to his employment. That is so by the very fact of his appointment. It is the case that he has been appointed to a position which is covered by one of the levels set out in clause 15.8. Against that the Respondent says that because it has not classified him in accordance with the mandatory requirement of clause 15.1 then the Claimant cannot be the subject of one of the generic classifications found in clause 15.8. In my view, such a narrow construction would result in the Award being an entirely optional document at the sole discretion of the Respondent. Indeed, that approach is reflected in what Mr Duckett said under cross-examination at page 108 of the transcript. I set out the relevant part—

"All right. Now can I take it that the council, or the City, rather, could have – takes the view that it could have employed Mr Jensen under the Local Government Officers Award if it chose to do so? --- Yes, it could have."

52 However, that is against the thrust of clause 5 which provides—

"*This award shall be binding on the Local Authorities named in the First Schedule in respect of all their employees …"*

53 It is not open for the Respondent to pick and choose which employees will be bound by the Award.

54 There is evidence from Theresa Mary Dooley, the Respondent's Manager of Human Resources, that some of the Respondent's employees are paid under other awards, for example, the Restaurant, Tearooms and Catering Workers Award No R 48 of 1978 (State), the Metal Trades (General) Award No 13 of 1965 (State), the Municipal Employees (Western Australia) Award 1999 (Federal), the Children's Services (Private) Award No A 10 of 1990 (State) and the Child Care (Out of School Care – Playleaders) Award No A 13 of 1984 (State).

55 Those awards are not before me and I do not know their terms. I cannot, therefore, determine any issue relating to the applicability of those awards to other employees employed by the Respondent.

Conclusion

56 The Award, construed within its four corners, results in the determination that the Award applies to the Claimant's employment and, further, that he is a Law Enforcement Officer.

57 In accordance with the agreed suggested approach, I now propose to adjourn the matter so the parties can discuss and, if possible, agree quantum.

(Sgd.) G. CICCHINI,
[L.S.] Industrial Magistrate.

2003 WAIRC 09637

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, CLAIMANT
	v.
	QUALITY BAKERS AUSTRALIA LIMITED, RESPONDENT
CORAM	MAGISTRATE WG TARR IM
DATE	THURSDAY, 9 OCTOBER 2003
CLAIM NO	M 131 OF 2003
CITATION NO.	2003 WAIRC 09637

Representation	
Claimant	Mr J Nicholas
Respondent	Ms Z Weir (of Counsel) instructed by *Freehills Barristers & Solicitors*

Reasons for Decision

1 The Claimant in these proceedings is the named party to the *Bakers (Metropolitan) Award No 13 of 1987* (the Award) and the Respondent is a named Respondent in the Award.

2 It is the Claimant's allegation that the Respondent is in breach of the Award by failing to pay Wayne Delaney, a member of the Claimant and an employee of the Respondent, his entitlement in relation to the Australia Day public holiday which fell on 27 January 2003.

3 Clause 10 of the Award relevantly provides as follows—

10. - HOLIDAYS

(1) The following day or days observed in lieu shall be granted as holidays for all employees 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.

(2) (a) When Christmas Day or New Year's Day falls on a Saturday or Sunday, such holiday shall be observed on the next succeeding Monday, and when Boxing Day falls on a Sunday or Monday, such holiday shall be observed on the next succeeding Tuesday, in each case the substituted day shall be deemed a holiday without deduction of pay, in lieu of the day for which it is substituted.

(b) ...

4 Subclause (1) gives an employee a fundamental entitlement to a holiday on each of the ten days mentioned without deduction of pay. In other words, ten paid public holidays each year.

5 Subclause (4)(a) provides for an employee, who accepts an offer to work or is rostered to work on any of those public holidays, to be paid at the rate of time and one half, in addition to the payment prescribed in subclause (1). In other words, double time and one half, not considering for the moment any overtime worked on a public holiday.

6 Subclause (4)(b) reinforces the entitlement for public holidays by providing as follows—

(b) At the request of an employee who works on any prescribed holiday, and with the agreement of the employer, paid time off in lieu of payment for the work done may be taken. Such time off in lieu, when taken during ordinary hours, shall compensate for the penalty premium at which the time off in lieu accrued. For example, two and one half ordinary hours compensates for one hour of double and one half time.

7 Subclause (6) further recognizes an employee's entitlement to public (Award) holidays even while on annual leave by providing as follows—

(6) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee 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.

8 There is no doubt in my mind that the Award provides for that which applies to most employees and which has been accepted and applied during my forty five or so years in the workforce; that is, days off with pay for the prescribed public holidays.

9 The Respondent denies that the employee in this case is entitled to any penalty or compensation for the Australia Day public holiday and relies on the ***Buttercup Bakery Malaga (WA) Enterprise Agreement 2001*** (the Agreement) which was registered pursuant to the provisions of section 41 of the ***Industrial Relations Act 1979*** (the Act) on 22 February 2002.

10 The intent of the Agreement is set out in clause 3 as follows—

3.INTENT OF AGREEMENT

3.1 *It is the intention of this Agreement to maintain and foster improved industrial relations in Quality Bakers Australia Limited t/a Buttercup Bakeries – Malaga (the employer).*

3.2 *This Agreement facilitates the parties' aim of creating a harmonious industrial relations environment between the Unions and the employer by ensuring, inter alia, the consistent implementation of fair and practical procedures to manage change and resolve disputes.*

3.3 *The objective of this Agreement is to develop and maintain a culture of trust, consultation and co-operation with the view to achieve a significant improvement in the competitive performance of the employer.*

3.4 *From the outset it needs to be emphasised that the products of the Employer are perishable and the total operation must be geared to produce, transport and sell the product within a short time frame.*

3.5 *A program of continual workplace review and reform is essential and all parties are committed to co-operate and participate fully in this endeavour.*

3.6 *The general aim of this Agreement is to operate within flexible, responsible parameters to meet dynamic customer and market requirements.*

3.7 *To foster a spirit of co-operation in achieving a reduction in workplace injuries.*

11 It was the Respondent's intention, according to its witness Mr David Jeffery, that there be a single agreement applying to all employee members of the three unions involved which provided for flexible shifts to meet the needs of its customers. As a result employees were required to work three shifts on a rotating basis. Each shift involved an employee working forty hours over four days of each shift which were as follows—

Shift 1 ran from Sunday through to Wednesday.

Shift 2, Sunday and Monday and Thursday and Friday.

Shift 3, Tuesday through to Friday.

12 When, for example, there was a public holiday on a Monday, those employees who were working shifts 1 and 2 worked on the public holiday (Monday) and had the day before off (i.e. the Sunday). The effect of that was or is that the employee works three days and is paid for four. Not quite as is required by clause 10(4)(a), but a clear acknowledgement that there is an entitlement with regards to public holidays.

13 Those employees who happen to be rostered on shift 3 are on a rostered day off on Monday and receive no compensation, benefit or acknowledgement for or of the public holiday. They are paid ordinary hours for the four days they work and that, according to the Claimant, is in breach of clause 7(5) of the Award which provides—

(5) In a week in which an award holiday/holidays falls on what would otherwise be an ordinary working day/days, the ordinary weekly hours shall be reduced by the number of hours that would have been worked on that day/days.

14 The Respondent argues that clause 7. - Hours of the Award does not apply because the Agreement provides for hours of work in clause 17 as follows—

17. HOURS OF WORK (ALHMWU - Breadline only - Bakers)

17.1 *Ordinary hour shifts can commence on any day Sunday to Friday inclusive. The ordinary hours of work (excluding casuals and part time employees) must be an average of 38 hours per week with a minimum of 6 hours and a maximum of 12 hours on any one day.*

17.2 *The ordinary daily working hours must be worked continuously exclusive of any meal breaks.*

17.3 *The rotating shift structure is 3 Teams working up to 10 hours per day over 6 days with each team working 4 shifts. Each employee must have a minimum of 2 consecutive days off (or a minimum of 48 hours) every week (i.e. a week = Sunday to Friday).*

17.4 *Rosters once set may be changed with consultation and agreement between the company and the employee/s concerned. After consultation and in the absence of agreement the changes may take effect after 1 months notice.*

17.5 *The 27.88% penalty structure applies between 6:00am Sunday and 6:00am Saturday.*

17.6 *No employee is to exceed a maximum of 12 hours continuous duty. In cases of emergency and then only with the agreement of all of those employees affected can the hours worked exceed a total of 12 hours but cannot exceed a total of 16 hours. If any employee feels fatigued during such extended hours of work to such an extent that their continued presence in the workplace may be a health and safety matter then the employer must ensure they be relieved from their duties. The employer is to ensure appropriate transport is arranged for the employee to get home. At all times the employer must ensure that, especially in circumstances of 'extended hours' there is a safe work environment and sufficient staffing to ensure a safe working environment.*

17.7 *An employee temporarily transferred to the breadline must receive pro-rata annual leave entitlements for the time they are on the breadline.*

17.8 *All time worked in excess of 12 hours on any shift must stand alone and be overtime paid for at the rate of double time.*

17.9 *Each of the breadline employees have an annual entitlement to 5 weeks (190 hours) annual leave.*

15 Nowhere in the Agreement is there mention of public holidays and it would appear from the evidence that the parties did not particularly turn their minds to the issue of public holidays. Mr Shane O'Reilly, a union official and witness for the Claimant, gave evidence that public holidays were not mentioned during negotiations for the Agreement and there was no need to discuss them. Mr Jeffery said in his evidence that public holiday penalties would stay the same and confirmed that public holidays were not discussed. He went on to say all employees get ten public holidays a year.

16 Mr Jeffery represented the Respondent at a meeting held on 26/27 March 2001 and presented slides including one which made a comparison of the current and proposed days off (see exhibit G). The slide (which was probably an overhead projection) showed the following—

Days Off

● Current	**● Proposed**
96 days/Yr off (2 days/wk)	141 days/Yr off (3 days/wk)
10 days Public Hols.	10 days Public Hols.
20 Days A/L	25 Days A/L
126 days off pa (18 wks)	176 days off pa (25.14 wks)

17 As I understand the evidence, what was proposed was put into effect.

18 It was conceded by the Respondent that its employees are entitled to ten days public holidays each year and it argues that they get those holidays either by the method used for the shift 1 and 2 workers or by having the Monday public holiday off if working shift 3, for example.

19 The Respondent also argues that while there may be some apparent discrimination in any one week, overall the rotating shift system compensates by all employees having the same number of public holidays on which they work and have off.

20 It follows, of course, that even if that were the end result, and I doubt that it would be, all employees would be off on a number of public holidays for which there would be no compensation. I have been asked to accept that the five days extra annual leave was to compensate for the missed public holidays but, from the evidence, that was never the intention nor provided for in the Agreement.

21 Section 41(1) of the Act provides that—

An agreement with respect to any industrial matter or for the prevention or resolution under this Act of disputes, disagreements, or questions relating thereto may be made between an organisation or association of employees and any employer or organisation or association of employers.

22 Section 41(9) reads—

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.

23 The Agreement provides in clause 6 that it is to be read and interpreted wholly in conjunction with the four awards mentioned including the Award in this case. Subclause (2) of that clause is similar to section 41(9) of the Act and reads—

Where there is any inconsistency between the Award(s) and this Agreement, this Agreement will take precedence to the extent of the inconsistency

24 As I have mentioned, there is nothing in the Agreement which is inconsistent with the Award in relation to public holidays. The Agreement is silent on the question of public holidays.

25 I have been referred to a number of authorities by the Respondent which deal with the question of interpretation of awards and agreements, including ***Norwest Beef Industries Limited and Another v WA Branch, Australian Meat Industry Employees Union 64 WAIG 2124*** which is often referred to where ambiguity is raised and an interpretation is required. My attention has not been directed to any alleged ambiguity in the Award or any clause where the ordinary meaning of the words used causes any difficulty. As Commissioner Beech (as he then was) said in ***The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) v Western Australian Sports Centre Trust 80 WAIG 1674*** at 1675—

"… I am not persuaded that where an industrial agreement is silent regarding a particular issue, the absence of a provision is taken as being ambiguous."

26 It is my view that if it was the intention of either party to an agreement that employees are to forfeit such a fundamental right as public holidays, the agreement must clearly provide for such a forfeiture and if it was intended by a party, as is claimed in this case, that the forfeiture is to be compensated by five days extra annual leave, the agreement should reflect that. The Agreement in this case makes no mention of public holidays and, therefore, the Award entitlement applies.

27 To argue that Mr Delaney, in this case, was rostered off on 27 January 2003 and, therefore, enjoyed the benefit of the public holiday is inconsistent with the intention of the Award in clauses 10 and 7(5).

28 I find, therefore, that there has been a breach of the Award and the employee, Wayne Delaney, is entitled to be paid the amount claimed.

(Sgd.) W. G. TARR,
[L.S.] Industrial Magistrate.

2003 WAIRC 09821

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	PATRICK LOUIS, CLAIMANT
	v.
	KDB ENGINEERING PTY LTD T/AS K-CARE, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 23 OCTOBER 2003
CLAIM NO	M 38 OF 2003
CITATION NO.	2003 WAIRC 09821

Representation	
Claimant	Mr P Mullally of *Workclaims Australia* appeared as agent.
Respondent	Mr D Jones of *The Chamber of Commerce and Industry of Western Australia (Inc)* appeared as agent.

Reasons for Decision

The Claim

1 On 6 March 2003 the Claimant filed his claim in this matter alleging breaches by the Respondent of the ***Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979 No R 11 of 1979*** (the Award) between 15 August 1996 and 16 August 2002 (the material period). It is not in issue that the Respondent employed the Claimant from 4 May 1992 until 16 August 2002, which included the material period.

2 The Claimant alleges that for each pay week during the material period the Respondent failed to pay to him the correct minimum rates and overtime. The Claimant accordingly alleges that he has been underpaid a total of $24,439.10.

Response

3 The Respondent denies that it is bound by the Award and asserts that, given that it is engaged in the industry of furniture and equipment making, that the ***Furniture Trades Industry Award No A 6 of 1984*** applies to its business enterprises.

Background of Respondent

4 The business "KDB Engineering" commenced in 1976 when Kerry John Ford and two others commenced trading in partnership. The business initially traded out of premises in Osborne Park and later moved to premises in Balcatta. Subsequently and more recently it has operated out of premises in Malaga with a sales warehouse in Melbourne. The business originated when Mr Ford took over the lease of a small factory that had closed its doors. He acquired the equipment in the factory that included just a few welders and a couple of pipe benders. The business used to fabricate brackets, plates and the like for use by businesses involved in the weights and measures industry. The business also involved itself in fabricating equipment for the bakery industry. It fabricated tube racks, trolleys, baking trays and the like.

5 The business was first registered pursuant to the ***Business Names Act 1962*** on 11 February 1976. By January 1979 the business had diversified its activities and had become involved in jobbing work fabrication. It became involved in tube bending to a greater extent than it had previously and started making chairs, furniture and other rehabilitation equipment. Its initial foray into that work was quite modest, however, as time progressed that work became the dominant aspect of the business' work, which ultimately developed into a multi-million dollar business.

6 When registered in 1976 the business was described by the registrants to be one of General Engineers. Mr Ford testified that the business then, and indeed subsequently, was really one of fabrication only. He "*never used an engineering calculation in his life*".

7 On 23 February 1979 the business name KDB Engineering was taken over by Brentway Nominees Pty Ltd, of which Mr Ford and his partners were directors, as Trustee for the Brentway Unit Trust. By about 1979 or 1980 the business had become significantly involved in the manufacture of home care furniture and rehabilitation equipment. To distinguish its operations in that regard from the hospital furniture produced, the name "*K Care*" was used for such home care products manufactured. The "*K Care*" brand has continued since then. In about 1981 Mr Ford's two "*partners*" sold out.

8 On 22 April 1987 Brentway Nominees Pty Ltd changed its name to KDB Engineering Pty Ltd following its resolution to do so made on 9 February 1987.

9 In 1991 the company's operation was divided up into three separate divisions, namely, *K Care*, *Kerry Equipment* and *Shoprider*. *K Care's* operations were designed to manufacture aids for daily living for the aged and/or disabled and to provide equipment for rehabilitation. The product was sold to hospitals, nursing homes, and aged care homes and to members of the general public for use within their own homes. *K Care* manufactured a wide range of product including chairs, seats, stools, commodes, bedroom furniture, tables, bed rails and grabs, toilet aids, mobility devices including walkers, walking frames, crutches and walking sticks. A number of other miscellaneous items for the aged and disabled were also produced. *Kerry Equipment* produced hospital equipment such as furniture, trolleys, instrument trolleys, patient trolleys and the like. The *Shoprider* division imported and marketed a wide range of electric wheel chairs and scooters for use by the aged and/or disabled.

10 In its quality manual produced in early 2001 the Respondent promoted itself as being "*one of Australia's largest manufacturers of Healthcare and Hospital Equipment with agency infrastructure throughout Australia, New Zealand and expanding into the Asian region"*. At that time the company employed some sixty people in Western Australia and had an Australia-wide network.

11 In October 2002 Hills Industries Ltd acquired the businesses of "*the K Care Group comprising K Care, Kerry Equipment and Shoprider*". In his press release concerning the acquisition Mr David Simmons, the Managing Director of Hills Industries Ltd, commented that the K Care Group sales were approximately $20 million. Mr Simmons also announced that Mr Kerry Ford, the founder of the K Care Group, would continue as Managing Director of the Group.

The Claimant's Background

12 The Claimant is thirty two years of age having been born on 3 August 1971. On 3 April 1992 he was awarded an Advanced Certificate in Mechanical Engineering from the Department of Technical and Further Education, Wembley Campus.

13 Following the completion of his studies the Claimant responded to an advertisement placed by the Respondent's "*sister company*", *Kerry Equipment*, which sought to employ the services of a suitably qualified draftsman. He responded to the advertisement. As part of the evaluation process for the job, the Claimant was required to undergo a drawing test. Although unsuccessful in gaining employment the drawings he had completed in the evaluation process were kept on file. Kerry Ford contacted the Claimant a few months later and asked him to attend an interview. After a brief interview Mr Ford told him that he liked the Claimant's drawings completed in the earlier job application and consequently there and then offered him a job as a draftsman. It was agreed that the Claimant would start the following Monday.

Claimant's Employment with the Respondent

Claimant's Evidence

14 Upon commencement the Claimant was required to work within the factory. Kerry Ford wanted him to gain a hands-on understanding of how the machinery worked and how the manufacturing process was conducted. Accordingly the Claimant carried out the functions of a labourer for about the first two to three months of his employment. He did the preparatory work necessary to enable manufacture. In his testimony the Claimant said that the operations of the Respondent within the factory at that time consisted of pressing, steel fabrication, bending, welding, tooling, upholstery and assembling product.

15 Following his initial stint on the factory floor he was transferred into a newly completed office built especially for him. The Claimant thereafter began to carry out drafting work. He solely carried out drafting work for the first couple of years of his employment with the Respondent. That was under the direct supervision of John Catoni who was in charge of the "*tool room*". Mr Catoni exposed the Claimant to the various products manufactured by the Respondent.

16 Initially the Claimant set about making records of the products that had been in manufacture for some time. Given that the Respondent had not hitherto employed a draftsman there was very little information available on how to make the product. Accordingly the Claimant was engaged in making drawings and production cards (i.e. steps on how to make the product). He had to make production cards for existing product. All drawings and production cards were collated and filed away.

17 After a little while that aspect of the Claimant's work diminished as he became more routinely involved in research and development (R & D). That involved putting ideas onto paper with the overriding criteria being that the end product would be cheap to manufacture. Prototypes of the product would be made. If Mr Ford was happy with the product it would become part of the standard product. It was the Claimant's obligation to record and collate all relevant information relating to the manufacture of such product.

18 The Claimant asserts that the ideas for new product were essentially his. Mr Ford would, for example, go to him and say, "*I want this chair to tilt backwards and forwards or something like that*". The Claimant said that he then set about designing the actual mechanisms. He thought of and developed the ideas to make it work. The Claimant said that he was not just involved in drawing but also looking at the specification and costs. Kerry Ford wanted him to be pro-active in getting involved with every aspect of design, which included contacting suppliers and obtaining prices. The Claimant said that his work entailed making engineering calculations all the time. He said that Mr Ford was not too concerned about the calculations but rather he was more concerned that the end product be satisfactory. Accordingly all the intermediate steps in calculating strength and so on were of little or no concern to Mr Ford. No records were kept in that regard. It was simply a situation of the end product being suitable and setting up the processes for manufacturing the same.

19 In the early days of his employment the Claimant's work was conducted manually. About two to three years into his employment the Respondent, at the suggestion of the Claimant, purchased a computer for use by the Claimant. The computer was used for drawing using CAD (Computer Aided Drawing) software and in order to run the then recently purchased CNC milling machine using CAM (Computer Aided Manufacture) software. The milling machine was then a state of the art apparatus that enabled the manufacture of more complex product. The Claimant, who had been trained to use the computer system, thereafter relied solely on the computer system to draw and assist in manufacturing. The computer systems were thereafter upgraded from time to time.

20 After the Claimant had worked for the Respondent for about 5 years, the Respondent moved its operations from Balcatta to Malaga. At about that time Fred Slivkoff was employed by the Respondent to join the Claimant in its R & D section. Indeed Mr Slivkoff was appointed to be the Claimant's supervisor. The Claimant testified that Mr Slivkoff's role was similar to his but that Mr Slivkoff did not use the CAD/CAM computer software. It was Mr Slivkoff's role to liaise with Mr Ford and concerned himself more so with issues relating to design and patent registration. The Claimant said that Mr Slivkoff was more of a graphic designer. "*He was good with pencil and paper*". He showed Mr Ford appealing conceptual pictures of proposed product.

21 On 27 February 2002 the Respondent announced to its staff that it would be employing two persons to assist Mr Slivkoff and the Claimant in the R & D section. The two people employed were Toshiyuki Maeda (Toshi), a qualified mechanical engineer, and Kamalika Wijewardene (Kam), a student who was then completing her final year of a Mechanical Engineering Degree. The Claimant testified that although each of the new employees was ostensibly employed to assist the Claimant and Mr Slivkoff, the reality was that they had little involvement with them. Toshi's main task was to work independently in the design and manufacture of prams for "*Plunketts for Babies*".

22 The Claimant testified that the R & D section was treated somewhat differently to other sections within *K Care*. In that regard he was told that those working within the R & D did not fall under the same employment conditions as other employees. It is the case, which is obvious from the correspondence contained within exhibit 5, that the Claimant repeatedly sought that he be appraised in respect of his performance but that was never carried out. It is apparent that the Claimant was concerned that there had never been an objective assessment of his work performance but rather that his overall performance was judged on an entirely subjective basis having regard to irrelevant criteria. That had led to him being placed on probation following many years of service. There can be no doubt that in the final years of his employment the Claimant became increasingly frustrated at the Respondent's unwillingness to define his role and performance. He was unable to pin his employer down on those issues. In the end it was an issue over the final promulgation of an accurate duty statement that caused the irreconcilable difference that led to the Claimant's resignation.

23 It is obvious from the documentary evidence before me that the Claimant's last few years with the Respondent were unhappy. During that period he was the subject of written warnings and was placed on probation. There was a concern on his part, as is reflected in the various letters that he wrote to management, that his position was being undermined for reasons unrelated to work performance. The letters reflect a degree of insecurity on his part, which is understandable in the light of the Respondent's failure to address the matters of concern expressed by the Claimant which effectively left him in limbo concerning his role and long-term position with the Respondent.

24 There can be no doubt also that the Claimant was of the view that he was an undervalued member of staff who was paid inadequately for the work that he did which went beyond mere drafting and which included the following—

- Creation of 3D models and the generation of tool poll programs using 3D CAD/CAM software for the design and manufacture of injection moulds and press tool dies.

- Designing new product.
- Developing and maintaining detailed drawings and operation sheets for all manufactured product.
- Assisting the production department in development of product part numbers and maintaining product materials lists and operation cycle times.
- Providing technical assistance to his supervisor and authorising modifications to product.
- Providing the sales team with technical information on all manufactured product and advising them on product modifications and limitations.
- Designing custom special product to customer specification and providing detailed drawings and materials lists for manufacture.

25 The Claimant also testified that in the last three to four years of his employment with the Respondent that he worked a little under forty-two hours for each week. Prior to that he had worked forty-two and a half hours per week. Accordingly he is of the view that his claim, based on the allegation that he worked forty hours per week, is conservative.

Kerry Ford's Evidence

26 Mr Kerry Ford was called by the Claimant to give evidence. He was invited to comment on the evidence given by the Claimant concerning his duties. Other than a difference of opinion concerning the extent of the Claimant's involvement in designing product, Mr Ford's evidence concerning the Claimant's duties is not inconsistent with evidence given by the Claimant relating to the issue.

27 Mr Ford testified that he believed that the ***Furniture Trades Industry Award*** binds the Respondent and its employees. Indeed he testified that the Respondent is a named party to that award. His evidence was that the Respondent carried out similar work and manufactured similar product to other named respondents within that award. Indeed many of the named respondents are in direct competition with KDB Engineering Pty Ltd. When cross-examined Mr Ford was invited to comment about the nature of activities undertaken by named respondents listed in the schedule of the ***Draughtsmen's, Tracers', Planners' and Technical Officers' Award*** under the headings "*Engineering – Fabricating*" and "*Engineers – General*". In that regard he was able to identify a number of the named respondents thereto. He testified that he had knowledge of the industries within which they operated and proffered the view that their operations were essentially different to that of the Respondent.

28 During the course of Mr Ford's examination in chief and also during his cross-examination, Mr Ford was asked a number of questions concerning the Respondent's employment of engineers. In that regard it became apparent that Mr Ford was careful to portray the impression that the Respondent did not employ qualified engineers to work in the capacity of engineers within its enterprises. It suffices to say that the reality was that the Respondent did during a particular period employ the services of engineers. That is so notwithstanding Mr Ford's obvious attempt to disguise that fact. Having said that, however, it remains the case that despite the Claimant having an engineering qualification, he was never employed to work in the capacity of an "*engineer*". I accept however that he utilized his engineering knowledge in the performance of his various duties.

Mr Fred Slivkoff

29 Mr Slivkoff was called by the Claimant to testify concerning this matter. His evidence was generally not inconsistent with that of the Claimant.

Conclusions

30 Given that the evidence concerning the Claimant's duties is not generally disputed, I have not been required in any comprehensive way to review the evidence given by the Claimant, Mr Ford and Mr Slivkoff. Indeed much of the evidence before me is not in issue except for those matters referred to by Mr Ford during the course of cross-examination going to the issue of the nature of the Respondent's operations and the issues addressed by both Mr Ford and Mr Slivkoff concerning the extent of the Claimant's involvement in original design. The Respondent has elected not to call evidence with respect to this matter and accordingly does not from an evidentiary standpoint challenge the evidence of the Claimant. Rather the Respondent points to inconsistencies within the Claimant's own case relating to his duties and the operations of the Respondent as undermining his case.

31 It suffices for my purposes to say that I accept the evidence given by the Claimant relating to his duties and employment generally. Indeed his evidence, except in some minor aspects, is not inconsistent with the evidence of Mr Ford and that of Mr Slivkoff. I find therefore that during the course of his employment with the Respondent the Claimant worked in the R & D section and was engaged in computer assisted drafting, documentation of tool paths and in the creation of design work both for existing products and for the creation and/or implementation of new ideas, designs and product for the Respondent's growing business. I accept that he carried out the responsibilities and functions set out in exhibit 5.3. I accept that the Claimant was involved in a vast range of drafting and designing work of a computer nature as depicted in exhibit 4. His involvement in projects was also considerable as is reflected in exhibits 18.1 to 18.10. The Claimant had a considerable involvement in the design and implementation of a vast range of products. His involvement included designing, drawing, recording and signing off as to quality. I accept that the Claimant's involvement in design was certainly much greater than Mr Ford and Mr Slivkoff were prepared to give him credit for. It was the Claimant's skill in design drafting which enabled the Respondent's business to grow as it did. There can be no doubt that the Claimant was, during the material period, involved in both design and drafting.

<u>Application of the Award</u>

Onus of Proof

32 The Claimant bears the onus of proving on the balance of probabilities that the Award applied to his employment with the Respondent and that the Respondent is in breach of the relevant provisions of the Award rendering it liable to make the payments sought. At the commencement of the hearing I was advised that the parties had agreed that I should at this stage decide the issue of liability without the need to consider quantum. I have accordingly proceeded upon that basis.

Claimant's Submission

33 KDB Engineering Pty Ltd is not a named Respondent to the Award. The Claimant nevertheless alleges that the Award has application by force of section 37(1) of the ***Industrial Relations Act 1979*** which provides—

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

(ii) all employers employing those employees;

and

(b) operate throughout the State, other than in the areas to which section 3(1) applies.

34 It is the case that the qualifying provision found in subsection (1)(b) has no application in this instance.

35 The Scope clause in the Award is in common form and provides as follows—

This Award shall apply to all employees employed in the classifications defined in Clause 6. - Definitions of this Award and employed by employers engaged in the industries set out in the Schedule to this Award.

36 The named respondents are set out in the Schedule under the heading which best describes the industry within which they operate. Accordingly the Award itself identifies the industries to which the Award applies. This type of Scope clause has been referred to as a "*Donovan clause*". (See ***RJ Donovan and Associates Pty Ltd v Federated Clerks Union of Australia WA Branch (1977) 57 WAIG 1317***.) The Claimant says that it is not necessary for this Court to embark upon a detailed analysis of the business activities of the Respondents to the Award as the scope or coverage of the Award is determinable by reference to the document itself.

37 In ***The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers*** *v.* ***Terry Glover Pty Ltd (1970) 50 WAIG 704*** His Honour Burt J (as he then was) said at 705—

"Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of the particular award. It may be that the question is not only primarily but finally a question of construction, and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.

An award if made in terms "to relate to the ship building industry" would be of the first-mentioned kind. An award expressed to relate, as the one under construction here is expressed to relate, to "the industries carried on by the respondents set out in the schedule attched (sic) to this award" is of the other kind. In such a case the industry to which the award relates cannot be made known without definition of the industries carried on by the respondents. And this is necessarily a question off fact."

38 Accordingly the Claimant contends that as a matter of construction the Award applies to a range if industries all of which have been set out and identified in the Schedule of Respondents.

39 The Claimant submits that it is the task of this Court to do the following in this matter—

1. Identify the industry carried on by the named respondents to the Award;
2. Identify the industry in which the employee was employed; and
3. Identify the industry in which the Claimant was employed as being one of the industries carried on by the named respondents to the Award (see ***Freshwest Corporation Pty Ltd v Transport Workers Union, Industrial Union of Workers, WA Branch (1990) 71 WAIG 1746*** per Franklyn J.).

40 The Claimant says that on an examination of the activities of the Respondent in the totality of the evidence before this Court, that the Court should be satisfied that the Respondent is engaged in any one of the industries of "*Engineers – Fabricating*", "*Engineers – General*" or "*Engineers – Equipment and Material Distributing*" all of which are referred to in the Schedule of Respondents to the Award.

41 The Claimant suggests that the evidence demonstrates that he was initially engaged as a design draftsman but by 1993 had worked his way up to be a "*technical officer*" being a classification in the Award. He says that the Respondent is not engaged in the furniture industry as it contends but rather is engaged in an industry set out in the Award. It is suggested that such a finding can be made if one has, amongst other factors, regard to the Respondent's origins, corporate structure, nature of operations and product range.

42 The starting point, it is said, is the Respondent's name. Relevantly it is called KDB Engineering Pty Ltd. It is involved in manufacturing and distributing an extensive range of disability and rehabilitation products. Design and drafting was and is at the very heart of the Respondent's business. The function of design and drafting as the first step in a manufacturing process is at the very heart of engineering, being the creation of something new and original. Accordingly its name reflects the industry within which it operates.

43 The operation of the Respondent included a substantial manufacturing and fabrication process conducted in its factory workshop. It operated a CNC milling machine, a tool shop and also extensively utilised injection moulds. Intrinsic to the operations of the Respondent were the use of welders, tool makers and sewing machinists. The Respondent had a significant welding division. By February 2002 its stainless steel welding section had expanded so significantly that it was to be housed in a separate building. The Claimant points out that the fact that the Respondent had two welding teams, an assembly team, a CNC milling machine, pipe benders and powder coating machines is entirely consistent with and indicative of the fact that it operated within the engineering industry generally or more particularly within engineering fabrication or engineering equipment manufacture and distribution. It is submitted that the processes of the Respondent, which includes design and drafting, cutting, welding, fabricating, assembly and sales, is consistent with an engineering undertaking.

44 The Claimant also contends that the product manufactured by the Respondent was not furniture but rather distinctly rehabilitation equipment for the aged and disabled taking the product outside of the type of product produced by those operating within the furniture industry to which the ***Furniture Trades Industry Award*** applies. Further the Claimant also contends that the fact that the Respondent has from time to time employed engineering staff is indicative of the fact that it was engaged in engineering. Indeed the corporate structure of the Respondent is also said to reflect its actual operations. The choice of the name KDB Engineering Pty Ltd was a deliberate choice by the directors and was consistent with their perception of the operations of the company. It has continued over the years to represent itself as a company involved in engineering and manufacturing home care and rehabilitation equipment.

Respondent's Submissions

45 The Respondent submits that the Court is required to determine the industry to which the Award applies and thereafter, by way of a fact-finding exercise, determine whether the employer is within the industry to which the Award applies. Once having done that, then the occupation of the employee must be considered to ascertain whether or not it fits within a term of the "*definitions*" clause, which describes the classifications covered by the Award. Only in that way can the determination be made as to whether the Award binds the employer. The first step must be the determination of what the industry of the employer is. The Respondent points out that the approach as suggested by the Claimant was in fact criticised by the Full Bench of the Western Australian Industrial Relations Commission in ***Bell A Bike Rottnest Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – WA Branch [2002 WAIRC 06654] 82 WAIG 2655***.

46 The Respondent contends that although clause 4 of the Award is a typical "*Donovan clause*" in that it refers to industries set out in the Schedule to the Award, the employer (Respondent) can only be bound if its business can properly be held to answer to the description of an industry so specified. In those circumstances an employer who is not named as a respondent to the Award will nevertheless be bound. In such circumstances it is not necessary to go outside the Award to determine the industry to which the Award applies. The proposition, however, only holds well if what is specified in the Schedule is an industry within the meaning of the Act. It is necessary to determine whether the emphasis in the Award is on the nominated industry or the work of the named respondents (see ***Australian Builders' Labourers' Federated Union, WA Branch v Heyring Pty Ltd (1988) 68 WAIG 683 at 684*** per O'Dea P).

47 It is submitted that the terms "*Engineers – Fabricating*", "*Engineers – General*" and "*Engineers – Equipment and Material Distributing*" being headings within the Schedule of Respondents of the Award suffer from the same type of difficulty as was referred to in ***Federated Clerks' Union of Australia Industrial Union of Workers, WA Branch v Hospital Salaried Officers Association of Western Australia (Union of Workers) and Spastic Welfare Association of WA Inc (1979) 59 WAIG 905*** (the **Spastic Welfare case**) in that the descriptions do not adequately define what the industry is. At page 908 His Honour Brinsden J said—

> *"Associations and/or Societies" does not in my view spell out with sufficient particularity the calling and hence does not spell out with sufficient particularity an industry. All it does is to state in general terms a group of employers. In my view therefore as a matter of law it is not sufficient to find the Spastic Welfare Association being an association is covered by the classification. In order to reach that conclusion it would be necessary to have entered into a fact finding exercise to determine the industry carried on by the named respondents under this classification and also a fact finding exercise to determine the industry carried on by the Spastic Welfare Association, the conclusion as to the industry in each case being arrived at by the application of the doctrine in Parker's case.*

48 It is submitted that the term "*Engineers – Fabricating*" does not at all identify an industry with the particularity required. "*Fabricating*" means "*to make*". That alone does not describe the industry. In such circumstances the Court must embark upon a fact-finding exercise in relation to what industries are fairly represented by the named respondents to the Award. Similarly, it is said, the term "*Engineers – General*" does not identify with particularity an industry.

49 In such circumstances a fact finding exercise as in "*Parker's Case*" (***Parker & Son v Amalgamated Society of Engineers (1926) 29 WAIG 90***) is necessary to determine the industry that the named respondents were in and that such exercise is predicated upon the Claimant establishing the industry that the named respondents carried on at the time that the Award was made. It is submitted in that regard that there is no evidence before the Court as to the undertakings of the named respondents falling under the description in the headings of the Schedule, which are said to apply in this instance. The Respondent says that the Claimant's claim must fail on that basis alone. It is argued in the alternative that even if I were to find against the Respondent on that issue I should only embark upon an inquiry to determine what it was that the employee was employed to do only if satisfied that the descriptive headings in the Schedule clearly define, in each relevant instance, a well known industry.

50 The Respondent in its submissions also addressed the issues raised by the Claimant concerning the company's name and product. In that regard the Respondent points out that the major and substantial components of the product range is furniture. Although it is true that some incidental items were produced, there can be no doubt that the Respondent's production was devoted to the production of furniture as is depicted in exhibit 12 (K Care catalogue). The manufacturing process which undeniably involves pipe bending and welding is all geared to the manufacture of home care furniture for use mainly within the home and domestic type environment. The Respondent does however acknowledge that such furniture is also sold to aged care facilities and hospitals. It is also accepted that the Respondent manufactures product for a very narrow sector of the market. The point stressed is that the operation of the Respondent is focused upon the production of furniture thereby bringing it within the furniture making industry.

51 Further and in the alternative the Respondent says that if the Court were to find against it by concluding that the Respondent conducts its operation within an industry to which the Award applies, then in any event, the Claimant is not a "*Technical Officer*" within the meaning of the Award. "*Technical Officer*" is defined in clause 6(13) of the Award as follows—

> *(13) "Technical Officer" - A technical officer shall mean an adult worker—*
>
> *(a) (i) who has been engaged for at least four years as a technical assistant or who has had two years' experience as a technician, or who has had training deemed by the employer to be equivalent thereto; and*
>
> *(ii) who has received a diploma from a State Education Department or Technical Education Department such as the Mechanical Engineering Diploma, Electrical Engineering Diploma, Chemistry Diploma or Metallurgy Diploma appropriate to the work in which he is engaged or its equivalent; and*
>
> *(b) who is required to perform technical duties as a specific field of engineering or scientific practice, such as research, development, laboratory and/or engineering activities, and who in carrying out such work is required to apply the skill acquired pursuant to the provisions of sub-paragraphs (a)(i) and (ii) hereof.*
>
> *(c) Notwithstanding the provisions of sub-paragraphs (a)(i) and (ii) hereof, an employer shall classify an employee as a technical officer who for six months satisfactorily performs work which is of the same nature as required by paragraph (b) hereof and which requires the application of a similar standard of knowledge and/or engineering or scientific experience which has been acquired by other means than as provided for in sub-paragraphs (a)(i) and (ii) hereof.*

52 The Respondent says that the Claimant does not meet the necessary criteria required by clause 6(13) (a) and (b). The Respondent notes that the Claimant has not received a Diploma but rather an Advanced Certificate (see exhibit 2). Further it argues that he does not come within paragraph (b) of the definition because almost all of the conceptual and innovative work in designing new product was done by Mr Ford. That is supported by the evidence of Mr Ford and Mr Slivkoff. The Respondent contends that the bulk of the Claimant's work was drafting up product designed by Mr Ford. It acknowledges however that from time to time the Claimant did do some one-off designs which comprised modifications of existing designs. The Respondent also denies that the Claimant is a "*design draughtsman*" within the meaning of clause 6(6) of the Award because he has not received the required Diploma and further because he has not met the criteria set out in clause 6(6)(b) of the Award. The Respondent argues that the definition which would best describe what the Claimant did is to be found in the definition of "*Draughtsman Detail*" found in clause 6(2) of the Award. That provides—

> *"Draughtsman Detail" - A draughtsman detail shall mean any worker, other than a "trainee draughtsman" as defined herein, employed on the making of drawings from sketches or other data.*

53 Another limb of the Respondent's argument is that the ***Furniture Trades Industry Award No A6 of 1984*** applies to the Respondent. Indeed it is a named Respondent to that award falling within the subset of industries undertaking metal furniture making. Many of the other named respondents within that award also make the same or similar type of product to that made by the Respondent and are in competition with it. The Respondent says that the Claimant falls within the classification "*Furniture Making Employee - Group 5*" of that Award. It points out that the Claimant's major and substantial duties, being designing and/or drafting using CAD and CAM, are consistent with that classification and reflect his engagement in work connected to or incidental with the production and distribution operations of the employer as a metal furniture manufacturer.

54 The Respondent also contends that should the Court find that the ***Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979 No R 11 of 1979*** also binds the Respondent then the specific award, being the ***Furniture Trades Industry Award*** overrides the general award in accordance with the principles outlined in ***Hungry Jacks Pty Limited & Others v Wilkins & Others (1991) 71 WAIG 1751*** and ***Shenton Enterprises Pty Ld trading as John Shenton Pumps v Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia (2000) 80 WAIG 2842***.

Determination

55 The starting point for my consideration of this matter is to determine the industry to which the Award applies. The Claimant says that the scope clause (clause 4) is a typical "*Donovan clause*" in that it refers to the industries set out in the Schedule of Respondents to the Award. Accordingly this Court does not need to embark upon a detailed analysis of the activities of the respondents to the Award as the scope or coverage of the Award is determinable by reference to the document itself. I agree with the Claimant's submission in that regard. There can be no doubt in my mind that the headings "*Engineers – Fabricating*", "*Engineers – General*" and "*Engineers – Equipment and Material Distributing*" are description of industries covered by the Award. Indeed the Award covers a number of other industries which are clearly delineated and defined. I reject the Respondent's contention that the description of the industries within the Award suffers from the same sorts of difficulties discussed in the **Spastic Welfare case** (supra). It is apparent that the headings within the Schedule of Respondents do, in this instance, refer to an industry as defined in section 3 of the ***Industrial Relations Act 1979***. In my view a fair reading of the Award can only lead to that conclusion. Clearly headings such as "*Concrete Products Manufacturing*", "*Earthmoving Contractors*", "*Steel Pipe Manufacturing*" and others to be found within the Schedule of Respondents to the Award are reflective of the industry within which the respective named employers are engaged. In those circumstances it is unnecessary to embark upon a fact finding exercise to determine the industry to which the Award relates.

56 The next step is to determine whether the Respondent was engaged within an industry referred to in the Schedule of Respondents to the Award. In my view the evidence clearly and overwhelmingly dictates that it was not. The evidentiary material before me dictates that the Respondent was during the material periods engaged in the manufacture of furniture to be used either at home, in aged care facilities or hospitals. The K Care catalogue (exhibit 12) is reflective of the nature of the product produced by the Respondent. It is the case, albeit with some exceptions, that the Claimant ostensibly manufactured furniture consisting of adjustable seating, shower commodes, bedroom furniture, toilet seats and bathroom and toilet accessories. Indeed such items are in keeping with the definition of furniture contained within the ***New Shorter Oxford Dictionary*** which defines "*furniture*" to mean—

> *"The moveable (functional) articles in a room, house etc; such articles in general."*

57 The Claimant contends that the Respondent is and was engaged in the manufacture and distribution of rehabilitation, aged care, nursing care and hospital equipment. Indeed it is pointed out that exhibit 12 of itself describes the items shown within it as being "*home care and rehabilitation equipment*". Such is found in bold writing on its cover and almost every page of the divisions within the folder. Indeed the Respondent's own advertising in the "*Yellow Pages*" refers to the Respondent as a manufacturer and supplier of equipment for the aged and invalid. Although the Claimant's contention in that regard is undeniable, the situation nevertheless remains that at all material times the Respondent's trading arm "*K Care*" manufactured and distributed what in reality was furniture but which it, for its own purposes, possibly for marketing reasons, referred to as "*equipment*". The labelling of furniture as equipment does not change its intrinsic characteristic as furniture.

58 Further the fact that the Respondent's name is KDB Engineering Pty Ltd does not of itself enable a conclusive inference to be drawn that its undertaking is one of engineering. Indeed the name of a company or business may not necessarily be indicative of the type of industry within which it operates. The operations of companies and of businesses often evolve and their names do not always reflect the industry in which they operate. I also reject the Claimant's argument that the Respondent's name was deliberately chosen to reflect its undertaking. There is no evidence before this Court to enable it to find that the company name, KDB Engineering Pty Ltd, reflects a deliberate choice on the part of the directors that the name be indicative of the operations of the company. The fact that the word "Engineering" is found within the Respondent's name is not determinative. The title of engineer is often used by those who are not professional engineers or otherwise involved in engineering. That is also the case with the description "Engineering". That descriptor is often used by those who are not, in reality, involved in engineering as it is usually commonly understood. Mr Ford testified that the Respondent was not an engineering company. He pointed out that he has never used engineering calculations. His company evolved from simple beginnings in general fabrication to one where it predominantly manufactures or fabricates tubular steel furniture product. It is the case that the Respondent did not, as a rule, engage the services of engineers. Its one attempt to do so which took place in the later stages of the Claimant's employment was largely unspectacular and unsuccessful. I accept Mr Ford's evidence that engineers were not an integral part of the Respondent's business.

59 Another of the Claimant's arguments upon which he relies is that the actual operations of the Respondent's business by the use of its various machines in manufacture, including welding, is indicative of the fact that the Respondent was and is involved in engineering. Although it is undeniable that at the material times, the processes used by the Respondent in manufacturing were engineering processes, it nevertheless remains the case that such processes were aimed at the manufacture of furniture. Indeed almost every manufacturing or fabricating process involves, whether by design or as a consequence of its actual operation, some engineering consideration. However just because an engineering process may have been utilised by the Respondent in the manufacture of furniture does not of itself change the nature of its undertaking or calling from one of furniture making to that of engineering, whether it be general, fabricating or any other form. The engineering process is only but one of the necessary steps in the production of the end product, in this case furniture. Further the fact that the Respondent is a named respondent within the ***Furniture Trades Industry Award*** is also reflective of the fact that its undertaking is that of furniture making was considered to be so by the relevant union who is a party to that award.

60 Accordingly for the reasons referred to above I conclude that the industry which the Respondent undertakes is that of furniture making.

61 Even if I am wrong in that regard (and I do not accept that I am), the fact remains that the Claimant has not established on the available evidence that he fits within the definition of "*Technical Officer*" or "*Draughtsman Designing*", being classifications within the Award. In each instance he does not meet the criteria because he has failed to achieve a "*Diploma*". An Advanced Certificate (exhibit 2) is not a Diploma.

62 Further, even if it could be said that the Award applies and that the Claimant satisfies the requirements of the definitions which he says apply to him, then nevertheless there would be two awards binding upon the Respondent. In those circumstances the specific award would override the general award and accordingly the ***Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979 No R 11 of 1979*** would not be operative. I agree with the submissions of Mr Jones on behalf of the Respondent in that regard.

Result

63 The Claimant has failed to prove, on the balance of probabilities, that the Award binds the Respondent. Accordingly the claim fails.

G. CICCHINI,

Industrial Magistrate.

2003 WAIRC 10010

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	MICHELLE JANET MURPHY, CLAIMANT
	v.
	JOHN BARNETT, MANAGING DIRECTOR C/O CELESTE CORPORATION, RESPONDENT
CORAM	MAGISTRATE WG TARR IM
DATE	THURSDAY, 6 NOVEMBER 2003
CLAIM NO	M 107 OF 2003
CITATION NO.	2003 WAIRC 10010

Representation	
Claimant	The Claimant appeared on her own behalf
Respondent	The Respondent appeared on his own behalf

Reasons for Decision

1 The claim before me is a claim alleging an entitlement to a redundancy payment pursuant to the ***Commercial Travellers and Sales Representatives' Award 1978 No R43 of 1978*** (the Award).

2 There is not an issue that the Award applies to the parties to this claim.

3 The Claimant was employed as a sales representative by Catering Concepts Australia Pty Ltd (Catering Concepts), which traded as Jiffy Foods, from 17 March 1997.

4 Jiffy Foods was purchased by the Respondent, Celeste Corporation Pty Ltd, by contract dated 23 January 2002 with effect from 13 March 2002.

5 Effectively the Claimant continued her employment with Jiffy Foods until her services were terminated on 19 May 2003. She was given two week's notice and, as I understand the evidence, a redundancy payment of two week's pay.

6 Clause 26 of the Award sets out the requirements and obligations of employers at the time of any redundancy. Subclause (4) of that clause provides for severance pay as follows—

(4) Severance Pay

In addition to the period of notice provided in Clause 13. - Contract of Employment and Termination, a permanent employee whose employment is terminated for reasons set out above 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	*2 weeks' pay*
2 years but less than 3 years	*4 weeks' pay*
3 years but less than 4 years	*6 weeks' pay*
4 years but less than 5 years	*8 weeks' pay*
5 years and over	*10 weeks' pay*

"Weeks pay" means the ordinary time rate of pay for the employee concerned.

Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

7 The Claimant argues that because she commenced employment with Catering Concepts on 17 March 1997 and continued that employment with the Respondent when it purchased the business she should be considered an employee with continuous service for a period in excess of five years. She should, therefore, qualify for ten week's severance pay and is accordingly entitled to be paid a further eight week's pay.

8 She relies on subclause (10) of clause 26 which provides—

(10) Transmission of Business

(a) Where a business is before or after the date of this award, transmitted from one employer (in this subclause called "the transmittor") to another employer (in this subclause called "the transmittee")

and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transmittee—

(i) The continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission, and

(ii) The period of employment which the employee has had with the transmittor or any prior transmittor shall be deemed to be service of the employee with the transmittee.

(b) In this subclause "business" and "transmission" has the same meaning and effect as in the Long Service Leave General Order at Volume 59 of the Western Australian Industrial Gazette, at pages 1 to 6.

9 The Long Service Leave General Order mentioned in subclause 10(b) of clause 26 defines transmission as including—

"…transfer, conveyance, assignment or succession whether voluntary or by agreement or by operation of law and "transmitted" has a corresponding meaning."

10 It is the Respondent's argument that because it was a condition of the contract of sale of the business that Catering Concepts would terminate the employment of all staff and pay them all accrued entitlements, the Respondent is only responsible for the Claimant's redundancy entitlement for the period of employment with the Respondent.

11 Clause 3 of the Contract of Sale provides as follows—

3.1 Catering Concepts shall terminate the employment of all staff (both full time and casual) employed in the Business with effect from the date of Completion.

3.2 Catering Concepts will pay to all staff (full time and casual) on the date of Completion the amount of all accrued entitlements calculated to the date of Completion in respect of salary, wages and annual leave of all such employees and as at the date of Completion shall also make payment of all employees Superannuation entitlements to the relevant complying Superannuation fund or funds calculated up to the date of Completion.

3.3 As soon as practicable following notification by Catering Concepts to the employees of the Business of the termination of their employment with effect from the date of Completion, the Director of Celeste shall negotiate upon and use reasonable endeavours to reach an agreement with each of the forty nine (49) existing full time employees of the Business (excluding workshop staff) in respect to their future employment and the terms and conditions of such employment from the date of Completion.

12 There is evidence that the Claimant was presented with a letter dated 18 March 2002 in the following terms—

RE: EMPLOYMENT ARRANGEMENTS FROM 13TH MARCH 2002

As you are aware, I have acquired the business known as Jiffy Foods, effective from the 13th March 2002.

Due to a very hectic schedule in acquiring the business, it has not been possible to finalise any future employment/contractual arrangements with existing staff of the business prior to takeover of the business.

Consequently, as an interim measure, I am offering employment to yourself on the same terms and conditions as the previous owner, until I have had the chance to meet with you and discuss future opportunities for you within our business. I envisage this occurring within the first month of our operation of the business.

13 The letter was signed by J Barnett as a director of the Respondent. There was provision on the bottom of the letter for the Claimant to sign under a sentence which reads—

"*I hereby accept employment on the terms outlined above.*"

14 The Claimant signed that acceptance on 21 March 2002.

15 On the same day she completed and signed an Application for Employment with the Respondent.

16 I accept the Respondent's evidence as to the terms of the Contract of Sale, the offer as an interim measure made to the Claimant of employment on the same terms and conditions as the previous owner and that she made application for employment with the Respondent.

17 It is clearly the intention of the Award that employees be rewarded for continuous service by the payment of severance pay at the time of being made redundant.

18 In determining whether or not there is merit in the Respondent's argument that it is only liable to pay the Claimant severance pay for the time during which she was employed by the Respondent it is necessary to consider the provisions of the Award.

19 When considering the meaning of a provision of an award the ordinary meaning of the words used should be applied.

20 Clause 26(4) is clear as to an employee's entitlement on termination on account of redundancy and the amount of severance pay payable based on years of continuous service.

21 Clause 26(10) has application in circumstances where during the course of employment of an employee in a business, the business is taken over by another owner. It provides that where a business is transmitted from one employer to another and an employee who at the time of transmission was an employee of the owner which, for example, sells the business, becomes an employee of the new owner then "*(t)he continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission"* and the period of employment which the employee has had with the owner selling the business shall be deemed to be service of the employee with the new owner. There can be no argument that the business was transmitted for the purpose of clause 26. The definition aforementioned includes "*transfer*" which the Shorter Oxford Dictionary has its meaning to include—

"*to convey or make over (title, right or property) by deed or legal process*."

22 I have been referred to a decision of ***Matthewson v Celeste Corporation Pty Ltd (Jiffy Foods) 2002 WAIRC 07114.*** That case was brought pursuant to the provisions of section 29(1)(b)(i) of the *Industrial Relations Act 1979* alleging unfair dismissal. I have given consideration to the reasons for the decision in that case and in my view the Commissioner's finding in relation to the transmission of the business are not inconsistent with mine. However, that case can be distinguished from this one because of the nature of the action therein. This action is one involving breach of an Award where as I have found the relevant terms of the award create an obligation on the Respondent herein. The *Matthewson case* was decided on the law as it relates to unfair dismissals and it was properly found that the Respondent had a right not to re-employ Mr Matthewson.

23 I do not see that there is any doubt, notwithstanding the evidence of re-employment, that the award provision as to severance pay is affected by any such re-employment, particularly in view of the deeming provisions. In any event the evidence before me is that there was continuity of employment of the Claimant.

24 While the Respondent may have intended not to have any obligation for its employees prior to the transmission of the business, there was clearly an obligation provided for in the Award to which, it would appear, consideration was not given during negotiations to purchase the business.

25 It is clearly the intention of the Award to protect the rights of employees who are employed in a business which has a change of ownership. One of those rights is severance pay.

26 I find, therefore, that the Respondent is liable to pay the Claimant her entitlement under clause 26(4) of the Award based on her continuous employment with Jiffy Foods during its ownership by Catering Concepts and the Respondent.

W. G. TARR,
Industrial Magistrate.

2003 WAIRC 09633

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	RICHARD JAMES QUINLIVAN, CLAIMANT
	v.
	AUSTAL SHIPS PTY LTD, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 9 OCTOBER 2003
CLAIM NO	M 314 OF 2002
CITATION NO.	2003 WAIRC 09633

Representation	
Claimant	Mr L Edmonds (of Counsel)
Respondent	Mr KJ Martin QC and with him Mr S Heathcote (of Counsel) instructed by *Messrs Clayton Utz, Lawyers*

Reasons for Decision

Applications

1 On 1 August 2003 the Respondent filed a notice directed to the Claimant seeking further and better particulars of claim. The further and better particulars as sought were not provided and accordingly on 25 August 2003 the Respondent made an interlocutory application seeking the following orders—

1. That the Claimant provide further and better particulars of the Claim ... within 7 days; and

2. If the Claimant fails to provide further and better particulars in accordance with Order 1 ... that the Claim be dismissed.

2 On 10 September 2003 that application came on for hearing but was adjourned to 18 September 2003. On 15 September 2003 the Claimant filed his interlocutory application seeking to substitute particulars of claim. That application also came on for hearing on 18 September 2003 at which time both the Claimant and Respondent's application were further adjourned to 23 September 2003. The adjournment was necessary on account of the fact that the Claimant's application went beyond mere amendment. In fact the Claimant sought to add another party to the action. An adjournment was granted so that the Claimant could, in proper form, make his application to add a party to the action. Accordingly on 22 September 2003 the Claimant made an interlocutory application seeking the following orders—

That the Court grant leave to add Austal Ships Pty Ltd (ACN 079 160 679) as the Second Respondent in this matter.

3 By further interlocutory application also dated 22 September 2003 the Claimant sought that the particulars of claim in the matter be substituted to reflect a claim as against both the First Respondent and the proposed Second Respondent. On the same day the Respondent filed its interlocutory cross-application seeking the following—

(1)(a) That the proposed claim (as amended) against Austal Limited (ACN 009 250 266) if it is an existing Respondent, do be summarily dismissed on the basis that it discloses no arguable cause of action (by reason of its reliance upon section 24(2) of the Minimum Conditions of Employment Act 1993(WA) upon a termination event, other than as employer, by Austal Limited); or

(b) alternatively that to the extent that Austal Ltd (ACN 009 250 266) is not an existing party to claim no. 314 of 2002, that any application for leave to add it as a party, do be refused on the basis that the addition of such a party would be entirely futile (for the reasons given in (1)(a) above);

(2)(a) that any application to add Austal Ships Pty Ltd (ACN 079 160 679) as an additional party to claim no. 314 of 2002 (if it is not currently a party), do be refused on the basis such application would be entirely futile (there being no arguable cause of action against Austal Ships Pty Ltd (ACN 009 160 679), since a proposed claim against it under section 24(2) of the Minimum Conditions of Employment Act 1993(WA) is based upon a termination of employment on 8 May 2001, during the existence of a Workplace Agreement, and the jurisdictional prerequisites of sections 21, 50(1) and 54 of the Workplace Agreements Act 1993 (WA) have not been satisfied); or

(b) alternatively, to the extent that Austal Ships Pty Ltd (ACN 079 160 679) is already an existing party to claim no.314 of 2002, that the claim do be summarily dismissed on the basis that (for the reasons mentioned in paragraph (2)(a) above) there is no arguable cause of action against Austal Ships Pty Ltd (ACN 079 160 679).

4 Notwithstanding that there had not been compliance with regulation 25(1)(b) of the ***Industrial Magistrates' Courts (General Jurisdiction) Regulations 2000*** with respect to the applications filed on 22 September 2003, the parties were desirous of my dealing with the matter and indeed sought that I deal with and determine all matters in controversy between them on their respective interlocutory applications. It is noted that the same solicitors and counsel representing the Respondent (proposed First Respondent) also represented the proposed Second Respondent.

History of the Action

5 This matter, which commenced on 25 November 2002 along with other associated matters, has a somewhat tortuous history. Indeed on 13 February of this year I made certain orders which had the effect of striking out the Claimant's claims made under the ***Workplace Agreements Act 1993*** in relation to a Workplace Agreement made between the Claimant on the one hand and Austal Ships Pty Ltd (ACN 079 160 679) on the other. On the same day I also dismissed part of the claim in so far as it related to the enforcement of the ***Metal Trades (General) Award 1965*** (the Award). My reasons for doing so are found at ***83 WAIG 552***.

6 In the course of previous argument, and in my previous consideration of the matter including my reasons for decision delivered on 13 February 2003 I proceeded on the basis that the Claimant had misdescribed the Respondent's ACN as had been pointed out by the Respondent in its response and with which the Claimant took no issue. However it seems, as explained by Mr Edmonds for the Claimant during the course of argument on these applications that it has always been the Claimant's intention to proceed against Austal Ltd formerly known as Austal Ships Pty Ltd (ACN 009 250 266).

7 The state of confusion as to the correct Respondent, it seems, loomed not only in my mind but also in the mind of Counsel for the Respondent. I say that because it was apparent during the course of submissions that the Respondent's representatives were initially of the view that the Claimant was seeking to add as a First Respondent, Austal Ltd formerly known as Austal Ships Pty Ltd (ACN 009 250 266). I confess that I was of the same view. However it became apparent that by his application the Claimant was seeking to add Austal Ships Pty Ltd (ACN 079 160 679) as a Second Respondent. That is so notwithstanding the fact that in the interlocutory application dated 15 September 2003 and in the supporting affidavit of Mr Edmonds thereto sworn 15 September 2003 Respondent is described as Austal Ships Pty Ltd (ACN 009 160 679). It seems therefore that even Counsel for the Claimant has also on occasions proceeded on an erroneous footing.

8 Once clarified, both parties have for the purpose of argument before, me proceeded upon the basis that the correct current Respondent party and the proposed First Respondent to this proceeding is Austal Ltd (ACN 009 250 266) formerly known as Austal Ships Pty Ltd and that the proposed Second Respondent is Austal Ships Pty Ltd (ACN 079 160 679)

Background

9 It is common ground that on or about 12 August 1996 the Claimant commenced with Austal Ltd (ACN 009 250 266). The Claimant alleges that he was an employee of the Respondent. The Respondent, on the other hand, contends that the Claimant was an independent contractor providing services to the Respondent under the business name "RJQ Welding and Fabrications". From 1 July 1998 the contract of service or for services, as the case may be, was transferred to Austal Ships Pty Ltd (ACN 079 160 679) being a wholly owned subsidiary of Austal Ltd. The Claimant continued to work for Austal Ships Pty Ltd (ACN 079 160 679) until 8 May 2001 at which time his employment was terminated by reason of redundancy. It is not disputed that from 20 January 1999 until termination occurred the Claimant was the subject of a contract of service regulated by successive individual Workplace Agreements made pursuant to the ***Workplace Agreements Act 1993***. I appreciate that the issue as to whether the Claimant was an independent contractor leading up to 20 January 1999 remains very much live, however, for the purposes of resolving the interlocutory applications before me I proceed on the basis, and without finally determining the issue, that the Claimant was at all material times an employee.

Issues

10 As a consequence of the Claimant's application for leave to add a party and for leave to amend, the Respondent's application for further and better particulars becomes redundant. I accordingly will deal only with the Claimant's interlocutory applications dated 15 and 22 September 2003 and the Respondent's cross application dated 22 September 2003.

11 The Claimant proposes to amend his claim and to add a party so that the proposed particulars of claim will be as follows—

IN THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA

HELD AT PERTH

No. 314 of 2002

BETWEEN—

Richard James Quinlivan

Claimant

AND

AUSTAL LTD FORMERLY KNOWN AS
AUSTAL SHIPS PTY LTD A.C.N. 009 250 266

First Respondent

AND

AUSTAL SHIPS PTY LTD A.C.N. 009 160 679

Second Respondent

CLAIMANT'S AMENDED PARTICULARS OF CLAIM

The particulars of the claim are set out hereunder.

1. *The Claimant was an employee of Austal Ltd (the First Respondent) inclusive of the period 12th August 1996 to 30 June 1998 and an employee of Austal Ships Pty Ltd (the Second Respondent) from 1 July 1998 to 8th May 2001.*
2. *On 20th January 1999 the Claimant agreed to sign and register an individual Workplace Agreement (hereinafter "the workplace agreement") with the Second Respondent.*
3. *On 8th May 2001 the Claimant's employment was terminated by the Second Respondent.*
4. *Contrary to section 24(2) of the Minimum Conditions of Employment Act 1993, the First and Second Respondents failed to pay annual leave to the claimant for the periods 12 August 1996 to 30 June 1998 and 1 July 1998 to 19 January 1999 respectively.*

AND THE CLAIMANT CLAIMS

5. An order for payment in lieu of annual leave calculated as follows—

a) 178 weeks employment between 12th August 1996 and 19th January 1999, multiplied by 2.923 hours pay per week of employment = 520.29 hours.

b) 520.29 hours multiplied by the Claimant's hourly wage rate as of 19th January 1999 being $21.99 per hour = $11,441.17.

TOTAL $11,441.17

c) INTEREST AND COSTS

12 The particular amendments have not been delineated in the usual manner and accordingly it is necessary to recite the previous pleadings so that an appreciation may be gained of the differences between the particulars filed on 6 March 2003 and those proposed. I set out the particulars filed on 6 March 2003—

IN THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA

HELD AT PERTH

No. 314 of 2002

BETWEEN—

Richard James Quinlivan

Claimant

AND

AUSTAL SHIPS PTY LTD A.C.N. 009 250 266

Respondent

CLAIMANT'S AMENDED PARTICULARS OF CLAIM

The particulars of the claim are set out hereunder.

1 The Claimant alleges that he was an employee of Austal Ships Pty Ltd (the Respondent) inclusive of the period 12th August 1996 to 8th May 2001, constituting 4 years' continuous employment with the Respondent.

2 On 20th January 1999 the Claimant agreed to sign and register an individual Workplace Agreement (hereinafter "the workplace agreement").

3 The Claimant alleges that, at all material times he was employed by the Respondent, and that his employment was regulated by the Minimum Conditions of Employment Act 1993 throughout the period 12th August 1996 to 19th January 1999.

4 On 8th May 2001 the Claimant was made redundant by the Respondent.

5 The Claimant applies for an order for recovery of unpaid annual leave pursuant to sections 23 and 24 of the Minimum Conditions of Employment Act 1993.

PARTICULARS OF BREACH

6. The Respondent failed to pay the Claimant annual leave entitlements pursuant to sections 23 and 24 of the Minimum Conditions of Employment Act 1993 throughout the period 12th August 1996 to 19th January 1999 inclusive.

AND THE CLAIMANT CLAIMS

7. An order for payment in lieu of annual leave calculated as follows—

a) 178 weeks employment between 12th August 1996 and 19th January 1999, multiplied by 2.923 hours pay per week of employment =

520.29 hours.

b) 520.29 hours multiplied by the Claimant's hourly wage rate as of

19th January 1999 being $21.99 per hour = $11,441.17.

TOTAL $11,441.17

c) INTEREST AND COSTS

13 It will be noted that the proposed amendment has the effect of distinguishing the Claimant's respective claims as against the proposed First and Second Respondents. It will also be obvious that the Claimant no longer alleges one continuous period of employment with Austal Ships Pty Ltd (ACN 009 250 266) being the current Respondent. Further the Claimant, in the proposed amended particulars, restricts his claim to one made pursuant to section 24 of the ***Minimum Conditions of Employment Act 1993***. Reference to the claim being made pursuant to section 23 of the same Act is removed. The other amendments are consequential and flow from those major amendments to which I have referred.

Determination

14 The real issue in controversy to be determined with respect to these applications is whether, on the face of the Claimant's claim in its amended form, there is a case as against the current and/or the proposed Respondent that can arguably succeed. In other words, whether the Claimant has as against each Respondent a cause of action, which has some possibility of success.

15 The onus rests with the current Respondent in its cross application to show that the claim against it is so totally devoid of merit that the Claimant ought not be given leave to amend his claim. It is argued that the Court should either dismiss the claim or alternatively stay the proceedings against the existing Respondent in order to stop an abuse of process. It is argued that it is permissible for this Court to permanently stay the action using its inherent powers to regulate its own proceedings. In that way the Respondent's exposure to costs would be limited and it would prevent a waste of the Court's resources having regard to the important principles of case flow management. The proposed Second Respondent argues that no action can lie against it and that it accordingly should not be added as a Second Respondent to the action. On the other hand all that the Claimant has to do in order to defeat the Respondents' arguments and succeed in his own applications is to show there is an arguable case as against each of the current and proposed Respondents. If that can be achieved he should be given leave to amend and to add the proposed Second Respondent.

16 The Claimant's claim against the current Respondent and the proposed Second Respondent is founded upon section 24 of the ***Minimum Conditions of Employment Act 1993***, which states—

> ***Payment for Annual Leave***
>
> *24 (1) ...*
>
> *(2) If—*
>
> *(a) an employee lawfully leaves his or her employment; or*
>
> *(b) an employee's employment is terminated by the employer through no fault of the employee,*
>
> *before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for all of that annual leave.*
>
> *(3) ...*
>
> *(4) ...*

17 It is not in dispute that the Claimant's employment was terminated on 8 May 2001 whilst the proposed Second Respondent employed him and whilst his employment was regulated by the terms of an individual Workplace Agreement. Accordingly any claim that he may have as against the proposed Second Respondent for entitlements predating the Workplace Agreement appears to arise by virtue of section 7 of the ***Workplace Agreements Act 1993***, which provides—

> ***Effect of workplace agreement on accrued entitlements***
>
> *7. Any entitlement accrued to an employee under the relevant award before the workplace agreement entered into by the employee comes into effect shall be preserved and paid to the employee by the employer at either —*
>
> *(a) the award rate; or*
>
> *(b) the rate the employee was paid,*
>
> *whichever was the higher at the time immediately prior to the workplace agreement coming into effect.*

18 The Claimant's entitlement to paid annual leave is preserved pursuant to section 7 of the Workplace Agreements Act and can only be recovered pursuant to that Act. If however it could be established that the Claimant left his employment or was terminated whilst his employment was not subject to an individual Workplace Agreement then his entitlement under section 24 of the ***Minimum Conditions of Employment Act 1993*** would arise as a minimum condition of employment, implied pursuant to section 5 of the ***Minimum Conditions of Employment Act 1993***. That benefit implied into his contract of service is only payable by force of the ***Minimum Conditions of Employment Act 1993***. Indeed the same can only be enforced by virtue of section 7(b) or (c) of that Act once one of the alternate criterion in section 24(2)(a) or (b) of that Act is satisfied.

19 Relevantly section 7 of the ***Minimum Conditions of Employment Act 1993*** provides—

> ***Enforcement of minimum conditions***
>
> *7. A minimum condition of employment may be enforced —*
>
> *(a) where the condition is implied in a workplace agreement, under Division 1 of Part 5 of the Workplace Agreements Act 1993;*
>
> *(b) where the condition is implied in an award, under Part III of the Industrial Relations Act 1979; or*
>
> *(c) where the condition is implied in a contract of employment, under section 83 of the Industrial Relations Act 1979 as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.*

20 The Claimant contends that on 19 January 1999 he lawfully left the employment of the proposed Second Respondent. The foundation for such contention lies in the fact that he entered into a Workplace Agreement on the following day. The Claimant's argument is entirely predicated on the employment relationship with the proposed Second Respondent coming to an end and a new employment relationship commencing. However it is quite obvious that the contract of employment continued across the changes to the terms of the employment relationship. It was not the case that by entering into the first of the Workplace Agreements that there was a termination of the contract of employment. Clearly that did not occur either in fact or in law. The existing contract of employment between the parties continued albeit subject to different terms. Indeed section 7(4) of the ***Workplace Agreements Act 1993*** provides for that very circumstance. It states—

> *(4) A workplace agreement does not displace the contract of employment between an employer and an employee but while it is in force it has effect —*
>
> *(a) as if it formed part of that contract; and*
>
> *(b) regardless of any provision of that contract.*

21 The Claimant's entitlement to the payment for annual leave not taken, which predated his entering into the Workplace Agreement was preserved and could only be paid out upon termination. Given that termination occurred during the currency of the second Workplace Agreement his rights thereunder can only be enforced under Division 1 of Part 5 of the ***Workplace Agreements Act 1993*** pursuant to section 7(a) of the ***Minimum Conditions of Employment Act 1993***. It follows therefore, given that the claim as against the proposed Second Respondent is not ostensibly being conducted pursuant to Division 1 of Part 5 of the ***Workplace Agreements Act 1993***, the claim cannot possibly succeed.

22 Turning to the claim as against the current Respondent Austal Ships Pty Ltd (ACN 009 250 266), can it be said that the same is arguable? Leaving aside the issue as to whether the Claimant was an employee or independent contractor and assuming, for the purposes of this exercise, that he was at all material times an employee of the Respondent between 12 August 1996 and 30 June 1998, can it be said that he is entitled to recover annual leave entitlements, or more precisely pay in lieu of annual leave entitlements accumulated over that period?

23 It has not been suggested that the Claimant was at any stage terminated by the Respondent. Accordingly the Claimant's entitlement claimed against the current Respondent is said to arise by virtue of section 24(2)(a) of the ***Minimum Conditions of Employment Act 1993*** rather than section 24(2)(b) of that Act. The claim is accordingly predicated on the fact that the Claimant lawfully left his employment on 30 June 1998 being his last day of employment with the current Respondent. It is suggested therefore that the employment relationship with the Respondent ceased on that day and that a new relationship with the proposed Second Respondent commenced the day after. Clearly that did not occur either in fact or in law. All that occurred was that there was a transmission of the business. The contract of employment continued across the transmission and was not determined by it. The mere fact that there has been a transmission of a business from one entity to another does not of itself mean that the employment contract comes to an end and that a new contract of employment ensues thereafter. Indeed in such situations the contract of employment transcends the takeover of the business and the employee's rights and entitlements are preserved.

24 Mr Edmonds asks that I infer from exhibit LAE 3 referred to in his affidavit sworn 22 September 2003, (handed to the Court on 23 September 2003) that the legal effect of the transfer as reflected therein was to bring the contract of employment with the current Respondent to an end. That being the case the trigger required by section 24(2)(a) of the ***Minimum Conditions of Employment Act 1993*** for the payment of accrued annual leave exists. In my view the Claimant's own conduct and pleadings in this matter contra-indicates any suggestion that the Claimant lawfully left his employment. Indeed, in the current particulars of claim filed 6 March 2003, the Claimant alleges in paragraph 1 that he was an employee of the Respondent inclusive of the period 12 August 1996 to 8 May 2001, constituting four years' continuous employment with the Respondent. It seems to me that what the Claimant is now saying is that the legal effect of what occurred was that he left the employment of the Respondent on 30 July 1998 and that he commenced employment with the proposed Second Respondent on 1 July 1998 as is supported by annexure LAE 3. In my view the annexure cannot be construed in that way. All the annexure does is to reflect transmission. In any event the argument seems to run contrary to and is inconsistent with argument inferentially made that the transmission of the business was a sham in any event. In that regard I was referred to annexure 4 of Mr Edmonds' affidavit sworn and filed 22 September 2003. The annexure consists of a warning given to the Claimant on 1 October 1998. Austal Ships Pty Ltd (ACN 009 250 266) gave that warning notwithstanding that it had by that stage transmitted its business to the proposed Second Respondent and was no longer the employer of the Claimant. The fact that it was no longer the employer is to be found in the transmission document (annexure LAE 3) and the other evidentiary material before me. Notwithstanding that, the current Respondent on the face of it (see annexure 4) appears to have given the warning in spite of the fact that it is obvious that the Claimant was at that time not working for it but rather for Austal Ships Pty Ltd (ACN 079 160 679). If the transmission was no more than a sham as is suggested by Mr Edmonds then that of itself cannot support the argument that the Claimant lawfully left his employment. Indeed if the process was a sham then all that occurred is that the Claimant remained working for the current Respondent. The undisputed evidentiary material before me would not support a conclusion either in fact or in law that at any stage during the four-year period that the Claimant lawfully left his employment with the Respondent and /or the proposed Second Respondent. I therefore cannot see how the Claimant could possibly satisfy the necessary trigger in section 24(2)(a) of the ***Minimum Conditions of Employment Act 1993*** to enable him to bring his claim as against the current Respondent. In such circumstances it cannot be said that the Claimant has an arguable case as against the current Respondent Austal Ships Pty Ltd (ACN 009 250 266).

Result

25 I find myself in general agreement with the submissions made by Mr Martin on behalf of the Respondents. It appears that the Claimant's ability to recover may rest solely with the provisions of the ***Workplace Agreements Act 1993***. I conclude therefore that the Claimant does not have an arguable case as against the current Respondent as pleaded or as against both the current Respondent and the proposed Second Respondent as pleaded in the Claimants proposed amended particulars of claim. I would accordingly not allow the Claimant's applications. It is appropriate, for the reasons given, to allow the Respondent's cross application.

26 The cross application should be allowed subject to my consideration of whether the appropriate order is to dismiss the claim or, alternatively, permanently stay the same.

27 Section 81CA(2) of the ***Industrial Relations Act 1979*** governs, subject to the ***Industrial Magistrate's Courts (General Jurisdiction) Regulations 2000***, the powers, practice and procedure of this Court. It provides—

> *(2) Except as otherwise prescribed by or under this Act or another law —*
>
> *(a) the powers of an industrial magistrate's court; and*
>
> *(b) the practice and procedure to be observed by an industrial magistrate's court,*
>
> *when exercising general jurisdiction are those provided for by the Local Courts Act 1904 as if the proceedings were an action within the meaning of that Act.*

28 Regulation 5 of the ***Industrial Magistrate's Courts (General Jurisdiction) Regulations 2000*** provides—

> ***Chief stipendiary magistrate's directions***
>
> *5 (1) The chief stipendiary magistrate may give directions as to the practice and procedure to be followed in proceedings generally, if—*
>
> *(a) these regulations do not provide for the practice or procedure in the proceedings; and*
>
> *(b) the Local Courts Act 1904 does not provide for the practice or procedure in the proceedings, or provides for a practice or procedure that is inconsistent with these regulations.*
>
> *(2) The chief stipendiary magistrate may amend or revoke directions given under subregulation (1).*
>
> *(3) The court is to make available to the public directions given under subregulation (1).*

29 There is no provision in the ***Industrial Magistrate's Courts (General Jurisdiction) Regulations 2000***, the ***Local Courts Act 1904*** or the rules created thereunder or in any direction given by the Chief Stipendiary Magistrate which would enable a Respondent to seek a summary judgment order in this Court. That, of course, stands in contrast with Courts of superior jurisdiction in Western Australia having the ability to deal with such applications within their own jurisdiction. Given that that is so, there is a concern that it may not be permissible to dismiss a claim, or any part of it, without it being dealt with on its merits. It could be argued that the only way that this Court can intervene in stopping the unmeritorious claim from proceeding further is to permanently stay the same.

30 The Local Courts' ability to dismiss an action so as to avoid an abuse of process has been the subject of recent judicial pronouncement by Her Honour Jenkins DCJ in ***Leonard James Green and Joyce Ruth Green v Rachel Daly and Melissa Daly (an infant by her Next Friend Rachel Daly) [2002] WADC 109.*** At page 7 Her Honour said,

> "*Having regard to the state of the authorities such as **Thorpe v City of Subiaco** (supra) and **CSR Ltd v Cigna Insurance Australia Ltd** (1997) 189 CLR 345 at 391 it seems that there is a general principle to the effect that any court may dismiss or stay proceedings which are oppressive, vexatious or an abuse of process. This implied power is reasonably required for the effective exercise of a court's jurisdiction to hear and determine matters before it. It is clear from the case of **Grassby** (supra) that the express and mandatory terms of a statute may deprive a court of such power. In my opinion the provisions of the Local Courts Act 1904 are not set out in such an express or mandatory form so as to deprive the Local Courts of the implied power to dismiss an action for want of prosecution so as to avoid an abuse of process of the Court."*

31 Having regard to section 81CA(2) of the ***Industrial Relations Act 1979*** the view expressed by Her Honour concerning the powers of the Local Courts is apposite in this case and in the considerations of the applications before me. It follows therefore that I do have power to dismiss the Claimant's action on the grounds that there has not been demonstrated an arguable case.

32 I accordingly propose to make the following orders—

1. The Respondent's interlocutory application filed on 25 August 2003
   be dismissed.
2. That the Claimant's interlocutory application filed on 15 September 2003 be dismissed.
3. That the Claimant's interlocutory application seeking leave to add a Respondent filed on 22 September 2003 be dismissed.
4. That the Claimant's interlocutory application seeking to substitute his particulars of claim filed on 22 September 2003 be dismissed.
5. The claim be otherwise dismissed.

(Sgd.) G. CICCHINI,
[L.S.] Industrial Magistrate.

2003 WAIRC 10009

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	PHIL WILKES, CLAIMANT
	v.
	AIR AUSTRALIA INTERNATIONAL PTY LTD, RESPONDENT
CORAM	MAGISTRATE IG BROWN IM
DATE	FRIDAY, 31 OCTOBER 2003
CLAIM NO	M 252 OF 2002
CITATION NO.	2003 WAIRC 10009

Representation	
Claimant	The Claimant appeared in person
Respondent	Mr D Clarke of *Senate Pty Ltd* appeared as agent

Reasons for Decision

1 This matter was brought to this Court on 20 August 2002 by way of an application pursuant to sections 170CT, 179C and 179D of the Commonwealth ***Workplace Relations Act 1996***, i.e. the small claims procedure was chosen by the Claimant.

2 The allegation is that the Respondent breached the terms of the ***Pilots (General Aviation) Award 1984*** and as a result the Claimant was underpaid $3,802.36. The Court subsequently gave leave to amend the claim so that the amount sought is now $4,183.64. The Claimant also seeks that upon conviction a penalty be imposed together with costs. In my view the term "*conviction*" is inappropriate. If an alleged breach of an award is proven a penalty may be imposed, but no reference to "conviction" appears in the relevant sections of the Act.

3 The Claimant filed the following particulars of claim—

1. *The Respondent was, at all material times, a company incorporated in Western Australia.*
2. *The Respondent employed the Claimant at its Jandakot premises during the period 3rd December 1997 and 10 August 1998.*
3. *During the period of employment, the Respondent was, by being a party "roped into the award with effect from 26 October 1992" bound by the federal Pilots (General Aviation) Award 1984.*
4. *During the period of employment, the Claimant's employment was subject to the provisions of the federal Pilots (General Aviation) Award 1984.*
5. *The Claimant was, during the period of his employment with the Respondent, employed in the positions of flying instructor, charter pilot and operations manager.*
6. *For the purposes of this claim, only those hours that the Claimant flew in the aircraft as the pilot or as an instructor have been taken into account in calculating the outstanding amount due.*
7. *As a consequence of the irregular flying periods, the Claimants status was that of a "Casual" as defined in Clause 3.4 -Definitions of the award.*
8. *During the period of employment, the Respondent failed to pay the Claimant the minimum hourly rates of pay as prescribed in Part B, Clause 1 and Clause 36(i)(iii-iv) of the Award.*
9. *The Respondent alleges that the Claimant was not an employee but rather an independent contractor who provided services to the Respondent.*
10. *It is the Claimant's view that, while he may have signed a written contract on 10th day of August 1998 stating that he was employed in the capacity of Contractor to the Respondent, it is his belief that he was always an employee, as his duties did not vary from the date of commencing work on 3rd December 1997.*
11. *In support of the Claimant's assertion that he was always an employee, he believes that the Respondent always had the "right to control" as to the hours of work and the duties carried out; there was "no opportunity to gain a profit or suffer a loss" from his relationship with the Respondent; he used equipment provided by the Respondent and also carried out administrative tasks on three days of each week for and on behalf of the Respondent.*

4 In support of his claim Mr Wilkes gave evidence. In addition Mr Logan-Scales, an industrial inspector for the past 15 years, gave evidence. The only evidence called on behalf of the Respondent was from Mr Charles Gates McElwey, the managing director of the Respondent. There were various documentary exhibits admitted in evidence.

5 In all contested matters in this Court it is my primary duty to determine the facts. As in all cases some facts are not in dispute, but where facts are disputed the Court is required to assess the credibility of all witnesses, weigh the evidence and give reasons as to why one version is preferred over another. At all times the civil burden of proof applies in these proceedings i.e. on the balance of probabilities.

6 It is convenient to set out the facts not in dispute as background before addressing the matters in contest; accordingly I find as fact that—

1. Wilkes is currently employed as a pilot, a second officer, with Qantas.
2. Before working for the Respondent he was a pilot with the RAAF from 1987.
3. He came to Perth looking for work as a pilot in late 1997 and made contact with Mr McElwey at Jandakot airport.
4. The Respondent is a corporation which was registered on 24 December 1991 as Air Sea Aviation Pty Ltd (see exhibit C1), and on 3 March 1992 subsequently changed its name to the present name. Mr McElwey has been managing director since that time i.e. 24 December 1991.
5. After discussions between Wilkes and McElwey an oral agreement was reached on or about 19 November 1997. The terms of that agreement are in dispute and, although some discussions were also held with the Respondent's chief pilot at the time, he was not called as a witness in these proceedings.
6. Wilkes signed a written agreement with the Respondent on 10 August 1998 (see exhibit C3). Wilkes ceased working with the Respondent eight days later i.e. 18 August 1998.
7. The ***Pilots (General Aviation) Award 1984*** is exhibit C4, as varied by exhibits C5, C6, C7 and C8.
8. During the "relevant period" i.e. 20 November 1997 to 18 August 1998, Wilkes flew various aircraft on trips set out in the schedule marked as exhibit C2. Some details on that schedule are in dispute and will be the subject of comment later in these reasons.

The Issue of Whether the Respondent is a Party to the Award

7 The Respondent maintains that it is not a Respondent to the ***Pilots (General Aviation) Award 1984***, as amended. It is common ground that the onus is on the Claimant to establish that fact.

8 The Claimant produced exhibit C4 which is a copy of the consolidated ***Pilots (General Aviation) Award 1984***. Schedule "A" to the document is a list of respondents in each State and in Western Australia there is no reference to the Respondent company.

9 As I understand the Claimant's case he relies on exhibit C5 together with exhibit C1 to establish respondency. Exhibit C5 is the ***Pilots' (General Aviation) Roping-in No 2 Award 1992***. Clause 4 of the award provides that the award came into force from the first pay period on or after 27 October 1992 and shall remain in force for a period of six months i.e. until 27 April 1993.

10 Clause 2 of that award provides that the award shall be binding on the employers listed in Appendix "A". The Appendix includes reference to both Air Sea Aviation Pty Ltd of Hangar 112 Jandakot and Air Australia International of Hangar 112 Jandakot. It is clear from exhibit C1 that Air Australia International Pty Ltd was previously known as Air Sea Aviation Pty Ltd between 24 December 1991 (when it was first incorporated) and 3 March 1992. It was simply a change of name and Charles McElwey was a director from 24 December 1991 and remains a director.

11 In the circumstances of this case I am satisfied that the absence of "*Pty Ltd*" after the name "*Air Australia International*" in Appendix "A" is of no great significance. I am satisfied on the evidence available that the Respondent company was a named respondent to the award up to 27 April 1993. The real difficulty for the Claimant is to establish that such respondency continued beyond 27 April 1993. An employer may be "*roped-in*" but in this case the Respondent was only roped-in for a fixed period as I read the award. None of the other exhibits, in particular exhibits C6, C7 or C4 make reference to the Respondent company. The alleged breaches of the award occurred in 1997-1998 and I am not satisfied on the balance of probabilities that the Respondent company was a respondent to the award in that period.

12 That finding is fatal to the Claimant's case.

13 In the event that my finding is held to be wrong I have chosen to make findings on the other issues raised because of the delay and unfairness to all concerned if the claim had to be reheard.

14 I now turn to the task of determining the disputed facts.

The Evidence of Wilkes

15 He says that the original offer of employment was three days a week in the office at the Jandakot airport performing the duties of operations manager at a flat rate of $100.00 per day until 26 February 1998 when the flat rate was increased to $125.00 per day.

16 He says that in addition he was to undertake flying duties, including charter flights and instructing flights on the days he was not employed as operations manager.

17 He says that for flying duties he was to be paid $30.00 per hour for charter flights, $15.00 for aerobatic flights and $65.00 for special trips to the Southwest of the State.

18 As to working hours, he said the office was open seven days a week from around 8.00 to 9.00 am until around 5.00 pm. He did not fly outside those hours, as shown by exhibit C9, except on rare occasions.

19 When he was at the office his duties were to interview new clients and assign the instructors to each new client and make bookings for flying lessons. He also booked charter flights and assigned pilots. He did some office work in relation to accounts, used the computer and phone as expected of the operations manager.

20 He agreed no tax was deducted from the amounts which he was paid. The actual sum he received in the relevant period is as shown on the bottom of the handwritten fortnightly invoices (exhibit C17) which he submitted to McElwey.

21 He said that his employer held an Air Operators Certificate under the ***Civil Aviation Act*** and that he did not hold such a certificate. He believes that if he was working as an independent contractor he would need his own certificate and also his own "*Operations Manual*" which is required by ***Air Navigation Regulations***. He referred to Order 20.11 and Civil Aviation Order 40.1.7 which relates to proficiency checks but it is my understanding that these regulations would need to be satisfied whether or not he was an employee or independent contractor to the Respondent.

22 He said he did not maintain a personal flying log whilst employed by the Respondent as such records were kept by the Respondent. In my view this fact carries little weight in the context of this case. It would have been helpful to have an independent witness from the Civil Aviation Authority to assist the Court in this case.

23 The Claimant said no uniform was supplied to him except a set of "*Air Australia Wings*" to be attached to a uniform which he supplied himself.

24 He said there was no agreement as to sick leave or holidays as he regarded the employment as casual. He said he did take an unpaid holiday after consultation with his employer.

25 He flew only aircraft owned or leased by the Respondent. He did provide his own navigation calculator/ruler but said this is common in the industry and also occurred at Qantas where he now works. He said the Respondent provided head sets to pilots but he supplied his own, which was of superior quality, because he had suffered prior industrial deafness from flying in the RAAF.

26 He said the Respondent did not make payments on his behalf to a superannuation fund pursuant to the Commonwealth Superannuation Guarantee legislation.

27 In summary he said that apart from the three days a week he was in the office as the operations manager he did flying tasks at the direction of the chief pilot and had no real control over what tasks he was allocated.

28 Under cross-examination the Claimant agreed that on some days which are recorded as "*office days*" on his invoice he actually flew for two other aviation companies which paid the Respondent for his services. He maintained he personally received no payment from anyone except the Respondent company during the relevant period.

29 The one unusual event he described was when he was paid by a friend to do some of his flying shifts at a company named Australia West Air.

30 He also said there were between five to ten days when he flew for that company on what would otherwise have been an "*office day*", i.e. a planned office day became a non-office day. His actual words were—

> *"...It's hard to say because some days I actually flew for Australia West Air but Australia West - - because it was my office day, then Australia West Air invoiced Air Australia - - sorry. Air Australia invoiced Australia West Air and said "This guy is supposed to be working in our office today. We'll let you use him but you have to pay us because we're paying him". So I'd get my office rates for that day and Australia West Air would pay Chuck for me to go and work for them on those days. But there were some other days when I didn't have any flying on for Air Australia, on my non-office days, where my friend - - because it was - - like, my best friend, he'd say "Look, you know, I've got something on tonight. Would you mind doing my run for me?" and then he just paid me out of what he would get paid and - - because he was the chief pilot and so I just got his rate for the day and I just put it onto my tax as another flight."*
>
> (Transcript page 33)

31 After further examination the Claimant sought to explain that on some designated "*office days*" he did fly, either for other companies (at the request of his chief pilot) or would do a flying lesson for another pilot who was unavailable on the day. It seems common ground that on the days he was rostered in the office he was able to claim and was paid $100.00 (or $125.00) as a flat rate with no payment for the flying. He received no direct payments from other parties except from his friend. In my assessment the payment by his friend for flying on non-office days is the equivalent of a doctor agreeing to fill in for a friend who is rostered to do a night shift or a locum i.e. it is work done outside the terms of the employment contract. He was unable to specify on what days he "*filled in*" for his friend and I infer that it would have been on his days off i.e. exhibit C17 reveals a pattern of 3/4 days off each fortnight during 1998.

32 The Claimant also conceded that as he did not have a copy of his invoice for the first period of employment i.e. up to 3 December 1997, he could not dispute that he claimed $200.00 on his invoice and was paid that amount. At page 42 of the transcript he said it was probably correct that he flew to Leeuwin Estate on 3 December 1997 as an extra pilot on what was regarded as an "*office day*".

33 The Claimant agreed he received a total of $17,300.00 odd during his employment and was now claiming an additional $4183.64 based on the rates in the award for a casual pilot.

34 In my assessment Mr Wilkes is a young man of a somewhat pedantic nature, which is probably a good feature for a pilot. He had made a very conscientious effort to prepare his case, with the assistance of Mr Logan-Scales. I have no reservations about his integrity or reliability as a witness, except that his evidence was extremely self-serving i.e. he tried, understandably, to put a gloss on the facts to assist his case and deliberately tried to conceal facts which did not serve his cause. The difficulty in this case is that his interpretation of the award and its application to his personal circumstances is under challenge.

The Evidence of McElwey

35 Mr McElwey has been the managing director of the Respondent since 24 December 1991. As to the employment of Mr Wilkes he said that after an interview "*we made him a package offer which we felt we must offer to keep a man of his skills in the company. He covered administration work and flying*".

36 When asked if he was paid as an employee at all he said "*Negative, No*".

37 As to the method of payment he said that each fortnight Mr Wilkes presented him with a handwritten invoice detailing the amounts he considered he should be paid. He said that the bundle of documents in exhibit C17 were the original invoices from Mr Wilkes for the fortnights ending 17 December 1997 through to 26 August 1998, plus the odd days up to 6 September 1998.

38 It is not disputed by Wilkes that he personally prepared these documents and handed them to McElwey and that he received the amount claimed each fortnight and that no tax instalments were deducted. The suggestion by McElwey is that Wilkes was an independent contractor, rather than an employee and that he rendered an invoice each fortnight and was paid pursuant to a contract for services.

39 McElwey said that the invoice for the fortnight ending 17 December 1997 was typical in that it included a claim for some flying tasks and for some days spent at the office as follows—

4/12 UQU 2-4 Leeuwin $65
5/12 Office $100
6/12 BEZ 3-7 Denmark 30/Hr $111
8/12 Office $100
9/12 Office $100
10/12 Office $100
11/12 Office $100
12/12 Office $100
13/12 Office $100

17/12 UQU 2-5 Southcorp (to Leeuwin) $65

==========

$941

40 McElwey said that the agreement with Wilkes was that he would take care of his own "*taxation and insurance*", by which I infer he meant workers compensation cover (because it is an offence pursuant to section 170 of the ***Workers Compensation and Rehabilitation Act 1981*** for an employer not to have workers compensation cover for every employee).

41 On the days when Wilkes was at the office McElwey said in chief that "*he pretty much set his own time to come in*". He started as early as 6.00 am on some days and would work until some time between 5.00 pm and 5.30 pm. He said the flat rate of $100.00 (and later $125.00) per hour was paid irrespective of the hours Wilkes actually spent at the office each day.

42 McElwey conceded that on some days when the invoice showed "*office - $100*", Wilkes actually did some flying. He explained that this occurred when Wilkes was at the office and no other pilot was available so he did the flight. On some occasions, McElwey said, other pilots were in the office and said to Wilkes "*Take it – I'll watch the phones*".

43 McElwey said the agreement with Wilkes did not prevent him taking work for any other company "*as long as he showed up when he said he would be at my company on the days he said*". He said that on about 80 "*office days*" Wilkes was actually flying. He recalled Wilkes often flew for "*Australia West*" and that Australia West would pay his company for his services. I observe that no documentation was produced to verify this evidence.

44 He said that in the first month he trained Mr Wilkes in the duties of operations manager, and was hoping he could progressively step back from his role as manager. That job involved assigning flying tasks to all pilots, and making sure all paperwork was done including the rendering of accounts and collection of money. After one month he felt that Wilkes was competent to do these tasks.

45 Mr McElwey said that at the time the Respondent had about fifteen pilots engaged as contractors and that the chief flying instructor was also a contractor but his contract adopted the award conditions.

46 He further maintains that his company is not a named respondent to the Federal award.

47 As to the degree of control he exercised over Wilkes he said that his only direction was that the flying work be shared fairly between all pilots, so long as they were qualified for the flights.

48 He said the Respondent is required to have a master library of manuals which are not to be removed and that Wilkes chose to supply his own equipment and publications.

49 Perhaps the most critical statement on oath from McElwey was that it was agreed between he and Wilkes that when he flew on "*office days*" he would not charge the Respondent. He elaborated on this by saying the idea was that Wilkes would take potential clients on an introductory flight with a view to them becoming trainee pilots and such flights would not be charged for.

50 It is significant that the documents created by Wilkes throughout his involvement with the Respondent are entirely consistent with McElwey's evidence on this point.

51 Under cross-examination McElwey said that for the contract with his chief flying instructor he used the award as a guideline, but did not concede that any worker was paid the award rates or that the Respondent was named in the award.

52 As to the critical issue of whether he was an independent contractor or not, Wilkes did suggest in cross-examination that due to the fact that fortnightly cheques were made out to him personally, and not to a business name, he was not an independent contractor. McElwey gave a quite adequate response by saying his company dealt with many sole traders and that he regarded Wilkes as a sole trader contractor. In my view the issue of whether an individual operates under his or her own name, or has a registered business name, is not of great weight in any determination of the over-riding issue i.e. an individual may be an employee or an independent contractor.

53 The only other matters challenged by Wilkes in his cross-examination of McElwey were in regard to the provision of aircraft by the Respondent, the life jackets for passengers and the office furniture and equipment. McElwey agreed all these were provided by the Respondent.

54 In regard to the flights to Leeuwin Estate on 16 and 17 January 1998 McElwey said that the person who booked the flight had said "*We will provide the pilot's overnight accommodation*". He denied that he personally had organised a tent for the pilot to use as overnight accommodation.

55 In my assessment the evidence of McElwey as to the terms of the original agreement is reliable. However at no time did he or Wilkes discuss whether he was to be an employee or a subcontractor i.e. the issue now in dispute was not discussed. Nor did they discuss whether he was a casual pilot or not. In an overall sense I consider McElwey to be a slippery customer in that he negotiated a contract to serve the best interests of his company and later persuaded Wilkes to sign exhibit C3. I do not believe he has misled the Court. Like Wilkes he has tried to put a spin on his evidence to serve his best interests.

The Evidence of Logan-Scales

56 Given the conclusion I have reached it is unnecessary to summarise or comment on Mr Logan-Scales' evidence.

Was the Claimant an Employee or an Independent Contractor?

57 The principles to be applied when considering this question were conveniently set out by the Full Bench of the Western Australian Industrial Relations Commission in ***United Constructions Pty Ltd v Birighitti 82 WAIG 2409***, a decision delivered on 19 August 2002, as follows—

> "First it is necessary to refer to a number of principles which govern the determination of the question of whether he was an employee as defined in the LSL Act (op cit).
>
> *(a) Whether a worker is an employee is a mixed question of fact and law.*
>
> *(b) Ascertaining the terms of the contract and the correct inferences to be drawn from those terms, are questions of fact. Whether or not the relationship arising from those terms is an employment relationship is a question of law (see Commissioner of Taxation (Cth) v J Walter Thompson (Australia) Pty Ltd [1944] 69 CLR 227 and Marshall v Whittakers Building Supply Co [1963] 109 CLR 210 at 216-217 per Windeyer J and also Australian Timber Workers' Union v Monaro Sawmills Pty Ltd (1980) 29 ALR 322 (FC) per J B Sweeney and Evatt JJ at pages 323-324).*
>
> *(c) (i) The nature of a contract of employment is to be ascertained from its terms, except when those terms are ambiguous or perhaps when they are a sham.*
>
> *(ii) The nature of the relationship between an employer and a worker is determined by a proper characterisation of the contract between them.*

(iii) Evidence relating to the subsequent conduct of the parties is admissible for the purpose of determining if the contract has been varied (see Australia Mutual Providence Society v Allan (1978) 52 ALJR 407 (PC) which was followed in Narich Pty Ltd v Commissioner of Payroll Tax (1983) 58 ALJR 30 (PC)).

(d) As many contracts to perform work are informal or not reduced to writing, it is often necessary to consider the totality of the relationship to ascertain the true nature of the contract (see Connelly v Wells (1994) 55 IR 73 (CA) per Gleeson CJ at pages 74-75).

(e) If the true parties to the contract are the employer and either a partnership or an employee corporation then it is very unlikely that the contract is an employment contract (see Australia Mutual Providence Society v Allan (op cit) (PC) at pages 410-411).

However, if the alleged partnership (or the attempted "incorporation" of the worker) is a sham or was divorced from the reality of the relationship then it will not be a bar to a finding of an employment contract (see Cam & Sons Ltd v Sargent (1940) 14 ALJR 162).

Remuneration of a worker need not be paid to the worker directly (see BWIU v Odco Pty Ltd (1991) AILR 239).

(f) An express term in a contract indicating the nature of the relationship created by it will carry weight in determining whether the relationship is one of employment (see Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16 and Australia Mutual Providence Society v Allan (op cit) (PC)).

This is especially true if the contract and relationship are otherwise ambiguous (see Australia Mutual Providence Society v Allan (op cit) (PC) and Narich Pty Ltd v Commissioner of Payroll Tax (op cit) (PC)).

(g) However, a statement in a contract categorising the relationship as either one of employment or not does not determine the issue (see Cam & Sons Pty Ltd v Sargent (op cit)).

(h) If the expressed intention of the parties are a sham, or the evidence clearly establishes that the term categorising the relationship is misleading and contrary to the established facts then the term will be ineffectual (see Cam & Sons Pty Ltd v Sargent (op cit) at page 162 and also Neale v Atlas Products Pty Ltd [1955] 94 CLR 419 and also see Australia Mutual Providence Society v Allan (op cit) (PC)).

(i) The parties cannot alter the substance or true nature of their relationship by such an express term (see Cam & Sons Pty Ltd v Sargent (op cit)).

(j) An employee can arrange for remuneration to be paid by the employer to a partnership or a corporation without such arrangement affecting the nature of the relationship between the employee and the employee (see Burke v Reander Pty Ltd (1996) 69 IR 346 and Ellis v Saks Design Pty Ltd (1997) AILR 2963).

(k) (i) In determining whether an employment relationship exists there is no single test to be applied.

(ii) The correct approach is to consider a wide range of indicia, none of which is determinative by itself (see Stevens v Brodribb Sawmilling Co Pty Ltd (op cit) per Mason CJ, Brennan J, Wilson and Dawson JJ and Deane J) (see also Hollis v Vabu Pty Ltd (Trading as Crisis Couriers) (2001) 181 ALR 263 (HC)) (see also Augustyn v Vistadale Pty Ltd as trustee for the Ranger Family Trust trading as Ranger Contracting (2002) 82 WAIG 939 (FB)).

(iii) A considerable amount of discretion is left in the hands of the court determining the issue (see Articulate Restorations and Development Pty Ltd v Crawford (1994) 57 IR 371).

(iv) It is fair to say that the courts engage in balancing a number of factors (see Stevens v Brodribb Sawmilling Co Pty Ltd (op cit)).

(l) In ascertaining whether an employment relationship exists, the control test is "significant" and "remains the surest guide" (see again Stevens v Brodribb Sawmilling Co Pty Ltd (op cit)). That test, however, is not the sole criteria and is not in itself sufficient to conclusively determine the nature of the relationship (see Queensland Stations Pty Ltd v Commissioner of Taxation (Cth) [1945] 70 CLR 539).

(m) The mode of remuneration is one of the factors to be taken into account when determining if an employment relationship exists, but it is not alone determinative of that fact (see Stevens v Brodribb Sawmilling Co Pty Ltd (op cit) at pages 24 and 37, and see Queensland Stations Pty Ltd v Commissioner of Taxation (Cth) (op cit) also).

(n) The provision of benefits commonly provided to an employee is relevant in determining if an employment relationship exists ((eg) holiday pay, long service leave, PAYE tax, etc).

(o) Whether or not a worker is in business on his or her own account is irrelevant indicium in determining whether an employment relationship exists (see Marshall v Whittakers Building Supply Co (op cit)).

(p) Whether or not a worker is "part and parcel" of an organisation is a factor to be taken into account when determining if an employment relationship exists (see Commissioner of Taxation (Cth) v Barrett [1973] 129 CLR 395).

Put another way the question is whether the worker is an integral part of the business of he employer (see Commissioner of Taxation (Cth) v Barrett (op cit)).

(q) Whether tax deductions are or are not made from the remuneration paid to a worker and the type of tax that is deducted from that remuneration is relevant in determining whether an employment relationship exists (see Stevens v Brodribb Sawmilling Co Pty Ltd (op cit) and Climaze Holdings Pty Ltd v Dyson (1995) 13 WAR 487).

(r) These factors are not determinative ((ie) whether tax is deducted on a PAYE basis or not) (see Stevens v Brodribb Sawmilling Co Pty Ltd (op cit) per Wilson and Dawson JJ).

(s) In certain circumstances it has been held that the weight given to those factors is slight (see Connelly v Wells (op cit) (CA) and see Re Porter; Transport Workers' Union (1989) 34 IR 179 per Gray J, and see also Australian Timber Workers' Union v Monaro Sawmills Pty Ltd (op cit)).

For example, if the parties have adopted a particular tax position based on advice from others, and if weight is to be placed on this indicium, then the court is assuming that the parties are complying with the laws (see Australian Timber Workers' Union v Monaro Sawmills Pty Ltd (op cit) at pages 378-379).

> *(t) Given the uncertainty of that assumption, heavy reliance should not be placed on those factors (see Re Porter; Transport Workers' Union (op cit) per Gray J).*
>
> *On the other hand courts have been critical of workers who seek to claim the benefits of income tax laws by representing themselves as independent contractors yet who represent themselves as employees for the purpose of claiming a statutory or other benefits (see Barro Group Pty Ltd v Fraser [1985] VR 577 at 180, but see also Jennings Industries Ltd v Negri (1982) 44 ACTR 9 per Kelly J)."*
>
> (at pages 2414 and 2415)

58 For my part I would add that whilst regard can be had to whether the parties regarded their contractual relationship one of employee/employer or independent contractor, if the evidence shows otherwise the parties cannot alter the truth of that relationship by putting another label on it (***Massey v Crown Life Insurance Co** [1978] 1 WLR 676* and ***Narich Pty Ltd v Commissioner of Pay-Roll Tax** (1983) 2 NSWLR 597*).

59 In applying the above principles to the facts of this case it is recognised that there is no single test which is to be applied. While the control test is to be given significant weight, it is never to be the sole criterion and it is necessary to consider all the various principles. It presents this Court with a difficult, time consuming and perplexing task.

60 Throughout the majority of the relevant period there was no written agreement between the parties. The written agreement dated 10 August 1998 (exhibit C3) was signed, according to the Claimant when he was about to leave and he signed without applying his mind to its content or its title. The document is clearly titled "*Standard Agreement for a Contractor of Air Australia International*", and Mr Wilkes is described as "*the contractor*" in the document. The Respondent submits the document should be accepted as a true reflection of what had previously been the oral arrangement.

61 In my view the document should be treated as a fresh agreement effective from 10 August 1998 and binding on both parties from that time. There is no reference in the document to the prior period, by way of recital or otherwise. There is no specific reference to the arrangement made orally as to Wilkes being operations manager which both parties agree was in place originally. It is a standard form of contract which clearly establishes that Wilkes was a contractor from that date.

62 It is noted that the document includes a number of amendments which have been initialled by the Claimant and it is not accepted that the Claimant, who presents as an articulate and intelligent individual, did not fully understand and accept that from the time he signed that document he was a contractor and not an employee. To the extent that his claim involves the period on or after 10 August 1998 the claim would therefore be dismissed.

63 It is my conclusion that the Claimant was an employee of the Respondent up to 9 August 1998. The terms of the oral contract were as follows—

(1) he was to attend the office at Jandakot on three days a week and be paid a flat $100.00 for each day (later increased to $125.00 a day.

(2) he was to be trained in the duties of operations manager (and within four weeks he was trained) which involved running the office, taking phone bookings for flying lessons, allocating instructors to trainees, doing related paper work and computer processing.

(3) the hours of work on the "*office days*" were to be from between 8.00 – 9.00 am through to 5.00 pm on the understanding that on days when early flights were booked he may have to attend as early as 6.00 am. No particular days of the week were specified.

(4) on the other days of the week he was able to undertake flying duties as an instructor or work for other aviation companies on the basis that the Respondent would pay the Claimant and the Respondent would then bill the other company. In addition the agreement was that if no instructor was available to fly on his "*office days*" the Claimant could undertake flying duties, but for no additional remuneration.

(5) he was to keep a note of his "*office days*" and any flights taken and submit a claim for payment each fortnight showing all details. These notes were referred to as "invoices" – see exhibit C17.

(6) the Claimant was responsible for his own taxation obligations i.e. no instalments were deducted, and no superannuation guarantee contributions were to be made by the Respondent.

(7) the Claimant was able to rearrange his regular three "*office days*" to suit the workload and convenience of the employer i.e. a careful examination of exhibit C17 shows there is no regular pattern to the "*office days*".

(8) he supplied his own uniform (which was not described in any detail) but was supplied with a badge with wings saying "*Air Australia International*". He chose to use his own headphones and navigation calculator rather than those provided by the company.

(9) on his days off i.e. weekends, public holidays, he was free to fly for other companies and be paid by them. He did that for a friend on odd occasions. Otherwise he was not to fly for other air navigation companies without the approval of Mr McElwey.

(10) he did not receive holidays or sick leave.

64 I respectfully adopt the following passage from the majority of the High Court in ***Hollis v Vabu Pty Ltd** [2001] HCA 44 at [43-44]; (2001) 181 ALR 263 at 276*; where Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ observed—

> *"... In Humberstone [62], Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out [63]—*
>
> *'The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one.'*
>
> *It was against that background that in Brodribb [64] Mason J said that, whilst these criticisms might readily be acknowledged—*
>
> *'the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': Zuijs v Wirth Brothers Pty Ltd [65]. Furthermore, control is not now*

regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.' "

65 This is obviously not a clear cut case. However the above features, in my view, are strongly indicative of an employee/employer relationship, albeit a flexible working arrangement to suit the needs of the employer. The Court notes that the totality of their working relationship shows that the employer had an appropriate degree of control over Wilkes, given his senior position.

Was the Claimant Employed as a Casual Pilot Under the Award?

66 It is necessary to set out the terms of clause 36(i) of the award before discussing this issue. The clause is headed "Casual hire" and reads as follows—

36 (i) (i) Casual pilots may be employed where it can be demonstrated by the employer (if required) that the employment by him of an additional pilot cannot be justified, provided that a pilot who is out of work due to retrenchment by that employer shall be offered such casual employment first on the basis of merit and the requirements of the position.

(ii) An employer may utilise pilots engaged on casual hire to fly up to an absolute maximum of 300 flying hours in the aggregate in any period of one year except in ANR 201/203 or SAL operations where an absolute maximum of 200 flying hours in the aggregate in any period of one year shall apply.

(iii) A pilot on casual hire shall be paid for each flying hour or part thereof an hourly rate which shall be calculated in accordance with the following formula—

By dividing the third year annual salary in the salary scale appropriate to the work in question as determined by clauses 1, 2, and 3 of Part B of this award, by the figure of 800 and adding to the resultant amount a loading of 25% to compensate for the casual nature of the engagement. The resultant figure shall be the hourly rate of pay for a pilot on casual hire and shall, subject to paragraph (iv) of this subclause, be paid for each flying hour or part thereof.

Provided that in the case of a pilot employed on casual flight instruction the dividend salary for the purpose of the above formula shall be the salary applicable to the pilot's year of service determined from the date the pilot was first employed by the employer as a Flight Instructor.

(iv) A pilot who is to be employed on a casual basis shall be paid a minimum of four hours flying pay at the rate prescribed in paragraph (iii) of this subclause for each tour of duty. Provided that where the duration of the tour of duty is four hours or less, a minimum of two hours flying shall apply.

Provided that a pilot employed for casual flight instruction shall be engaged for four hour periods in any one period of 24 hours and shall be paid a minimum of two hours flying pay for each such four hour period.

67 It is critical to the Claimant's case that he was eligible for payment as a casual pilot under the award. It is my assessment that he was at no time employed as a casual pilot. The reality is that he was offered a position which involved a basic requirement of being at the office three days each week together with the opportunity to undertake either charter flying for the employer or instructing flights for the employer on the other days. I am satisfied as fact that Wilkes agreed and understood that if he was for some reason required to fly on "*office days*" he would not be paid above the flat $100.00 or $125.00.

68 This was an employment contract designed to give Wilkes a guaranteed income of $300.00 per week with the option of increasing that income by undertaking flying duties on other days. In those circumstances I do not accept that he was at any time hired as a casual pilot for the purposes of clause 36 of the award.

69 Mr Wilkes was not "*out of work*" from the time he commenced employment. He was employed on the terms set out above. I accept that he, like the other thirteen pilots, could accept or swap flights with trainees to suit his convenience, but in my view it is not appropriate to split his contract into an arrangement whereby he was employed part-time i.e. for three days a week, and as a casual pilot on the other days. This was a "*package*" situation and I am satisfied that neither Wilkes or McElwey, at the relevant time, regarded the situation as being one where he was a casual pilot on the days other than "*office days*". The invoices (exhibit C17) simply list the "*office days*" and the flying trips without any attempt to suggest it was other than as I have found.

70 The authorities provide some guidance as to whether a particular relationship is one of a "*casual employee*" or not. It is always a question of fact and no two cases will be the same. The essence of casual work is that it is irregular, uncertain and arranged on an informal basis between the two parties. In this case an objective examination of exhibit C17 reveals that the flying duties undertaken by Wilkes during the relevant period can be properly regarded as regular.

71 I would also adopt, with respect, the observations of Sharkey P in ***Serco (Australia) Pty Ltd v Moreno* (1996) 76 WAIG 937 at 939**, as follows—

> *"The concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration."*

72 It seems to me that the Claimant has, after the event, ascertained that if he had become a casual pilot at that time his remuneration under the award would have been greater. The evidence adduced in this hearing does not support a finding that the Claimant was hired as a casual pilot by the Respondent.

73 For all of the above reasons this claim must be dismissed and I order accordingly.

74 As indicated to the parties, these reasons for decision will be posted to each party by the Clerk of the Court. There is liberty to apply on the question of costs if costs cannot be agreed by the parties within the next 28 days.

I. G. BROWN
Industrial Magistrate

LONG SERVICE LEAVE—Appeals Committee—Government Wages Employees—

2003 WAIRC 09598

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HELEN GODFREY, APPLICANT
	v.
	NANNUP DISTRICT HOSPITAL (WARREN BLACKWOOD HEALTH SERVICE), RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 8 OCTOBER 2003
FILE NO.	BOR 1 OF 2003
CITATION NO.	2003 WAIRC 09598

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 23rd June 2003 the applicant lodged a claim in the Western Australian Industrial Relations Commission pursuant to the provisions of s.11(a) of the Long Service Leave Conditions State Government Wages Employees General Orders;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 15th September 2003;

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

THAT the application be and is hereby discontinued by leave.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2003 WAIRC 09902

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA JANE AUBURN, APPLICANT
	v.
	CALINGIRI SPORTS CLUB INC, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 31 OCTOBER 2003
FILE NO.	APPLICATION 448 OF 2003
CITATION NO.	2003 WAIRC 09902

Result	Application alleging unfair dismissal and outstanding contractual benefits dismissed
Representation	
Applicant	Mr B Stokes (as Agent)
Respondent	Mr D Johnson (as Agent)

Reasons for Decision

1 The applicant claims that she was harshly, oppressively or unfairly dismissed from her employment with the respondent, and she seeks compensation. She also claims denied contractual benefits on the basis that she was paid as a casual when she alleges that she was entitled to be paid as a permanent employee. She seeks pay in lieu of notice and payment for annual leave.

2 The applicant was employed by the respondent in a number of different capacities, some concurrently, from around March 2000 until approximately 16 March 2003.

3 As I understand the applicant's case, immediately prior to her taking a period of leave in February/March 2003, she was working as a cleaner, cleaning the respondent's premises for approximately 5 hours each Monday morning, and was performing bar attendant work each Saturday, 11.00am to 5.00pm, Sunday from 11.00am to 1.00-1.30pm and on alternate Tuesdays, from 4.00pm until 9.30-10.00pm. She returned from leave and some time soon thereafter, but before 16 March

2003, one of the respondent's joint managers, Charlie Hammond, told her that he had been instructed at a meeting of the respondent's Committee to sack her from bar work. At a later time, he also told her that the reason for her dismissal was that the respondent's president, Richard Britnall Smith, made derogatory comments about her appearance and age. Mr Hammond also gave evidence that other members of the Committee had said that she was "dipsy" and that there were problems associated with her previous involvement on the local shire council. She was hurt and upset. Because of these comments, she decided that if she was not to be employed on bar work then she did not wish to continue with her employment as a cleaner either. I gather from her evidence that she may have resigned or foreshadowed a resignation, later confirmed the resignation and then some time after that attempted to rescind the resignation. However, she was told by Mr Hammond that it was too late. The applicant says that the termination of her employment constitutes a dismissal.

4 The Commission has heard evidence from the applicant, Charlie Hammond and Shelley Ann Brown, the respondent's joint managers from September 2002, Richard Britnall Smith, the respondent's president, and Rex Sampson Thorpe, a committee member.

5 I will deal with questions of credibility as they arise in the course of dealing with aspects of the evidence.

6 Notwithstanding the applicant's evidence regarding her working times referred to earlier, having heard all of the evidence and seen her time sheets (Exhibit A1) I make the following findings as to those working arrangements.

7 The applicant commenced working with the respondent in March 2000 undertaking cleaning work of the sports club premises on Monday of each week for approximately 5 hours in the early morning. She continued this week until her resignation around 16 March 2003 except when she took unpaid leave. She was paid as a casual.

8 From some unspecified time until 16 February 2003, the applicant worked as a kitchen hand some Friday evenings when the Club put on meals for members and visitors. In the period July 2002 to 16 February 2003, the time sheets show that she worked 10 such Fridays in total usually for 3-4 hours. On about four of those occasions, the last of which was Friday 16 February 2003, she was given short notice of the requirement to prepare salads and cook the meals. She had prepared for a large number of meals, but only a small number of people attended, so a good deal of her efforts and much food were wasted. She made it clear that she was unhappy with this situation, and advised the manager that she would cease that work immediately, without giving notice. By the time the applicant's employment came to an end in mid March 2003, she had not done this work for a month.

9 The applicant also worked in the kitchen from July 2002 to 31 October 2002 assisting to prepare meals for workers who were engaged in the construction of a wheat silo.

10 In September 2002, when new managers, a couple, Charlie Hammond and Shelley Brown, were appointed to the club they asked the applicant if she was interested in doing bar attendant work and she said that she was. She did a couple of training shifts behind the bar without pay, then worked the following days and times in the bar in addition to her cleaning work—

WEEK ENDING +	DAY OF THE WEEK	TIME OF DAY
8 December 2002	Saturday	11.00am to 5.00pm
15 December 2002	Friday	6.00pm to 8.00pm
	Saturday	8.00am to 5.30pm *
22 December 2002	Saturday	11.00am to 5.00pm
28 December 2002	Saturday	11.00am to 5.00pm
4 January 2003	Tuesday (New Years Eve)	6.30pm to 1.30am
	Wednesday	4.00pm to 8.00pm
	Saturday	11.00am to 5.00pm
11 January 2003		
19 January 2003	Saturday	11.00am to 5.00pm
26 January 2003		
2 February 2003		
8 February 2003		
16 February 2003	Saturday	5.00pm to 10.00pm
23 February 2003	Tuesday	4.00pm to 10.00pm
	Saturday	11.00am to 5.30pm
2 March 2003	Annual Leave	
16 March 2003	Saturday (15th)	5.00pm to 11.00pm
	Sunday (16th)	4.30pm to 9.00pm

* includes some cleaning work

\+ these are the dates according to the timesheets

11 It is clear from the time sheets and other evidence that the bar work that the applicant performed in the period from the beginning of December 2002 until 16 March 2003 was not regular, predictable or continuous nor could it be described as something which the applicant could have expected to have continued indefinitely. For at least the last two and a half months of her employment this work was irregular. Accordingly, I find that this bar work was casual, and Mr Stokes on behalf of the applicant conceded in closing submissions that the bar work was relief work.

12 The evidence also indicates that the bar work was usually done by the two managers and that prior to Christmas 2002, there were a couple of other employees engaged in casual bar work. One such person was Kara Steel who left work around November 2002 to have a baby. In addition, there was Renee who hurt her back around Christmas time and accordingly, was unable to work for a while. It was the evidence of Mr Richard Smith, the president of the respondent, that he had offered Ms Steel the opportunity to return to bar work once she was able after the birth of the baby and it was expected that she would do so.

13 Therefore, at the time of the termination of the applicant's employment she had, at best, a permanent part time job doing cleaning work for approximately five hours per week. In accordance with the qualifications applying to casual and part-timers

in the Club Workers' Award, 1976 (No. 12 of 1976) ("the Award") the applicant could not be described as being a part-timer in that she regularly worked less than 20 ordinary hours per fortnight. She did extra cleaning work from time to time but not on a regular basis.

14 While the applicant was casual in all aspects of her work for the purposes of the Award, in accordance with *Serco (Australia) Pty Limited and John Joseph Moreno* (FB) (1996) 76 WAIG 937, in respect of her cleaning work, this is most likely not to have been casual due to its regularity and continuity.

15 The evidence for the applicant as to how her employment came to an end is, as Mr Johnston for the respondent described, confusing and confused. According to the applicant she was advised by Mr Hammond, the club manager, at some time either before or after she went on leave in late February/early March that he was instructed by the respondent's Committee to dismiss her from the bar work. She cannot recall the sequence of events around this time and says that she has a condition whereby she blocks out from her memory unpleasant thoughts and experiences. She says, though, that Mr Hammond told her that during the course of a Committee meeting where Mr Hammond had been instructed to dismiss her from bar work, the president, Mr Smith had said words to the effect that the applicant was ugly and over the hill. She says that she was offended, shocked and hurt by these comments and decided that if she was not good enough to work behind the bar then she was not good enough to do cleaning work. Her evidence as to what she actually told Mr Hammond at this point is confused and I am unsure from that evidence as to whether she informed him that day that she resigned from cleaning work or whether she told him that she felt inclined to do so, and whether she then confirmed her intention to resign the next day or at some other time. She also says that she approached Mr Hammond some time soon after, although it is not clear what soon after might mean, to seek to regain that work and rescind her resignation. She says Mr Hammond either told her that the resignation had been accepted by the Committee or that the Committee would not accept her back. From Mr Hammond's evidence it is not clear on what basis Mr Hammond might have told her that the decision to accept her resignation would not be overturned other than perhaps from a discussion he might have had with the club secretary, Jacqui Crowther.

16 Mr Hammond's evidence was less reliable than and as confused as that of the applicant. Apart from being unable to recollect matters and the sequence of events, Mr Hammond's evidence was vague and confused. He gave evidence of having said certain things at Committee meetings which he described as being said by him because that was what the Committee wanted him to say and what they told them to say. There was no evidence to support Mr Hammond's assertion that anybody told him to say any particular thing. I note that he was easily led in cross examination to agreeing with propositions which he later appeared to reject. Strangely, the only thing Mr Hammond consistently recalled during his evidence, and did so word for word, was that Mr Smith had commented in respect of the applicant during the course of the meeting of the Committee that "you wouldn't want to see that behind the bar – just look at it, and besides she is over the hill". However, those are not the words Mr Hammond attributed to Mr Smith when he wrote a statement for the applicant some two weeks after her termination of employment (Exhibit A7). Further, in cross examination he said that the words he used were not Mr Smith's words, but that that was what he believed they meant. Mr Hammond also gave evidence which leads me to believe that he misinterpreted other information. For example, his version is that he was instructed to sack the applicant from bar work. Yet other evidence demonstrates the applicant's employment behind the bar was casual and that the Committee decided to utilise another casual employee in preference to the applicant, when that person was available. The difference is subtle but significant.

17 Shelley Brown's evidence was not entirely reliable as to sequences of events and what she was told. She readily volunteered on a number of occasions that she was not good with dates and times. Ms Brown gave evidence of Mr Hammond having reported the comments allegedly made at the Committee meeting to her, some hours after the meeting. The words recited by Mr Hammond and Ms Brown in their evidence were, word for word, the same. Given that a) Mr Hammond used different words in his statement a fortnight later, and used other words in evidence, and b) Ms Brown did not attend the meeting and heard only from Mr Hammond, I do not consider that merely because Mr Hammond and Ms Brown have used the same words in their evidence in describing what Mr Smith is alleged to have said, that those words were actually spoken by Mr Smith. On the contrary, their use of the same words in these circumstances is less than convincing.

18 Accordingly, I find that notwithstanding that Mr Hammond says that he reported to Ms Brown fairly soon after the meeting the words that he says that Mr Smith used, I am not satisfied that he gave or was able to give a reliable recitation of what Mr Smith has said, if Mr Smith said anything at all to that effect.

19 I also take into account that Mr Smith has given evidence and he has denied making any such comments as have been attributed to him by Mr Hammond. Mr Smith's evidence was unshaken in cross examination. Where the evidence of Mr Hammond and Ms Brown conflicts with that of Mr Smith, because of the considerable inconsistencies in the former evidence, and the clear inability of the applicant's witnesses to give reliable accounts of what occurred, I am left with little alternative but to accept the evidence of Mr Smith. I do accept Mr Smith's evidence as credible. That is not to say that I find that Mr Hammond was dishonest in his evidence but he is clearly not an educated or articulate man and his thought processes conveyed during the course of his evidence were confused. His evidence is of little assistance in that regard. Where Ms Brown's evidence as to the requirements for bar staff conflicts with the evidence of Mr Smith, I have no hesitation in accepting Mr Smith's evidence as being reliable.

20 Mr Smith has given evidence that on 25 February 2003 the Committee decided to not continue with the applicant undertaking bar work on the basis that Ms Steel had previously performed that work, that Mr Smith had undertaken to Ms Steel that she could resume bar work as soon as she wished to after the birth of her child and that he understood that she was now available to return to work. As the applicant's employment in bar work was relief work only, there seemed to be no impediment to her ceasing that work, and the arrangement was conveyed to the manager that Ms Steel was to resume that work.

21 Both the applicant and Mr Smith gave evidence that the applicant approached him a number of days after the termination of her employment wanting to talk to him about the termination but she did not ask for the job back nor did he offer it.

22 The other evidence called by the respondent was from Mr Rex Thorpe, a member of the Committee. During the course of the meeting in which Mr Smith allegedly made derogatory comments about the applicant, Mr Thorpe was alleged by Mr Hammond to have said that she was "dipsy". The applicant's representative chose not to cross examine Mr Thorpe at all, and did not put this to him. Mr Thorpe's evidence was of little assistance either way as he could not recall either the meeting of 25 February 2003 at which Mr Smith said that a direction was given to the club managers as to Ms Steel's return and that the applicant would not be doing further bar work, or the meeting of 12 March 2003 where Mr Smith says the report was given to the meeting that the applicant had resigned from her cleaning work and was undertaking her last week of work.

23 In all of the circumstances, I am bound to find and do find that the applicant's employment as a bar worker was temporary and casual. Her employment as a bar worker was discontinued by the respondent when the circumstances under which she had worked intermittedly in the bar over a period of three months, changed and with the impending return of Ms Steel, the number of available bar staff was at an acceptable level. The applicant was not dismissed from this work, as each shift she worked behind the bar was pursuant to a separate contract of employment. She was removed from the roster for casual work.

24 Her employment as a cleaner was at best permanent part-time. This contract of employment came to an end when she was told by Mr Hammond his version of the comments allegedly made at the Committee meeting and she resigned. This resignation was conveyed to the club secretary by Mr Hammond and was accepted. The best I can make of the applicant's evidence of her confirming or attempting to rescind her resignation was that she did confirm that resignation the day after she had verbally tendered it to Mr Hammond. Therefore she had time to consider the matter and could not be said to have resigned in the heat of the moment. It was a voluntary resignation, albeit apparently based on inaccurate or erroneous information supplied by the manager. Some time after, she sought to rescind her resignation and Mr Hammond indicated to her, apparently without discussing the matter with the Committee, that it would not be acceptable for her to return to work.

25 In all of the circumstances then, I find based on the evidence before me that there was no dismissal of the applicant. She resigned based on information given to her by Mr Hammond which I am unable to conclude was an accurate reflection of what was said at a meeting of the Committee. Accordingly, I am unable to find that her resignation from a cleaning job came as a result of some conduct on the part of the employer or was other than a bona fide resignation. (See *J L v Haydar Family Restaurants t/a McDonalds* (FB) (2003) 83 WAIG 3303 at 3309). Therefore, there was no dismissal and no unfair dismissal.

26 As to the claim of denied contractual benefits, there appears to be no dispute between the parties that the Award applied. The benefits the applicant seeks to enforce are pay in lieu of notice and annual leave. As there was no dismissal on the part of the employer, no claim arises for pay in lieu of notice, whether under the Award or otherwise. There was no evidence of annual leave entitlements arising other than through the Award. Section 29(1)(b)(ii) of the Industrial Relations Act 1979 provides for employees to pursue claims for benefits which arise from their contracts of employment, not from award benefits. This claim would appear to arise from an award benefit. Accordingly, the Commission has no jurisdiction to deal with it.

2003 WAIRC 09848

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA JANE AUBURN, APPLICANT
	v.
	DICK SMITH, PRESIDENT OF THE CALINGIRI SPORTS CLUB, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	TUESDAY, 28 OCTOBER 2003
FILE NO.	APPLICATION 448 OF 2003
CITATION NO.	2003 WAIRC 09848

Result	Name of Respondent Amended

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS at the commencement of the hearing on Thursday, the 23rd day of October 2003, the Applicant sought to amend the name of the Respondent to the application; and

WHEREAS the parties agreed that the name of the Respondent be amended to "the Calingiri Sports Club Inc.";

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 the Calingiri Sports Club Inc.

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

2003 WAIRC 09900

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA JANE AUBURN, APPLICANT
	v.
	CALINGIRI SPORTS CLUB INC, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	FRIDAY, 31 OCTOBER 2003
FILE NO.	APPLICATION 448 OF 2003
CITATION NO.	2003 WAIRC 09900

Result	Application alleging unfair dismissal and outstanding contractual benefits dismissed

Order

HAVING heard Mr B Stokes (as Agent) on behalf of the applicant and Mr D Johnson (as Agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

2003 WAIRC 09810

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COURTNEY BAIRD, APPLICANT
	v.
	WESTCO JEANS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 24 OCTOBER 2003
FILE NO.	APPLICATION 1188 OF 2003
CITATION NO.	2003 WAIRC 09810

Catchwords	Termination of employment – Failure to pursue claim – Dismissed – *Industrial Relations Act, 1979 s.27*
Result	Dismissed
Representation	
Applicant	No appearance for the Applicant
Respondent	No appearance for the Respondent

Reasons for Decision
(Extempore)

1 Under section 27 of the *Industrial Relations Act,* 1979 (the Act) except as otherwise provided, the Commission may in relation to any matter before it at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter if it is satisfied that the matter is trivial or it is not in the public interest, or for any other reason the matter or any part thereof should be dismissed or the hearing discontinued. Under section 27(1)(d) the Commission is empowered to proceed to hear and determine the matter or any part of it in the absence of any party who has been duly summoned to appear or duly served with a notice of proceedings.

2 The background to this matter is that on 1st August 2003, Courtney Baird (the Applicant) applied to the Commission for an order pursuant to s.23(A) of the Act on the grounds that she had been harshly, oppressively and unfairly dismissed from her employment with Westco Jeans Pty Ltd (the Respondent).

3 On 26th August 2003 the Registrar wrote to the Applicant to advise her that the application could not proceed until she lodged a Declaration of Service. She was told that if she wished to proceed she needed to send a completed Declaration of Service, and a copy of a Form 2 was enclosed.

4 The Applicant was given the option that if she no longer wished to continue, she should send a Notice of Discontinuance. A copy of the appropriate form was also enclosed.

5 The Applicant was told that it was important that she respond to the request to file the appropriate forms and at least to complete the Declaration of Service, otherwise the application would be listed for hearing and it may be dismissed.

6 The file was allocated to the chambers of the Commission as constituted on 11th September 2003. My Chambers had cause to write to the Applicant on 16th September 2003. The Applicant was told the matter had been allocated for hearing and that the records show there had been no Declaration of Service filed. The Applicant was told the Commission assumed that the application had not been served upon the Respondent.

7 The Applicant was told that if she did not file a Declaration of Service by 24th September 2003 that the application cannot proceed and may be listed for her to show cause why it should not be dismissed.

8 There was no response from the Applicant and on 6th October 2003, the Applicant was sent a Notice of Hearing that the Commission would sit on 21st October 2003 at 10.30 am to hear show cause why the application should not be dismissed for want of prosecution.

9 At the commencement of the hearing the Applicant's name was called in the precincts of the court and there was no response. There was no appearance at the hearing.

10 The Commission is not to proceed and hear and determine matters in the absence of a party unless there are good reasons to do so. This is a case where it is clearly open to the Commission to properly conclude that the Applicant has no interest in pursuing the claim. In fact, the Applicant has done nothing at all to pursue it since it was filed on 1st August 2003. There have been three separate communications in writing from the Commission to the Applicant to ascertain from the Applicant whether she wished to pursue the claim and there has been no response.

11 The Commission is entitled to conclude there has been proper service of the Notice of Hearing, the requirement being that the Notice of Hearing be sent by prepaid post which the file indicates was the case in this matter.

12 I am satisfied that this Applicant has no intention of pursuing the application. It is not in the public interest that the application be allowed to proceed past this date. Any further proceedings are clearly not desirable in the public interest and for the reasons that I have outlined, the matter will be dismissed for want of prosecution.

2003 WAIRC 09811

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COURTNEY BAIRD, APPLICANT
	v.
	WESTCO JEANS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 24 OCTOBER 2003
FILE NO.	APPLICATION 1188 OF 2003
CITATION NO.	2003 WAIRC 09811

Result Dismissed

Order

HAVING no appearance on behalf of the Applicant or the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application be, and is hereby dismissed.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09760

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE DIANE BUTLER & GLEN ROBERT BUTLER, APPLICANTS *v.* NELSON MARINE T/AS DUNSBOROUGH RAIL CARRIAGES & FARM COTTAGES, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 2 JULY 2003
FILE NO/S.	APPLICATION 713 OF 2003 & APPLICATION 714 OF 2003
CITATION NO.	2003 WAIRC 09760

Catchwords	Industrial law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(2), s 29(3).
Result	Order issued
Representation	
Applicant	Ms M Butler
Respondent	Mr J Nelson

Reasons for Decision

(Ex Tempore)

1 The substantive applications in this matter are brought by Glen and Michelle Butler, against the respondent, Nelson Marine trading as Dunsborough Rail Carriages and Farm Cottages. Both applications allege that the applicants, as managers of the respondent property, were harshly, oppressively and unfairly dismissed on or about 12 March 2003. From the particulars of claim, it is said by the applicants that they were employed on a permanent full-time basis, earning approximately $1,135.00 per month, paid weekly, with the duties being to manage the property, which the Commission understands is a farm stay accommodation facility.

2 The Commission has listed both applications of its own motion, by reason of the fact that both applications were filed outside of the 28 day time limit, as required by s 29(2) of the *Industrial Relations Act 1979* (WA) ("the Act"). It is the case, however, that pursuant to s 29(3) of the Act, the Commission has discretion to extend the time within which such applications may be brought, to accept the referrals out of time in order that the matters may be heard and determined at a subsequent date. It is the case that both applications were initially filed on 9 May 2003, according to the stamp of the registry of this Commission. Subsequently, it seems, on 19 May 2003 there was a further notice of application filed to correct the name of the respondent employer. For present purposes, the Commission takes the date of 9 May 2003 as the effective date of filing of both applications.

3 Evidence was adduced in these matters. The evidence on behalf of the applicants was adduced from Ms Butler, and her husband, Mr Butler, as manager of the respondent business. She testified that in or about July of 2002, both she and her husband entered into a written contract of employment with the respondent employer, as evidenced by and contained in a document tendered as exhibit R2, headed "Contract for employment." That contract document contains some six clauses, and there was no issue taken that that contract was validly entered into and executed by the respondent and the applicants respectively. The term of the contract, in essence, was for two years, from 1 July 2002. Clause three specified the working hours and duties of the applicants. Clause four specified the compensation arrangements. Clause five dealt with annual leave entitlements. And finally, clause six dealt with a notice of termination provision such that either party may terminate the contract by the giving of two weeks written notice to the other.

4 Whilst the employment contract purported to be, at clause two, for a term of two years commencing 1 July 2002, in my opinion, quite plainly, it was not a fixed term contract as a matter of law, rather it was a contract for a specified period of time, terminable on notice by either party by the giving of two weeks written notice, in accordance with its terms.

5 The applicants, through Ms Butler, testified that both she and her husband subsequently commenced employment with the respondent. She testified that they have two young children, aged four and one half and two years. The applicants' evidence, through Ms Butler, was that both she and her husband worked in managing the property and at no stage during the course of the employment, up until the time that it came to end, which was on 12 March 2003, was either she or her husband expressly warned that her employment, or her husband's employment for that matter, may come to an end for poor performance.

6 Nonetheless, it appears, on the evidence, that towards early March, it seems, there were some discussions between the respondent and the applicants in relation to their ongoing tenure. As the Commission understands the evidence, the issue raised was Department of Immigration requirements imposed upon the Nelsons, as the proprietors of the respondent business, it being common ground that they were conducting the business for the purposes of obtaining permanent residency in Australia. Subsequent to those discussions, it would appear that the parties, by way of a written instrument, tendered as exhibit R1, agreed for the employment of the applicants to come to an end. The terms of exhibit R1 are in some detail. Exhibit R1 records the fact that "the parties agree to the terms of termination as follows:", and thereafter are set out some five clauses dealing with accommodation, severance payments and other matters.

7 The applicants' evidence, through Ms Butler, was that as a consequence of events that transpired at about that time, they considered that they really ought to leave the employ of the employer, and as a consequence of that, entered into the negotiations which subsequently led to the conclusion of what is described as the "employee termination agreement". The Commission should add that prior to this time, as a result of discussions, there was also a proposal for, in effect, a reduction in the applicants' working hours in exchange for which they would be provided accommodation and lodging at no cost to them, as a result of what was described as changes imposed by the Department of Immigration on the respondent, for permanent residency purposes.

8 Ms Butler was cross-examined about her evidence as to these events, and to her credit, told the Commission, under oath, and confirmed the terms of exhibit R1, that that was the agreement that they reached at the time of departing the employment with the respondent. Thereafter it seems, in fact shortly thereafter, it seems that the cheques made payable to the applicants pursuant to the terms of exhibit R1, were negotiated for the purposes of obtaining alternative accommodation, according to Ms Butler, and for other matters.

9 In terms of the delay in bringing these proceedings, Ms Butler testified that on or about 21 March 2003 she contacted Legal Aid and obtained an appointment some two weeks later, by telephone, for 5 April 2003. Furthermore, the applicants' testified, again through Ms Butler, that she also made contact with various government agencies, it seems ultimately leading to receipt of the appropriate application forms to commence these proceedings some time in late April, with them both being executed on or about 20 April 2003. I note from the record that the notices of application, according to the declaration of service filed on 13 June, were served by personal service, on 29 May 2003, again, some time after 9 May, and indeed 19 May 2003, that being the date of the second application to correct the name of the employer.

10 Ms Butler also testified that in this time both she and her husband were obtaining alternative accommodation, seeking to obtain Centrelink benefits and also, in her case at least, as the Commission was informed, seeking alternative employment. In short, Ms Butler considers that the dismissals were unfair because at no time prior to 12 March 2003, were either her or her husband informed that their employment was at risk.

11 On behalf of the respondent, Mr Nelson testified. Mr Nelson informed the Commission that he along with his wife, are the proprietors of the respondent's business, and it seems also now are the managers of it. He referred to the contract of employment document tendered as exhibit R2, and furthermore the employee termination agreement, tendered as exhibit R1. It was his evidence that as both he and his wife are seeking to satisfy immigration requirements for permanent residency in this country, there were two obligations imposed upon them in relation to their business. Firstly that they engage two full-time or full-time equivalent employees for a period of two consecutive years. And secondly that that business obtain a turnover of at least $200,000.00 per annum, again for two consecutive years. Self-evidently, the terms of the contract of employment in exhibit R2 were no doubt drawn with those obligations in mind.

12 The Commission was informed through Mr Nelson, that some time after the applicants commenced employment, it became clear to him that the applicants were not performing their duties as they ought to have been, in terms of gardens not being properly attended to, rubbish not being properly cleared and complaints were received from customers. For these reasons, no doubt, and also it seems for reasons in connection with possible changes to immigration requirements, there were discussions held between Mr Nelson and the applicants in relation to the applicants' ongoing tenure of employment. It is common ground along with the evidence of Ms Butler, that there was an initial proposal to reduce the applicants' hours of work to approximately 15 per week in exchange for the provision of free accommodation and utilities. Mr Nelson, and indeed, to an extent, corroborated by Ms Butler, gave evidence that that was initially agreed, but it seems, for whatever reason not entirely clear on the evidence, that some short time later that arrangement was no longer suitable to the applicants.

13 Mr Nelson then testified that subsequent to that arrangement not being successful, it seems, the parties then negotiated the terms of exhibit R1, with the respondent saying in evidence that what it sought to do was to bring the arrangement to an end amicably and fairly to avoid, no doubt, the litigation which they currently find themselves in. It was Mr Nelson's evidence also, that in his view, the applicants bargained hard for what they obtained. And in his opinion, the value of the final separation package was in the order about $5,000.00 or thereabouts.

14 I will now turn to consideration of the relevant factors as a matter of law, in relation to applications of this kind. The Commission, as presently constituted, in the matter of *Azzalini v Perth In-flight Catering* (2002) 82 WAIG 2992 at para 28 set out what it considered to be relevant factors in determining whether an application ought to be referred out of time for the purposes of s 29(3) of the Act. In that decision I set out what I considered to be five relevant factors, and they are as follows. Firstly, the length of the delay, secondly the explanation for the delay, thirdly steps taken, if any, by an applicant to evidence non-acceptance of the termination of employment and that it would be contested, fourthly the merits of the substantive application in the sense that there is a sufficiently arguable case. Finally, whether there would be any prejudice to the respondent over and above that which would normally be occasioned in proceedings such as these.

15 I apply those factors for present purposes and conclude as follows. In terms of the length of the delay, in my opinion the delay in filing the application is a substantial delay and is a matter which is not neutral in relation to the applicants' position in these proceedings. Secondly, in relation to the reasons for the delay, I have already referred to the applicants' testimony that it took some time to consult Legal Aid and various government agencies, culminating in these proceedings being filed when they were. Whilst I accept that there may have been some time taken to obtain legal advice and making other arrangements, I am concerned, if it is the case, that the applicant was not given advice as to the commencement of these proceedings within 28 days. As for any legal adviser, the provision of advice on time limitations is, in my opinion, a critical and important factor.

16 In relation to the merits of the substantive proceedings, in my opinion the applicants have major difficulties. An essential element of the applicants' claims in this aspect of the Commission's jurisdiction is that they must establish, on the balance of probabilities, that they were both dismissed as a matter of fact and law, in order to attract the Commission's jurisdiction. In this case, in my view and having regard to all of the evidence in its totality, I accept that exhibit R1 is indeed an employee termination agreement. In my opinion, on its terms they reflect a degree of negotiation between the parties which has been incorporated into five substantive clauses by way of a termination package. I also accept the evidence of Mr Nelson, to an extent corroborated by the applicants through Ms Butler that this document resulted from a degree of negotiation between the parties. And I also am satisfied, and I find, that by this stage the applicants wanted to leave the respondent's employ and the premises.

17 In my opinion, as a matter of law, exhibit R1 reflects a termination of the employment by agreement, which in my view, could never constitute a dismissal for the purposes of attracting the Commission's jurisdiction. This factor is, in my opinion, an overwhelming factor against the applicants in terms of accepting their application out of time, for the purposes of its prosecution. I note also in *Azzalini* I reached the same conclusion, albeit in that case there was a resignation, again which did not constitute termination at the initiative of the employer, or a dismissal for the purposes of attracting jurisdiction.

18 As to the question of prejudice, I accept there might be some issues in relation to there being no evidence that the applicants were going to contest the dismissal within the 28 days following the termination of the employment. However, I do not regard, in the circumstances, that factor being overly strong.

19 For all of these reasons, whilst I consider what has happened between the parties to be most unfortunate, and that the arrangement did not work out between them, I am simply not satisfied that there is, before the Commission, evidence and material which would move the Commission for an order to exercise its discretion to accept the referral of the unfair dismissal claims outside of the 28 day time limit. For those reasons the unfair dismissal applications will be dismissed for want of jurisdiction.

2003 WAIRC 08642

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE DIANE BUTLER & GLEN ROBERT BUTLER, APPLICANTS
	v.
	NELSON MARINE T/AS DUNSBOROUGH RAIL CARRIAGES & FARM COTTAGES, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 3 JULY 2003
FILE NO/S.	APPLICATION 713 OF 2003 & APPLICATION 714 OF 2003
CITATION NO.	2003 WAIRC 08642

Result	Applications dismissed for want of jurisdiction
Representation	
Applicants	Ms M Butler
Respondent	Mr J Nelson

Order

HAVING heard Ms M Butler on behalf of the applicants and Mr J Nelson on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the applications be and are hereby dismissed for want of jurisdiction.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09727

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMARAL AMO PEREIRA, APPLICANT
	v.
	MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
PARTIES	GREGORY MOLGA, APPLICANT
	v.
	MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
PARTIES	FRANCESCANTONIO RECHICHI, APPLICANT
	v.
	MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT

PARTIES	RITA MARGARET CHONG, APPLICANT *v.* MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
PARTIES	PRANEE PAWABOOT, APPLICANT *v.* MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 17 OCTOBER 2003
FILE NOS	APPLICATIONS 983 OF 2003, 984 OF 2003, 985 OF 2003, 986 OF 2003 AND 987 OF 2003
CITATION NO.	2003 WAIRC 09727

Catchwords	Contractual benefits – Entitlements under contract of employment – Commission only contracts – Respondent fails to attend – Application heard in absence of Respondent – Proceedings before Real Estate and Business Agents Authority distinguished – Claims successful – Orders for payment – *Industrial Relations Act 1979 s.27(1)(d); s.29(1)(b)(ii) – Real Estate and Business Agents Act 1978 s.93*
Result	Compensation awarded
Representation	
Applicant	Each Applicant appeared on their own behalf
Respondent	No appearance on behalf of the Respondent

Reasons for Decision

(Extempore)

1 Five different applications all made against the same respondent, Tangibar Pty Ltd trading as Glenn Low First National Real Estate currently Glenn Low Properties Pty Ltd (the Respondent). Each of the Applicants - Mr Gregory Molga, Ms Pranee Pawaboot, Mr Amaral Amo Pereira, Ms Rita Chong and Mr Francescantonio Rechichi filed applications, numbers 984, 987, 983, 986 and 985 of 2003 respectively.

2 The Commission has proceeded to hear this matter pursuant to s.27(1)(d) of the *Industrial Relations Act, 1979* (the Act) where power is given to proceed and determine a matter or any part thereof in the absence of any party thereto who has duly been served with a notice of the proceedings. The Commission has published verbally the reasons for so proceeding and I now incorporate that part of the transcript of proceedings into these Reasons for Decision.

3 The Commissioner heard first from Mr Francescantonio Rechichi. His evidence was that he commenced working for the Respondent in September 2000; it was trading under licence of at that time as trustee for the Tangibar Unit Trust and traded as Glenn Low First National Real Estate. That name later changed to operate under the name of Glenn Low Properties Limited. I note Mr Rechichi has not provided any information relating to the registration of those various names but I make nothing further of it.

4 Mr Rechichi was employed as General Manager and also as a sales person. As General Manager he was to be paid $40,000.00 per annum as a retainer. That amount was later reduced by agreement to $20,000.00 and later still the Respondent tried to reduce the retainer to zero. This was not agreed and gives rise to a claim of $1,230.00 for salary which was unpaid at the time of termination. Mr Rechichi also says that he was entitled to sell property and when he did he was entitled to receive commission of 60% of the gross company commission for residential property sales listed solely from his own efforts. Various exhibits were presented to support the contention (Exhibits R1, R2, R3 R4).

5 When the employment relationship came to an end Mr Rechichi was owed $28,753.85 for commissions not paid. In January and February 2003 Mr Rechichi claims it became clear that the Respondent was experiencing financial difficulties. There was an internal memo (Exhibit R5) which gave an indication that Mr Low, the Principal, was going to have less involvement with the day to day operation of the Respondent. Mr Rechichi was told that he was to keep that information quiet.

6 Mr Rechichi became aware of that from an email (Exhibit R5(5)). On 19th February 2003 he was so concerned he wrote to Mr Low in an attempt to confirm the facts but he received no response.

7 The normal way of payments were advised was that a commission payment slip would be created by the Respondent. An example was produced (Exhibit R3). If there is any doubt about the commission to which Mr Rechichi was entitled, it is clear from those documents that there is entitlement of 60% of the gross commission earnings.

8 It was well known from other sources that there were financial problems at the Respondent. There was mention made that there was an investigation by the Real Estate and Business Agents Authority (REBA) but the staff were given to believe that there would be no problems arising from that enquiry. The staff then became aware that there was an attempt made to sell the business but that sale fell through. Deterioration in the financial situation continued. Commission payments between March and April 2003 were delayed. When Mr Rechichi made approaches about the delay there were many excuses about the failure to pay. He was unable to find out much from the Directors as they ceased to appear at weekly management meetings. Early in April Mr Rechichi, and he says the other staff, became aware that Hall Chadwick, a firm of accountants, had been appointed by the REBA to administer the Respondent's Trust Account.

9 There were various proceedings involving REBA which are not a point for this case other than they show in the affidavits made by the various applicants who appear in these proceedings that they had attested that they were employees of the Respondent. More particularly insofar as this case is concerned there is a memo to all sales persons from the Prinicipal, Mr Glenn Low relating to commission payments. It describes Mr Low's opinion of the REBA activities, however importantly for this case the final sentence of the memo records as follows—

"You will all be paid at the earliest opportunity. Please do not fear. May God bless you and every one of you."

(Exhibit R5(7))

10 This can be taken as a clear indication that there were moneys owed by the Respondent to the Applicant.

11 There are proceedings on foot involving REBA relating to fidelity funds. I do not need to comment upon those. The preceding recitation is a fair chronology of relevant events in this matter.

12 Each of the claims made by Mr Rechichi is supported by documentation which is attached to Exhibit R5. There are 14 different parts to that exhibit including two press clippings which indicate a cancellation of the licence of the Respondent and a newspaper report that the REBA had found the Respondent guilty of misdealing with its trust accounts and for breaching trust and accounting requirements for which certain fines were awarded. It should be noted that the Commission accepted the exhibit as proof that there was a newspaper report, not that the Respondent was guilty of misdealing with trust accounts or had been fined for breaching trust and accounting requirements.

13 Mr Rechichi produced a summary of the amounts of commission he says are owed to him in relation to certain properties sold by him which were settled. There was one further property settled so that at the end of the day Mr Rechichi says that he was owed $28,753.85 nett from which a payment of $1,152.00 to him by Hall Chadwick should be deducted. The gross figure is $32,920.12.

14 Each of the other Applicants has presented evidence to support their claim. Ms Rita Chong produced three settlement instruction sheets which she says described the amount of money owing to her (Exhibit C1). She also produced a facsimile transmission relating to a payment made by Hall Chadwick and commission payment slips which demonstrate that she was to receive a commission on the basis of 60% (Exhibit C3). Also produced was a document she prepared for Hall Chadwick which was used to establish the claims she made against the Respondent. She also has again, in support of her contention, produced a budget which shows the detail of her claim. In all, she says that she is owed $14,035.11 minus superannuation leaving $6,327.00.

15 I now deal with the application by Ms Pranee Pawaboot who attested that her situation was similar to that described by Mr Rechichi. She demonstrated that she had a contractual entitlement for 60% commission. A commission payment slip was produced as evidence of her claim (Exhibit PA1). Ms Pawaboot submitted a schedule of monies she says is owing to her. This schedule showed a gross amount of $6,294.53.

16 Mr Pereira gave evidence to support his contentions. He had been an employee of the Respondent. He attested to the accuracy of Mr Rechichi's summary of events. There is evidence before the Commission of his combined efforts with his colleagues as employees of the Respondent to try and obtain redress from the situation in which they found themselves. Mr Pereira also provided an affidavit deposed by him on the 22nd April 2003 in proceedings relating to a Chamber Summons in support that the appointment of a supervisor under s.93 of the Real Estate and Business Agents Act (*Real Estate and Business Agents Act 1978*).

17 In that affidavit, which I accept is truthful he deposed he was employed by the Respondent and that he was owed commissions of $4,363.78. In further support of his contentions that he was, in fact, an employee, he produced a minute of a meeting held with Mr Elias Mokhtar of Hall Chadwick on the 22nd April 2003 during which the Applicants, here present, and some others attended relating to these issues. He has also produced settlement details relating to sales made by him. He says that the total amount of money owed to him by the Respondent is $5,900.00.

18 Dealing with the final application, the Commission heard from Mr Gregory Molga. He gave evidence under oath that he had been employed by the Respondent. He produced a copy of an employment contract which clearly describes the relationship (Exhibit M4). He also adopted the recitation of the chronology submitted by Mr Rechichi. He also gave proof of unpaid commissions in a schedule (Exhibit M1) in which he claimed commissions on five separate properties. He acknowledged a payment which had been made by Hall Chadwick as part of their activities. He says his total claim before this Commission is $12,900.47.

19 I need to make general findings concerning these applications. First I comment on the onus that the various applicants have to prove their cases. Section 29 of the Act under which these applications are filed has as condition precedent that there be an employment contract. That the Applicant was an employee and that there was an employment contract which in some part has not been met, so that an entitlement exists.

20 Each of the applicants established to the satisfaction of the Commission that they were an employee of the Respondent. Each of them has established to satisfaction of the Commission that they were employed, at least for four of them as sales persons, to be paid commission at 60% of the gross commissions earned. Mr Rechichi enjoyed that type of remuneration plus he was the General Manager in respect of a retainer of $40,000.00. I find that by consent, he agreed to that to be reduced by $20,000.00 to $20,000.00. I accept his evidence that he did not agree to the retainer being reduced to zero, hence his claim for salary unpaid.

21 I have had an opportunity to see the Applicants give their evidence. They were not cross-examined because there was no Respondent present to do so but I am satisfied as I can be that they truthfully told me what had occurred in their dealings with the Respondent. There is no cause for me to make any adverse finding against any of them concerning veracity of the evidence they gave. I find they are all credible witnesses. I find that they have established that they were employed by the respondent. I find that they have established they were contractually entitled to payments as claimed and payments have not been made.

22 The Commission will issue orders that Mr Francescantonio Rechichi be paid the sum of $32,920.12 which includes the salary of $1,230.00; there will be an order made in favour of Ms Rita Chong in the sum of $6327.00; an order made in favour of Mr Amaral Amo Pereira in the sum of $5,900.00; an order made in favour of Ms Pranee Pawaboot of $6,294.53. An order made in the favour of Gregory Molga in the sum of $12,900.47. These orders will issue and will require payment within 7 days.

2003 WAIRC 09755

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMARAL AMO PEREIRA, APPLICANT
	v.
	MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 983 OF 2003
CITATION NO.	2003 WAIRC 09755

Result Compensation awarded

Order

HAVING heard Mr Amaral Amo Periera who appeared on his own on behalf and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Respondent pay Mr Amaral Amo Periera the sum of $5,900.00 within seven days of the date hereof.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09756

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREGORY MOLGA, APPLICANT *v.* MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 984 OF 2003
CITATION NO.	2003 WAIRC 09756

Result Compensation awarded

Order

HAVING heard Mr Gregory Molga who appeared on his own on behalf and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Respondent pay Mr Gregory Molga the sum of $12,900.47 within seven days of the date hereof.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09757

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANCESCANTONIO RECHICHI, APPLICANT *v.* MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 985 OF 2003
CITATION NO.	2003 WAIRC 09757

Result Compensation awarded

Order

HAVING heard Mr Francescantonio Rechichi who appeared on his own on behalf and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Respondent pay Mr Francescantonio Rechichi the sum of $32,920.12 within seven days of the date hereof.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09758

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RITA MARGARET CHONG, APPLICANT
	v.
	MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 986 OF 2003
CITATION NO.	2003 WAIRC 09758

Result Compensation awarded

Order

HAVING heard Ms Rita Margaret Chong who appeared on her own on behalf and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Respondent pay Ms Rita Margaret Chong the sum of $6,327.00 within seven days of the date hereof.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09759

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRANEE PAWABOOT (ILEY), APPLICANT
	v.
	MR GLENN WILLIAM LOW AND MRS JAHNA LOW BOTH DIRECTORS OF TANGIBAR PTY LTD TRADING AS GLENN LOW FIRST NATIONAL REAL ESTATE AND CURRENTLY TRADING AS GLENN LOW PROPERTIES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	APPLICATION 987 OF 2003
CITATION NO.	2003 WAIRC 09759

Result Compensation awarded

Order

HAVING heard Ms Pranee Pawaboot (Iley) who appeared on her own on behalf and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Respondent pay Ms Pranee Pawaboot (Iley) the sum of $6,294.53 within seven days of the date hereof.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09615

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* VICE CHANCELLOR, CURTIN UNIVERSITY OF TECHNOLOGY, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY 10 OCTOBER 2003
FILE NO.	APPLICATION 1468 OF 2002
CITATION NO.	2003 WAIRC 09615

Result	Application alleging unfair dismissal upheld. Application for compensation dismissed.
Representation	
Applicant	Ms C Bowden
Respondent	Mr R Jones

Reasons for Decision

1 Dorothy Albrecht was employed by the Vice Chancellor, Curtin University of Technology ("the respondent") until 1 August 2002 when she was made redundant. As a result of Ms Albrecht being made redundant the Civil Service Association of Western Australia Incorporated ("the applicant") commenced proceedings under s.29(1)(a)(i) of the *Industrial Relations Act 1979* ("the Act") alleging that Ms Albrecht had been harshly, oppressively and unfairly dismissed from her employment. Conciliation proceedings did not resolve the claim and the matter was referred for arbitration.

Jurisdiction

2 The respondent raised a preliminary issue of jurisdiction and submitted that the Western Australian Industrial Relations Commission ("the Commission") did not have jurisdiction to deal with this matter on the basis that Ms Albrecht's contract of employment was governed by a Federal certified agreement and that Ms Albrecht's salary exceeded the prescribed amount for the purposes of s29AA of the Act. The parties were required to file written submissions in relation to the issue of jurisdiction prior to the substantive matter being heard. As the evidence filed on behalf of the respondent and the applicant in relation to jurisdiction was insufficient to determine whether the Commission had jurisdiction to deal with this application, leave was granted to the parties to give further evidence and submissions on jurisdiction when the substantive matter was heard.

Leave to Amend the Claim

3 At the commencement of the hearing the applicant sought leave to amend the claim to include Ms Albrecht being reinstated. Given the short notice of reinstatement being sought as a remedy the respondent opposed the application being amended. I formed the view that in the circumstances it would not be unfair to grant leave to amend the application in the terms sought as it had only been recently brought to the applicant's attention that a position may be suitable for Ms Albrecht, however because of the short notice of the amendment the respondent was given the opportunity to make submissions and give evidence in relation to the issue of Ms Albrecht being reinstated after the hearing finished.

Applicant's Evidence

4 Ms Albrecht was employed by the respondent for a period spanning 11 years. Ms Albrecht commenced employment with the respondent in January 1991 as a Promotions Officer with the Curtin Student Guild. From May 1991 Ms Albrecht held various contract positions including Events Coordinator in the Public Affairs Unit and Development and Marketing Manager, Curtin Business School. From May 1997 to August 2002 Ms Albrecht undertook the role of Director, University Marketing. As part of this role Ms Albrecht was involved in the respondent's corporate marketing strategies and initiatives, she managed the respondent's marketing budgets and she dealt with internal and external marketing directions and advertising. In 2001, as Ms Albrecht was concerned that her employment had been on a contract basis for some time she sought an appointment to a substantive position with the respondent. In 2001 Ms Albrecht was offered two positions with other universities in the eastern states, one of which offered a salary package much higher than what she was earning with the respondent. As the respondent wanted to continue to employ Ms Albrecht she was offered a full-time Level 11 position continuing in the role of Director, University Marketing effective 1 July 2001. In order to retain Ms Albrecht's services she was paid a special allowance taking her remuneration up to Level 12.1 per annum in addition to her substantive salary at Level 11. This special allowance was applied for the period from 1 July 2001 to 30 June 2003 and this arrangement was confirmed in a letter from the respondent to Ms Albrecht on 2 July 2001 (Exhibit A2 document 4). Ms Albrecht stated that even though the respondent offered her less money than the position offered by an eastern states university she was happy to remain working with the respondent as she enjoyed her job and wished to continue in her existing position working in Western Australia. By August 2002 Ms Albrecht had partially completed her Master's degree in International Studies.

5 Exhibit A1 document 2 summarises Ms Albrecht's duties as Director, University Marketing—

> "This position is responsible for developing University-wide marketing policy, together with the development, management and implementation of University marketing strategy, and setting guidelines for management of the Curtin Brand. It provides strategic and creative marketing advice to senior management, Divisions, Schools and Departments, thus informing the University Strategic Planning process."

6 Ms Albrecht gave evidence that she was successful in her marketing role and she received numerous awards, commendations and acknowledgements from her peers.

7 In early 2002 Ms Albrecht took time off to deal with personal issues relating to her marriage and she returned to full-time duties after Easter 2002. On 12 June 2002 Ms Albrecht was asked to attend a meeting with the respondent's Executive General Manager, Mr Peter Walton. At this meeting Mr Walton informed Ms Albrecht that there may be changes to the current organisational structure in Mr Walton's area however, it was not made clear to Ms Albrecht at this meeting that these foreshadowed changes related specifically to Ms Albrecht's position. During this meeting Ms Albrecht was asked what she thought of restructuring the "externally" focussed components of her area into one grouping – that being Alumni, Development, Careers, Marketing and Curtin Public Relations and Publications ("the CPRP"). Ms Albrecht confirmed that Mr Walton told her that there were possibly "too many Directors in the portfolio [and] this would need to be looked at" and she stated that Mr Walton told her that she needed to think about what she wanted to do in the future. She asked Mr Walton if there may no longer be a role for her with the respondent. Mr Walton agreed that this may be the case but at that point things were

still "woolly". Ms Albrecht's notes of this meeting are contained in Exhibit A2 document 5. Subsequent to this meeting Ms Albrecht went home as she was upset and unable to work as she was concerned that she may no longer have a position with the respondent. Ms Albrecht then raised the matter with her supervisor, Ms Jane den Hollander who did not know what she was talking about.

8 On Wednesday 12 June 2002 at 10.30pm Ms Albrecht was sent an email by Mr Walton. This email confirmed that there was to be a restructure within the Office of the Executive General Manager ("OEGM") and that the new structure was to comprise of Alumni, CPRP, Development and Marketing and Ms Valerie Raubenheimer would act as Area Head on an interim basis.

The email stated—

> "The immediate challenge will be for the team to be clear about the desired outcomes and to think through how best to structure the Area within the resources currently available. This will involve all concerned. Hopefully this should be resolved within four to six weeks, at most."

(Exhibit A2 document 6)

9 As Ms Albrecht was concerned about the discussion she had with Mr Walton on 12 June 2002 she sent him an email stating that she welcomed the possibility of the section being restructured and confirming that it was indicated to her at the meeting that her position would more than likely no longer be required. She stated that this was of deep concern to her and she sought clarification as to the time scale for implementing the changes outlined and about her future role with the respondent (Exhibit A2 document 7). Mr Walton responded on 14 June 2002 stating that he was not about to "spring anything" and that his next step was to have further discussions with Ms Albrecht when she was ready. He stated that he wanted her to think about her options and the things that she would like to have happen and then he would see what could be done to provide support for her (Exhibit A2 document 7).

10 Ms Albrecht gave evidence that throughout her employment with the respondent she had been involved in three restructures. These processes were lengthy and numerous discussions took place. Ms Albrecht understood that under the Curtin University of Technology General Staff Certified Agreement 2000-2003 ("the Agreement") covering her employment, there would need to be extensive consultation about any changes which arose from a restructure (Exhibit A1).

11 Ms Albrecht met with Ms Raubenheimer on 21 June 2002 and was told by her that Ms Raubenheimer would be a caretaker head of the new section, that there would be a need to temporarily fill her old position of Director CPRP, and that the respondent would be looking at eventually appointing someone to that position. Ms Albrecht made a file note of this meeting (Exhibit A2 document 10).

12 Ms Albrecht stated that she felt the discussion she had with Mr Walton on 12 June 2002 was premature as she understood that over the ensuing weeks decisions would be made about changes that would be taking place. Even though Ms Albrecht understood there was no urgency about the status of her existing position, nevertheless she was concerned about her ongoing employment. On this basis she sought advice from Mr Steve Lockwood who is employed in the respondent's human resources section. Mr Lockwood informed Ms Albrecht that there was a possibility of her losing her job and that redeployment was not a viable option as she was currently being paid at Level 12 and it was unlikely that another position would be available for her at this level.

13 Subsequent to this meeting Mr Lockwood sent an email to Ms den Hollander, General Manager of Student Staff Services on 3 July 2002 (Exhibit A2 document 11). The contents of the email is as follows, formal parts omitted—

> "Hi Jane,
>
> I met with Dorothy last week and discussed options. She would like to view her redundancy quote, to help her make decisions. Do I have your authorisation to proceed with this or should I go to Peter. Normally we do not provide quotes to staff until their position has been made officially redundan,t (sic) because it leads to an expectation, could cause us problems in the IRC and there are usually EBA provisions that need to be addressed prior to a person being made redundant, ie 10 weeks, etc.
>
> In this case this might not be necessary as placing a H12 would be extremely difficult."

The response from Ms den Hollander dated 3 July 2002 (Exhibit A2 document 11) was as follows, formal parts omitted—

> "I think you should provide her with the information as outlined in the EBA and suggest she see the Union andthen (sic) you need to go to PW as he will have to provide permission r ethe (sic) quote as he has advised he is handling this issue."

14 On Wednesday 17 July 2002 Ms Albrecht met with Mr Walton for approximately ten minutes. Mr Walton informed Ms Albrecht that her position was redundant and he stated that he wanted Ms Albrecht to cease employment with the respondent by Friday 19 July 2002.

15 On Thursday 18 July 2002 Ms Albrecht arrived at work and found a copy of a memorandum on her desk. This memorandum, dated 17 July 2002, was sent to Mr Lockwood from Mr Walton. The contents of this memorandum follows, formal parts omitted—

> "Following the recent restructure within the Office of the Executive General Manager, it has been determined that the position of Director, Marketing is now surplus to the Area's requirements. I met with Dorothy Albrecht today to advise her of the situation. Dorothy is giving consideration to her options with regard to the timing of her departure from Curtin. I understand that Val Raubenheimer, as the acting General Manager, has spoken to Dorothy regarding the timing and form of the announcement of the decision and we await Dorothy's advice before proceeding with a statement for staff.
>
> Accordingly, would you please confer with Dorothy and make appropriate arrangements regarding her redundancy."

(Exhibit A2 document 12)

16 On 19 July 2002 the respondent's Director, Workplace Relations Mr Ron Jones formally advised Ms Albrecht that her position was redundant.

The letter reads as follows, formal parts omitted—

> "In accordance with Section D Clause 50 of the *Curtin University of Technology General Staff Certified Agreement 2000 – 2003*, and further to your recent series of meetings and discussions with Mr Peter Walton, Executive General Manager, I now confirm that the position which you occupy within University Marketing has been declared surplus to requirements with effect from 18 July 2002.
>
> In accordance with subclause 50.4 and 50.5 you will be classified as a redeployee and may be placed in a suitable alternative position. If after a period of ten (10) weeks no such placement is available or there is no likelihood of one being available you will be offered a redundancy payment or the option of continuing your redeployment status for a further forty (40) weeks. You will be given a further period of two weeks at the conclusion of the ten week period to make this decision.

Should you wish to avail yourself of any career counselling process please advise Steve Lockwood.

The University acknowledges that this may be a difficult time for you. Please do not hesitate to contact Steve Lockwood on extension 4385."

(Exhibit A2 document 13).

17 At that point Ms Albrecht understood she had no option but to negotiate a redundancy package with the respondent. Once these negotiations were finalised Ms Albrecht ceased employment with the respondent on 1 August 2002. At termination Ms Albrecht was given a termination payment of approximately $102,629.29 nett part of which included an amount for redundancy pay, in accordance with the Agreement covering Ms Albrecht's contract of employment (Exhibit A2 document 14).

18 Ms Albrecht claims that she was never told why her position was chosen to made redundant in preference to others nor was she given any opportunity to negotiate any alternatives to termination. Ms Albrecht gave evidence that she was only given reasons for the restructure of her department subsequent to initiating this application (Exhibit A2 document 22).

19 After being made redundant Ms Albrecht sought alternative employment. She has undertaken short term contract work in Indonesia and Malaysia and she has 22 weeks left of a current work contract. A summary of her losses is at Exhibit A3.

20 Ms Albrecht stated that her termination has had devastating impact on her personal and professional life. She stated that it is very difficult to obtain employment in her area of expertise at the level that she was employed at by the respondent. She stated that she has experienced financial problems because she no longer has long term ongoing employment. Since being terminated she has suffered depression and has been hospitalised as a result of this, and she is currently on medication for depression.

21 Under cross examination Ms Albrecht confirmed that she was given a redundancy payment based on the Level 12 salary as detailed in the Agreement. Ms Albrecht was asked if she made contact and sought assistance of the applicant's representatives between 12 June 2002 and 1 August 2002. Ms Albrecht stated that in early July 2002 she contacted a union workplace delegate for advice and was informed that nothing could be done until Mr Walton had decided to formally make Ms Albrecht's position redundant. When she was formally made redundant she stated that she contacted the union as she was concerned about the process used in effecting her termination and because she wanted advice about her options.

22 Ms Albrecht is aware that the current position of Director, Public Relations and Marketing is available with the respondent and she believes she has the skills, qualifications and experience to undertake this role. She stated that the advertised position has a job summary and purpose which essentially involves the same work which she undertook in her previous position (Exhibit A2 document 20). The only difference to her previous position is that this new position includes a public relations role. Ms Albrecht stated that she has experience in public relations which she gained whilst she was employed by the respondent and prior to commencing employment with the respondent, and it was her view that this could be a position that she could undertake.

Respondent's evidence

23 The respondent did not lead any evidence in relation to this application.

Jurisdiction

24 The respondent submits that the Commission does not have jurisdiction to deal with this matter as Ms Albrecht was earning more than the prescribed amount specified in s.29AA of the Act. Section 29AA(3) and (5) of the Act read as follows—

"…

(3) The Commission must not determine a claim of harsh, oppressive or unfair dismissal from employment if —

(a) an industrial instrument does not apply to the employment of the employee; and

(b) the employee's contract of employment provides for a salary exceeding the prescribed amount.

…

(5) In this section —

"industrial instrument" means —

(a) an award;

(b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section;

(c) an industrial agreement;

(d) an employer-employee agreement; or

(e) a workplace agreement;

"prescribed amount" means —

(a) $90 000 per annum; or

(b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section."

The respondent maintained that Exhibit R2 demonstrates that Ms Albrecht's salary at termination was $90,126.32 and that this amount is in excess of the prescribed amount. The respondent argued that annual leave loading, which it included in the amount of $90,126.32, constitutes salary and therefore should be included when quantifying Ms Albrecht's salary. Additionally the allowance paid to Ms Albrecht which took her from a Level 11.1 salary to a Level 12.1 salary should be included in Ms Albrecht's salary as this allowance was paid to Ms Albrecht on a regular basis. The respondent relies on the definition of "salary" from the Concise Oxford dictionary that being a "fixed payment made by employer at regular intervals".

25 The respondent also argues that the Commission has no jurisdiction to deal with this matter because Ms Albrecht was employed under a Federal certified agreement. As Ms Albrecht was not employed under an industrial instrument as defined under s.29AA(5) of the Act, which the respondent argued is a precondition for the Commission to deal with an application of this nature, the Commission had no power to deal with this application.

26 The applicant relies on written submissions tendered prior to the hearing in support of its contention that the Commission has jurisdiction to deal with this claim. The applicant maintains that the only issue of jurisdiction is whether or not the applicant's contract of employment provides for a salary exceeding the prescribed amount of $90,000.00 per annum.

27 The applicant argues that when Ms Albrecht was appointed to her position of Director, University Marketing on a permanent basis on 1 July 2001 she was appointed to a HEGS Level 11 classification with an initial salary of $76,226.00 per annum. The applicant relies on the contents of Ms Albrecht's letter of appointment which states—

> "Your initial salary will be $76,226 per annum. In addition to this you will receive a special allowance up to HEGS Level 12.1 ($87,953) per annum between 1 July 2001 and 30 June 2003. This allowance is superannuable and incremental."
>
> (Exhibit A2 document 4)

As Ms Albrecht was paid an overaward personal allowance of an amount equating to the salary of Level 12 employee, which only operated until 30 June 2003, this allowance should not be included when assessing Ms Albrecht's salary. The applicant thus argues that as Ms Albrecht's income was less than the prescribed amount there is jurisdiction for the Commission to deal with this matter.

28 The applicant also maintains that the Commission has jurisdiction to hear this claim of unfair termination as the certified agreement covering Ms Albrecht's contract of employment does not give exclusive jurisdiction to the Australian Industrial Relations Commission ("the AIRC") to hear unfair dismissal claims and that this agreement does not cover the field in relation to termination. Further, the applicant argues that s.29AA(3)(a) and (b) of the Act state that both conditions must be met in order for the Commission not to deal with a claim of harsh, oppressive or unfair dismissal.

29 It is my view that in this instance I have jurisdiction to deal with Ms Albrecht's claim even though she is covered by a Federal certified agreement. I find that given the construction of s.29AA(3) of the Act, I am required to read subsections (a) and (b) together. The effect of this is that an employee covered by the terms and conditions of a Federal certified agreement, unless that agreement provides for the AIRC to deal exclusively with claims of unfair termination, can make an application pursuant to s.29(1)(b)(i**)** of the Act as long as an employees annual salary does not exceed $90,000.00. In this case the Agreement covering Ms Albrecht's contract of employment does not give exclusive jurisdiction to the AIRC to deal with claims relating to unfair termination and on the evidence before me in relation to Ms Albrecht's salary I find that at termination Ms Albrecht's annual salary did not exceed $90,000.00.

30 When Ms Albrecht was appointed by the respondent to a permanent position in July 2001, she was appointed to a Level 11.1 position and paid the salary rate for this level. This is confirmed by Ms Albrecht's letter of appointment and her pay slips up to her date of termination. Even though she was also in receipt of a "higher duties allowance" which took her up to Level 12.1, this allowance was not a permanent arrangement as the payment of this allowance was to cease on 30 June 2003. On the basis that the "higher duties payment" was a discretionary allowance which applied for a finite period, I find that this allowance does not constitute "salary" for the purposes of s.29AA(3) of the Act.

31 In reaching this view I note that there is no definition of salary provided within s.7 of the Act. However the definition of "industrial matter" in s.7 is helpful. It states, in part, that:

> "**"industrial matter"** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;"

This section distinguishes between salary, allowances or other remuneration and this same distinction is evident in the wording in other sections of the Act. For example s.23(2)(a) refers to the power of the Commission to hear and determine "any matter or dispute relating to the salaries, wages, or other remuneration, or other conditions of employment". These distinctions have been applied by this Commission when dealing with questions of loss and compensation. Remuneration has been interpreted broadly and applied incorporating salary as one aspect of remuneration. The Honourable President in the Full Bench decision in *Ramsay Bogunovich v Bayside Western Australia Pty Ltd* [1998]79 WAIG 8 at 10 states—

> "Remuneration is wider in meaning than "wages" or "salary". The word "remuneration", as it is used in s.23A(4) of the Act, includes salary or wage, commission, superannuation or contributions, the cost of providing a car and non-monetary benefits (see Capewell v Cadbury Schweppes Australia Ltd (FB)(op cit) per Sharkey P at page 301 and the cases cited there)."

32 Even if I am wrong in determining that the "higher duties allowance" paid to Ms Albrecht does not constitute salary for the purposes of s29AA(3) of the Act I am of the view that the annual leave loading due to Ms Albrecht, which the respondent relied on to take Ms Albrecht's annual salary over $90.000.00, should not be regarded as salary as it is a loading which is paid in addition to an employee's normal earnings.

33 Given that I have found that Ms Albrecht's salary did not exceed $90.000.00 and as it is also clear that the Agreement covering Ms Albrecht's contract of employment does not provide for the AIRC to exclusively deal with claims of unfair termination I find that I have jurisdiction to deal with this application.

Submissions

34 The applicant submits that Ms Albrecht was terminated in an unfair manner. The applicant also argues that there was no reason for terminating Ms Albrecht as the new position currently being advertised by the respondent, that of Director, Public Relations and Marketing which is in the process of being filled, was essentially Ms Albrecht's previous position.

35 The applicant argues that no discussions were held with Ms Albrecht after Mr Walton informed her on 17 July 2002 that her position was redundant as Ms Albrecht was told that she was to leave the University as soon as possible when informed of her termination. Even though the letter from Mr Jones dated 19 July 2002 referred to the possibility of Ms Albrecht being redeployed (Exhibit A2 document 13) this was never a real option that was properly put to Ms Albrecht and canvassed with her. The applicant argues that the respondent treated Ms Albrecht unfairly as it breached the requirements of Clause 11. - Consultation and Change Management of the Agreement. Under the requirements of this clause the respondent had to refer its decision to abolish Ms Albrecht's position to the Joint Management/Union Consultative Committee for consideration prior to implementing workplace changes likely to have a significant effect. The applicant argues that prior to Ms Albrecht being terminated there was no evidence that the respondent did this apart from assertions by Mr Jones. The applicant also relies on the contents of a memo advising of the structure of the new 'Communications' area dated 24 July 2002 (Exhibit A2 document 16) forwarded to the applicant on or after 24 July 2003. This memo confirms that the respondent did not raise the restructure of Ms Albrecht's section with the applicant until after a decision was made to terminate Ms Albrecht's contract of employment.

36 Given that there were no issues with Ms Albrecht's performance the applicant argues that in the circumstances Ms Albrecht should be reinstated to her former position or the position of Director, Public Relations and Marketing. Alternatively the applicant seeks compensation for Ms Albrecht's termination on the basis that Ms Albrecht has demonstrated that she has mitigated her loss. Ms Albrecht is also seeking compensation for injury.

37 The respondent argues that even if the Commission finds there is jurisdiction to deal with this matter, the Commission should find that Ms Albrecht was not unfairly terminated. The respondent argues that Ms Albrecht was given adequate notice that her position was to be made redundant. On 12 June 2002 she was called to a meeting with Mr Walton and it was conceded by Ms Albrecht that as a result of this meeting she understood that the respondent had formed the view that changes were necessary in her department and that there could be the possibility of Ms Albrecht's job being abolished. Mr Jones also asserted that the requirements of Clause 11 of the Agreement had been met by the respondent. Given that there were numerous discussions subsequent to 12 June 2002 about the possibility of Ms Albrecht losing her position the respondent submitted that the process adopted by the respondent was fair. Further, redeployment was a possibility for Ms Albrecht, as confirmed by the contents of Mr Jones letter to Ms Albrecht dated 19 July 2002 (Exhibit A2 document 13) however, Ms Albrecht did not avail herself of this option. The respondent also argues that if the Commission finds that Ms Albrecht was unfairly dismissed and reinstatement is impracticable then she is not entitled to any compensation as the payment of redundancy paid at termination covered a period of at least 6 months' wages.

38 The respondent submitted that Ms Albrecht could not be re-instated to the position of Director, Public Relations and Marketing as this was a new position created as a result of the restructure of the respondent's communication activities and that Ms Albrecht was not qualified or sufficiently experienced to fulfil the requirements of this role.

Findings and Conclusions

Credibility

39 I listened carefully to Ms Albrecht's evidence. She had a clear recollection of the events relating to her termination and a number of documents were tendered supporting and corroborating her evidence. Further, her evidence was not broken down in cross examination. On this basis, I accept the evidence given by Ms Albrecht.

40 I turn now to the principles in relation to these matters and my findings and conclusions.

41 The respondent argued that Ms Albrecht was terminated due to a redundancy situation. Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and Other v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). If a decision is made to make an employee redundant based on the operational requirements of the company that can be a valid reason for the dismissal. In this case I am of the view that Ms Albrecht was terminated due to a genuine redundancy situation. The evidence was clear that the respondent made a decision to reorganise the OEGM area and this led to staff movements to accommodate these changes, including Ms Albrecht's existing position being abolished. Although the applicant argued that in reality Ms Albrecht's position continued, as demonstrated by the nature of duties of the recently advertised position of Director, Public Relations and Marketing, it is clear when comparing the duties of Ms Albrecht's position and the new position different skills and pre-requisites are required for the position of Director, Public Relations and Marketing to that of Ms Albrecht's previous position. Further, the applicant has not demonstrated the onus on it that another employee should have been made redundant in preference to Ms Albrecht once the respondent made a decision to re-organise the OEGM section.

42 Having said that it is appropriate to consider any unfairness in relation to the process used in effecting Ms Albrecht's termination, as well as all of the circumstances surrounding her termination having regard to s.26 of the Act. The question to be determined by the Commission is whether the legal right of the respondent to dismiss Ms Albrecht has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right *(Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

43 Section 50. – Redeployment and Redundancy of the Agreement covering Ms Albrecht sets out the respondent's obligations in relation to redeployment and redundancy. The relevant subclauses are—

> "….
>
> Scope
>
> 50.1 Redeployment and redundancy shall, where appropriate, only be considered after provisions in Clause 11 of this agreement have been complied with. This clause shall only apply to continuing staff.
>
> Reasons for Redundancy
>
> 50.2 Where an area within the University has decided that one or more positions are surplus to requirements for reasons of an economic, technological, structural or similar nature, the University will formally notify the staff member(s) concerned and the relevant union(s) in writing and will outline the reason(s) for that decision. These positions shall be classified as being redundant.
>
> 50.3 The determination of the positions to be made redundant shall be by use of fair and objective criteria and the staff member(s) shall be advised of this information.
>
> Notice of Termination
>
> 50.9 Where a decision has been made to proceed with redundancy, the staff member concerned shall be given formal written notice that their employment with the University is to be terminated."

44 The relevant sub-clauses of Clause 11. – Consultation and Change Management of the Agreement are—

> "
>
> 11.1 The University shall provide opportunities for staff and union input to the decision making processes of the University.
>
> 11.2 The University recognises the role and responsibilities of staff as partners in the development and maintenance of Curtin's teaching programs, research activities and corporate functions.
>
> 11.3 The University encourages the establishment of collaborative and participative mechanisms which enable all staff to gain meaningful opportunities to present their views on University initiatives and for such views to be considered. Where staff and unions are represented on University decision making bodies, that representation shall be maintained.
>
> 11.4 Where issues arise which may lead to workplace change, these shall be discussed with all staff in the area concerned allowing for meaningful consultation and input by those staff and their union or nominated representatives. The parties accept that there will often be informal discussion or consideration of issues which may or may not lead to

workplace change, prior to the development of any specific change proposals. Staff may seek the assistance of their union in such discussions.

11.5 Where the University has determined that initiatives designed to promote the goals of the University are to be introduced or implemented and are likely to result in significant effects for staff, then, prior to implementing any such change, those initiatives should be referred to the Joint Management/Union Consultative Committee for its consideration. Those staff affected shall be advised and have the right to comment on and influence the proposals in a period of meaningful consultation. The Director, Workplace Relations shall be informed of any proposed changes and shall advise the relevant union and the staff concerned. Such advice and notification shall include details of the changes and the likely impact.

11.6 The University remains committed to maintaining the overall FTE of the general staff workforce during the life of this Agreement.

11.7 Should there be a need for restructuring in any Division or Area, the University shall manage any proposed reductions in staff in accordance with this clause. The University and the relevant unions and staff shall consider the proposals and shall seek through consultation to avoid or mitigate any detrimental outcomes for affected staff.

11.8 The parties agree that opportunities for placing staff in continuing positions is a high priority and shall be considered before initiating redundancy or early retirement action. Staff reductions shall be managed through natural attrition, voluntary separations, pre-retirement contracts, leave without pay, voluntary conversion to part time employment, long service leave, internal or external secondment or transfer, or short to long term placement. Forced retrenchments shall only be used as a last resort.

…

11.10 Where the consultation process is not successful, either of the parties may seek to utilise the grievance procedures or dispute resolution procedures set out in this Agreement."

45 It is my view that Ms Albrecht was terminated in an unfair manner when she was terminated on 1 August 2002 due to a redundancy situation. The obligations on the respondent under Clauses 11 and 50 of the Agreement covering Ms Albrecht's employment require that the respondent be transparent and consultative prior to effecting an employee's redundancy, and the possibility of redeployment and redundancy of an employee was only to be considered by the respondent after the requirements of Clause 11 of the Agreement were met. In this case a number of obligations required under Clauses 11 and 50 of the Agreement were not met. The respondent was unable to demonstrate at the hearing that it had followed the procedures and processes set down in these clauses. Even though the respondent's representative asserted that the relevant requirements were met, this was disputed by the applicant and not supported by the evidence.

46 Although there is reference in an email from Mr Lockwood to the applicant to an announcement on 18 July 2002 at a Joint Management/Union Consultative Committee meeting that Ms Albrecht's position was surplus to requirements (Exhibit A2 document 18) in my view this does not meet the obligation on the respondent required in subclauses 11.4, 11.5, 11.7 and 11.8 under Clause 11. - Consultation and Change Management of the Agreement. Indeed, the contents of this email confirms that the processes required to be undertaken by the respondent, as detailed in Clause 11 of the Agreement did not commence until at least the date of the email. Further, the applicant responded to this email on 19 July 2002 (Exhibit A2 document 17) disputing what was said at the meeting and stating that they " have serious concerns as to why normal processes do not appear to have been followed in this case" and the evidence was clear that on 19 July 2002 Ms Albrecht was sent a letter confirming her position had been declared as being surplus to requirements (Exhibit A2 document 13).

47 In addition, the respondent did not follow the procedures required of it under Clauses 50.1, 50.2 and 50.3 of Clause 50. – Redeployment and Redundancy of the Agreement. It is possible that if the respondent had followed the required procedures and negotiations, a different outcome may have eventuated for Ms Albrecht. Specifically the respondent failed to formally notify Ms Albrecht and the relevant union (the applicant) of the decision to make Ms Albrecht's position surplus to requirements and the reasons for this decision. The respondent also had an obligation to use a "fair and objective criteria" in arriving at it decision to choose Ms Albrecht for redundancy and Ms Albrecht should have been advised of this criteria. As a result of the flawed process followed by the respondent Ms Albrecht was not given a genuine opportunity to canvas alternatives to termination. Even though Ms Albrecht was invited to consider the option of redeployment this was done after it was made clear to Ms Albrecht that the respondent no longer wanted her to remain employed by the respondent.

48 Given the manner in which Ms Albrecht was terminated it is my view that in all of the circumstances she was treated unfairly. She was not given "a fair go all round".

Reinstatement

49 The applicant is seeking reinstatement or re-employment into the newly created position of Director, Public Relations and Marketing. I find that the applicant has not demonstrated that she has the requisite skills and qualifications to undertake this position. Even though Ms Albrecht is in the process of completing a Masters of International Studies qualification majoring in Marketing, I accept the respondent's argument that Ms Albrecht does not meet one of the essential criteria for this position, that of being in possession of academic qualifications in public relations, marketing or journalism. I also accept that the position requires a high level of skills and experience in public relations, which the applicant has not demonstrated she possesses. Reinstatement to Ms Albrecht's previous position is not an option as her previous position no longer exists and the applicant has not demonstrated that another employee, instead of Ms Albrecht should have been made redundant. I therefore find that reinstatement of Ms Albrecht or re-employment into another position is impracticable.

Compensation

50 I therefore now turn to the question of compensation. It was not in dispute that the respondent paid Ms Albrecht approximately $102,629.29 nett at termination with $101,738.96 gross of this amount being a redundancy component. It is my view that if the respondent had followed the proper, fair and reasonable processes required of it in making Ms Albrecht redundant then Ms Albrecht would have remained in employment with the respondent for a period of at least eight weeks for this process to take place prior to ceasing employment with the respondent. I thus find that Ms Albrecht has suffered a loss of eight weeks' pay, $14,032.96 gross (4 x $3508.24).

51 I also find that Ms Albrecht has demonstrated injury over and above that normally associated with a termination given the manner of her termination. In *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849 Coleman CC and Smith C observed at 2862—

> "It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an

employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299)."

I accept that as a result of the process adopted by the respondent Ms Albrecht sought medical assistance and was treated for depression. Even though it is unclear as to the exact extent to which her termination impacted on Ms Albrecht's health, I accept Ms Albrecht's evidence that there was a correlation between her deteriorating health given the manner of her termination over and above that normally associated with a termination. In the circumstances I will award Ms Albrecht $1,000.00 for injury. However, I am required to offset Ms Albrecht's loss ($15,032.96) against the amount paid to her at termination (see: *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193). Given that Ms Albrecht was paid $101,738.96 gross as a redundancy payment at termination no monies by way of compensation are thus due to be paid to Ms Albrecht.

52 I would otherwise dismiss the application.

2003 WAIRC 09616

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	VICE CHANCELLOR, CURTIN UNIVERSITY OF TECHNOLOGY, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 10 OCTOBER 2003
FILE NO/S.	APPLICATION 1468 OF 2002
CITATION NO.	2003 WAIRC 09616

Result	Application alleging unfair dismissal upheld. Application for compensation dismissed.

Order

HAVING HEARD Ms C Bowden on behalf of the applicant and Mr R Jones 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 Dorothy Albrecht by the respondent was unfair and that reinstatement is impracticable.

2) ORDERS THAT the application for compensation be dismissed

3) ORDERS THAT the application otherwise be, and is hereby, dismissed.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

2003 WAIRC 08770

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN CLISSA, APPLICANT
	v.
	SOUTH EAST METROPOLITAN COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 22 JULY 2003
FILE NO.	APPLICATION 467 OF 2003
CITATION NO.	2003 WAIRC 08770

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms R Cosentino (of counsel)
Respondent	Ms N Wainwright

Reasons for Decision

1 On 11 April 2003, John Clissa ("the applicant") referred a claim to the Western Australian Industrial Relations Commission ("the Commission") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") that he was harshly, oppressively and unfairly dismissed by South East Metropolitan College of TAFE ("the respondent") on 14 November 2002. Section 29(2) of the Act requires that such an application be lodged within 28 days of the day of the applicant's employment terminating. As the application was lodged on 11 April 2003 this application is 120 days out of the required timeframe for lodging a claim of this nature. The matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not the application should be accepted under s.29(3) of the Act. Section 29(3) of the Act reads as follows—

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

2 In reaching a decision in this matter I take into account whether there was an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he was unhappy with his termination and that he would contest his termination and prejudice to the respondent. These guidelines were recently discussed as being relevant to a matter of this nature by Beech S C in *Anthony William Andrew v Metway Property Consultants & Auctioneers* (2002) 82 WAIG 3260. In applying these guidelines I am mindful that there is a 28 day time frame to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless there is good reason to do so.

3 I make the following findings taking into account these guidelines. The applicant gave evidence that he initially commenced casual employment with the respondent around about August 2001 and on 31 January 2002 the respondent employed him on a four year fixed term contract as a part-time lecturer (Exhibit A1, Annexure JC1). The applicant gave evidence that during his employment with the respondent he had a number of conflicts and confrontations with Ms Angie Koh. Ms Koh was the co-ordinator of the department in which the applicant was employed, and the applicant believed Ms Koh had acted dishonestly and unprofessionally towards him. He stated that Ms Koh undermined his ability to perform his duties by restricting his access to resources for conducting lessons and he claimed that in December 2001 Ms Koh told his students that he was "a crazy man". The applicant gave evidence about a specific verbal confrontation which he had with Ms Koh on 12 August 2002. The applicant stated that as a result of this altercation he was allocated less hours teaching the Cambridge course.

4 Subsequent to the altercation with Ms Koh on 12 August 2002 the applicant lodged a written complaint against Ms Koh. The respondent's Acting Managing Director, Mr Robert Stratton wrote to the applicant advising him that his language during the incident with Ms Koh was totally inappropriate and not condoned by the respondent and that any further occurrence of this behaviour would result in disciplinary action being taken. The letter also stated that Mr Kim Wood would convene a meeting with Ms Koh and the applicant to discuss the applicant's allocation of lecturing hours and programmes.

5 The applicant stated that he waited for this meeting to be arranged and as one was not convened by 9 September 2002 he asked Mr Wood for leave without pay by email on 10 September 2002 (Exhibit A1, Annexure JC2). On 11 September 2002 he received a return email from Mr Wood refusing his application for leave without pay and providing reasons why that request was refused (Exhibit A1, Annexure JC3). The applicant stated that his last day of work with the respondent was 11 September 2002 and he has not returned to work since that date. On or about 13 or 14 September 2002 the applicant flew to China to take up a teaching position.

6 Whilst the applicant was in China he became aware that the respondent was sending correspondence about his employment to his mother's address. On 23 October 2002 the applicant sent an email to the respondent's Managing Director, Mr Geof Gale, stating that on his return to Perth in the first week of February 2003 he will have the Equal Opportunity Commission and/or an Industrial lawyer investigate Mr Stratton, Mr Wood and Ms Koh's style of management and workplace practices (Exhibit A1, Annexure JC4). The applicant stated that he did not receive a response to this email even though he was contactable at this email address whilst he was in China. The applicant stated that he returned to Perth on 26 January 2003 and read letters from the respondent, sent to his mother's address, notifying him that he had been terminated effective 16 September 2002 on the basis that it was considered that he had abandoned his employment (Exhibits R2, R3, and R4). He stated that he did not see these letters prior to 26 January 2003 and that he was unaware that he had been terminated until this date.

7 In late January 2003 the applicant sought legal advice in relation to his termination and attended a meeting at the offices of Gibson and Gibson on 5 February 2003. He then returned to China to continue his teaching duties. On 11 March 2003 he engaged Gibson and Gibson to commence proceedings on his behalf against the respondent. He stated that the delay in the application not being lodged until 11 April 2003 was because he was in China.

8 Mr Wood gave evidence on behalf of the respondent. Mr Wood stated that the applicant had raised two grievances with him whilst he was employed by the respondent. One grievance related to the incident with Ms Koh on 12 August 2002. He confirmed that he had discussions with the applicant about a teaching position in Qatar with TAFE International. He stated that it was only after the applicant's request for leave without pay was rejected that he had discussions with the applicant about working in China. The applicant told Mr Wood that he would be contacted about a reference regarding the applicant's job in China. He stated that he was not aware that the applicant had been appointed to the teaching position in China in September 2002 before the applicant ceased working for the respondent. He also stated that he tried to contact the applicant by email and by mobile phone prior to the applicant being sent his letter of termination on 14 November 2002 however, he received no response.

9 The applicant submits that even though the delay in lodging his application was lengthy it was understandable because the applicant was overseas and as his application was not straight forward, it took some time to give his representative appropriate instructions. Further, the applicant was not aware that he was terminated until he returned to Australia on 26 January 2003. The applicant argues that he was constructively dismissed and that it was unreasonable that the respondent refused his application for leave without pay. The applicant also argues that he was denied procedural fairness. The applicant relies on his email to the respondent dated 23 October 2002 to demonstrate that the respondent was aware that he was not happy with his termination (Exhibit A1, Annexure JC4).

10 The respondent maintains that even though the applicant was in China subsequent to ceasing employment with the respondent, this was no excuse for him not being able to obtain advice and to deal with issues relating to his contract of employment. Even if it was accepted that the applicant was unaware of his termination until 26 January 2003, his application was not lodged until 11 April 2003, some time after the applicant met with his advisors on 5 February 2003.

11 The respondent maintains that there is no merit to the applicant's claim, and that it was not unreasonable that the applicant was denied the ability to take leave without pay. Further, there was a process that the applicant could have followed to contest this decision but the applicant chose not to do so. On 16 September 2002 the applicant was directed to attend work and notwithstanding this reasonable direction he chose not to do so. In the circumstances it was not unreasonable for the respondent to terminate the applicant's contract of employment.

12 The respondent argues that it will be severely prejudiced if this application is accepted. It has been approximately nine months since the applicant ceased working with the respondent and there has been significant organisational change during this period thus there was no possibility of accommodating the applicant if he was reinstated. Further, the respondent was not aware that the applicant was unhappy about his termination as the email to the respondent on 23 October 2002 does not specifically refer to the applicant's termination. Even if it is accepted that the respondent was on notice that the applicant was to contest his termination his email refers to the applicant taking this matter up in February 2003 however, nothing was done by the applicant until 11 April 2003.

13 On the evidence currently before me, I find that it would be difficult for the applicant to sustain his claim that he was constructively dismissed as it is not clear that the respondent behaved in such a way as to give the applicant no alternative but to resign. Further, the applicant could have contested the respondent's decision not to grant him leave without pay, but he chose not to do so.

14 The delay in the applicant submitting his application is significant and inordinate. Even if it is accepted that the applicant was unaware that he was terminated until 26 January 2003, I do not accept the applicant's argument that the matter was so complex that he was not able to lodge his claim until 11 April 2003. I also do not accept that the delay in lodging the application was excusable because the applicant had returned to China in February 2003 as the applicant gave evidence that he was contactable by email whilst in China. In the event the applicant's agent signed this application on his behalf over two months after initially meeting with the applicant. The applicant's representative is well aware of the time-frames for dealing with matters of this nature and in my view, the application should have been lodged soon after the date upon which the applicant first raised the issue of his termination with his representative, if the applicant was serious about pursuing his claim.

15 Even if the application had been lodged in February 2003, I find that the respondent would have been severely prejudiced by the delay. I accept that the respondent's operations have changed significantly and I find that the respondent would be prejudiced if this matter is to go ahead. Nine months have elapsed since the applicant worked with the respondent and it is clear that this presents a problem for the respondent in defending this case. It is also clear that the applicant did not expressly state to the respondent that he would be contesting his termination. In all of the circumstances, I do not believe that there are special circumstances warranting the acceptance of this application out of time, thus there is no jurisdiction for me to deal with this application.

16 An Order will now issue.

2003 WAIRC 08767

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN CLISSA, APPLICANT
	v.
	SOUTH EAST METROPOLITAN COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 22 JULY 2003
FILE NO/S.	APPLICATION 467 OF 2003
CITATION NO.	2003 WAIRC 08767

Result Application dismissed for want of jurisdiction

Order

HAVING HEARD Ms R Cosentino of counsel on behalf of the applicant and Ms N Wainwright on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

2003 WAIRC 09600

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALBERT FARRO, APPLICANT
	v.
	DJ TRANSPORT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 8 OCTOBER 2003
FILE NO.	APPLICATION 870 OF 2003
CITATION NO.	2003 WAIRC 09600

Result	Application dismissed
Representation	
Applicant	Mr A Farro on his own behalf
Respondent	No appearance

Reasons for Decision

Given extemporaneously and edited by the Commissioner

1 The applicant claims that he was employed by the respondent to undertake duties of delivering boxes of salads and vegetables and flavoured milk to certain shopping centres and supermarkets. He says that it was agreed with John of D J Transport at the office of the business that he would undertake that work for a few days - 3 to 4 days. If it worked out he says that they would discuss things further. If it did not work out, he would be paid off.

2 It appears that the applicant had an understanding that he would be paid what he described as the basic wage, although I am uncertain as to whether that was ever discussed with the respondent.

3 The applicant then commenced work on the Friday and continued working on Monday and Tuesday, and attended for work on Wednesday. When he attended for work on Wednesday he was told that there was no work for him and he subsequently made attempts to contact the respondent to obtain payment. No payment has been made to him for the 3 days that he performed work for the respondent.

4 This is an application made pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") and that provides that an industrial matter may be referred to the Western Australian Industrial Relations Commission ("the Commission"), in the case of an employee, that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment.

5 In this particular case, the applicant appears to have been engaged by the respondent either as a motor driver's assistant, a loader or a driver. He was engaged in working for the respondent who appears to have been involved in what might be described as the cartage contracting industry. It might also be that the respondent is engaged in some aspect of grocery dealing, is a fruit and vegetable merchant or agent, or is in fruit trading, although that is not entirely clear to me. There is also the prospect that the respondent might be engaged as a general carrier.

6 There is an award of the Commission known as the Transport Workers' (General) Award No. 10 of 1961 ("the Award"). That Award applies, according to its scope, to—

> "all workers following the vocations referred to in the wages schedule who are eligible for membership in the applicant union and who are employed in the industries referred to in the Schedule of Respondents. Provided that this award shall not apply to bread carters, workers engaged in the timber industry within the South West Land Division nor to workers whose duties involve them in delivering goods or materials solely beyond the West Australian State border."

7 The Schedule of Respondents list industries of cartage contractors, grocery dealers, fruit and vegetable merchants and agents, and general carriers. The Wages Schedule refers to vocations such as motor driver's assistant, loader and driver. It would appear to me on the face of it that there is a significant prospect that the applicant's employment may have been covered by the Award. He seeks payment at what he describes as "the basic wage". I conclude that it is more likely than not that what the applicant is seeking to do is to enforce the Award in respect of the rates of pay.

8 In the circumstances, that is not a matter that I can deal with under section 29(1)(b)(ii) of the Act. That is a matter for the Industrial Magistrate's Court.

9 If I am wrong in that and that in fact the applicant's employment with the respondent was not covered by an award, then the question arises as to what the contract was which he seeks to enforce. The contract seems to have been that the applicant would be paid the "basic wage", if that was what was agreed. However, I am not clear from the applicant's evidence whether that is merely an assumption on his part or whether that was what was actually agreed. While there was once the concept of a Basic Wage, it no longer exists. There is a Minimum Wage and that is enforceable elsewhere than in the Commission. There was no discussion between the parties as to any monetary amount, and in those circumstances I find it difficult to come to any conclusion as to what the contractual benefit was.

10 In all of the circumstances, I find that the applicant has either sought to enforce the Award or alternatively has sought to enforce a contractual benefit which in fact was not agreed between the parties as to the amount to be paid.

11 Accordingly, I find that I have no alternative but to dismiss the application and an order for the dismissal shall issue.

2003 WAIRC 09569

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALBERT FARRO, APPLICANT
	v.
	DJ TRANSPORT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 6 OCTOBER 2003
FILE NO.	APPLICATION 870 OF 2003
CITATION NO.	2003 WAIRC 09569

Result	Application Dismissed

Order

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

THAT this application be, and is hereby dismissed for want of jurisdiction.

(Sgd.) P. E. SCOTT,
Commissioner.

[L.S.]

2003 WAIRC 09513

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STUART HOWLETT, APPLICANT
	v.
	KALINDA MEADOWS PTY LTD AND OTHER, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 30 SEPTEMBER 2003
FILE NO.	APPLICATION 1982 OF 2002
CITATION NO.	2003 WAIRC 09513

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Redundancy – *Minimum Conditions of Employment Act 1993* s 41(2) - Whether another position should have been offered - Industrial Relations Act 1979 (WA) s 23A, s 26 & s 29(1)(b)(i) – Amounts to be taken into account when determining compensation – Commercial Travellers and Sales Representative Award – Implied notice.
Result	Applicant dismissed unfairly; compensation ordered
Representation	
Applicant	Mr A Drake-Brockman of Counsel
Respondents	Mr C Raymond of Counsel

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Mr Stuart Howlett, was a Sales Manager with the respondent companies and alleges that he was summarily dismissed on 15 November 2002 by the directors, Mr Ross Taylor and Ms Karen Read. The respondents are in the business of operating a sales force which sells and stocks products for clients in retail stores. Sales commission is achieved on the products stocked.

2 The background to the termination is that on the afternoon of 12 November 2002 Mr Taylor sent an email to Mr Howlett indicating that Ms Read and he would be in Perth on 13 November 2002. They wanted to meet with Mr Howlett to discuss their decision to restructure the Western Australian business. He then goes on to say, "With the restructure we propose to make the position of Sales Manager redundant. We would like to discuss with you our reasons & obviously your entitlements to severance & other pay should redundancy occur as well as any assistance or options we may be able to offer you. You are entitled to have a support person to represent you at this meeting" [Exhibit R4]. The respondents had earlier sought advice from the Timber Merchants Association regarding making the sales manager's position redundant. This is clear from the text of the [Exhibit R10].

3 Mr Howlett met Mr Taylor and Ms Read at the Mercure Hotel on the morning of 13 November 2002. Mr David Howlett, the applicant's brother and a solicitor experienced in employment law, attended the meeting at the applicant's request. Mr David Howlett put two options to Mr Taylor and Ms Read. The options were that his brother be allowed to work out a six month notice period. At the end of that time he then be paid a redundancy payment. Alternatively, a hybrid position be created for the applicant whereby Mr Howlett's position and that of the full time sales representative, Mr Neat, be abolished and a new position be established. Seemingly, Mr Howlett was to continue employment in the new position and the rate of pay to apply is not clear. The respondents were left to consider the options and they were all to meet again. They met again at the Mercure Hotel on the morning of 15 November 2002. Mr Howlett was advised that his employment was to be terminated with effect from 5pm that day. An envelope was handed to him detailing his termination payment (which was later discovered to be 16 weeks payment). The meeting abruptly ended soon thereafter. Mr Howlett worked from home and the companies' possessions, including the motor vehicle, were collected from him later that day. There was later some discussion between Mr David Howlett and Mr Taylor, and exchanges between Mr David Howlett and solicitors for the respondents in the period following termination.

4 The two companies employing Mr Howlett were Kalinda Meadows Pty Ltd and Arnhem Estate Pty Ltd, both trading as Ausrep. The applicant first commenced with the respondents on 7 December 1998. The respondent companies are run by Ms Karen Read and Mr Ross Taylor who are brother and sister. Mr Howlett commenced as a sales representative on $31,000 per annum plus 7% superannuation and a fully maintained motor vehicle. The use of this car is in dispute. At the time of his termination he was driving a 1999 VT Commodore Wagon with a V6 motor.

5 The evidence of Mr Howlett is as follows. He used the car every day for business and private use. Mr Taylor and Ms Read were both aware of this use. Mr Howlett asked that the car be fitted with a tow bar for recreational purposes and this was agreed. Twelve months before his termination he was promoted to Sales Manager for Western Australia. He said his duties were as follows:

> "Okay. Well, with - - with the part-time and other full-time staff, if they had any issues in WA they'd usually ring or email me, and I would fix those problems they had. Periodically I would travel out to the country towns that some of the part-timers worked in and catch up with them, have a coffee, go through their files, talk about any issues or problems they were having. I would organise their call plans for them, which was - - we tried to factor in all the calls over a 3 month period" (Transcript p.23).

6 He was heavily involved in the training of the staff both full time and part time. In the metropolitan area the sales representatives were Mr Adam Kaczmarczyk, a full time representative, Mr Darryl Neat, a full time representative and Ms Barb Beaubridge, a part time merchandiser. Mr Kaczmarczyk left in early October or late September 2002. Mr Howlett had to pick up Mr Kaczmarczyk's call plans. He asked Mr Taylor and Ms Read to urgently employ a replacement. The workload was quite stressful. Just prior to Mr Kaczmarczyk's departure Mr Howlett says that he suggested to Mr Taylor that he would be happy going back to the sales representative role as he was not enjoying the manager's role. He suggested that Mr Neat might take on the management role. This discussion occurred in June-July 2002. Mr Howlett says this affected his relationship with Mr Taylor who never spoke to him again until just before he was dismissed. Mr Howlett mentioned his concern to Ms Read. His concern being that Mr Taylor was not speaking to him.

7 Immediately following his dismissal Mr Howlett says that he encountered a Ms Jane Beech, whom he had previously known. She advised him that Ms Read had offered her a part time position with a car. There were two part time employees employed following his dismissal.

8 On 25 October 2002 Mr Howlett was ill at home and received a call from Mr Murray Panell, a category manager for Bunnings. Mr Panell was angry at the lack of stock being supplied. It was late on the Friday afternoon and Mr Howlett could not solve Mr Panell's problem that day. On Monday, 28 October 2002 Ms Read rang Mr Howlett and advised Mr Howlett that she believed he had handled Mr Panell badly. Shortly thereafter Ms Robyn Mayer, Ausrep's National Bunnings Account Manager flew to Perth to resolve the problem with Bunnings. Ms Mayer defended Mr Howlett against an angry Mr Panell. After the meeting she advised Mr Howlett not to worry about the issue as it was not as bad as he thought. She advised him that she was happy with the way Western Australia was going and acknowledged that Mr Howlett was under quite a lot of stress.

9 Mr Howlett says that Ausrep had lost business from Rexel, Sabco, Smart Home Products and Patience and Nichols in approximately the preceding 12 – 18 months which had affected the respondents' business.

10 On 12 November 2002 Mr Taylor phoned Mr Howlett to advise him that Ms Read and he were coming to Perth the next day. He indicated that they planned to restructure the Western Australian business and they were making the sales manager's position redundant. Mr Taylor asked Mr Howlett to attend a meeting the following day. He suggested that Mr Howlett could bring someone to the meeting. Mr Taylor and Ms Read, Mr Howlett and Mr Howlett's brother David, met the next day at the Mercure Hotel. Mr Taylor commenced the meeting by saying that the respondents had lost a lot of business in Western Australia. He mentioned Sabco, Smart Home Products and Patience and Nichols as clients that had been lost. Mr Howlett says these had not been Ausrep's clients for over a year. Mr Taylor indicated that the income in Western Australia was down $150,000 and Western Australia was being supported by the other states. Mr Taylor also said that Ausrep had been unsuccessful in a tender for the work of Nylex. Mr Taylor said that they decided to make the sales manager's position in Western Australia redundant. They mentioned an award they believed Mr Howlett came under and David Howlett spoke to them about giving notice. Mr David Howlett said that he believed that six months' notice was a reasonable term.

11 The applicant's brother also proposed a couple of options at the meeting. The first option was to allow the applicant to work out the six months' notice period and to look for work during that period. This was on the basis that it would be more favourable applying for jobs if Mr Howlett was still working. Mr David Howlett asked them whether Mr Neat's position was also being made redundant. He mentioned the possibility of creating a hybrid position out of the two positions. One of the directors asked whether Mr Howlett would take a pay cut if that were to occur and Mr David Howlett indicated that he would be able to speak to the applicant about that.

12 The applicant says that two part time sales representatives have been taken on since his dismissal. He says Mr Taylor and Ms Read were prepared to look at the options proposed. Ms Read thought that the option of working out his notice was a good option. Mr David Howlett proposed that after his notice his brother would be paid a three month redundancy. The applicant says that Mr Taylor and Ms Read seemed to think that was fair and reasonable. Mr Taylor was concerned about Mr Howlett working out his notice and thought that he might not perform his duties properly. Mr Howlett assured him that he would continue to work hard.

13 At the end of the meeting Mr David Howlett said he would like Mr Taylor and Ms Read to think about the options that he put to them. He asked them not to make any decisions and suggested they should have another meeting on Friday and said that he did have some other options that he had not mentioned to them. The meeting lasted 40-45 minutes. At the end of the meeting the applicant thought that they had managed to salvage some time for him. The meeting had been conducted in a friendly manner.

14 Two days later the four persons met again at the Mercure Hotel. Mr Taylor said they had made a decision to make the sales manager's position redundant. Mr Howlett's employment was to be terminated that afternoon. Ms Read had an envelope and placed it on the table. Mr David Howlett said, "I asked you not to make a decision. I told you the last time I had some other options that I wanted to put to you. Are we still negotiating?" Either Mr Taylor or Ms Read replied, "No". Mr Howlett's car was to be picked up later that day. The letter which Mr Howlett later opened contained a deed of settlement. Mr Howlett was not prepared to sign the deed. The meeting only lasted approximately five minutes. Mr Howlett returned to his home office and loaded the equipment into the car which was picked up that afternoon. He received his final pay by electronic direct deposit into his account on 19 November 2002. He received payment for three weeks notice and thirteen weeks redundancy.

15 After the meeting on 15 November 2002 Mr Howlett was very upset. He says this emotion continued for some months and his sleep was affected. He was worried about finding work. He had feelings of nausea and heartburn. His wife wanted him to go to the doctor but he did not.

16 On 24 April 2003 he gained full time employment as a sales representative with Gale Pacific Ltd. The respondents do not contest that Mr Howlett took proper steps to find alternative employment and mitigate his loss. Mr Howlett says he also received "around fifteen, $1600" (Transcript pg 48) in casual work before he was employed by Gale Pacific Ltd. In financial terms Mr Howlett now receives approximately the same as when he worked for the respondent.

17 Under cross examination Mr Howlett says he operated from his home office. He covered the entire state and Darwin and was on the road for part of the time. He travelled for approximately half a week. During this time he performed his management responsibilities of training and doing visit plans for staff, checking on staff and dealing with clients. Exhibit R1 is a report which incorporates the activities of Mr Howlett. Mr Howlett would compile monthly reports of his staff's activities and cover this with his overview.

18 At the time that Mr Howlett worked as a field supervisor he had discussions with Ms Read about the payment of annual leave loading pursuant to the Commercial Travellers Award. Mr Howlett says that he had been paid leave loading in every job he has had. He was aware that the company had a motor policy. He was not aware whether the other sales representatives were complying with that policy. He kept a fringe benefits log book for a number of months each year. However, he does not recall seeing either the January 2003 or April 1996 motor policy. He was not aware of the clause in the policy that required permission when driving a vehicle on long distances or interstate. He simply thought it was the right thing to do to get permission to do so. He was never questioned about his personal use of the vehicle on weekends. He was aware that the company had no objection to limited private use of the motor vehicle.

19 Mr Howlett remembers Karen Read speaking to him prior to his departure on holidays in mid 2002. She suggested he forget about the job, go on holidays and she would see him after the holidays. She then flew over to see him and they worked out ways to better manage his time. Mr Howlett did not think he had a problem with time management. He says he spoke to Ms Read and Mr Taylor about wanting to stand down as Sales Manager. Mr Taylor had not spoken to him for months. Ms Read suggested there was nothing to worry about. Mr Howlett did not seek to contact Mr Taylor. He knew very little about the financial performance of Western Australia. He was not given much information on this. He does not know whether the loss of the Osram business in October 2002 was a significant loss. He was not aware that the delay in filling Mr Kaczmarczyk's job in September 2002 was due to concern about further work. However, this was explained to him as was the desire to win the Nylex business in the meeting in November 2002. Mr Taylor explained to him at that time there had to be a restructure because clients had fallen off and there was a loss of replacement work.

20 Mr Howlett knew that the meeting on 13 November 2002 was to discuss making his position redundant, he had been advised of this by email. In relation to the Bunnings matter Mr Howlett says that Ms Mayer defended him at the meeting and Ms Read had simply indicated that he had handled the matter badly. He disagreed with this assessment.

21 At the meeting on 13 November they discussed a hybrid proposal whereby in effect Mr Howlett's and Mr Neat's positions would be made redundant and Mr Howlett would remain as a sales representative. He says a second hybrid option was also discussed whereby they were both to remain as sales representatives. He says at that point Ms Read asked whether he would be prepared to take a pay cut and his brother David said, "we'd have to discuss". The other alternative was that he work out his notice and be paid redundancy when he left the company. Mr Howlett did not challenge the details of what led to the restructure. At the close of the meeting Mr David Howlett said that he had a couple of other options. He does not recall Ms Read saying that she wanted to hear about them then. They were going to have another meeting on the Friday. At the meeting on 13 November 2002 the provision of outplacement services was mentioned.

22 At the meeting on 15 November he was told that a decision had been made and an envelope was slid across the table. Mr Taylor or Ms Read said, "there's our offer, it's very generous". They were asked why they did not open the letter and Mr David Howlett indicated that they did not need to, they knew what was in it. They left without opening the envelope. He says they did ask, "are we still negotiating?" the answer was "no". Mr David Howlett then rang Mr Taylor and stated that they were not signing the deed. He was advised to speak to Ausrep's lawyer and refused to do so. The applicant went to the automatic teller and found a large amount of money had been deposited in his account. He then received a schedule of his redundancy payments. Mr David Howlett queried the schedule of payments and the breakdown.

23 Mr Taylor gave evidence that he is the General Manager of the respondents and a director of Kalinda Meadows. His evidence is that Mr Howlett was appointed State Manager on 5 November 2001. Mr Howlett carried out some supervisory and administrative functions. He was also responsible for building sales and promoting Ausrep and its suppliers. There was not a lot of training involved in the role. The key component was "developing relationships with key people, service via core planners in the most efficient cost effective manner". This involved building rapport with key people in the major accounts. Mr Howlett's main administration tasks were distributing sales representatives information and preparing monthly reports. The monthly reports would take about two days a month, training one day a month. Core planners would require about one day in every two or three months. In total Mr Taylor says Mr Howlett had to spend about one day per week on administration. He had to spend four days per week in stores.

24 Mr Taylor never had a difficulty with Mr Howlett. Ms Read had mentioned that Mr Howlett had said something to the effect that he could not talk to Mr Taylor. He believes that Mr Howlett was a very capable state manager. Mr Taylor gave evidence about the various clients that was lost or he expected could be secured but were not. In the latter part of September 2002 the respondents ran advertisements for a full time sales representative and two part time representatives. This was to make up for the loss of Mr Kaczmarczyk. In the end Mr Kaczmarczyk was not replaced as they did not win the Nylex contract. Exhibit R6 detailed staff that were taken on and off during that period post Mr Howlett's termination. The total income earned in Western Australia was approximately $120,000 between June 2002 and May 2003 (transcript p.108) [Exhibit R7].

25 Mr Taylor says that once they learned about the Nylex contract they sought advice on redundancy from the Timber Merchants Association. This occurred on 7 November 2002. They assessed the sales manager position and the sales representative positions and the possibility of making the sales manager position redundant. They also sought some advice from solicitors in Victoria. He sent an email and spoke to Mr Howlett on 12 November 2002 regarding a meeting the next day in Perth. He advised him the meeting was about making the sales manager's position redundant. He advised Mr Howlett that he may wish to bring along someone else.

26 Mr Taylor opened the meeting by mentioning the loss of business in Western Australia and the need to discuss the possibility of making the sales manager's position redundant to reduce costs. Ms Read and he were there to discuss and listen to options that were put forward to them. Mr David Howlett put forward the option of six months notice being worked, followed by a redundancy payment or alternately to make the sales manager and sales representative roles redundant and create one position. Mr Taylor was also advised by Mr David Howlett that there were other options. He was not advised of these. In the meeting Mr Taylor said that they would go away, consider these options, and then would need to meet again with Mr Howlett. It was quite an amicable meeting (transcript p.116). He asked to be told of the other options. He was not advised.

27 Mr Taylor says they considered the options and could not afford the first option. In relation to the second option, they did not consider that practical, that is making two positions redundant rather than one. After discussion with their solicitors they settled on the amount of 16 weeks payment as being the termination payment. At the meeting on 15 November 2002 Mr Taylor advised Mr Howlett that after considering the options they would need to proceed with making his job redundant. He handed Mr Howlett an envelope containing a letter of termination and a deed of release. They did not explain what was in the envelope. Mr David Howlett was agitated that they had already made the decision. He said he already knew what was in the envelope. He said it would be an offer of about 10 weeks. Ms Read said that was wrong. Mr Howlett made a comment to the effect that they had made the biggest mistake of their life and his brother and he left the meeting. Mr Howlett rang Mr Taylor later that day and asked for further discussion. He indicated that Mr Howlett would not accept the offer and asked whether his services were being terminated. Mr Taylor confirmed they were. Mr Taylor suggested Mr Howlett speak to his solicitor and Mr Howlett rejected this. Mr Taylor contacted his solicitor and asked him to contact Mr Howlett. Mr Taylor did not hear further as to whether Mr Howlett wanted to work out his notice. Mr Howlett was paid a cheque on the Friday afternoon of 15 November 2002 for some monies owed. Mr Howlett's payments were later adjusted to incorporate a private use component for the motor vehicle. At the end of the meeting on 15 November 2002 Mr Taylor does not recall Mr David Howlett asking, "are we still negotiating?" Exhibit R11 is Mr Taylor's calculation of the remuneration cost of the motor vehicle.

28 Under cross examination Mr Taylor says that Mr Les Unwin is part of the permanent part time sales workforce. He said Exhibit R6 demonstrates the state of the business earnings on a month to month basis. The actual income except for one month was higher than the predicted income. Mr Taylor was cross examined on document 4 – duties for the sales manager. He says whilst there are management duties there is a large component of sales representative work in the job. Mr Taylor denies that Mr Howlett ever had a discussion with him about moving back to a sales representative role and having Mr Neat take on the management role. He believes this discussion was had with his sister Ms Read. He denies also that he went "cold" on Mr Howlett. He says his sister advised Mr Howlett to think about it and they did not believe it was a good move. Mr Taylor was advised about the discussion between Mr Howlett and Mr Panell of Bunnings. Mr Taylor says he would not have objected to Mr Howlett using the car to go to Exmouth but he was not advised of this. A part time representative commenced on 25 November 2002 and Mr Unwin became permanent after that date. Mr Taylor said he first considered making the sales manager's position redundant when he looked at the loss of the Osram business. This would be in late October or early November 2002. He says it had nothing to do with the Bunnings incident.

29 Mr Taylor says Mr Howlett was keen to keep his job. Mr Taylor says they went away and considered the discussion from the meeting on 13 November 2002 and decided to make Mr Howlett's employment redundant with effect from 15 November

2002 (transcript p.166-167). They decided to pay him 16 weeks pay conditional upon him signing a deed of settlement and release. Mr Taylor picked up the car from Mr Howlett's home on 15 November 2002 and gave him a cheque for accrued annual leave and some expenses. On 19 November 2002 by electronic deposit Mr Howlett was paid his final entitlements for redundancy and notice. This included an additional component for private use of car allowance. Mr Taylor says the two part time sales people employed after Mr Howlett's termination have together earned $20,000 in six months. The structure of using two part time staff is better for the coverage of clients than one full time person.

30 Ms Karen Read gave evidence that Mr Howlett was a very diligent employee. She reviewed the loss of business over the previous 12 months with Mr Taylor and concluded that income had substantially reduced. Once they discovered that they had not secured the Nylex business they decided to reduce costs in Western Australia. They sought advice from the Timber Merchants Association and their solicitors. At the meeting of 13 November 2002 Mr Taylor outlined the business situation and the need to restructure Western Australia. The applicant did not say much at the meeting and his brother David took control. It was an amicable meeting and two options were proposed by Mr David Howlett. At the end of the meeting Ms Read says they indicated to the two brothers "we're happy to consider all of those and get back to you" (transcript p.182). They mentioned outplacement services but this was never discussed again. Ms Read says also that they discussed the fact they were putting on two part time people and explained that Mr Howlett could be considered for one of those positions but no interest was shown. Mr David Howlett said there were other options that might be available. Ms Read asked him what they were and was not told of any options. They agreed to meet in the next couple of days.

31 Ms Read says their intention in handing over the letter on 15 November was to have further discussions with Mr Howlett. At that meeting Mr Taylor advised Mr Howlett that his employment was to be terminated as at 5 o'clock that day. She says Mr David Howlett got agitated at that point. He said, "you've just made the biggest mistake of your life". Ms Read said Mr Howlett indicated that he had asked them not to make their decision until they had heard his other options. She asked, "what are they?" and he indicated, "Oh, you'll find out". Ms Read then said, "Well, I can see where this is going". Mr Howlett indicated he knew what was in the envelope suggesting it was 10 weeks. He did not want to discuss the matter further and both brothers left.

32 Ms Read said that Mr David Howlett rang her brother later in the day and asked him to confirm if Mr Stuart Howlett's employment was terminated. Mr Taylor confirmed that and asked Mr Howlett to speak to his solicitor. Ms Read said it was her understanding that Mr Howlett would probably want to work out his notice (Transcript p.187).

33 Ms Read gave evidence that Mr Howlett in June or July of 2002 had called her indicating that he wished to move back to being a sales representative and forego the role of sales manager. She visited Perth to speak to him and he said he regretted making that phone call. He was happy to continue as sales manager. At that time Mr Howlett had just taken holidays. Ms Read suggested some ways in which he could better prioritise his work. In the conversation a little bit after that time Ms Read says that Mr Howlett indicated that he thought that Mr Taylor had lost confidence in him. Mr Howlett said that he was concerned that Mr Taylor had not spoken to him for ages. Ms Read advised him not to read anything into that. In relation to the Bunnings incident Ms Read says that on speaking to Mr Howlett about this she indicated to him that he probably could have handled Mr Panell better, however, they needed to fix the issue. She arranged for Ms Mayer to go to Perth to sort out the problem. She says that Ms Mayer was supportive of Mr Howlett.

34 Ms Read says that at the meeting on 15 November Mr David Howlett asked at the end of the meeting "Are we still negotiating?" and Ms Read responded that they were not.

35 Ms Read under cross examination says that the actual income for the business on their predictions had been reduced. She was cross examined in some detail about this. Ms Read was also cross examined at length about whether Mr Howlett had had a conversation with Mr Taylor and then considered Mr Taylor had lost confidence in him. Ms Read was adamant that the conversation was directly between Mr Howlett and her regarding Mr Howlett's concern that Mr Taylor had lost confidence in him. She sought to resolve that situation with Mr Howlett. She says Mr Howlett indicated that he regretted making the telephone call to her about that.

36 In the meeting on 13 November Ms Read said they knew that Mr Howlett was keen to keep his job. There had been an advertisement for a part time sales representative. Ms Read says the decision was made between the meetings of 13 and 15 November to make the position of sales manager redundant. Mr Howlett was to depart his employment on 15 November. Ms Read says at the meeting they expected to have more discussion with Mr Howlett. Ms Read says they were acting on advice that the deed of release was a standard arrangement. Ms Read then has the following exchange with Mr Drake-Brockman—

> "Yep. So there was nothing to negotiate on the 15th. It was, "Take it or leave it"?---No, that's not true.
>
> It's not true?---Had they opened the letter when we were there, and not got up and just left the meeting, we might have been able to get some more discussion going.
>
> You would have offered more money?---Who knows?
>
> How much more money were you prepared to offer?---At that time, I couldn't tell you, because it hadn't even got to -—
>
> You hadn't even discussed whether you'd offer him more money, because all you were going to offer him was $12,520.65?---That was - - that was the 4 months which we thought was reasonable.
>
> We were advised that it was based on the award, and it's actually - - the award was actually less than that, so -—
>
> But, in fairness, you didn't go there on the 15th of November 2002 wanting to offer him any more money than that, did you?---No, that was what we considered a fair offer." (Transcript p.210)

37 Since Mr Howlett's departure two part timers have commenced employment. Ms Read says that it would not have been ideal arrangement for Mr Howlett to have covered the work of the part timers. Ms Read says they found out about the Nylex contract in the early part of November.

38 In closing submission Counsel for the respondents says the Commercial Travellers and Sales Representatives Award applies to Mr Howlett. The relevant clauses of that award are clause 3, 7, and 6C. Mr Raymond says also that the parties accepted the award applied to Mr Howlett given the evidence in relation to payment of leave loading. Mr Raymond says that the predominant aspect of Mr Howlett's work was that of sales representative. In respect of the meeting on 15 November 2002 Mr Raymond says that the clear intention was to have further discussions with the applicant. He submits Exhibit A5 is clear and says in relation to the payments "that this represents a notice period of 16 weeks if the above offer is acceptable to you". Mr Raymond says there was no breach of the *Minimum Conditions of Employment Act 1993*. In the alternative, it is submitted that if there was a breach of this Act then it was minor or insignificant and not so as to render the dismissal unfair.

39 The respondents' submission is that there was a clear business need for restructure in Western Australia. The change to business relative to previous years and the failure to win the Nylex contract left the respondents in the position that projected income would decline. Exhibit R7 displays this anticipated decline in income and the reduced staffing which was maintained

since the date of the applicant's termination. Mr Raymond says there was nothing suspicious in the Bunnings incident and the company was fully supportive of Mr Howlett. Mr Raymond says it was the applicant's position which was made redundant. The administrative functions of the job were removed to Melbourne and hence it was a bonafide redundancy. Mr Raymond says the issue about whether negotiations had ceased at the meeting on 15 November 2002 should be resolved in the respondents' favour for the following reasons. The evidence of the respondents should be favoured over that of the applicant. Mr Taylor and Ms Read offered to withdraw from the meeting so that Mr David Howlett could read the letter and discuss the matter further. There were some further negotiations between Mr David Howlett and the respondents' solicitors. To find otherwise would be inconsistent with the letter setting out the offer and the proposed deed of release and the events that transpired thereafter. In respect of whether it should have been Mr Howlett who was made redundant Mr Raymond says it was the administrative part of Mr Howlett's job that was made redundant and so it was that job and that person that should have been made redundant.

40 In close Mr Drake-Brockman for the applicant directed the Commission to [Exhibit R10] and the advice of the Timber Merchants Association which says, "There may be an argument that the award would not apply to a Sales Manager, however, that would depend entirely on the work that person was performing." Mr Drake-Brockman says clearly the respondents were looking at the sales manager's position to be made redundant and only that position. Mr Drake-Brockman says that [Exhibits R6 and R7] prepared by the respondents do not show there was reduced income or a financial problem as of November 2002. In that sense there was no genuine reason for Mr Howlett being made redundant. Mr Drake-Brockman's submissions are that if there were to be more discussions following the meeting of 15 November 2002 they were not about any continued employment. It could have only been about whether Mr Howlett could have been offered more money. Mr Drake-Brockman submits that the respondents were not interested in paying Mr Howlett more money. The payment had been determined and was conditional upon signing a deed of release. Shortly after Mr Howlett's dismissal two part time employees were employed. The respondents conceded in cross examination that Mr Howlett could have covered those roles.

41 Mr Drake-Brockman submits that Mr Howlett was summarily dismissed on 15 November. The letter advised him he was to finish at 5pm that day. His contract did not allow him to be terminated without working his notice and he was not given reasonable notice. Mr Drake-Brockman says that the respondents had no regard to the circumstance of Mr Howlett being married with two children, carrying a mortgage and the termination occurring just prior to Christmas. Mr Neat, the full-time sales representative, was 28 years of age, with apparently no family commitments. Mr Drake-Brockman says that in relation to whether the severance payments must be deducted from loss or injury for compensation that the relevant authority is still the Industrial Appeal Court decision in *Jacob Gilmore –v- Cecil Bros, FDR Pty Ltd & Cecil Bros Pty Ltd* 76 WAIG 4434 at p.1102. He says nothing in the Industrial Appeal Court in *Dellys v Elderslie Finance Corporation Ltd* 82 WAIG 1193 affects that.

42 There are numerous matters in contention in this application. They relate to whether the applicant was summarily dismissed, whether the applicant had somehow gotten offside with Mr Taylor, whether the Bunnings episode was a trigger for his removal, whether the applicant's employment was covered by an award, the value and use of the motor vehicle, the actual extent of management functions performed, and whether the respondents had ceased to negotiate at the meeting of 15 November 2002 or were still open to options and negotiation. The first issue to be addressed, however, is whether there was in fact a true redundancy and then whether the process followed was fair and whether Mr Howlett should have been made redundant.

43 I should say that I do not take issue with the credibility of the evidence given by the applicant, Mr Taylor or Ms Read. There are clear differences of opinion and recall within these respective versions of what transpired. However, I consider that each witness, in the main, sought to answer directly the questions, as put, to the best of their recollection. Mr Howlett's evidence was in parts more tentative and his recall less sure, but this may simply be the effect the hearing had on him. This was more visible though after the completion of his evidence. It is the case, however, that after seeing the witnesses and having the opportunity to read carefully their evidence, where there is any doubt I would favour the evidence of Ms Read. It is her evidence that I have the greatest confidence in. Her recall in my opinion was very clear. She did not seek to argue her case in evidence, but merely addressed the questions. She was willing to concede points readily.

44 The following appears plain to me on the evidence. Mr Howlett was diligent and good at his job. In June or July 2002 the stress of his job, coupled perhaps with matters outside his job, caused him to ask to be relieved as the manager and to undertake the role of sales representative. The suggestion being that Mr Neat would assume the role of manager. This matter was addressed to Ms Read and not Mr Taylor. The proposal never eventuated and was not pursued very far by either party. Ms Read at that time assisted Mr Howlett to organise his priorities, a task which Mr Howlett did not see as necessary. In early November 2002 Mr Taylor and Ms Read became concerned that the income for Ausrep would diminish due to the progressive loss of customers and in particular due to the failure to secure a new account for Nylex. Acting on that concern they considered and took advice on making redundant the position of Sales Manager in Western Australia. They considered the functions undertaken in the position could be absorbed by headquarters.

45 Mr Howlett was advised of this on 12 November 2002 and then he met with Mr Taylor and Ms Read on 13 and 15 November 2002. In attendance also was his brother David. The first discussion was amicable and two options were put forward by Mr David Howlett. I will refer to then as the "notice" option and the "hybrid" option. These were explained and discussed and it was left for the respondents to consider them. The parties were to meet two days later for further discussions. Mr David Howlett suggested that he had other options but the detail of these was never mentioned, either then or at a later time. The respondents were open to consideration of both the options.

46 The meeting of 15 November was brief and was not amicable. The meeting was drawn to a swift close by Mr David Howlett. The applicant was advised that his employment would finish that day. The company's property was collected later in the day.

47 It is clear from these findings that I consider the position of sales manager was made redundant and that there was a true redundancy. It that respect the onus upon the respondents to prove that there was a valid redundancy has been discharged. It is noteworthy that at the time of the discussions about redundancy on 13 and 15 November 2002 there was no challenge as to the need for a redundancy. Mr Howlett was represented by his brother, a solicitor, in these discussions. The focus was instead on persuading the respondents to continue Mr Howlett's employment in some way and on the payments that might be considered.

48 Having said that I consider this matter does involve a genuine redundancy, it is necessary to assess the other allegation on behalf of the applicant; namely that he was dismissed summarily. Mr Drake-Brockman cross-examined Mr Taylor and Ms Read at length about the company's projected and actual income figures. It is clear that there is a difference between projected and actual income such that the companies' planning was not precise. It is also clear that the inability to attract the Nylex contract was a deciding factor in the respondents' decision to make the sales manager's position redundant. He also questioned them extensively about whether Mr Taylor had some concern about Mr Howlett and would not speak to him, and about the Bunnings incident. I consider that both Mr Taylor and Ms Read were clear, genuine and undiminished in cross-examination. Indeed I consider that Ms Read had displayed a good deal of concern and support for Mr Howlett in addressing his desire to

return to the role of sales representative and the resolution of the Bunnings matter. Clearly it was her expressed view that Mr Howlett had not handled Mr Panell as well as he could have, but Mr Howlett was still openly supported and his own evidence reinforces this view. As I have said, it is noteworthy that in all the evidence about the discussions on 13 and 15 November 2002 the need for a redundancy was not challenged with any force if at all. Nor I should add was there any suggestion that Mr Howlett was held in poor regard or that there were or had been difficulties between the parties. The discussion on 13 November 2002 on all the evidence was amicable. Mr Howlett played little part in these discussions. He was on the evidence of both parties keen to retain employment. His interests were being pursued by his brother, who was experienced in these matters, and the options canvassed were clearly to secure the best outcome from a redundancy; not to negate the actual redundancy. I am convinced by the evidence of Mr Taylor and Ms Read that they held concerns about the level of business within Western Australia and, as I have indicated, these concerns were crystallised when they failed to secure the Nylex contract. Having said this, it is the case that I am not convinced that somehow a personality conflict or the Bunnings incident generated into a plan to dismiss Mr Howlett and was concocted and executed in the form of a redundancy. I reject the submission that this matter involves a summary dismissal. I will address the issue of notice later. I reject also any sense of harshness or oppression in the manner of dismissal. It is a fact that the decision was taken and the termination executed within a short period of time. However, there is nothing inherently unfair about this approach.

49 It is the case that the only position that was considered for redundancy was that of the Sales Manager. The advice they first sought from the Timber Merchants Association only relates to this position and it can be inferred that this was the only position in focus. I am not critical of this approach. Their evidence is that they absorbed the administrative or management functions within head office. In that way I do not believe that it should not have been the manager's position which was chosen for redundancy. The next part of the equation is not so immediate. It is the case that in considering a redundancy it involves first the position and then the person. In other words once the decision was taken that there was no longer a need for a sales manager then the consideration needed to turn to who should be made redundant. This is most obvious when the situation arises for example of having to reduce a sales force from say five salespeople to four. Some logical and fair manner of selection or assessment needs to be undertaken. This may not need to be time consuming or complex, depending on the situation, but it should not be arbitrary or perfunctory. In perhaps most cases, especially in small organisations, the decision will be obvious and the person occupying the job, which is no longer required, will be made redundant.

50 The respondents adopted the course that the sales manager's position had to go and hence Mr Howlett had to go. As I have said it is clear that only the sales manager's position was considered. It is also the case that only Mr Howlett was considered. I do not doubt that Mr Taylor and Ms Read gave consideration to the "notice" and "hybrid" options, as they indicated they would at the conclusion of the meeting on 13 November 2002. They considered the "notice" option too expensive and not immediate enough. I do not quibble with this as the proposal was effectively to pay Mr Howlett for nine months, six months of which he would continue in employment. I will deal with this issue in more detail later but I do not consider that proposal reasonable. It may have been a negotiation position and treated as such but I do not know that. In relation to the "hybrid" option, Ms Read's evidence is that it would not have been right to make Mr Neat's position redundant as they still required sales representatives and if they had made a sales representative position redundant then they would not have a sales representative (Transcript p.207).

51 The clear connection is that the sales manager job was the one not needed and straightforwardly Mr Howlett was no longer required. As I have said this may normally be expected to be the ready and correct assessment. However, there are three issues that need further consideration in this matter and each of them bear on the requirements of section 41(2) of the *Minimum Conditions of Employment Act 1993* (MCE Act). I accept that Mr Howlett was advised, as required under section 41(1), of the respondents' decision as soon as reasonably practicable after the decision was taken. The evidence is that having not secured the Nylex contract the respondents considered redundancy. This was early November. Then on 12 November 2002 Mr Howlett was informed as a prelude to discussions.

52 Firstly, the respondents' evidence and submission is that Mr Howlett's management or administration duties occupied him for about one day a week. This is the average amount of time taken through the course of a week to complete all of these functions. The submission of the respondents is that "the predominant aspect of the applicant's work was that of a sales representative" (Transcript p224). The evidence of Mr Howlett is different and his view is that his management role took a greater amount of time. If the respondents' view is correct, and I accept this evidence, then I do not understand why they did not compare Mr Howlett with Mr Neat in deciding who was to be made redundant.

53 Secondly, the evidence is that two part-time sales people were employed shortly after Mr Howlett's termination. These two employees earned between them $20,000 over the following six months. Mr Howlett's salary was $40,000 per annum. The evidence of Mr Taylor and Ms Read is that one person would not have been effective as two people because he/she could not have been in two places at once. Ms Read's evidence is—

> "And Mr Taylor said it wouldn't ideal but Mr Howlett could cover their roles?---If he can be in two stores at once, yes.
>
> Oh well, Mr Taylor said it wouldn't be ideal, but he could cover - - cover their work - - ?---Yep, could do." (transcript p.212)

54 Mr Taylor and Ms Read were alerted to the possibilities existing in the award of transferring Mr Howlett to lower duties. This appears in the advice of the Timber Merchants Association of 7 November 2002. They knew that Mr Howlett wanted to keep working. This is the evidence for the respondents but it is also patently clear as both proposals put forward on Mr Howlett's behalf involved him continuing to be employed for at least six months (or less if he found another job). Yet there is nowhere in the evidence a sense that they gave serious consideration to continuing to employ Mr Howlett to perform a sales representative role instead of employing the two part-time staff. There does not appear to have been any discussion about this. Neither the applicant nor the respondents directly raised this as a proposal. Ms Read does say that Mr Howlett was advised that he could be considered for one of the part time sales roles but no interest was shown. I accept this evidence. I consider it understandable that Mr Howlett would not wish to assume a part-time job when he needed to support his family. It can be assumed that Mr Howlett was happy to continue as a sales representative because the "hybrid" option would have delivered this result and he had only a matter of months earlier suggested that he wanted such a role. In terms of whether Mr Howlett would accept less pay the evidence is that Mr David Howlett indicated that his brother and he would need to discuss this. This is not an outright rejection and my impression at hearing and from the evidence is that Mr Howlett primarily wanted to continue in a job.

55 The third issue is perhaps not a separate point but relates to each of the first two issues. Both Mr Taylor and Ms Read gave evidence that they considered and rejected the two proposals put forward on behalf of Mr Howlett. Mr David Howlett said he had other options but never expressed these I accept this evidence. However, I cannot see in the evidence where the employer raised measures to avoid the significant effect on Mr Howlett. I infer from the evidence that in some respects Mr David Howlett took charge of the discussion on 13 November 2002, his brother took a back seat and Mr Taylor and Ms Read being unfamiliar with redundancies simply followed his lead and then sought advice. This is perhaps understandable. They were faced with an unpleasant task, they met with a lawyer experienced in these matters and the discussion was conducted amicably, at least on the first occasion.

56 There can be no doubt though, that Mr Howlett and his brother were surprised that the respondents took to the meeting on 15 November 2002 a concluded view; Mr Howlett was to finish that day. There is much evidence about who terminated the meeting. I find that Mr David Howlett terminated the meeting. I also infer from Ms Read's evidence under cross examination that the discussion the respondents' may have had was simply about money, not about keeping Mr Howlett employed. The tenor of Ms Read's evidence is that it was Mr Howlett's fault (I use that term liberally) that the meeting broke down and that he did not work out his notice. It is the case that the respondents' had decided prior to 15 November 2002 that Mr Howlett was to finish that day. The issue in my mind is whether the employer was open to Mr Howlett continuing in employment, if practicable, not simply whether they would continue to discuss money and who ended the negotiation.

57 The decision of Heenan J, with which Parker J concurs, in the matter of *Garbett v Midland Brick Company 83 WAIG 893* makes it plain (at paragraph 90) that—

> "the terms of the condition implied by s 41 of the Act in cases of redundancy or action likely to have a significant effect on an employee, actually require the employer to carry out the discussion with the terminated or affected employee which the condition provides for even where, and perhaps particularly where, the employee is unaware of the existence of that obligation or takes no steps to insist upon its performance."

and again (at paragraphs 94 and 95)

> "the obligation to discuss with the employee the various matters mentioned in s 41(2), actually requires the employer to bring that entitlement to the attention of the employee and to discuss the matters so arising, notwithstanding that the employee may not be aware of the existence of his or her entitlement to be so informed or of the obligation of the employer to discuss the matters provided."
>
> "Consequently, in the present case, I consider that the respondent, Midland Brick Company Pty Ltd, was in breach of the implied term of the contract of employment between itself and the appellant, Mr Garbett, in failing to inform him of his entitlements under s 41 of the *MCEA* and in failing to discuss with him the likely effects of the redundancy in his respect and measures that might be taken by the appellant or by the respondent to avoid or minimise that effect."

58 The facts in this case are different of course to those in the *Garbett* matter. Mr Howlett was represented at all times by experienced counsel and hence it can be assumed that he knew of the employer's obligation to him under the *MCE Act*. It is also the case that the employer instigated the discussion with Mr Howlett and considered the options put to them on his behalf. They in fact both came to Perth for this purpose, had an initial discussion, and then reconvened for further discussion. There is nothing in this approach which on its face is unfair or a breach of the *MCE Act* and hence Mr Howlett's contract. However, the *Garbett* decision in my view, when read as a whole, makes it plain that the onus falls on the respondents to have a discussion about measures to avoid or minimise the significant effect on the employee. If there are measures that are reasonably and practicably available for the employer to adopt should these be proposed by the employer for consideration by the employee? This to me would commonsensically be the case and would follow from the obligation imposed by s.41(2) of the MCE Act.

59 Put simply, if there was no job in which Mr Howlett could legitimately continue in employment, then I would take no issue with his termination. The respondents went to some effort and care in executing the termination. They sought advice, they acted quickly in informing Mr Howlett, they instigated the discussion, they met in person, they suggested that he bring along someone to help him, Mr Howlett had legal representation and they considered the issues which were put to them. Given this backdrop they may well feel aggrieved by my conclusion. However, none of these issues negate their responsibility to seek to continue Mr Howlett in employment if that is what he desires and it is reasonable and practicable to do so.

60 As I have said, clearly it is the evidence of both parties that Mr Howlett wanted to continue in employment. He had a young family to support. He did not have an issue with being "downgraded" to the role of sales representative. He had asked that this occur some months earlier. He effectively requested it again in a different fashion by raising the "hybrid" option. The respondents employed two part time sales representatives shortly after Mr Howlett's services were terminated. These jobs had been advertised prior to Mr Howlett's termination. They earned together the same amount of salary as Mr Howlett was paid. Therefore the option was not out of the question due to cost.

61 Mr Taylor and Ms Read were both cross-examined on this point and a fair assessment of their responses in my view is that this option could have been pursued and adopted but was not considered. The real difficulty they expressed was that two persons would have provided for better coverage of stores than one. A very legitimate consideration. Mr Howlett could not have been in two places at the same time. Ms Read concedes though that Mr Howlett could have covered the work. I consider that it can also be inferred from the evidence that as it was not put as an option to them, they did not consider it. This in my view is not a proper approach to their obligations under s41(2) of the *MCE Act*, notwithstanding the other factors which I have mentioned. In other words, if the onus is on the employer to have the discussion, and there is a chance of ongoing employment, then the employer needs to at least explore this option to properly discharge their obligations under s41(2) of the *MCE Act*. In this way the dismissal of Mr Howlett can be said to be, and is, a wrongful dismissal. A wrongful dismissal is not necessarily unfair and all the circumstances of the dismissal need to be considered to make this judgment.

62 I am bolstered in this view by the judgment of Hasluck J in the decision of *Garbett v Midland Brick Company Pty Ltd* 83 WAIG 893 at paragraphs 53 – 55. He states—

> "This passage suggests that it is sufficient for an employer to inform the employee of the decision and then to afford to the employee an opportunity to discuss the matters mentioned in s 41(2), namely, the likely effects of the action or the redundancy in respect of the employee and measures that may be taken by the employee or the employer to avoid or minimise a significant effect.
>
> In my view, as I foreshadowed in my earlier observations, this reveals a misconception as to the nature of the obligations imposed upon the employer by the statutory provision. It is significant that s 41(2) speaks of "the matters to be discussed". This suggests that the employer has an obligation to raise the matters for discussion and to ensure that the relevant points are in fact covered. Further, and in any event, in the case of remedial legislation of this kind which is obviously designed to ameliorate the effects of redundancy to some extent, the provision clearly requires that there be a discussion.
>
> To my mind, if the employee remains silent, possibly because of shock or diffidence or ignorance about his statutory entitlement, it is not open to the employer to leave the matter in abeyance. The employer must ensure that a discussion of the prescribed kind takes place, so that the employee will be able to draw the employer's attention to any considerations that may have been overlooked such as, adverse effects upon the employee or measures that might be taken to avoid or minimise the effect".

63 It is trite to observe that it is not for the Commission to unduly interfere with the business of the respondents. Included in this view would be to determine that the respondents should have structured its workforce inappropriately, eg to make the

respondents employ one full-time position where two part-time positions are required. However, Mr Howlett was a good employee. On the respondents' evidence he operated as a sales representative for four days a week. He knew the respondents' business and customers very well. Indeed he was responsible for ensuring good client relationships. It is not hard then to infer that Mr Howlett would have operated effectively and immediately as a sales representative. Mr Taylor and Ms Read do not challenge this; their only observation is that one would not have been as good as two; yet Ms Read concedes that Mr Howlett could have covered this work.

64 In my view the respondents' should have considered this option and it is more probable than not that if it had been considered then Mr Howlett would have continued to be employed for at least the immediate future. It is not sufficient that simply because it was not raised by the applicant then it was not considered. As this work was not offered to Mr Howlett I find that he was not 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) and hence I find the dismissal of Mr Howlett to be unfair. There was continuing work to be performed, in a full-time capacity which Mr Howlett was clearly well equipped to perform but he was not offered the opportunity.

65 I need to say something about whether Mr Neat should have instead been made redundant. This was in effect the "hybrid" option. I cannot on the evidence of the applicant find that Mr Neat should have been chosen for redundancy instead of Mr Howlett (*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; see also *Gromark Packaging v The Federated Miscellaneous Workers Union of Australia, WA Branch* 73 WAIG 220). Mere reference to the difference in personal circumstances of the two employees does not give me sufficient to come to a conclusion that Mr Neat's services should have been terminated. I do not know the respective performance of the two employees. I do know that the respondents' considered that it was unfair to consider Mr Neat as it was not his job which was made redundant. I do not support this approach but I cannot find on the evidence that it was unfair to terminate Mr Howlett's services instead of Mr Neat.

66 Mr Howlett is now engaged in employment. I find that it is not practicable to reinstate Mr Howlett. The relationship has broken down and Mr Howlett now has other employment. He was without employment from 16 November 2002 until 23 April 2003 inclusive. This is except for some casual work for which he earned on his evidence $1500 or $1600. It is not challenged that Mr Howlett sought to properly mitigate his loss. His period of unemployment, barring the casual employment, was 22.6 weeks. Importantly, the part-time staff were engaged for all of this time.

67 I do not award any injury to Mr Howlett. There is nothing in the manner or timing of the dismissal to make the effect of the dismissal particularly debilitating or stressful. Undoubtedly the applicant was adversely affected by the termination but dismissals by their nature tend to cause stress (*Nicholas Richard Lynam –v- Lataga Pty Ltd* 81 WAIG 986). Mr Howlett did not seek medical attention, albeit he says that his wife wanted him to see a doctor. In these circumstances I do not find that any sum for injury should be awarded.

68 It is common ground that at the time of termination the applicant's annual salary was $40,000 and in addition he had private use of the motor vehicle and received 9% superannuation. The point in dispute is the value and use of the motor vehicle. I address this point for the purpose of calculating loss.

69 Mr Howlett commenced employment with the respondents on 7 December 1998 as a sales representative. The companies traded as Ausrep and Mr Howlett's contract is at [Exhibits A1 and A2]. Exhibit A2 references salary, superannuation, company vehicle and mobile phone. There are other conditions but these are not relevant for the purposes of this claim. In respect of the mobile phone, [Exhibit A2] reads, "Fully maintained for business uses – as per Mobile Phone policy attached." In respect of company vehicle, it states, "Fully maintained as per Motor Vehicle attached". It is the evidence of Mr Howlett supported by the evidence of Mr Taylor that he asked for a tow bar to be fitted to his car so that he could tow his boat. This was agreed. Mr Howlett was later promoted to Field Sales Supervisor and then on 5 November 2001 was promoted to the position of Sales Manager for Western Australia. His duties also included responsibility for Darwin. His letter of promotion [Exhibit A3] states:

> "We are delighted to be able to confirm your appointment to the position of Sales Manager in your state. Persistence and hard work do not go unnoticed and results because of effort should be rewarded.
>
> This new title brings with it new challenges and responsibilities that we know you are capable of and we trust that you will take these on just as you have in your previous capacity of field sales supervisor."

This is an adequate summary of how the terms of the contract developed.

70 I find the value of the motor vehicle in the remuneration package to be $15,000 per annum. My reasoning is as follows. I note the applicant in his application ascribes the annual value as being $15,000. The applicant's counsel at hearing tendered an RAC pamphlet [Exhibit A11] and based on that an estimate of kilometres travelled per year. Counsel for the applicant says the remuneration value on the car would be $16,232.84. Evidence was given by Mr Taylor for the respondents as to the cost of motor vehicles incurred by the business. He estimates that Ausrep operate about 20 cars. He gave evidence as to the various cost components to the business of running the car. His calculations {Exhibit R11] are headed up "consideration to private component of car". It then lists a figure of $15,000 per annum. He then seemingly deducts the cost of fuel and is left with a figure of $10,000 per annum. He then allocates two days per week for private use and calculates for the period of 16 weeks notice which was paid a sum rounded up of $1000. This was paid to the applicant on termination. The issue of valuing motor vehicles as part of the remuneration is somewhat problematic at times. However, the value must be viewed in terms of the remuneration value to the employee. Mr Taylor goes on to cost all of these factors on behalf of the business, being registration, purchase of leasing servicing and repairs, replacement of tyres, petrol, and insurance. There well may be other costs attached to the car, and the value to individuals working with the same employer who have private use of the car is likely to be different in actual terms. My logic is simpler, namely that the applicant at first assigned the value of $15,000 per annum and the respondents on mature calculation of the cost of the car valued the car at $15,000 per annum. I am happy to accept that this is the reasonable cost of the remuneration package of the motor vehicle to the applicant.

71 The respondents then sought to limit the cost of the car as they say the applicant did not have full private use of the car. In reference to the motor vehicle policy dated April 1996 and January 2002 [Exhibits R8 and R9 respectively], the policies relevantly state:

> "The vehicle is provided for the purpose of performing work related to Ausrep.
>
> Private mileage is to be kept to a minimum. If this exceeds 100kms after hours a deduction of 10c per kilometre will be applied."

The second policy [Exhibit R9] does not have the additional stipulation of 100kms. The respondents also exhibit two fringe benefit tax returns for the year ended 2000 and 2002 [Exhibit R12]. Both these returns show a 100% business use and a nil

FBT expense. Days unavailable for private use in both cases are nil. The days available for private use vary being 366 and 224 days. It is not clear to me what I should make of this exhibit. It is also not clear to me what I should make of [Exhibit R16] which shows, for a period 9 December 1998 to 30 March 1999, usage of the vehicle for FBT calculation purposes. The evidence given about that particular document by Mr Howlett and the evidence on behalf of the respondents is not particularly enlightening or helpful.

72 I am not convinced by the evidence of Mr Howlett that he was not aware of the motor vehicle policies. His demeanour in cross-examination whilst answering these questions was mainly to seek to underplay them, hence diminishing my confidence in his responses on this point. In addition to this Mr Howlett would appear to be a careful person. He sought adherence to the award for payment of leave loading and he was responsible for administration which included to "provide all the compulsory and requested administration requirements that are a part of you and your team's job." I consider it unlikely that he was not aware of the motor vehicle policy. In contrast however, there is no evidence to suggest that any deductions were made for kilometres in excess of 100 kilometres. The respondents agreed to fit a tow bar. The evidence of Mr Howlett unchallenged by Mr Taylor's evidence is that he had child seats in the car. There is no dispute that he used the car for private purposes. However the question is the extent of the usage. His original contract in relation to the company vehicle says fully maintained whereas for the mobile phone it says for business uses. Mr Howlett's evidence is that he declared to the respondents and got Mr Taylor's approval to take the car to Exmouth on holidays. He paid the petrol for this journey. This would seemingly indicate in the respondents' submission that Mr Howlett was aware of the policy and the stipulation therein which says "permission must be obtained to drive the vehicle on long distances or interstate". I am confident that Mr Howlett knew of the motor vehicle policy. I am also confident the motor vehicle policy was not applied with any rigour. In that sense, and weighing all these factors, I am confident that Mr Howlett enjoyed full private use of the motor vehicle. This is with the one exception namely that long distance travel to Exmouth.

73 Given these findings the remuneration package for Mr Howlett, upon which any compensation should be calculated is salary $40,000, motor vehicle $15,000 and superannuation $3600. That is a total package of $58,600 per annum (see *Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8).

74 I need to address the question of loss and compensation in some detail. The loss suffered by Mr Howlett relates simply to the loss of continuing employment he should have enjoyed, and the income he should have derived from this, but for his termination. The part-time salaries equated coincidently to the exact amount Mr Howett was paid. The unfairness found was the termination of Mr Howlett, instead of continuing to employ him as a sales representative to perform the work which two part-time staff were shortly thereafter employed to do. How then is compensation to be calculated? Anderson J in *Dellys v Elderslie Finance Corporation Ltd* 82 WAIG 1193 @ 1199 states—

> "In the absence of express terms in the contract of employment providing for special payments on termination and where summary dismissal is not justified, the single obligation on the employer in terminating the contract is to give reasonable notice and if he fails to do so, there will be a wrongful dismissal entitling the employee to the single remedy of damages. The general rule with respect to the quantification of damages for wrongful dismissal is that the starting- point is the gross amount that would have been earned during the period of reasonable notice had the contract continued. From this must be deducted the gross amount actually received by the employee during that period: *Kilburn v Enzed Precision Products (Australia) Pty Ltd* (1988) 4 VIR 31 at 33 - 34. The amounts to be deducted include all payments made to the employee by the employer (including payments for leave which is due to the employee) as well as all remuneration earned by the employee in other employment: *Quinn v Jack Chia (Australia) Ltd* (supra) at 581. (Of course, the employee will be entitled to have the benefit of any accrued rights such as wages actually earned, but not paid.) Even if an employee who is wrongfully dismissed elects to keep the contract of employment on foot, he or she cannot claim wages in respect of any period after the wrongful dismissal because the right to receive wages is dependent on the services having been rendered: *Byrne v Australian Airlines Ltd* (supra) per Brennan CJ, Dawson and Toohey JJ at 427 - 428. Furthermore, the employee is under a duty to mitigate. He must act reasonably to minimise the loss which the wrongful dismissal has occasioned to him: *Gunton v Richmond-upon-Thames London Borough Council* [1981] 1 Ch 448 at 468."

I cover this for completeness but it is not the method by which compensation should be approached in this matter. As stated there is an aspect of wrongful termination in this matter, but essentially the dismissal is unfair for the reasons expressed.

75 I have addressed the issue of injury. Counsel for the applicant submits that an amount of six months compensation should be awarded. He says that the amounts paid to Mr Howlett for notice and redundancy are separate and should not be deducted from any loss found. He relies on the Full Bench decision in *Jacob Gilmore –v- Cecil Bros, FDR Pty Ltd & Cecil Bros Pty Ltd* 76 WAIG 4434. The loss incurred by Mr Howlett is undoubtedly the loss of income due to the termination. He was unemployed for 22.6 weeks; excepting a short period of employment. Therefore, Mr Howlett's total loss, on the logic submitted by the applicant, can be calculated as follows. Mr Howlett was on a package of $58,600. If this figure is multiplied by 22.6 weeks and divided by 52 weeks a sum of $25,468.46 is derived. From this Mr Howlett's earnings from casual employment of $1,498.75 must be deducted. Mr Howlett gave evidence of an approximate figure. Counsel for the applicant submitted this precise figure, without challenge, and it is this figure which I will adopt. The figure remaining is then $23,969.71. If the submission on behalf of the applicant is correct then this is the compensation figure which should be awarded. However, Mr Howlett received payments for notice of $2,308.50, for redundancy of $10,003.50 and an additional payment for car allowance of $1,000. He also received additional payments for accrued leave which I do not take account of and there is no submission on behalf of the respondents that those leave payments should be factored in. Therefore if these termination payments are deducted from the calculated loss then a figure of $10,657.71 is derived. The issue is whether the termination payments should be deducted?

76 The Hon President in the *Gilmore* case at page 4447 outlined the principles to be followed in assessing compensation. He stated—

> "Only if reinstatement is "impracticable" is the court to turn its attention to the remedy of compensation" (see per Gray J in Liddell v Lembke (trading as Cheryl's Unisex Salon) (op cit))at page 368.
>
> I set out the following principles:-
>
> (1) The Commission will not be able to adjust the measure of compensation according to its opinion of the conduct of the employer.
>
> (2) It is required to order the employer to compensate the employee as far as possible up to the limit specified in respect of any loss which the employee has suffered by reason of the termination.
>
> (3) The limit specified is a limit on what the court can order by way of compensation, not a limit on what the employee can receive from the employer.

Thus, even if an employer has already paid a sum of money designed to compensate the employee for dismissal, if the employee is entitled to greater compensation, the court must award it up to the limit specified (see Liddell v Lembke (trading as Cheryl's Unisex Salon) (op cit) per Gray J at pages 368-369).

(4) The Commission is able to order that compensation be paid for "loss or injury caused by the dismissal", provided that the amount not exceed six months remuneration (see s.23A of the Act).

(5) There must be a causal link between the dismissal and the loss or injury alleged to have been suffered.

(6) The manner in which the Commission is to assess compensation is not prescribed otherwise by the legislation.

(7) The Commission must assess compensation having regard to s.26(1)(a), s.26(1)(c), and perhaps from time to time s.26(1)(d) of the Act.

Following what I have said, the statutory limit is a limit upon what the Commission can order by way of compensation. The Commission may still order an amount up to the maximum of six months remuneration, even though the employer has already paid an amount which might be said to be "compensation" or was even designated as such. Of course, it will be a relevant factor to consider that a sum by way of compensation, if the Commission considers it to be compensation, has been paid. In the end, the Commission had the power to order that Mr Gilmore be paid an amount equal to as much as six months remuneration by way of compensation."

77 These are the principles which in my view should be followed. In *Gilmore* the applicant was paid twelve months wages on termination and the Commission having regard to all the circumstances and in particular the nature of the dismissal, which had characteristics of being a summary dismissal, awarded Mr Gilmore an additional two months in compensation pursuant to s.23A, having exercised his judgment as required under s.26. The circumstances relating to Mr Howlett are quite different. His termination was not summary in nature as I have found. The manner of dismissal was not harsh or oppressive. In simple terms the employer in my view got the termination wrong as there was work which Mr Howlett clearly could have done and which instead the employer chose not to offer to Mr Howlett but to employ two new employees to do. Mr Howlett's loss or compensation relates directly to this lost opportunity for work. I turn to the judgment of Heenan J in the *Garbett* case. He says—

"issues of the claimant's entitlement to the payment of any moneys due under his contract of employment, or to compensation for the loss or injury caused by the dismissal are discretionary under s 23A of the Act. There can be little doubt that the discretion should be exercised in favour of the claimant where actual loss or damage can be proved, but where no loss or damage is proved, or where any entitlement to damages or compensation is adequately covered by payments made by the employer to the employee at the time of termination, whether as wages in lieu of notice and/or for other accrued benefits, will always be a matter for investigation. If no loss or damage, nor entitlement to compensation for the former employee is established beyond payments which have been made by the employer then there would be no entitlement to redress because the powers conferred under s 23A are intended to compensate the employee who has been harshly, oppressively or unfairly dismissed in respect of losses so caused and no more. They are not a means for punishing the employer or for conferring any windfall gain upon the claimant. This does not mean that the compensation which the Commission may order under s 23A(1)(ba) of the *Industrial Relations Act* is restricted to the damages which might be recovered at law for wrongful dismissal, but it does mean that payments ordered under s 23A must be in respect of a lawful entitlement and/or as compensation for a demonstrated loss or injury caused by the harsh, oppressive or unfair dismissal."

78 He makes it plain that, as per *Gilmore*, a generous termination payment does not preclude the Commission from exercising its discretion to make an award for compensation. He also makes it plain that "the measure of damages at law for wrongful dismissal of an employee is not necessarily the same as an employee's entitlement to compensation or other relief under s 23A of the *Industrial Relations Act* for a case of harsh, oppressive or unfair dismissal even though, in both instances, the principle underlying the measure of relief to be granted is compensatory and not punitive." He concludes that, "where there is relief claimed for harsh, oppressive or unfair dismissal, the court or tribunal should concentrate on the overall effect of the dismissal in its context".

79 The facts in this matter are clearly different to those in *Gilmore*. The loss incurred by Mr Howlett is the loss of employment. In my view, having regard to my obligations under section 26 of the *Act*, from that period of lost employment should be deducted the termination payments made to Mr Howlett. He is entitled to compensation, not to a windfall gain. His earnings during the period should also be deducted. Therefore the loss incurred by Mr Howlett is $10,657.71. This is the amount I would award in compensation, less any taxation payable to the Commissioner of Taxation; the amount to be paid within 7 days of the order.

80 There is one last area of dispute between the parties, ie whether the Western Australian Commercial Travellers and Sales Representatives' Award 1978 applied to the applicant's employment. I understand this to be relevant to the question of whether appropriate notice was paid and whether it was open to the respondent to pay Mr Howlett for notice in lieu. Given my findings in relation to the unfairness of the dismissal and the approach I consider appropriate to the calculation of compensation I consider this point to be moot. However, if I am wrong, and for completeness, I will cover this issue.

81 The respondents sought advice on this from the Timber Merchants Association [Exhibit R10]. A Ms Watt provided that advice and says quite rightly in part, "There may be an argument that the award would not apply to a Sales Manager, however, that would depend entirely on the work the person was performing." She then goes on to give the respondents further advice in respect of notice and severance payments and the discussions they need to entertain. Clause 3 of that award, ie the scope clause states:

"This award shall apply to all workers employed in the callings listed in Clause 7. – Wages hereof by employers engaged in the industries set out in the schedule to this award."

The respondency schedule lists numerous manufacturers and distributors in numerous industries. I think there can be little doubt that the industry in which the respondents were engaged is covered by this award. My view is that it is so plain it is not necessary to go into further detail. Clause 7 of the award simply refers to a commercial travellers/sales representative or the same employee but as a probationary employee. The respondents say that Mr Howlett was a sales manager by title but his duties were predominantly that of sales representative. The definition of commercial travellers/sales representative is in clause 6 of the award and states:

"Commercial Traveller/Sales Representative" shall mean a worker who is employed—

(a) away from or substantially away from his employer's place of business; and

(b) wholly or mainly for the purpose of soliciting orders or promoting business;

but shall not include—

(i) persons selling Motor Vehicles or attachments or Motor Cycles;

(ii) persons eligible to be members of the Western Australian Shop Assistants' and Warehouse Employees' Industrial Union of Workers, Perth, in accordance with the rules of that Union as they existed on 1st March, 1979; or

(iii) persons employed in the calling of Motor Vehicle drivers wholly or mainly for the purpose of delivering goods to retail establishments."

82 The respondents also say that Mr Howlett had access to the award when he sought payment from the respondents of annual leave loading and this was agreed. It is clear from Mr Howlett's job description, his evidence and that of the respondent that he is a sales manager. The evidence of Mr Howlett and Mr Taylor differs in respect of how much time he spent on the various requirements of his job in the managerial capacity. I accept the evidence of the respondent that those duties amounted to, on average, one day per week of work. Irrespective of this it is clear in my view, from Mr Howlett himself, that the majority of his time was spent on sales representative duties for the company. In this way the major and substantial part of Mr Howlett's job is to perform sales representative duties and hence I find that Mr Howlett's employment was covered by the award.

83 I would add that the evidence of Mr Howlett is that he was not aware of the financial records of the respondent. He did compile regular reports and did do training as part of his job. He also monitored the activities of the other sales representatives. Clearly he thought that the managerial duties could be relatively easily transferred to Mr Neat as he suggested that that should occur. Mr Howlett had earlier sought to have the award applied to him for the purpose of annual leave loading. Whilst that occurred when he was in another role it would seem that the benefit continued whilst Mr Howlett adopted the management duties.

84 If I am wrong on this point then an issue arises as to the reasonableness of the period of notice granted (see *Antonio Carlo Tarozzi v WA Italian Club Inc* 71 WAIG 2499). There is no evidence in respect of industry practice. Weighing the factors expressed in that decision I consider that a reasonable notice period would be six weeks. The position is not a position of high salary or standing, albeit he was a sales manager. He worked for the respondent for about 4 years and has now obtained employment in his field. Mr Howlett does not hold professional qualifications nor are these required for his work. In weighing these factors I have had regard for the amounts of notice, and my reasons for decision in respect to notice, which I awarded in *Deborah Marion Smith v Nutricia Australia Pty Limited* 82 WAIG 162 and *Ihaan Adriansz v ePath WA Pty Ltd* 82 WAIG 2690.

2003 WAIRC 09602

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STUART HOWLETT, APPLICANT
	v.
	KALINDA MEADOWS PTY LTD AND OTHER, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	WEDNESDAY, 8 OCTOBER 2003
FILE NO.	APPLICATION 1982 OF 2002
CITATION NO.	2003 WAIRC 09602

Result	Applicant dismissed unfairly; compensation ordered
Representation	
Applicant	Mr A Drake-Brockman of Counsel
Respondents	Mr C Raymond of Counsel

Order

HAVING heard Mr A Drake-Brockman of counsel on behalf of the applicant and Mr C Raymond of counsel on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, Mr Stuart Howlett, was unfairly dismissed by the respondents on the 15th day of November 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay within 7 days of this order, as and by way of compensation the amount of $10,657.71 to Stuart Howlett, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S. WOOD,
Commissioner.

[L.S.]

2003 WAIRC 09571

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TAHLIA ROBYN JAMIESON, APPLICANT
	v.
	CITY FIRE HOLDINGS PTY LTD T/A SKATERS ON ICE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 3 OCTOBER 2003
FILE NO.	APPLICATION 1488 OF 2002
CITATION NO.	2003 WAIRC 09571

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Casual employment - Industrial Relations Act 1979 (WA) s 23 & s 29(1)(b)(i) & (ii) – Fair go all round - Applicant unfairly dismissed – Reinstatement impracticable – Notice – compensation ordered.
Result	Applicant dismissed unfairly; compensation ordered
Representation	
Applicant	Mr T Solomon as agent
Respondent	Mr B Hull

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) and (ii) of the Western Australian *Industrial Relations Act, 1979* ("the Act"). The applicant, Ms Tahlia Robyn Jamieson, alleges that she was unfairly dismissed on 4 August 2002. She seeks compensation for her loss of income of six months pay and a payment of notice of two weeks wages.

2 The Commission forwarded to the parties on 29 April 2003, after the conclusion of the hearing, a copy of the decision of the Senior Commissioner in *Mary Slatter v Cityfire Holdings Pty Ltd t/as Skaters on Ice* 2003 WAIRC 08144. The Commission advised the parties that he would take regard of this decision and sought submissions from the parties if they so desired. Further submissions were heard on 10 June 2003.

3 Evidence for the applicant was given by Tahlia Jamieson, John Papamatheos, Mark Ellis, Mary Slatter and Mellisa Grier. Mr Barry Hull and Ms Pamela Hume gave evidence on behalf of the respondent.

4 Mr John Papamatheos gave evidence that he was formerly a partner in Skaters on Ice and that he had employed the applicant under the conditions of a workplace agreement [Exhibit A1]. He says that around June 2002 the applicant was employed as a cashier and performed various administrative duties along with some relief duties in the coffee lounge. He says that she was subject to a monthly work roster. He says that he terminated the applicant upon the sale of the business on 3 or 4 June 2002, at which time he forwarded to all staff a letter of termination [Exhibit A2]. He says that the applicant was initially employed as a casual. He did not have a problem with the applicant's attitude and had no cause to counsel her. Around the school holidays the business was very busy.

5 Under cross examination Mr Papamatheos says that the applicant was initially employed as a casual and that she was not fulltime. The applicant's agent in re examination asked the following :

> "MR SOLOMON: Mr Papamatheos, you said she wasn't full-time. Was she regarded by you as a part-time employee?--- No, she was a casual" (Transcript pg14).

6 Mr Mark Ellis gave evidence that he is currently a Senior Supervisor with the respondent, and has been employed at Skaters on Ice for nine years. He says that up until 4 June 2002 he had no problem with the applicant's attitude at work and did not need to reprimand her concerning her performance. Following the new owners taking over, his position remained the same but he had less responsibility. However, he continued to supervise the applicant.

7 In the period between June and August 2002 he did not see a change in the applicant's attitude to work. She worked also in the coffee shop. He is not aware of the duration of the applicant's rosters. The applicant would be aware from week to week what needed to be done. The rosters were compiled by the office staff. He is also unaware as to how busy the business is during the school holidays.

8 Under cross examination Mr Ellis says that when the new owners took over the rosters were done on a weekly basis. He also says that he never saw Mr Hull abuse or say anything to the applicant that was detrimental.

9 Mary Elizabeth Slatter gave evidence that she was employed as a cashier and bookkeeper with the respondent. She says that she worked for Mr Papamatheos when he owned the business and later for Mr Hull after he purchased the business. The rosters under Mr Papamatheos were put out on a monthly basis. She says that at any one time four weeks of rosters were located behind the office door. Between June and August there was no change in the frequency of the rosters. There continued to be four weekly rosters behind the office door. She states also that there were never any discussions about rosters with the new owners.

10 Her employment was terminated on 6 August 2002. She trained Ms Jamieson in cashiering duties and after 4 June 2002 they did not work together very often. Between June and August she did not see any deterioration in Ms Jamieson's standard of work or her attitude towards her work. Around the school holidays the centre was very busy and during July 2002 it was the busiest she had seen. In July of 2002 she received a call from Ms Jamieson advising her that her hours were going to be reduced to 7 hours per week. She considered this to be highly unfair. Prior to that she was working 24 to 34 hours per week. Her hours actually decreased to about 20 to 24 hours per week. She says that she had a telephone conversation with Ms Jamieson during which Ms Jamieson advised that she was looking for another job as she was not earning enough. She says that she was employed by Skaters on Ice in a casual capacity. She says that her work was continuous and was never terminated by the week. Ms Slatter says that neither Ms Jamieson nor herself were employed on a weekly basis when Mr Hull took over the business.

11 Under cross examination she says that she did not compile rosters after the new owners took over as this was a task for Ms Jamieson and Ms Alfonso.

12 Mellisa Grier gave evidence that she was employed in March of last year in the coffee lounge supervising other staff and preparing rosters. The agent for the applicant later referred to her as Ms Green. She says that she found Ms Jamieson's performance in the coffee lounge reasonably good and she had requested additional hours. After the new owners took over on 4 June 2002 initially there was no change. She says that she prepared rosters on a monthly basis and had to obtain their permission before posting the roster. During the period between June and August 2002 she had discussions with Ms Jamieson in regards to working in the coffee lounge, after the new owners took over she estimates that Ms Jamieson worked between 3-5 shifts in the coffee lounge.

13 After June 2002 the staff hours in the coffee lounge and front office were reduced due to an apparent lack of work. Ms Grier says that the July school holidays was one of the busiest periods she had seen. After Ms Jamieson was dismissed on 4 August 2002 Ms Hume took the hours.

14 Under cross examination she says that for the first two months she prepared rosters on a monthly basis and was then instructed by Mr Hull to prepare rosters on a weekly basis.

15 Tahlia Robyn Jamieson gave evidence that she has been employed at BP Erindale for the past 7 months, commencing on 26 July 2002, she currently works 30 hours per week. She first worked for Skaters on Ice on 15 June 2001 in the coffee lounge and was trained by Ms Slatter and was employed by the then owner Mr Papamatheos. Her employment with the previous owner came to an end on 3 June 2002. She says that while working for Mr Papamatheos rosters were prepared on a monthly basis and were kept on the back of the door in the office. She spoke to the new owners in the first week and was advised that everything was going to remain the same.

16 The rosters around June were still being done on a monthly basis. Ms Jamieson says Layla and she prepared the rosters. In relation to [Exhibit A4] Ms Jamieson says that her name appears on the rosters after the time of her dismissal. There were a maximum of four rosters on the wall in the office after June 2002. During July she says that it was stressful having to train up Ms Hume and that her hours had been reduced, however her attitude to work remained the same and there were no complaints regarding her conduct or attitude.

17 On 26 July 2002 she was instructed by Mr Hull to contact Ms Slatter and advise her that her hours were being reduced. Mr Hull advised her that Ms Hume was going to do the night shifts, and that apart from this instance the respondent never advised her in relation to a reduction in her hours. The school holidays in July 2002 were pretty busy. She says that Mr Hull offered her some work in the coffee shop as her hours were being reduced and that during July she did about three or four shifts.

18 She says that towards the end of July her relationship with the owners was fine although she was frustrated with the task of having to train Ms Hume. However, she was never rude or demeaning to her. Ms Jamieson says that on 31 July there was an incident whereby a small boy lost his money in a machine. She advised Mr Hull and Ms Hume that it was company policy not to give refunds and was told by Ms Hume not to lecture her and that "this is my authority".

19 Ms Jamieson says that around 5pm on 4 August 2002 Mr Hull came into the office and advised her that he was giving her one hour's notice. She queried this and was advised that she had upset Ms Hume and that Ms Hume did not want Ms Jamieson working there anymore. The conversation lasted about 10 minutes during which she told Mr Hull that he was losing all his experienced staff. He then went home at about ten past five. She worked out her notice and at 6pm Mr Hull and Ms Hume came into the office. Ms Jamieson requested that Mr Hull advise her in writing as to why she had been dismissed. He replied that he did not have to do that and he did not owe her anything. She advised Mr Hull that his refusal would be noted in her complaint and he said he would provide her with a letter stating that they were over staffed. She says Mr Hull and Ms Hume were getting angry and the conversation was getting a little heated and she apologised to Ms Hume for making her feel stupid saying that it was not her intention. She says that she never received a letter. During the conversation she was told that she was argumentative and insubordinate towards the new owners.

20 Ms Jamieson says that on 4 August she was working 20 hours at BP Erindale and 21 hours with the respondent. Her hours at the service station had increased but not in line with the situation she previously had. She has sought additional part time employment to fit in with her part time job at BP Erindale but it is hard to juggle the hours. She has applied for one full time position but says that she is more interested in finding a job that will fit around her employment at the service station.

21 Under cross examination she says that she was advised by the new owners that nothing would change—

> "The only thing we were told by yourself is that as far as the work was going in the office and everything like that, we knew what we were doing and what we were about and everything was going to stay the same way. That included hours, the job itself, everything.
>
> And your work status - - ?---Yeah.
>
> - - as a casual?---Well, yeah" (Transcript pg 68).

22 Ms Jamieson says that the rosters were drawn up on a monthly basis but were changed depending on circumstances in the workplace. Ms Jamieson says that she started work fifteen minutes early on occasion to enable the girls to change over so that jobs left were completed. She agrees that she did not follow up getting more hours in the coffee lounge. She was not the boss of the business and it was up to Mr Hull and Mellissa. She says that on one occasion she left her shift early in the coffee lounge as she was feeling unwell.

23 When Ms Hume made changes Ms Jamieson advised her why it had been done in a certain way in the past. If Ms Hume insisted on the change the applicant would do it. Ms Jamieson says that she simply offered her opinion in line with questions the new owners had asked upon their taking over the business. In relation to issuing refunds on machines Ms Jamieson assumed that the old policy was in place as she was not advised otherwise. She does not know whether Ms Hume handed money back to children.

24 Mr Barry Hull gave evidence that he is the director of City Fire Holdings trading as Skaters on Ice. In regards to the date of dismissal he says that at 5pm on 4 August 2002 he gave the applicant one hour's notice. He then went home for dinner and later returned to the centre. At that time he had a discussion with Ms Jamieson with Ms Hume present. He advised the applicant that he was restructuring the business and her services were no longer required. He gave the applicant one hour's notice believing that she was employed on a casual basis.

25 Mr Hull says that he decided to terminate the applicant at 5pm on 4 August 2002 following an argument the applicant had with Ms Hume just prior to 5pm on that day. Ms Jamieson verbally abused Ms Hume over a child asking for money to be refunded. This had occurred previously and Ms Hume had had enough. Mr Hull did not witness the incident but came to the view that it could not be tolerated.

26 In relation to the altercation between Ms Hume and the applicant, on the day of termination he says that Ms Hume advised him that she had a little boy come up and ask for a refund and the applicant advised that he was not going to get his money back as it was not their policy. Ms Hume then interjected and said that she would give the money out of her own purse.

27 When Mr Hull terminated the applicant she screwed up a number of rosters and put them in the bin. He says that he told the applicant not to draw the rosters on a monthly basis, but she continued doing so regardless.

28 Under cross examination Mr Hull says the decision to terminate the applicant had built up over a month as a result of altercations between the applicant and Ms Hume. He is unable to say whether the altercation between the applicant and Ms Hume occurred 4 days prior to the dismissal.

29 When the applicant was first employed she was advised that nothing would change. On the day of dismissal he gave the applicant one hour's notice at 5pm and returned to the office at 6pm with Ms Hume. Ms Jamieson was annoyed and upset and Ms Hume and she got into a discussion. Mr Hull says that he told the applicant she was being dismissed for lack of hours and denies that she was dismissed for the refund incident. He says that she was insubordinate to management and that they had put up with it but enough was enough. He is unable to recall whether the applicant apologised to Ms Hume. Mr Hull also says that he is unaware how many rosters were behind the door.

30 Ms Pamela Hume gave evidence that she had a difficulty with Ms Jamieson in relation to refunding children's money from machines and that she had told her on five or six occasions, perhaps more, that she was to give money back but Ms Jamieson always argued the point and said it was not policy. Ms Hume said she told Ms Jamieson that she did not care what the last owner's policy had been. She said that she got sick of arguing and said she would pay with the money out of her purse because the applicant kept saying Ms Hume would run the place broke.

31 Ms Hume says that the centre had various discount nights and that for ease she made all discount nights a standard $10.00. Ms Hume says that the applicant argued with her that it had been $7.00 for a long time and should not be changed. She says that the applicant was informed by Mr Hull to draw the rosters up on a weekly basis, but that no matter what she was told she did not change.

32 On the day of dismissal Ms Hume says that when she entered the office the applicant wanted to go on about the boy's money, Ms Hume went home and when she returned at 4pm Mr Hull told her that he was going to dismiss the applicant. Ms Hume says that the applicant was put off as a result of too many staff and that she had no complaints with her work.

33 Under cross examination Ms Hume says that about a week before the applicant was dismissed she had an argument with Ms Jamieson about the refunds policy. Ms Hume said that she would give the money to the children out of her own purse. The refund policy was put to the applicant in July when they took over the business and on at least five other occasions. On the day of dismissal at 6pm when Ms Hume returned to work the applicant queried why she had been put off and Ms Hume advised her that there were too many staff and that she would not refund money to children.

34 During the July school holidays Ms Hume said that the centre was very busy but quiet thereafter.

35 The respondent maintains that Ms Jamieson was a casual employee, subject to notice of one hour. Mr Hull submitted that he gave the applicant one hour's notice in accordance with her contract of employment. The contract he says was her previous workplace agreement, the terms and conditions of which he carried over when he purchased the business. He submits that he advised Ms Jamieson at that time that "nothing would change" and that her evidence goes to support this view.

36 Mr Hull says that work had slowed down after the July school holidays and that he did not require the office staff as Ms Hume had taken over the duties which were required. He submits that as owners of the business Ms Hume and he were free to work in the business as they saw fit. Ms Jamieson had arguments with Ms Hume which bordered on misconduct. The hours worked by all staff were reduced. He submits that rosters were drawn up and changed on a weekly, not monthly, basis.

37 Mr Solomon for the applicant submitted that Ms Jamieson's contract was based on the workplace agreement. The rosters [Exhibits A4 and R1] demonstrate that the work was continuous. Ms Jamieson expressed her concern to Mr Hull about a week before her termination that her hours had been reduced and that she was seeking other employment. Mr Solomon submits that this reduction and replacement of staff was not done in a proper and lawful manner. In his submission this has relevance to the quantum of compensation, not to whether the dismissal was unfair.

38 Mr Solomon submits that the dismissal of Ms Jamieson is unfair as she was dismissed without warning and given that the business was restructuring some better notice should have been given. Ms Jamieson had continuous employment and hence was a permanent employee and should have been treated differently. Mr Solomon complains that Ms Jamieson's alleged argumentative behaviour was not put to her during hearing or previously and hence the Commission should disregard the evidence of the respondent on this point. He submits that the evidence is that Ms Jamieson wanted to continue working, she had sought additional hours in the coffee shop.

39 The first issue to determine is whether Ms Jamieson's employment was casual in nature. It is common ground that Ms Jamieson was previously employed under a workplace agreement and the agreement provided that Ms Jamieson's employment was subject to termination on one hour's notice. There was no provision for annual leave or sick leave. The evidence of Mr Papamatheos is clear and that is that Ms Jamieson was always casual. I consider that it is clear from Ms Jamieson's evidence at transcript p.68 that she understood that her employment status was casual. This is my direct impression of her evidence as opposed to any submission or arguments. It is common ground also that when Mr Hull purchased the business he advised Ms Jamieson that nothing would change. The criteria to be applied in deciding whether an employee is casual are expressed in *Serco (Australia) Pty Limited v John Joseph Moreno* 76 WAIG 937. It is clear from that decision that an employee may not be casual simply because they are labelled as such. Ms Jamieson's contract clearly referred to her employment as being subject to termination on one hour's notice, and Mr Papamatheos and Mr Hull when he assumed control of the business clearly understood this to be the case. Rosters were changed by staff to suit their respective commitments. Ms Jamieson's timesheets and payslips [Exhibits A6 and A7] clearly show that her hours varied considerably. Ms Jamieson was employed on the same basis as Ms Slatter. Weighing those factors I find that Ms Jamieson's employment was casual in nature.

40 There was much evidence as to whether Ms Jamieson worked according to a monthly roster or a weekly roster. Mr Papamatheos' evidence is that he operated under a monthly roster. The evidence of Mr Ellis, who supervised Ms Jamieson's work, was that the new owners changed the rosters to a weekly basis. The evidence of Ms Grier is that she was instructed by Mr Hull to prepare rosters on a weekly basis. The rosters had previously been done on a monthly basis. Ms Jamieson and Ms Slatter say that rosters were prepared on a monthly basis, albeit Ms Slatter did not prepare rosters. Mr Hull says that he asked Ms Jamieson not to compile rosters on a monthly basis but she continued doing so regardless. This issue, like many others, was not put to Ms Jamieson in cross-examination. It is clear in my view that Ms Jamieson compiled the August roster on a monthly basis.

41 On the basis of the evidence of Mr Ellis and Ms Grier, which I accept, I find that the roster intended by the respondent was a weekly roster. These two employees were not party to the dispute and gave their evidence in a straightforward manner. In addition, it is clear from the evidence and unchallenged that the respondent was in the process of reducing hours for employees. Ms Jamieson advised Ms Slatter that her hours were reduced and Ms Jamieson complained to Mr Hull about her hours and the need to look for another job. It is uncontested that Ms Hume was taking over hours of other employees. It is also the case in my view that the business was moving to a less busy period post the July school holidays. Much evidence was given about this and it is clear in my view that the July holidays were busy but then business lessened. Weighing these factors it is more probable that the rosters then needed to be adjusted more frequently to cope with the changes the new employer wished to make.

42 Having said this, however, I do not consider that the employer's intentions were translated into the actual posting of a weekly roster and, as I have said, Ms Jamieson compiled a monthly roster for August. In any event I do not consider this issue to be the most important issue in determining the application. It is clear that the business was restructuring. The hours of staff were being reduced and the owners of the business were performing more of the work. Ms Jamieson has sought and gained additional work elsewhere. Against this backdrop there is little doubt in my mind that the rosters would have been subjected to further change and that Ms Jamieson's employment was bound to finish in the short term. It is also the case that Ms Jamieson on her own evidence was frustrated with Ms Hume.

43 Mr Solomon concedes that the evidence is that the secretaries' positions have not been replaced by the respondent. Ms Slatter's services were terminated on 6 August 2002, shortly after Ms Jamieson finished. The July school holidays had finished and there was less business.

44 There is an issue as to whether there was some friction between Ms Jamieson and Ms Hume regarding how the business should be run. Ms Jamieson says that she simply offered her opinion about matters but did as she was advised. In relation to the incident where Ms Hume gave back money to a child, Ms Jamieson says that she was simply following policy. Mr Solomon complains that matters were not put to Ms Jamieson in cross-examination about her "argumentative" nature. I agree, but the money incident was covered. Ms Jamieson says she apologised to Ms Hume for making her feel stupid. She says Ms Hume told her not to lecture her and that "this is my authority". Clearly Ms Hume felt challenged and belittled by Ms Jamieson's behaviour. Mr Hull says that he had had enough, arising from this incident, and dismissed Ms Jamieson. Evidence regarding the date of this incident differs but the incident was clearly pivotal, in my view, in the dismissal of Ms Jamieson and Ms Jamieson must take some responsibility for her actions.

45 Ms Jamieson says that she was not given a proper reason for her termination. She was told that she had upset Ms Hume. She asked for a reason in writing and did not receive one. Mr Hull says that it was due to restructuring. However, his evidence lacks consistency and my clear impression at hearing, and on a later fair reading of the evidence, is that but for the incident with the child, Ms Jamieson would not have been dismissed on 4 August 2002; albeit I consider that her employment was not destined to last. The respondent in the Notice of Answer and Counterproposal lodged in the Commission on 16 September 2002 says that Ms Jamieson was simply not offered further hours due to the restructuring. This explanation is not plausible.

46 As indicated, I have no doubt that the respondent was restructuring. This exercise had been occurring since the respondent took over the business. It led also to Ms Slatter's termination. I have no doubt that as a result of this restructure, the quiet period experienced post July school holidays, and the choice by the owners to do the work themselves rather than employ staff, that Ms Jamieson's employment was bound to finish in the short term. However, I also have no doubt that her employment was terminated due to the earlier incident with the child and her "debate" with Ms Hume, and that she was not given a proper explanation as to why. Clearly Ms Hume was offended by the exchange with Ms Jamieson. Clearly also Ms Jamieson's employment, even on a weekly basis was not due to finish that day, but for the incident.

47 I have to weigh all factors in considering the fairness or otherwise of the dismissal. Mr Hull was entitled to restructure his business as he did. Ms Jamieson was entitled to be given a proper reason, and the correct reason, for her dismissal. Ms Hume was entitled to give back the money to the child without challenge by Ms Jamieson; or at the very least without questioning in such a manner as to be offensive to Ms Hume. Bearing in mind the rule in *Brown v Dunn* [1894] 6 R 67 and relying on the evidence of other witnesses, including Ms Hume, Ms Jamieson was otherwise a good employee.

48 If I weigh all those factors I must conclude that Ms Jamieson was dismissed unfairly on 4 August 2002. Reinstatement is not practicable. There is no job for Ms Jamieson to perform. Ms Jamieson has sought to mitigate her loss, she indeed gained additional work at BP Erindale prior to her dismissal. In relation to Ms Jamieson's contractual benefits claim, which was not pursued with any force, her contract is clear; she was subject to termination on an hour's notice and this occurred and was lawful. This claim must fail. In relation to her claim for compensation, having regard to the fact that Ms Jamieson's employment was bound to finish in the short term, and having regard to my obligation under section 26 of the *Act* and the circumstances surrounding her dismissal, I would award Ms Jamieson compensation for the loss of what in my view would have been fair notice, namely one week. I do not consider that Ms Jamieson's employment would have continued for longer and her services could have been fairly terminated within that time.

49 Ms Jamieson's regular earnings [Exhibit A6 & A7] prior to her termination were as follows—

Week Ending (Sun) 28/07/02	21.0 hrs @ $10.70	$224.70
Week Ending (Sun) 21/07/02	33.5 hrs @ $9.60	$321.60
Week Ending (Sun) 14/07/02	30.5 hrs @ $9.60	$292.80
Week Ending (Sun) 07/07/02	43.25 hrs @ $9.60	$415.20
TOTAL	128.25 hrs	$1254.30

50 If I average these earnings (as per s.23A(9) of the Act) then the amount of one week's notice at the rate of $10.70 (being the final rate of pay) by 32.06 hrs (128.25/4) is $343.07. This is the amount I would award in compensation, less any taxation payable to the Commissioner of Taxation; the amount to be paid within 7 days of the order.

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2003 WAIRC 09652

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TAHLIA ROBYN JAMIESON, APPLICANT
	v.
	CITY FIRE HOLDINGS PTY LTD T/A SKATERS ON ICE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	APPLICATION 1488 OF 2002
CITATION NO.	2003 WAIRC 09652

Result	Applicant dismissed unfairly; compensation ordered
Representation	
Applicant	Mr T Solomon as agent
Respondent	Mr B Hull

Order

HAVING heard Mr T Solomon on behalf of the applicant and Mr B Hull 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, Tahlia Robyn Jamieson, was unfairly dismissed by the respondent on the 4th day of August 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay within 7 days of this order, as and by way of compensation the amount of $343.07 to Tahlia Robyn Jamieson, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S. WOOD,
Commissioner.

[L.S.]

2003 WAIRC 09896

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ERICA VERA JOLLEY, APPLICANT
	v.
	SIN-AUS-GREENOUGH PTY LTD T/A GREENOUGH RIVER RESORT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 31 OCTOBER 2003
FILE NO.	APPLICATION 315 OF 2003
CITATION NO.	2003 WAIRC 09896

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Casual employment - Industrial Relations Act 1979 (WA) s 23 & s 29(1)(b)(i) – Applicant unfairly dismissed – Reinstatement impracticable – Compensation awarded.
Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mrs E Jolley
Respondent	Mrs C Wee

Reasons for Decision

1 The name of the respondent was amended at hearing, by consent, to Sin-Aus-Greenough Pty Ltd t/a Greenough River Resort.

2 The applicant, Mrs Erica Vera Jolley, alleges that she was dismissed on 2 March 2003 by Mr James Cochran, the then manager of the Greenough River Resort. She says on that morning she was ready to attend for work and Mr Cochran rang to advise her that she was not to come in any more. She says a conflict had arisen the day before whereby Mrs Wee, the proprietor of the business, refused to pay her penalty rates for weekend work. On that basis she indicated that she would not continue to work weekends. She says she was later contacted by Mr Chris Loxton, the chef at the resort, who asked her to work the next day being a Saturday. He indicated that she would be paid the weekend rates for this work. The next morning when she received a call from Mr Cochran, he advised that he had spoken to Mrs Wee the night previous and Mrs Wee had told him to advise Mrs Jolley that she was not to come in any more. Mr Cochran advised Mrs Jolley that he would talk further to Mrs Wee and get back to her. She says that he never did.

3 Mrs Jolley says that she worked for the respondent, and previous owners, from 1999 to 2 March 2003. Her duties included those of house maid, kitchen hand, waitress and bar maid. She worked as a casual and her hours per week varied a lot from 4 to 40 hours per week. She says that typically she was advised on the previous day that she was needed the next day and quite often was rung in the morning and asked to work on that day. Her employment was covered by the Hotel and Tavern Workers Award and she was paid at the rate of $14.71 per hour. She was paid weekend penalties at the rate of $17 per hour. As she did not receive a call following the Saturday from Mr Cochran she went and sought other employment and gained employment the

following Tuesday at the African Reef Motel as a house maid. She received $14.70 per hour with that employer and worked anything between 20 to 30 hours per week. She had recently left that job. Under cross examination Mrs Jolley reiterated that Mr Cochran said not to come in any more. She denies that the quality of her work was challenged other than there was an incident where she spilt some wine on a table. She says the people were okay about this but they complained later about the food.

4 Mr Alan Jolley, the applicant's husband, gave evidence that he was standing near his wife on the Saturday morning. He says she received a call, she was dressed for work and on finishing the call she had tears in her eyes and advised him that she had been told by James not to come in.

5 Mrs Wee says that Mrs Jolley has not been dismissed. If Mrs Jolley is available for work, work is available and the managers decide to engage her, then Mrs Jolley will be offered work. Mrs Wee is adamant that Mrs Jolley was never dismissed.

6 Under cross examination Mrs Wee says that Mrs Jolley did not want to come in on the Saturday despite there being a full house. She says Mrs Jolley told Mr Cochran and Mr Loxton of this. Mr Cochran had made emergency arrangements for a friend to attend at the motel. Mrs Wee says that she does not interfere with the day to day management of the business. She says she pays the manager and accountants to attend to these matters. Mrs Wee says that she has checked and the applicant has been paid the correct penalty rates. Mrs Wee says that she did not dismiss Mrs Jolley and the manager did not dismiss Mrs Jolley; that Mrs Jolley simply refused to turn up.

7 Ms Simone Gardner, a manager in Mrs Wee's business, gave evidence that she had never been instructed by Mrs Wee to dismiss anyone. She says that Mrs Wee always gives employees another chance.

8 Mr Mark Guthrie, a manager in Mrs Wee's business, gave evidence that he had never heard Mrs Wee tell him to dismiss anyone. He says he runs a fairly autonomous arrangement without interference by Mrs Wee.

9 In the respondent's notice of answer and counterproposal Mrs Wee says:

> "I have given no directive to my manager not to offer Ms Jolley work when available and my manager Mr James Cochran did not state that he did not want Ms Jolley to work at the Resort any more. He stated that he did not require her to work that day. To my best knowledge Ms Jolley is still on our books as available for casual work when required."

10 It is not in dispute that Mrs Jolley was a casual worker. Her normal rate of pay being $14.71 per hour is also not in dispute. Exhibit A1 which shows Mrs Jolley's time sheets and pay slips indicate clearly that she worked varied hours. In relation to penalty rates she says she was to be paid $17 per hour. This is not apparent on the payslip, but if one calculates the percent penalty rate in the award, applicable from 1/1/03, then one achieves this rate.

11 The applicant says she worked under the Hotel and Tavern Workers Award. This is not disputed by the respondent. This award refers to a casual as—

> "A casual employee shall mean an employee engaged and paid as such and whose employment may be terminated by either the employer or the employee giving not less than 1 hours notice or the payment or forfeiture, as the case requires, of 1 hours pay."

12 In weighing the evidence I note that it is not an issue for the Commission as to whether Mrs Jolley was paid penalty rates or not. This is a dispute between the parties in another jurisdiction.

13 I note also that it was Mrs Wee's clear evidence in re-examination that Mrs Jolley refused to turn up. Seemingly the reference is that she refused to turn up on the Saturday. Mrs Wee's notice of answer and counterproposal however indicates that Mr Cochran stated to Mrs Jolley that she was not to work at the resort on that day. It says, "He stated that he did not require her to work that day". These two statements are inconsistent and cannot both be correct. Mr Cochran was not called to give evidence. Mrs Wee's submission is that he is not in the country. I have no reason to challenge this submission other than to say that there is no direct evidence by the respondent as to what was actually said in the conversation on the Saturday morning between Mr Cochran and Mrs Jolley.

14 I have no reason on hearing Mrs Jolley's evidence to have any doubt about her credibility. Her evidence is in part backed up by her husband, who says that he overheard her telephone call and was advised by his wife in tears that she had been sacked. Equally on seeing Mr Jolley give evidence I have no difficulty in accepting that evidence. My impression is that both Mrs Jolley and Mr Jolley gave their evidence in a direct and frank manner.

15 I find therefore that Mr Cochran rang her on that morning to advise her not to come in any more. I find that Mrs Jolley had been a long serving employee. Notwithstanding some comments made in the course of cross examination by Mrs Wee in respect of some complaint when Mrs Jolley was waitressing, I find there was no issue with respect to Mrs Jolley's performance. In that sense then I find that Mrs Jolley was dismissed suddenly, without notice and without reason. Applying the principles in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385, I find that Mrs Jolley was dismissed unfairly.

16 Mrs Jolley does not seek to be reinstated. She found other employment of equal value on the Tuesday following her dismissal on the Saturday. I find that reinstatement is not practical. Mrs Jolley has certainly taken proper steps to mitigate her loss. The question is what loss Mrs Jolley as a casual employee has suffered? I find the loss suffered, given that Mrs Jolley was subject to employment on an hourly daily basis, but was expected to work that Saturday, is the loss of the work on the Saturday. It is this rostered work which she expected to receive which is her period of loss. Her evidence is that she was to receive $17 per hour for 6 hours. I would therefore award a sum of $102 gross less any taxation payable to her as compensation. There is no component for injury sought and in any event given the circumstances I do not consider that any component for injury could be awarded. I will issue an order to this effect.

2003 WAIRC 10005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ERICA VERA JOLLEY, APPLICANT
	v.
	SIN-AUS-GREENOUGH PTY LTD T/A GREENOUGH RIVER RESORT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 11 NOVEMBER 2003
FILE NO.	APPLICATION 315 OF 2003
CITATION NO.	2003 WAIRC 10005

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mrs E Jolley
Respondent	Mrs C Wee

Order

HAVING heard Mrs E Jolley on her own behalf and Mrs C Wee 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, Erica Vera Jolley, was unfairly dismissed by the respondent on the 2nd day of March 2003;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay within 7 days of this order, as and by way of compensation the amount of $102.00 to Erica Vera Jolley, less any taxation that may be payable to the Commissioner of Taxation.

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

2003 WAIRC 10017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRLEY LANZA, APPLICANT
	v.
	ARRIX INTEGRATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 31 JULY 2003
FILE NO.	APPLICATION 559 OF 2003
CITATION NO.	2003 WAIRC 10017

Catchwords	Termination of employment – 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 be exercised – Extension of time to accept referral granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(1)(2) & s 29(3).
Result	Order issued
Representation	
Applicant	Ms J O'Keefe as agent
Respondent	Mr P Watson as agent

Reasons for Decision

(Ex Tempore)

1 The substantive application in this matter is one brought by Shirley Lanza against Arrix Integrated. It is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) ("the Act") alleging that she was harshly, oppressively and unfairly dismissed, it seems on the particulars of claim, on or about 31 March 2003.

2 The Commission has listed this matter of its own motion by reason of the fact that the application commencing these proceedings was not filed until 5 May 2003 and therefore outside of the 28 day time limit prescribed by s 29(3) of the Act. It is the case however that by s 29(3) of the Act the Commission has a discretion to accept a referral of such an application out of time if it considers it would be unfair not to do so.

3 The evidence adduced in relation to this application to extend time was primarily on affidavit and in addition evidence on behalf of the respondent was adduced through Mr Berry, the managing director of the respondent. The applicant by her affidavit tendered as exhibit A3 testified to the effect that she was employed by the respondent from about November 1999 until March 2003 as a permanent part-time cleaner. Her evidence was that she worked in various locations and ultimately would appear to have been employed primarily at the Atwell Primary School where she testified she stayed until she was dismissed in March of this year.

4 Her evidence also was that she worked approximately six to six and one half hours per day on a split shift basis cleaning that school. The applicant also testified that she worked fewer hours than that, logically of course, during school holiday periods. Ms Lanza also said to the Commission in her evidence that some time during the course of the first half of 2002 she worked also at Royal Perth Hospital on behalf of the respondent for about two or three months on day work. Her evidence was this was additional to the work she was performing at that time at the Atwell Primary School.

5 Additionally, her evidence was that she worked at other school locations apart from Atwell Primary School from time to time in addition to that work and in that regard she referred to the Hope Valley Primary School and the Wattleup Primary School in the 2002/2003 Christmas holiday period additional to her work at Atwell. Reference was also made by her in her evidence to working at Coolbellup Primary School and Applecross High School from time to time.

6 The events relevant to the ultimate termination of the applicant's employment appear to have commenced on or about 12 March 2003. The applicant testified she was charged by the police with stealing dexamphetamine. Apparently, on her evidence, there was some video surveillance taken of the applicant performing her duties at the Atwell Primary School. As a consequence of that, the applicant faced charges in the Magistrate's Court. The applicant testified that as soon as she was charged she took steps, on her evidence, to telephone the respondent's area manager, Ms Hill, on or about that time. The applicant's evidence was she informed Ms Hill of the charges and her bail conditions to the effect that she was not to attend the Atwell Primary School, nor have any contact with staff at that site.

7 Next, it seems, relevantly, on about 14 March 2003 the applicant was contacted by Ms Hill of the respondent to inform her that her employment was suspended in accordance with company policy but that other alternative positions would be sought for her. Subsequently, as a result of contacting the Miscellaneous Workers' Union, a meeting took place on the premises of the respondent it seems, on the applicant's evidence, on or about 31 March 2003 attended by the applicant and a Mr Justice and a Mr O'Reilly of the union were present on the applicant's behalf.

8 At that meeting, which was also attended by a Mr Brown, who the Commission understands is the respondent's human resources manager, and a Ms Thompson, an operations manager for the respondent, discussions took place in relation to the applicant's status.

9 Various matters were discussed not relevant for the purposes of this particular application. The upshot was, it seems, that on 31 March, at 2 pm, the applicant testified, she was contacted by Ms Thompson at her home. She said that she was informed that her employment was terminated and she would receive one week's wages in lieu of notice.

10 In that regard, tendered as exhibit R1 was a copy of a letter of termination of employment dated 2 April 2003 to the applicant from Ms Thompson to the effect that her employment was terminated, it seems, and reference is made in this letter to concluding of the employment, on 31 March 2003 for two reasons, the first being frustration of her employment contract due to restrictions imposed by the Police Service as a result of charges laid against her and, secondly, it seems on the evidence, failure to provide a current Australian Federal Police clearance in accordance with company policy. I pause to note that that latter matter was a matter in issue in these proceedings.

11 The applicant after her dismissal told the Commission that she commenced a search for further employment and was ultimately successful, it seems, on or about 22 June. I also add on the applicant's evidence it would appear that as a result of proceedings before the Court of Petty Sessions on 2 July 2003 the charges brought against the applicant were dismissed.

12 There was also affidavit evidence, adduced by Mr Justice, an officer of the Miscellaneous Workers' Union, and also Ms Northcott, again an officer of that union. Their evidence went only to in effect, apart from Mr Justice referring to the meetings involving the respondent, the reason for the delay in this application being brought. In short, Mr Justice testified, which evidence was not challenged, that he proceeded on leave it seems, after being informed by the applicant of her dismissal on 1 April, on 14 April 2003 and thereafter did not ensure that the application was properly prosecuted within time, relying upon, it seems, Ms Northcott, who it seems at that stage was also on annual leave, according to her evidence.

13 The evidence of Mr Berry was generally to the effect of the requirements imposed by the respondent's contracting entities for the need for employees to obtain and hold current police clearances and, secondly, the issues surrounding the charging of the applicant and her subsequent bail conditions which, according to Mr Berry, imposed some limitations on the ability of the applicant to be employed.

14 To his credit, Mr Berry admitted he was not directly involved in the proceedings in relation to the charging of the applicant but did have a strong view about the requirement for the possession of police clearance forms, although it seems given that the applicant worked for a considerable period of time without a police clearance it appears from about November 2002 to March 2003, according to Mr Berry, some leniency was accorded to her, as the Commission understands the respondent's position.

15 In relation to applications of this kind, I simply refer to observations the Commission as presently constituted in *Azzalini v Perth In-flight Catering* (2002) 82 WAIG 2992 and 2993 and following. At par 28 of that decision I set out what in my opinion ought be regarded as the appropriate principles in relation to applications of this kind, suffice to say that those considerations are fourfold; firstly, the length of the delay in bringing the proceedings; secondly, the explanation for the delay; thirdly, steps taken, if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested, and finally, the merits of the substantive application in the sense that there is a sufficiently arguable case. Furthermore, there is a consideration of whether there would be any prejudice to a respondent in bringing the application within time for purposes of its prosecution on the merits.

16 Having regard to those factors, I conclude as follows: The length of the delay in this matter, although it seems to be not entirely clear but it seems about five to seven days, depending upon one's acceptance of the ultimate date of termination of employment, whether it be 31 March or 2 April, and quite frankly on the evidence I am not entirely clear about that matter. Secondly, in terms of the reason for the delay, it is not controversial on the evidence that the reason for the delay seems to lie solely at the door of the Miscellaneous Workers' Union, on the evidence of Mr Justice and Ms Northcott, and it appears that because of inadvertence by one or both of them the applicant's claim simply lay in abeyance until both of them realised the error which had occurred. I do note however that on the evidence, uncontested, as soon as that error came to light, it seems, the union acted promptly on Ms Lanza's behalf to commence these proceedings.

17 In relation to that question, whether or not that is a good reason for delay, I had occasion to consider this matter recently in a decision of the Full Bench in *Carnarvon Medical Service Aboriginal Corporation v Stiles* (Unreported), (2003) WAIRC 08703, Appeal No FBA 11 of 2003, delivered 14 July 2003. At par 138 of that decision I considered the question of the delay by a solicitor in bringing proceedings in this Commission in relation to unfair dismissal and said the following, and I quote—

> *"The Full Bench has not had the benefit of hearing from Mr Reading, the appellant's solicitor, in relation to the delay question. Consideration of the extent to which a party's legal adviser has been responsible for delay in bringing appeal proceedings, is recognised as a factor. It has been said, that "it is very hard that a party should suffer because of the blunder of a solicitor": Christie v Harvey and Hayward (1900) 2 WAR 146 at 150 per Hensman J. It has also been held, that the fact that any delay or fault lay at the feet of a party's solicitor and not the party, is a material factor in determining whether the discretion to extend time ought be exercised: Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196 at 199. This latter proposition was also adverted to by Kirby J in Jackamara v Krakouer (1998) 195 CLR 516 at 543-544. This principle is not as applicable however, where the party has also contributed to the default."*

18 In my view, the reason for the delay is solely attributable to the officers from the Miscellaneous Workers' Union. Whilst that may not reflect well on the organisation, in my opinion, the applicant, Ms Lanza, ought not pay the ultimate price for the delays occasioned by the fault of the union itself and, in my opinion, the same principles to which I have just referred in *Stiles'* case have application to the relationship between a union member and a union.

19 In relation to the position of the applicant herself, I accept her evidence that she was not aware or could certainly not recall being advised of any obligation to commence these proceedings within 28 days of the date of the termination of her employment. As I have already observed however, when the union did become aware of its errors in this respect certainly Ms Northcott, on her evidence which was uncontested, took prompt steps to ensure that the application was filed very quickly to prosecute the applicant's claim.

20 In terms of steps taken, if any, by the applicant to evidence non-acceptance of her dismissal and that it would be contested, again there is evidence before the Commission through Mr Justice that he informed the representatives of the employer during the course of meetings had with them prior to the applicant's dismissal that if she was dismissed then it would be challenged.

21 I turn to the question of the merits. Necessarily the Commission at this stage of the proceedings has scant evidence before it in terms of the merits and I note also that in particular in relation to the question of police clearance forms that appears to be somewhat controversial and it is not a matter for the Commission at this stage of this matter to resolve any of those matters conclusively.

22 However, having regard to that, I am of the view that there is sufficient evidence before the Commission to at least raise an arguable case on the merits in relation to the application filed. That should not be taken however to be an expression of any view as to whether the applicant would ultimately succeed. It is simply an observation on the evidence at this stage of the matter that there is an arguable case for the purposes of extending time.

23 I note the uncontested evidence that she brought to the respondent's attention promptly the terms of her bail conditions and that she had been charged and it also seems on the evidence thus far at least that at no stage immediately prior to her dismissal was she expressly warned that her employment was in jeopardy at that time. But as I say, the merits ultimately will be for another day.

24 Having regard to all of those factors, I am of the view, in the absence of any material prejudice being established by the respondent on the evidence, that the Commission ought exercise its discretion in this matter to extend time to accept the referral out of time. An order will issue to that effect. The matter will be referred to a deputy registrar for conciliation pursuant to s 32 of the Act in due course.

2003 WAIRC 08896

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRLEY LANZA, APPLICANT *v.* ARRIX INTEGRATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 31 JULY 2003
FILE NO.	APPLICATION 559 OF 2003
CITATION NO.	2003 WAIRC 08896

Result	Extension of time granted
Representation	
Applicant	Ms J O'Keefe as agent
Respondent	Mr P Watson as agent

Order

HAVING heard Ms J O'Keefe as agent on behalf of the applicant and Mr P Watson 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 referral of the herein application be and is hereby accepted out of time.

[L.S.]

(Sgd.) S. J. KENNER,
Commissioner.

2003 WAIRC 10019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRLEY LANZA, APPLICANT *v.* ARRIX INTEGRATED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 12 NOVEMBER 2003
FILE NO/S.	APPLICATION 559 OF 2003
CITATION NO.	2003 WAIRC 10019

Result	Order issued
Representation	
Applicant	Ms J O'Keefe as agent
Respondent	Mr P Watson as agent

Order

HAVING heard Ms J O'Keefe as agent on behalf of the applicant and Mr P Watson 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 discontinued by leave.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09854

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RYAN NICHOLAS LEVITT, APPLICANT
	v.
	BROOME CROCODILE PARK, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 184 OF 2003
CITATION NO.	2003 WAIRC 09854

Catchwords	Termination of employment – Unfair dismissal – Applicant not dismissed – Lack of jurisdiction - No standing to bring application – Application devoid of merit – *Industrial Relations Act, 1979 s.29*
Result	Dismissed for want of jurisdiction
Representation	
Applicant	Mr R.N. Levitt appeared on his own behalf
Respondent	Ms S. Auburn (of Counsel) appeared on behalf of the Respondent

Reasons for Decision

1 This is an application by Ryan Nicholas Levitt (the Applicant) for orders pursuant to s.23A of the *Industrial Relations Act, 1979* (the Act) against the Broome Crocodile Park (the Respondent). The application was filed on 17th February 2003. There were conciliation proceedings conducted by Deputy Registrar McCann. Those proceedings were unsuccessful in resolving the matter and the application was listed for hearing in Broome on 8th July 2003 at which time the Applicant appeared in person and Ms S. Auburn, of Counsel, appeared for the Respondent.

2 Very soon after those proceedings commenced it became apparent that the Applicant wished to call evidence for persons who had not been summonsed and were not present. He was given the opportunity to continue with the application then or have it listed for another date, of which he would be given notice, so that he could have his witnesses present. The Applicant requested that the matter be adjourned and for natural justice reasons the adjournment was granted. The Applicant had complained that he had not received proper notice of the date of the hearing, bearing that in mind the Commission then agreed to adjourn the matter.

3 The matter was re-listed for 9th September 2003 at which time the Commission heard from the parties. It should be recorded that the Applicant did not call evidence from any person who was not present at the 8th July 2003 hearing even though he had over two months to do so.

4 The Applicant contends that he was dismissed from employment with the Respondent. He says that the termination was in the form of a letter written by Solicitors Skea Hager and Co on behalf of the Respondent. The Applicant says that he opened the letter in the caretakers cottage of which he was a resident. After having commenced packing had decided he was unable to vacate the property within the time specified in the letter. This was passed on to the Respondent. On the following Sunday, 9th February 2003 the Applicant's Principal, Malcolm Douglas and his wife arrived at the property, turned off the power and interfered with the water supply. The Applicant claims he was dismissed by Mr Douglas by telling him to leave. It was conceded by the Applicant that there were heated words, but eventually Mr Douglas and his wife left after the Applicant and his partner had handed over keys. The Applicant did not vacate the property on that day, nor did he until action was taken in Court to evict him.

5 There are allegations between the parties which have been subject to civil proceedings which I do not intend to summarise other than to say that both parties eventually obtained interim Violence Restraining Orders against each other. The Interim Order against Malcolm Douglas was later dismissed.

6 It is contended by the Applicant his employment arose when his partner, Ms Michelle Reid, who had been working for the Respondent told him of a position that was coming up as a caretaker. He was later employed as a permanent fulltime farmhand/caretaker at a crocodile farm. The location is known as the '10 Mile' near the town of Broome. The Applicant says he could live on the premises seven days a week rent free in return for working two or three hours on Saturdays. He says there was no tenancy agreement or contract of employment or workplace agreement covering his employment or his accommodation. He admits he had a verbal agreement with the Respondent. The Applicant says that he generally worked

between 6:30am and 3:30pm. There were odd occasions that he would do work for others if they were sick and if he did work extra hours, he would be paid for them.

7 The various tasks and duties included maintaining and feeding crocodiles, other animals and wildlife; maintaining water reticulation and undertake repairs to fences; assist with culling and harvesting and transporting crocodiles and general maintenance of the farm buildings including caretaker's quarters. He also learned how to stun crocodiles and it is in performing this activity that he suffered an accident when he fell into a pen with approximately 100 two metre crocodiles.

8 The Applicant says he received no sympathy from Mr Douglas when this occurred.

9 According to his evidence there were problems with the working relationship particularly between his partner and Mr and Mrs Douglas. He alleged that there was a meeting between the parties and the Douglas' picked on both him and his partner. He alleges that the employment relationship was strained. It was suggested to him that they both take six months off and come back. That option was not satisfactory as he believed his job would not have been there when he returned.

10 His partner raised concerns with the Respondent. Ultimately her relationship as an employee with the Respondent discontinued but she continued to live with him in the caretakers quarters at the 10 Mile. It was alleged that Mr Douglas was abrupt and difficult to work with. He would often yell instructions. Eventually reports were made to Worksafe and an Inspector arrived. The Applicant and his partner were blamed for making the reports.

11 The alleged harassment continued until 19th January 2003 when his partner was asked to vacate the property. She refused to do so. Eventually after various court proceedings between the parties on 9th February 2003 the Applicant says Mr Douglas dismissed him.

12 A brief summary of the Respondent's position is that they agree they employed the Applicant as a caretaker at the Crocodile farm situated just out of Broome. His duties included caretaking and conducting crocodile farm tours and maintaining reticulation and maintenance equipment. Housing was supplied as part of the caretaking job it was made clear the residence was for a caretaker. The nature of the operation requires a caretaker on site and for this reason the residence was provided. There were restrictive covenants on the Applicant and his partner from having pets on the property due to the presence of various wild animals. The Respondent says the Applicant and his partner breached this covenant by bringing pets and other animals onto the property and refused repeated requests to remove them.

13 The Respondent say they were concerned about performance of the Applicant. He did not seem to be coping and on 21st October 2002 they arranged a meeting for which they prepared an agenda for the purpose of trying to help him organise his work in a better way. During the meeting they indicated they were willing to train him to conduct tours at another facility operated by the Respondent at Cable Beach. It was also agreed that the Applicant should keep a diary to assist him to keep his work process in order.

14 Ultimately the Respondents say that it became clear to them that the Applicant was not suited to the caretaking role because of his inability to adequately perform it. He was told that they were not prepared to use his services on the 10 Mile property but would continue to employ him at the gardening department at Cable Beach. He had been employed in that department since 21st January 2003 and appeared to be successfully discharging the duties of that position.

15 It became necessary for the Respondent to ask the Applicant's partner to leave the caretaker's residence but she refused, notwithstanding that the Applicant was no longer working as a caretaker. The Applicant was well aware the residence was provided solely for a caretaker, he was not the caretaker and there being no lease and no rental payment, the Applicant was asked to vacate the property. This was done by a letter from the Respondent's then Solicitors, who were not the Solicitors for the Respondent in these proceedings. The Applicant was told that he was to vacate by 12:00 noon on 9th February 2003 and to return the keys. He was also required to move cattle and dogs from the property.

16 The letter made it clear that the Respondents were happy to continue to employ the Applicant in a role suited to his ability and indicated to him that they looked forward to the relationship continuing with him in the gardening department at Cable Beach. The letter then indicates that should there not be an immediate vacation of the premises then the Respondents would be forced to the view that non compliance could be seen as a breach of employment relationship which would lead to immediate termination.

17 The events of the day on 9th February 2003 from the Applicant's point of view are that Mr Douglas and his wife arrived at the property, he says Mr Douglas turned the power off. When he met the Applicant he said words to the effect that "do you understand the letter?" to which he said "yes it means I am terminated" and Mr Douglas replied in the affirmative. This the Applicant took to be his dismissal.

18 The Commission heard evidence from the Applicant in person, he was supported by evidence from his partner Michelle Jeanine Reid. Her evidence was short in that she related the incident when Mr Douglas and his wife arrived at the caretaker's house on 9th February 2003. She confirmed that her memory of the conversation between Mr Douglas and the Applicant was that when the Applicant said he was not leaving, he asked Mr Douglas whether he was sacked and Mr Douglas said yes.

19 There is no other evidence taken from Ms Reid.

20 At this point in the proceedings Ms Auburn submitted that there was no case for the Respondent to answer. The Commission indicated to her that there were strong indicators that could be the case but justice of the matter indicated that the Applicant should have the opportunity to cross examine Mr and Mrs Douglas if he wished to do so. Evidence was then called from Mr Douglas.

21 There is a central issue in these proceedings as to whether there has been a dismissal. I intend to focus on determining that point. There was a great deal of other information which was put to the Commission about the relationship which can be categorised as a stormy one, characterised by various civil court proceedings between the parties. However I have no need to deal with those issues in detail because of the findings that I make on the threshold issue of *locus standi*.

22 The evidence of Mr Douglas is that on the day of the alleged dismissal he had no intention to dismiss the Applicant at all, in fact when the Applicant asked whether he was dismissed he specifically said that he was not. He said "you are now working in town". Mr Douglas was given the keys to the property and left.

23 The relevant evidence of Valerie Douglas is that on the day of the incident, 9th February 2003, Mr Douglas had twice told the Applicant he was not sacked. It became clear that he was not because later Mrs Douglas wrote to him on 19th February 2003 to ask him when he was coming to work and again on 24th February 2003 he was asked if he was coming into work (Exhibit A8).

24 There are many indicators that the contract of employment did continue and the Applicant knew it to be continuing. In fact he says he did not attend to work because of a Violence Restraining Order, not because he did not have a job. He says he thought a Violence Restraining Order taken out against him by Mr Douglas stopped him going into the premises. This is completely contrary to his contentions about when the job finished.

25 I should make some findings on credibility before I deal with the analysis of the evidence. I heard from the Applicant, his evidence was convoluted, misleading and contradictory. He repudiated statements he made in evidence in chief under cross examination. He admitted to Ms Auburn, of Counsel, who appeared for the Respondent that he had lied to Mr Douglas on a number of occasions, those lies were associated with the conduct of his partner, one would think a most extraordinary thing to lie about. The Applicant is a witness of little credit, how one could place much weight on his testimony when it was admitted by him that he is not adverse to not telling the truth when it suited him not to, is testament to the fact that little weight at all should be given to what he said.

26 The Applicant called evidence from his partner, Michelle Janine Reid, she was only asked three or four questions, her demeanour in that short time gave the Commission no confidence that a great deal of weight should be placed on her testimony although in that short time one could not draw the conclusion that she attempted to mislead.

27 The Commission heard evidence from Malcolm Douglas it is open to find that during various civil proceedings Mr Douglas has made statements about the employment status of the Applicant which are on the face of it contradictory to his evidence in these proceedings that the Applicant was not dismissed. However the Commission is not of a mind to disregard his evidence entirely because of those contradictions. The reason for this is that in the crucial issues which are to be determined here, the evidence of Mr Douglas is strongly corroborated by the evidence of Mrs Valerie Douglas who presented to the Commission as a truthful person who cared about the Applicant and tried very hard to help him in his relationship with the Respondent. I find Mrs Douglas to be a witness of high credit and her evidence as to whether the Applicant was dismissed on 9th February 2003 by Mr Douglas is clearly that Mr Douglas' version is, on the balance of probabilities, correct.

28 The application has standing under s.29(1)(b)(i) of the Act if the Applicant was an employee, as he clearly was, and if he had been dismissed. Therefore the Commission has to decide whether a dismissal occurred.

29 The Applicant tried to assert that the letter from Skea Hager & Co (Exhibit L8) was in fact a dismissal. I need to deal with that contention.

30 The second last paragraph of the letter is in my view not worded with elegance, but it is nothing more than advice of an intention to terminate if certain things did not happen. It is not a termination in itself nor could it be. The Respondent can terminate the contract of service, not a solicitor, and even if that is wrong the letter in any event is not a termination and I so find.

31 It is clear that there was a potential for the parties to part ways at that time but I favour, after considering the evidence of all of the witnesses, the contention urged upon the Commission by the Respondent's witnesses who I believe are credible with the caveats as expressed above. There was no dismissal on 9th February 2003.

32 The Applicant's conduct after the 9th February 2003 certainly does not indicate that he was dismissed that day or even that he thought he was dismissed. More likely than not this application was commenced for vexatious purposes. It is one of a series of litigations between the parties. There appears to be a deep seated civil dispute between these parties which is not resolvable by this application.

33 This Commission is required to decide matters before it in accordance with equity, good conscious and substantial merit. It would be inequitable to allow the matter to proceed any further. The application is devoid of merit and for the reasons I have set out above the application will be dismissed.

2003 WAIRC 09855

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RYAN NICHOLAS LEVITT, APPLICANT
	v.
	BROOME CROCODILE PARK, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 184 OF 2003
CITATION NO.	2003 WAIRC 09855

Result Dismissed for want of jurisdiction

Order

HAVING heard Mr R.N. Levitt on his own behalf and Ms S. Auburn (of Counsel) 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 be, and is hereby dismissed for want of jurisdiction.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09634

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HANS THEODOOR MACHIELSE, APPLICANT
	v.
	NU WEST DEVELOPMENTS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 10 OCTOBER 2003
FILE NO.	APPLICATION 1728 OF 2002
CITATION NO.	2003 WAIRC 09634

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal – Probationary employment – Substandard performance – Final warning - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) – Fair go all round – Application dismissed
Result	Application dismissed
Representation	
Applicant	Mr H Machielse
Respondent	Ms M Bilston as agent

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant Mr Hans Machielse alleges that he was dismissed unfairly by the respondent, Nu West Developments Pty Ltd on 18 September 2002. The applicant seeks reinstatement or in the alternative compensation.

2 Mr Machielse's evidence is that he has not been employed since his termination. He has simply been in receipt of unemployment benefits of approximately $374 per fortnight for some of the time. Since his termination he has been busy preparing a painting for the Archibald competition. He has tried to register a company, has put advertisements in the Western Australian newspaper to offer his services as a planning or building consultant. He has also sought to assist a friend with plans for a new house. He has not earned any income. He says he has pursued advertisements from the paper or the internet for jobs as a site supervisor or building supervisor. He exhibited a bundle of applications [Exhibit A1].

3 On the day of his dismissal Mr Machielse says that Mr Robert Francis walked into his office with a cheque in his hand. He says he thought Mr Francis was going to give him a bonus instead he said "here is - - here is a cheque one week in lieu of". He was then asked to go to the conference room where it was confirmed that his services were no longer required. He asked for a reason and was told that "it is not working out". He says his termination came as a huge surprise to him.

4 Mr Machielse says that he was never counselled about the standard of his work. He says he was spoken to by Mr Robert Francis in terms of certain procedures. Mr Francis did complain that Mr Machielse was not up to speed with the computer. Mr Machielse says that he stressed in his initial interview that he had not seen a computer for nine years. He in fact purchased a computer at home to practise.

5 The applicant says he was introduced to Mr Robert Francis by a friend. In their initial discussion Mr Francis mentioned that he was a developer and had big plans to develop certain blocks of land with low cost housing. He says Mr Francis stated that he was trying to build 60 houses in Seaforth, Gosnells, 11 houses in Wrights Crescent and 10 houses in Fremantle Road. Mr Francis indicated that he could use a person with Mr Machielse's background to give Alan Thomson, the construction manager, a hand. Mr Francis showed him photographs of eight houses in Hardy Road, Bayswater. Mr Francis assured him that these would sell like "hot cakes". Mr Machielse advised Mr Francis that he needed a long term job to make an application to the Department of Immigration. Mr Francis asked Mr Machielse what sort of salary package he would require. Mr Francis said he would start Mr Machielse on $45,000 per year and then after an initial three month period, and subject to the sale of the Hardy Road townhouses, he would increase that to $52,000. He offered Mr Machielse an old car to use. Mr Francis said that he was moving offices from Osborne Park to Bayswater. Mr Machielse said that he would need to relocate his living arrangements from Spearwood to Bayswater. Mr Francis offered Mr Machielse one of the ten low cost houses in Midland which he had completed. He suggested the rent could be taken out of Mr Machielse's salary. Mr Machielse thought that was a good solution in respect to taxation. This offer of accommodation did not eventuate and Mr Machielse had to find rental accommodation in Bayswater. Mr Francis provided a reference to the real estate agent for Mr Machielse in order to obtain the accommodation.

6 Having obtained a job and accommodation on 23 August Mr Machielse asked Mr Gary Francis if he could lodge the application for his wife and two children to come to Australia. Mr Francis replied "Yes that - - you know, that should make you happy". A few days later Mr Gary Francis gave Mr Machielse a coloured television to use in his accommodation. Mr Machielse considered this a kind act and thought he would get on with the Francis brothers.

7 When Mr Machielse started work he took the initiative to keep minutes of meetings. Mr Robert Francis was not impressed with Mr Machielse for doing this however, Mr Machielse still did the task. He said Mr Robert Francis' concern related to the lack of clarity about Mr Machielse's role. Mr Machielse says that he actually took over Mr Gary Francis' job. Mr Gary Francis was the Construction Co-ordinator. This involved seeing councils in regard to permits or licences. He thought he had a relatively free hand, however, every time he made a suggestion it was knocked on the head.

8 Mr Machielse said that he had discussions with an investor in the company who was concerned that the eight town houses were not selling. He says Mr Robert Francis was also getting niggly and scared that these town houses were not selling. The 60 houses he hoped to commence building were not starting.

9 Mr Machielse says that Mr Gary Francis asked him on 25 July 2002 to sign a letter that purported that he had discussions with Mr Robert Francis to build 60 houses in four stages costing $4.8 million. He queried why he needed to sign this letter and Mr Robert Francis said it was for the bank as he was the construction co-ordinator and Mr Francis needed it to secure finance. Mr Machielse said he was unhappy about this but went along with it.

10 Mr Machielse exhibited his letter of appointment [Exhibit A3]. Mr Machielse also exhibited a copy of the letter in relation to Seaforth Avenue property.

11 Mr Machielse also exhibited business cards to prove, as he says, that he took Gary Francis' job. He says a lot of the time his job was spent trying to work out what "we were really doing". He exhibits a document [Exhibit A7] which shows his duties and responsibilities and those of Mr Thomson.

12 Mr Machielse says that one of the reasons why he was dismissed was due to financial problems in the company. Either projects had not been started as they should have or houses were not sold. The Fremantle Road units had not started. The Seaforth Avenue units had not started and still have not (at the time of hearing). He says these are exhibited in the minutes of the meeting of 28 August 2002 which he compiled. The meeting was about weekly progress on projects.

13 Mr Machielse says that from what he could gather, all the jobs of the respondent in the past had been done by the seat of their pants. There was no program. He says his forte was the planning and programming of jobs and to make sure subcontractors adhered to the program. He issued documents, making sub contractors sign on to conditions and this had not previously been done. Mr Machielse said that the day before his dismissal he had sought tender prices for electrical work on the Wright Crescent job. Mr Gary Francis favoured a firm Vila which had been used before. Mr Machielse favoured a firm Hilite which had tendered a much lower price. After discussion with Mr Francis and Mr Thomson he says they agreed to engage Hilite. He then appointed Hilite to do the job and then later heard from Mr Francis that his brother Robert wanted Vila to drop their price to do the same job. Mr Machielse complained that it was too late and he says the next day he got the sack.

14 Mr Machielse says that the respondent in their cash flow documents indicated that jobs had been done when they had not. He says this is an indication of the practices they employ. Mr Machielse exhibited a bar chart [Exhibit A13] which he says shows the jobs that was supposed to be done on those and were not. They were not undertaken.

15 Under cross examination Mr Machielse says his position with the respondent was that of construction co-ordinator. In relation to his experience in building and construction, and in particular co-ordination and scheduling of projects, he says he attended the RMIT in Melbourne to do an architectural course. He also attended the Perth Technical College in 1990. He dropped out of that course. He registered a building company in Sydney in 1972 which was a design and construct company and he was the licensed builder for that company. Between 1972 and 1978 he built a number of houses and other public works as part of that company. He then closed that company and moved overseas with a Dutch construction company doing international tendering. He managed a very large tender for a railway project in Paraguay of $1.8 billion US. He did this despite his lack of formal qualifications. In 1981 he was a planning engineer for Fleur. He worked on site at Cobar. He was then asked to join the company Warmac and he worked for them in Dubbo until 1985. He then worked as a planner on the new Parliament House with the McLoughlin group. He then worked in Melbourne for a short time for AV Jennings as site manager on a project in the Mornington Peninsula. He then worked for a firm called Project Planning and Management and in 1993 before he moved to South America. In relation to his duties Mr Machielse had the following exchange—

> "What experience did you require - - did you understand that you required to fulfil the requirements of the position as construction coordinator at Nu West? What experience did you need to do - - to do the job?---What experience did I need as a coordinator to do the job?
>
> Mm. What was your understanding? What - - what experience did you think you needed in order to be able to complete the requirements of the construction coordinator position at Nu West?---Well, you see, this was more or less up to Nu West to - - to tell me. As I understood it, Gary, Robert's brother, was functioning as the person that did all the running around, that organised the - - the consultants, that organised the - - the designers, organised the engineers, organised the surveyors to set out the sites, called in for tenders, appointed the subcontractors to do the work, ordered material, purchase - - purchase the material for the job itself. All these - - these disciplines, all these activities, I've been very familiar with as being a builder myself, so, you know, whether you call it a "coordinator" or whether you call it a "builder", whether you call it a "project manager", it's almost the same thing." (Transcript p.31)

16 Mr Machielse says he had the skills and experience to do all that was required. He does not believe he is over qualified for the job. He says he knows more about construction than Mr Gary Francis.

17 He agrees that part of his duties were scheduling contractors, drawing up schedules, quote comparisons and providing purchase orders for authorisation to Mr Gary Francis. These requirements were not communicated to him at interview. He was made aware of them as he went along.

18 Mr Machielse agrees that his salary package was $45,000 per annum together with the provision of a motor vehicle and a mobile telephone. He says he could use the mobile telephone and the motor vehicle for private use. Mr Machielse disagrees that there was a three month probationary period. It was never discussed with Mr Robert Francis. He denies that a probationary period was left out of the contract to assist him with the sponsorship of his wife to Australia. Mr Machielse says he would not have taken the job if there was a probationary period as he needed a secure job to sponsor his wife. The applicant says he reported directly to Mr Gary Francis.

19 Mr Machielse says he was concerned about his familiarity with computers when he commenced employment with Nu West. He stressed this to Mr Robert Francis when he commenced employment. He was advised he would be given ample time and training to learn the computer programs. He does not remember being given a Microsoft Project tutorial book. Or that he was given a week on a computer to play around with the program. He says they were not settled into the new office until the second week of July and that the computer did not work properly until 8 August 2002. He says he got a bit suspicious about this. Everyone else's computer was working. He says he asked everyone for help but he was hardly given any help. He says he had about five minutes of help from Ms Noelene Whiteford and about 20 minutes of help, all up, from Mr Gary Francis. He says in the first week he was trying to figure out how the computer worked. Mr Machielse says that he could not get the computer to work, he does not know whether it was broken but there was a loose plug at the wall. He says he practised at home on his computer and he took a disk home to do so.

20 In relation to whether Mr Machielse thought that the company Nu West was going to wind up he says:

> "Well, it looked very much like it, yes, because Mr Francis had on several occasions said to Alan and myself, and perhaps even in the presence of Gary, that if Alan and I did not perform, he was not going to go any further with Nu West developments and - - because he could - - he could spend his time in - - in a far better - - far better environment than - - than he was, something to that effect. He has said on several times to Alan and myself that he was unhappy with the way the business was going" (Transcript p. 45).

He says he had a feeling that the company was in financial strife.

21 Mr Machielse says that it could have been that he got not more than the two hours of instruction from Gary and Noelene regarding the computer. He says Mr Robert Francis promised him tutorials on the computer but he never got any.

22 Mr Machielse says that the procedure for quote comparisons at Nu West was minimal. He says there were minimal specifications; they were open to so much interpretation. He discussed this with Mr Robert Francis, Mr Gary Francis and Mr Alan Thomson. He suggested that their specifications were not really specifications. Mr Machielse says that the bundle of

documents [Exhibit R2] was written by him in the satirical way and not meant to be malicious. He says he was upset at the time and he wrote to them on a without prejudice basis. Mr Machielse says he is suspicious of Mr Robert Francis and Mr Gary Francis. He says they have not shown a great deal of scruples or integrity.

23 Mr Machielse denies that he saw a quote comparison for plasterers for the property at 43 Wright Street. He says that he was sacked before he even finished 10% of the quotations that he received. The quotation that he did do was the electrical one. Mr Machielse says that he was not provided with a contract list until after the advertisement in the newspaper of 17 August 2002 which called for tenders. At that time Mr Robert Francis questioned him as to why he put the advertisement in the paper. Mr Machielse said that Mr Francis had earlier agreed to the advertisement. The applicant denies that he was provided with a contractors list and refused to use that list. Mr Machielse says he was not advised that his quoting procedure was not acceptable

24 The applicant says he was learning how to generate purchase orders using the QuickBook program on the computer. He denies he was required to have purchase orders signed by Mr Gary Francis before faxing it to a supplier. Mr Machielse says that on a purchase order he put a zero value because he did not know what the cost was. He does not see a situation arising where, if there is a zero value, a contractor may charge what they like. He does not really know what happened. He does not understand the QuickBook. He says he typed in "supply and deliver pavers" and was told six packs of new Nupav sandstone. He denies the delivery of pavers in one day is an unrealistic time frame, especially for such a small quantity. He says he did have problems with the purchase order 3208A. He says someone gave him assistance to get the details correct. Somebody would have told him that instead of six packs you put down 16 square metres. He would have asked that question of them. In relation to purchase order M22 he says he never knew that Mr Gary Francis had to countersign the order. He is not aware of how the number is generated, or that it related to another employee Matthew Francis. He did not manually generate the purchase order, it was done through the QuickBook program. He denies that he was asked on numerous occasions to get purchase orders countersigned before faxing them to contractors. He says from a safety point of view it is reasonable to say that purchase orders needed to be countersigned.

25 Mr Machielse says that Mr Thomson scheduled contractors and that he, the applicant, scheduled the jobs. It was his responsibility to provide schedule reports. He did not use Microsoft Project to do these reports. He did not know how to do this. In relation to the scheduling reports using the computer program, Mr Machielse says he had discussions with Mr Francis about the program. He says the program is extremely detailed and he wanted to leave some details off. He says he was experimenting with just that. He says he was learning to do that and he was fiddling with that. He was instructed by Mr Robert Francis and Mr Gary Francis on a number of occasions to use the program. He says during his employment he provided twenty to fifty schedules to the respondent. Some of these were computer trials. He denies that he produced only hand written schedules. He denies that he ever refused to produce the schedules. He believes that his manually generated schedules had all the required information.

26 Mr Machielse was asked—

> "Would a proposed construction require completion dates and confirmation dates and start dates?---No, no. That is another programme again, you know. You have preliminary programmes. You have ordering programmes. You have all kinds of different ones. This is one that is hanging in the site shed on the site and it said "Oh, on Monday we pour that slab". That's all" (Transcript p. 74).

In relation to [Exhibit R7] Mr Machielse says that he was not spoken to anyone about this schedule. He says that this was a case of just trying things out. It was not the schedule that they were going to work with.

27 Mr Machielse denies that he was spoken to on 2 September 2002 by Mr Robert Francis and, after a particular heated meeting, regarding schedules, was dismissed for not completing the schedules. He says what happened was that Mr Francis at his own unit had the first floor completely poured the wrong way and he took it out on Mr Machielse. He says there was the threat of employment made because Mr Francis gave him a cheque on that day and later on that day he accepted it back because he realised what a childish act he had performed. He says:

> "Oh, well, you know, I don't even know what it was for, how much the amount was. You know, it was a cheque that I didn't even dare look at because I thought it was just so unbelievable for this man to give me this cheque and say "You've got 1 week in lieu of" and I - - I - - in fact I thought he'd come in the office to give me a bonus" (Transcript p. 76-77).

28 He says firstly that he remembers the cheque and then under questioning by the Commission he says, "Not Really". (Transcript p.76-77). He says he did not ask for his job back. He did not even believe that he had lost it. He says in relation to whether he believed he had lost his job:

> "So, you know, literally 2 or 3 weeks later he fires me, for what? The reason was because he realised he didn't sell the units and he was getting pressure from - - from Rudolf DeLapsen to sell these units and something had to give. Well, I had to give because I was the last one in and the first one out. That's how I interpret it." (Transcript p.80-81).

29 Mr Machielse said he was asked to produce a schedule for River Road but it was not complete. He does not recall whether he produced the schedules for the River Road job on 17 September as requested. He does not believe that he was dismissed for this. He says he did not ask for his job back this time with Mr Robert Francis. He says on 2 September he did argue about it or talk about it all day and in the end Mr Francis got the cheque back and Mr Machielse continued with his job.

30 Mr Machielse says that because it was a small company he reported to Mr Gary Francis and also if there is a problem he discussed it with Mr Thomson. He denies there was any personal animosity between Mr Gary Francis and himself. He says Gary gave him a television set. He denied that he exceeded his authority, eg with the purchase orders not being countersigned. He says his actual authority was never pinned down. Mr Machielse denies that he was remiss in his duties by sending reduced scale plans as opposed to scale plans to contractors. He does not consider that a contractor would need to have to scale drawings to provide adequate quotes.

31 Mr Machielse says that he did not have any issue with the way in which Mr Gary Francis managed his employment. He says he was more qualified than Mr Gary Francis. He says he liked Mr Francis, they got on very well and Mr Machielse liked the way Mr Francis did things. He totally denies that he tried to work around Mr Gary Francis or tried to pick one brother against the other. He did not have any argument with Mr Robert Francis about the way he ran his business. He said it was a very friendly atmosphere and he liked working there very much. He says he liked the brothers very much. He denies that he lacked respect for his employer or he was sometimes argumentative in his attitude towards Mr Robert Francis and Mr Gary Francis.

32 Mr Robert Francis gave evidence that he is the managing director of Nu West Development and has 30 years experience in the construction development industry. Mr Machielse was referred to him by the father of an employee. The company was about to expand. The expansion was some three to five months hence. Mr Machielse's experience was a lot more than the type of person they were seeking. He wanted some one to assist his brother with scheduling and purchasing. Mr Francis says he arranged for Mr Machielse to have the use of the computer as he indicated that he did not have much computer experience. He says he had two interviews with Mr Machielse, first by himself and the second involved his brother Mr Gary Francis. He says

his brother does not have a significant span of experience in the construction industry but he handles people exceptionally well. He says he relies on his judgment. Mr Machielse said he needed permanent employment. He explained that Mr Machielse would be on probation. He says he specifically outlined that there would be a three month probation and that he would not put anyone on without a probationary period.

33 Mr Robert Francis says it was Mr Machielse's duties to schedule the jobs. He needed to schedule the jobs on the computer and do the quote comparisons and submit these comparisons for approval to Mr Gary Francis. He then had to raise the purchase orders but had no authority to sign these purchase orders. His duties were conveyed to Mr Machielse at interview and during his first weeks of employment. They had weekly meetings to discuss progress. This was slightly disrupted by moving to new premises. Mr Francis said he started Mr Machielse earlier than they needed him or was intended. He says he reworked the applicant's contract with a salary review because Mr Machielse did not want the contract to mention a probationary period. Mr Francis says that the salary review was made subject to satisfactory performance, which was the best wording he could come up with and not specifically say probation. This was at the request of the applicant because he had to be able to show that he had permanent employment, not probationary employment, to be able to lodge a claim with the immigration department. Mr Francis says he was trying to help Mr Machielse out.

34 Mr Francis says that he gave Mr Machielse the computer, the disks and tutorial for learning the program and advised him to play around with it. He says it is not a difficult program. Mr Machielse was to direct any questions to Mr Gary Francis or Ms Noelene Whiteford.

35 Mr Francis says that Mr Machielse raised concerns with him about his computer training on 2 September 2002 after he had given him his notice and a termination payment cheque. Mr Machielse came and asked him for another chance and Mr Francis said that this would be his final chance. He says Mr Machielse was well aware he wanted him to work through his brother because he continuously came to him instead of going through his brother. Mr Francis says he referred Mr Machielse back to his brother.

36 Mr Francis says they had a preferred list of suppliers and would get three quotes on a job. He says on a number of occasions Mr Machielse did not go to the people on the preferred list. These were people that had been used before and were found to be effective. Mr Machielse did not follow the quote comparison process. He addressed this with Mr Machielse generally at meetings but he left it to his brother to actually counsel Mr Machielse. Mr Francis says that most engagement in the industry is done via a simple purchase order and binds the supplier to the housing industry of Australia specifications and standards. Mr Machielse needed to raise the purchase order and get it countersigned by Mr Gary Francis. The quote comparison was to be filled out for each major function of the job. These purchase orders were generated via the QuickBook program on the computer. He said Mr Machielse did not seem to have much difficulty after initial training in producing these purchase orders. He seemed to be at least quite capable of producing the purchase orders by about the end of August. Mr Machielse did not always follow the instructions and sent out purchase orders under his own signature without reference to Mr Gary Francis. In a number of cases they were sent out without quote comparisons. Mr Francis raised his concerns with his brother to speak to Mr Machielse. Mr Francis said that he did speak to Mr Machielse directly and advised him that he had no authority to sign purchase orders. This occurred prior to 2 September 2002. He says Mr Machielse was under no misapprehension.

37 Mr Robert Francis said he required scheduling documents in computer format. He says Mr Machielse was requested from July onwards to produce such a document for the River Road house in Bayswater or at least attempt to give a computer generated schedule for that house but he never received anything. He required a computer generated schedule because any changes could be automatically adjusted.

38 Under cross examination Mr Francis denies he had difficulty with the designer of his own house. He says there were difficulties with the computers when they shifted premises on 7 July 2002. Mr Francis says in his first week of employment Mr Machielse was given a computer and asked to practise on the computer. Mr Francis agrees that in their initial interview he said to Mr Machielse he was developing 60 houses on a building site. He said Mr Machielse approached the company through the father of an employee looking for work. He agrees Mr Machielse indicated he did not have computer experience. He says that was why he was given time to learn. He says the person that took over from Mr Machielse took about 2 weeks to fully operate the program. Mr Francis says it was explained to Mr Machielse that it was no use having a teacher come in to teach him until he had mastered the fundamentals of the functions of the program. He said that Mr Machielse had not seemed to be even trying to do anything on the computer.

39 Mr Francis says he was sympathetic towards wording a letter for Mr Machielse's purposes with the Immigration Department. He had had a similar experience with his wife. Mr Francis says that Mr Machielse barely asked for assistance on the computer. Mr Francis says that at interview Mr Machielse was offered transport as he did not have transport. This was agreed as part of his package. He says a building supervisor's licence was not required as part of his job and the person hired to replace Mr Machielse is the son of Mr Gary Francis. In response to a question from Mr Machielse, the exchange was:

> "But he was already hired while I was there so you have not hired a new person?---We've only hired the construction manager that has taken a similar amount of time. You'll have to ask Gary that" (Transcript p. 157).

40 Mr Francis says that Mr Machielse at interview was told that his duties were in relation to co-ordinating schedules, making that information available, assisting the purchasing, obtaining quotes and doing quote comparisons. He was told at interview that purchase orders needed countersigning. Mr Francis said that Mr Machielse would take over some of the duties of Mr Gary Francis. He says the suggestion of a pay rise after three months had nothing to do with whether the eight town houses in Hardy Road sold or not. Mr Francis informed Mr Machielse that if he wanted to take a salary sacrifice it could be offset as rent.

41 Mr Francis says that he asked Mr Machielse to put down what his role was and what he would like it to be. He says he did this because he needed to make an assessment of what sort of people were needed to be employed by the company for its next stage of development. Mr Francis did not reply to the reports given to him by Mr Machielse. These were given to Mr Gary Francis to co-ordinate and no response had been made by the time Mr Machielse was dismissed. It was up to Mr Gary Francis to co-ordinate the people in the construction group and to come up with an overall plan for expansion. Mr Francis says that he did not dismiss Mr Machielse because he had been hired too early.

42 Mr Robert Francis says that the Microsoft computer program is not complicated. Mr Machielse simply had to adjust the start date and check the date for each of the job particulars specifications to see whether the time allowed was enough. The program automatically adjusted the schedule. Mr Machielse was asked to attempt this program for one house and he never attempted to do so. Mr Francis says that the program is a working program to ensure that anyone who needs access to the information is kept up to date. Mr Robert Francis referred to an example of this [Exhibit R11]. He also exhibited an example of the schedules and reports that can be produced using the Microsoft Project program [Exhibit R12]. He says he continually asked for the computer generated schedules but never got any. He asked for the schedules through his brother Mr Gary Francis. Mr Machielse did present a number of manual schedules. These were not what were required. He says it was impressed to Mr Machielse that the manual format was absolutely no use to the company because it did not have live data. He says all Mr

Machielse had to do was to amend the start dates and get a report generated for a single house. He says manual schedules are simply not sufficient because they do not have the depth of information and cannot be adjusted regularly.

43 Mr Robert Francis said that he indicated to Mr Machielse both individually and at meetings that his job was in jeopardy. He says on the first Monday in September at the normal weekly meeting he asked Mr Machielse whether he had any computer generated reports. Mr Machielse handed over another manual report. At that time there was also a difficulty with a purchase order. Mr Robert Francis indicated to Mr Machielse that it was not working as Mr Machielse would not comply with their requirements. Mr Francis arranged for Mr Machielse's termination pay. Mr Francis presented Mr Machielse with the cheque and asked him to clear out his desk. He was paid notice of a week in lieu. Mr Machielse then went to see Mr Francis and asked what he needed to do to make things work. Mr Francis said he was not to issue purchase orders and that computer generated reports were required. Mr Machielse asked for another chance and gave the cheque back to Mr Francis. Mr Francis gave him one final chance.

44 Mr Francis says that Mr Machielse seemed to want to stick his nose in everyone else's work but his own. At the meeting subsequent to Mr Machielse's dismissal Mr Francis said he told Mr Machielse that he wanted a computer generated report at the next meeting. He says there was no doubt or misapprehension about this request. At the following meeting there was again no report. He asked Mr Machielse whether there was any reason why he had not generated the report. Mr Machielse did not give a reason. Mr Francis adjourned the meeting then later called Mr Machielse back in and asked him if there was any reason why he should not be dismissed. This was Mr Machielse's reply "I suppose if it's not working it's not working." Mr Francis then arranged for a further cheque to be given to Mr Machielse. Mr Gary Francis later approached his brother and said the applicant was seeking use of the vehicle. Mr Robert Francis agreed to allow Mr Machielse to use the car for his period of notice. Mr Machielse did not return the car and this had to be followed up by the respondent.

45 Mr Francis says he could not reinstate Mr Machielse. He says he was disruptive within the office and tried to work around his brother and effectively the licensed builder. He says Mr Machielse did not comply with requirements of the job even after numerous requests. He says Mr Machielse wanted to do things the way he wanted to do them. Mr Francis gave two examples where he says Mr Machielse had mishandled quotations.

46 Mr Francis says that Mr Machielse continued to harass him following his dismissal. He received correspondence from him but did not give it any credence. Mr Francis complained that Mr Machielse's attitude at work was derogatory. He says he would "overlord" over the contractors and his brother Mr Gary Francis. He says Mr Machielse has a tendency to shout and to dominate conversations with the loudness of his voice. Mr Francis tried to correct this to no effect. He says he found purchase orders that had been issued without the value on them. This is effectively a blank cheque. There were purchase orders that were not put on the computer. These purchase orders had been wiped from the computer. There was a purchase order that went out and two lots of bricks were delivered instead of one.

47 Mr Francis said that Mr Machielse's position had not been replaced or filled. This is because Nu West took Mr Machielse earlier than they needed him. He says they have—

> "employed a construction manager which is an office manager because effectively our construction stages has now got up to about triple what it was when Mr Machielse was there. We have employed, if you like, a trainee supervisor and we have engaged on a permanent basis, if you like, a person to actually get there and do the general duties on site such as cleaning up and things like that" (Transcript p. 137).

Mr Francis says that a junior (about 20 years old) now does the work Mr Machielse did. He says the firm had teething problems when Mr Machielse started but these lasted about two weeks not two months. Mr Francis says that Mr Machielse continually did not supply what was required of him. He says what was being asked for was not beyond Mr Machielse's capability either computer or non computer, particularly given the amount of time that he was allowed to come up with just a single computer document. Mr Francis says that Mr Machielse has caused the company concern effectively both during and subsequent to his employment which has cost the company a considerable amount of funds.

48 Mr Gary Francis gave evidence that in relation to Mr Machielse's experience and skills he seemed to be quite capable with purchase orders. He seemed to have reasonable computer knowledge but not with Microsoft Project, he did not seem to want to know about it. He says Mr Machielse would let certain things out which he would never have let go including purchase orders which were supposed to be countersigned or at least seen by himself but were not. He says Mr Machielse was responsible for quoting and quote comparison. The applicant generated purchase order 3254 and signed off to it. In relation to purchase order for Wright Crescent, Mr Machielse raised this and there were no errors in that document. Mr Francis only received about four quote comparisons from Mr Machielse the whole time he was there. There should have been one for each purchase order raised. Mr Machielse was told that this was not acceptable. Mr Francis says that he told Mr Machielse that he needed to have purchase orders countersigned. This did not always occur. In respect of purchase orders 3208, Mr Francis was concerned that there was no costing amount in that order. Mr Francis complained that the purchase order M22 had been raised by Mr Machielse and it had a number only used for hand written purchase orders. He says also that the Butko Transport require three to five days for delivery. Mr Francis found a number of these types of purchase orders after Mr Machielse was terminated.

49 Mr Francis says he wanted schedules in a computer generated format. This was so that he could give these to other people involved in the building. The manually generated format did not provide enough detail. He advised Mr Machielse of this. Mr Machielse knew that he needed to generate the schedules on computer. The applicant only came and asked him about three times to show him things on the computer with respect to that program. Mr Machielse initially had a week just to play around with Microsoft Project. The computer was not hooked to any other computer so that he could not do any damage. Mr Francis said he advised Mr Machielse that if he needed help to come and see either Alan, Noelene or himself. He says the program was not hard to learn.

50 In early September Mr Gary Francis says that his brother indicated that he was going to dismiss Mr Machielse as he was sick to death of it. He says Mr Machielse was dismissed because they were not getting out from him what they required. He says the schedules and purchase orders were not written out properly. This was placing a burden on the rest of the staff who were doing most of the scheduling for jobs. He says at the time of his termination he was present at a meeting with Mr Robert Francis and the applicant. He says Mr Robert Francis terminated the applicant's services because they were not receiving the information required to do the job. He says Mr Machielse's reply was, "Well, there is not much point in me talking about it". He said most of the time he considered Mr Machielse was reasonable.

51 Under cross examination Mr Francis says that Mr Machielse took over his function as co-ordinator. Mr Francis became General Manager and Mr Machielse reported to him. Mr Machielse advised him that he had not seen any computer for about nine years. He says at the start Mr Machielse said he had to play with the computer but he did not show any progress to the time he was terminated. He says the same computer is still in use and there is nothing wrong with it. He says Mr Machielse's computer was playing up because as he had advised him his chair had moved back on to the connection point and bent the tabs

on the networking cable hence it was showing up as a fault. He says that he helped Mr Machielse when he was asked. In response to the question as to how many times? He says:

> "It wasn't many times. And the reason that was, was because I was under the impression that he knew something about computers. I mean, the way he's - - he's raised purchase orders, the way he's sent us emails, I mean, I was under the impression - - he knew how to use it" (Transcript p. 203).

52 Mr Gary Francis says that he has not seen notes made by Mr Alan Thomson prior to his departure on leave. Mr Francis said there has been a big increase in staffing in the company. In relation to Mr Machielse's accommodation someone from Century 21 rang Mr Francis and wanted to know what wage Mr Machielse was on and whether he was capable of making the rent. Mr Francis provided a letter to that effect. He says Mr Machielse was doing things in the company mostly to Mr Francis' satisfaction (Transcript p.211). He says he knows that Mr Machielse worked on some Saturdays and Sundays. He denies that he told Mr Machielse not to take any notice of his brother Robert after Mr Machielse was sacked on 2 September 2002. Mr Francis says on 17 September 2002 Mr Machielse came into the conference room and when he was advised of his dismissal he said, "no good me asking for my job back" and Mr Francis says that he replied, "Yeah, fine." He said he could not see why Mr Machielse would be surprised, he had not produced the documents that had been asked from him on the previous Tuesday morning. He says he did not say that he did not want Mr Machielse to go. He said to Mr Machielse after the meeting that he would talk to his brother Robert. He said he would try and get his, i.e. Mr Machielse's job back. He says he spoke to Robert who indicated that Mr Machielse was not coming up to scratch with the work required. He says he did not relay Mr Robert Francis' answer to Mr Machielse.

53 In response to a question as to whether he was upset that Mr Machielse got the sack, Mr Gary Francis says, "Not really. I was burdened with your job as well as my own. Why should I feel remorse for you because I had to do your job as well." He says that Mr Machielse completed the bar chart schedule which was not adequate for their purposes and could not be given to a contractor.

54 Ms Noelene Whiteford gave evidence that she had no experience in the construction industry before commencing with Nu West Developments. Her computing experience was just basic computing such as Word Perfect. She says when Mr Machielse started he was given a training disk and if he had any problems he was to ask. She says that he spent most of the first week looking through all the construction jobs. She says the disk he was given was fairly self explanatory. She says Mr Machielse was very personable. She says there were a few occasions in meetings when there were a few raised voices. She had heard Mr Machielse raise his voice. She says it could be that she heard Mr Machielse talk loudly on the telephone. She says Mr Robert Francis had told her words to the effect that she needed to function better and pull up her socks. She says Mr Francis told her that she needed to get better organised. She says whenever Mr Machielse asked for a hand with the computer she gave him a hand. This occurred at least six times. She says Mr Machielse had a few problems with purchase orders and QuickBook. She says she did not find any problems with Mr Machielse's computer. She says he turned it off and on a few times and it was fine. She says it was her understanding that Mr Machielse was using the Microsoft Project program to simply put in start dates and finish dates for a project like Wright Crescent.

55 I have no confidence in the evidence of Mr Machielse and unreservedly prefer the evidence given on behalf of the respondent. I consider the evidence of Mr Machielse to be inconsistent and unreliable at best. I consider the evidence of Mr Robert Francis, Mr Gary Francis and Ms Noelene Whiteford to be direct, honest and temperate in the face of the occasional unnecessary and intemperate interjections by Mr Machielse. Mr Robert Francis complained that Mr Machielse would seek to dominate conversations with the loudness of his voice and would seek to "overlord" others. He described him as argumentative. These characteristics were witnessed at hearing.

56 The applicant at various times complains that he was dismissed the day after he had a disagreement with the Francis brothers over the use of an electrical contractor, he says that one of the reasons that he was dismissed was due to the financial problems of the company, he alludes to the company having got his employment wrong by employing him before they actually required his services. It is not clear to me how each of these allegations can be the reason for his termination. He says that his dismissal came as a huge surprise to him and that instead he was expecting a bonus. Yet, even though Mr Machielse's evidence changed on this point, he was earlier dismissed on 2 September 2002 and the respondent then decided to rescind that decision. Mr Machielse's evidence was frequently inconsistent and it is very difficult to have confidence in it.

57 Mr Machielse's evidence is that the atmosphere at the respondent's business was very friendly and that he got along well with the Francis brothers. He says that he liked the brothers very much and similarly liked working there very much. He compliments them on their generosity in giving him a coloured television set. His claim is for reinstatement which he views as being practicable. Yet at hearing the applicant refers to Mr Robert Francis as a bully. Further, leaving to one side the document marked without prejudice, Mr Machielse has since his termination sent a range of correspondence to the Francis brothers [Exhibit R2] which has been less than cordial or friendly. For example the email of 13 December 2002 implies some connection between them and a burglary at his house.

58 Mr Machielse says also that he did not have sufficient time to learn the computer and that he received limited assistance in learning the computer program. The evidence of the Francis brothers is that Mr Machielse was requested to familiarise himself with the computer in the first week and that he received assistance and that they were available to help him but he did not ask. It is difficult to accept that Mr Machielse considered them to be very friendly and got on well with them yet struggled with the computer and his difficulties were ignored.

59 The computer and Mr Machielse's inability to produce computer generated project schedules is a key element of the evidence and the reason for Mr Machielse's termination. It is not in doubt that Mr Machielse did not produce these computer generated schedules. He chose instead to do manual schedules. Mr Robert Francis in particular was not happy about this as they lacked detail and could not easily be adjusted to reflect changes to the project. I will deal with this in detail.

60 Mr Machielse complains in his evidence and final submissions that he had to rent a property close to his work, that the respondent provided a letter to the real estate agent to support this rental and that his dismissal has left him with a rental which he cannot afford. He claims compensation for this rental. It is not submitted that this rental is part of his contract of employment and in fact it is not. Mr Machielse chose to move on accepting the job. His employer provided him with a motor vehicle at his request and this did form part of the contract. The letter to the real estate agent was simply verifying his employment so that Mr Machielse could in fact obtain the rental, and again was at the applicant's request. Needless to say that the Act does not provide for compensation to cover the rental property where this cannot be seen in anyway as part of the contract. I should add that the evidence is that Mr Machielse was introduced to the respondent through he says a friend. Mr Robert Francis says that the applicant was referred to him by the father of an employee. It is clear from the evidence that Mr Machielse was very keen to obtain employment to assist him in his immigration applications. It is not the case that the employer sought out Mr Machielse and offered him a job or enticed him to join the respondent. This is sometimes a factor in considering the unfairness of a termination, particularly where someone has been wooed from a secure job and then is

dismissed soon thereafter. However, it also gives background to whether there was some encouragement by the respondent or obligation upon Mr Machielse to enter into the rental accommodation, and there was not.

61 I turn then to the main issue in question and that is the performance of Mr Machielse. It is clear on all the evidence that one of the main duties of the applicant were to schedule projects and to do this he had to access and manipulate a computer program called Microsoft Project. Mr Machielse was also responsible for arranging quotes, quote comparisons and for raising purchase orders. Mr Machielse's evidence is not direct on this issue, as is the case with much of his evidence. However, under cross-examination it is apparent that these were his prime duties. The evidence of the Francis brothers is clear and consistent on this issue and I find that these were his prime duties. The evidence of the Francis brothers in terms of whether Mr Machielse took over the job of Gary Francis as co-ordinator is different. However, this does not alter what actual duties he was required to do.

62 The chief complaint against Mr Machielse is that he did not perform his main duties, in particular he did not properly raise purchase orders, did not properly compare quotations and would not produce computer generated scheduling reports. There were complaints also that he raised his voice, was argumentative and interfered with the duties of others. Mr Machielse's evidence and submission are that all of these claims are without foundation except the one to do with computer generated schedules. He says of this that he was not familiar with computers and had been in a third world country for the last nine years without presumably, on the evidence, access to computing or at least computing programs for work. It is common evidence that he declared his lack of familiarity with computers at interview and was taken on nevertheless. He says also that he was not assisted to learn the computer. He was not sent on a course to learn the computer as others in the workplace had done. The computer did not work properly or on occasion at all for an extended period of time. In the initial week of employment he was given a manual and told to learn the computer. This was unrealistic as the business was moving and he was helping in the shift, the manual was very large (at least this is his final submission, not his evidence) and if I understand his evidence correctly the computer was not fully in use.

63 It is the evidence of Mr Robert Francis, Mr Gary Francis and Ms Whiteford that they knew Mr Machielse did not have familiarity with computers and the Microsoft Project program. Albeit I should say that the evidence is that Mr Machielse was familiar with aspects of the computer, eg emails and word processing, and he was able to do purchase orders. They say that the scheduling program was not difficult to learn, the disk was self explanatory, they had easily learnt the program, others had also learnt the program within four weeks and that basic entries were required of Mr Machielse, eg start and finish times for jobs, and the length of jobs. I consider this more probable otherwise, commonsensically, why would they have employed Mr Machielse, knowing of his lack of computer knowledge, if the program was in fact hard to learn or manipulate. They say also that the training they received was more advanced and was not required initially. Ms Whiteford says that it related to tailoring the program for the company's needs. They say that Mr Machielse simply had to engage himself in understanding the computer and the disk and he did not, even though Mr Gary Francis arranged for the disk to be put on Mr Machielse home computer. They all say that they were available to help him and did. They say that he did not ask for extra help.

64 It is the evidence of Mr Gary Francis which I find most compelling on this central point. As I have indicated I accept the evidence of Mr Robert Francis, Mr Gary Francis and Ms Whiteford. However, it would appear on a fair reading of the evidence that it is Mr Gary Francis who had most to do with Mr Machielse and who acted as his supervisor. It is also my strong impression from hearing that Mr Gary Francis could be described as a very accommodating witness for the applicant. On the evidence of Mr Gary Francis his brother would appear to adopt a tougher approach to issues than himself (transcript p213).

65 Mr Gary Francis had no animosity toward the applicant. He readily conceded points for the applicant even when the cross-examination was rambling and the questions hence unclear. He helped the applicant with a television set, he sought to talk his brother around in terms of the dismissal and he says that Mr Machielse was performing mostly to his satisfaction. Albeit this perhaps relates to early in Mr Machielse's employment when one considers the flow of the cross-examination. However, I make no finding to this effect and would give the applicant the benefit of the doubt given that Mr Gary Francis also later sought to persuade his brother to retain Mr Machielse. Against this background Mr Gary Francis' evidence, in short, is that Mr Machielse did not want to know about the computer program and did not produce the schedules as requested. He was very clear and convincing on those issues. Ms Whiteford says also that she did not find any problems with Mr Machielse's computer (transcript p231). Clearly she assisted him with the computer. I find that the applicant did not seek to perform properly on this duty and did not follow instructions. I find also that it is probable that he had all the support needed and resources available to be able to learn the required programs.

66 In relation to the other complaints about Mr Machielse's performance it is clear from the cross examination in relation to purchase orders 3208, 3208a and M22 that Mr Machilese was responsible for these orders and that they had not been completed properly and in at least one instance amounted to issuing a blank cheque on behalf of the company. I so find. In relation to the quotation system and the quote comparison I find also that Mr Machilese did not perform this duty properly and did not follow instruction. He complains that he was seeking to save money for the respondent. This is an admirable objective but at least in relation to the electrical contractor his actions did not marry with the reasonable requirements of the company. Having regard to all of this I find that Mr Machielse did not perform his duties properly, did not follow instructions and was thus not suited to the job.

67 The procedure followed by the respondent was not one of formal counselling and in that way could have been and should have been better. There can be no doubt though that the applicant was told to improve his performance and deliver the work asked of him. As is evident in the decision of *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891 the procedural flaws of a dismissal are but one factor to consider in deciding whether a dismissal can be said to be harsh, oppressive or unfair. There can be little doubt in my mind that what was being asked of Mr Machielse was straightforward and clear. He had to do proper quote comparisons and he did not. He had to get purchase orders countersigned and he did not. He had to produce the computer schedules which were a key part of his job. In fact it is simpler than this. The applicant had to produce the computer schedule for one house to demonstrate that could and would perform his job and he failed to do so. He failed to do so even though it was clear that he had been dismissed on 2 September 2002 for failing to do so and was on one last chance. Mr Machielse disputes his termination on 2 September 2002 as a misunderstanding, or a joke or having arisen from a confrontation. This is not supported by any other evidence and is indeed difficult to believe. The applicant was given his termination pay on that day and only after extensive discussions with Mr Robert Francis, and agreeing to do the job that he was asked to do, was he given back his job. He then failed to deliver and was finally dismissed some two weeks later after failing to produce the schedule as asked on two occasions in the weekly team meetings, and failing to give any legitimate reason for so doing. In all the circumstances I do not consider that Mr Machielse was not afforded a far go all round (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385) and I would hence dismiss the application.

68 I have not dealt with one key area of dispute between the parties, namely whether the applicant was on probation. I do not consider this aspect to be decisive in determining whether the dismissal was fair or otherwise. For the reasons expressed I accept unreservedly the evidence on behalf of the respondent and have significant difficulty with the applicant's evidence.

Having said that the contract is clear in its expression and is sufficiently complete so as not to seek to go behind it. It does not include a period of probation. It includes a period of three months after which the salary would be increased subject to satisfactory performance. This is not the same thing. A probationary period is capable of clear and simple expression and is not expressed in the contract. The contract that the respondent then entered into must be seen in that light as one without a probation period and on its face is not open to any other interpretation. I so find.

2003 WAIRC 09635

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HANS THEODOOR MACHIELSE, APPLICANT
	v.
	NU WEST DEVELOPMENTS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 10 OCTOBER 2003
FILE NO.	APPLICATION 1728 OF 2002
CITATION NO.	2003 WAIRC 09635

Result	Application dismissed
Representation	
Applicant	Mr H Machielse
Respondent	Ms M Bilston as agent

Order

HAVING heard Mr H Machielse on his own behalf and Ms M Bilston on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2003 WAIRC 09921

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REX J MINTROM, APPLICANT
	v.
	STONDON PTY LTD T/AS AVON WASTE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY 5 NOVEMBER 2003
FILE NO/S.	APPLICATION 1338 OF 2003
CITATION NO.	2003 WAIRC 09921

Result	Application to accept applicant's claim which was lodged out of time granted
Representation	
Applicant	Mr R Mintrom
Respondent	Mr G Fisher and with him Ms C Fisher

Reasons for Decision

1 On the 3 September 2003 Rex J Mintrom ("the applicant") lodged an application in the Western Australian Industrial Relations Commission ("the Commission") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that he was harshly, oppressively or unfairly dismissed by Stondon Pty Ltd trading as Avon Waste ("the respondent") on 4 August 2003.

2 Section 29(2) of the Act requires that such an application be lodged within 28 days of the day the applicant's employment terminated. As this application was lodged on 3 September 2003 the application is two days out of the required timeframe for lodging a claim of this nature.

3 The matter was listed for hearing to allow the parties to put submissions and to give evidence as to whether or not the application should be accepted under s.29(3) of the Act.

4 Section 29(3) of the Act read as follows—

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

Findings and Conclusions

5 In reaching a decision in this matter I take into account whether there was an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he was unhappy with his termination and that he would contest his termination and prejudice to the respondent. These guidelines were discussed as

being relevant to a matter of this nature by Beech S C in *Anthony William Andrew v Metway Property Consultants & Auctioneers* (2002) 82 WAIG 3260. In applying these guidelines I am mindful that there is a 28 day time frame to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless there is good reason to do so.

6 I make the following findings taking into account these guidelines.

7 The evidence given by the applicant confirms that he made every effort to lodge his application in the required timeframe. I accept the applicant's evidence that he was aware that his application had to be filed by 1 September 2003 and that in order to comply with this deadline he went to his local post office on 29 August 2003 and sent his application to the Commission by registered post on the basis that he was informed by the staff at the local post office that in doing so his application would arrive at the Commission on time on Monday 1 September 2003. Even though the application was sent by registered mail it was not received by the Registry until 3 September 2003. I accept that the delay in lodging the application by the due date was due to postal problems and was not directly attributable to any action on the part of the applicant. I also accept that the applicant went to the post office in the morning of Friday 29 August 2003 in order to ensure that his application arrived at the Commission the following Monday. I find the delay of two days in lodging this application did not constitute an inordinate delay and therefore it is my view that this delay does not adversely impact on the respondent.

8 In relation to the issue of merit both the applicant and the respondent gave differing evidence about the facts surrounding the applicant ceasing employment with the respondent. On the one hand the applicant states that he did not resign from his position with the respondent and would have had no reason to resign even though he was in the process of taking up another part-time position. It was not in dispute that the applicant worked Friday, Saturday, Sunday and Monday with the respondent and the additional employment obtained by the applicant around the time that he ceased employment with the respondent was for two other days per week. The applicant tendered a written contract confirming that this second job covered two days per week (Exhibit A1). On the other hand evidence given by the respondent was to the effect that the applicant resigned his position with the respondent in order to take up the new position. Whilst I do not make a final decision in relation to the issues in dispute I find that the applicant has an arguable case on the basis that he has a contract (Exhibit A1) which supports his contentions. It is thus my view that the applicant has established that there could well be some merit to his claim.

9 The evidence was not in dispute that the respondent was aware that the applicant was unhappy about ceasing employment with the respondent and this was confirmed at a discussion held between Mr Graeme Fisher and the applicant approximately one week after the applicant claimed he was terminated.

10 Taking into account the circumstances as a whole it is my view that the balance of convenience in relation to this matter lies with the applicant in that there was an acceptable reason for the delay, there is sufficient to establish an arguable case and the respondent was aware that the applicant was concerned about his termination. As the application was only two days out of the required timeframe for lodging this application and given that there is no significant disadvantage to the respondent in allowing this application, apart from the normal disadvantage associated with a claim for unfair termination, I have formed the view that it would be unfair not to accept this application.

11 An Order will issue to that effect.

2003 WAIRC 09970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REX J MINTROM, APPLICANT
	v.
	STONDON PTY LTD T/AS AVON WASTE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO/S.	APPLICATION 1338 OF 2003
CITATION NO.	2003 WAIRC 09970

Result Application to accept applicant's claim which was lodged out of time granted

Order

HAVING heard Mr R Mintrom on his own behalf and Mr G Fisher and with him Ms C Fisher on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the referral of the herein application be and is hereby accepted out of time.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

2003 WAIRC 09812

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNETTE MAREE SALTMARSH, APPLICANT
	v.
	MR SCOTT SLY & MR MARK BUSHELL , RESPONDENTS
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 23 OCTOBER 2003
FILE NO.	APPLICATION 426 OF 2002
CITATION NO.	2003 WAIRC 09812

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal – Identity of respondent – Whether a dismissal occurred - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) – Application dismissed
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms A Saltmarsh
Respondents	No appearance

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) and (ii) of the Western Australian *Industrial Relations Act, 1979* ("the Act"). The applicant, Ms Annette Maree Saltmarsh alleges that she was unfairly dismissed on 22 February 2002. She seeks compensation for her termination. The matter was heard in Kalgoorlie on 27 June 2003 and I will recite for the record the history of the application.

2 The application was initially lodged by Ms Saltmarsh on 11 March 2002; the matter was promptly served on 13 March 2002. The application was lodged against Onsite Health and Medical Services. The Commission unsuccessfully attempted to contact the applicant and wrote to her on 22 April 2002 requesting her to contact the Commission. On the same date the Commission received a Warrant to appear as agent form from the Australian Liquor, Hospitality & Miscellaneous Workers Union to act on behalf of the applicant.

3 On 3 May 2003 the respondent lodged their Notice of answer and counterproposal. Their address for service being 130 Hannan Street Kalgoorlie. After consultation with the parties in late April 2002 the matter was listed for a conciliation conference on 17 May 2002 in the Kalgoorlie Court House. The respondent contacted the Commission on 7 May 2002 requesting the matter be adjourned on the basis of a shutdown occurring, the adjournment was consented to by the applicant and the matter was relisted for conference on 23 May 2002. At the conclusion of the conference on 23 May 2002 the matter remained unresolved and was adjourned for four weeks. The applicant wanted time to consider her position.

4 On 21 June 2002 the Commission contacted the agent for the applicant and was advised by Mr Rosales-Castaneda that the union was no longer representing the applicant and that she should be contacted directly. The Commission then wrote to the applicant, at her address on record of 35 Maxwell Street Kalgoorlie, on 28 June 2002 requesting her advice as to her intentions with the matter by close of business Friday 12 July 2002. There was no response to this letter and the Commission again wrote to the applicant on 24 July 2002 requesting her advice as to whether she was proceeding with the application, by close of business 7 August 2002. There was no response to this letter and the Commission again wrote to the applicant on 13 August 2002 advising that there had been no response to previous correspondence from the Commission and that failure to respond to the letter of 13 August 2002 by close of business 27 August 2002 would result in the matter being listed for a show cause hearing.

5 By correspondence dated 22 August 2002 the applicant advised the Commission that she intended to seek to settle the matter herself and was to meet with Mr Sly.

6 The Commission wrote to the applicant on 7 October 2002 requesting advice as to the progress with the matter by close of business 21 October 2002. There was no response to this correspondence and the Commission again wrote to the applicant on 22 October 2002 seeking advice as to progress with the matter by close of business 5 November 2002; the letter advised the applicant that failure to respond by that date would lead to the matter being listed for a show cause hearing.

7 By correspondence dated 1 November 2002 the applicant advised the Commission that she wanted the matter to proceed to hearing.

8 A copy of that correspondence was forwarded to the named respondent under cover of a facsimile sheet dated 5 November 2002 requesting their views by close of business 7 November 2002. There was no response. The Commission then wrote to both parties on 11 November 2002 seeking their unavailable dates for the week commencing 17 March 2003 for a hearing of the matter. There was no response to this correspondence from either party and on 19 November 2002 the Commission forwarded to the parties a notice of hearing advising that the matter was listed for hearing in the Kalgoorlie Court House on 21 March 2003.

9 The Commission contacted the applicant on 25 February 2003. The applicant advised the Commission of her new address and further advised that she believed that the company had gone bankrupt and that it would be difficult to chase them.

10 The Commission then received correspondence from the respondent on 5 March 2003 in the following terms—

> "I refer to the abovementioned matter.
>
> Onsite health & Medical Services ceased trading in December 2002. Onsite Health & Medical Services was deregistered in January 2003;
>
> As Onsite health & Medical Services has ceased to exist and I do not know where to contact Mark Bushell, Mark Bushell or I will not be appearing on behalf of Onsite Health & Medical Services in regard to the alleged unfair dismissal.
>
> Yours Faithfully,
>
> Scott Sly"

11 The Commission then attempted to contact the respondent on the numbers listed in the application and the notice of answer and counterproposal. On 4 March 2003 the Commission contacted Kalgoorlie Health Service on a number listed as being for the respondent. The Commission was advised that Kalgoorlie Health Service was a new business and neither Mr Bushell nor Mr Sly were involved with the company.

12 On 17 March 2003 the Commission through the office of the Registrar sought to conduct a company search of the respondent through the Australian Securities & Investments Commission ("ASIC"). Advice was received from ASIC that the respondent was not a company and referred the Registrar to the Department of Consumer & Employment Protection ("DOCEP"). A business names search was conducted and the extract detailed that the business name Onsite Health & Medical Services was registered on 10 February 2003 and the business commenced on 15 February 2003, the principal place of business is 39 Porter Street Kalgoorlie and the person carrying on the business is a Mr Mark Bushell.

13 The Commission was advised on 18 March 2003 that the applicant was being assisted by Mr Chopra from the law firm Moss & Co. After discussion with the Commission and in response to a facsimile dated 18 March 2003 the applicant forwarded the following response—

> "I refer to your facsimile of 18 March 2003 and advise as follows—
>
> 1. The applicant commenced action against Mark Bushell & Scott Sly on the understanding that they were carrying on business under business name 'ONSITE HEALTH AND MEDICAL SERVICES'.
>
> 2. The business names extract indicates that the said business is registered on 10 February 2003 and the document does not disclose name of persons carrying on business previously. The matter needs further investigation and in the circumstances, I request that the hearing date of 21 March 2003 be vacated by administrative means without necessitating appearance from either party. The matter be re-scheduled for hearing in 4 weeks time.
>
> 3. Within next 14 days, I will provide you further details and outcome of the investigation particularly what transpired between 11 March 2002 and 10 February 2003 regarding registration of 'ONSITE HEALTH AND MEDICAL SERVICES'.
>
> 4. In any case, the applicant is entitled to seek an order in personal capacity of the individuals as named above provided they or either of them were the employer at the time. The Deregistration of the business name would not make any difference".

14 The Commission wrote to the parties on 19 March 2003, to the applicant care of Moss & Co and to the respondent at 130 Hannan Street Kalgoorlie and 39 Porter Street Kalgoorlie, advising that the hearing of 21 March 2003 had been adjourned and would be relisted in the next four weeks. Mr Chopra contacted the Commission on 7 April 2003 advising that he had undertaken a basic investigation and requested that the matter be put off until the next month. He further advised that the applicant would be representing herself but all correspondence should be forwarded to him. The parties were advised on 14 April 2003 that the matter would be heard in the Kalgoorlie Court House on 27 June 2003.

15 On 12 June 2003 the applicant filed in the Commission a further application naming Mr Scott Sly and Mr Mark Bushell as her employer, the application had a number of attachments, including a number of business names extracts. The first being a copy of the extract conducted by the Registrar on 18 March 2003, detailing that the business name Onsite Health & Medical Services was registered on 10 February 2003 and the business commenced on 15 February 2003, the principal place of business is 39 Porter Street Kalgoorlie and the person carrying on the business is a Mr Mark Bushell. The next two business names extracts appear to have been undertaken by Moss & Co on behalf of the applicant. The first dated 24 March 2003 details the business of Complete Paramedical being registered on 30 July 2002 and the business commencing on 5 August 2003. There is no principal place of business and the person carrying on the business is a Hutson Duddy. The next extract is dated 24 March 2003 and is for the business Onsite Health & Medical Services which was registered on 12 February 2002, commenced on 14 February 2002 and was deregistered on 17 January 2003. The principal place of business was 130 Hannah Street Kalgoorlie and the persons carrying on the business were Mr Mark Bushell and Mr Scott Sly. Notices of hearing were forwarded to Mr Sly and Mr Bushell, on 16 June 2003, as per the addresses provided in the 12 June 2003 application. The application was served on Mr Sly on 19 June 2003.

16 The matter came on for hearing on 27 June 2003 in attendance was Ms Saltmarsh. There was no appearance on behalf of the respondents, Mr Sly or Mr Bushell. I now turn to the evidence in this matter.

17 In opening submission the applicant confirmed to the Commission that she seeks as a remedy compensation for her unfair dismissal. She does not seek any outstanding entitlements. The amended application is being pursued against Mr Sly and Mr Bushell personally and not against Onsite Health and Medical Services following legal advice received by the applicant. Leave was granted for the applicant to amend her application to cite Mr Scott Sly and Mr Mark Bushell as respondents.

18 The applicant gave evidence under questioning from the Commission that the details contained in the amended application of 12 June 2003 are true and correct. The application was not served on Mr Bushell. The applicant says that Mr Sly and Mr Bushell took over the paramedics at Cawse Nickel on 14 February 2002. She met Mr Sly for about 20 minutes on that day and he advised that there would be no change to the paramedics. He asked if she would be interested in doing extra shifts and said that there would be no changes to money or uniforms until a proper contract could be secured with Cawse Nickel. Mr Sly said that he had big plans for the Goldfields. She had not met Mr Bushell at any time during or post her employment.

19 The date of termination was 22 February 2002, she had just returned from 5 days off and during the course of the day there were two big acid burns. At about 6:15 she went to the stores and on her way back she saw Mr Sly and he had a discussion with her in the Medical Centre. He advised her: "Annette, I'm here to inform you that Cawse Nickel don't require your services here any more and I've been asked to escort you off site" (Transcript pg 8). Not much else was said and she gave a hand over to Ms Fiona Teakle, the oncoming paramedic, in front of Mr Sly. She asked Mr Sly if she could speak to Ms Teakle alone which he agreed to. She advised Ms Teakle that she was not allowed to collect her personal belongings and that she would call her later to sort something out. She was escorted off the site by Mr Sly who drove her back to Kalgoorlie.

20 During the drive back to Kalgoorlie she had a discussion with Mr Sly in which he said he was not at liberty to say why she had been dismissed and that he had been in meetings all week to try and save her job, with Mr Jim Stewart, Director/General Manager of Cawse Nickel, Mr Tim Dobson, Acting Manager Safety and Training Department and Mr Max Crowther, Superintendent Safety and Training Department. He further said that she had not been dismissed from Onsite Health and Medical and she assumed that on the following Monday she would get work elsewhere as Mr Sly had promised her.

21 On Monday 25 February 2002 she rang Mr Sly and asked for her pay. Mr Sly made out a cheque for $814.00 which she had difficulty cashing and this was remedied by Mr Sly. She says that on the Monday she was expecting work. She did not believe Cawse Nickel had asked for her removal from site as there was a protocol that needed to be followed and this did not occur. She says that Mr Sly did not get her work on the Monday. She requested a separation certificate from Mr Sly for her employment with Cawse Nickel and he would not provide one as he said she was still on the books of the respondent. He did provide her with a letter dated 25 February 2002 indicating that she was an employee of the respondent as a casual employee who was no longer required at Cawse Nickel and that the respondent had no work available for her. When Mr Sly gave her the letter she enquired about whether he had work for her and he said that he was looking and thought there might be some at Black Swan. She says that she contacted Mr Terry Young at Black Swan who advised her that he had never been contacted by Mr Sly in relation to work.

22 She says she asked Mr Sly for her resume on a number of occasions, the first probably being the meeting of 22 February 2002. She says she eventually received her resume but it had been changed, she is unsure of the date. She says she had a discussion with Mr Sly on the weekend following her dismissal about getting work elsewhere. She spoke to Mr Sly again on Monday 25 February when he presented her with the letter. Her next contact with Mr Sly was 5 March when she forwarded the application for unfair dismissal. She says she decided to make the application following a discussion with Mr Stewart in which he stated that Cawse Nickel had nothing to do with her being escorted from site.

23 The applicant's evidence is also that Ms Christine Ryan by email dated 13 February 2002 advised the staff that Minesite Health and Medical Services (MHMS) was no longer employing the paramedics and that Mr Sly and Mr Bushell were taking over.

24 The applicant was initially employed by Ms Ryan through Minesite Health and Medical Services. Cawse Nickel went into receivership and Ms Ryan continued to pay the paramedics. Ms Ryan then sought to sell her business. Mr Sly and Mr Bushell came in and took over the paramedics. Ms Ryan terminated the applicant's services but Ms Saltmarsh never received notice or leave entitlements. The only thing received during employment was a fortnightly pay. Ms Saltmarsh's employment was governed by a permanent roster that did not change. She worked two days and two nights on and the four days off. If someone wanted time off then they made arrangements to cover their shifts. There was no entitlement to annual leave or sick leave.

25 Following her termination from MHMS Ms Saltmarsh says that Mr Sly simply took over payment of the paramedics until things settled down post the receivership and whether Cawse would take the paramedics on as staff or leave them as contractors. During her time at Cawse she was paid by a number of different persons, Ms Christine Ryan, Ms Cath Connor and EMT, however, she continued to work the same rosters.

26 She says that between 14 February 2002 and the date of her dismissal there were no discussions with the respondent and further there was no correspondence or contract. She worked on the 14th, 15th 16th & 22nd February 2002. These days were paid with the cheque provided by Mr Sly on Monday 25 February 2002. She says that Onsite Health & Medical Services was her employer from 14 February 2002 (Transcript p24).

27 She says following her termination she sought alternative employment. She is currently employed with Choice One Meditemp at the Kalgoorlie Nickel Smelter on two days two nights on, four days off roster. Each shift is 12 hours in duration. She says she commenced around May 2002 or perhaps a little earlier and is paid on an hourly basis of $21.00, which she says is $3.00 less per hour than her previous employment with Cawse. She says that she works on the same arrangement as she did at Cawse except the new employment pays less. She says that between 1 March 2002 and 26 April 2002 she worked for her current employer Choice One Meditemp on a series of small jobs, including casual fire and rescue training at Western Mining and Black Swan. Exhibit A1 details that her gross earnings in this period were $5,390.50. She says that she had no other employment during this period. She states that during her time with Cawse she did a number of extra shifts and she earned between $65,000 and $68,000 per year.

28 The history in this matter is somewhat prolonged and chequered and I recite it in full as it is important in the context of this decision. It is the case that the applicant took sometime to decide whether she wished to pursue her application and how she wanted to pursue her application. I am in no way critical of that, nor am I critical of her attempts to seek redress on the application herself. The Commission was alerted later to a bereavement in her family in the months following her alleged dismissal. The issue is that since the time of conference on 23 May 2002, which was attended by Mr Bushell as Managing Director of the business ie Onsite Health and Medical Services, the business has ceased to trade. Ms Saltmarsh was advised of Mr Sly's letter to this effect of 5 March 2003, and of the Commission's investigation. Ms Saltmarsh wished to pursue the matter and albeit she was self-represented, she sought legal assistance from a solicitor in Esperance. Following that advice it is apparent that Ms Saltmarsh then sought leave to amend her application to change the name of the respondents to take action against Mr Sly and Mr Bushell personally. That application was filed in the Commission on 12 June 2003. Ms Saltmarsh was questioned carefully about this and confirmed that she wished to amend her application to rename the respondents. The Commission has power to amend an application in this manner (see *Parveen Kaur Rai v Dogrin Pty Ltd* 80 WAIG 1375). I note that this application was served on Mr Sly but there is no record of the application having been served on Mr Bushell.

29 Given the history to the matter I had every reason to believe that the respondent would not attend at hearing. Mr Sly stated this in his letter of 5 March 2003. I decided to proceed with the hearing in the absence of the respondent, they having been duly notified of the hearing. There is no doubt that both Mr Bushell and Mr Sly represented the business at various times. There is also no doubt that the applicant was employed by the business Onsite Health and Medical Services and I so find. That is the evidence of the applicant. She says that Mr Sly and Mr Bushell took over the paramedics at Cawse Nickel on 14 February 2002. She says that Onsite Health and Medical Services was her employer from 14 February 2002. She met Mr Sly briefly on that day and he indicated that there would be no change to the paramedics.

30 This is not a matter of misdescription of the respondent (see *Bridge Shipping Pty Limited v Grand Shipping SA and Another* 173 CLR 231; *Sin-Aus-Bel Pty Ltd t/a The Ascot Inn v Ray Parfitt* 74 WAIG 2075). The applicant acting on advice that the business of Onsite Health and Medical Services had ceased to trade, and I assume being concerned about whether an action could be continued or would otherwise be effective, chose on legal advice to take action instead against the individuals behind that business. There is no suggestion that Mr Sly and Mr Bushell were in partnership. On the records obtained by the Commission and the investigation made on behalf of the applicant the business was registered and traded for the period covered by the application; namely the applicant's period of employment. At a later date the business deregistered and then subsequently registered again, but listed the name only of Mr Bushell.

31 As Mr Sly and Mr Bushell were not the employers of Ms Saltmarsh and instead the employment relationship existed with Onsite Health and Medical Services then Ms Saltmarsh has chosen to take action against the wrong legal entity. I know of no precedent in this jurisdiction which would allow an application to succeed in these circumstances and no authorities were submitted. I should add that this is not a situation where the Commission, having resort to the powers under section 26 to act without regard to technicalities or legal forms, can or should correct the mistake made. Given these reasons it follows that the application must be dismissed for want of jurisdiction. The necessary employment relationship between applicant and respondent did not exist.

32 There are other matters contained in this application which I do not need to deal with in detail. The contractual benefits claimed in the amended application were not pursued at hearing and no evidence was led in support of such a claim. In any event I doubt, given the periods claimed, and the fact according to Ms Saltmarsh that the business had recently changed hands, that these amounts could validly be claimed. There is an issue as to whether Ms Saltmarsh was a casual employee, but I make no findings on this point. However, there is one issue which I do wish to cover. It is the case that Ms Saltmarsh was removed from the Cawse Nickel site by Mr Sly on 22 February 2002. In the car on return to Kalgoorlie from the site Ms Saltmarsh says that Mr Sly indicated that she had not been dismissed from Onsite Health and Medical Services and she assumed that on the following Monday she would get work elsewhere as Mr Sly had promised her. The applicant challenges the reason given for her removal from the Cawse Nickel site. On her evidence the best description of what then occurred is that Mr Sly indicated that he would seek other opportunities for her, she mistrusted him, checked up on what he had told her and disbelieving him then sought a separation certificate from him the next day, to in her words allow her to stop all her payments. Mr Sly initially refused and indicated that Ms Saltmarsh was still on his books. Mr Sly then provided a letter for her on 25 February 2002 stating that the applicant was a casual employee of Onsite Health and Medical Services, she was not required at Cawse and there was no work available for her at that time. Ms Saltmarsh pursued the separation certificate and finally presented it to Mr Sly to sign on 5 or 6 March 2002. On its face Ms Saltmarsh's evidence would indicate that she in fact ended the

employment relationship as she was not happy with Mr Sly's actions and answers. It is difficult then to conclude that she was dismissed from her employer on 22 February 2002 or alternatively constructively dismissed on that day or shortly thereafter.

2003 WAIRC 09813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNETTE MAREE SALTMARSH, APPLICANT
	v.
	MR SCOTT SLY & MR MARK BUSHELL , RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 23 OCTOBER 2003
FILE NO.	APPLICATION 426 OF 2002
CITATION NO.	2003 WAIRC 09813

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms A Saltmarsh
Respondents	No appearance

Order

HAVING heard Ms A Saltmarsh on her own behalf and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2003 WAIRC 09700

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT ALAN SHAFRAN, APPLICANT
	v.
	MOSAIC FAMILY SUPPORT SERVICES INC, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 15 OCTOBER 2003
FILE NO.	APPLICATION 1661 OF 2002
CITATION NO.	2003 WAIRC 09700

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Industrial Relations Act 1979 (WA) s 23 & s 29(1)(b)(i) - Applicant harshly and unfairly dismissed – Reinstatement impracticable – Compensation ordered.
Result	Applicant dismissed harshly and unfairly; compensation ordered
Representation	
Applicant	Mr RA Shafran
Respondent	Ms M Bilston as agent

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Mr Robert Alan Shafran, was employed as a Team Leader with the respondent, Mosaic Family Support Services, from 6 April 1999 to 19 September 2002. He was dismissed on 19 September 2002 for verbal abuse of a client. He received a letter on that day and was paid three weeks notice. He worked part of this period and was paid in lieu for the remainder. Mr Shafran alleges his dismissal was unfair because, in short, he has done nothing to justify dismissal.

2 The respondent is involved with the residential care of disabled persons. Mr Shafran at the time in question was engaged as a Team Leader and responsible, at different times, for the care of three clients. I will refer to these clients by their initials, namely **J**, **S and JY**, and the residences are to be referred to as **J's** option, and the **S and JY** option. Mr Shafran worked in the **S and JY** option for all but the last three to four weeks of his employment when he did extra shifts in **J's** option and continued to co-ordinate the other option.

3 Mr Shafran's evidence is as follows. Following his termination he gained employment on 22 February 2003 at a new option. His salary is $900 per fortnight gross. He earned $900 net for some fencing contracting work which he had to cease performing due to injury. He performed also some casual work at Rocky Bay and did 18 hours @$15.66 per hour. Mr Shafran applied for 12 positions during his period of unemployment. He has canvassed newspapers, telephoned prospective employers and business associates in an attempt to find employment. Mr Shafran seeks financial compensation as he does not believe that reinstatement will now be practicable.

4 On 19 September 2002 he was called into a meeting with the Chief Executive Officer, Ms Trish Thompson-Harry and a list of allegations were brought to his attention. In attendance also were Ms Ann Berrell the agency co-ordinator and Ms Gillian Davies, as support for Mr Shafran. Ms Davies was also a Team Leader. Ms Davies had operated as a support person for Mr Shafran on previous occasions. Mr Shafran was advised of the meeting a day or two prior. He was not aware of the allegations against him until the meeting of 19 September 2002. Mr Shafran says that the allegations against him were that he was intimidating to **J** and that **J** was scared of him. In relation to this issue, it was alleged that Mr Shafran had told staff to knee **J** in the groin if he attacked them. It was alleged also that Mr Shafran had mentioned to a board member of Mosaic that **J** was naughty or evil. After hearing his response to the allegations at the meeting he says Ms Thompson-Harry advised him that he was going to be fired. He then asked if he would have the opportunity to resign and her response was "no". He says she indicated that the decision to dismiss him had already been made before he arrived at the meeting. He was dismissed at that meeting.

5 In response to a question as to why he considered his termination to be unfair he says as follows—

> "Well, the - - there were many other staff that had done far more worse than I had done and, furthermore, the board of management gave me the authority to address any threat to client and staff safety. I'd done exactly that and I was dismissed for using that authority. They claim that I was abusive to this client. I was less abusive than other staff had been over the previous 9 months of taking this client in. I have an authority there addressed from the board of management giving me that ability. I exercised that authority and I was dismissed. If anything they could have said it was a misuse of my appropriate authority and disciplined me for it." (Transcript p.25)

6 Mr Shafran says when he commenced with the respondent on 6 April 1999. He worked in **S and JY's** Option. The young woman was a selective mute, was self abusive and had severe clothing problems. She would engage in frequent head banging, spend an entire day in her room changing clothes, defecate and smear. He says in the 3 years he worked with her he reduced the staff turnaround in the household to nothing. He dramatically reduced her head banging and radically changed her clothing obsessions.

7 Mr Shafran says **JY** had exhibited violence towards the staff and **S**. He would lash out at her and beat her unknowingly and then retreat to his room. Staff had also on numerous occasions been assaulted by him. Mr Shafran says he introduced consistent policies in the house to correct the behaviours. He was given favourable performance appraisals for his work. Mr Shafran says he was one of the highest commended employees.

8 Mr Shafran says he was given a letter [Exhibit A2] which gave him authority as the occupation health and safety representative to be responsible for client and staff safety and for policies to that effect.

9 Mr Shafran says he received a six month performance review [Exhibit A3]; a review on 10 July 2000 [Exhibit A4] and on 8 August 2001 a certificate of recognition for his outstanding commitment [Exhibit A5]. He concurs with each of these performance assessments. He says he has never received any formal written warning, however, informally he has received plenty of comments. He says as follows—

> "I've received plenty of, I suppose, what you call counselling sessions[?] saying, "Mm. Shouldn't really do that, Robert.", or, "Don't do that again.", or, "Be careful of how you're addressing that in future.", but I've never had to be told the same thing twice. I was very good at being - - responding to management direction." (Transcript p.32)

10 He believes he has received two formal counselling sessions. In May 2002 he reported the ongoing problems of a staff member who was abusing a client. He interviewed three staff about this matter. One of the staff members accused him of being "a bit overzealous" because he was doing too many hours. As a follow up Ms Berrell spoke to him and arranged for him to have counselling/debriefing sessions with the, at that time, new CEO. In the course of those sessions he was accused of being a bit overzealous. He took this to mean that he was perhaps coming down on staff too hard. He agrees he was making a few errors in judgment but puts this down to the stress of work and the excessive hours he worked.

11 Mr Shafran exhibited the respondent's policy for managing substandard performance [Exhibit A6]. The policy states:

> "Any deficiency in an employee's performance will be brought to the employee's attention properly and arrange a formal meeting to discuss the matter, and at this formal meeting presided by the employee's supervisor identify the actual nature of any deficiency and elicit the employee's views on the existence, nature and cause of the problem, and then chart out a formal written action plan."

He says there is no written documentation outlining his alleged poor performance.

12 Mr Shafran says the respondent did not investigate work related instances whereby **J** physically or sexually assaulted employees. He says also the respondent did not provide relevant information and training to staff on occupational health and safety standards and practices. Mr Shafran says he wrote to the Board regarding his concerns about **J's** behaviour and the lack of management action to protect staff [Exhibits A13 and A14]. Management did not take any action on this.

13 Mr Shafran says he attended a team meeting in August 2002 at **J's** household at which the CEO and numerous staff were present. **J's** behavioural problem was being discussed. In relation to **J** Mr Shafran commented that staff do not come to work to be sexually abused, threatened or assaulted and it is not a condition of employment. He says he indicated that if ever the need arose and a staff member had to defend themselves then they should do whatever they had to do, even if it meant slapping **J** or kneeing him in the groin.

14 Under cross examination Mr Shafran says his responsibilities as Team Leader were, "the day to day running of a household, liaison with parents, management. The first line of support for staff and management, basically to make sure the house runs smoothly, as well as implement whatever type of specific strategies or goals have come down from management". Mr Shafran says as Team Leader it was his responsibility to relay all information to the Mosaic Co-ordinator regarding staff and client issues. He says strategies for coping with challenging behaviours on the clients were discussed with management, parents and team members. Strategies were implemented as a result of these discussions. Mr Shafran was asked to work in **J's** household by management due to some difficulties Ms Davies had experienced. This arose at a meeting in August 2002 where Ms Davies asked to see Ms Thompson-Harry and Mr Shafran was present. He denies that he volunteered to work in **J's** household. He remained a Team Leader at **S's** household but filled in shifts at **J's** household. Mr Shafran says that he worked with **J** for three or four weeks every other day. He knew **J's** previous guardian as his grandson and Mr Shafran's son were good friends at school. He knew the previous guardian had used very firm guidelines with **J**. Mr Shafran says that Mr Stott advised him that **J** required firm guidance and could not be allowed to get away with doing things that **J** knew to be wrong. Mr Shafran used those strategies of being very firm with **J**. He did not provide to management information that was given to him by Mr Stott. He believed management had the information but when he started at **J**'s household he became aware that the information was not there.

15 Mr Shafran says that **J** would run up and scare people. He says if you had your back to him he was likely to come up and throw something at you or king hit you. One had to be ever vigilant around him and monitor him very closely. He says from

the information staff had given him **J** was volatile and behaved in a sexually inappropriate way with women and little girls. Mr Shafran did not see **J** exhibit any sexually offensive behaviour. Mr Shafran says he weighed the information from a number of sources and drew the conclusion that staff were inexperienced, there were no behavioural management guidelines for **J** and he was being allowed to slip between the cracks. Mr Shafran says that **J's** behaviour would deteriorate if there was a lack of consistency in how he was treated. He said also that **J** was unpredictable and that an incident could happen without any warning.

16 Mr Shafran says he based his judgment about **J's** dangerous behaviours on information provided to him by Mr Stott and Mrs Ponzio, **J's** previous carer, and their communication book and incident reports at the house. He believes that **J's** condition had deteriorated since being at Mosaic. This was because he believed that staff were inexperienced and not properly trained to deal with **J's** behaviours. Mr Shafran says that from the documentation staff had given him there were no intervention instituted in the household. There was simply a daily routine. Mr Shafran does not agree with Ms Morag Budiselik's assessment of **J** or the situation in the house (a clinical psychologist with the Disability Services Commission (DSC)). He says emphatically that when he went into the house, there was no background information on **J**. If it was given to Mosaic then they kept it and did not pass it onto the household. Mr Shafran maintains that **J's** behaviours were not managed at all by the respondent.

17 Mr Shafran gave evidence about a conversation he had with **J** whereby he indicated that he told **J** not to sneak up behind him in the kitchen or he might get "snotted". He says this could be interpreted as a verbal threat. Mr Shafran saw it as a warning for **J** as he says:

> "**J's** only reason for sneaking up behind me was to king hit you and since he had tried to do that in the past, I had tried numerous other things to stop him doing it and I realised it was pointless going down the normal reign of things so I applied something a bit more constructive and it happened to work. And at that time I was the only staff member that never got injured."

18 Mr Shafran agrees that his workplace agreement includes under heading "Dismissal" a clause which says:

> "Knowingly violate established policies/procedures or verbal orders of Management are grounds for instant dismissal."

He denies having received a document entitled Prohibited Practice Document. He says at the time he went into **J's** house there were no practices or policies in place to address **J's** behavioural concerns.

19 At the meeting of 19 September 2002 with Ms Thompson-Harry, Mr Shafran says he admitted saying that **J** was evil at times. He believes some of **J's** behaviour was premeditated. He acknowledged in that meeting that on occasion his behaviour could be seen as aggressive and threatening and this is not acceptable. He agreed at the meeting in August he told staff that, to defend themselves, they could slap **J** or knee him in the groin. Mr Shafran says he has never physically assaulted **J** or **S**. He says he admitted to Ms Budiselik that to control **J** he had sent him outside to the garden and he had on occasion indicated to **J** that he would "snot" him. Mr Shafran says that at the time of the meeting on 19 September 2002 he was in severe pain suffering from a kidney stone. He says he was on considerable Panadol and had not slept for some time (Transcript p.87). He does not deny that at the meeting on 19 September 2002 he indicated to Ms Thompson-Harry words to the effect that he said he "would probably dismiss me too" if he were in her position.

20 In relation to **S**, Mr Shafran says that she had a clothing obsession whereby she would constantly change her clothes. At one point in the policy the staff followed the practice whereby if she cycled through all her clothes she was left in her room naked. Her mother complained of this and this policy was corrected. He thereafter ensured **S** always had some clothing. Mr Shafran agrees that he called **S** names on occasion although no four letter offensive word. He says that her mother asked that she not be called "bad" and he did not use this term thereafter. Mr Shafran admits that at a meeting at some stage that Mr Rick Ward the then CEO counselled him not to refer to **S** as a "bitch".

21 The respondent conducted a training session called the Smart Thinking program. At that session Mr Shafran's behaviour was argumentative towards the trainer and he was counselled for this by Ms Thompson-Harry. He says he was advised that his behaviour was unprofessional and he indicated that he would not do it again. This meeting with Ms Thompson-Harry occurred on 5 June 2002. On 4 July 2002 Mr Shafran attended a meeting with Ms Thompson-Harry, Mr Clarke (**S's** father) and Ms Davies. Mr Clarke was there as President of the Mosaic Board. At that meeting he says Ms Thompson-Harry advised him that his demeanour was seen as "bossy, aggressive, threatening and that it was giving a less than positive impression of Mr Shafran and Mosaic." Mr Shafran acknowledged that there was some truth in the allegation. He agreed to change his behaviour.

22 Mr Shafran says he was relieved of his occupational health and safety duties on 2 September 2002. He may have been advised that the wrong procedure had been followed in his appointment as occupational health and safety representative.

23 Mr Richard Ward gave evidence that he worked for the respondent between June 1999 and December 2001. At the time he left he was the CEO of the respondent. Ms Ann Berrell took over from him when he left. Mr Ward says that he found Mr Shafran to be a high maintenance employee in that he required a bit of debriefing. He says he had to speak to Mr Shafran on two occasions about his performance. One was when a Board member had heard from someone else that Mr Shafran had referred to **S** as a "bitch". He says Mr Shafran did not recall the incident but indicated that it was something that he might say, but he would not do it again. The second occasion was when a staff member felt that Mr Shafran was showing favouritism towards certain staff on rosters. Mr Ward says that he investigated that and found that it was not the case.

24 Mr Ward says that Mr Shafran helped him draft new programs and policies. Mr Ward says that because of Mr Shafran's personality he often offends people. He does not believe that Mr Shafran devalued people and no staff member ever came to Mr Ward and complained about it. He says Mr Shafran set goals to reduce behaviours of the clients. He does not believe that Mr Shafran ever concealed client issues from him. He says Mr Shafran did allow staff to develop skills. Mr Shafran did an excellent job of managing **S's** head banging. He never heard of an incident whereby Mr Shafran may have shouted at staff.

25 Mr Ward says that Mr Shafran ensured that all staff complied with the routines and rules of the house. Under cross examination Mr Ward says that Mr Shafran adopted the agency as pretty much his whole life. If he was not doing shifts in the house he was helping in the office.

26 Mr Daniel Farrell gave evidence that Mr Shafran was fastidious in the application of policies and procedures. Mr Farrell did not have a problem with Mr Shafran personally or his treatment of him.

27 Mr Grant Stott, **J's** previous guardian gave evidence that he was **J's** guardian for the period 1999 through to 2002. He has been responsible for **J** for some considerable time. He says he was concerned that **J** suffered from temporal lobe epilepsy. In 1995 he was injured by **J**. In December 2000 his carer Mrs Ponzio was injured by **J**. In May 2001 she was badly injured during one of **J's** outbursts and was on workers compensation for almost two years. He says on occasion **J** acted in a sexually inappropriate way to young girls. On one occasion Mrs Ponzio spoke severely to **J** and that seemed to work. Mr Stott says that the DSC was aware of **J's** behaviour as was Mrs Berrell. Mr Stott said that he managed **J's** community living option from its inception until September 2000. At that time the last carer of **J** left suddenly after one of **J's** outbursts. Mr Stott contacted the local area co-ordinator for DSC and advised him that he was no longer prepared to manage **J's** community living option. DSC

took over the management of that option from the beginning of November and then managed it until Mosaic took over in December 2001. In the year 2000 Mr Stott says that **J** had three outbursts where he physically assaulted someone. In 2001 there was one physical assault on Mrs Ponzio. He says **J** was aware of his actions generally.

28 Mr Stott says that if **J** had an outburst he would get out of the way and leave him. Mr Stott says he advised Mosaic of **J's** sexual behaviour and outbursts. Mr Stott said that **J's** unpredictable behaviour was due to his temporal lobe epilepsy. He said the usual pattern was that he would shriek, often throw or push something, he would then lunge at the nearest person. If that person could get out of the way, the normal pattern was drop to the ground and he would lay there until the episode passed.

29 Ms Gillian Davies gave evidence that Mr Shafran was outspoken at the training session on 21 May 2002 but no different to what he normally is. She says he was perhaps a bit more outspoken than herself or one or two other staff at the time. Ms Davies says she found the presenter of the session was derogatory towards staff and made them feel that they were not very good at their job. Ms Davies then attended a meeting at Mosaic on 5 June 2002 to discuss Mr Shafran's behaviour at the Smart Thinking program. She says it was not a disciplinary meeting. She says Mr Shafran was advised that his behaviour was really inappropriate in front of other staff. Ms Davies says that Ms Thompson-Harry and Ms Berrell did not disagree with Mr Shafran's explanation of his comments at the session but they disagreed with how he had projected himself.

30 Ms Davies says that she worked in **S's** household and **S** was placed under strict clothing program in consultation with her parents. Ms Davies says she also worked in **J's** household. She says **J** would physically assault staff. There were a couple of sexual assaults on staff and **J** was destructive of his own property. **J** would shriek and lunge at people. She says some staff were not qualified to look after **J**.

31 Ms Davies says at a meeting in **J's** household in January 2002 staff were advised that they could use aversive methods to control **J** in a vehicle and that staff would not be incriminated in any way if they handled **J** to protect themselves. Ms Davies says she was at the meeting on 19 September 2002 when Mr Shafran was sacked. She says Mr Shafran's response to some of the allegations was to laugh at them and some of them he thought were a sackable offence and he had no knowledge of some.

32 Ms Davies says that after she was assaulted by **J** she asked not to go back into that household. Mr Shafran was asked to replace her in the house and she went to **S's** house. In relation to management's handling of the incident with **J**, Ms Davies says that Ms Berrell was very helpful at the start in trying to put some methods in place with **J** but after a while "with the restructure and everything nothing was ended up putting in and no action was taken" (Transcript p.157). Ms Davies says that partly as a result of their instructions in January 2002, and partly because staff found it an effective way to deal with **J's** behaviour, especially in the community, staff were very aversive to **J**.

33 Ms Davies says that Ms Budiselik met with her and some other staff perhaps three times in compiling her report. Ms Davies says that she presumes the reference in Ms Budiselik's report to "an overuse of openly aversive and coercive behaviour" refers to probably most of the staff including herself. In relation to the meeting on 19 September 2002 Ms Davies agrees that Mr Shafran was advised in response to his question as to whether he would be given the opportunity to resign that the decision had already been made.

34 Under cross examination Ms Davies says that a good percentage of incidents (called SDI's) reported in relation to **J** involved abuse of a staff member. She says she did not report all incidents involving **J** to Mosaic management. She says **J's** behaviour was unpredictable. Ms Davies gave a description of **J's** sexual behaviour towards staff. She agrees that socially unacceptable behaviour is part and parcel of the work she is engaged in.

35 Under questioning by the Commission, Ms Davies says that she was physically assaulted three times by **J**. She says "One I got thrown across the car, one I got thrown into the bath, and the last one was up against the wall". She saw other incidents where **J** pushed staff. She says there were 25 such incidents over nine months. She says **J** lunges at people with, his arms straight out. She does not recall **J** ever physically punching someone or slapping them.

36 Ms Maryann Davies gave evidence that she attended the training session on 21 May 2002. She says Mr Shafran was outspoken but nothing unusual for him. She says that the presenter at the session was belittling and undermined what they were doing in their work. Ms Davies says that Mr Shafran treats staff fairly and equally. She says he shows staff everything they need to be shown in the routines of clients. She was aware of staff having sworn at **S** when she did something adverse.

37 Mr Neil Maslij says that he worked in **S's** option. He was inducted by Mr Shafran and considers that Mr Shafran's treatment of him was fine. He says that Mr Shafran was approachable and very thorough in his induction. Mr Maslij says that the only guidelines in **J's** house is the daily routine for **J**. He says **J** can be very disruptive in public. He disagrees that **J** is no threat to the public.

38 Ms Jenny Maslij gave evidence that prior to starting work with Mosaic she had no experience in the disability field, apart from having worked with a child with cerebral palsy in out of school care. She was not given training at Mosaic. Ms Maslij remembers a meeting in August 2002 of staff. At that meeting staff voiced their concerns about their safety with **J**. **J** would come up to them in an aggressive manner. She says Mr Shafran indicated that "if we had no other option that to protect ourselves we could knee him in the groin". Ms Maslij says that Ms Thompson-Harry was at that meeting. Ms Maslij says that she did not believe that anything was done to protect the welfare of staff. She says "I felt apprehensive every time I went to work and I've brought this up at one meeting and it was, I guess, discussed but there was no real outcome to that, and I continued to feel apprehensive when I went to work".

39 Under cross examination she says Ms Thompson-Harry advised staff in August 2002 that if they felt in danger while caring for **J** they were to leave the room. She says it is not always possible to leave the room.

40 Ms Thompson-Harry gave evidence that she is the Chief Executive Officer of Mosaic Family Support Services. She commenced employment there at the beginning of May 2002 and worked for a few hours per week until she assumed a 25 hour per week position in June 2002. She gave evidence in relation to her extensive qualifications in the disability industry. Ms Thompson-Harry says that her aim at Mosaic was to improve the way in which the organisation worked. She wanted to improve channels of communication, note taking, reporting, and everything from the correspondence system to various proformas that were used to report clients. Ms Thompson-Harry says that when Ms Davies left **J's** option, Mr Roy Haughton assumed responsibility. He unfortunately had a heart attack some weeks after that and Mr Shafran offered to do some shifts in the house. Mr Shafran was working at the time at **S and JY's** option. As far as Ms Thompson-Harry was aware, things at that option were good. There were no major client issues. Mr Shafran worked five to seven shifts at **J's** option. This was over a two to two and a half week period.

41 Ms Thompson-Harry says she became aware several weeks after she commenced with Mosaic that they had scant information on **J**. She says Mr Shafran did not communicate any information to her regarding **J** and his previous carer. She says Mr Shafran had a duty to communicate that information to Mosaic. She says **J's** condition is that he has a disability by way of autism. He has frontal lobe epilepsy. He has an IQ of approximately a four year old. He is able to understand simple conversation. **J** exhibits repetitive behaviour. His epilepsy causes him sometimes to act unpredictably and sometimes to become violent towards property or staff. This can happen without warning. Ms Thompson-Harry says she understands from

Ms Budiselik that **J** always had these behaviours. She says **J** does have a challenging behaviour whereby he pushes people. Staff need to employ strategies to protect themselves, protect **J** and protect the public. Different people see challenging behaviours differently. Ms Thompson-Harry gave evidence regarding the training provided to staff to deal with clients' behaviours. She says she believes that Mosaic offers a fair range of training. She does not believe that the respondent is deficient in that area albeit they would like to offer more.

42 Ms Thompson-Harry says that Mosaic answered queries from DSC regarding treatment of **J** and DSC was satisfied with Mosaic's response. Mosaic also answered questions from Mr Rod Powell from Worksafe in relation to a complaint about occupational health and safety practices. She was advised by Mr Powell that the investigation was complete unless the complainant wished to take the matter further. She has not been advised of any other action.

43 Ms Thompson-Harry says that it is Mosaic's role to teach **J** more socially appropriate ways of communicating. It is not Mosaic's role to control his behaviours; instead Mosaic needs to look after him and show that he is safe, the public is safe and the clients are safe to the best of their ability. She says verbal threats to clients are totally unacceptable. They breach the employee's contract, they breach good practice, they breach DSC's standards and risk the funding of Mosaic. They also breach the good care of **J**. Aversive strategies are where someone at an emotional or physical level may feel threatened, intimidated or bad about themselves. Aversive strategies are unacceptable. This was most certainly communicated to staff.

44 Ms Thompson-Harry says that the two types of behaviour of Mr Shafran, of which she complained, were under the DSC guidelines, referred to as "verbal threats of dire consequence" and "shouting, screaming, at or abusing persons". She says verbal threats do not have to be followed through to be considered abuse of a client. She says as follows:

> "I'm not a mind reader. I - - I cannot in my position afford threats of harm to be made, apart from the fact that at that level it breaches our standards of care. I'm not in the position to judge whether or not a person will carry something through. That's not my role. My role is to act upon what occurs factually and when that is made that - - that's the issue." (Transcript p.204)

45 Mr Shafran brought to her attention one staff member in **J's** household who he said had referred to **S** as a "bitch". They met to discuss this with the staff member.

46 Ms Thompson-Harry says that she made the decision to dismiss Mr Shafran at the end of the meeting on 19 September 2002 after they had discussed all the allegations and Mr Shafran had an opportunity to respond to them. The allegations were that Mr Shafran had described a client as evil to one of the Board members. She says that was a particular concern because that was one of the comments that was being made throughout the organisation about this particular client. Mr Shafran could not remember what he had said however, he agreed he could have said words to that effect. The next allegation was that Mr Shafran had at a meeting of staff on 16 or 17 September 2002 at which Ms Thompson-Harry was present and in front of DSC staff, advised **J** that if he came up behind Mr Shafran that Mr Shafran would snot him. She also advised Mr Shafran of the discussion she had had with Ms Kelly Murray of Interwork, a place where **J** attends as a day placement. Ms Murray raised concerns that some Mosaic staff were using aversive techniques. She singled out two staff being Mr Shafran and another and said that Mr Shafran had advised her that he had advised staff to knee **J** in the groin or slap him if he got out of hand. Ms Murray had advised Mr Shafran that that was not appropriate. Ms Thompson-Harry said that Mr Shafran responded in the affirmative to all the allegations. He agreed that he may have referred to **J** as evil. She says Mr Shafran was aware of the seriousness of the allegations and indicated that they were dismissible. She says Mr Shafran asked to resign and her reply was "no", she had already dismissed him. She would not re-employ Mr Shafran.

47 She agreed Mr Shafran could work out his notice. It was useful for him to finalise his paperwork. During the period of notice she says Mr Shafran came and went with the knowledge of the respondent. Mr Shafran then left of his own choice. She considers that he had been doing some administration work and she considered that he perhaps found this unfulfilling. Mr Shafran was paid out by the finance officer and ended his employment.

48 Ms Thompson-Harry said she received feedback from the Smart Thinking program whereby Ms Pedlo, the trainer who was being overseen by Ms Budiselik, had complained about a number of staff who had disrupted the session. Mr Shafran was singled out. He arrived late, disrupted the commencement of the training and behaved inappropriately. Ms Thompson-Harry received this information from Ms Berrell and she says two or three other staff complained to Ms Berrell about Mr Shafran's behaviour. She says Mr Shafran had asked the trainer during the training session to make him a cup of coffee. She considers his behaviour totally unacceptable and unprofessional. She says Mr Shafran acknowledged that he could be obnoxious and probably says too much at times. Mr Shafran acknowledged that he would seek to conform to the standards required.

49 In May 2002 Ms Thompson-Harry says she attended a meeting with Ms Berrell and representatives from DSC, being Ms Budiselik and Mr Gavin Currie. Ms Budiselik presented to them a list of concerns in relation to organisation, staffing and client issues that had arisen from visits to **S's** and **J's** options. Concerns raised were about unprofessional conduct, use of aversive strategies and concealing information from management. Ms Thompson-Harry says she was not shocked as the concerns raised were in line with her observations. She had already flagged to the Board her concerns about the lack of professional discipline in the organisation, organisational issues, staffing issues and client issues. This report she said had no impact on Mr Shafran's employment. Ms Thompson-Harry and Mr Clarke met with Mr Shafran and Ms Davies as Team Leaders of the options to discuss the concerns raised by Ms Budiselik. The concerns related to Mr Shafran, Ms Davies and other staff. She says the upshot of the meeting was to convey to them the importance of maintaining standards of care, behaving professionally, not employing the use of aversive strategies and using correct communication. Ms Davies and Mr Shafran expressed their desire to work with Mosaic and with Ms Thompson-Harry to improve the organisation.

50 She says she also discussed with Mr Shafran at this time the way he was perceived by others. That is how he speaks to clients and staff. She says it was acknowledged that Mr Shafran had a level of knowledge that was believed to be greater than a number of other staff within the organisation but this did not make him the team leaders' leader; nor did it give him a monopoly on knowledge and expertise in regards to working with clients. Ms Thompson-Harry believed there was a positive outcome to the meeting and that the team leaders were flagging their commitment to the organisation and to her as CEO to help improve the organisation. She agreed to work with Mr Shafran on tempering some of his behaviours.

51 Ms Thompson-Harry says she did not have any other cause to speak to Mr Shafran about his employment. She did have a number of informal meetings/discussions concerning staffing issues. She did have a discussion with him on 9 September 2002 regarding some changes to rosters to relieve some of the pressure on Mr Shafran. Ms Thompson-Harry was concerned that Mr Shafran was doing too much. This is work that Mr Shafran takes on of his own bat. At that time she flagged to Mr Shafran, and she says, had done so before, that his appointment as the occupational health and safety representative had been incorrect in relation to the protocol and procedures that were required. She says Mr Shafran indicated that in all likelihood he would end up being the occupational health and safety representative because probably no one else would want to do it. She did not convey to Mr Shafran that she was taking the position from him; it was merely a matter of getting the administration and procedure correct.

52 Ms Thompson-Harry was extremely concerned about allegations Mr Shafran had made about **J** sexually assaulting her daughter at a staff/client gathering at Churchman's Brook. Ms Thompson-Harry was annoyed at this because Mr Shafran was not there and her daughter was in no way traumatised by the event. The information being bandied around the organisation was inaccurate.

53 Ms Thompson-Harry says that **J** at times approaches female members of staff and puts his hands on their breasts. She says he has done that to her on occasion. She says he has not assaulted her, he has simply been redirected and told not to do that. This technique has been successful.

54 Under cross examination Ms Thompson-Harry gave the following evidence:

> "MR SHAFRAN (TO WITNESS): You state, Trish, that there was numerous items brought to your attention about my work performance. Is that correct?---Yes, that's correct.
>
> You state that you sought information on what to do?---Are you referring specifically in regards to your dismissal?
>
> Yes?---Yes. Yes, that's true. At what point did you actually come to me and address this matter as a substandard performance?---It was beyond an addressing of substandard performance. It was the seriousness of threatening to harm a client on more than one occasion. Admitting that and acknowledging that had taken place is not, in my view, to be managed as a substandard performance. It is a - - is a serious incident - incidents - which call for more than managing substandard performance. I certainly sought a range of advice including the Disability Services Commission human resources. I spoke with Morag Budiselik. I spoke with the advocate. I also spoke with the Department of Community Development, Human Resources which I was put on to by the Disability Services Commission. I also in regards to the possibility of your termination, I discussed with the Director General of the Disability Services Commission Dr Ruth Sheen who in fact supported your dismissal if in fact the allegations were proven. Your admittance of those proved that they did occur. Therefore there was no cause for me to manage your behaviour.
>
> MR SHAFRAN: How did you come to find out of the statement I had said regarding **J**?---In - - that he was evil?
>
> No. The question of snotting him?---You said it in a public forum where I was present.
>
> Can you specifically state which one?---I think the date was the 16th of September. It was an - - some staff training, informal staff training that we had asked Morag Budeselik and Jacky McGregor who was working very closely with Gill Davies up until the time Gill left **J's** option in order to introduce some strategies around working with **J** and client routines"

55 The case for the respondent is also clearly described in the evidence of Ms Thompson-Harry (Transcript p.229–231). In answer to questions by the Commission Ms Thompson-Harry says as follows—

> "WOOD C: You've given evidence in respect of a verbal threat on the 16th of which you witnessed?---Yes.
>
> What are the other verbal threats that you refer to?---Um, the discussions with Kelly Murray that revealed that Robert had advised her staff to, um, to harm **J** if - - if he was difficult to manage.
>
> That's the discussion which refers to a knee to the groin?---That's correct and also to slap him.
>
> And the date of that roughly?---That meeting?
>
> Yes?---It was the 18th of September.
>
> All right. And when did Kelly Murray, from your knowledge, come to get that information?---From what I understand she'd had that information for some time and I think if you refer back to the meeting that I've mentioned which was with Interwork, **J's** day placement, and the comment that she had made in regards to Interwork staff can't deal with **J** in the same way that Mosaic staff can - and again the implication was the use of aversive strategies by Mosaic staff which I believe is at the beginning of September - Ms Murray and I had been attempting to meet for those - - those weeks and we had a hit and miss number of calls until we arranged that particular date to meet.
>
> Thank you. In respect of your evidence to date and in respect of the notice of answer and counterproposal, there appears to have been a discussion on about the 4th of July with Mr Shafran - - ?---Yes.
>
> - - in respect of the DSC's concerns?---Mm hm.
>
> There appears to have been a discussion some time earlier in respect of the training sessions concerns - - ?---Yes.
>
> - - and a discussion in June in respect of Mr Shafran referring to **S** as a bitch?---I wasn't privy to that. That was in 2000, I believe. That was the previous CEO.
>
> All right. And you have a discussion on the 19th of September - - ?---Yes.
>
> - - which ends up in dismissal, yes?---Mm hm.
>
> Are they - - is that a rough summary - - or, sorry, I should say is that an adequate summary of the discussions that had been had in a formal sense with Mr Shafran - -—
>
> formal sense with Mr Shafran?---Yes.
>
> ……..
>
> All right. And the concern is that his attitude in terms of use of aversive tactics, shall we say, against a client is just totally unacceptable?---Absolutely unacceptable, yes, sir."

56 Ms Ann Berrell gave evidence that she was the finance officer for Mosaic. She previously worked as the co-ordinator for the service. Ms Berrell says that she remembers that Ms Davies had an injury at **J's** house at the end of August 2002. Mr Shafran was a close friend of Ms Davies and realised that additional staff were required. He volunteered to assist in **J's** house whilst he maintained his role in overseeing **S and JY's** house. To accommodate his extra shifts at **J's** house and to keep **S and JY's** house operating successfully, Mr Shafran arranged for Ms Davies to do some shifts in **S and JY's** house. Mr Shafran worked at **J's** house for three or four weeks. He worked there as a support worker not as a Team Leader.

57 Ms Berrell says they had very scant information on **J** prior to him joining Mosaic. She says Mosaic started providing service to **J** in December 2001. Mr Stott and Ms Ponzio had been looking for a service for **J**. She met with them in November 2001 with Ms Davies present. Ms Berrell was seeking information on **J**. Mr Stott indicated that he had a suitcase full of information about **J** but as far as she was aware Mosaic never received that. Ms Berrell was aware from Mr Stott that **J** had temporal lobe epilepsy and may lunge forward in an outburst. Mr Stott advised that the manner to deal with this is to simply get out of the way.

58 Ms Berrell says that Mr Shafran understood the requirements under his contract, she had no reason to believe otherwise. Ms Berrell says she has not seen an outburst from **J** but she was advised by others that it involves shouting and lunging forward at a person and he may fall to the floor.

59 Ms Berrell says that team meetings occur on a monthly basis where there is input from all parties concerned about handling challenging behaviours and the routines required for clients. These routines are modified as required in consultation. Mosaic has disability standards and a copy of this policy is available in all households. In relation to their standards if a staff member is found to have threatened a client it would result in severe disciplinary action being taken. Ms Berrell says that Mr Shafran indicated to her that he preferred not working with **J** and that he had difficulty dealing with **J's** behaviours. Ms Berrell's reply to Mr Shafran was that it was only a temporary arrangement and that they would work through it as much as they could until another team member could be put in the house.

60 Ms Berrell says they applied DSC standards and there are certain techniques which are banned. These practices would not be allowed under any circumstances and they include such things as cold sluices, physical punishment, tormenting, threatening, verbal threats of dire consequence, foul tasting or harmful substances, shouting, screaming at or abusing people, electric shocks or pulse, spraying of obnoxious substances on to people. She says her understanding is that any breach of these techniques is a breach of the workplace agreement and is dismissible.

61 Ms Berrell says the issues raised with Mr Shafran on 19 September 2002 were as far as she can remember that he had referred to **J** as evil, there were concerns raised with Ms Thompson-Harry by Ms Murray regarding Mr Shafran's instruction to staff and suggesting that staff may knee **J** in the groin or slap him. Mr Shafran acknowledged the points raised. Ms Berrell says that Mr Shafran was dismissed at the meeting. He was paid three weeks notice and he worked the first week and a half of that. Mr Shafran felt that he was treading water, not being very effective or doing an awful lot, and hence decided to leave.

62 Ms Berrell says that she also had a meeting with Interwork and Ms Kelly at which Mr Shafran attended. He brought with him **J** because at that time there were no other staff available to provide support to **J**. She says Mr Shafran was very abrasive towards **J** and on a number of occasions told him to "zip it". She described Mr Shafran as being overzealous in his response. Mr Shafran told **J** to sit down and keep quiet. Ms Murray advised Ms Berrell that she was concerned about the way staff were being instructed to deal with clients. She said some of these behaviours would be a breach of guidelines. Ms Berrell suggested that she would discuss Ms Murray's concerns with Ms Thompson-Harry.

63 Ms Berrell said that from her own observations there was a good rapport between **S** and Mr Shafran; albeit he could be quite authoritarian towards her. Ms Berrell said there was an occasion where Mr Ward had reason to speak to Mr Shafran as he had referred to **S** as a "bitch". Mr Shafran indicated that he would be mindful of this and not do so again. Ms Berrell says that Mr Shafran's behaviour at the Smart Thinking workshop was considered to be destructive and he did not go to the further sessions.

64 Ms Berrell gave evidence in relation to the sacking of three Activ employees and references given by Mr Shafran to Ms Davies. I take no account of this evidence. These matters were not put to Mr Shafran in cross examination and on the evidence of the respondent did not play a part in their consideration of the allegations put to Mr Shafran on 19 September 2002 or in his dismissal.

65 Ms Berrell says she attended a meeting on 25 June 2002 with Ms Budiselik. At that meeting Ms Budiselik indicated that she had previously met with Mr Shafran and that his attitude had been that he knew most things, was not willing to listen, staff did not feel they could go to him and he was very autocratic in his approach. His quality of care was said to be very good. Ms Berrell says she remembers incidences of violence by **J** but she does not recall 25 such incidents.

66 In relation to the role of Mr Shafran as occupational health and safety representative Ms Berrell says that the Board and she nominated Mr Shafran as the safety officer. He was offered four hours pay per month for that role. She then realised that he could not be an officer and represent staff at the same time. This occurred at the beginning of 2002. She says Mr Shafran thrives on being kept busy. There was a time where she was concerned that he was doing too much. She therefore took over compiling the rosters. She denies Mr Shafran was dismissed due to his occupational health and safety investigations. Ms Berrell was cross examined about Mr Shafran's performance. There were a number of things she says she cannot comment on, however, she describes him as fairly honest and that he has been a good employee and has done some good things at Mosaic. But she describes him as very controlling and selective in the information he passed to management.

67 Ms Michelle Wragg gave evidence that she is currently a support worker and administration assistant at Mosaic. She had previously been a team leader and assistant co-ordinator. She has worked at Mosaic for 5½ to 6 years. She says that when someone first starts work they are trained through a system of buddy shifts with a Team Leader. She has worked with **J** who she says has autistic tendencies, frontal lobe epilepsy and challenging behaviours. She says **J** is a pleasure to work with. He has never been overly violent towards her. She says when **J** gets elevated the task is to calm him down. This behaviour is a means by which **J** communicates. She does not feel that **J** is a threat to her or to the public. She is aware that when **J** has a seizure he may lunge at people but she has not come across this as yet. Ms Wragg says that she has been trained as to what is appropriate behaviour with clients at Mosaic. She says that she initially did only relief shifts with **J** but recently she has been working with him quite often. She says that she discussed **J** with Mr Shafran. Mr Shafran did not think highly of **J**.

68 Ms Wragg says she has also done relief work with **S and JY**. She says Mr Shafran's strategies for dealing with **S** were usually quite good. She did hear Mr Shafran on one occasion refer to **S** as a "dirty little bitch".

69 Ms Wragg says that generally Mr Shafran's interaction with Mosaic staff was quite good. She says that sometimes Mr Shafran lacked in team building. Sometimes staff would report that Robert was not allowing them to get more involved with the issues in the running of the house. Ms Wragg says that on one occasion, when she was on the telephone to Mr Shafran, she heard him say to **J** not to sneak up on him otherwise he would snot him. She advised Mr Shafran not to say those things. She says Mr Shafran acted very unprofessionally at the Smart Thinking program. He was constantly questioning and arguing and interrupted the presenter.

70 Ms Theodora Clarke gave evidence that she was on the Board of Mosaic and **S's** mother. She says that **S** has some very challenging behaviours, such as clothing obsessions, stripping, smearing, wetting and head banging. She complained that Mr Shafran had referred to her daughter to her face as "a dirty little bitch". Ms Clarke says that her daughter's clothing regime was discussed at team meetings. If her daughter cycled through all her clothes including dressing gowns then she was left in her bedroom naked. This regime led at home to an accident with **S** and hence Ms Clarke asked Mr Shafran to immediately amend the routine. Mr Shafran said he would talk to staff and put the new procedure in place. She says it became evident two years later in a conversation between Ms Thompson-Harry and her husband that Ms Thompson-Harry had found **S** sitting in her bedroom naked. Ms Clarke was shocked as she had thought this had been dealt with two years before. Mr Shafran was not employed at that stage. She says she would not let Mr Shafran work with her daughter again because of this and because she had heard from her time on the Board of his threats to clients. She would not be able to trust him.

71 Under cross examination Ms Clarke agrees that all decisions regarding the welfare of her daughter were discussed at team meetings and if routines were changed she was given a copy of the information. Ms Clarke says she has a copy of a handwritten note from Mr Shafran saying that **S's** dressing gowns have to be renewed at all times. This note was about November 2000. There was then the following exchange between Mr Shafran and Ms Clarke—

> "Okay. And we had to revise all the clothing programmes yet again because **S** saw this as an opportunity to have access to her wardrobe?---Well, yes, that probably would've happened. Yeah.

Okay. The reason I'm asking you is that all those guidelines were reviewed then and it did not state on them that **S** was to be left naked?---Probably because that wasn't the issue at hand. That issue had been dealt with.

But you'd just said that it was "left naked" since 2000?---Well, she had obviously because she was being left to - - naked. That's what Trish found."

72 Ms Clarke says that under Mr Shafran's care her daughter had improved quite a bit. He did well in making staff aware of **S's** needs. She says he did well in a lot of areas. Ms Clarke agrees that **S** needs strict guidelines. On occasion in public she would need to be physically manhandled to prevent her from running away.

73 Ms Morag Budiselik gave evidence of her qualifications and that she had worked in the area of disability for sixteen years. She is currently employed in the DSC on the specialist accommodation support team. She assists both DSC and the non government sector in the management of adults with challenging behaviours living in residential accommodation. Ms Budiselik was asked for assistance in relation to Mosaic and she commenced her work in May 2002. Ms Budiselik said she met with Ms Davies and she was unsure about the level of Ms Davies' skills. Ms Davies' reports of **J's** behaviour which were of concern were not very useful. On one occasion she saw a staff member retaliate when **J** pushed that person. The staff member pushed **J** back. She found Mr Shafran's house, i.e. **S's** house, much better organised than **J's** house. He had better procedures and immaculately kept documentation. Mr Shafran was very expansive about how he managed clients. A few of his remarks concerned Ms Budiselik. Mainly, one of the comments was that he had torn up a psychologist program that was written to address **S's** head banging. Mr Shafran did not consider it useful. She says Mr Shafran also told her that the management of Mosaic was not at all helpful in terms of direct input as to the managing of client behaviours. She says Mr Shafran indicated that he had told Ms Davies that if she had any problems not to bother letting management know but to go straight to him.

74 Ms Budiselik saw charts provided by Mr Shafran which showed that **S's** head banging under his care had reduced. However, she did not approve of the method used. The focus of intervention in **J's** house was to make the environment as predictable and consistent as possible hence increasing **J's** capacity to communicate through appropriate behaviour. She says it was very hard to get specific information about how best to support **J**. She says that she tries not to use aversive strategies. She says on rare occasions, when she considered it necessary for clients safety and for the safety of others, such procedures could be used. Ms Budiselik does not believe that **J** should be a significant threat to the safety of Mosaic staff if handled appropriately. She says some of the techniques that she saw were in her opinion inappropriate. For example shouting at **J** at close range was being promoted as the way to manage his behaviours. She was surprised at how sudden **J** reacted to that. Ms Budiselik said she tried to have this stopped through the then Team Leader Ms Davies. From what she saw Ms Budiselik says it was difficult for her to say whether a carer needed to exert authority over **J** in order to control him. The social trainer who worked with him for some time indicated that **J** was quite responsive and more extreme measures were not necessary. She says from what she heard about **J** and his behaviour that was said to be sexually inappropriate, she was not able to ascertain whether this was a product of staff anxieties about what might happen (or what they thought was happening) or was **J's** actual behaviour. However, given the frequency of the behaviour she did not consider it to be a major challenging behaviour. Ms Budiselik says she does not know what Mr Shafran was advising staff to do about **J**.

75 Ms Budiselik says she met with Ms Thompson-Harry and Ms Berrell to discuss her findings at the end of June or the beginning of July 2002. In her report she expressed general concerns about the structure and processes used in the agency rather than focusing on specific issues about staff. She was concerned that some of the staff in **J's** option were not working within a model that was seen as best practice. The Team Leaders were working quite long shifts and the management structure was almost dislocated from what was happening in the houses. She did not believe this to be deliberate concealment. She raised her concerns with Ms Berrell as to the manner in which the head banging was being managed. She says **S's** head banging had been reduced from 300 a day to 60. However, she was still concerned about the high rate of head banging. Other ways of further reducing it needed to be explored. She said she did not get the feeling from Mr Shafran, albeit a short meeting, that he was concerned about further improvement.

76 Ms Budiselik said that she encouraged the Team Leaders to go to the Smart Thinking program. She got the impression that they were not intending to attend this session but she encouraged them to do so. Later she said she got feedback from Ms Pedlo who had conducted the session that she found Mr Shafran and some others very argumentative and quite disruptive. Particularly she said Mr Shafran on occasion seemed to be arguing with her.

77 Under cross examination Ms Budiselik went through the items in the respondent's notice of answer and counterproposal which they say DSC raised with them. Ms Budiselik says she did find a demarcation between staff who had experience and staff who were less experienced. She says this was also experienced at the workshop. She did not have an issue with Mr Shafran and his ability to set goals. She says the issues raised by her were ones for Mosaic to follow up and investigate. She cannot recall whether Mr Shafran had failed to allow staff to develop their own skills. She says Mr Shafran told her that he concealed information about clients from management. She says this was a matter for Mosaic to further investigate. It may have been that Mr Shafran was simply running off at the mouth. She says at the training session for staff in mid December last year, Mr Shafran indicated to staff that **J** had to be afraid of them otherwise he would not behave appropriately. Mr Shafran indicated that he had said to **J** that "if you do that, I'll drop you" or "I'll snot you". She says she was shocked because she had never heard any staff member publicly state those sentiments in such a forum. She said Ms Thompson-Harry immediately intervened and stated quite clearly to all staff that that was not an approach she would tolerate.

78 She says her impression of Mr Shafran is that he could be very forceful, influential and persuasive. She had the impression at the staff training session that was run that Mr Shafran would have liked to have taken over the session.

79 The applicant in essence says that his actions do not warrant being dismissed.

80 The respondent says that Mr Shafran was advised, in advance of his final counselling session on 19 September 2002, that this was a disciplinary meeting and he was invited to bring along a witness. Mr Shafran brought Ms Davies as a witness and he was fully aware of the gravity of the situation. At that meeting Mr Shafran was presented with several serious allegations which amounted to verbal abuse of a client. These allegations included Mr Shafran referring to a client as being evil, that Mr Shafran came across as being threatening and aggressive, that Mr Shafran had threatened to snot a client, and Mr Shafran had advised staff to knee a client in the groin. Mr Shafran admitted to these allegations at that meeting. Mr Shafran admitted that he was well aware that the offences were of a dismissible nature and indicated to Ms Thompson-Harry that if he were in the CEO's shoes he would have no choice but to terminate the contract. In summary, Mr Shafran admits to the claim of verbal abuses against clients, acknowledges that verbal abuse is a dismissible offence, and yet he still claims that he has been unfairly dismissed.

81 The respondent says that Mr Shafran received counselling on numerous occasions with regard to his conduct. He was counselled on 26 June 2000 by Mr Ward due to the inappropriate language he had used about a client; namely he referred to **S** as a "bitch". On 29 May 2002 Mr Shafran attended a disciplinary meeting with Ms Thompson-Harry regarding his conduct during the Smart Thinking training session. Mr Shafran admitted that his behaviour was unacceptable and he would ensure that

it did not happen again. On 4 July 2002 Mr Shafran attended a disciplinary meeting with Ms Thompson-Harry and Mr Clarke, the President of the Board at the time. Mr Shafran admitted at that time that sometimes he was seen as monopolistic and bossy and he would seek to rectify these issues. The final disciplinary meeting was on 19 September 2002. Mr Shafran admitted to the very serious concerns posed by Ms Thompson-Harry and the respondent had no alternative but to dismiss Mr Shafran. Mr Shafran was given ample opportunity to refute the allegations. Ms Bilston for the respondent says that the decision to dismiss Mr Shafran was not taken lightly. The respondent sought advice from numerous sources. The respondent found they were in an untenable position and had no alternative due to the seriousness of the allegations.

82 It is clear that Mr Shafran was dismissed for making a verbal threat of physical violence to **J**, for instructing staff to be physically violent to **J** to defend themselves, and for making offensive remarks about **J** (i.e. he was evil) and about **S** (i.e. she was a "bitch" or a "dirty little bitch"). There are other claims against Mr Shafran in respect of his treatment of staff, his manner, and the lack of communication to management of relevant information about staff. I will address these more fully, but it is clear from the evidence, especially that of Ms Thompson-Harry (transcript pg 229-231) that these matters were not the grounds for dismissal. In fact, it is clear form the letter of termination that the reason for Mr Shafran's dismissal was the verbal threat by Mr Shafran of physical violence towards **J**. The latter [Exhibit A1] states relevantly:

> "As stated at this meeting, the seriousness of these concerns relating to verbal abuse of a client incorporating verbal threats of physical harm, contravene Mosiac policy and DSC Prohibited Practices and are therefore unacceptable.
>
> Having taken your comments into consideration we feel that there is no option but to terminate your employment with Mosiac Family Support Services Inc".

83 I do not have an issue with the credibility of any of the evidence given. There is a difference of opinion about people and events, and in particular about the appropriateness of interventions with **J**, but in the main the recall of the key events is quite similar. Mr Shafran and Ms Thompson-Harry have a difference in evidence as to whether Mr Shafran volunteered for extra shifts in **J's** option or was asked to work there. This is not of any importance in determining this matter.

84 I consider that it is important in this matter to express the clear impression which I have formed of Mr Shafran. In short, he was a good, honest employee who was very committed and dedicated to Mosaic and his work. He also exhibits other characteristics, on the evidence given by a number of witnesses, and which I doubt that Mr Shafran himself would disagree with. Ms Budiselik says that her impression is that he could be forceful, influential and persuasive. I agree with these impressions. He was forceful and persuasive at hearing and from the tenor of the evidence given by other staff it is safe to infer that he was influential. None of those characteristics are necessarily negative. They may well be positive attributes. He was also accused of being high maintenance, authoritarian and over zealous. I am confident that each of these descriptions were also appropriate at various times. It is also a fair description, in my judgement, to say that Mr Shafran is without guile; what you see is what you get.

85 I say this because I consider that an important issue is whether trust could said to have broken down between the employer and employee. This is not argued by either side. The case for the respondent is really that the causal link between threatening **J** with physical violence and dismissal is obvious if not immediate, and breaches Mr Shafran's contract. The case of the applicant is that his actions, which at all times he admitted, did not warrant dismissal. It is the case that many aspects of Mr Shafran's dismissal have features associated with a summary dismissal. I will explore this in more detail later.

86 Firstly, was Mr Shafran a good employee? The answer to this question must be yes. A fair impression of Mr Ward's evidence, who was CEO of Mosaic, and to whom Mr Shafran worked for approximately two and a half years, is that Mr Shafran was a difficult personality but very committed and of great assistance to Mr Ward. He says that Mr Shafran adopted Mosaic as pretty much his whole life and if he was not doing shifts in the house he was helping in the office.

87 Ms Berrell refers to Mr Shafran as a good employee who had a good rapport with **S**; he has done some good things at Mosiac and his quality of care was very good. Mr Shafran's performance appraisal [Exhibit A3] dated 8 December 1999, conducted by Ms Berrell in the review summary states as follows —

> "A very good review. Robert has a very direct approach and is willing to provide input and feedback in a constructive, well balanced manner. Robert is a dedicated person, who is intent on providing the best for the clients whom he supports."

The review dated 10 July 2000, conducted by Mr Ward, [Exhibit A4] in the reviewer comments states as follows—

> "As reflected in this Review, Robert has distinguished himself as a confident and capable leader, who always puts the interest and welfare of his clients and staff ahead of his own. Robert's character is described by his integrity and dependability. I look forward to a long and mutually beneficial relationship between Robert and the Association".

The comments in both reviews then are extremely positive, the only negative comments are contained in [Exhibit A4] and relate to Mr Shafran's personal appearance and co-operation with other staff members.

88 The report of Ms Budiselik is also of note. She disagreed with aspects of Mr Shafran's performance (i.e. managing of head banging) and was alarmed at some of his comments eg. telling staff to come to him and not management. Yet the report notes the quality of care as good, the paperwork and routine management as good, and she does not believe the concealment of information by team leaders was deliberate. I find that Mr Shafran was a good employee.

89 Was Mr Shafran an honest employee? The answer again must be "yes". Ms Berrell, in her evidence, describes him as "fairly honest" and Mr Ward refers to Mr Shafran's "integrity" in his performance review. That may have been some time ago, however, it is a fair assessment of Mr Ward's evidence that he still holds a favourable attitude towards Mr Shafran as an employee. Furthermore, Mr Shafran when challenged in meeting or at hearing always readily admitted his actions, subject of course to accurate recall. He was "very expansive" in his discussions with Ms Budiselik, I consider that it can be inferred from the evidence in relation to withholding information from management that this was a case of Mr Shafran wishing to assist Ms Davies, not a case of him being devious, and it is not argued as such. Ms Budiselik did not consider that staff were deliberately concealing information from management. I find that Mr Shafran was an honest employee. I will say some more in relation to Mr Shafran's background knowledge of **J**.

90 Mr Shafran was obviously a dedicated employee and I so find. Ms Berrell and Ms Thompson-Harry were concerned that he was doing too much. Ms Berrell in her performance review says he is a dedicated person. Mr Ward says that Mr Shafran made Mosaic pretty much his whole life.

91 Was Mr Shafran's performance good? Leaving to one side for now the incidences of verbal abuse of clients, the evidence when weighed up properly clearly indicates that Mr Shafran's performance was good and I so find. The only performance appraisals that exists are complimentary. He received a certificate of commendation. I do not go to each aspect of the evidence given by other staff members. However, it is said that he treats staff fairly and equally, he teaches staff what they need to know about the house routines, he is approachable and thorough and his interactions with staff were quite good. The evidence is that he ran **S's** household well, ensured staff adhered strictly to the routines required and could be overzealous. His results in decreasing

S's head banging were good, albeit Ms Budiselik wanted Mr Shafran to be open to other interventions to further reduce the head banging.

92 Was Mr Shafran responsive to management's direction? I pose this question as there is no evidence and no allegation that Mr Shafran at any time physically abused a client or handled a client in an aggressive manner. The allegation which was freely admitted by Mr Shafran, and indeed openly witnessed by Ms Thompson-Harry on one occasion, is one of verbal abuse or threat. Mr Shafran referred to a client in a derogatory way, threatened that he would hit **J** if **J** behaved in a certain way and told staff to slap or knee **J** to protect themselves. However, if directed or instructed not to engage in certain behaviour would Mr Shafran have complied? This goes clearly to the issue of trust and whether the employer could trust that if directed Mr Shafran would obey such direction. It is not argued that he failed to obey lawful directions. Mr Ward counselled Mr Shafran about calling **S** a "bitch". Mr Shafran said he would not do it again and there is no suggestion from Mr Ward that this promise was not adhered to. Mrs Clarke asked Mr Shafran to change **S's** routine for managing her cycling of clothing. It is clear from the cross examination of Mrs Clarke that this change was made. Mrs Clarke says she found out from Ms Thompson-Harry after Mr Shafran's dismissal that the routine of which she had complained was occurring. Mr Shafran cannot be held accountable for this. The note of November 2000 would suggest that Mr Shafran responded to Mrs Clarke's request. Against this evidence must be weighed the view that Mr Shafran thought he knew more than others, was overzealous and had been made aware of the concerns raised by DSC. It is the case that routines for clients were instituted in consultation with staff and parents. I doubt that Mr Shafran would have deviated from those routines if instructed to apply them and instructed not to apply verbal abuse and threats. He certainly had strong views about the routines but it is not argued that somehow he was an employee out of control who only did his own thing.

93 The respondent complains about Mr Shafran's treatment of staff. Several staff members came forward and gave support to Mr Shafran and his treatment of them, and this evidence was not challenged. Contrary evidence was given, on behalf of the respondent, by other staff members. But even then Mr Shafran was not accused of anything worthy of being disciplined for, let alone being dismissed for. This is of course not the substantive issue for which Mr Shafran was dismissed. The evidence at its highest suggests that Mr Shafran could be a difficult personality to deal with, and did not get along with everyone. It does not suggest that he was aggressive towards staff or others. Clearly though he got along with and was appreciated by some staff members.

94 So the background picture is that Mr Shafran was a good, honest, dedicated employee who had his own way of doing things but consulted others about the routines to apply to clients and was susceptible to direction. He was appreciated by some staff and found to be overzealous and authoritarian at times by others.

95 I turn then to the specific complaints against Mr Shafran. He was counselled by Mr Ward in June 2000, more than two years before his termination, for referring to **S** as a bitch. He did not deny this and there is no evidence that he displayed an ongoing negative or abusive attitude to **S** or that his care of her was substandard. The reverse is true. Mrs Clarke says that she would now not trust him to look after **S** due to comments that have been passed to her effectively since Mr Shafran's termination or thereabouts. Yet her direct evidence, that is what she herself experienced, is that **S** improved under the applicant's care. Ms Budeselik also formed a favourable impression of how the **S** and **JY** option was run in comparison to the **J** option.

96 Mr Shafran was rightly counselled for his unprofessional behaviour at the Smart Thinking training session. The evidence is that he was not the only person whose behaviour was offensive on that day, however, his behaviour was clearly the worst. He was not given a formal warning. Ms Davies says that it was not a disciplinary meeting. The applicant apologised for his behaviour. There is no evidence that other staff who misbehaved were counselled. I note also that at least some staff found the presenter to be derogatory toward staff or belittling of them. This evidence was unchallenged.

97 Neither of these two misdemeanours on the part of Mr Shafran justify his dismissal or unduly tarnish his record of good work. The remaining complaints by the respondent about Mr Shafran relate to his treatment of **J**. It is important to note that the evidence, which is common, is that Mr Shafran worked in **J's** option for approximately 3 to 4 weeks. This was just prior to his dismissal. He had no record of physically harming or handling clients. It is also relevant that he was asked to work in the house or volunteered to do so (it does not matter which) after his friend and fellow team leader Ms Davies was assaulted by **J.** The effect that this incident had on her was that she could not continue working with **J** for a least a period of time. She moved instead to work in the **S** and **JY** option. Ms Davies gave evidence unchallenged that she had been assaulted by **J** on two previous occasions and it is safe to infer that Mr Shafran was aware of this.

98 Mr Shafran was aware also of other incidents involving **J** and his physically aggressive behaviour. He knew Mr Stott, **J's** long term guardian, and hence was aware of **J's** background and behaviour. Mr Stott gave evidence that he had been injured by **J** and that Mrs Ponsio who was **J's** carer for some years had been injured by **J**. Mrs Ponsio had in fact been quite badly injured by **J**. It is the tenor of Mr Shafran's evidence that he knew this and if there is any doubt it is safe to infer that given Mr Shafran's diligence he would have ascertained this information.

99 I should note that there is evidence from Ms Thompson-Harry and Ms Berrell that it was either the applicant's duty or his moral obligation to advise the respondent of his knowledge about **J**. It is also their evidence that they have a different view of **J**, his aggression and how to deal with it, than that of Mr Shafran. Mr Shafran says quite plainly that he assumed that the respondent had the necessary information on **J**, even though he did not see it in the household. Mr Stott says that he met with Ms Berrell. Ms Berrell says he told her about **J** and that he had suitcases full of information on **J**. It is undoubtedly in my view the responsibility of the respondent to obtain the relevant background information about **J**. They cannot and should not attribute any blame to Mr Shafran in that regard, especially as he had only limited time in **J's** household.

100 Mr Shafran says also that there were 25 recorded SDI's in **J's** option. This evidence is supported by Ms Davies who says that a good percentage of the SDI's related to **J** assaulting a staff member. The respondent does not agree that there were 25 SDI's.

101 The weight and importance of all this evidence is that Mr Shafran had, and rightly had, an impression that **J** could be violent and physically harm staff. He had that impression prior to working with **J**. These are findings I make. Mr Shafran's own experience then reinforced this view. He says unchallenged that **J** would sneak up on him. This is not conclusive that Mr Shafran knew that **J** would harm him but his suspicions were raised.

102 It is important to assess the evidence about **J's** behaviour. There is much evidence about how this behaviour should be managed or responded. **J** required clear and consistent routine and if he lunged at someone then they should seek to get out of the way. Mr Shafran said that he needed to be firm with **J** and that he found that this achieved good results and better results than other staff had managed to achieve. I do not go to all the evidence about how best to manage **J's** behaviour. It is not necessary for me to do so as I am not deciding the best approach to be adopted with respect to **J** and would not presume that I had any expertise to do so. It is however clear that **J** suffered from frontal lobe epilepsy which led to occasional unpredictable behaviour in the form of lunging at people and shrieking. This had been a problem even for those who were very experienced in dealing with **J**. This means that there was a justifiable basis for concern on the part of Mr Shafran in dealing with **J**. It is accepted by all who gave evidence on this point that one has to expect difficult or challenging behaviour when dealing with clients in this industry or profession. It is not accepted or proposed that one has to accept being assaulted or physically harmed.

103 I add to this background that Mr Shafran was, at least until 2 September, responsible for health and safety issues. The evidence is that he was appointed by the wrong procedure. He was paid for 4 hours per month for these additional responsibilities. I do not need to reconcile all the evidence on this point. It is safe to infer, given the dedication and zealousness of Mr Shafran, that he took these responsibilities seriously. It is also then safe to infer that he had a heightened sense of safety in the workplace. Mr Shafran does not say that he acted toward **J** in a forceful manner due to his safety responsibilities. Simply that being firm with **J** worked. He does say that he was given the authority to address any threat to client or staff safety. I am confident that this was behind his statement to staff that they could slap **J** or knee him in the groin if needed to protect themselves. I do not go to the evidence about **J's** sexual behaviour as it is not necessary for me to do so.

104 The other relevant factor is that the evidence is that other staff, not Mr Shafran, had been physically aggressive toward **J**. Mr Shafran says that one of the reasons why his dismissal is unfair is that, "there were many other staff that had done far worse than I had done." Ms Davies says unchallenged that staff were very aversive to **J** partly because staff found it an effective way to deal with **J**, and partly as a result of their instructions in January 2002 that they could use aversive methods. Ms Thompson-Harry says that Ms Murray advised her at the beginning of September 2002 that Mosaic staff were using aversive strategies on **J** and that Ms Murray had had this information for sometime. Hence the information must pre-date Mr Shafran's time in the **J** household. Ms Budiselik says that she saw a staff member retaliate and push **J** back. She tried to get Ms Davies to stop staff from shouting at **J** from close range. It is fair to say that on the weight of evidence other staff acted more physically toward staff than did Mr Shafran. There is no evidence that any action was taken against these staff, albeit Ms Thompson-Harry on her own evidence at least knew of some allegations about staff using aversive strategies to manage **J**.

105 The test to be applied in matters such as this is that of a fair go all round (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). It is obvious from the findings I have made and the issues I have covered that I consider Mr Shafran was not afforded a fair go all round. I find his dismissal to be unfair and harsh. The penalty imposed upon him is excessive given his record as an employee. There is no reason to believe that Mr Shafran could not be trusted not to assault an employee. I understand fully that verbal abuse is not appropriate. However, it is clear that other staff were behaving in a manner towards **J** which was more inappropriate than the behaviour of Mr Shafran. Yet Mr Shafran who had worked with **J** for only 3 to 4 weeks was dismissed.

106 The other factor which I cannot ignore and I cannot understand is that Mr Shafran stated in a group session that staff could act aggressively towards **J** to protect themselves. Ms Thompson-Harry and Ms Budiselik were present. The only evidence I have that management, i.e. Ms Thompson-Harry, redressed the situation in that session is the evidence of Ms Budiselik. She says in effect that Ms Thompson-Harry told staff that such behaviour was not acceptable. She did not say staff would be dismissed for doing so. Yet three days later Mr Shafran was dismissed for saying they (namely staff) could do so. Yet he had had no prior warning in writing and no warning that such behaviour, openly expressed by Mr Shafran, but not actioned, would lead to his dismissal. His concession in the meeting of 19 September 2002 that he considered some of his offences dismissible, or that he asked to be given the opportunity to resign, is not relevant in my view. He may have said that in the process of the meeting, but clearly by his application and evidence he does not hold that view.

107 The last issue which I wish to cover is that Ms Thompson-Harry clearly consulted a range of people prior to the meeting of 19 September 2002 and it was agreed that Mr Shafran should be dismissed. It is safe to conclude that she had made up her mind when she advised Mr Shafran on 18 September 2002 that he should attend a disciplinary matter. He did not know he was to be dismissed. These are actions often found in a summary dismissal.

108 In the decision of the Full Bench in *J A Margio v Fremantle Arts Centre Press* 70 WAIG 2559 at page 2561 His Honour the President states—

> "It is true that the fact that a dismissal has been effected in accordance with the terms of the relevant contract of employment and is thus not "wrongful" will not preclude a finding of unfairness; similarly, the unlawfulness of a dismissal will not automatically render it unfair.
>
> However, the question of wrongfulness or not must be an important element in deciding whether a dismissal was unfair, having regard to s.26(1) of the Industrial Relations Act, 1979 (as amended) (hereinafter referred to as "the Act") and of the Undercliffe Case (op cit.). The question is, as Brinsden P. said in that case at page 386:-
>
> > "... the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."
>
> The onus lay upon the applicant at first instance to establish that the dismissal was unfair.
>
> What occurred, as the Commission found, was that an instantaneous termination of employment was effected by the respondent accompanied by the payment of an amount equal to two weeks wages. The dismissal was wrongful as the Commission at first instance found. It was sought to be justified on the ground of the appellant's incompetence when the matter came on for hearing. There was no sufficient attempt to warn or counsel the appellant.
>
> An employee should, so far as is practicable, not be dismissed without warning as to the possibility of dismissal (see Lumsden v. Woodroffe (1979) 46 SAIR 211 at 226 and S.D.A. v. Katies Fashions (op. cit.)).
>
> That consideration is mainly relevant to cases of unsuitability or incompetence."

109 I do not consider that reinstatement is practicable. Mr Shafran has gained other employment, albeit for less income, and does not now believe the relationship with the respondent can be revived. The respondent opposes reinstatement. The applicant has properly sought to mitigate his loss.

110 Applying the figures provided in the application, to which the applicant attested to at hearing, and [Exhibit R6], the applicant worked 105 hours per fortnight at the rate of $13.70 per hour giving a gross fortnightly figure of $1,438.50, or $719.25 per week. The applicant was terminated on 19 September 2002 and continued to be paid by the respondent for three weeks, he worked out part of his notice and was paid in lieu for the remainder, which would take the applicant up until 10 October 2002. The applicant obtained full time employment with his current employer on 22 February 2003 some 19 weeks and 2 days after his dismissal, giving a loss of $13,809.60 ($719.25 @ 19.2 weeks).

111 The applicant gave evidence that in his current employment he earns $900.00 gross per fortnight. The difference between the current employment and his employment with the respondent is $269.25 per week. This loss is a direct result of his dismissal and it can be inferred will continue for some time. I would award the applicant an ongoing loss for 12 months, giving a figure of $14,001.00 ($269.25 @ 52weeks).

112 The total loss is therefore $27,810.60. From this figure must be deducted amounts the applicant earned in mitigation. The applicant gave evidence that he earned $900.00 net ($1,250.00 gross) with a fencing contractor and $281.88 (18 hours @ 15.66p/h). This gives a figure of $26,278.72 (*Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8).

113 The applicant's compensation must be capped at six months as this is the maximum allowed under the *Act*. That figure is $18,700.50 ($719.25 @ 26 weeks). This is the amount I would award the applicant, less any taxation that may be payable to the Commissioner of Taxation. An order will issue to that effect.

2003 WAIRC 09878

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT ALAN SHAFRAN, APPLICANT
	v.
	MOSAIC FAMILY SUPPORT SERVICES INC, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 1661 OF 2002
CITATION NO.	2003 WAIRC 09878

Result	Applicant dismissed harshly and unfairly; compensation ordered
Representation	
Applicant	Mr RA Shafran
Respondent	Ms M Bilston as agent

Order

HAVING heard Mr RA Shafran on his own behalf and Ms M Bilston 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, Mr RA Shafran, was harshly and unfairly dismissed by the respondent on the 19th day of September 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay within 7 days of this order, as and by way of compensation the amount of $18,700.50 to Robert Shafran, less any taxation that may be payable to the Commissioner of Taxation.

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

2003 WAIRC 09801

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER ROBERT SMYTH, APPLICANT
	v.
	CHUBB SECURITY AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY 24 OCTOBER 2003
FILE NO/S.	APPLICATION 883 OF 2002
CITATION NO.	2003 WAIRC 09801

Result	Application alleging unfair dismissal dismissed
Representation	
Applicant	Mr P Ward (of counsel)
Respondent	Mr J Brits (of counsel)

Reasons for Decision

1 This is an application by Christopher Robert Smyth ("the applicant") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that he was unfairly terminated from his employment with Chubb Security Australia Pty Ltd ("the respondent") on 16 May 2002. The respondent claims that it was appropriate to summarily terminate the applicant.

Background

2 The applicant was employed by the respondent from 2 January 2001 until his termination on 16 May 2002. He was employed as a security officer which involved monitoring passenger movements to and from trains at various railway stations throughout the metropolitan area, servicing railway commuters and patrons and ensuring public safety. The applicant also monitored unruly behaviour.

3 Prior to the applicant being terminated on 16 May 2002 as a result of an incident at Whitfords station he was involved in two disciplinary matters. The first issue related to an incident in December 2001 when the applicant was counselled for issuing a non fare related infringement notice to a patron at the Subiaco railway station and in April 2002 the applicant was disciplined

for allowing two passengers to board a train without paying a fare. As a result of this second incident the applicant received a written warning (Exhibit R6).

4 When the applicant was terminated he received a letter of termination dated 17 May 2002 (Exhibit R11). The contents of that letter are as follows (formal parts omitted)—

"Re: Outcome of Discipline Hearing

In regards to the meeting that took place on the 16th of May 2002, between Chris Mazzali, Stephen Connell, and you, the following represents the points that were discussed—

- You had cause to talk to a youth after you saw him throw something onto the freeway from the overpass,
- You asked him to supply his details so you could verify this with the CSSO based in the City,
- You were then seen on videotape holding a youth by his shirt, then grappling with him and taking him to the ground. At this point you held him until the Sabre unit arrived to deal with him.

The reasons you gave for your behaviour were—

On the Chubb policy and procedure—

- You stated you were verifying his details should anything come out of his actions, throwing something onto the freeway, and that in fact he assaulted you first by spitting on you.

Chubb has the following view on this incident—

- You had no right to ask for the details and then detain the youth and in fact had committed assault by placing your hands on him and then deprived him of his liberties by holding him until the Sabre crew arrived. You had only been counseled (sic) about your role as a security officer two weeks prior to this event and agreed at this interview that this was covered previously.

I have considered your explanation of these events as well as your previous counseling (sic) history and the company has moved for your immediate termination. The decision to terminate is based on the serious nature of your actions and is classed as summary dismissal, and therefore you are not entitled to any payment for notice in lieu."

(Exhibit R11)

5 The applicant worked alongside revenue protection officers and special constables who were employed by the respondent to undertake different duties to that of the applicant. The revenue protection officer's role was to ride on trains and issue infringement notices for fare evasion and special constables had the power to arrest patrons.

Amendment to the Respondent's Name

6 At the hearing the applicant sought leave to amend the respondent's name and this amendment was agreed to by the respondent. Given the consent of the respondent to this course of action and having formed the view that it was appropriate in the circumstances to grant the amendment I propose to issue an order that Chubb Protective Services be deleted as the named respondent in this application and substituted with Chubb Security Australia Pty Ltd.

The Respondent's Evidence

7 Mr John Binnekamp was employed by the respondent for approximately seven years and was the respondent's Field Supervisor during 2000 and 2001 when the applicant was employed by the respondent. Mr Binnekamp was aware of a memo dated 21 May 2001 that highlighted the law enforcement expectations of security officers (Exhibit R1). He stated that these memos were normally read out to security officers at muster and then distributed to stations for security officers to read and that the applicant was working as a security office at the time this memo issued. The contents of that memo is as follows (formal parts omitted)—

"The purpose of this minute is to detail the law enforcement expectation of Chubb security officers when employed on Western Australian Government Railway Station duties.

The purpose for having Chubb security officers on WAGR stations is to provide customer service. Their role in respect to law enforcement is for them to observe and report. If required they are to support special constables or the police.

Chubb security officers are only empowered and trained to infringe for the purpose of revenue protection. (ie: fare enforcement) Infringements for non-revenue offences such as disorderly behaviour are not to be made. Where other offences have or are being committed, their duty is to observe, summons assistance and to report.

Chubb security officers on station duties are not to make citizen arrests."

(Exhibit R1)

8 Mr Binnekamp gave evidence that he counselled the applicant about issuing an infringement notice to a patron for loitering at the Subiaco railway station in early December 2001 whilst working without the assistance of special constables. Whilst Mr Binnekamp was speaking to the applicant about issuing infringement notices he told the applicant that his authority to issue infringement notices had been withdrawn and he made it clear to the applicant that the discussion was disciplinary in nature. Mr Binnekamp reminded the applicant that he was not to issue any further infringement notices and confirmed this in an email to Mr Graeme Fry, the respondent's Patrol Supervisor on 6 December 2001—

"… I have spoken to both officers and advised them that they are not to issue any infringements at all. I have removed from them their "Certificate of Authorisation to issue infringements notices" cards. They have both been advised of the consequences of any further discretions (sic)."

(Exhibit R2)

9 Under cross examination Mr Binnekamp stated that memos of the type detailed in Exhibit R1 are normally read to all employees at muster time when employees commence their roster. He agreed that the applicant was given a booklet containing infringement notices when he commenced employment with the respondent, but he stated that this was to be used when their duties changed to that of a revenue protection officer and they were operating in partnership with a special constable. He conceded that even though the infringement booklet was designed specifically to issue infringements for fare evasion, there was a space in the notice to specify a different offence. Mr Binnekamp was asked how a security officer should act when faced with unruly behaviour. He stated that the first action would be to call a special constable to assist. It was then the duty of the security officer to observe and report and if no special constable was available, to obtain advice from a supervisor. After obtaining this advice and if appropriate the security officer was expected to deal with any unruly behaviour. He stated that at no stage was a security officer empowered to issue an infringement notice for unruly behaviour.

10 Mr Stephen Connell is the respondent's Business Manager and has been employed by the respondent for approximately 13½ years. He stated that when the applicant was first employed by the respondent the applicant received a letter of appointment

which detailed the applicant's duties, his terms of employment and the types of misconduct that the respondent would consider to be serious. He confirmed that the appointment letter stated that any breach of these examples could result in an employee being immediately dismissed (Exhibit R3).

11 Mr Connell confirmed that when the applicant commenced employment he attended a half day introductory session conducted by the respondent and then a four week training course which was run by the Western Australian Government Railway Commission ("the WAGR") and covered security officer and revenue protection officer duties. He stated that the applicant's training covered both fare evasion and monitoring security. He stated that security officers were trained to deal with fare evasion as from time to time they undertook relief duties as revenue protection officers. He stated that there was an expectation that security officer duties would take up to approximately 95 percent of all of the duties performed by a security officer.

12 Mr Connell commented on an incident which took place in May 2001. He stated that this incident related to security officers checking passengers' tickets for fare evasion. Mr Connell was concerned about this as it was not the role of security officers to check passenger tickets for fare evasion. This resulted in a memo being issued to patrol supervisors to remind security officers of their role (Exhibit R1). He stated that memos of this nature were read out at a regular muster and a copy is kept in a file at each station and employees were required to be familiar with the information held in these files. He was aware that Mr Binnekamp had a discussion with the applicant in December 2001 about not issuing infringement notices to patrons and he was aware that subsequent to this incident the applicant's authority to issue infringements had been revoked. He understood that the applicant was informed that any further incidents of this nature would not be tolerated.

13 In mid April 2002 Mr Connell was advised that a complaint had been received from two passengers who arrived at the city station without paying their fares. As they had not paid for their fares they were issued with $50.00 infringement notices. The passengers were upset because they were advised by the applicant when they commenced their journey that they could pay for their tickets when they reached the city. The applicant was advised by memo dated 20 April 2002 that he was required to attend a disciplinary hearing about this issue and attached to this memo was an Offence Sheet alleging misconduct on the part of the applicant (Exhibit R5).

The Summary of Facts listed in the Offence Sheet is as follows—

> "As a result of a complaint received on the 8th of March 2002 from a member of the public and request for action from the Revenue Services Manager and subsequent correspondence submitted by you on the 26th of March 2002—
>
> 1. Failed to perform your duties in accordance with relevant Post Orders by informing a passenger that he could board a train service without buying a ticket.
>
> 2. Fail to follow section 74 of the WAGR bylaw by informing the complainant that he had permission to travel without fare being tendered (waived because there was no ticket inspectors on board the train service)."
>
> (Exhibit R5)

A disciplinary hearing about these allegations was held on 24 April 2002 between the applicant, the respondent's Field Supervisor Mr Chris Mazzali and Mr Connell and the applicant conceded at this meeting that he told the passengers that they could board the train without purchasing tickets and he told them they could pay for their fares at the end of the journey.

14 As a result of the hearing the applicant was issued with the following warning—

> "… I have considered your explanation of these events as well as your length of service with the company and previous clean record. In this circumstance, the company could have moved to terminate your employment. The decision is to issue a first written warning and you are required to pay the infringements for the Complainants if they are not quashed by the West Australian Government Railways Commission. You are also reminded that any future breaches of your work practices may result in your immediate termination."
>
> (Exhibit R6)

Mr Connell stated that the applicant had now twice breached the respondent's instructions and this letter from the respondent constituted a final warning.

15 On or about 14 May 2002 Mr Connell became aware of another incident involving the applicant. Mr Connell understood that on the evening of 9 May 2002 the applicant was attempting to issue a youth with an infringement notice at Whitfords station and he had escorted the youth to the respondent's office located on the platform in order to do so. Mr Connell understood that the applicant then attempted to check the youth's name and details on a central data base. Once Mr Connell became aware of this incident he sought copies of incident reports completed about this issue and whilst the matter was being investigated the applicant was stood down with pay.

16 Mr Connell stated that he was given a copy of the incident report about the events on the evening of 9 May 2002 prepared by the two special constables responsible for the Whitfords station (Exhibit R7), and Mr Connell stated that Mr Mazzali spoke to the two special constables James Downs and Emma Darby about their report. He also had discussions with the applicant's partner, Mr Rod Beattie who was on duty with the applicant at the station on the evening that the incident took place. A copy of the videotape of the incident was requested from the WAGR and he received a tape from WAGR which detailed the applicant's interaction with the youth. This tape covered a period of approximately two minutes (Exhibit R12). Mr Connell also received an Action Report from the applicant about the incident (Exhibit R8).

17 Subsequent to conducting interviews with employees, reviewing the videotape and reading the reports, Mr Connell formed the view that there was sufficient information to confirm that the applicant had misconducted himself during this incident at Whitfords station. As a result of reaching this view Mr Connell forwarded an offence sheet to the applicant detailing the serious misconduct alleged—

> "**Security Officer Chris Smyth 45039**
>
> You are charged with a breached (sic) of Section 1.6 – Attitude and Conduct – Chubb Protective Services, Security Officer's Standing Instruction 2000 Edition (Chubb Blue Book), which reads—
>
> ***1.6 Attitude and Conduct***
>
> *When on duty or in uniform, the Security Officer is required to be courteous and conduct themselves in a professional manner, and, if unable to supply the information requested, refer to the person from whom the information may be obtained.*
>
> *Conduct unbecoming of an officer will generally result in disciplinary action. Some examples of unbecoming conduct are—*
>
> *a) Discourtesy to the Client or the general public;*
>
> *b) Insolence;*

c) Use of coarse, profane or threatening language;

d) Immoral conduct;

e) Violation of any criminal law;

f) Drinking intoxicants whilst on duty or being under the influence of alcohol or drugs whilst on or reporting for duty; and

g) Any action, at any time which would serve to bring discredit to Chubb

Summary of Facts

As a result of your actions and subsequent conversation with you on 9th of May 2002 and review (sic) correspondence submitted by you and on view of the video surveillance tapes—

a) You violated a criminal law by assaulting a person at Whitfords railway station (section 313 Criminal Code) and you also deprived him of his liberty by holding him against his will in the office at the station (section 333 Criminal Code).

b) You acted in a manner that would discredit Chubb and the contract it holds with the West Australian Government Railways."

(Exhibit R9)

18 At a meeting held on 16 May 2002 with Mr Mazzali, Mr Connell, the applicant and his independent witness the applicant gave a more detailed account to the respondent than what he had written in his Action Report (Exhibit R10). The two minute videotape of the incident at Whitfords station was played at this meeting and the applicant was given an opportunity to put his side of the story. The applicant mentioned that before following the youth up the station escalators the youth spat on his trousers. Mr Connell stated that this was the first time that this issue had been raised by the applicant nor was this issue referred to in any of the reports. As a result of its investigations Mr Connell stated that he had formed the view that the youth involved in the incident could lay charges against the applicant for deprivation of liberty and assault. The respondent thus formed the view that as the applicant had a physical altercation with the youth during the incident and given the applicant's intent to issue an infringement notice to the youth the applicant was acting outside of the 'bounds' of his duties. The respondent also took into account that the applicant's right to infringe had been removed in December 2001 and only two weeks prior to this incident the applicant was put on notice that future indiscretions would not be tolerated. The respondent thus decided to terminate the applicant. At the end of this meeting the applicant was informed that he was summarily terminated and this was confirmed in a letter dated 17 May 2002 (Exhibit R11).

19 Under cross examination Mr Connell agreed that the videotape of the incident did not cover the events which took place prior to the applicant and the youth coming up the escalators. In response Mr Connell stated that he understood the videotape given to him by WAGR was the full videotape of the incident. He confirmed that he did not ask for a videotape of the events which occurred prior to the applicant following the youth up the escalator as he understood the video that was provided by WAGR covered all events relating to the incident. He re-iterated that the applicant first raised the issue of the youth spitting on him prior to him following the youth up the escalators at the meeting held on 16 May 2002 and that information was not contained in the applicant's Action Report (Exhibit R8). Mr Connell was asked why he relied on the contents of the incident report completed by Special Constables Downs and Darby (Exhibit R7). Mr Connell stated that as the officers were trained to "conduct lawful and give a legal unbiased opinion when they write an action report to the West Australian Government Railways" (transcript page 49) he relied on their ability to note events accurately. He stated that even if the applicant had been spat on by the youth this was irrelevant to the respondent forming the view that the applicant had misconducted himself as the applicant was not following the respondent's procedures by making enquiries about the youth's name and address. Mr Connell stated that the only reason for the applicant to do this was to issue the youth an infringement notice and the applicant confirmed this was his intent at the meeting on 16 May 2002. Mr Connell stated that as the applicant was not a special constable he did not have the power to do this.

20 It was put to Mr Connell that the respondent had already made up its mind to terminate the applicant prior to meeting with the applicant on 16 May 2002. Mr Connell stated that this was not the case. Mr Connell was shown a copy of a confidential referee report which was completed by the transit guard manager with WAGR, Mr John Kiddis to assist the applicant in obtaining employment as a security officer with WAGR. Mr Connell stated that this document was filled in at approximately 10.40am on 16 May 2002 by Mr Kiddis and that when this document was filled out by Mr Kiddis there was no reference at that point to the applicant being terminated. The only notation made on the document at that time was "no comment' as the applicant was under investigation. He understood that it was subsequent to the meeting held with the applicant on 16 May 2002 that Mr Kiddis wrote additional information on the confidential referee report about the applicant's termination.

21 It was put to Mr Connell that from time to time passengers were allowed to travel on trains without pre-purchasing a ticket. Mr Connell said that he was aware of one instance when this occurred which was when the sky show was held and this happened because it was important in a situation of this nature to move passengers quickly. He stated that this happened at the instigation of WAGR and not the respondent. Mr Connell stated that he was unaware of any of the respondent's employees allowing people to ride on trains without tickets. Mr Connell stated that he asked the applicant for examples of the respondent's employees allowing passengers to ride without tickets but the applicant was unable to give details. Mr Connell stated that the applicant had no discretion to allow passengers to travel without paying for their fare and he claimed that during the applicant's induction course instructions were given to security officers that this was not allowed.

22 Mr Connell was asked to clarify what process a security officer should follow in order to deal with an incident involving disorderly conduct. Mr Connell stated that in the first instance the security officer had to evaluate the risk to him/herself and their partner, whether or not there was any danger for example if weapons were involved, to call for backup if a fight was to take place or alternatively to calm a situation and to back off if overwhelmed. It was important to then either contact the railway police or a police officer and if anyone absconds they should be let go.

23 Mr Connell confirmed that he did not interview the bus driver who observed part of the incident at the Whitfords station involving the applicant and the youth on 9 May 2002. He also agreed that two patrons who were witnesses to the altercation were not contacted.

24 Mr Connell was asked what the applicant should have done given the youth's behaviour at Whitfords station on 9 May 2002. He stated that if the youth had thrown a bottle onto the freeway as alleged by the applicant it was appropriate for him to approach the youth. The applicant should have asked the youth if a bottle had been thrown and if so it may have been appropriate to ask for the youth's name. He stated that it was not necessary for the security officer to check the veracity of this information. A patron's name should only be checked if an infringement notice was going to be issued. It would have been appropriate for the applicant to keep the youth in the vicinity by talking to him or by using a ruse to take the youth to the respondent's office located at the station. He stated that in this instance it was inappropriate for the applicant to obtain information from the police Name Identification System ("NIS") data base.

25 Mr Connell confirmed that the applicant was terminated for serious misconduct because he showed discourtesy to a patron, he violated a criminal law, and he brought discredit to the respondent. The respondent also took into account the two previous incidents that the applicant had been involved in, in particular the incident in April 2002 where the applicant had disobeyed a direct instruction.

26 In re-examination Mr Connell stated that he was aware that the WAGR could have a videotape of the lower concourse of the Whitfords station but he understood that the videotape of that area did not capture any of the applicant's interactions with the youth on the evening of 9 May 2002. He re-confirmed that the confidential referee report on the applicant filled out by Mr Kiddis at 10.40am in his presence only had the words "no comment" put on the document at that time. He stated that he did not know when the words relating to the applicant's termination were written on the document.

The Applicant's Evidence

27 The applicant is currently employed by the Public Transport Authority as a transit guard. He confirmed that when he commenced employment with the respondent on 2 January 2001 he attended a four week training course which covered the duties of a revenue protection officer and a security officer. The course also covered health and safety issues, safe working of the railway system, disability awareness, fare evasion, fare evasion strategies and acceptable excuses for patrons not having a ticket. He also undertook handcuff training to assist special constables when dealing with trouble makers and people who are misbehaving. *The Police Act 1892* was also touched on briefly in relation to powers of arrest. As a result of this training the applicant believed that whilst he did not have the power to arrest a person he could make a citizen's arrest.

28 The applicant was asked about the incident which took place in early March 2002 when he allowed two passengers to ride a train without a fare. He stated that he was aware that passengers should have a valid ticket to ride on a train and that he did not have first hand knowledge of anyone who had been given the opportunity to buy a ticket at the end of a journey. However, he stated that occasionally the rules were bent in this regard depending on the circumstances. He stated that up to three times a week he heard requests over the railway radio system seeking permission for patrons to ride without a ticket. He stated that in early March 2002 he allowed two well dressed males to board a train without tickets because they were in a hurry and the train was about to leave. He stated that it was his view there was no issue about the two men purchasing the tickets at the end of the journey because one was trying to buy a ticket on the platform and the other one had money in his hand. On this basis he agreed to allow the two men on the train without pre-paying for their fares.

29 The applicant confirmed that in December 2001 he and his partner issued infringements to some youths who he claimed were harassing commuters at the Subiaco station. He confirmed that he issued infringements notices for loitering and a supervisor later advised him he should have issued a notice for refusing to leave, which was much easier to enforce in court. He confirmed that subsequent to this incident the respondent told him that he had no power to issue infringement notices unless he was assisting special constables.

30 The applicant gave evidence about the events of 9 May 2002. He stated that he was in the crib room at the Whitfords station when he heard a ruckus. He stepped outside of the crib room and saw a youth carrying a glass bottle which the youth then tossed from the bus deck onto the freeway. The applicant stated that he approached the youth and told him that it was an offence to throw missiles whilst on WAGR property. The applicant asked for the youth's name and address so that an infringement notice or summons could be issued. He tried to stall the youth pending the arrival of special constables by asking the youth to attend the respondent's office downstairs. The youth then asked to farewell his sister who was waiting to catch another train. The applicant asked his partner Mr Beattie to conduct a name check on the police computer as he had a suspicion that the youth had given him false details. He stated that by this time Special Constables Downs and Darby had been called. The applicant gave evidence that the youth farewelled his sister then spat at the applicant, said "see you, pig" and ran up the escalators. The applicant followed the youth up the escalators and subsequently there was a verbal and physical altercation, whereby the youth punched the applicant on his left cheek. The videotape of the incident showed the applicant and the youth wrestling. Included also on the tape was footage of a bus driver who was at the station and had observed the incident and then came over to assist the applicant. The applicant stated that he then asked his partner Mr Beattie to come and assist him whilst arresting the youth. He stated that by this point the youth was agitated. Special Constables Downs and Darby arrived approximately six minutes after this incident and Special Constable Darby went upstairs to discuss the incident with some of the witnesses to the incident. The applicant confirmed that when Special Constable Downs interviewed the youth he asked that the applicant leave the office because the youth was agitated in the applicant's presence.

31 The applicant stated that he had been able to review the WAGR master copy of the videotape of the incident which occurred at Whitfords station on 9 May 2002. This videotape showed more detail about what took place than what was on the videotape supplied to the respondent by WAGR (Exhibit R12). The master videotape shows the youth prior to the applicant approaching him and the tape confirms that at this stage the youth had something in his hand. The youth then goes out of camera view and later comes back into view with his hand empty. The applicant confirmed that the spitting incident was not shown on the tape supplied by WAGR but the tape shows the youth running away from the applicant up the escalators. After the incident the applicant wrote notes in his note book (Exhibit A4) and that evening he completed an Action Report (Exhibit R8). The applicant stated that as he had completed this Action Report in a hurry not all relevant information was written in the Action Report (Exhibit R8). He stated that he prepared this report on the WAGR computer. The applicant stated that on re-reading his notes he amended his initial Action Report and generated Exhibit A2 which contains a more detailed review of his notes (Exhibit A4) and submitted it to the respondent. The applicant stated that he recalled completing this revised Action Report on the Sunday prior to being stood down. The applicant confirmed that on 13 May 2002 he was stood down by the respondent with pay and he was informed that a disciplinary hearing would be held on 16 May 2002.

32 The applicant agreed that he had been involved in a prior incident involving an arrest at Subiaco railway station. He stated that he and another security officer had been alerted by metro control about a problem with four passengers who were on a train which was about to pull into the station. When the train arrived at the station the applicant asked the four offending passengers to leave however, one person wanted to remain on the train. The applicant stated that this person assaulted him and that he restrained him until a special constable arrived. The applicant stated that even though he was admonished for this incident his General Manager at the time Mr Fry told him that no disciplinary proceedings would eventuate in relation to this matter as the applicant had acted in good faith.

33 The applicant gave evidence about his earnings since termination (Exhibit A3). He stated that he had worked on a casual basis doing crowd control work until he commenced employment on 19 September 2002 as a transit guard. The applicant stated that his total earnings for the period 16 May 2002 to 19 September 2002 equated to $4,067.68. He stated that he was earning on average $2,057.29 gross per fortnight with the respondent prior to termination. Thus, his loss for the 18 weeks that he was out of work was approximately $14,447.94. The applicant stated that he did not seek out full-time work during this period as he had good prospects of obtaining work as a transit guard with WAGR, now the Public Transport Authority.

34 Under cross examination the applicant confirmed that he received and signed his letter of appointment dated 2 January 2001 which outlines what the respondent regards as serious misconduct (Exhibit R3). He stated that he objected to the removal

of his authority to issue infringements in December 2001 and he confirmed that at the time of this incident it was made clear to him that he was not to issue infringements notices to patrons. It was put to the applicant that it was only in unusual circumstances that passengers should be allowed onto trains without paying for a ticket. The applicant agreed with this and stated that as a result of his training he was made aware of examples of when passengers would not be infringed for fare evasion, for example if someone was new to the country or if a ticket machine had broken down. He stated that in relation to allowing the two males to board a train without paying fares in early March 2002 in retrospect he should have let his supervisor know that the two passengers would be arriving at the Perth station so that the supervisor could ensure that they purchased tickets. The applicant confirmed that at the time of the incident he was not working as a revenue protection officer.

35 The applicant stated that he viewed the master copy of the WAGR videotape of the events which took place on 9 May 2002 after the disciplinary hearing which took place on 16 May 2002.

36 The applicant confirmed that during the incident on 9 May 2002 after the youth spat on him the youth ran away from him and he chased the youth up the escalator. He stated that he detained the youth under a private citizen's arrest because the youth had committed common assault by spitting on him and the youth had behaved in a disorderly manner by throwing a missile on WAGR property. It was subsequent to this arrest that Special Constables Downs and Darby were called. It was put to the applicant that there were different versions of what took place on 9 May 2002 when comparing the report completed by the special constables (Exhibit R7), the applicant's notes of the incident (Exhibit A4) and the applicant's two Action Reports completed in relation to the incident (Exhibits A2 and R8). The applicant confirmed that the statement that he gave to the respondent at the meeting on 16 May 2002 (Exhibit R10) was completed on the 11 May 2002. The applicant stated that his statement was written in the way it was as it may have been required for a possible court case relating to the youth's actions. The applicant again stated that he generated a second action report after reviewing his notes.

Submissions

37 The applicant argued that the warnings that were given to him prior to the incident on 9 May 2002 were not warranted as his actions were appropriate and justified in each instance. The applicant maintained that the infringement notice he issued in December 2001 constituted a minor breach. The applicant had not been employed with the respondent for very long and he strongly believed that it was necessary for him to do something about the youths involved unnecessarily loitering on the platform on the day in question. The respondent had issued the applicant with an infringement notice book and the applicant believed that in issuing the infringement notices to the youths the applicant was doing the job for which he was employed. Further, his initial training involved the process of issuing infringement notices. The applicant maintains that as the letter to the applicant about the outcome of the applicant's disciplinary hearing about the applicant allowing passengers to board a train without a ticket in early March 2002 (Exhibit R6) refers to the applicant having a "clean record" the respondent should not have taken this incident into account when deciding to summarily terminate the applicant. The issue of allowing passengers to board a train without a ticket was based on the applicant's view that he was doing the right thing by the two patrons involved and the respondent. The applicant was customer focussed and he made a judgement in an instant to allow two men to ride on the train without a ticket. The applicant argues that this was a common sense decision in the circumstances and that he did not knowingly defy the respondent's rules as the applicant understood that the practise of allowing passengers to pay for their fare at the end of the journey in some instances was wide spread.

38 The applicant argues that he had every right to effect a citizen's arrest on the youth involved in the incident at Whitfords station on the evening of 9 May 2002. It was appropriate for the applicant to be concerned when the youth spat on him as this act constituted an offence under the criminal code. The applicant argues that the citizen's arrest was also justified on the basis that the youth threw a missile onto the freeway and he verbally abused the applicant as confirmed in the applicant's statement (Exhibit R10). On this basis alone the applicant had a right to effect a citizen's arrest of the youth. The applicant was following set procedures when he initially engaged the youth to detain him at the station whilst awaiting the arrival of two special constables, but when the youth tried to abscond the applicant restrained him. The applicant was not depriving the youth of his liberty as the applicant had an entitlement to use reasonable force to restrain the youth given the offences he had committed. The applicant denied assaulting the youth and there was no challenge to the applicant's claim that the youth had verbally abused him.

39 In the three instances relied on by the respondent to effect the applicant's termination the applicant behaved appropriately and was exercising his discretion to the best of his ability and in the respondent's best interests. In all of the circumstances the respondent did not have an adequate reason for summarily terminating the applicant.

40 The applicant argues that the process adopted by the respondent in investigating the incident at Whitfords station was flawed and the outcome was predetermined. The contents of the reference completed on 16 May 2002 (Exhibit A1) demonstrates that prior to the applicant's disciplinary meeting held on 16 May 2002 the respondent had already made up its mind to terminate the applicant. Further, the videotape of the incident on 9 May 2002, relied on by the respondent to effect the applicant's termination, did not cover all of the incidents which occurred on that date. The respondent should have asked for further videotape footage when it became clear to the respondent that other incidents had occurred that evening. The applicant argued that the respondent had no interest in finding out what actually took place at Whitfords station on 9 May 2002. As the respondent did not complete a proper investigation into this incident this contributed to the applicant being unfairly terminated.

41 The respondent argues that it had every right to terminate the applicant as he misconducted himself at Whitfords station on 9 May 2002 and he had committed serious breaches of the respondent's procedures on two previous occasions. The respondent argues that the applicant was not authorised to arrest people nor was he authorised to infringe people for disorderly conduct. The respondent also maintains that it conducted full and adequate enquiries into the events surrounding the incidents relied upon by the respondent to effect the applicant's termination thus the applicant was not denied procedural fairness.

42 The respondent relies on the contents of the memo dated 21 May 2001 (Exhibit R1) which confirms that the applicant and other security officers were reminded by the respondent that it was not their role to issue infringement notices or to make citizen's arrests. Notwithstanding this reminder the applicant issued infringement notices to patrons in December 2001. The respondent counselled the applicant about this and his authority to issue infringement notices was cancelled (Exhibit R2).

43 The respondent argues that the applicant provided no evidence that it was a common practice to allow passengers to travel on trains without tickets and the applicant's claim that this practice was widespread was disputed by the respondent's witnesses.

44 The respondent argues that the applicant's behaviour in relation to the incident at Whitfords station on 9 May 2002 was very serious. The respondent maintained that the youth involved was assaulted and wrongly detained by the applicant and that the applicant was acting contrary to the respondent's policies which were well known to the applicant in attempting to issue the youth with an infringement notice and/or to effect a citizen's arrest on the youth. The respondent argues that the applicant's evidence in relation to this matter lacked credibility because the allegation that the youth spat at him was not mentioned in the Action Report initially completed by the applicant, nor was it mentioned in the report completed by Special Constables Downs and Darby. Further, the additional Action Report completed by the applicant (Exhibit A2) had not been sighted by the

respondent prior to these proceedings. The respondent also argues that the applicant was well aware of the types of serious misconduct which the respondent could rely on to terminate him.

45 The respondent maintains that it conducted a full and extensive investigation into the incident on 9 May 2002 prior to deciding to terminate the applicant. The applicant's partner was interviewed, the two special constables involved completed a report and were interviewed and a videotape of the incident was reviewed. The applicant was also asked to complete a report of the incident and he supplied a supplementary statement when interviewed on 16 May 2002. The applicant had a witness present at the interview on 16 May 2002 and he was given sufficient opportunity to put his views about the allegations levelled against him. The respondent also maintains that Mr Connell adequately explained that when the applicant's confidential referee report was initially filled out at 10.40am on 16 May 2002 no notation was on the document about the applicant being terminated.

46 The respondent thus maintains that in all of the circumstances and taking into account the applicant's previous performance breaches, it was appropriate to summarily terminate the applicant.

Findings and Conclusions

Credibility

47 The applicant gave his evidence in a clear and forthright manner and his evidence was consistent and not broken down during cross-examination. In my view the respondent's witnesses also gave their evidence honestly and clearly and in my view to the best of their recollection. On this basis I accept the evidence given by all witnesses in these proceedings.

48 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)

49 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."

50 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 misconduct justifying summary dismissal. Further, I am satisfied that the applicant was treated fairly because he was given sufficient opportunity to defend himself against the allegations relied upon to effect his termination. He was afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

51 It was not in issue that the applicant undertook an extensive induction process prior to commencing employment with the respondent. I accept the respondent's argument that the expectations of the applicant and the restrictions that applied to his job as a security officer as compared to the roles of special constables and revenue protection officers were made clear to the applicant. Even if it was not clear to the applicant at his induction that he was unable to issue infringements notices or to effect a citizen's arrest, the inability to issue infringement notices or to effect a citizen's arrest should have been clear to the applicant subsequent to the memo dated May 2001 being issued by the respondent. I accept the respondent's evidence that employees were required to be familiar with management directives in relation to behaviour and expectations of security officers and that on this basis I find on the balance of probabilities that the applicant would have thus been aware of the contents of the memo sent to the respondent's employees about this issue (Exhibit R1). Further, the applicant did not give evidence that he was unaware of the contents of this memo. Having said this however, I also accept the applicant's argument that the respondent did not regard the incident which took place in December 2001 relating to the applicant issuing infringement notices as particularly serious, as when the subsequent incident about the non-payment of fares occurred in early March 2002 reference was made by the respondent to the applicant having a clean record (Exhibit R6).

52 In relation to the incident which took place in early March 2002 relating to the applicant allowing two passengers to board a train without paying a fare it is my view that the actions of the applicant constituted a serious matter even though it was characterised by the applicant as a spur of the moment initiative based on the practice being widespread. I accept that it was important for the respondent to maintain the integrity of the respondent's security contract which involves ensuring that patrons pay when riding on trains. I also find that the applicant was well aware of the few exceptions to paying a fare at boarding and that this did not cover the circumstances that the applicant was faced with in this instance. I am satisfied that the respondent behaved appropriately in disciplining the applicant in this instance and that as a result of this incident the applicant was given a written warning and he was reminded that any future breaches of work practices may result in his immediate termination (Exhibit R6).

53 I accept that the applicant undertook his role seriously and diligently and that he was an effective and committed employee. In my view the applicant was well organised in his approach to his work and it was clear that the applicant undertook his role to the best of his ability. This has been reflected in the applicant being able to obtain and retain similar work after being terminated by the respondent. However, it is also my view that the applicant's enthusiasm towards his work led him to significantly overstep the role expected of him given his actions and behaviour during the incident at Whitfords station on 9 May 2002. I accept the respondent's argument that the applicant breached at least two specific requirements of his contract of employment sufficient to amount to misconduct. I find on the evidence that it was open for the respondent to form the view that the applicant had no right to obtain the youth's details with a view to issuing him with an infringement notice and then assault and detain the youth until security officers arrived. I accept the respondent's argument that the applicant was in the process of issuing an infringement notice during the incident at Whitfords station and that the applicant endeavoured to effect a citizen's arrest on the youth involved. The respondent argued that the only reason for the applicant to be checking the youth's name was with a view to issuing an infringement notice which was a role the applicant was specifically excluded from undertaking. I am supported in reaching this view as the applicant confirmed that he was in the process of obtaining information about the youth's true identity to issue the youth with an infringement notice at the meeting held on 16 May 2002.

Notwithstanding being provoked, the applicant was also under a clear direction from the respondent not to become involved in effecting a citizen's arrest of a patron. The evidence was not in dispute that the applicant was in the process of issuing an infringement notice and was trying to effect a citizen's arrest when the special constables arrived. Even though the applicant initially endeavoured to abide by the respondent's requirements and attempted to stall the youth pending the arrival of the special constables the applicant then took it upon himself to become engaged in a physical altercation with the youth and as a result of the verbal and physical altercation between the applicant and the youth it was possible that the applicant could well have assaulted the youth. I make no finding on this issue but quite clearly it was open to the respondent to be concerned about the applicant's physical altercation with the youth given what was detailed on the videotape obtained from WAGR (Exhibit R12). I accept that the applicant was aware of the specific instances that the respondent regarded as constituting misconduct as it formed part of his written contract of employment (Exhibit R3). I find that the applicant's behaviour on 9 May 2002 at Whitfords station was such that he repudiated his contract of employment with the respondent. In my view in acting the way he did towards the youth the applicant not only breached the respondent's procedures, he discredited the respondent through his actions and showed discourtesy to a client. The applicant argues that it was appropriate for him to behave in the way he did because the youth provoked him by spitting on him and that it was reasonable for the applicant to restrain the youth as he understood the youth had thrown a bottle onto the freeway. I do not accept this contention. The applicant's role was to monitor and service patrons, not to effect arrests of patrons and become involved in physical altercations even if provoked. In my view there was a clear set of instructions as detailed in the respondent's evidence about how the applicant should have handled a situation of this nature and the applicant did not do so. I therefore accept that in relation to this incident alone the respondent had an appropriate reason to summarily terminate the applicant.

54 The applicant argued that the process adopted by the respondent in effecting his termination was unfair and that the respondent had made up its mind to terminate the applicant prior to meeting with the applicant on 16 May 2002. In support of this contention the applicant relied on the notations on the confidential referee report completed by Mr Kiddis on 16 May 2002 (Exhibit A1). Even though the applicant argued that this notation denoted that the respondent had already made up its mind to terminate the applicant prior to meeting with the applicant on that day I accept Mr Connell's evidence that when the report was filled out by Mr Kiddis at 10.40am on that morning there were no comments on the document about the applicant's termination. I find that the applicant conducted an appropriate investigation into the 9 May 2002 incident at Whitfords station and it is my view that the applicant was not denied procedural fairness. As a result of the reports gathered, discussions held and a review of the videotape requested by the respondent of the incident it is my view that the respondent made every effort to investigate the main events which occurred on 9 May 2002. Even though there was the possibility of a master tape existing in relation to events prior to the youth coming up the escalator I find that even if the respondent had access to this information it was still open for the respondent to reach the view that the applicant had misconducted himself. I reach this view because the breaches relied on by the respondent to terminate the applicant and put to the applicant on 16 May 2002 related to the applicant checking on the youth's name to issue an infringement notice and to the applicant effecting a citizen's arrest. I accept the respondent's evidence that the only reason for the applicant obtaining information from the NIS data base was to check the youth's name to issue an infringement notice and that the applicant had no power to issue an infringement notice nor to effect a citizen's arrest. In addition the evidence was uncontested that the applicant had a physical altercation with the youth whilst the applicant was in the process of effecting a citizen's arrest. The tape the respondent relied upon also shows the applicant grappling with the youth in a public place and possibly assaulting the youth. In the circumstances I find that the respondent undertook an appropriate investigation. I find that the process adopted by the respondent in raising the incident with the applicant was fair and reasonable in that the applicant knew what was being alleged against him and he was given appropriate opportunities both verbally and in writing to put his side of the story, with a witness being present both at and prior to the meeting held on 16 May 2002.

55 In all of the circumstances I find that it was appropriate for the respondent to summarily terminate the applicant.

56 An Order will now issue dismissing the application.

2003 WAIRC 09797

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	CHRISTOPHER ROBERT SMYTH, APPLICANT
	v.
	CHUBB SECURITY AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 24 OCTOBER 2003
FILE NO/S.	APPLICATION 883 OF 2002
CITATION NO.	2003 WAIRC 09797

Result Application alleging unfair dismissal dismissed

Order

HAVING HEARD Mr P Ward (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) ORDERS THAT the name of the respondent be deleted and that Chubb Security Australia Pty Ltd be substituted in lieu thereof.

2) ORDERS THAT the application be and is hereby dismissed.

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

[L.S.]

2003 WAIRC 09742

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELENA STIPANICEV, APPLICANT
	v.
	GOLDEN EGG FARMS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 17 OCTOBER 2003
FILE NO.	APPLICATION 1237 OF 2003
CITATION NO.	2003 WAIRC 09742

Result	Application to accept application out of time granted
Representation	
Applicant	Mr B Stokes (as agent)
Respondent	Mr E Rea (as agent)

Reasons for Decision

Given extemporaneously and edited by the Commissioner

1 On 12 August 2003 the applicant lodged an application pursuant to s.29(3) of the Industrial Relations Act 1979 ("the Act") by which she seeks to file an application claiming that she has been harshly, oppressively or unfairly dismissed from her employment beyond the 28-day time limit set out in s.29(2) of the Act.

2 The employment was terminated on 20 January 2003, therefore the application was filed more than 6 months after the time limit set out in the Act.

3 There are a number of aspects to this application with which I will deal, but the first is the history of the applicant's wrist injury and the termination. The applicant has given evidence that she was employed by the respondent from 16 November 2000 as a casual packer and later she became permanent. According to her evidence, in around late August 2002, she began experiencing pain and swelling in her left wrist and on 5 September 2002, she reported this to her employer through a workers' compensation claim.

4 Over the next weeks and months she was given light duties and was absent from work for various periods with medical certificates, and significantly she was given medical certificates which included one for a period of 6 weeks from 6 December 2002 and another for 6 weeks from 17 January 2003.

5 Her workers' compensation claim was not accepted and she was utilising sick leave which was exhausted on 16 November 2002. She then began taking other leave.

6 Around 12 December 2002, the applicant received a letter from the respondent's Human Resource Coordinator, Ann Johnson, dated 12 December 2002 which, formal parts omitted, reads—

> "Thank you for your certificate advising that you would be unfit for work for a further 6 weeks.
>
> As previously advised you have exhausted all of your sick leave entitlements and, as agreed, are currently being paid annual leave entitlements. Your annual leave entitlements will run out on the 21st January 2003 and you will have no further paid leave entitlements due to you after that date.
>
> You should contact myself or Hamish MacDougall *as soon as possible* to indicate your intentions in respect of returning to work after this date."

7 By letter dated 9 January 2003, the applicant responded, formal parts omitted, saying—

> "I am very sorry but I am unable to return to work until I am pain free.
>
> For further information please contact my general practitioner, Dr P.J. Swan ..."

8 The evidence from the applicant and also from Hamish MacDougall, the respondent's production manager, is that the respondent made no further contact with the applicant to discuss her position or her future, but on 20 January 2003, wrote to her, formal parts omitted, in the following terms—

> "Thank you for your letter received 9th January, 2003 advising that you are not returning to work on the 21st January, 2003 as previously requested.
>
> To date we have allowed you to use all your annual leave entitlements along with all your sick leave entitlements and your future sick leave entitlements due to you up until the 7th of May 2003.
>
> As you aware Golden Egg Farms has gone through a significant change with the introduction of the new grading machine recently and our current staffing requirements mean that we are not in a position to offer any staff member indefinite leave without pay.
>
> As you are unable to give us any indication of when you are likely to return to work and have not contacted me to discuss the matter as previously suggested, I am unable to hold your position open for you after today.
>
> I would ask that you return any uniforms or any other property you may have that belongs to GEF and contact me to make a time to clean out your locker if required."

9 The letter was signed for Hamish MacDougall, Production Manager

10 It is also significant that according to the applicant's evidence and a letter from Graham Taylor, clinical psychologist, the applicant began seeing him on 24 October 2003 until 3 February 2003 and then from 30 July 2003.

11 According to her own evidence and to Mr Taylor's report, the applicant was very distressed about alleged treatment of her in the workplace. Mr Taylor says that by February 2003 her level of depression was in the very severe range and she became more depressed, became physically fatigued, her appetite decreased, she lost the motivation to leave the house, and she ceased treatment with him at around that time. By July 2003, when the applicant recommenced seeing Mr Taylor she was spending most of the day lying on the couch at home, and had become forgetful, irritable and non-communicative. He describes her level of depression as having become chronic. One of the aspects of the applicant's depression was that she was avoiding memories and thoughts about work.

12 The applicant's evidence is that she was unaware that she could make a claim of unfair dismissal. She was seeing various medical practitioners and facing bills for medical treatments. She went to Mission Australia and Centrelink for assistance. It was in discussions with representatives of Centrelink that she was informed of the prospect of making a claim for unfair dismissal and she was referred to Wageline, which I understand to be the service provided by the Department of Consumer and Employment Protection.

13 The applicant was then provided with the necessary forms on 6 August 2003. She took those forms to her member of parliament for assistance to fill them out. I point out here that the applicant does not have, or would not appear to have, English as her first language, albeit that she appears to have some reasonable English language skills. The applicant gave evidence that she was informed that she had to fill the form out herself. She did so on 12 August 2003 and saw an industrial agent on 25 August 2003, having filed the application on 12 August 2003.

14 The applicant's evidence is that after the termination of employment she did not contact her employer to challenge the dismissal. She is not a member of a union. She says that she did not contact anyone to challenge the dismissal because her past experience regarding her allegations of harassment and bullying and other unfair treatment had received no sympathy.

15 The applicant says that the grounds of her claim of unfair dismissal are that her employment was terminated while she was on sick leave. It is alleged that there was a breach of the Workers' Compensation and Rehabilitation Act 1981 in that the respondent did not keep the position open as required. She says that the respondent has breached s.41 of the Minimum Conditions of Employment Act 1993 in not discussing changes which would have a significant effect on her employment. The applicant also says, though, that she has not been provided with industrial fairness in that the respondent did not discuss the circumstances with her, whether or not that relies upon s.41 of the Minimum Conditions of Employment Act 1993.

16 The applicant also says the respondent's reasons for bringing about the termination are not justified and that it was unreasonable not to give her leave without pay while she recuperated.

17 I note that the applicant's evidence is that she was unfit for work for the whole period to date from the termination of her employment.

18 The respondent objects to the extension of time being given and says that the applicant has failed to meet her obligations to notify the employer of her challenge to the dismissal, that the length of delay has been inordinate and that the reason for the termination was that the applicant was unable to indicate when she was likely to be able to return to work and that it was difficult to hold her job open indefinitely, given the changed requirements brought about by the use of new machinery.

19 Further, the respondent says that the applicant failed to respond to its inquiries as to her intentions to return to work within a reasonable period, in that she was asked to respond to the letter of 12 December 2002 as soon as possible but did not do so until a month later on 9 January 2003.

20 The respondent also says that there was no entitlement to workers' compensation established at the time of termination and it had no obligation to comply with the requirements of that Act.

21 The tests to be applied in a case such as this are those set out in the decision of Kenner C with which I agreed, in the Full Bench matter in the *Director General, The Department of Education v Prem Singh Malik*, FBA 13 of 2003. In his reasons for decision, Kenner C pointed out the appropriate tests to be applied. They are to be dealt with in the context that the time limits imposed by the Act are to be complied with and that an extension of time is not automatic. It a matter of discretion for the purpose of doing justice between the parties.

22 Section 29(2) of the Act sets out a time limit and s.29(3) provides that that time limit might be extended if it would work an injustice and be unfair in all the circumstances for the time limit to be applied.

23 The considerations in this matter as to whether to extend time include the length of the delay, the explanation for the delay, the steps taken, if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested, and the merits of the substantive application in the sense that there is a sufficiently arguable case. It is also a consideration whether or not there would be any particular prejudice to the respondent in granting the application to extend.

24 In this case the length of delay is considerable; it is almost 6 months. The explanation for the delay is firstly that the applicant was not aware of an opportunity to challenge the dismissal by making a claim. I note that this is not a reasonable explanation for a delay in normal circumstances. However, these are not normal circumstances.

25 The evidence tends to indicate on a prima facie basis that the applicant had a medical condition in that she was suffering from depression at the time of the termination of employment and continued to do so at least for some months, if not still currently. This involved the applicant avoiding thoughts regarding work and the work situation, it involved fatigue and would have made it difficult for the applicant to deal with any aspect of her employment. The applicant took no steps to evidence non-acceptance of the termination and that it would be contested, and it seems to me that that is at least partly explained, if not entirely explained, by the depression she was suffering.

26 As to whether the substantive application might not constitute an arguable case, I am satisfied that the applicant has demonstrated an arguable case in that whether or not there was a requirement pursuant to s.41 of the Minimum Conditions of Employment Act 1993 it appears that there is a case to be answered in respect of whether the applicant was appropriately consulted and whether proper consideration was given to her circumstances at the time the employer decided to make the decision to terminate. The respondent appears, on the face of it, not to have made inquiries of the applicant or discussed the situation with her except to the extent that it made inquiries about her intentions regarding returning to work some 6 weeks before the termination of employment.

27 In that regard, I find that there is an arguable case.

28 The respondent has not argued that there is a particular prejudice to it from the application proceeding.

29 I also note that the respondent challenges that there may not be any prospect of any real remedy for the applicant in that she has been and continues to be unfit for work. However, I note that a significant consideration in this matter is that the applicant is pursuing a workers' compensation claim, and this may have an impact on that situation.

30 In weighing all of the aspects of this matter in the balance, I conclude that the applicant's circumstances, her ill health, in particular in her depression which brought with it avoidance of thoughts regarding matters related to work, and the arguable case aspect mean, notwithstanding that she did not challenge the dismissal and the delay is substantial, that it would be unfair not to grant the extension of time.

31 Accordingly an order shall issue for the extension of time in which to refer the claim of unfair dismissal to the Commission.

———

2003 WAIRC 09670

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELENA STIPANICEV, APPLICANT
	v.
	GOLDEN EGG FARMS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	APPLICATION 1237 OF 2003
CITATION NO.	2003 WAIRC 09670

Result	Application to accept application out of time granted

Order

HAVING heard Mr B Stokes (as agent) on behalf of the applicant and Mr E Rea (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT this application be accepted out of time.

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

2003 WAIRC 09873

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NAKKEERAN SUBRAMANIAM, APPLICANT
	v.
	HUMAN RESOURCES (MEDICAL) SIR CHARLES GAIRDNER HOSPITAL, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 1965 OF 2002
CITATION NO.	2003 WAIRC 09873

Result	Application alleging unfair dismissal dismissed for want of prosecution.
Representation	
Applicant	No appearance
Respondent	Ms C. Drew

Reasons for Decision

1 On 3 December 2002 the applicant in this matter, Dr Subramaniam, lodged a claim of harsh, oppressive or unfair dismissal against the respondent. On 23 December 2002 the Minister for Health, incorporated as the Board of Sir Charles Gairdner Hospital under s.7 of the *Hospitals and Health Services Act 1927* filed a Notice of Answer objecting to the claim.

2 The Commission listed the application for conference before a Deputy Registrar of the Commission on 5 and 12 February 2003. Dr Subramaniam then informed the Commission in writing from an address in Nedlands WA in a letter dated 5 February 2003 that he would be unable to attend as "I have to travel interstate in connection with a job offer. I will on my return inform you so that a mutually convenient time can be arranged". The Commission then adjourned the application. The Commission endeavoured to arrange for conciliation to occur with Dr Subramaniam attending by way of conference via telephone link. On 11 June 2003, however, he advised that he "cannot attend" on the date set down "and it is not convenient to take part in the conference via telephone". He indicated he was likely to return to Perth at the end of November or early December of 2003 and he would inform the Commission of specific dates and times closer to his return so that a conference could be arranged at a mutually convenient time.

3 On 18 June 2003, the Commission wrote to the parties noting the above history and informing the parties that claims of unfair dismissal are to be dealt with relatively speedily. The Commission expressed its concern that the application should not wait until a date which may only possibly be November or December 2003 until even a conference of the parties is held. The Commission renewed its efforts to contact Dr Subramaniam to arrange a conference via telephone link. On 8 July 2003 an officer of the Commission telephoned Dr Subramaniam in Victoria and spoke to a person who identified herself as Dr Subramaniam's daughter who indicated she would pass on a message to Dr Subramaniam. She also gave the address in Victoria at which Dr Subramaniam was currently residing. No contact was received from him. A letter sent to that address remains unanswered.

4 On 1 October 2003, the respondent wrote to the Commission and, somewhat unsurprisingly, noted that it is almost 11 months since Dr Subramaniam's employment ceased and the delay in progressing the issue has been prejudicial to the hospital's ability to effectively defend the application. It requested the Commission give consideration to dismissing the application for want of prosecution by Dr Subramaniam.

5 The Commission set the matter down for hearing and sent a copy of the respondent's letter and the Notice of Hearing to the applicant at the last address given to the Commission as being his place of residence in Victoria. The Commission advised Dr Subramaniam that it did not expect him to return to Western Australia on the date and time specified in order to appear at the hearing however, if contact was received from him on or before that time the Commission would give consideration to the

respondent's request in the light of any information received from Dr Subramaniam. The letter noted that failure on his part to contact the Commission in response to this letter and the Notice of Hearing would be taken by the Commission as non-appearance at the date and time specified. It also stated that if no contact was received from him on or before that time the application was likely to be dismissed.

6 When the Commission convened at the date and time specified in the Notice of Hearing, contact had not been received from Dr Subramaniam. The respondent, represented by Ms Drew, appeared and presented well thought out and comprehensive submissions why the application should be dismissed.

7 Ms Drew carefully took the Commission to the powers it has to dismiss a matter before it at any stage of the proceedings if it is satisfied that further proceedings are not necessary or desirable in the public interest (*Robe River Iron Associates v. Amalgamated Metal Workers and Shipwrights Union of WA and Others* (1987) 68 WAIG 4 at 6). Further, she drew attention to authorities in this Commission where that power has been exercised in claims of unfair dismissal (*Kangatheran v. Boans Ltd* (1987) 67 WAIG 1112 at 1113; *Foseberry v. Mt Newman Mining Company Ltd* (1988) 68 WAIG 1882; *Morgan v. BHP Iron Ore (Goldsworthy) Ltd* 72 WAIG 1639; *Burke v. Action Industrial Catering Pty Ltd* (1997) 77 WAIG 1522; and lastly *Owens v. Waugh and Dwyer Pty Ltd* (2002) 82 WAIG 2242.

8 In my view, the submissions of Ms Drew are patently correct. It has long been held in this Commission that claims of unfair dismissal are to be dealt with promptly. Further, where an applicant does not take the steps open to it to prosecute his or her claim then the Commission is likely to dismiss the claim for want of prosecution. The *Industrial Relations Act 1979* requires such claims to be lodged within 28 days of the day the employment terminated and from this can reasonably be inferred a legislative requirement that such claims be dealt with speedily. The failure of an applicant to make him or herself available to participate in conciliation proceedings and, as here, a total lack of co-operation on the applicant's part, for a period of 10 months, is quite unreasonable. There is no reason why a telephone conference is unable to be organised with a party resident in another State. Indeed, such matters occur on a regular basis.

9 As Ms Drew points out, it is now almost 12 months since Dr Subramaniam's employment ceased and, due to his non co-operation, there has not even been a conciliation conference able to be held. Further, Ms Drew points out that whilst there is some documentation detailing the circumstances of his employment being terminated, to now pursue this matter involves relying upon the memories of staff and their recall of circumstances and events. Accurate recall of detail is potentially compromised by the passage of time. The quality of the evidence which could be presented to the Commission when this matter is finally dealt with by it would be severely impaired. It can hardly be in the public interest for the resources of the State to be utilised at the whim of an applicant especially in circumstances where the delay caused by the applicant's non co-operation means that the Commission is unlikely to be able to receive the quality of evidence it requires in order to discharge its statutory duty to enquire into and deal with the claim before it according to equity, good conscience and substantial merit.

10 In my view, this application has now become trivial in terms of the public interest due to the lack of co-operation on the part of Dr Subramaniam. For the reasons set out above, it is appropriate that I exercise my discretion in this matter to dismiss it and an Order to that effect will now issue.

11 Order accordingly.

2003 WAIRC 09874

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	NAKKEERAN SUBRAMANIAM, APPLICANT
	v.
	HUMAN RESOURCES (MEDICAL) SIR CHARLES GAIRDNER HOSPITAL, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 29 OCTOBER 2003
FILE NO.	APPLICATION 1965 OF 2002
CITATION NO.	2003 WAIRC 09874

Result	Application alleging unfair dismissal dismissed for want of prosecution.
Representation	
Applicant	No appearance
Respondent	Ms C. Drew

Order

HAVING HEARD Ms C. Drew on behalf of the respondent, and there being no appearance on behalf of the applicant, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT the application be dismissed for want of prosecution.

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

2003 WAIRC 09703

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHLOE QIUFANG WAN, APPLICANT
	v.
	ROXSTEAD HOLDINGS T/A ROXON ENTERPRISES, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 25 SEPTEMBER 2003
FILE NO/S.	APPLICATION 385 OF 2003
CITATION NO.	2003 WAIRC 09703

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Dismissal occurred during period of probationary employment – Issues in relation to applicant's performance – Procedural fairness considered – Principles applied – Applicant not harshly, oppressively and unfairly dismissed – Application dismissed – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(1)(b)(ii)
Result	Order issued
Representation	
Applicant	Ms C Wan
Respondent	Mr S Vlahov

Reasons for Decision

(Ex tempore)

1 The present application is one brought pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act") by the applicant. The applicant, in her claim, says she was unfairly dismissed by the respondent from her position as a bookkeeper/accountant on or about 28 February 2003. It is also a part of the applicant's claim that she was denied a contractual benefit on termination of her employment in the sum of approximately $1,154 which the Commission understands to be two weeks salary in lieu of notice. At the outset of these proceedings whilst the applicant claimed initially for public holidays and annual leave, those claims were not pursued by her. The respondent denies the claim in its entirety. The facts of the matter are relatively straightforward and are these.

2 The applicant gave evidence that she commenced employment with the respondent in accordance with a written contract of employment which was tendered as exhibit A1. Whilst it seems that the agreement specified the applicant would commence on 27 January, it seems on the evidence that the applicant actually commenced employment on 28 January 2003. The terms and conditions of employment are set out in exhibit A1, although it is also common ground in addition to the written terms set out in the written contract of employment it was agreed orally between the applicant and the respondent as an additional term that the applicant be employed initially on a period of probation for three months.

3 I pause to observe that it seems on the evidence that notwithstanding that it was the applicant's understanding that nonetheless, if the employment was terminated during that period of time she would receive two weeks salary or two weeks notice.

4 The applicant testified that from the commencement of her employment to the time the employment was brought to an end by the employer on 28 February 2003 she attended to her duties diligently and complied with the employer's requests. The applicant denies that she was at any time during the month or so of her employment counselled or spoken to by the employer in relation to any shortcomings concerning the performance of her duties as an accountant/bookkeeper.

5 The applicant testified that on the last day of her employment, on 28 February 2003, she saw Mr Vlahov who was the principal of the respondent's business who came to see her in her office. According to the applicant she was advised by Mr Vlahov that he had decided to terminate the contract of employment that day because of her inability to work in accordance with the respondent's requirements and because of performance problems during the first month of her employment. In short, the applicant testified that she did not consider these conclusions to be justified and said in her evidence that she was not given a fair procedure on the termination of her employment. As a consequence of those events the applicant seeks compensation for loss arising from her dismissal. The applicant informed the Commission that in July of this year she obtained other employment in the same field, it seems, on a similar remuneration arrangement.

6 The respondent gave evidence through Mr Vlahov. He testified that the applicant was employed in the position of accountant and bookkeeper and the applicant was the only person in the respondent's office performing those duties. The respondent, through Mr Vlahov, said that the respondent's office is a small one and in his view matters of personality and small team performance, in short, were important. Mr Vlahov testified that shortly after the applicant commenced employment he identified difficulties with the applicant's performance. Firstly, his evidence was there was a period of what was described as a handover from another employee performing the applicant's duties who was to or who had resigned from the respondent's employment. Mr Vlahov also testified that not only during this first week or so, but also in subsequent weeks he observed difficulties in the applicant's work performance. Whilst conceding she was very diligent his evidence was the applicant was often slow in performance of assigned tasks and seemed to have difficulties in comprehending work instructions and directions. In particular, the evidence of the respondent is that the applicant had difficulties complying with the respondent's work and quality control procedures not only in relation to banking matters it seems, but also in relation to the general procedures prescribed in the respondent's office.

7 Mr Vlahov also gave evidence that the applicant, according to the respondent, had some difficulties, as I have observed, in comprehending instructions and it seems on Mr Vlahov's evidence some difficulties with written and spoken English. When this matter was raised with Mr Vlahov by the Commission whilst he was giving his evidence, Mr Vlahov informed the Commission that at the initial interview he formed the view that the applicant's comprehension seemed adequate, however, he decided to offer her probationary employment for a reason, including how she would perform in this respect during this period.

8 According to the respondent's evidence concerns regarding the applicant's employment were, from time to time and, indeed, it seems, continuously raised with her. According to Mr Vlahov, he had to repeatedly speak to the applicant regarding compliance with office procedures and according to him when these matters were raised it seems the applicant undertook to remedy the matters but according to the respondent's evidence, they were not, with the effluxion of time.

9 It was also the evidence of the respondent that complaints from time to time were received by parties external to the business, particularly in relation to, it seems, the taking of messages and relaying of information which, according to the respondent, was

important in the discharge of the applicant's duties as bookkeeper and accountant. In short, the respondent says that to quote the phrase, "the applicant's employment was simply not working out in the position of bookkeeper and accountant", and Mr Vlahov felt he had no alternative but to terminate the contract of employment on 28 February 2003.

10 In relation to matters of this kind the law is well settled. An employer has a lawful right to terminate a contract of employment, however, that right must be exercised fairly so as not to constitute an abuse of the lawful right to terminate. On the evidence which is before the Commission the Commission accepts that there were some issues identified in relation to the applicant's employment. The Commission accepts and finds firstly, however, that the applicant's employment was on the terms as contained in exhibit A1 as supplemented by an oral term that the applicant be employed on a probationary period for the first three months of her employment and during that time the employment could be brought to an end by either party without reason without the giving of notice.

11 The Commission also accepts and finds that in the first one month of employment and, indeed, the one month the employment continued on the respondent's evidence which the Commission accepts, there were difficulties identified in relation to the performance of the applicant including difficulties with office procedures, compliance with directions given on a day to day basis and also it seems to the Commission, quite clearly, there were obviously difficulties between the parties in relation to communications in the office. The Commission accepts that the respondent did raise issues on a regular basis with the applicant as to her work performance in these various areas.

12 Whilst in my opinion on the evidence it may not have been the case that these issues were raised in terms that the probation may not be confirmed as permanent employment at the end of the three month period, the Commission is satisfied at the very least that the applicant was advised and was aware of dissatisfaction by the employer from time to time in these areas.

13 I will turn to the question, firstly, of the nature of probationary employment. As I have said, it is common ground that the applicant was employed on probation for the first three months of her employment. The law in relation to probationary employment in this jurisdiction is also well settled and I simply refer in passing to two decisions of this Commission in that regard, the first being *Gregory R Hutchinson v Cable Sands (WA) Pty Ltd* [1999] 79 WAIG 951 and, secondly, *Matthew James East v Picton Press Pty Ltd* [2001] 81 WAIG 1367. In those cases the principle of probationary employment is set out and relevant observations made by the Commission. It is the case, however, that whilst an employee may be on probation that fact alone is not a licence to dismiss unfairly.

14 Turning to the circumstances in particular of this case the Commission is, having considered the evidence, of the view that the relationship between the applicant and the respondent clearly evidences a degree of a mismatch in my opinion. In my view, probationary employment as a matter of principle is designed to enable both employee and employer to assess one another during the course of the probationary employment to determine whether either would wish to make the arrangement permanent at the end of the period of probation.

15 I am satisfied on the evidence with what is before the Commission presently that issues were raised with the applicant, as I have already said, in relation to various matters. On all of what is before the Commission I am not satisfied that the respondent has, given the nature of the probationary employment, acted unfairly. Whilst the Commission accepts that the applicant may no doubt have been very disappointed with the outcome, she now has, on the evidence, other full-time employment at a comparable rate of remuneration to that she received during her employment with the respondent. In other respects the Commission is not persuaded that the applicant has made out her case and the applicant accepts that she has now been paid her accrued annual leave that she initially claimed in these proceedings. For those reasons the application is dismissed and the Commission will issue an order in those terms in the usual way.

2003 WAIRC 09473

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHLOE QIUFANG WAN, APPLICANT
	v.
	ROXSTEAD HOLDINGS T/A ROXON ENTERPRISES, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 25 SEPTEMBER 2003
FILE NO.	APPLICATION 385 OF 2003
CITATION NO.	2003 WAIRC 09473

Result	Application dismissed
Representation	
Applicant	Ms C Wan
Respondent	Mr S Vlahov

Order

HAVING heard Ms C Wan on her own behalf and Mr S Vlahov on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the herein application be and is hereby dismissed.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

SECTION 29 (1)(b)—Notation of—

Parties		Number	Commissioner	Result
Abdul-Lateef Al sarrakh	Kailis and France Foods	349/2003	Coleman CC	Discontinued
Alan Norman Jones	Herbert Wessels Byveritte Pty Ltd	2012/2002	Coleman CC	Discontinued
Alicia Anne Chequer	Veem Engineering Group Pty Ltd	564/2003	Kenner C	Discontinued
Amanda Joy Albert	Hair FX	515/2003	Coleman CC	Discontinued
Amy Siobhan Wilson	Consolidated Fitness	1059/2003	Wood C	Discontinued
Amye Estelle Martin	Kindale Pty Ltd t/a Baci Cafe	997/2003	Gregor C	Discontinued
Anne Gortat	(Mr Robert Kevin Murrie) The Australian Bush Hat Co. Pty Ltd	591/2003	Coleman CC	Discontinued
Antonio Soler	Fingall Holdings Pty Ltd	1841/2002	Gregor C	Order Issued
Arthur Raymond Broughton	Christian Aboriginal Parent-Directed School (Kurrawang)	1941/2002	Gregor C	Discontinued
Ashlee Amanda Fruet	Scarboro Painting	1324/2003	Beech C	Discontinued
Barry Warren Stewart	Mr Zdravco Bakreski, Makedonia Cleaning Services	357/2003	Coleman CC	Discontinued
Benjamin Warwick Cox	Command-A-Com Pty Ltd (ABN 90 927 390 478) T/As Command-A-Com & Classical Communications (ACN 009 008 780)	1287/2003	Wood C	Discontinued
Brendan McKenna	DP McKenna Pty Ltd	198/2003	Kenner C	Discontinued
Brian Frederick Moyle	Elegant Landscapes Pty Ltd (ACN 098 602 325)	1030/2003	Wood C	Discontinued
Caroline Potter	Flavius Nominees Pty Ltd ATF the Browne and Grove Unit Trust T/A Browne Grove and Associates	298/2003	Scott C	Discontinued
Chantelle Rhonda M Simpson	Michael Ramirez	964/2003	Scott C	Discontinued
Chloe Qiufang Wan	Roxstead Holdings T/A Roxon Enterprises	385/2003	Kenner C	Dismissed
Christopher Brennan Wales	Charles and Lorraine Hoar - Norseman Eyre Motel	865/2003	Wood C	Discontinued
Clare Veronica Sack	Avinash Chandra Shrivastava,Pain & Stress Management Clinic	378/2003	Beech C	Discontinued
Cynthia Ball	Management Committee of the Frank Konecny Community Centre Inc	560/2003	Kenner C	Discontinued
Damian Charles Dean	The Cross Restaurant	911/2003	Wood C	Dismissed
Daniel Stephen Reveley	WA Marble & Granite Co	161/2003	Beech C	Discontinued
Danielle Beckwith	Newhaven Enterprises Pty Ltd T/as Caves Realty Director Peter Davies	975/2003	Wood C	Discontinued
Darren Lesley Thomason	Buick Holdings Pty Ltd	1180/2003 1181/2003	Gregor C	Discontinued
Darren Quartermaine	BHP Iron Ore Pty Ltd ABN 46008700981	1399/2002	Kenner C	Discontinued
Darryl Ross Bennett	Paul Cordingley/Cordline Fishing	587/2003	Coleman CC	Dismissed
Dave Ramsey	Western Construction	2087/2002	Coleman CC	Discontinued
David Ashley Kindred	Blaxland Pty Ltd	1378/2003	Kenner C	Discontinued
David Bozuwa	Chetta Products	1120/2003	Kenner C	Discontinued
David John Kellock	Wynai Pty Ltd ATF George Day Caravan Trust T/A George Day Caravans	214/2003	Harrison C	Discontinued
David Leslie Olsen	Chattis Nominees Pty Ltd	356/2003	Scott C	Discontinued
David Thompson	Dairy Link	1268/2003	Wood C	Discontinued
Deborah Cooper	Verigen Australia Pty Ltd	401/2003	Kenner C	Discontinued
Denise Elizabeth Duff	Shire of Harvey	1040/2003		Discontinued
Donald William Carroll	LC Bonner's Transport	1165/2003	Gregor C	Discontinued
Eammon Ian McIntyre	BGC Steel ,Keith Walker & Gil Sanders	150/2003	Gregor C	Dismissed
Frank Joseph Calanna	Roofspan	2107/2002	Wood C	Discontinued
Gary Woolterton	Calebruzze Enterprises Pty Ltd	1481/2002	Wood C	Discontinued
Gaven Ray Mackie	Tanks West Pty Ltd	1262/2003	Wood C	Discontinued
Geoffrey Allan Barker	Coventry Group Ltd	1825/2002	Coleman CC	Discontinued
Gillian Greta Kinny	SGS Australia T/A Pinkhealthcare Services	724/2003	Harrison C	Discontinued
Glen Robert Williamson	City of Perth	895/2003	Harrison C	Discontinued
Graeme Gard	Direct Link Communications	1217/2003	Kenner C	Discontinued

Parties		Number	Commissioner	Result
Graham Thomas	Patrick Oldfield	1339/2003	Coleman CC	Discontinued
Grenville Ronald Turnbull	Shire of Ashburton	2099/2002	Coleman CC	Dismissed
Hossam Hussein Ibrah Ahmed	Angus & Coote Pty Ltd	578/2002	Kenner C	Discontinued
James Preston Lloyd	Exuma Pty Ltd ACN 009023250 ATF Performance Tyre Trust T/a Ian Diffen World Tyres	293/2003	Coleman CC	Discontinued
Janelle Robert	Chloe Boutique	529/2003	Wood C	Discontinued
Janis Kay Clark	Jaeger Hair Design	1060/2003	Gregor C	Discontinued
Jason Smith	Five Star Upholstery	1088/2003	Harrison C	Discontinued
Jennifer Leigh Bloor	Silver Chain	1075/2003	Gregor C	Discontinued
Jessica Meyer	National Panel Beating Co	1099/2003	Wood C	Discontinued
John Cornwell	Clough Nuigini Ltd & Clough Engineering Ltd	523/2003	Wood C	Discontinued
Jonathon Penny	Roadwest Transport Equipment & Sales Pty Ltd	1102/2003	Beech C	Discontinued
Juanita Estella D'Cruz	Kresta Blinds Ltd	1066/2003	Scott C	Discontinued
June Carol Anderson	Marks & Sands Lawyers , Penega Pty Ltd	970/2003	Wood C	Discontinued
Karla Madeline McKeon	Roebuck Bay Hotel	238/2003	Coleman CC	Dismissed
Kassey Margaret Whiteford	BGC Insulation	1439/2003		Discontinued
Kathy Edmett	Inten Pty Ltd T/A All Things X-Ray Pty Ltd	1730/2002	Harrison C	Discontinued
Kevin Gregory Peter	Department of Education of WA	431/2003	Harrison C	Discontinued
Kevin Leslie Beardmore	Mohammed R Khaki	1275/2003	Wood C	Discontinued
Kieron Wayne Lee	Airefrig Australia	940/2003	Harrison C	Discontinued
Kristina Skilton	Fresh Choice WA Pty Ltd ACN 082 733 006	1145/2003	Harrison C	Discontinued
Kylie Maree Farrell	Donna Walker	1119/2003	Coleman CC	Discontinued
Laurence Errol Ford	Travelabout	1209/2003	Gregor C	Discontinued
Leigh Kevin Smith	Homecare Mobile Vet	902/2003	Kenner C	Discontinued
Leisha Marie Kane	Chubb Health	25/2003	Coleman CC	Dismissed
Leon John Rushack	Kevin Lee t/as Urgent Auto Panel and Paint	828/2003	Harrison C	Discontinued
Lesley Irene Pearce	Tomlinson Ltd	90/2003	Kenner C	Discontinued
Liesbeth Bernadine Pijnenbierg	Mr Martin Wiltshire The Trustee For Goldblock Unit Trust c/- Goldblock Corporation Pty Ltd	1026/2003	Coleman CC	Discontinued
Linton Thomas Phillips-Jones	ARW Nominees Pty Ltd	1411/2003	Coleman CC	Discontinued
Lloyd Roger Wilson	Perth Cargo Centre Pty Ltd	2104/2002	Harrison C	Order Issued
Luke Abdul-Kadir	Atom Supply Pty Ltd	1244/2003	Gregor C	Discontinued
Malcolm John George	Videx Pty Ltd	577/2003	Wood C	Discontinued
Malkeet Virdi	WesTrac Equipment Pty Ltd	1311/2003	Coleman CC	Discontinued
Maree Corner	Galvin Design Gallery	1269/2003	Coleman CC	Discontinued
Margret Farquhar Hallifax	Ascot McDonalds, McDonalds Pty Ltd	1068/2003	Scott C	Discontinued
Mark Gwilliam	Multiform Plastice's Engineering	1446/2003	Kenner C	Discontinued
Martine Watson	North West Training and Inspection Services Pty Ltd (ABN 1300 945 3712)	1063/2003	Scott C	Dismissed
Matko Radisic	Austal Ships Pty Ltd	495/2003	Harrison C	Discontinued
Matthew Jealous	Cooks Construction	1272/2003	Kenner C	Discontinued
Melissa Duke	Millport Pty Ltd t/a Linneys of Subiaco	1524/2003	Coleman CC	Discontinued
Michael Edward Bridge	Perth Auto Alliance Pty Ltd t/a Range Ford	1329/2003	Coleman CC	Discontinued
Michael Edward Porteous	Mark Coomblas, HR Co-Ordinator, WA Salvage Pty Ltd	1319/2003	Coleman CC	Dismissed
Michael Stephen Mace	John Welgemood Penguins Formal Suit Hire	840/2003	Wood C	Discontinued
Murray Tasman Edwards	Norwest Seafoods Pty Ltd	1285/2003	Gregor C	Dismissed
Narelle Selfe	John Wilson – WA Mercantile Pty Ltd	1199/2003	Kenner C	Discontinued
Neil Cooper	Sue Foy c/o Britmove	1168/2003	Wood C	Dismissed
Nigel Charles Williams	ASAP Metallising Pty Ltd	1328/2003	Kenner C	Discontinued
Nikea Maree Whaanga	Mark Andrew Haney of Heightech Safety Systems	1052/2003	Scott C	Dismissed
Paul Keith Marrow	Geraldton Brickworks Pty Ltd	2028/2002	Wood C	Discontinued
Peter Wylie Ward	Albert Haak and Associates Pty Ltd / Mastervine Pty Ltd	1238/2003	Gregor C	Discontinued

Parties		Number	Commissioner	Result
Raul Jaramillo	WA Forktruck Distributors Pty Ltd	1232/2003	Gregor C	Discontinued
Reginald Wayne Claybrook	Toll Energy Logistics	1395/2003	Scott C	Discontinued
Richard John Butler	Gosnells Financial Services Limited	1053/2003	Wood C	Discontinued
Robert Frederick Letter	Waikiki Waterboring and Reticulation Services	1057/2003	Gregor C	Discontinued
Salvatore Ciuppa	Logo Appointments	595/2003	Kenner C	Discontinued
Sam Pescetti	Sportstar Nominees Pty Ltd	876/2003	Beech C	Discontinued
Samantha Finn	Mildesa Pty Ltd	715/2003	Kenner C	Discontinued
Sandra Lee Carter	Derrick Hubble Thorn Australia Pty	942/2003	Harrison C	Discontinued
Sarah Louise Wallace	Esze Berryman Pty Ltd (ABN 97 086 727 344)	1157/2003	Wood C	Discontinued
Scott Anthony Gask	The Modi Family Trust Trading as Dewsons North Beach, Sai Enterprises (Australia) Pty Ltd	1360/2003	Coleman CC	Discontinued
Scott Gray	Goldfields Contractors	1741/2002	Gregor C	Discontinued
Sean Edmett	Inten Pty Ltd T/A All Things X-Ray Pty Ltd	1731/2002	Harrison C	Discontinued
Sebastian Fisher	Crestline Pty Ltd t/a Business Recruiters Australia	234/2003	Coleman CC	Discontinued
Shaun Mellowship	Co-Operative Bulk Handling Limited	501/2003	Harrison C	Discontinued
Shirley Hughes	Juta Caporn t/a Hainsworth Creche	1277/2003	Kenner C	Discontinued
Simon Jenje	Sandvik Tamrock Australia	514/2003	Harrison C	Discontinued
Sinead Paloma Hughes	Retail Decisions Pty Ltd ACN 005 970 570	1169/2003	Gregor C	Discontinued
Sonia Claire Thorpe	Scitech Discovery Centre (ABN 55 009 292 700, ACN 009 292 700)	1177/2003	Wood C	Discontinued
Sonnie Martin King	Hamersley Iron P/L	1331/2003	Coleman CC	Discontinued
Stana Garic	Cosco Oceania Marine Services	1111/2003	Wood C	Discontinued
Sussan Marie Streets	Perth Solid Surfaces Pty Ltd (ABN 31 008 700 098)	516/2003	Wood C	Discontinued
Suzanne Patricia Lord	Aspire WA Pty Ltd trading as Steve Smith's Aspire Fitness	869/2003	Beech C	Discontinued
Tracey Lynette Luxton	Andrea Coffey,manager of Cut It Out within the corporation of Sunfire Enterprises Pty Ltd	333/2003	Beech C	Discontinued
Troy Michael Clark	Temay Pty Ltd T/as Domus Nursery	1499/2003	Coleman CC	Discontinued
Tyrone Perera	Format Holdings Pty Ltd	513/2003	Harrison C	Discontinued
Veronica Lee Jackson	Sandalford Cruises (Trading Under Eyre Travelstops Pty Ltd) 8206302K	1748/2002	Kenner C	Discontinued
Veronica Mary Sowden	Sir James McCusker Training Foundation Inc (ABN 20 775 386 504) , Anglican Homes (Inc)	32/2003	Wood C	Discontinued
Viscardo Supino	Australian Fine China Pty Ltd	1279/2003	Harrison C	Discontinued
Wayne Davenport	SDS Digger Tools Pty Ltd	1100/2003	Kenner C	Discontinued
Wayne Stuart Laubscher	Joe Zito, New Town Toyota	509/2003	Wood C	Discontinued
Yolande Louise Lawrence	Mr Keith Bedell Managing Director, ILHA Pty Ltd (Trading as "Thrifty" WA) ABN 28 356 747 284	946/2003	Harrison C	Discontinued

CONFERENCES—Matters arising out of—

2003 WAIRC 08727

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

BHP BILLITON IRON ORE PTY LTD, RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE THURSDAY, 17 JULY 2003

FILE NO/S. C 90 OF 2003

CITATION NO. 2003 WAIRC 08727

Result	Suggestion issued
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr R Lilburne of counsel

Suggestion

WHEREAS on 26 May 2003 the applicant applied to the Commission for a conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 12 June and 3 July 2003 the Commission convened conferences between the parties pursuant to s 44 Act;

AND WHEREAS at the conference the Commission was informed that the applicant and the respondent are in dispute in relation to, amongst other matters, the standing down without pay of one of the applicant's members, Mr D Mackie, on 25 April 2003, arising from a disciplinary inquiry into his alleged absence from site on 19 April 2003;

AND WHEREAS the applicant informed the Commission that in its view, the member concerned should have been able to have had his preferred union representative present to assist him at the disciplinary inquiry;

AND WHEREAS the respondent informed the Commission that another representative of the applicant was available to assist and to represent Mr Mackie in the disciplinary inquiry and it was therefore unreasonable and a breach of his contract of employment for Mr Mackie to not take part in the inquiry;

AND WHEREAS the Commission, in an endeavour to assist the parties in a resolution of the dispute, advised the parties that it would issue a suggestion in relation to this matter;

NOW THEREFORE the Commission, having regard for the interest of the parties directly involved and to prevent the deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Act hereby suggests –

(1) THAT in the ordinary course the union representative of an employee(s) subject to a disciplinary process who has had direct involvement in and possesses relevant knowledge of the issues involved should represent the employee(s) at any or all stages of the disciplinary process as may be required.

(2) THAT if for good reason, such as a short term absence from site or due to the operational requirements of the respondent and the like, the representative in para 1 is not available to assist the employee(s), any step in the disciplinary process, on a without prejudice basis, should be deferred for up to 24 hours to enable that union representative to provide the required assistance to the employee(s).

(3) THAT if the period of unavailability is to or does exceed the period in para 2 then the employee(s) concerned should obtain representation and assistance from another representative of the applicant or another union with the written authority of the applicant and the disciplinary process should continue.

(4) THAT if the subject matter of the disciplinary process is such that there has been no prior involvement in or knowledge of issues by any particular union representative then the terms of paras 2 and 3 have no application.

(5) THAT subject to the commitment by the parties to the terms of this Suggestion Mr Mackie be paid for the balance of his shift on Friday 25 April 2003.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09943

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* THE HUMAN RESOURCES MANAGER BHP BILLITON IRON ORE, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 6 NOVEMBER 2003
FILE NO/S.	C 90 OF 2003
CITATION NO.	2003 WAIRC 09943

Result	Order issued
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr R Lilburne of counsel

Order

HAVING heard Mr L Edmonds of counsel on behalf of the applicant and Mr R Lilburne 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 discontinued by leave.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2002 WAIRC 07273

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 23 DECEMBER 2002
FILE NO/S.	C 225 OF 2002
CITATION NO.	2002 WAIRC 07273

Result	Recommendation and direction issued
Representation	
Applicant	Mr W Tracey
Respondent	Mr R Lilburne of counsel

Reasons for Decision

1 The present application is one filed pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") by which the applicant puts in dispute a decision by the respondent to implement redundancies of 11 mechanical tradespersons employed in the maintenance department at the respondent's Finucane Island operations.

2 The application as filed on 30 October 2002 alleged that the respondent, on announcing plans to effect the redundancies, had failed to consult with the employees affected and their representatives, in order to properly discuss the issues.

3 As a consequence of the application, an urgent s 44 conference was convened by the Commission in Port Hedland on 31 October 2002. At that conference, a range of contentions were advanced by the parties and at the conclusion of the conference, the Commission directed the parties to confer in relation to the proposed redundancies and to report back to the Commission by 1 November 2002.

4 According to correspondence provided to the Commission, a meeting took place on 1 November 2002 between the parties. As a result of that meeting, it appears that the respondent agreed to extend the period in which mechanical tradespersons could accept an offer of voluntary redundancy, for a further two weeks until 22 November 2002. The Commission was advised that discussions in relation to the proposed redundancies were to be ongoing.

5 In earlier correspondence dated 30 October 2002 from the respondent to the applicant, provided to the Commission, the respondent outlined its basis for the need for further redundancies to be effected. The respondent noted that towards the end of 2001 it moved to fortnightly shutdowns leading to a lesser requirement for maintenance employees. The respondent at that stage, offered voluntary redundancies with one employee accepting. The letter refers to the respondent's view that at that point, it still had five mechanical tradespersons in excess of its requirements.

6 Additionally, reference is made to the transfer of crusher overhaul work from Finucane Island to Nelson Point. It is said by the respondent that this means a reduction in requirements by a further two mechanical tradespersons. Furthermore, the respondent said that it no longer required mechanical tradespersons to remain on shift as its requirements in this area were now more limited, and could be covered by other employees. This led to a further mechanical tradesperson being in excess of the respondent's requirements.

7 The Commission was informed that discussions between the parties continued and by letter dated 6 December 2002 from the respondent to the applicant, its position was outlined. Up to 6 December 2002, four employees had elected to take up the offer of voluntary redundancies. Furthermore, it appeared that another employee was intending to transfer to another operation, and the respondent had agreed to remove a contractor employee from the plant. In the final analysis, and after considering various proposals put by the applicant, the respondent had identified five of the original eleven redundant positions, as still to be determined.

8 A further report back compulsory conference was held on 10 December 2002. At that conference, the parties put their respective positions in particular, in relation to the respondent's letter of 6 December 2002. The respondent's position essentially is that it has considered all of the various alternatives advanced by the applicant, and pursued some of its own, in order to reduce the number of employees to be made compulsorily redundant. It now has invited the applicant to confer with it in relation to proposed selection criteria to identify employees to be terminated on the grounds of redundancy.

9 At the conclusion of the compulsory conference, the Commission requested the applicant to identify what relief it sought from these conference proceedings. By communication of 12 December 2002 it did so, and in short the applicant seeks a range of orders in the following terms—

> *"In respect of the fitters who were taken off shift we say the commission should find that there are operator maintainer positions in the bene plant, hat a contractor from Total Machinery and Fabrication was employed in the bene plant as an operator maintainer in the same week as the announcement of voluntary redundancies and that this person should go and be replaced with one of BHP's own employees who came off shift.*
>
> *In respect of income maintenance for those 2 fitters taken off shift who did not seek redundancies it should be for a period of 2 years.*
>
> *The commission should find that the removal of the crusher overhaul to Nelson Point has only resulted in one position being made redundant rather than 2 as put forward by BHP. This would result in the total redundancies being 10 positions rather than 11.*
>
> *That BHP cease to use PANAS contractors to perform the 2 full time positions on site currently covered by PANAS contractors and that this work be handed back to full time BHP employees.*
>
> *That BHP cease to use Total Machinery and Fabrication contractors to perform the 2 full time positions on site currently covered by Total Machinery and Fabrication and that this work be handed back to full time BHP employees.*
>
> *That if any positions are still left to fill after this process has been exhausted then the redundancies be opened up to Nelson Point on the basis of similar skills and competencies. The Union should be involved in this process."*

10 By letter dated 13 December 2002, the respondent's solicitors replied to the request for orders by the applicant in effect submitting that the orders sought would require the Commission itself to select those employees to be made redundant, and submitted that the Commission should not take such a course. It submitted that over the last seven weeks or so, there had been extensive discussions between the parties and the respondent has endeavoured to resolve the matter.

11 In light of the position adopted by the parties the Commission has determined as follows.

12 As has been repeatedly said by this Commission over several decades, it is not for the Commission to conduct the affairs of an employer. The Commission will interfere when it is persuaded there is demonstrated unfairness. Whilst this is a trite principle of law, nonetheless it is worth bearing in mind some of the authorities in this regard including *Federated Clerks Union v Public Service Board and Others* 128 CAR 219 per Wright J; *Nabalco Pty Ltd v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (Print C4814) per Coldham J; *AMWU v Robe River Iron Associates* (1986) 67 WAIG 2.

13 In my opinion, the orders now sought by the applicant effectively require the Commission, to take the chair of the manager and to make decisions as to the deployment of labour within its workforce, and to effectively select employees for redundancy. Consistent with the authorities to which I have referred, and the long standing view of this Commission, that is something I am not prepared to do. Furthermore, on what limited material is before the Commission at this point of these proceedings, I am not persuaded that prima facie, the process undertaken by the respondent thus far has been demonstrated to be inherently unfair. Of course, I do not express any concluded view about that matter at this stage of these proceedings.

14 The power of the Commission to refer a matter for hearing and determination pursuant to s 44(9) of the Act is discretionary. The Commission is not bound to refer a matter. In all of the circumstances, the Commission is not prepared to exercise its discretion to refer the matter of the orders sought for hearing and determination pursuant to s 44(9). Any allegations of unfair or harsh treatment by the respondent at the conclusion of the process can be the subject of further proceedings before the Commission, if necessary.

15 However, in my opinion, the respondent, as a measure to avert the need for compulsory redundancies at Finucane Island, should extend the offer of voluntary redundancy to maintenance tradespersons, within the appropriate categories, at Nelson Point. To do so, does not oblige the respondent to accept any expressions of interest. There may well be employees at that operation, within the appropriate skills and competency category, who may wish to take up such an offer, whose positions could be occupied by suitably qualified tradespersons identified as in excess of requirements at Finucane Island. I intend to so recommend.

16 Furthermore and in any event, in the interim, the Commission will direct the parties to confer in relation to the identification of appropriate selection criteria for employees to be made redundant, whether they be those set out in the respondent's letter of 6 December 2002 or otherwise.

2002 WAIRC 07274

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 23 DECEMBER 2002
FILE NO/S.	C 225 OF 2002
CITATION NO.	2002 WAIRC 07274

Result	Recommendation and direction issued
Representation	
Applicant	Mr W Tracey
Respondent	Mr R Lilburne of counsel

Recommendation and Direction

HAVING heard Mr W Tracey on behalf of the applicant and Mr R Lilburne of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

1. RECOMMENDS that the respondent extends its offer of voluntary redundancies to relevant mechanical tradespersons at Nelson Point in order to, where possible, avoid or minimize the need for compulsory redundancies of mechanical tradespersons at Finucane Island.

2. DIRECTS that in any event the parties confer in relation to the identification of appropriate selection criteria to be utilised for the purposes of selecting mechanical tradespersons from Finucane Island to be compulsorily made redundant, if necessary.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

2003 WAIRC 09940

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 6 NOVEMBER 2003
FILE NO/S.	C 225 OF 2002
CITATION NO.	2003 WAIRC 09940

Result	Order issued
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr R Lilburne of counsel

Order

HAVING heard Mr L Edmonds of counsel on behalf of the applicant and Mr R Lilburne 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 discontinued by leave.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 08533

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 17 JUNE 2003
FILE NO.	C 99 OF 2003
CITATION NO.	2003 WAIRC 08533

Result	Direction issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr R Lilburne of counsel

Direction

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr R Lilburne of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the applicant file and serve further and better particulars of claim by 24 June 2003.
2. THAT the respondent file and serve a notice of answer by 27 June 2003.
3. THAT each party shall give an informal discovery by serving its list of documents by 1 July 2003.
4. THAT inspection of documents shall be completed by 8 July 2003.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 08534

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 17 JUNE 2003
FILE NO.	C 107 OF 2003
CITATION NO.	2003 WAIRC 08534

Result	Direction issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr R Lilburne of counsel

Direction

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr R Lilburne of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the applicant file and serve further and better particulars of claim by 24 June 2003.
2. THAT the respondent file and serve a notice of answer by 27 June 2003.
3. THAT each party shall give an informal discovery by serving its list of documents by 1 July 2003.
4. THAT inspection of documents shall be completed by 8 July 2003.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09884

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING, APPLICANT
	v.
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 30 OCTOBER 2003
FILE NO/S.	C 227 OF 2003
CITATION NO.	2003 WAIRC 09884

Result	Order issued

Order

WHEREAS on 28 October 2003 the applicant applied to the Commission for a conference pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS on 29 October 2003 the Commission convened an urgent conference between the parties pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS at the conference the Commission was informed that the applicant and the respondent are in dispute in relation to the reclassification of Education Assistants from Level 1 through to Level 3 and in relation to a claim by the respondent's members employed by the applicant for increased wages and enhanced conditions of employment;

AND WHEREAS in support of the respondent's claims its members commenced rolling stoppages on 28 October 2003 and the Commission was advised that further stoppages are planned;

AND WHEREAS the Commission was also informed that Education Assistants, Home Economic Assistants, Gardeners and Cleaners have had work bans in place in support of their claim for increased wages and enhanced conditions since 23 October 2003;

AND WHEREAS the Commission was informed that one of these bans is a ban by Education Assistants (Special Needs) on undertaking yard duty during recess and lunch breaks except where an Education Assistant is employed for the purpose of assisting a student during recess and lunch breaks;

AND WHEREAS the parties have agreed to hold substantial discussions forthwith to negotiate a process to enable the reclassification of Education Assistants from Level 1 through to Level 3 to take place, and agreement was reached that the Commission would assist the parties in relation to these discussions through conciliation and/or arbitration;

AND WHEREAS the Commission was informed that an offer in response to the respondent's claim for increased wages and enhanced conditions would be made to the respondent and its members before 7 November 2003;

AND WHEREAS as a result of discussions between the parties it was agreed by the respondent that no further rolling stoppages would take place until the respondent's report back meeting with its members to be held on 7 November 2003, and the respondent confirmed that no rolling stoppages would take place before the parties attended a conference convened by the Commission on 7 November 2003;

AND WHEREAS the respondent confirmed that all bans currently in place would continue until the respondent's report back meeting with its members to be held on 7 November 2003;

AND WHEREAS the commission was informed by the applicant that the ban by Education Assistants (Special Needs) not to undertake yard duty at recess and lunch breaks was creating duty of care issues for children with special needs during these breaks and that disputation was occurring at some workplaces as a result of this ban;

AND WHEREAS the Commission is of the opinion that an interim order is necessary to prevent the deterioration of industrial relations so that further conciliation and/or arbitration can take place in relation to all issues currently before the Commission;

NOW THEREFORE, the Commission having formed the view that in order for conciliation and/or arbitration to occur to resolve the matters in dispute, and pursuant to the powers conferred on it under the Act, in particular s.44(6)(ba)(i) and (ii), hereby orders—

1) THAT Education Assistants (Special Needs) who work at the applicant's Education Support Schools, Education Support Centres and Education Support Units or who work on a one-on-one basis with special needs students in a mainstream school environment are to cease their ban on undertaking yard duty during recess and lunch times, which commenced on 23 October 2003, from the date of this order.

2) THAT this order will remain in place until a conference between the parties is reconvened by the Commission on 7 November 2003.

3) THAT either party has liberty to apply in relation to this order.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

2003 WAIRC 09857

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	BAYSWATER POWDER COATERS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY 29 OCTOBER 2003
FILE NO/S.	C 142 OF 2003
CITATION NO.	2003 WAIRC 09857

Result	Jurisdiction found
Representation	
Applicant	Mr T Pope (by way of written submissions)
Respondent	Mr G Partacini (by way of written submissions)

Reasons for Decision

1 On 16 June 2003 the Shop, Distributive and Allied Employees' Association of Western Australia ("the applicant") commenced proceedings under s.44 of the *Industrial Relations Act 1979* ("the Act") claiming that one of its members Mr Ben Coccaro was owed monies by the respondent arising from an accident he was involved in whilst driving a work vehicle home from work. Mr Coccaro was an employee of Bayswater Powder Coaters Pty Ltd ("the respondent") and the vehicle was provided to him by the respondent.

2 At conciliation proceedings held in relation to this claim the respondent raised the issue of jurisdiction and claimed that as the dispute between the parties constituted a civil matter the Western Australian Industrial Relations Commission ("the Commission") did not have jurisdiction to deal with this issue. As the issue of jurisdiction was raised the Commission determined that this issue would be dealt with by way of written submissions.

Submissions

3 The respondent maintains that the issue before the Commission is not an industrial matter as it is not a matter which affects or relates to the employment relationship between Mr Coccaro and the respondent. In support of this contention the respondent relies on the authority contained in *Hotcopper Australia Ltd v Saab* (2002) 82 WAIG 2022. The respondent argued that the Commission does not have the power to resolve all disputes between employers and employees and that the claim in the present case was a claim for damages not a claim relating to Mr Coccaro's employment. The respondent relies on the authority of *Lister v Romford Ice and Cold Storage* (1957) AC 555 to argue that there is no entitlement for an employee to be indemnified by the employer against an employee's inappropriate conduct in the employee's normal course of employment. The respondent also maintains that at the time of the accident, which was approximately 8.00pm in the evening, Mr Coccaro was not undertaking work related to his normal duties. The respondent maintained that the accident was purely as a result of Mr Coccaro's negligence, and relies on Mr Coccaro being charged for driving without due care and losing three demerit points subsequent to this accident in support of this claim.

4 The applicant maintains that when Mr Coccaro commenced employment with the respondent in 1998 part of his duties included undertaking deliveries for the respondent. In order to carry out deliveries the respondent provided Mr Coccaro with a utility for carrying the respondent's products. Mr Coccaro claimed that most evenings he would load his vehicle with the respondent's products (fences, flyscreens or similar items) and drive them to his house after finishing work in order to deliver the products early the following morning on his way to commence duties at the respondent's premises. On the evening of the

accident Mr Coccaro maintained that even though he had undertaken alternative duties after finishing his normal work with the respondent at 5.30pm, which was not unusual, he returned to the respondent's premises at approximately 7.30pm and then loaded up the respondent's materials to be delivered as part of his duties with the respondent the following day. Mr Coccaro maintained that he often worked beyond the regular hours of 9.00am to 5.00pm to perform his duties and that the respondent was aware of the extra hours he worked. The respondent was also aware that Mr Coccaro would sometimes undertake work for another business subsequent to finishing his normal duties and that he would then return to the respondent's premises to load the respondent's goods for delivery the following morning.

5 The applicant maintains that the definition of industrial matter covers any matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees. The respondent had an expectation that Mr Coccaro would drive home with the respondent's goods to be delivered the following morning and the respondent allocated Mr Coccaro a vehicle for this purpose. The applicant maintains that Mr Coccaro's accident happened in the course of his employment as the vehicle supplied by the respondent was used to assist Mr Coccaro in delivering the respondent's products. As Mr Coccaro was undertaking duties in connection with his employment when the accident happened the applicant maintains that the Commission has jurisdiction to deal with this issue.

Conclusion

6 I am required to determine if the dispute before me constitutes an industrial matter.

7 Section 7. – Interpretation of the Act defines an "industrial matter" as—

> "any matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to-
>
> …
>
> (ca) the relationship between employers and employees;"

8 In this particular case I accept that the respondent allocated Mr Coccaro a vehicle in order for him to undertake part of his duties. I find that Mr Coccaro's duties included delivering the respondent's products prior to Mr Coccaro presenting for duty at the respondent's premises in the morning. I accept that Mr Coccaro often worked beyond his regular hours of 9.00am to 5.00pm in order to undertake these duties and that the employer was aware of these extra hours worked by Mr Coccaro. I also find that the respondent was aware that Mr Coccaro occasionally worked elsewhere after work before returning to the respondent's premises to load up the respondent's goods to take home and deliver the next day. In my view it was part of Mr Coccaro's normal duties to load deliveries at the end of his working day, take them home in the vehicle provided by the respondent and to deliver these goods on his way to work the next morning. I find that this requirement constituted the duties expected of Mr Coccaro by the respondent and that Mr Coccaro was in the course of fulfilling these duties on 16 January 2001 when he was involved in a motor vehicle accident at approximately 8.15 pm in the evening whilst driving his loaded work vehicle home from his normal place of work.

9 As it is my view that as Mr Coccaro was allocated a vehicle in order to undertake one of the duties expected of him by the respondent and as he was driving from work to home loaded with goods to be delivered the next morning when the accident happened, I find that there was a sufficient connection with the act of Mr Coccaro driving home from work with the respondent's goods for delivery the next day to constitute this dispute being an industrial matter. I thus find that I have jurisdiction to deal further with this application.

2003 WAIRC 09885

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	BAYSWATER POWDER COATERS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF DECLARATION	THURSDAY, 30 OCTOBER 2003
FILE NO/S.	C 142 OF 2003
CITATION NO.	2003 WAIRC 09885

Result Jurisdiction found

Declaration

HAVING HEARD Mr T Pope by way of written submissions on behalf of the applicant and Mr G Partacini by way of written submissions on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby—

DECLARES THAT the matter referred to the Commission is an industrial matter and the Commission has jurisdiction to enquire into and deal with it.

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

[L.S.]

CONFERENCES—Matters referred—

2003 WAIRC 09680

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	SPOTLESS SERVICES AUSTRALIA LIMITED, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY 14 OCTOBER 2003
FILE NO/S.	CR 242 OF 2002
CITATION NO.	2003 WAIRC 09680

Result	Application to dismiss application for want of jurisdiction dismissed.
Representation	
Applicant	Mr Llewellyn
Respondent	Mr A Lucev (of counsel)

Reasons for Decision

1 In November 2002 the Australian Workers' Union West Australian Branch, Industrial Union of Workers ("the applicant') commenced proceedings under s.44 of the *Industrial Relations Act 1979* ("the Act") claiming that a number of the applicant's members were denied a benefit due to them under their contracts of employment with Spotless Services Australia Limited ("the respondent"). Conciliation proceedings did not resolve the claim and the matter was referred for arbitration under s.44(9) of the Act.

Background

2 The schedule of matters for hearing and determination is as follows—

> "The applicant's members engaged by the respondent at its Argyle operations are due redundancy entitlements, as outlined in the applicant's letter to the respondent on 17 June 2002.
>
> The respondent denies that the applicant's members are entitled to the redundancy entitlements as claimed."

3 The matter was set down for hearing on 31 July and 1 August 2003. On the morning of the first day of hearing the respondent claimed that the Western Australian Industrial Relations Commission ("the Commission") as constituted did not have jurisdiction to hear the applicant's claim and made submissions to that effect. Given that no notice was given to the applicant that the issue of jurisdiction was to be raised by the respondent the applicant was given time to file and serve submissions in response. Subsequent to these submissions being filed the respondent made further submissions in reply.

Respondent's Submissions

4 The respondent submits that the Commission does not have jurisdiction to deal with this application for a number of reasons.

5 The respondent argues that the effect of any order which this Commission issues would impair, alter, destroy, detract or vary the provisions of the Argyle Catering Australian Workers' Union/Spotless Services Australia Limited Award 2002 ("the Federal Award") [which supersedes the Argyle Catering (Australian Workers' Union/Spotless Services Australia Limited) Consent Award 1996] and the Argyle Catering (Australian Workers Union/Spotless Services Australia Limited) Agreement 1996 ("the Federal Agreement"). The respondent thus argues that this order would be invalid and relies on the authority contained in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 499 per Isaacs J; MTIA v AMWSU (1983) 152 CLR 632 at 642 per Gibbs CJ, Wilson and Dawson JJ; both cited with approval in *City of Mandurah v Hull* (2000) 80 WAIG 4319 at 4325 in support of this contention.

6 The respondent claims that the order sought by the applicant would be inconsistent with the terms of the Federal Award covering the employees the subject of this application. The respondent argues that the Federal Award which came into effect on 1 July 2002 by consent, contains a redundancy clause (Clause 12) which provides for redundancy entitlements to be paid to employees when they are made redundant. The relevant clause of the Federal Award is as follows—

> **"12.3 Severance pay**
>
> **12.3.1** In addition to the period of notice prescribed for ordinary termination in clause 16 (sic) - Termination of employment, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service—

Period of continuous service	**Severance pay**
1 year or less	1 week
1 year and up to the completion of 2 years	4 weeks' pay
2 years and up to the completion of 3 years	6 weeks' pay
3 years and up to the completion of 4 years	7 weeks' pay
4 years and over	8 weeks' pay"

The respondent maintains that if the Commission was to exercise its powers in the terms sought by the applicant in this matter it would be inconsistent with the Federal Award and the Commission would be interfering with the Federal Award as this award already deals with the amount an employee subject to the Federal Award is entitled to be paid in a redundancy situation. Further, there is a mechanism within Clause 12 of the Federal Award for The Australian Workers' Union (the federal union) to apply to increase the redundancy quantum specified in the Federal Award by a further order of the Australian Industrial Relations Commission ("AIRC"), not this Commission. Given this inconsistency the respondent argues that any order of this Commission dealing with the issue of redundancy or varying the quantum of redundancy payable under the Federal Award will be invalid by virtue of s.152 of the *Workplace Relations Act* (1996) ("the WR Act") and s.109 of the *Commonwealth of Australia Constitution Act* ("the Constitution") which provides that Federal laws prevail over State laws to the extent of any inconsistency.

7 Section 152(1) of the WR Act reads as follows—

> "(1) Subject to this section, if a State law or a State award is inconsistent with, or deals with a matter dealt with in, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid."

8 Section 109 of the Constitution reads as follows—

> "109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

9 The respondent claims that the Federal Agreement which applies to the employees the subject of this application is to be read in conjunction with the Federal Award and that the effect of this is that the Federal Agreement incorporates Clause 12. – Redundancy of the Federal Award into their contracts of employment. If the Commission was to order the increased redundancy amounts sought by the applicant this order would be inconsistent with the Federal Agreement. Further, if an increased quantum was ordered it would be in excess of what is in the Federal Agreement and the prescribed mechanism for varying the Federal Agreement would be breached. The respondent thus claims that any order dealing with the matter of redundancy entitlements of the employees named in the schedule or any order varying the quantity of redundancy payable to each employee under the Federal Agreement would be invalid. In support of this contention the respondent relies on s.170LZ(1) of the WR Act which reads as follows—

> "(1) Subject to this section, a certified agreement prevails over terms and conditions of employment specified in a State law, State award or State employment agreement, to the extent of any inconsistency."

10 The respondent argues that this Commission does not have the power to vary or set aside an award of the AIRC as the only power to vary a federal award is vested in the AIRC and if an order issues in the terms sought this would effectively vary the Federal Award. Further, if any order issues in the terms sought this would effectively vary the Federal Agreement and the only power to vary a federal certified agreement is vested in the AIRC under s.170MD(7) of the WR Act.

11 The respondent argues that the Commission has no jurisdiction to settle disputes in relation to the employees the subject of this application as all disputes and grievances must be dealt with by the AIRC as required under the Federal Agreement applying to these employees. The respondent argues that as the grievance procedure outlined in Clause 14 of the Federal Agreement has not been invoked in this matter then the Commission should not deal with this application. Also, Clause 8 of the Federal Award contains a dispute settlement procedure which has a provision that all disputes must ultimately be referred to the AIRC.

12 The respondent argues that if any order was to issue in relation to this matter it would be contrary to the National Wage Case Principles. The respondent maintains that any order issuing with respect to the quantum of redundancy payments to be paid to employees under a Federal Award would increase entitlements in the Federal Award and would thus be inconsistent with the National Wage Case Principles. The respondent relies on the authority of R *v Clarkson & Ors; Ex parte Australian Telephone & Phonogram Officers Association* (1982) 39 ALR 1 whereby the High Court held that the AIRC was to act in conformity with the National Wage Case Principles and that only an AIRC Full Bench could consider whether there should be a departure from those principles.

13 The respondent also maintains that the order sought by the applicant in this matter would be inconsistent with this Commission's State Wage Case Principles. If an order issues in the terms sought it would constitute a variation to redundancy entitlements above the safety net. As the order sought seeks to vary each employee's conditions of employment with respect to redundancy above the safety net the matter should be referred under Principle 10 of the State Wage Case Principles to the Chief Commissioner for consideration.

14 The respondent also maintains that this exact dispute remains a live issue before the AIRC as the matter has not been disposed of by McCarthy DP. The applicant's counterpart federal body lodged an application against the respondent in the AIRC (Matter No. C2002/176) seeking an order under s.170FB of the WR Act in the same terms sought under this application and as this matter remains on foot before the AIRC, then the Commission is unable to deal with this application.

Applicant's Submissions

15 The applicant maintains that the Commission has jurisdiction to deal with this issue. The applicant argues that the matter in the AIRC (C2002/176) is no longer before the AIRC as the applicant's counterpart federal union is no longer pursuing this application. The applicant submitted that the issue relating to this application had been disposed of when this matter was lodged in the Commission. The applicant claims that the matter before McCarthy DP is closed and the applicant's counterpart federal body was always acting on the belief that the matter was finalised. The applicant submitted that McCarthy DP also understood the matter was closed when this matter was re-agitated by the respondent subsequent to the jurisdictional matter in relation to this issue being raised in the Commission on 31 July 2003 and quotes the following from the transcript of proceedings in the AIRC on 6 August 2003 in support of this contention—

> "THE DEPUTY PRESIDENT: Yes, leave is granted. Mr Lucev, it is up to you, I suppose. We have received communications that this matter was requested to be relisted. The file had actually been closed, although I never formally dismissed the matter that was before me. I think it was a fairly safe assumption on my part that the matter had been concluded. So why should I in effect reopen it?"
>
> (Transcript C2002/176 PN3)

16 The applicant argues that this application seeks the enforcement of contractual benefits relating to a number of the applicant's members and that the benefits sought are not entitlements due to these employees under the Federal Award or Federal Agreement. The applicant argues that the Commission has the power under the Act to deal with matters of this nature and that by considering this application the Commission is not exercising powers beyond its jurisdiction. As there is no mechanism under the WR Act for the enforcement of a contractual entitlement not arising under a federal award or agreement there is therefore no inconsistency between the WR Act and the Act.

17 The applicant maintains that the enforcement of a contractual benefit due to an employee can only be dealt with under the WR Act if the matter falls within the scope of an industrial dispute as defined under the WR Act and is a contractual entitlement that is dealt with in an award. As the employees the subject of this application are no longer employed by the respondent (the employees were terminated on or about 9 September 2002) they are thus unable to commence an action to alter or vary the Federal Agreement that no longer applies to them. The only way that the Federal Agreement that applied to the employees could be altered would be by a vote of the majority of employees employed by the respondent as set out in the WR Act. As the employees the subject of this application are currently not employed by the respondent the Federal Agreement can not be altered in the terms sought by this application.

18 As the applicant is entitled to represent its members' industrial interests the applicant has the right to access the provisions of s.44 of the Act to bring a claim for the enforcement of a benefit due under an employee's contract of employment when that

benefit has been denied to an employee. The applicant argues that as the enforcement of a contractual benefit does not alter or vary the Federal Award or Federal Agreement there is thus no inconsistency with the WR Act. Further, there has been no challenge by the respondent that the employees the subject of this application are ineligible to be members of the applicant Union.

19 In all of the circumstances the applicant argues that there is no impediment to the Commission dealing with this matter under s.44 of the Act.

Findings and conclusions

20 By this application the applicant is asking the Commission to determine whether or not the employees named in the schedule are due benefits owing to them under their contracts of employment with the respondent. The respondent relies on a number of grounds to argue that the Commission does not have the power to issue the order sought by the applicant.

21 The respondent argues that if an order issues in the terms sought by the applicant it would be invalid as it is inconsistent with the Federal Award and the Federal Agreement, as the Federal Award and Federal Agreement applying to each of the employees named in the schedule covers the issue of redundancy. The respondent also argues that any enforcement of rights and entitlements due to an employee under the Federal Award and Federal Agreement cannot be dealt with by this Commission as the Commission does not have the power to vary a federal award or agreement. Further, the respondent argues that the effect of any order if it was to issue would be contrary to the current State Wage Principles and the National Wage Case Principles.

22 I accept that the Commission is not able to issue orders in relation to the recovery of entitlements due by the operation of a federal award or agreement. It is also clear however, that a federal award or agreement, whilst comprehensive, may not deal with all matters and therefore may not be inconsistent with a State law. In *Metal Trades Industry Association of Australia and Others and The Amalgamated Metal Workers' and Shipwrights' Union and Other* (1983) 152 CLR 632 at 650 Mason, Brennan and Deane JJ stated the following—

> "It may appear from the terms and nature of an award, or from the subject-matter with which it deals, that, notwithstanding that it contains provisions dealing with a particular matter, it is not intended to deal with that matter to the excusion (sic) of any other law. At first glance there might seem to be a problem in accommodating such an award to the language of s. 65. But in such a case it will be found that the award fails to deal with the particular conduct or matter which is regulated by the State statute. In this respect it is important to note that an award which apparently regulates an entire subject-matter may leave some small area of it untouched. This area may then become the relevant field capable of regulation by State law. An award which provides for the terms and conditions of employment and termination on notice but not dismissal for misconduct fails to deal with dismissal for misconduct and leaves that particular matter or conduct to be regulated by State law (*Reg. v. Clarkson; Ex parte General Motors-Holden's Pty. Ltd*. (38))."

23 It is my view that the power that is being sought to be exercised by the Commission in this particular case relates to a claim for the enforcement of an existing contractual entitlement which is due under the contracts of employment of the employees named in the schedule which is not a benefit arising from the operation of the Federal Award or Federal Agreement which covered the relevant employees. In the case of an employee whose contract of employment is regulated by a federal award or agreement it is clear that this Commission has the power to deal with the enforcement of these entitlements as long as the benefit claimed does not constitute the recovery of entitlements or benefits due under the operation of a federal award or agreement. Further, in particular circumstances it is not unusual for parties to agree to over-award entitlements which are superior to the existing terms and conditions of an employee's contract of employment, and which are not incorporated into an industrial instrument but become terms of an employee's contract of employment. I also take into account that when the terms of an employee's contract of employment are agreed it is not always exhaustive of all remedies to apply when resolving all disputes relating to an employee's terms and conditions of employment. The authority contained in *Daniel Silvio Penco v D'Arcy MacManus and Masius and Gill Pty Ltd* [1985] 65 WAIG 529 at 530 supports these views. Fielding C (as he was then) noted that the employee concerned, Mr Penco, was employed pursuant to a Federal Award being the Commercial and Industrial Artists Award of 1983 and went on to say—

> "…so far as the claim purports to seek redress for a dismissal which is said to be unfair, this Commission is without jurisdiction. There is little, if anything, to distinguish the Award to which reference has been made in these proceedings and the Award considered by the Industrial Appeal Court in Metropolitan (Perth) Transport Trust v Gersdorf (*supra*). Gersdorf's case is binding upon me and I am bound to follow it, and of course I do so. I therefore hold that the Commission is without jurisdiction to entertain that part of the Applicant's claim which relates to an allegation of unfair dismissal.
>
> In my view, some parts of the claim made by the Applicant could well be said to relate to overaward payments and thus there was no need to rely on an Award, Federal or otherwise, and to that extent the Commission is not completely without jurisdiction. [cf: True v Amalgamated Collieries of WA Ltd [1940] 62 CLR 451 and Steele v Tardini [1946] 72 CLR 386]."

It is also the case that the AIRC does not have jurisdiction to determine a contractual dispute relating to an employee's existing rights and no submission to the contrary was put to me. As the power sought to be exercised in this matter does not relate to an entitlement due under a federal award or agreement, and as the AIRC does not have the power to enforce an employee's contractual entitlements it is my view that there is therefore no inconsistency which arises which would make such an order invalid.

24 As I have found that the applicant is seeking the enforcement of entitlements for its members which are due to them under their contracts of employment with the respondent which are not entitlements arising out of the Federal Award or the Federal Agreement which covered each employee, it is my view that any order which may issue in relation to this matter does not alter or vary the operation of the Federal Award or Federal Agreement. Although there is an entitlement to an eight week redundancy payment in the Federal Award and there is a mechanism for varying this quantum there is no clause in the Federal Agreement or Federal Award incorporating the specific entitlement to the redundancy payment sought by this application. It is therefore my view that the Commission is not prevented from dealing with this dispute as it relates to an additional redundancy quantum that the applicant claims the employees are owed, over and above the redundancy payment currently provided for in the Federal Award. I thus find that in relation to this matter any order that may issue in relation to this application would not be inconsistent with the Federal Award or Federal Agreement.

25 As I have found that the AIRC does not have the power to deal with the enforcement of an employee's entitlements then the field is not and cannot be covered by the dispute settlement procedures detailed in the Federal Award and/or Federal Agreement which applied to the employees the subject of this application.

26 It is my view that any order which may issue arising out of this claim for over-award contractual entitlements is not contrary to the provisions of the current State and National Wage Case Principles. The issue before me is whether or not over-award terms

and conditions are implied into the employees' contracts of employment and if so whether or not an order should issue for the quantum claimed. In my view if such an order issues for the enforcement of the over-award amounts claimed this does not constitute a variation to the Federal Award or Federal Agreement as the order sought relates to an order for payment of an over-award benefit due to an employee and does not and cannot constitute a variation to the Federal Award and/or Federal Agreement.

27 I have had the benefit of reading the decision of McCarthy DP dated 26 September 2003 in relation to application C2002/176. I understand that even though the applicant in this matter indicated that its federal counterpart body no longer wanted to proceed with the application that the matter was initially not dismissed by McCarthy DP and that McCarthy DP indicated that he did not dismiss the matter as he was precluded from doing so given the terms of s.170FD of the WR Act. In relation to finalising this matter McCarthy DP has declined to issue an order or make a determination disposing of this matter, and I understand that this is the final step in McCarthy DP's consideration of this matter. Even though this application has not been formally dismissed I understand that this matter has reached its finality and as no additional redundancy entitlements have been granted to the employees the subject of this application in the same terms as the order sought in this application I do not accept the respondent's argument that I should refrain from dealing with this application.

28 In all of the circumstances the respondent has not demonstrated that the Commission does not have jurisdiction to deal with this application. As I have found that the Commission has jurisdiction to deal with this application the substantive matter will now be heard.

2003 WAIRC 09679

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	SPOTLESS SERVICES AUSTRALIA LIMITED, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO/S.	CR 242 OF 2002
CITATION NO.	2003 WAIRC 09679

Result	Application to dismiss application for want of jurisdiction dismissed.

Order

HAVING HEARD Mr M Llewellyn on behalf of the applicant by way of written submissions and Mr A Lucev of counsel on behalf of the respondent in person and by way of written submissions, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the application to dismiss application CR242 of 2002 for want of jurisdiction is dismissed.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

2003 WAIRC 08505

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 19 JUNE 2003
FILE NO/S.	CR 41 OF 2003
CITATION NO.	2003 WAIRC 08505

Result	Order issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr R Curry of counsel

Order

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr R Curry of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT each party shall give an informal discovery by serving its list of documents by 26 June 2003.
2. THAT inspection of documents shall be completed by 3 July 2003.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09154

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 AUGUST 2003
FILE NO.	CR 41 OF 2003
CITATION NO.	2003 WAIRC 09154

Result	Direction issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr F Gaffney of counsel

Direction

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr F Gaffney of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely no later than 19 September 2003.
5. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 3 October 2003.
6. THAT the parties have liberty to file and serve upon one another any signed witness statements in reply no later than 17 October 2003.
7. THAT the matter be listed for hearing for three days.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09826

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 24 OCTOBER 2003
FILE NO.	CR 41 OF 2003
CITATION NO.	2003 WAIRC 09826

Order

WHEREAS on 13th October 2003 The Construction, Forestry, Mining and Energy Union of Workers (CFMEU) has applied for orders relating to the filing of witness statements and media records of radio transmissions. This last said to be important as to verification of evidence which may be presented to the Commission at hearing; and

WHEREAS the Commission conducted a hearing in relation to the application on 23rd October 2003; and

WHEREAS relevant to this matter the Commission constituted by Kenner C on 25th August 2003 issued a Direction in relation to the filing and serving of evidence in the form of witness statements which may be adduced in proceedings before the Commission; and

WHEREAS the CFMEU was required to serve upon the Respondent its signed witness statements no later than 19th September 2003; and

WHEREAS the Respondent was required to file and serve upon the CFMEU any signed witness statements upon which it intends to rely no later than 3rd October 2003; and

WHEREAS neither party met the timelines set out in the Directions; and

WHEREAS on 11th September 2003 the Respondent requested that the dates set for the filing of witness statements by the Respondent specified in the Directions be extended by four weeks; and

WHEREAS this 'application' to vary the Directions issued on 25th August 2003 was never listed; and

WHEREAS the Commission has now heard from Mr Schapper, of Counsel, on behalf of the CFMEU and Mr Lucev, of Counsel, on behalf of BHP Billiton Iron Ore Pty Ltd (the Respondent) and having considered the submissions, in particular those of Mr Schapper that because of the failure to file in accordance with the Direction the Respondent be given further directions to file any witness statements by close of business on 24th October 2003; and

WHEREAS having heard the reply by Mr Lucev in which he advised that the task was onerous but that the Respondent could file the said statements by 31st October 2003; and

WHEREAS the Commission has considered this matter and has decided that it would most likely be a Direction incapable of practical application if it were to accede to the request of Mr Schapper and having reached the conclusion if the statements are filed by 31st October 2003, that is within a further seven days of the date of this Direction, that there will be adequate time for the CFMEU to consider the statements and file any response thereto, has decided that it issue Directions that the Respondent file and serve upon the CFMEU any signed witness statements upon which it intends to rely no later than 31st October 2003 and that the parties will have liberty to file and serve upon each other any signed witness statements in reply no later than 14th November 2003; and

WHEREAS the Commission has considered the submissions by Mr Schapper that the Respondent be required to file an affidavit in support of its contention that the recording media upon which radio transmissions were retained have been lost or destroyed and has decided that it is appropriate in these circumstances to order that such affidavit be filed detailing the sequence of events leading to the alleged destruction of the recording media; and

WHEREAS the Commission has decided to issue orders that such affidavit be filed.

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

1. THAT the Respondent file in the Commission file and serve upon the CFMEU any signed witness statements upon which it intends to rely no later than 31st October 2003.
2. THAT the parties file and serve upon each other any signed witness statements in reply no later than 14th November 2003.
3. THAT the Respondent file and serve upon the CFMEU an affidavit detailing the sequence of events leading to the alleged destruction of the recording media within seven days.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09153

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 AUGUST 2003
FILE NO.	CR 99 OF 2003
CITATION NO.	2003 WAIRC 09153

Result	Direction issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr F Gaffney of counsel

Direction

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr F Gaffney of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT discovery is to be given by the respondent of the following documents or classes or documents by 4 September 2003—
   (i) those documents in relation to incidents involving Messrs Clark, Brandis and Kyte.
2. THAT inspection of these documents shall be completed by 11 September 2003.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely no later than 19 September 2003.
5. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 3 October 2003.
6. THAT the parties have liberty to file and serve upon one another any signed witness statements in reply no later than 17 October 2003.
7. THAT the matter be listed for hearing for three days.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09152

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS, APPLICANT
	v.
	BHP BILLITON IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 AUGUST 2003
FILE NO.	CR 107 OF 2003
CITATION NO.	2003 WAIRC 09152

Result	Direction issued
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr F Gaffney of counsel

Direction

HAVING heard Mr D Schapper of counsel on behalf of the applicant and Mr F Gaffney of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT discovery is to be given by the respondent of the following documents or classes or documents by 4 September 2003—
   (i) those documents in relation to the post-interview stage of the selection process for the position of supervisor; and
   (ii) the "further application documents" referred to in a letter dated 13 August 2003, from the respondent's solicitors to the applicant's solicitor.
2. THAT inspection of these documents shall be completed by 11 September 2003.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely no later than 19 September 2003.
5. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 3 October 2003.
6. THAT the parties file and serve upon one another any signed witness statements in reply no later than 17 October 2003.
7. THAT the matter be listed for hearing for two days.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09788

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	PERSONNEL CONTRACTING PTY LTD T/A TRICORD PERSONNEL, HANSSEN PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 23 OCTOBER 2003
FILE NOS	CR 168 OF 2003, APPLICATION 1036 OF 2003
CITATION NO.	2003 WAIRC 09788

Catchwords	Jurisdiction – Whether employee or contractor – Definition of employer – Respondent a labour hire company – No jurisdiction – *Industrial Relations Act, 1979 s7, s44*
Result	Dismissed for want of jurisdiction
Representation	
Applicant	Ms K. Scoble of Counsel appeared for the Applicant
Respondent	Mr A.W. Buchan of Counsel appeared for the Respondents

Reasons for Decision

1 There are two applications where the Commission is asked to determine whether it has jurisdiction to hear the substantive matters therein.

2 Application No. C168 of 2003 arises from a notification pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) relating to a dispute between Personnel Contracting Pty Ltd t/as Tricord Personnel (Tricord) over the alleged dismissal of a member of the Construction, Forestry, Mining and Energy Union of Workers Western Australian Branch (CFMEUW), Mr Kevin Bartley, from employment at the Market Rise Project in West Perth.

3 At a conference conducted between the parties pursuant to s.44 of the Act an issue arose whether the Commission had jurisdiction to deal with the matter. This resulted in a Memorandum of Matters for Hearing and Determination under s.44 being made.

4 The schedule of that memorandum notes that the CFMEUW seeks a declaration that its member, Kevin Bartley, is an employee of Tricord or alternatively an employee of Hanssen Project Management Pty Ltd who is described in the memorandum as the second respondent. The schedule requires that if the Commission does make the declaration sought, that it makes a further declaration that the termination of Mr Bartley on 30th June 2003 was an industrial matter within the meaning of s.7 of the Act, hence this proceeding.

5 Application No. 1036 of 2003 has an entirely different genesis. It arises from the service on Tricord by the CFMEUW of an intention to initiate of bargaining for an industrial agreement under s.42 of the Act. In May 2003 the CFMEUW advised Tricord in writing of its intention to seek an industrial agreement to be registered pursuant to s.41 of the Act to operate on building and construction projects throughout Western Australia where work is being performed by persons who are members of or eligible to be members of the CFMEUW. Attached to the letter of initiation was a draft agreement.

6 On 4th July 2003 the CFMEUW filed an application for an enterprise order under s.42H of the Act. This application appeared to be an error because it left out the necessary step of applying for a declaration under s.42I of the Act. An amended Notice of Application was accepted by the Commission but it became clear that Tricord had a jurisdictional objection to the making of any declaration under s.42I of the Act and by consent between the parties it was agreed that both matters would be listed to have the jurisdictional issue determined as a preliminary matter. This took place on 12th September 2003.

7 It would be useful for the construct of these Reasons for Decision if the Commission recites the evidence of the witnesses Bartley and Fowler first.

8 Mr Bartley is the subject of application No. CR168 of 2003. The substance of his evidence is that approximately two years ago Mr Bartley had made contact with Mr Peter Wieske of Tricord. This occurred after Mr Bartley had rung Tricord and supplied them with some details following which he had an interview. During the interview Mr Wieske put certain documents to him, checked his name, date of birth, address and his qualifications, then advised him of some hourly rates for his type of work. In a conversation that Mr Bartley described as relaxed he agreed that he may have been told that he was to be a contractor. He was given written details of Tricord and an agreement to contract, which he signed. Mr Bartley could not remember any of the details of that contract.

9 Two years later Mr Bartley saw an advertisement for a form worker in the newspaper and he rang the telephone number given. He did not realise at the time that the number was that of Tricord, he came to that realisation later on. He received a return phone call and was told to go to a site and see a site foreman. It was there he had a discussion and agreed to work for a flat rate of $22.00 per hour. He was not asked to sign any contract at that stage apparently because in 2001 he had signed the contract referred to above. He was put to work first on steel fixing and later when that work ran out he was promised work as a form worker. In due course he performed form work duties.

10 Evidence was given by Mr Bartley that he worked eight hours a day, from 7:00am to 3:30pm. While he was working as a steel fixer he was paid $22.00 per hour. The arrangement if he was sick was that he would ring Mr Wieske from Tricord. He knew that to be the case because it was written down for him in Tricord's Rules and Regulations. He took the same break that every other person took on the site for smoko. He was not able to employ anyone else to do his work or to give orders to anyone on the site, that was in the prerogative of the leading hand of the Project Manager whom he would go and see when he had finished work. Duty times were recorded on a bundy clock. At the end of each week he would extract the total hours from the bundy card and fax them to Tricord. Eventually he would receive a direct deposit into his bank account from Tricord. He was not able to work on any other job, he was fully employed by Tricord. He had completed taxation forms in 2001 and they went onto his file held by Tricord.

11 Mr Bartley supplied his own hand tools such as a claw hammer, nail bag, saw, hand saws and chisels. Any electrical tools, power saws, drills and angle grinders were supplied by the builder as were all of the materials for the job.

12 There were arrangements made with the Project Manager where hand tools could be purchased through the Project Manager and reimbursements were made by Mr Bartley for any tools purchased. Mr Bartley had no trade qualifications.

13 In his cross examination by Mr Buchan, of Counsel who appeared for the Respondents, Mr Bartley acknowledged that he received a Personal Contracting Guide (the Guide) from Tricord (Exhibit B1). That document describes Tricord as a personnel contracting agency supplying a flexible and efficient labour force for clients. The contractors supplied to clients were not employed by Tricord but were said to be bona fide self employed independent contractors in their own right. The document details how work is acquired, accepted and requirements for attendance. In this respect Tricord required that if for any reason Mr Bartley was unable to attend it was essential that he make a call and advise the problem. This was to ensure that proper service was given to its client by Tricord. The rules required Mr Bartley to be appropriately dressed for work and that he must supply all relevant work wear which would be neat and tidy.

14 The Guide requires that the hours worked details be supplied by 5:00pm on Monday. Payment would be made by direct debit into a bank. There are details relating to taxation which specify Tricord's responsibilities. The Guide provides if difficulties and problems arise on site, including personality clashes or unsafe working practices, there is to be advice to Tricord immediately so Tricord can 'rectify the problem'. There are arrangements concerning insurance and advice is given that Tricord can provide insurance for public liability and would do so by default if that is not arranged by the 'employee'. There are guidelines concerning discrimination and equal opportunity.

15 Further in the cross examination Mr Bartley identified a medical certificate supplied to him and a tax declaration which describes the basis of payment as labour hire.

16 Mr Bartley attested that he had signed an agreement to contract (Exhibit B4). That agreement purports to acknowledge there is no relationship of employer/employee with Tricord, that there is no guarantee of work that Mr Bartley is self employed and not bound to accept any work. The agreement provides that Mr Bartley agrees to work for a flat fee, and that Tricord has no responsibility or liability except that he is guaranteed to be paid the agreed hourly rate. There are provisions that there will be no claims against Tricord for holiday pay, sick leave or any similar payment including no claims for loss of tools.

17 Mr Bartley also confirmed the contractor payment remittances (Exhibit B7).

18 The Commission also heard evidence from Mr Craig Fowler who is the subject of Application No. 1036 of 2003. It is not necessary to summarise his evidence in full because it is very similar to that of Mr Bartley, but in short he told the Commission

that he was normally employed in the building industry as a form work carpenter and was currently working on a Hanssen Project managed property at 78 Terrace Road. He also works as a scaffolder and in traffic control. His work was subject to control by the supervisors of the building company. He had similar arrangements to Mr Bartley with Tricord. He made an agreement on 12th June 2003 with Tricord (Exhibit A1). The recitals to the agreement describe the Tricord business as providing work force management services to its clients. It defines the person with whom Tricord makes agreement, in this case Mr Fowler, as a contractor or a self employed individual who operates on independent business providing labour services. The engagement clause provides that the contractor not provide services to any other person or entity during the engagement. It sets out the duties of the contractor, Tricord's obligations to use reasonable endeavours to refer appropriate work, provides for the fees to be paid based on a flat hourly rate as agreed between Tricord and their client. It contains a restrictive covenant for work during the currency of the agreement with any other person or entity which is a competitive business with that carried on by Tricord. It provides the right for discretion and describes the relationship of principal and contractor. Finally it provides an indemnity to Tricord.

19 Mr Fowler said that the document was presented to him by Mr Wieske who basically made a brief explanation of each part. He signed the document because he believed he would not get a job if he did not. There was some discussions about pay increases with site supervisors. Mr Fowler understood the situation to be that pay issues could only be negotiated in that way. He acknowledged that Mr Wieske said to him that he was an independent contractor and that he did not reject that notion. He gave similar evidence to Mr Bartley about the compliance with the site rules for times of work.

20 Mr Bartley gave evidence that he was given a fluorescent vest for safety purposes and that it contained Tricord Personnel lettering on it. He also had a t-shirt with a similar identification of Tricord. He supplied his own hand tools for the job but major tools were provided by the contractor. He supplied his own safety boots and hard hat, materials were supplied by the builder. He had a time card where times were printed from a time clock and provided to Tricord on Mondays. After assessment by Tricord he was paid by electronic transfer. On one occasion when he had the flu and wanted the day off he rang Mr Wieske and left a message that he was unfit. He did not raise his sickness with the site supervision. In cross examination he admitted that when he was sick and rang Mr Wieske he was directed to call the site representative in future.

21 Mr Peter Wieske gave evidence on behalf of Tricord. He said he was a Director of Tricord and had been with the company for two years. Its purpose is to supply personnel and it is his function to get clients who look for certain types of contractors with particular skills. Those people are found and placed. Tricord is not registered under the Employment Agents Act. Mr Wieske described the process by which so called contractors are engaged. There is a telephone interview this is followed by another interview in which the Guide is presented. The Guide gives extensive detail on how Tricord conducts its operations. The documentation is left with the contractor to read. Then there is a further explanation of the Guide and the independent contractor agreement to make sure that everything is understood. Tricord also talked to the putative contractors about their medical history, the occupational, health and safety training and whether they are members of the union. Bank account and superannuation details are collected as is a completed tax declaration.

22 Mr Wieske gave evidence how contacts were made with both the witnesses in this case, they need not be summarised in any further detail for the purpose of these Reasons. Mr Wieske said that each contractor is engaged as an individual and taxed in accordance with Australian Taxation Office (ATO) rulings which were presented to the Commission (Exhibit B10, B11, B12). Under the existing superannuation legislation and because the agreements are made with individual contractors predominantly supplying labour and not an entity which is a company, Tricord is required to pay superannuation. Under the extended definition of worker under Western Australian compensation legislation Tricord also has responsibility in respect to compensation. There are also arrangements made concerning public liability (Exhibit B13).

23 Mr Wieske gave evidence of his version of events when Mr Bartley was engaged as a contractor. Mr Wieske said that he carefully explained all of the details. There was no need to complete a number of the forms because Mr Bartley had signed on two years previously. Mr Wieske said that on 30th June 2003 there was a phone call from the site saying there was no more work for Mr Bartley and he in due course advised him. He asked whether Mr Bartley wished Tricord to look for further work. Mr Bartley declined telling Mr Wieske he already had alternate employment. He had not heard from Mr Bartley since nor has Mr Bartley ever made claim against Tricord for denied contractual benefits.

24 Tricord says the Commission has no jurisdiction to deal with either of these matters because both Mr Bartley and Mr Fowler were not employees of Tricord who merely acted as an intermediary between them and the particular builder with whom they were sent to work.

25 It is trite to say that whether either of the men were employees of Tricord depends on two things. First whether the general law says that either of them were Tricord's employee and second, whether a particular piece of legislation says for a particular purpose for instance workers compensation or occupational health or safety that the men are to be treated as an employee whatever the common law says. The issues are well set out in the law for example authorities such as *Stevens v Brodribb Sawmilling Company Proprietary Limited (1986)* 160 CLR 16; *Barry John Hollis v Vabu t/a Crisis Courier (2001)* HCA 44, *Franchita v Wave Master International Pty Ltd (1999)* 79 WAIG 1886 and in particular in relation to the issues to be decided here *Building Workers Industrial Union of Australia and Others v Odco Pty Ltd* Federal Court of Australia 99 ALR 735 and *Roger Borg v Troubleshooters Available Pty Ltd (1995)* 75 WAIG 2852. I will deal with these last two authorities in more detail later, in essence they apply the ratio that has been established in the cases previously cited.

26 The common thread of all of these cases is that the common law does not have a clear and unequivocal definition of an employee, instead the courts look at the whole of the relationship. The main distinction is whether each of the men who are named in these applications serves Tricord in Tricord's business in which case they would be an employee or whether each of them carries on a trade of business of his own in which case they would each be an independent contractor.

27 In the authorities cited above the courts have established a series of indicia, the weighing of which allows a final judgement to be made about whether the overall relationship is one of employer/employee. I will deal with a number of the indicia hereunder by applying the facts of the case as they have been disclosed by the evidence summarised above. The order in which I deal with them does not indicate a particular emphasis on the weighing process although it is relevant to note that the question of control has been regarded in some authorities as a particularly important matter to consider.

- *What degree of control had both of men over the work. If Tricord can direct them about specific significant aspects of how the men go about the work that supports that they were an employee.*

  A source document which indicates a modicum of control by Tricord over the men's activities is set out in Exhibit B1 Personnel Contracting Guide (the Guide). That Guide is said to be constructed to set out the parties obligations to each other and the obligation of Tricord to its clients. The document seeks to establish that the men are not employed by Tricord but are self employed. It sets out various requirements about benefits. It requires compliance with some guidelines about acquiring work such as keeping Tricord informed about their availability and attendance. The men were

each required to promptly notify Tricord if they were unavailable for work. They were to supply a personal tool kit and clothing and equipment. They were told that the working week is from Sunday to Saturday and details of their pay must be provided by 5:00pm on Monday night. These were the minimum hire arrangements as specified. The putative contractor was required to advise Tricord of any difficulties or problems experienced on site ranging from personality clashes and unsafe work practices. The putative contractors were required to telephone Tricord immediately with the promise that everything would be done to rectify the problem quickly. There are provisions relating to Union representatives.

Each of the men involved in these applications received a letter from Tricord setting out its mission statement for occupational health and safety and emphasis was given to some issues which required them to wear the appropriate safety equipment and to wear personal protective equipment. Safety equipment was available at wholesale prices. Every so called contractor had to have completed an occupational health and safety induction course relevant to the industry and they were advised that Tricord had zero tolerance drug and alcohol policy. The putative contractors were encouraged to report perceived safety hazards and incidents to their site supervisor and to Tricord without delay.

There are no provisions in any of the documentation exchanged between the parties which vested the ability in Tricord to control the worker at the work place. The hours of work were those set by the client of Tricord and could not be changed by the putative contractor. All allocation of work and anything relating to the conduct of the job was under the direct and complete supervision of Tricord's client.

- *The degree to which the putative contractor is integrated into or treated as part of Tricord's enterprise for example whether he wears a uniform and represents the enterprise to the public.*

  The Commission received evidence from Mr Fowler that he was issued with a coloured safety vest with markings identifying Tricord and that he wore a t-shirt at work with Tricord's logo and writing on it. This was offered as evidence that he wore a uniform. The competing evidence from Mr Wieske is that the vest was worn for safety reasons not for advertising reasons. There was no compulsion from Tricord for Mr Fowler to wear a company t-shirt. A t-shirt was issued to him at his request in fact when he asked for a number of t-shirts they were refused. The evidence of Mr Wieske concerning the provision of t-shirts marked with company identification and logo is accepted. There is no evidence before the Commission, at least credible evidence, that either of the men were required to wear any apparel which would identify them as being employed by Tricord.

- *Whether the putative contractors made a significant capital contribution to the enterprise for instance the provision of capital equipment. If a putative employer brings his ordinary tools of trade it is not likely to be a significant factor.*

  The evidence is that both of the men supplied tools of trade relevant to the type of work on which they were engaged. Any electrical tools or specialist tools were provided by the builder on site. That the builder on site allowed the men to purchase their personal tools at cost through the builder's resources does not give any weight to the proposition that the men supplied anything other than personal tools. Neither did either of the men supply any building materials or apparatus to assist in the building process.

- *How Tricord pays the putative contractor, for example by results or on an hourly basis. If the putative contractor is paid by results this might support the contention that he was an independent contractor.*

  In this case the two men were paid on a time sheet they presented by 5:00pm Monday of each week. The time sheet was extracted from an electronic record and detailed the hours of work they performed during each week. The payment was on an hourly basis at a flat rate which was an all in payment including sick leave, long service leave and the like. Tricord paid directly to each of the men's bank accounts. Tricord was reimbursed by its client at the rate agreed between them which was a different hourly rate to the rate paid by Tricord to each of the men. Neither of the men submitted any quotes or charges of particular services. The rate was specified by the building contractor and remained the same unless the building contractor agreed with either of the men that an increase be paid. When this happened Tricord was advised that there had been an increase.

  The regime of payment was an hourly rate and not a lump sum from which an inference in favour of a contract for services can be drawn. But against that inference the payment did not include overtime or allowances. There was no expectation by either Mr Bartley or Mr Fowler that they would be paid for annual leave or sick leave. Both of them accepted payments with a deduction of 20% of the tax rate and did not pay PAYE income tax. The 20% deduction arrangement does not of itself convert an employee into a sub contractor, but there is evidence that the deduction of that amount of tax is relatively common in the industry. Neither of the men queried the deduction of that amount of tax at the time. There was a deduction of pay made for accident insurance which may be inconsistent with an employment relationship but this was not queried by either of the men. There was no obligation on Tricord to find either of the men work once the job on which they were working ceased. In fact in an offer which was made to Mr Fowler but declined because he found other work.

- *Whether the putative contractor has an obligation to work – if Tricord has a right to dictate hours of work and the putative contractor cannot refuse a task this supports the relationship being employer/employee.*

  The hours of work were not set by Tricord they were set by the builder. The men were both required to attend at the site for the hours specified by the builder during the times specified. They took breaks on the site at exactly the same time as any other worker and Tricord had no influence whatsoever over the hours of work. This points to lack of control by Tricord in this respect and an acceptance by the men, in reaching the arrangement they did with Tricord to find them work, that they would work what ever hours they were allocated on the site where the work was taking place. Each of the men could refuse work by merely informing Tricord that they were not available. For instance if they were sick they could ring in and say they were not available. They could also become unavailable for other reasons without necessity to specify those reasons. They merely needed to ring Tricord to advise of their availability.

- *Provision of leave, superannuation and other entitlements. These entitlements usually apply to employee and not an independent contractor.*

  There was no entitlement under the arrangements made between both the men and Tricord for payment of any leave whatsoever.

- *Place of work –that the putative contractor works at his own premises might support him being classified as an independent contractor.*

  It was inherent in the arrangement between Tricord and both of the men that they would work where ever they were sent subject only to them agreeing to accept the assignment. There was no ability for either man to specify he would work at a particular premise or in fact his own premises. In some circumstances this would indicate that the men might not be classified as independent contractors.

- *Whether there was the right of delegation of work to others.*

  There was a specific provision in the agreement between the parties that there was no power to delegate work to another person. The men could not subcontract any work. They were required to make all arrangements for the conduct of the work through the site supervisor. There is no indication at all that either of the men had the right to delegate or sublet.

- *Whether income taxes were deducted.*

  In this case tax was deducted. The Respondent gave detailed evidence about the authority it says that it has to deduct the taxes arising from the ATO PAYG Bulletin No. 3 which gives instructions from the Tax Office regarding pay as you go, withholding tax to labour hire firms. Tricord says that it has written to the Variations Unit of the ATO (Exhibit B10). In that letter Tricord identifies itself as a labour hire company which contracts with individual workers to provide labour for clients and requested a group variation for the 2003-2004 financial year. It is noted that under the ATO standard hire provisions Tricord is required to withhold PAYG tax from contractors in accordance with the ATO scheduled rate as specified in the tax tables. It indicates that Tricord predominantly provides contractors to the building and construction industry and by deducting tax at the scheduled rates workers would be disadvantaged by having significantly more tax withheld, Tricord therefore sought a group variation of 20% flat.

  The Deputy Commissioner of Taxation's letter dated 30th June 2003 issued a notice of variation of income tax withholding rate and allowed Tricord a group variation to 20%. It is on the basis of these tax arrangements that Tricord says that even though it deducted tax it was upon a type of arrangement which is recognised by the ATO which allows withholding payments to be paid for contractors, not employees.

- *Whether the putative contractor provides a similar service to the general public for instance does he advertise or put in public tenders.*

  There is no evidence at all that either of the men did any work for any person by way of tender or by offering services. Nor did they, or could they, sublet any work. There is no evidence that the men provided services to the general public.

- *Whether the men were providing skilled labour or labour that required special qualification.*

  It is clear that both men did provide skilled labour although they had no formal qualifications. Both of them could do form work and a variety of other work in the building industry. The provision of these skills may weakly support the contention that the men were independent contractors.

- *Whether there is scope for the men to bargain for remuneration. If there is no scope that supports the contention that both of them were employees.*

  The men could not bargain with Tricord but they could raise the issue of pay with the site supervision and could do deals with the site supervision about the amount of pay. If there was an increase then Tricord would pay the increase. The method of remuneration does not strongly indicate either way whether both these men were employees or contractors.

28 The Commission is required to weigh the relevant factors and make a judgement about the overall relationship, that is, whether it was one of employer/employee or one of independent contract that is a contract for services. Before I do so I need to place on record the findings of the Full Court of Australia in the *Odco* Case (*ibid)*. It is the contention of Mr Buchan of Counsel that the *Troubleshooters* model which is described in *Odco* applies here and for that reason the Commission ought to find that there is no jurisdiction in both applications.

29 The Full Bench of the Federal Court summarised the essential facts which had been discovered at first instance by Woodward J. The summary is as follows—

> *"The essential facts found by Woodward J can be summarised comparatively shortly. However, it will be necessary later to refer to some of the detail contained in the comprehensive findings made by the learned trial judge.*
>
> *The workers, to use a neutral term, whom Troubleshooters makes available to its builder clients are first screened at interviews conducted by Troubleshooters in which inquiry is made of their reasons for wanting to be self-employed, whether they have been self-employed before, whether they are members of a relevant union and of the Building Unions Superannuation Scheme (BUSS), and whether they have Construction Industry Long Service Leave registration (LSL). If satisfactory answers are given to these and other questions, a worker is invited to sign a contract in the following form—*
>
> *"AGREEMENT TO CONTRACT*
>
> *"CONDITIONS OF CONTRACT*
>
> *"Hereunder let Troubleshooters Available be read as—*
>
> *"TROUBLESHOOTERS AVAILABLE AND/OR ASSOCIATED CLIENTS.*
>
> *"(1) I (the undersigned) acknowledge and agree that there is no relationship of employer-employee with TROUBLESHOOTERS AVAILABLE and that TROUBLESHOOTERS AVAILABLE does not guarantee me any work. I (the undersigned) am self-employed and, as such, I am not bound to accept any work through TROUBLESHOOTERS AVAILAVBLE.*
>
> *"(2) I (the undersigned) hereby agree to work for…per hour for actual on-site hours or job price to be agreed.*
>
> *"(3) I (the undersigned) hereby acknowledge and agree that TROUBLESHOOTERS AVAILABLE does not cover me in respect of Workcare, the onus of responsibility and liability in respect of insurance is mine only. Further, I have no claim on TROUBLESHOOTERS AVAILABLE in respect of Workcare.*
>
> *"(4) I (the undersigned) expressly forbid TROUBLSHOOTERS AVAILABLE to make deductions in respect of PAYE taxation.*
>
> *"(5) I (the undersigned) hereby agree that I have no claims on TROUBLSHOOTERS AVAILABLE IN RESPECT OF HOLIDYA PAY, LONG SERVICE LEAVE, SICK PAY OR ANY SIMILAR PAYMENT.*
>
> *"(6) I (the undersigned) hereby agree that TROUBLSHOOTERS AVAILABLE has no responsibility or liability to me except that I am guaranteed to be paid agreed hourly rate for actual on-site hours or agreed job price for work done.*
>
> *"(7) It is agreed that I (the undersigned) must carry out all work that I agree to do through the agency of TROUBLSHOOTERS AVAILABLE in a workmanlike manner and TROUBLSHOOTERS AVAILABLE is hereby guaranteed against faulty workmanship. All work must be made good. Further, I agree to cover the work (where necessary), for public liability, accident insurance, long service leave, holiday pay, sick pay and superannuation, and have no claims on TROUBLSHOOTERS AVAILABLE in respect of the above.*
>
> *"(8) I (the undersigned) agree that I must be a financial member of the trade union covering my trade.*

"(9) I (the undersigned) hereby agree to supply my own plant and equipment, safety gear, boots, gloves or any necessary ancillary equipment required and that I (the undersigned) have no claim on TROUBLSHOOTERS AVAILABLE in respect of the above.

"Signed…

"Witnessed…

"Dated…"

In addition to signing that form of contract, the worker is required to sign a form authorising deductions under the Prescribed Payments Scheme (PPS) administered by the Taxation Office, and an application for BUSS membership if that is not already held. The worker is told to obtain "worker's" or employee's LSL and to state to the Construction Industry Long Service Leave Board when applying for it that he is unemployed.

Upon signing the form of contract and complying with Troubleshooters' other requirements, the worker is placed "on the books" of Troubleshooters. The result is to make him eligible to be offered work, from time to time, on some particular site for some particular builder-client of Troubleshooters.

Troubleshooters' relations with its clients are defined by general and special conditions of hire which Woodward J found to be imported into the contracts between Troubleshooters and its clients…

The learned trial judge found that Troubleshooters paid BUSS and Workcare contributions in respect of each worker to whom it allocated work for the period during which that work was performed. His Honour's findings on those matters were—

"The next point made is that, contrary to the wording of the document, Troubleshooters pays for both Workcare and BUSS. I do not see any significance in this. Workcare has been paid under protest at least until the recent decision of the Full Court of the Victorian Supreme Court in Odco Pty Ltd v Accident Compensation Commission (16 June 1989, unreported) dealt with in section 8, below. In the case of BUSS, an artificial 'availability' payment, equalling the required BUSS payment, is credited each week to each worker, and the BUSS payment is then deducted and paid on the worker's behalf. It is true that this looks like a direct payment of BUSS moneys by Troubleshooters, but the worker has to pay tax on the availability allowance and, to this extent, has a hand in the payments. The arrangement is explained to him when he signs with Troubleshooters, though not all workers who gave evidence seemed to understand the position fully."

His Honour also found that the rates of pay offered to its workers were adjusted unilaterally each year by Troubleshooters without consultation with the workers who were nevertheless advised of each adjustment shortly before or immediately after it occurred. He noted as well that the written contract between Troubleshooters and its workers set out above did not include the whole of the terms of engagement because it contained no reference to the wet weather allowance, the six hours minimum payment or overtime provisions."

30 I summarise the essential facts in the *Odco* Case as follows. Troubleshooters Available screens potential workers. During the screening inquiry is made into the reason for wanting to be self employed, whether they have been self employed before, whether they are members of a relevant union and whether they are aware of other matters relating to the building industry in Victoria. If satisfactory answers are given the workers are invited to form a contract (see citation above). That contract is an acknowledgement and an agreement that there was no relationship of employer/employee with Troubleshooters Available. There is agreement regarding an hourly rate; an acknowledgement that there is no liability for workers compensation; there is prohibition upon Troubleshooters making deductions in respect of PAYE taxation. There is an agreement that the worker has no claim in respect of holiday pay, long service leave, sick pay or any other similar payment. The worker has to supply his own safety gear and tools and there is an authorisation of deductions upon a prescribed payment scheme administered by the ATO. When the agreement is signed the worker is then eligible to be offered work from time to time on a particular site for a client of Troubleshooters Available.

31 From the evidence of the ingredients of the work relationship I have described above, in determining whether Mr Bartley and Mr Fowler were employees or not it is clear that there are many similarities to the Troubleshooters Available regime. Both of the men received a screening interview, they were invited to sign a contract (see Exhibit K1), that contract acknowledges that there is no relationship of employer/employee. The similarity continues in that there is an agreement that deductions would be made for prescribed payments. That there is no holiday pay, long service leave or similar payment and that the employee supply their own safety gear and tools. Upon accepting that deductions will be made for public liability insurance and workers compensation the employees were then put on the books.

32 The differences seem to be here that there is a requirement for workers compensation but this arises from particular legislation in Western Australia and therefore does not detract from the comparison with the Troubleshooters Available regime. There is public liability insurance which does not seem to be part of the Troubleshooters Available regime. Apart from those differences the regimes are similar.

33 Upon review of the evidentiary summaries under each of the heads of analysis of the employer/employee relationship set out above in paragraph 35 it is obvious that Tricord has no control over the work provided by each of these men. It has influence upon the contractual relationship through workers compensation and from insurance deduction. It also seems to have a heightened influence over the necessity for the putative contractors to advise Tricord about their availability or not. Whether this creates a difference with *Troubleshooters Available* Case cannot be destilled from the *Odco* Case. On my reading of Odco the question of availability does not seem to be mentioned.

34 I conclude that the indicia that favour that Mr Bartley and Mr Fowler are employees of Tricord are weak. The question remains as to what is their status?

35 This is dilemma that came into focus in the *Odco* Case and was subject to the detail analysis by the learned judges who concluded that in a particular set of circumstances described with Troubleshooters Available that the persons associated with Troubleshooters Available under regime described in the *Odco* Case were not employees. The High Court in *Hollis v Vabu (ibid)* found that the couriers involved in that case were not independent contractors. In my view the strong distinguishing point between *Vabu* and these applications is that the bicycle couriers worked for the one employer, their contract was substantially different to that which has been made between Mr Bartley and Mr Fowler and Tricord. I am, on consideration of all of the issues, drawn to the conclusion that the two men who are the subject of these proceedings are not party to a contract of service with Tricord, the relationship is more likely than not a contract for services. I now need to consider whether the amendment to the Act in the Labour Relations Reform Bill of 2002 has changed the situation so that the status of the two men as I have found in this case as employees is overcome legislatively.

36 The definition in s.7 of the Act of employer is as follows—

> **"employer"** includes —
>
> (a) persons, firms, companies and corporations; and
>
> (b) the Crown and any Minister of the Crown, or any public authority,
>
> employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person;
>
> [emphasis added]

37 On the introduction of the Act the Minister described the intent of the amendment in the following terms—

> The definition of what constitutes an "employer" for the purposes of the Industrial Relations Act is integral to the jurisdiction of the commission. There has been a growing concern that the labour hire industry has not been adequately regulated by awards, and by the industrial relations system in general. To ensure that the commission has the power it properly requires, the Bill makes it explicit that an employer also includes labour hire and group training organisations.
>
> [Hansard of WA Parliament Tuesday, 9th February 2002 p.7521]

38 It is clear from the Minister's speech that it was thought by the Legislature that there were difficulties that had to be overcome due to the growth of the labour hire industry. The intent was to ensure that it was explicit in the legislation that an employer also includes labour hire and training organisations.

39 Tricord in these cases identifies itself as a labour hire agency in its letters to the ATO (see Exhibit B10). Prima facie that would bring into operation the definition so that it might be identified as an employer. However the definition makes clear that the labour hire agency or group training organisation that arranges for an employer to do work for another person is only an employer when it is party to a contract of service with the person for whom it arranges the work. This is the clear intention of the words which appear in the bracket in the definition above and to which I have added emphasis.

40 Therefore it seems clear that for a labour hire agency group such as Tricord to be classified as an employer under the Act it has to be in a relationship of a contract of service with a person and in this case the contract of service would have to be with both Mr Bartley and Mr Fowler.

41 However I have found that on applying the *Odco* definition in the same way as it was applied by Senior Commissioner Beech in *Borg v Troubleshooters Available Pty Ltd (1995)* 75 WAIG 2852, that Mr Bartley and Mr Fowler were not in the relationship with Tricord which can be described as a contract of service and that on balance they were in a relationship of contract for services. The expanded definition in the Act resulting from the Labour Relations Reform Act 2002 does not and cannot operate where a contract for services exists.

42 Nor could that be the case given the intent of the Act to regulate the relationship between employers and employees.

43 I summarise the situation as follows.

44 The Commission has found that in each of the cases under review neither Mr Bartley nor Mr Fowler were in a relationship with Tricord of employer/employee. They were subject to a relationship which could best be described as a contract for services and that being the case the Commission has no jurisdiction to hear and determine the matters and both of the applications will be dismissed.

45 Finally I note for completeness that no substantive evidence or submissions were received relating to Hanssen Pty Ltd the second respondent to Application No. 1036 of 2003. Hence no findings or conclusions concerning the second respondent appear in these Reasons.

2003 WAIRC 09789

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	PERSONNEL CONTRACTING PTY LTD T/A TRICORD PERSONNEL, HANSSEN PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 23 OCTOBER 2003
FILE NOS	CR 168 OF 2003, APPLICATION 1036 OF 2003
CITATION NO.	2003 WAIRC 09789

Result Dismissed for want of jurisdiction

Order

HAVING heard Ms K. Scoble (of Counsel) who appeared on behalf of the Applicant and Mr A. Buchan (of Counsel) who appeared on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the applications be, and are hereby dismissed for want of jurisdiction.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09612

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ARRIX INTEGRATED, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY 10 OCTOBER 2003
FILE NO.	CR 129 OF 2002
CITATION NO.	2003 WAIRC 09612

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement
Representation	
Applicant	Ms S Northcott
Respondent	Mr P Watson (as agent)

Reasons for Decision

1 Teresa Hamblin, Wendy Anne Dixon, Vera Nedeljkovic, Eleanore Williams, Janet James, Patricia Kaye Fox and Elizabeth Mary Buckingham were employed by Arrix Integrated ("the respondent") until 30 June 2002. As result of these employees being terminated on that date, the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch ("the applicant") commenced proceedings under s.44 of the *Industrial Relations Act 1979* ("the Act") alleging that each employee had been terminated in a harsh, unfair and oppressive manner. Conciliation proceedings did not resolve the claim and the matters were referred for arbitration under s.44(9) of the Act. The respondent denies that it harshly, oppressively and unfairly dismissed the seven employees.

2 The schedule of matters for hearing and determination (as amended at hearing) is as follows—

"…

1. The applicant claims that the following members were made redundant on 29 June 2002 and the length of service of each member is as follows—

Name	Length of Service
Teresa Hamblin	6 years 2 months
Wendy Anne Dixon	6 years 2 months
Vera Nedeljkovic	6 years 2 months
Eleanore Williams	6 years 1 month
Janet James	6 years 2 weeks
Patricia Kaye Fox	6 years 2 weeks
Elizabeth Mary Buckingham	6 years 2 months

2. The Applicant Union claims that its members were dismissed in a harsh, unfair and oppressive manner within the meaning of the *Industrial Relations Act 1979* on 30 June 2002. The Applicant seeks orders for compensation in lieu of re-instatement.

3. The Respondent opposes the claim for re-instatement or compensation in lieu of re-instatement. The Respondent claims it dismissed the Applicant's members because of a loss of contract on 30 June 2002. Further the Respondent claims that adequate alternative employment was found for all employees seeking employment."

Background

3 The length of service of the employees identified in the schedule was not in issue. It was also not in issue that all employees, except Ms Buckingham, commenced employment with OCS Quirk Pty Ltd ("Quirks") on or about 1 July 2002 and each employee was paid the same rate of pay and allocated similar shifts as in their previous employment with the respondent. It was also not in issue that the respondent had been unsuccessful in retaining the cleaning contract at the Maddington Metro Shopping Centre ("the Centre") as at 30 June 2002 and that all employees, except for Ms Buckingham, did not receive payment in lieu of notice. On termination all employees were paid outstanding annual leave entitlements owing to them. It was also not an issue that each employee employed by Quirks lost all sick leave and long service leave entitlements which had accrued whilst working with the respondent when they were terminated on 30 June 2002.

Applicant's Evidence

4 Ms Fox is currently employed by Quirks at the Centre. Ms Fox stated that she heard rumours that the respondent may lose its contract at the Centre and then approximately two weeks before 30 June 2002 she read a memo on the respondent's noticeboard at the Centre confirming that the respondent no longer had the contract. The contents of this memo are as follows, formal parts omitted.

"To All Staff
It is with great regret, that we must
inform you all that our tender with
Centro Properties/Maddington
Metro, has been unsuccessful.
Therefore, the

last day of service
with
Arrix Integrated
shall be the
29th of June 2002.
Each individual employee, shall be
spoken to by Arrix Management,
with the view to be relocated.
I wish to extend my sincere thanks
to you all for your commitment to
ARRIX and the Centre.

Terry Mathers
OPERATIONS MANAGER"

(Exhibit A1)

Ms Fox stated that notwithstanding the contents of this memo she did not have any discussions with the respondent about her termination, nor was Ms Fox given written notification that she would be terminated on 30 June 2002.

5 In the two weeks prior to 30 June 2002 the respondent's employees had the option of applying for a position with Quirks and as Ms Fox was already employed by Quirks on a part-time basis Quirks did not require her to fill out an application form. Ms Fox stated that the period just prior to 30 June 2002 was a stressful time for her as it was unclear whether or not Quirks would employ her for the same hours that she worked for the respondent in addition to her existing hours.

6 Under cross examination Ms Fox stated that she was unsure whether she would be working with Quirks until a couple of days before the end of June 2002. She stated that she only knew she had obtained employment with Quirks on 27 June 2002 when she arrived at work and found that a Quirks uniform had been allocated to her. She agreed that she had discussions with the respondent's supervisor at the Centre, Mr Lex Stowell prior to being terminated and that during these discussions he confirmed that the respondent had lost the Centre contract.

7 Ms Williams worked for the respondent at the Centre until 30 June 2002. Ms Williams found out about the respondent losing the Centre contract via the contents of a note put on the respondent's staff room noticeboard (Exhibit A1). Prior to this date she was aware of rumours circulating about the respondent losing the Centre contract. She stated that she had no specific discussions with the respondent about her ongoing employment nor did she receive any letter confirming that she was to be terminated. She stated that it was stressful time for her as she relied on being in paid employment. She stated that prior to 30 June 2002 a meeting was held with Quirks representatives and she had to fill out forms to apply for a job with Quirks. Ms Williams stated that she did not receive confirmation of her position with Quirks until her name appeared on a list on the staff noticeboard requesting her shirt size for the uniform that she had to wear, two days before the end of June 2002. Ms Williams stated that in the lead up to her termination she was unaware of the possibility of undertaking ongoing work with the respondent. When Ms Williams commenced employment with Quirks, she was asked to sign a workplace agreement however Quirks later withdrew this requirement. When Ms Williams commenced employment with Quirks she was put on probation and she was worried that she may lose her position during this period. She stated that the process of taking on new employment was stressful for her.

8 Under cross examination Ms Williams confirmed that she was aware that employees in the cleaning industry are normally terminated when a contract finishes. She also reiterated that she could not recall having any discussions with the respondent about her termination or the possibility of undertaking alternative employment.

9 Ms Dixon is 56 years old and commenced employment at the Centre in 1993. When the cleaning contract at the Centre was taken over by the respondent in 1996, she was employed by the respondent until her termination in June 2002. When she was terminated in 1996 she lost all accrued entitlements except for annual leave. She stated that she found out about the respondent losing its contract at the Centre through a notice on the board in the respondent's staff room (Exhibit A1). She stated that no meetings took place about the respondent's loss of contract or about the option of her undertaking alternative employment with the respondent, nor did she receive any correspondence from the respondent in this regard. She was particularly upset by her termination as it was hard to obtain alternative employment given her age. The last time she was terminated her working hours decreased and she was concerned that this may occur again. She confirmed that she had to fill out an application form to work with Quirks. Ms Dixon stated that even though she has been working for over ten years at the Centre she did not accrue an entitlement to long service leave as she had three different employers during this period and she has had to recommence accruing long service leave and sick leave each time the contract changed at the Centre.

10 Under cross-examination Ms Dixon agreed that she had discussions with Mr Stowell in the two weeks before the end of June 2002. Ms Williams was asked if she had been sent a letter by the respondent in relation to future employment options (Exhibit R1). Ms Dixon could not recall receiving any letter from the respondent about her termination and the possibility of ongoing employment with the respondent. She stated that even though she said she may have read something similar to what was in this letter she could not recall receiving the letter.

11 Ms Buckingham gave evidence that she was the only one of the respondent's employees who was not employed by Quirks in July 2002. She stated that she did not wish to retire, nor did she resign from her employment with the respondent. Ms Buckingham did not obtain employment until 8 November 2002 when she was employed by Quirks following an application being lodged in the Commission. Ms Buckingham stated that it was only two weeks before the end of June 2002 that she became aware that the respondent had lost its contract at the Centre. Ms Buckingham recalled seeing a memo on the noticeboard around this time about the contract being lost (Exhibit A1). She stated that just before 30 June 2002 one of the respondent's supervisors rang her when he found out she had not been employed by Quirks. This supervisor told her that he would contact her about alternative employment but did not do so. She was not advised until 27 June 2002 that she was not going to be employed by the new contractor. She stated that she could not recall receiving any correspondence from the respondent about being terminated. Ms Buckingham recalled being paid approximately two weeks' pay in lieu of notice by the respondent some time after she was terminated.

Respondent's evidence

12 Mr Stowell is currently employed by Quirks. He confirmed that he finished working with the respondent on 30 June 2002 and commenced employment with Quirks on 1 July 2002 and that his conditions of employment with both Quirks and the respondent were similar. Prior to commencing employment with Quirks he worked for approximately two and a half to three

years with the respondent, initially as a cleaning co-ordinator at Westrail then as the contract co-ordinator at the Centre supervising cleaning. Whilst employed as the respondent's supervisor he had ongoing dealings with the Centre's operations manager, Mr Phil McDonald. At some stage around the middle of June 2002 Mr McDonald informed Mr Stowell that the respondent was unsuccessful in retaining the contract at the Centre. He stated that even though there had been rumours about the respondent losing the contract it was not until this meeting with Mr McDonald that it was confirmed that the respondent had lost the contract. He stated that he could not remember the exact date when Mr McDonald informed him that the respondent had lost the contract at the Centre.

13 He gave evidence that soon after being advised by Mr McDonald about the loss of the contract and approximately two weeks before 30 June 2002 he saw a memo to all staff pinned up on the noticeboard in the respondent's staff room (Exhibit A1). He confirmed that all of the respondent's employees except Ms Buckingham were employed by Quirks and they all worked essentially under the same roster arrangement and they undertook the same duties that they undertook with the respondent. He stated that he received a letter from the respondent in similar terms to Exhibit R1, but he could not recall when he was sent this letter. He also recalled seeing the attachment to the letter. He was unaware if other employees had received the letter and he could not recall having any discussions with any other employees about the contents of the letter. He recalled having some discussions about possible future employment options with some employees but could not recall when these discussions took place. He confirmed that in his role as supervisor at the Centre he had no power to hire or terminate staff, or to negotiate an employee's terms and conditions of employment.

Submissions

Applicant's submissions

14 The applicant maintains that the employees named in the memorandum were unfairly terminated on 30 June 2002. The applicant argues that these employees were made redundant in a summary fashion with no notice and in an unfair manner. The applicant argues that the memo put up on the staff noticeboard on or about mid June 2002 (Exhibit A1) did not constitute a written notice of termination. The weight of evidence was overwhelming that the respondent's employees did not receive Exhibit R1, a letter dated 12 June 2002, which the respondent claims was sent to employees. Mr Stowell did not have authority to terminate the respondent's employees, and no other representative of the respondent had a discussion with the employees about their termination. The employees were summarily terminated as employees were given no formal notice before they ceased employment with the respondent that they were to be terminated. As no employees were paid a redundancy payment, this contributed to the unfairness of their termination.

15 The applicant argues that the employees identified in the schedule should be compensated for their unfair termination. As s.23A of the Act does not limit compensation to lost wages, even though employees did not have a break in service, except for Ms Buckingham, the Commission should award compensation to each employee in this case.

16 There was no issue about any employees' performance, nor was there formal notification from the respondent that the employees were to be terminated. Further, there was no attempt to relocate employees to alternative employment with the respondent. Even when the respondent became aware that Ms Buckingham was not employed by Quirks no attempts were made to relocate her or to ameliorate the impact of the termination on her. There was no evidence of any discussions that were held with Quirks about transferring entitlements such as sick leave and long service leave across to their new positions. Employees were treated in an unfair manner as, except for Ms Fox, they all had to apply for new jobs and they were initially required to sign a workplace agreement (even though this was later withdrawn as a condition of their employment). Each employee had to commence employment with Quirks on probation and with no accrued sick leave or long service leave entitlements. It was also clear that each employee satisfied the duty to mitigate their loss.

17 The applicant argues that employees were not given reasonable notice that their contracts of employment were to be terminated. When taking into account the indicia outlined in *Antonio Carlo Tarozzi v WA Italian club (Inc.)* [1991] 71 WAIG 2499 the employees should have been given or paid 12 weeks' notice. This amount covers appropriate notice and loss of long service leave accumulation and sick leave entitlements. Further, employees were not given notice in accordance with the minimum requirements as provided under s.170CM of the *Workplace Relations Act 1996.*

18 The applicant argues that there was an onus on the employer to assist in mitigating the loss of each employee however, in the case of Ms Buckingham in particular, the respondent had not satisfied that onus. The applicant argues that the respondent's reliance on Exhibit R1, the letter to employees dated 12 June 2002, should not be taken into account as each employee who gave evidence, except Mr Stowell, denied receiving the letter and the letter's author did not give evidence. The applicant further argues that as the requirements of the *Minimum Conditions of Employment Act 1993* ("the MCE Act") in relation to redundancy were not met, the respondent's employees were treated in a procedurally unfair manner.

Respondent's submissions

19 The respondent argues that the contract cleaning industry runs on a tender basis and it is not uncommon for employees to be terminated once a contract is lost and in cases of this nature employees are not terminated due to a redundancy situation. No employee complained about being worse off when they took up their new positions with Quirks and no loss was suffered by employees in commencing employment with Quirks because each employee was paid the same hourly rate of pay and were working the same, if not similar, hours as when they were employed by the respondent. As employees were advised about their termination as soon as the respondent was aware that it had lost its contract, and as employees were notified immediately that they would be terminated, the respondent had complied with the requirements under the MCE Act. Further, the respondent mitigated any loss or damage to employees as all employees except one were found suitable alternative employment immediately after termination.

20 The respondent relies on the contents of Exhibits A1 and R1, and discussions undertaken with employees prior to 30 June 2002 as confirmation that employees were notified that their contracts of employment were to be terminated. As the employees identified in the schedule of matters for hearing and determination did not suffer any loss of pay between being terminated by the respondent and taking on a new position with the Quirks then no compensation is due to each employee. Further, there was no legal requirement on the employer to come to an arrangement with the new employer about sick leave and long service leave entitlements. On this basis the respondent argued that it was fair in all of the circumstances to terminate the employees in the manner which it did.

Findings and conclusions

Credibility

21 I listened carefully to the evidence given by each witness. In my view each witness gave their evidence honestly and to the best of their recollection. On this basis I accept the evidence given by each witness.

22 I turn now to the principles in relation to these matters and my findings and conclusions.

Were the employees made redundant?

23 Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and Other v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). If a decision is made to make an employee redundant based on the operational requirements of the company that can be a valid reason for the dismissal.

24 In this case I am of the view that the employees were terminated due a redundancy situation. It was not in dispute that the respondent lost the contract at the Centre, effective 30 June 2002, and as a result of this loss of contract the jobs previously undertaken by the respondent's employees no longer existed. I do not accept the respondent's argument that the employees were dismissed due to the ordinary and customary turnover of labour and not due to a redundancy situation. Generally the customary turnover of labour involves an employee having some knowledge and understanding that their employment is of a limited duration, such as a seasonal worker or where termination was a normal feature of an employer's operations. In this instance employees had a reasonable expectation that their employment would be ongoing (each employee had over six years of service with the respondent) or if the respondent lost a specific contract there was some possibility of being redeployed elsewhere in the respondent's operations as confirmed by the contents of Exhibit R1 and Exhibit A1. I have therefore formed the view that when the respondent's employees were terminated on 30 June 2002 as a result of the respondent's loss of the Centre contract this was not a termination due to the ordinary and customary turnover of labour. It is thus my view that the employees named in the schedule were made redundant.

25 Having said that it is appropriate to consider any unfairness in relation to the process used in effecting a redundancy, as well as all of the circumstances surrounding the termination of the employment having regard to s.26 of the Act. The question to be determined by the Commission is whether the legal right of the respondent to dismiss the employees has been exercised harshly or oppressively against the employees so as to amount to an abuse of that right *(Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

26 The provisions of Part 5 of the MCE Act are implied into the employees' contract of employment. A failure to comply with the mandatory requirements under s.41 of the MCE Act is a factor to be taken into account in deciding whether a dismissal is unfair (*Gilmore v Cecil Bros and Ors* (1996) 76 WAIG 4434, per the President at 4445). See also *WA Access Pty Ltd v Vaughan* (2000) 81 WAIG 373 at 378 and cases cited therein).

27 Section 41 of the MCE Act provides

> **"41. Employee to be informed**
>
> (1) Where an employer has decided to —
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are —
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires."

28 Section 43 of the MCE Act provides

> **"43. Paid leave for job interviews, entitlement to** (sic)
>
> (1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.
>
> (2) The 8 hours need not be consecutive.
>
> (3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.
>
> (4) Payment for leave under subsection (1) is to be made in accordance with section 18."

29 Section 41 provides that where an employer has decided to make an employee redundant the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made of the redundancy and discussions are to be held with the employee about the likely effects of the redundancy and measures that may be taken to avoid or minimise its effect. In this case these requirements were not met. I find that as the employees who gave evidence in these proceedings were not consulted in relation to their dismissal their termination was unfair. The evidence was clear that discussions about the effect of the redundancy on each employee did not take place and alternatives to termination were not canvassed with employees once the decision was made by the respondent to make them redundant. It is also clear on the evidence that s.43 of the MCE Act was not complied with as employees were deprived of any ability to avail themselves of paid leave to attend job interviews as employees were given minimal notice of their impending termination. Even though most employees obtained employment with Quirks, Ms Buckingham in particular lost this opportunity.

30 On the weight of evidence I find that all of the employees named in the schedule were terminated without notice. On the evidence given I find that all employees named in the schedule did not receive the letter that the respondent claims to have sent them (Exhibit R1) prior to the respondent's contract expiring at the Centre. If I am wrong in reaching this conclusion, even if the letter was sent to all employees it is dated mid June 2002, which would not have constituted sufficient notice under each employee's contract of employment given that the length of service for all employees was in excess of six years. Further, employees only became aware that their employment with the respondent was possibly in jeopardy approximately two weeks before they were terminated, and only via a memo placed on the respondent's notice board, which also referred to the prospect of ongoing employment with the respondent. In the circumstances, in my view this memo did not constitute notice of termination being given to each employee.

31 The respondent conceded that it did not give any of its employees working at the Centre a redundancy payment when they were terminated. A redundancy payment is intended to provide a payment as compensation for the loss of non-transferable

credits and entitlements which have accrued as a result of length of service, such as sick leave and long service leave, and for inconvenience and hardship imposed by the termination through no fault of the employee (*Termination, Change and Redundancy case* (1984) 8 IR 34 at 62, and 73). As no redundancy payment was made to any of the employees named in the schedule I find that this contributed to the unfairness of each employee's termination.

32 In all of the circumstances even though all of the employees named in the schedule did not give evidence I find that each employee named in the schedule was terminated unfairly.

Compensation

33 I am satisfied on the evidence and given the circumstances of this matter the working relationship between the employees and respondent has broken down such that an order for re-instatement would be impracticable.

34 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.

35 I am satisfied on the evidence that the employees named in the schedule took reasonable steps to mitigate their loss as they all obtained alternative employment, although in Ms Buckingham's case it was not until some months after she was terminated.

36 As I have found on the weight of evidence that the employees named in the schedule were not given notice of their termination which is required under their contract of employment each employee is due at least four weeks' pay in lieu of notice as each employee had at least six years service with the respondent. If an employee was over 45 years old at termination this notice would be five weeks. I also find that each employee should be compensated an amount of $500.00 each for the loss of non-transferable credits such as long service leave and sick leave and for their inability to access the requirements outlined under s.41 and s.43 of the MCE Act prior to termination. In assessing this amount of compensation I also take into account the onus on the respondent as detailed under s23A(7)(a) of the Act. It is clear that the respondent did not undertake any action to mitigate the loss of each employees' non-transferable credits which were lost as a result of the dismissal.

37 As no details were given during the hearing as to each employee's earnings I direct the parties to confer and within seven days of the date of this Decision to lodge a schedule of amounts owing to each employee in light of my Reasons for Decision.

2003 WAIRC 09971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ARRIX INTEGRATED, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 7 NOVEMBER 2003
FILE NO/S.	CR 129 OF 2002
CITATION NO.	2003 WAIRC 09971

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement.

Order

HAVING HEARD Ms S Northcott on behalf of the applicant and Mr P Watson (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby—

1 DECLARES THAT the dismissal of Teresa Hamblin, Wendy Anne Dixon, Vera Nedeljkovic, Eleanor Williams, Janet James, Patricia Kay Fox and Elizabeth Mary Buckingham by the respondent was unfair and that reinstatement is impracticable;

2 ORDERS that the respondent pay employees the following compensation within 7 days of the date of this order—

Teresa Hamblin	$1446.72 gross
Wendy Anne Dixon	$2536.35 gross
Vera Nedeljkovic	$1817.35 gross
Eleanor Williams	$1472.88 gross
Janet James	$2553.50 gross
Patricia Kay Fox	$2215.95 gross
Elizabeth Mary Buckingham	$589.58 gross.

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

[L.S.]

2003 WAIRC 09761

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 21 OCTOBER 2003
FILE NO.	CR 101 OF 2003
CITATION NO.	2003 WAIRC 09761

Result	Memorandum of Matters Referred amended.
Representation	
Applicant	Ms S. Northcott
Respondent	Mr G. Blyth (as agent)

Order

WHEREAS on 19 September 2003 the Commission otherwise constituted issued an amended Memorandum of Matters Referred for Hearing and Determination under s.44(9) of the *Industrial Relations Act 1979*;

AND WHEREAS the respondent has sought clarification of the matters set out in the schedule attached to that amended Memorandum;

AND WHEREAS the Commission heard the parties in Chambers and is satisfied that the schedule attached to the Memorandum of Matters referred for hearing and determination should be amended to clarify the claims made;

NOW THEREFORE, I the undersigned, pursuant to the powers vested in me pursuant to s.27 of the *Industrial Relations Act 1979* hereby order—

THAT the schedule attached to the amended Memorandum of Matters Referred for Hearing and Determination dated 19 September 2003 be amended by deleting the schedule and substituting the schedule attached hereto and signed by me for identification.

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

SCHEDULE

The union claims that its member, Kiernan Neal, has been unfairly treated by the respondent because the respondent has failed to offer work to Mr Neal, and because the respondent has failed to redeploy Mr Neal to a suitable alternative position.

The union further claims Mr Neal's terms and condition of employment should be determined by the Burswood International Resort Casino Employees Award 2002, as amended from time to time.

The union further claims that Mr Neal should be paid compensation for loss of wages when he has been fit to work but has not been offered work by the respondent.

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

FULL BENCH—UNIONS—Application for alteration of rules—

2003 WAIRC 09585

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
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 7 OCTOBER 2003
FILE NO/S.	FBM 7 OF 2003
CITATION NO.	2003 WAIRC 09585

Catchwords	Industrial law (WA) – An application to alter the rules of an organisation – Rule relating to eligibility for membership of the organisation – Application granted – *Industrial Relations Act* 1979 (as amended), s6, s26, s55, s56, s58, s62, s71 – *Industrial Relations Commission Regulations* 1985 (as amended) r98 – *Interpretation Act* 1984, s56
Decision	Application granted
Appearances	
Applicant	Mr R J Walker, Industrial Officer, and with him Mr A E Drewett, Secretary

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 made pursuant to s62(2) of *the Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The applicant is an "organisation", as that term is defined in s7 of *the Act*, which means that it is registered as an organisation under *the Act*.

3 S62(2) of *the Act* 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 s71(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 14 August 2003, and bears the common seal of the applicant organisation and the signature of its secretary, Mr Anthony Edward Drewett.

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) ……..
>
> (b) As Storeman, store officer, general assistant and technical officer by the Western Australian Fire Brigades Board." (my underlining)

6 The application is, therefore, as I am satisfied, an application for authorisation to alter the rules of an organisation that relates to qualifications of persons for membership of it.

7 If the alteration sought is authorised, then the existing exclusion from the membership of the applicant 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.

8 Particulars of the proposed alterations appear also in the notice of the application of 14 August 2003 contained in the Western Australian Industrial Gazette published on 27 August 2003 ((2003) 83 WAIG 3002).

9 Regulations 98(1) and (3) of *the Industrial Relations Commission Regulations* 1985 (as amended) have been complied with by the applicant.

10 Rule 40 is the Amendment of Rules rule of the applicant organisation, and 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."

That is, of course, a mandatory rule.

11 By virtue of s62(4) of *the Act*, s55, s56, s58 and s58(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 s62(2) and referred to by me above.

12 This application for alteration of its rules is an application to which s62(2) applies and therefore, s55, s56 and s58(3) apply.

BACKGROUND ISSUES AND CONCLUSIONS

13 Following the requirements of s55(1) and (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, the material required to be published was published in the Western Australian Industrial Relations Gazette on 27 August 2003 more than 30 days before the date listed for hearing, the same having been listed for hearing on 1 October 2003. (S55(2) and (3) were therefore complied with).

14 The Full Bench is required to refuse an application such as this, unless it is satisfied about a number of matters (see s55 of *the Act*). That requirement is a mandatory requirement (see s56 of the *Interpretation Act* 1984 (as amended)).

S55, S56 and S62(4) Requirements

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

> (c) There is a statutory declaration of the secretary of the applicant, Mr Anthony Edward Drewett, filed herein and declared on 14 August 2003.
>
> (d) There is a number of other documents which are evidence in the matter. (All are Ex 1).

16 On 11 June 2003, the applicant's committee of management authorised the secretary to convene a general meeting for the special purpose of considering the rule change to remove the exclusion in the rules for membership applying to communications officers.

17 In accordance with rule 40, a notice was published in "The West Australian" newspaper on 26 July 2003 advertising the time and date of the general meeting specially called for 13 August 2003, for the purpose of considering the proposed rule changes. Included in the notice is a statement of the reason for the proposed rule changes.

18 In accordance with rule 40 a copy of that notice of the general meeting specially called for the purpose of considering the proposed rule changes was faxed to each workplace on 28 July 2003. A copy of the notice was posted on the noticeboard at the front of the union office which is the practice for all union faxes as it is to place them on all workplace noticeboards.

19 At the general meeting specially called for the purpose of considering the rule changes held on 13 August 2003, a majority of financial members present approved the proposed rule alterations and authorised the secretary to make application to the Commission to amend the rules in accordance with the decision at the meeting. Minutes of the meeting were posted at each workplace and subsequently posted on each workplace noticeboard.

20 At the meeting, one twentieth of the financial members of the union was required to be the quorum. At that time the financial membership was 883 with a quorum of at least 45 members. The quorum requirement was met with 82 members, and it would seem implicit, financial members, attending.

21 I am satisfied and find that the resolution approving the proposed alteration to the rules was passed at a properly convened quorate general meeting specially called for that purpose, and passed by a majority of financial members present and voting, as the rules require.

22 In accordance with rule 40(2) amendment of rules, and s62(3) of *the Act*, a notice publicising the rule change adopted by the general meeting and advising that members could object to the proposed alteration by forwarding a written objection to the Registrar within 14 days was faxed to all workplaces and posted on the noticeboard at the front of the union office. That was on 14 August 2003. On 29 August 2003 a further notice, which this time included the proposed alteration to the rules and the reasons therefore as well as advice to members of their right and ability to object, was sent to members and posted on the noticeboards in the same manner.

23 This was in accordance with union practice.

24 I also accept that Mr Drewett's evidence that the applicant has a process of faxing notices and circulars to all workplaces is what occurs and occurred. I accept that this system exists to ensure that all financial members of any workplace have access to the union's notices and information, and that the long established practice is for the first person receiving a union fax to place the material on the union's noticeboard at that workplace. Copies of the fax notices/circulars are also posted out to each workplace with the minutes of the previous Committee of Management meeting. I am satisfied, as advised, that the process has worked well over a long time and ensures that all financial members are kept informed of any information. Further, each shift coming onto duty checks the noticeboard for updated or new information from the union, as I find.

25 There were no objections to the alterations filed in the Commission.

26 The rules, by rule 40, provide for the alteration of the rules by reasonable notice insofar as it is necessary to find.

27 The rules of the organisation relating to elections for office provide for election by secret ballot and in conformity with s56(1) of *the Act* again, insofar as it is necessary to find.

28 I am therefore satisfied, on the above findings, that reasonable steps have been taken to adequately inform the members of the intention of the organisation to apply for the registration of the proposed alterations to the rules of the organisation, the reasons therefor and to inform them 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.

29 Having regard to the structure of the organisation and all other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection, and I so find.

30 Because none have objected, less than 5% of the membership has certainly objected, there being no objection at all to this application.

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

32 Communications officers will, even if this application is granted, remain eligible to join the CSA. It is fair to observe, that given the history of former membership and the nature of the role of "communications officers" as well as the agreement between the organisations, namely the CSA and the applicant, I was satisfied that, pursuant to s55 of *the Act*, notwithstanding the overlap in membership coverage, there is good reason consistent with the objects prescribed in s6 of *the Act*, to permit registration of the alterations sought; indeed to authorise it.

33 Next, the object in s6(g) of *the Act* is advanced by such an order being made because the rule is being altered to bring it in line with the rules of the federal organisation, namely the United Firefighters Union of Australia. I am satisfied on that evidence and for all of those reasons therefor, that all of the relevant requirements of s55 and s56 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 s55(4)(a) which I will come to in a minute. There is thus no obstacle to the Commission exercising its discretion in favour of the applicant. I am of the opinion and find for the above-mentioned reasons that rule 40 of the organisation's rules has been complied with and therefore so has s55(4)(a) of *the Act* in its entirety. I am therefore satisfied that the application should be granted, having regard to s55, s56, s62(2) and (4), s26(1)(a), s26(1)(c) and s60(f) and (g) of *the Act*.

34 I expressed similar views in the reasons for decision in *Re The United Firefighters Union of Western Australia* (2003) 83 WAIG 1400 (Scott C and Harrison C agreeing), and insofar as they are applicable to this case I repeat them.

Finally

35 For those reasons, I agreed with my colleagues to make the order authorising the Registrar to register the alteration sought to be made to the rules of the above-named applicant organisation.

SENIOR COMMISSIONER A R BEECH—

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

COMMISSIONER P E SCOTT—

37 I have had the benefit of reading the Reasons for Decision of His Honour, the President. I agreed that the United Firefighters Union of Western Australia has complied with the requirements of the Industrial Relations Act 1979 and with the requirements of its Rules in this application. Accordingly, I agreed to make the order authorising the alteration to the rules as sought.

THE PRESIDENT—

38 For those reasons, we made the order authorising the Registrar to register the alteration sought to be made to the rules of the above-named applicant organisation.

2003 WAIRC 09528

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA, APPLICANT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
DELIVERED	WEDNESDAY, 1 OCTOBER 2003
FILE NO/S.	FBM 7 OF 2003
CITATION NO.	2003 WAIRC 09528

Decision	Application granted
Appearances	
Applicant	Mr R J Walker, Industrial Officer, and with him Mr A E Drewett, Secretary

Order

This matter having come on for hearing before the Full Bench on the 1st day of October 2003 and having heard Mr R J Walker, Industrial Officer, and with him Mr A E Drewett, Secretary, on behalf of the applicant, and the Full Bench having heard and determined the matter, and the Full Bench having determined that 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 1st day of October 2003, ordered that the Registrar be and is hereby authorised to register alterations to the rules of the above-mentioned organisation, as amended in the following terms:-

By deleting the words "communications officer, trainee communications officer, communications supervisor," where they appear in the existing rule 5 (e) (14) (b) so that rule 5 (e) (14) (b) of the rules will read as follows:-

"As Storeman, store officer, general assistant and technical officer by the Western Australian Fire Brigades Board."

By the Full Bench

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

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union	Golden West Corporate Total Management	HARRISION C C85/2002	6-May-03 6-Aug-03	Industrial action over proposed EBA	Referred
Australian Liquor, Hospitality and Miscellaneous Workers Union	Golden West Corporate Total Management	HARRISION C CR85/2002	23-May-03	Alleged unfair dismissal	Dismissed
Australian Liquor, Hospitality and Miscellaneous Workers Union	Arrix Integrated	HARRISION C C129/2002	23-Jul-02 13-Nov-02	Application for severance entitlements	Referred
Australian Liquor, Hospitality and Miscellaneous Workers Union	Department of Conservation and Land management	WOOD C C176/03	7-Aug-03 21-Aug-03	Classification of Rangers	Concluded
Australian Rail, Tram and Bus Industry Union	A/Chief Executive Officer, Public Transport Authority, Public Transport Centre	WOOD C CR 217 of 2003	27-Oct-03	Rosters	Dismissed
Australian Workers' Union, West Australian Branch, Industrial Union of Workers	BHP Iron Ore Ltd	KENNER C C56/2002	27-Mar-02 05-Apr-02	Dispute in regards to change of shifts of applicant union member	Concluded

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Dampier Salt Ltd	KENNER C C5/2002	15-Feb-02 30-Oct-03	Award exclusion	Concluded
Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Leighton Contractors	KENNER C C120/2002	08-Aug-03 30-Oct-03	Dispute in relation to termination of applicant union member due to Drug & Alcohol policy that was introduced without consultation or agreement	Concluded
Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Sons of Gwalia Ltd	KENNER C C194/2003	22-Oct-03	Position made redundant	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers -	Kingscape Holdings Pty Ltd	GREGOR C C213/2003	13-Oct-03	Alleged Termination	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers -	Volgren Australia	GREGOR C C198/2003	08-Sep-03	Assist in EBA S42E	Concluded
Civil Service Association of Western Australia Incorporated	Chief Executive Officer, Department of the Culture and the Arts	SCOTT C PSACR11/2003	11-Jul-03	Reclassification	Dismissed
Civil Service Association of Western Australia Incorporated	Director General Department of Housing and Works	SCOTT C PSAC45/2003	15-Sep-03	Employee denied entitlements	Referred
Civil Service Association of Western Australia Incorporated	Director General, Department of Health	SCOTT C PSAC55/2003	22-Oct-03 28-Oct-03 03-Nov-03	Transfer of employee	Concluded
Civil Service Association of Western Australia Incorporated	Director General, Department of Indigenous Affairs	SCOTT C PSAC34/2003	05-Aug-03 20-Aug-03 27-Aug-03 18-Sep-03 02-Oct-03	Dispute re transfers	Referred
Civil Service Association of Western Australia Incorporated	Director General, Department of Justice	SCOTT C PSAC1/2003	3-Feb-03 17-Mar-03 26-Jun-03 29-Aug-03	Respondent's refusal to provide work to a member	Referred
Civil Service Association of Western Australia Incorporated	The Chairman,Anti Corruption Commission	SCOTT C PSAC29/2003	24-Jun-03 27-Jun-03 5-Aug-03 25-Aug-03	Loss of employment due to AC Commission closing	Concluded
Civil Service Association of Western Australia Incorporated	The Governing Council C Y O'Connor TAFE	HARRISON C PSAC48/2003	06-Oct-03	Higher Duties	Concluded
Civil Service Association of Western Australia Incorporated	Governing Council of the Challenger College TAFE	SCOTT C PSAC2/2003	5-Feb-03 19-Jun-03 29-Jul-03-	Under payment of wages	Referred
Civil Service Association of Western Australia Incorporated	The Water Corporation	SCOTT C PSAC44/2003	16-Sep-03	Alleged failure by company to produce a copy of a written report to the Union's member	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers	Zodiac Group Australia	GREGOR C C199/2003	4-Sep-03 22-Sep-03	Non withdrawal of disciplinary letter	Concluded
Construction, Forestry, Mining and Energy Union of Workers	Gavin Constructions	GREGOR C C220/2003	No Conference held	Amenities	Concluded
Construction, Forestry, Mining and Energy Union of Workers	Personnel Contracting Pty Ltd t/a Tricord Personnel and Other	GREGOR C C168/2003	16-Jul-03 12-Sep-03	Alleged Termination	Concluded
Construction, Forestry, Mining and Energy Union of Workers	Total Corrosion Control Pty Ltd	GREGOR C C212/2003	No Conference held	Safety issues	Concluded

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Construction, Forestry, Mining and Energy Union of Workers	Minister for Health	SCOTT C C203/2003	30-Sep-03	Employment conditions applying to plant operators	Concluded
Hospital Salaried Officers Association	Director General of Health as delegate of the Minister for Health in his capacity as board of the Metropolitan Health Services	SCOTT C PSACR 36/2002	18-Aug-03	Confidential matter	Dismissed
Western Australian Police Union of Workers	(Commission's own motion)	SCOTT C PSAC47/2003	12-Sep-03 12-Sep-03 30-Sep-03	Proposed industrial action	Concluded
Western Australian Police Union of Workers	Commissioner of Police	SCOTT C PSAC50/2003	12-Sep-03 30-Sep-03	Proposed industrial action	Concluded
Western Australian Prison Officers Union of Workers	The Hon. Attorney General	SCOTT C C200/2003	8-Sep-03 18-Sep-03 30-Sep-03	Shift Penalties	Referred
Western Australian Prison Officers Union of Workers	The Hon. Attorney General	SCOTT C C211/2003	01-10-03	Suspension without pay and entitlements	Referred
Western Australian Prison Officers Union of Workers	The Hon. Attorney General C/- Department of Justice	SCOTT C C166/2003	19-Sep-03 03-Oct-03	Alleged denial of performance assessment in renewal of employment contract	Concluded

CORRECTIONS—

2003 WAIRC 10001

CARRIER-APAC MANUFACTURING (WA) ENTERPRISE BARGAINING AGREEMENT

No. AG 269 of 2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CARRIER AIRCONDITIONING, APPLICANT

v.

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, RESPONDENTS

CORAM COMMISSIONER J F GREGOR

DATE MONDAY, 10 NOVEMBER 2003

FILE NO. AG 269 OF 2003

CITATION NO. 2003 WAIRC 10001

Correction Order

WHEREAS on 6th November 2003 an Order in this matter was deposited in the Office of the Registrar; and

WHEREAS there was an error in the Order; and

WHEREAS that Order should have read—

THAT the agreement made between the two parties lodged in the Commission on 14th October 2003 entitled Carrier-APAC Manufacturing (WA) Enterprise Bargaining Agreement 2003 be registered as an Industrial Agreement. Agreement No. AG 108 of 2001 is hereby cancelled.

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

1. THAT the agreement made between the two parties lodged in the Commission on 14th October 2003 entitled Carrier-APAC Manufacturing (WA) Enterprise Bargaining Agreement 2003 be registered as an Industrial Agreement.
2. THAT Agreement No. AG 108 of 2001 is hereby cancelled.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

2003 WAIRC 09923

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA, CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA, AUSTRALIAN MINES & METALS ASSOCIATION INC. AND THE MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 23 OCTOBER 2003
FILE NO/S.	APPLICATION 797 OF 2002
CITATION NO.	2003 WAIRC 09923

Result Correction Order issued

Order

WHEREAS an error occurred in the General Order dated 22 July 2002 issued in application 797 of 2002, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the Variation Schedule attached to the Order dated 22 July 2002 with respect to the *Electronics Industry Award No A 22 of 1985* in Application 797 of 2002 be amended in the terms of the following Schedule.

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

SCHEDULE

1. Part I – General: Clause 33. – Wages: Delete subclause (1)(a) of this clause and insert the following in lieu thereof—

The minimum rates of wages payable weekly to employees covered by this award shall be as follows—

(1) (a) Adults

	Rate Per Week	Arbitrated Safety Net Adjustment	Total Rate Per Week
Electronic Technician (Grade III)	537.50	106.00	643.50
Electronic Technician (Grade II)	463.30	106.00	569.30
Electronic Technician (Grade I)	442.20	108.00	550.20
Electronic Serviceperson	418.90	108.00	526.90
Installer	375.90	106.00	481.90
Serviceperson's Assistant	357.90	106.00	463.90
Assembler (1)	352.60	106.00	458.60
Assembler	331.50	106.00	437.50
Trainee Installer (90% of Installer)	338.30	95.40	433.70

2. Part II – Construction Work: Clause 10. – Wages: Delete subclause (3)(a) of this clause and insert the following in lieu thereof—

(3) (a) CLASSIFICATIONS

	Rate Per Week	Special Payment	Arbitrated Safety Net Adjustment	Total Rate Per Week
Electronic Technician (Grade III)	537.50	31.50	106.00	675.00
Electronic Technician (Grade II)	463.30	26.90	106.00	596.20
Electronic Technician (Grade I)	442.20	25.40	106.00	573.60
Electronic Serviceperson	418.90	24.00	108.00	550.90
Installer	375.90	18.10	106.00	500.00
Trainee Installer (90% of Installer)	338.30	16.30	95.40	450.00

2003 WAIRC 09924

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA, CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA, AUSTRALIAN MINES & METALS ASSOCIATION INC. AND THE MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 23 OCTOBER 2003
FILE NO/S.	APPLICATION 569 OF 2003
CITATION NO.	2003 WAIRC 09924

Result Correction Order issued

Order

WHEREAS an error occurred in the General Order dated 5 June 2003 issued in application 569 of 2003, 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 Variation Schedule attached to the Order dated 5 June 2003 with respect to the *Electronics Industry Award No A 22 of 1985* in Application 569 of 2003 be amended in the terms of the following Schedule.

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

SCHEDULE

1. Part II – Construction Work: Clause 10. – Wages: Delete subclause (3)(a) of this clause and insert the following in lieu thereof—

(3) (a) CLASSIFICATIONS

	Rate Per Week	Special Payment	Arbitrated Safety Net Adjustment	Total Rate Per Week
Electronic Technician (Grade III)	537.50	31.50	123.00	692.00
Electronic Technician (Grade II)	463.30	26.90	123.00	613.20
Electronic Technician (Grade I)	442.20	25.40	123.00	590.60
Electronic Serviceperson	418.90	24.00	125.00	567.90
Installer	375.90	18.10	123.00	517.00
Trainee Installer (90% of Installer)	338.30	16.30	110.70	465.30

PROCEDURAL DIRECTIONS AND ORDERS—

2003 WAIRC 09792

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROBERT PAUL HANTSCHE, APPLICANT
v.
ALS CHEMEX, RESPONDENT

CORAM COMMISSIONER J F GREGOR
DATE THURSDAY, 23 OCTOBER 2003
FILE NO. APPLICATION 342 OF 2003
CITATION NO. 2003 WAIRC 09792

Result Application for discovery of documents granted in part

Order

WHEREAS on 1st October 2003 Robert Paul Hantsche (the Applicant) has applied for orders for discovery of documents from ALS Chemex (the Respondent); and

WHEREAS on 17th October 2003 in conference the Commission heard submissions from the Agent for the Applicant and counsel for the Respondent; and

WHEREAS having considered the submissions from the parties the Commission decided to order that at least 14 days before the hearing listed for 11th and 12th days of November 2003 in Kalgoorlie, if the Respondent intends to call an expert witness, then the substance of the evidence to be given be provided to the Applicant.

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

1. THAT at least 14 days before the hearing listed for 11th and 12th days of November 2003 in Kalgoorlie, if the Respondent intends to call an expert witness, then the substance of the evidence to be given be provided to the Applicant.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2003 WAIRC 09949

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN JOHNSTON, APPLICANT
	v.
	BROOME PEARLS PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	THURSDAY, 6 NOVEMBER 2003
FILE NO.	APPLICATION 589 OF 2003
CITATION NO.	2003 WAIRC 09949

Result	Name of Respondent Amended

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS at the commencement of the hearing on Tuesday, the 4th day of November 2003, the Respondent sought to amend the name of the Respondent to the application; and

WHEREAS the parties agreed that the name of the Respondent be amended to "M G Kailis Pty Ltd";

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 M G Kailis Pty Ltd.

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

2003 WAIRC 09941

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIE LOUISE ASHWORTH, APPLICANT
	v.
	JARDAMU WOMEN'S GROUP ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 6 NOVEMBER 2003
FILE NO.	APPLICATION 915 OF 2003
CITATION NO.	2003 WAIRC 09941

Result	Directions issued
Representation	
Applicant	Mr M Kane as agent
Respondent	Ms J Stevens of Counsel

Direction

1 The Commission, having heard Mr M Kane on behalf of the applicant and Ms J Stevens, of Counsel on behalf of the respondent, and having determined that the following orders and directions were necessary and expedient for the just hearing and determination of the matter, it is ordered and directed that the respondent provide to the applicant, by close of business Friday, 14 November 2003, discovery and inspection of the following documents—

1. Any correspondence, letters or any other documentation from the Department for Community Development ("DCD") in relation to financial and operational audits for the financial years 2001/2002, and 2002/2003.
2. Any Statements of Compliance issued by DCD to Jardamu Women's Group Aboriginal Corporation ("JWGAC") for the period from 2001 to 2003.
3. A copy of the financial audit conducted in 2003 by the DCD.
4. Any DCD checklist in your possession provided for Auditor.
5. A copy of any review or correspondence commenting on the performance of the operation of the JWGAC or any associated entity by DCD during the period 2002 to 2003.
6. Any Jardamu Safe House reports for the period 2001 to 2003.
7. A copy of any Policies and Procedures relating to employment or human resources that were current at the time of the Applicant's termination.
8. Minutes of the Committee meeting dated from and including 4 February 2002 to June 2003.
9. Copies of all documents, correspondence and or any other item from the applicant's personal file.
10. Staff minutes and Managers Reports for 2002 and 2003.
11. A payment summary of the Applicant's wages and entitlements for the period May to June 2003.

12. Any letters or other correspondence containing any warning to the Applicant of any inappropriate behaviour and or performance during the course of her employment.

13. Any other documents which the respondent intends to rely upon in proceedings.

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

2003 WAIRC 09069

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DWAYNE RICHARD WHITE, APPLICANT
	v.
	PERTH WEB PAGES PTY LTD TRADING AS NETPLAY SYSTEMS AND PYRC CONSULTING, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 29 JULY 2003
FILE NO.	APPLICATION 930 OF 2003
CITATION NO.	2003 WAIRC 09069

Result	Extension of time granted
Representation	
Applicant	Mr D White on his own behalf
Respondent	Mr C Pyrc

Order

HAVING heard Mr D White on his own behalf and Mr C Pyrc on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the referral of the herein application so far as it relates to a claim of harsh, oppressive or unfair dismissal be and is hereby accepted out of time.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

JOINDER/CONCURRENCE OF PARTIES—Application for—

2003 WAIRC 09630

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS
	v.
	BHP BILLITON IRON ORE PTY LTD & OTHER , RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 10 OCTOBER 2003
FILE NO/S.	APPLICATION 1246 OF 2003
CITATION NO.	2003 WAIRC 09630

Result	Order issued
Representation	
Applicants	Mr D Schapper of counsel
Respondents	Mr R Lilburne of counsel on behalf of BHP Billiton Iron Ore Pty Ltd and Mr M Llewellyn on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers

Order

HAVING heard Mr D Schapper of counsel on behalf of the applicants, Mr R Lilburne of counsel on behalf of BHP Billiton Iron Ore Pty Ltd and Mr M Llewellyn on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch be and is hereby joined as an applicant in the herein application.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
ACI Glass Packaging - Perth, Maintenance Trades (Enterprise Bargaining) Agreement 2003 AG 208/2003	28/10/2003	ACI Glass Packaging	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch , Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	GREGOR C	Agreement Registered
Boodarie Iron-Port Hedland Operations Industrial Agreement 2003 AG 270/2003	31/10/2003	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	BHP Billiton HBI	WOOD C	Agreement Registered
Carrier-apac Manufacturing (WA) Enterprise Bargaining Agreement 2003 AG 269/2003	6/11/2003	Carrier Airconditioning	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch , Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	GREGOR C	Agreement Registered & Correction Order Issued
Co-operative Bulk Handling Limited District Maintenance Employees Enterprise Partnership Agreement 2003 AG 224/2003	27/10/2003	Co-operative Bulk Handling Limited	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	GREGOR C	Agreement Registered
Electrolux Home Products - Spare Parts and Service Belmont W.A. Enterprise Agreement 2003-2006 AG 236/2003	27/10/2003	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Electrolux Home Products Pty Ltd	GREGOR C	Agreement Registered
Komatsu Australia Perth (Service Department) Enterprise Agreement 2003 AG 246/2003	21/10/2003	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Komatsu Australia Pty Ltd	GREGOR C	Agreement Registered
Pyrotronics Fire Protection Pty Ltd ABN 73102333899 Enterprise Bargaining Agreement 2003 AG 272/2003	N/A	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Pyrotronics Fire Protection Pty Ltd	COLEMAN CC	Discontinued
Salaried Officers Mayne Diagnostic Imaging (Joondalup) Western Australian Enterprise Agreement 2003 AG 242/2003	10/10/2003	Hospital Salaried Officers Association of Western Australia (Union of Workers)	Mayne Group Limited A.C.N. 004 073410 trading as Mayne Diagnostic Imaging	SCOTT C	Agreement Registered
St John of God Health Care Geraldton (HSOA) Caregiver Agreement 2003 AG 267/2003	03/11/2003	St John of God Health Care Geraldton (a division of St John of God Health Care Inc.)	Hospital Salaried Officers Association of Western Australia (Union of Workers)	SCOTT C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Swan Village of Care (Inc), Hospital Salaried Officers Association (Union of Workers) Enterprise Agreement 2003 AG 248/2003	16/10/2003	Hospital Salaried Officers Association of Western Australia (Union of Workers)	Swan Village of Care Incorporated	SCOTT C	Agreement Registered
The Salvation Army Property Trust (Western Australia) Hospital Salaried Officers Association Enterprise Agreement 2003 AG 281/2003	07/11/2003	Hospital Salaried Officers Association of Western Australia (Union of Workers)	The Salvation Army Property Trust (Western Australia)	SCOTT C	Agreement Registered
Western Australia Police Service Enterprise Agreement for Police Act Employees 2003 PSAAG 45/2003	07/11/2003	Commissioner of Police	Western Australian Police Union of Workers	SCOTT C	Agreement Registered
WesTrac Equipment (Service Operations) Enterprise Agreement 2003 AG 237/2003	27/10/2003	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	WesTrac Equipment Pty Ltd	GREGOR C	Agreement Registered

NOTICES—Cancellation of Awards/Agreements/ Respondents—Under Section 47—

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATION COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the *Industrial Relations Act 1979*, intends by order to cancel out the following award, namely the –

Charcoal Iron and Steel Industry Award No 24 of 1960,

on the grounds that the Respondent named in the abovementioned award does not employ workers in the capacity as identified in Clause 4 – Scope.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to Commission making such an order.

Please quote File number 686/77/186 on all correspondence.

Dated this 27th day of October 2003.

J. SPURLING,
Registrar.

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATION COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the *Industrial Relations Act 1979*, intends by order to cancel out the following award, namely the –

Child Care Centres (Pre-School Teachers') Award 1983 No. A 3 of 1983

on the grounds that there is no longer any person employed under the provisions of that award.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to Commission making such an order.

Please quote File number 686/77/162 on all correspondence.

Dated this 4th day of November 2003.

J. SPURLING,
Registrar.

Editors' Note: This Notice replaces the Notice published in October WAIG, Vol. 83, Part 2 at page 3240.

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATION COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the *Industrial Relations Act 1979*, intends by order to cancel out the following award, namely the –

Printing (Western Mail) Award No 39 of 1982,

on the grounds that there are no longer any persons employed under the provisions of that award.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to Commission making such an order.

Please quote File number 64/2002 on all correspondence.

Dated this 15th day of October 2003.

J. SPURLING,
Registrar.

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, intends by order to cancel the following award, namely the—

Teachers Accommodation Allowance Award 1982, No. TA 1 of 1982

on the grounds that the Respondent named in the abovementioned award does not employ workers in the capacity as identified in Clause 4 – Scope.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such an order.

Please quote 39/2003 on all correspondence.

Dated this 27th day of October 2003.

J. A. SPURLING,
Registrar.

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, intends by order to cancel the following award, namely the -

The Teachers' (Kindergartens) Award 1964, No. A 22 of 1963

on the grounds that the Respondent named in the abovementioned award does not employ workers in the capacity as identified in Clause 4 – Scope.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such an order.

Please quote 102/2002 on all correspondence.

Dated this 27TH day of October 2003.

J. A. SPURLING,
Registrar

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATION COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the *Industrial Relations Act 1979*, intends by order to cancel out the following award, namely the –

Ticketwriters' Award, No. 29 of 1958

on the grounds that there are no longer any persons employed under the provisions of that award.

Any person who has sufficient interest in the matter may, within 30 days of the date of the publication of this notice object to Commission making such an order.

Please quote File number 65/2002 on all correspondence.

Dated this 24th day of October 2003.

J. SPURLING,
Registrar.

PUBLIC SERVICE APPEAL BOARD—

2003 WAIRC 09729

AGAINST THE DECISION TO TERMINATE MADE ON 18/12/2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARILYN JOYCE KISH, APPELLANT
	v.
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT – CHAIRMAN
	MR B HEWSON – BOARD MEMBER
	MR R MAY – BOARD MEMBER
DATE	FRIDAY, 17 OCTOBER 2003
FILE NO.	PSAB 1 OF 2003
CITATION NO.	2003 WAIRC 09729

Result	Appeal dismissed
Representation	
Appellant	Ms C Bowden
Respondent	Mr D Matthews (of counsel)

Reasons for Decision

1 These are the unanimous reasons of the Public Service Appeal Board ("the Board").

2 The appellant claims that the decision of the respondent to bring her employment to an end on 18 December 2002 was harsh, unjust and unfair and she wishes to continue in that work. The respondent says that the appellant's employment came to an end due to frustration of the employment contract arising from the appellant's incapacity to perform her contracted duties as a result of a back problem.

The Evidence

3 The Board has heard evidence from Karen Anne Walker, a supervisor employed by the respondent, Cheryl Anne Burrows, a social trainer, and from the appellant. The Board also received into evidence a large number of documents including medical reports, correspondence and material dealing with the duties and requirements of social trainers.

4 The appellant is a government officer employed pursuant to the Government Officers (Social Trainers) Award 1988 (No. PSAA 20 of 1985) and has been employed by the respondent since 1988. She first commenced working with the respondent as a nursing assistant in one of its hostels. At the time her employment came to an end, the appellant was a Social Trainer, Level 1.

5 The respondent provides services to disabled persons, including accommodation of a variety of different types depending upon the needs of the clients. The respondent employs approximately 850 social trainers and has approximately 95 work sites. According to Ms Burrows those include high support hostels where clients' physical requirements are at a high level and the social trainers engage in manual handling and lifting; challenging behaviour units where the clients have particular behavioural problems and can be violent; group homes where extra physical care of residents is necessary; minimal support units where the clients generally care for themselves, under supervision and training by social trainers who give verbal prompts to direct the clients; and family support operations where the social trainers attend the client's home, and provide support and training there and on outings.

6 As much as possible, clients are grouped together according to their similar level of needs. An average group home would require the social trainer to have some, albeit limited, physical interaction with clients. According to Ms Burrows, although it is rare, clients who are normally co-operative can be antagonistic and unco-operative and the clients may be unpredictable. The social trainer has a set of skills aimed at promoting co-operative behaviour, and as a last resort may use some physical redirection.

7 The Peterborough Crescent group home, in which the appellant worked immediately prior to the employment coming to an end, is a duplex. Each side of the duplex had one social trainer and 3 clients. The appellant worked in the A side of the duplex. Of the 3 clients, 2 require minimal support, and there is also a third client, a Ms Diane Gill. Generally, Ms Gill requires minimal support but has been known to require higher levels of support from time to time. The appellant gave evidence that verbal prompting worked in about 50 per cent of cases in dealing with clients at Peterborough Crescent, but that some physical interaction was otherwise required. She says that clients can be unpredictable in their behaviour.

8 The Generic Job Description Form for the position held by the appellant of Social Trainer, Level 1, sets out the following key responsibilities or prime function of the job as being—

> "Undertakes general training, support and advocacy activities with persons with an intellectual disability and their families".

9 The Statement of Duties prescribes the duties performed in descending order of importance as being—

> "Undertakes general training, support and advocacy activities with people who have an intellectual disability and/or members of their family.
>
> Implements special training programs as directed.
>
> Maintains records of assessments and training programs as required.
>
> Maintains records of attendance, client finance, unit operations, and other clerical tasks as required.
>
> Organises and conducts outings, holidays and leisure activities for persons with an intellectual disability.
>
> Ensures the emotional, social and physical well being of persons with an intellectual disability is enhanced.

Reports any incident or matter detrimental to disabled persons well being.

Assists persons with an intellectual disability in matters relating to his/her person or estate.

Administers medication as required to persons who have an intellectual disability.

Carries out other duties as required."

(Exhibit A4)

10 The Selection Criteria for the position of Social Trainer, Level 1 sets out the number of essential demonstrated criteria including "6. The ability to cope with the physical demands of the job."

11 The "Social Trainer Disability Services Commission – Pre-employment Physical Demands Assessment Criteria" document sets out an Overview and the Physical Demands associated with the position of Social Trainer as follows—

"OVERVIEW

Working with people who have an intellectual and/or physical disability is physically and emotionally demanding.

The applicant needs to be fit to cope with frequent involvement in recreational activities, many of which are physical.

Continuous interaction with people who have intellectual and/or physical disabilities can be very demanding because of the residents need to attention, assistance and training.

People with an intellectual disability can be subject to unpredictable behaviour, which can lead to loss of control in some situations.

An employee working in such an environment will be constantly challenged in their communication, training and behavioural management skills.

Most direct care staff work shifts on a rotating roster."

(Exhibit R1)

12 The physical demands are described in detail and relate to walking, including weight bearing; standing and prolonged standing; crouching and stooping involved in assisting clients in daily activities such as bathing and dressing, and household and leisure activities; carrying; reaching; driving; awkward movements and positions including being able to deal with clients displaying aggressive or unpredictable behaviour and the need for passive self defence techniques; manual handling; prolonged sitting and sitting on a variety of chairs and surfaces during a variety of activities; and lifting, pushing and pulling both clients and equipment.

13 Prior to commencing employment with the respondent, the appellant had an injury to her back and had undergone surgery from which she appeared to have completely recovered. In 1992 she sustained a disc prolapse and was treated by Mr George Wong with microdiscectomy. In November 1995, the appellant had back pain after getting out of an armchair at work. There is also evidence that in 1996 the appellant made a workers' compensation claim associated with injuring her back when she attempted to open a window at the respondent's facility at 34 Lilacdale Road, Innaloo. She subsequently injured her back in July 2000 when working at the Peterborough Crescent group home, when she was assisting Ms Gill in showering and Ms Gill fell towards her. The appellant developed a large disc prolapse and she had further surgery. The appellant then underwent a lengthy period of rehabilitation including a graduated return to work programme over a period of some 20 months. She returned to the Peterborough Crescent group home. The appellant did not object to returning to that location.

14 In February 2002, again working in the Peterborough Crescent group home, the appellant had assisted Ms Gill to shower, and wanted to put cream on Ms Gill's leg. She asked Ms Gill to lift her leg to enable her to do this. Ms Gill did not do so and the appellant reached down and lifted Ms Gill's leg when the appellant felt back pain. She was then off work for a day.

15 More recently there was an incident on 23 June 2002, where the appellant was once again working with Ms Gill. Ms Gill had refused to get out of bed. The bed was soiled. The appellant says that she attempted to persuade Ms Gill to get out of bed on a number of occasions but was unsuccessful. She conferred with her supervisor by telephone but was still unable to achieve getting Ms Gill out of bed. Ms Gill did not have breakfast, morning tea or lunch that day because she was not out of bed.

16 Another social trainer came on duty later and was successful, almost immediately, in assisting Ms Gill to get out of bed.

17 Ms Walker and the appellant both gave evidence that on 4 July 2002, the appellant, together with her union representative, met Ms Walker and the respondent's Area Manager, Peter Hodgson, regarding in particular the incident on 23 June 2002. Ms Walker's recollections and her notes, and the appellant's evidence regarding the meeting, include that in this meeting the appellant said that she had a back condition and could not do Item 1 of the Staff Development Programme which requires physical prompting or supporting a client physically, that she was not comfortable and could not physically assist Ms Gill. However, the appellant identified that she could work in the B side of the duplex in Peterborough Crescent as opposed to the A side where she had worked. The notes of the meeting and Ms Walker's evidence indicate that Mr Hodgson said that this would be problematic as there was a need to help out in the A side and that the appellant could not be limited to working in the B side only. There was discussion at the meeting as to where the appellant might be placed so she would not be at risk. The appellant said in response to a question from Mr Hodgson that she would not provide support for Ms Gill. In her evidence before the Board, the appellant said that her inability to do more for Ms Gill was due to her concerns for her back and because of Ms Gill's unpredictability.

18 Following this meeting, the respondent determined that the appellant could not return to the Peterborough Crescent group home but was to report to the Walter Road group home where she would be supernumerary and have a five shift induction period where she would work with another social trainer, not on her own as social trainers usually do.

19 As a result of this situation, the respondent sought that the appellant have an assessment of her physical fitness. She was assessed by Dr Christine Archer on 9 July 2002, whose final comment in the conclusion to her report was that "I do not believe that this woman is fit to continue in her current position. She is at greatly increased risk of further symptomatic back problems with minimal trauma. Given the unpredictable nature of the clients served by your service, there is a high chance of further injury in this woman." (Exhibit A9).

20 The appellant also went to see Mr George T Wong, the neurosurgeon who had treated her for many years and in whom the appellant indicated in evidence that she had confidence. His report indicates that his assessment is based on advice given to him by the appellant as to her condition and as to the duties she was required to perform. His assessment of 29 July 2002, concludes with the following comment—

"I do agree with Dr. Christine Archer that because of the two previous spinal operations and aggravation of her symptoms due to bending, that she should stop working as a Social Trainer. She tells me that working as a Social Trainer does involve a lot of bending, helping patients to shower and some lifting. Because of her continuing problem, I think it is best for her to give up this type of work."

(Exhibit A10)

21 A further report was sought, this time from Associate Professor Brian Galton-Fenzi, a Specialist Occupational Physician. His final assessment of Wednesday 28 August 2002, formal parts omitted, was—

> "…
>
> It would be important, given Ms Kish's history of back pain, for her to work in tandem with another colleague, and in certain circumstances, avoid the more physically demanding tasks such as assisting the non-compliant residents or clients, especially where there is little control over the tasks.
>
> She is at high risk of further aggravations and recurrences with tasks that require bending under load (such as showering and toileting heavy, non-compliant clients), repetitive bending to access low shelving below mid-thigh height, and rotational torque when attempting to move static or mobile items (beds, wheelchairs) and to support clients that may be difficult to manage, particularly when wet during showering activities.
>
> Clerical duties, which allowed changes of position, along with tasks such as client feeding, and certain client tasks such as teeth cleaning, would seem appropriate. Purely sedentary duties would not be the answer, as sitting does have an implication for increased discogenic pressures. The best prospect is for a job with several tasks, allowing mobility, standing, and walking, whilst working at an appropriate bench height, with reduced forward flexion doing work at, for example, the bench.
>
> Overall, she is at high risk of further back pain events, with the risk increasing substantially, the more physically demanding the tasks."

(Exhibit A11)

22 Following these reports, the respondent considered the situation including the duties required of a social trainer. The evidence demonstrates that there were at least two meetings involving the appellant and her Union representative with her employer's representatives about her future. By letter dated 7 October 2002, the respondent advised the appellant that, in light of the three medical reports concluding that she could not continue as a social trainer because of the condition of her back, and that notwithstanding that she wished to continue as a social trainer, the medical evidence did not support her continuing. Accordingly, the respondent considered that her contract of employment was frustrated and had come to an end. However, before coming to any final conclusion in that regard, the respondent invited the appellant "to bring to (its) attention any reasons why you believe your contract of employment has not been frustrated" (Exhibit A14). She was to respond in writing by close of business 18 October 2002. It appears from the evidence that the appellant responded to that letter by letter dated 15 October 2002, however, that response is not in evidence. The appellant's letter appears to have identified a number of areas where she believed she could be employed.

23 By letter dated 18 November 2002, the respondent wrote to the appellant addressing the areas she had apparently suggested in her letter of 15 October 2002 as providing opportunities for her continued employment and why her contract was not frustrated. Those areas included "hostels where manual handling was not required", "visiting clients at their home", "working with children" and "training for deployment to another position within the Commission". The respondent's letter addressed each of these issues, formal parts omitted, as follows—

> "**CONTRACT OF EMPLOYMENT**
>
> Thank you for your letter dated 15 October 2002.
>
> I have considered the reasons you cite as to why you believe your contract of employment with the Disability Services Commission has not been frustrated and provide the following—
>
> ***Hostels where manual handling is not required***
>
> There are significant physical demands associated with the position of Social Trainer. Manual handling is a physical demand of all Social Trainers in all facilities of the Commission, to varying extents.
>
> Deployment to a hostel facility will require you to fulfil the full range of core duties required of a Social Trainer, which will expose you to a high risk of further aggravation to your back condition. This is supported by medical evidence.
>
> In view of the outcome of Dr Brian Galton-Fenzi's assessment, as detailed in his report of 28 August 2002, there are no Social Trainer positions in a hostel or other facility that can accommodate your physical restrictions.
>
> ***Visiting clients at their home***
>
> Social Trainers working in Individual and Family Support Services ("IFS") provide skills development and supported community living support to people with intellectual disabilities, both within community settings and home environments.
>
> The range of physical demands of a Social Trainer in IFS is similar to those of a Social Trainer in residential facilities of the Commission.
>
> Tasks of a Social Trainer in IFS may include the following—
>
> - Drive to various appointments or outings up to 2 hours per day.
> - Utilise stairs to client homes, outings etc.
> - Lift up to 5kg in weight (eg. shopping).
> - Take appropriate action to respond to aggressive and unpredictable client behaviour.
> - Provide physical support to individuals with poor balance.
>
> All Social Trainers, including those in IFS, are required to participate and assist clients in a broad range of daily and recreational activities, requiring a wide range of movements and positions, some of which are physically demanding.
>
> All Social Trainers must be fit to respond to aggressive and unpredictable client behaviour, if or when it occurs. If a Social Trainer is not able to effectively respond, that person and the client will be exposed to a high risk of injury.
>
> There are no Social Trainer positions in IFS that can accommodate your physical restrictions.
>
> ***Working with children***
>
> There are no Social Trainer positions within the Commission that provide services directly and exclusively to children with disabilities. This was an outcome of a restructure of the Commission in October 1999.

Training for deployment to another position within the Commission

As you have previously been advised, there are no suitable Level 1 positions within the Commission at this time that could reasonably accommodate your physical restrictions, aptitude and work capacity, with practicable and reasonable adjustment to the work environment.

Therefore, providing training to you, where there is no reasonable likelihood of securing employment at its conclusion, would be futile.

While I empathise with your wish to continue employment with the Commission, the reasons you cite do not alter the Commission's position that your contract of employment is frustrated and has come to an end.

The Commission has today served its answer in respect of application P No. 51 of 2002 made to the Public Service Arbitrator on your behalf by the Civil Service Association of Western Australia (Incorporated)."

(Exhibit A15)

24 The respondent then sent the appellant a letter dated 18 December 2002 confirming "that your employment with the Disability Services Commission has come to an end with effect from the date of this letter." (Exhibit A16). This letter attached calculations of her final pay which was paid directly into her bank account, and thanked the appellant for her service to the respondent.

25 The appellant says that the contract was not frustrated and also that the respondent was unfair in its treatment of her. It did not terminate the employment in accordance with the Award which required four weeks' notice. Further, in accordance with tests set out for frustration, the appellant says that there has been no frustration of the contract as the circumstances do not satisfy the tests set out for frustration. The appellant also says that she had entitlements to payment of sick leave, that she had sick leave available to her, that her back condition dated from at least 1998 and it was reasonable to expect that she could continue in employment "independent of injury". Further the appellant says that the level of her disability of approximately 13 per cent remains the same as it has for some time and that nothing has changed that would bring about the employer's decision to bring the employment to an end. Further, the appellant says that the respondent engages 850 social trainers, has 95 facilities and that there is no good reason why she could not be provided with other work. This work could take account of her being required to refrain from heavy lifting. The appellant says that there was no reason to terminate her employment and that as a large employer the respondent has the capacity to engage her or place her elsewhere. She is still willing to work. The appellant says that there was no attempt to give her a trial in other facilities and that the respondent ought to have tried harder to provide her with greater support and to give her a fair go in accordance with the values and vision of the organisation.

26 The respondent says that there has been frustration of the contract on the basis of the appellant's incapacity to perform the basic and broad range of tasks essential to being a social trainer. As the appellant's contract of employment was as a social trainer, the respondent had no option but to accept the frustration. The respondent also says the reports of the medical practitioners who assessed her indicated, not that she should not be a social trainer in a particular facility, but that she should not be a social trainer at all. Mr Wong referred generally to the duties of a social trainer, not specifically to those that she had performed at the group home in Peterborough Crescent in Morley and recommended that she give up this type of work. Further, the unpredictability of the clients made it difficult if not impossible to allow her to continue to perform that work.

27 The respondent says that there is no requirement at law to transfer the appellant to another position when she could not perform her contract, however, it did attempt to place her in other work but even the most simple tasks may have been a difficulty. The respondent says that the situation of the appellant's capacity to perform her work was radically different from the requirements of the contract which was in place.

28 Whilst the respondent acknowledged that the appellant had been employed by the respondent in the long term, and there had been no issues of discipline, there was simply an inability of the appellant to perform her contract.

Conclusions

29 The Board has considered the reports of Dr Christine Archer of 9 July 2002, Mr George Wong of 29 July 2002 and Associate Professor Brian Galton-Fenzi of 28 August 2002 as well as the other medical and rehabilitation reports provided in respect of the appellant. The Board has also noted her evidence and the evidence of the other witnesses called by her as to the duties and physical requirements of social trainers, the different yet informal categorisations of the respondent's facilities, and the needs of the clients in those facilities.

30 The evidence demonstrates and we find that the appellant's back condition can be adversely affected by her performing some very normal, everyday activities such as getting out of an armchair, lifting a window, bending and lifting a client's leg. Fear of injury to her back prevented her from physically assisting a client to get the client out of a soiled bed. The client remained in the bed without breakfast, morning tea and lunch because of the appellant's fear for her back. The appellant's back condition has been long standing and there is no evidence to suggest that it will improve. The evidence demonstrates that the work of a social trainer requires bending, lifting and bearing weight on a regular basis. It requires dealing with clients who are unpredictable in their behaviour, and who may from time to time be resistant to doing what is required of them and they may need physical assistance.

31 We note that there are informally identified within the respondent's operations different types of facilities. The respondent does not formally classify its facilities. The respondent attempts to place clients with similar needs in the same facility as far as is practicable. The respondent also attempts to keep those group homes relatively settled within the range of the clients' needs, however, from time to time this is not able to be controlled and needs to be changed. Social trainers generally work singly in a group home. It is clear, and we think the appellant recognises, that she could not appropriately be placed in a high support facility. The same applies in the challenging behaviours area.

32 The facility in which the appellant was engaged prior to her employment coming to an end, the Peterborough Crescent duplex in Morley, has two clients who could be described as requiring minimal support and one client, Ms Gill, who under normal circumstances required little if any physical assistance but does require some physical assistance from time to time. The other side of the duplex is also a facility requiring minimal support of the clients. The respondent also has Home and Family Support services where services are provided in the client's own home and the social trainer drives the client to appointments, takes them on outings, shopping and other similar duties to those performed in the group homes.

33 There is evidence that there is not really such a thing as an average group home. However, if there was such a thing its clients would require support "a shade above minimal support." There is no guarantee that in a minimal support facility or in a Home and Family Support role she would not be placed in a situation of dealing with clients who are unpredictable in their behaviour and who would require some physical assistance. Further, based on medical opinions and on the appellant's own evidence, she is unable to do a number of basic aspects of the job without fear of injury, aggravation or recurrence of her injury. In respect of the situation regarding Ms Gill, the appellant acknowledged when she met with her employer in July 2002 that she could not and would not provide support to this client and had not done so in the circumstances because of fear of injury to her back.

34 Therefore, on the balance of probabilities, we conclude that the evidence demonstrates that the appellant is unable to do the work of a social trainer in the spectrum of that work as defined by her Job Description Form (Exhibit A4), and is restricted in dealing with the physical demands set out in the Pre-Employment Physical Demands Assessment Criteria (Exhibit R1) which deals with those requirements of a social trainer. This is so in high support, challenging behaviours and minimal support areas. It is unlikely that she would be able to do the full range of duties or even modified duties which potentially require the social trainer to deal with unpredictable behaviour of clients in their home and family support arrangements.

35 The question then arises as to whether or not there has been frustration of the contract of employment as a social trainer, and whether the evidence demonstrates that on the balance of probabilities there is work of a social trainer position which she could reasonably perform without risk to herself, her clients and the respondent.

36 The law regarding frustration has been dealt with by a number of authorities over time. The reference by the appellant to *Finch v. Sayers and Another* [1976] NSWIR 540 was one in which His Honour, Wootten J. referred to the decision of Donaldson J., President of the National Industrial Relations Court in *Marshall v. Harland & Wolff Ltd* [1972] 1 WLR 899. Wootton J. said that he believed the decision was an attempt to explain the law of frustration in terms comprehensible to laymen. He noted—

> "In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: 'Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?' In considering the answer to this question, the tribunal should take account of—
>
> (a) *The terms of the contract, including the provisions as to sickness pay*
>
> "The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment.
>
> (b) *How long the employment was likely to last in the absence of sickness*
>
> "The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job than if it was expected to be long term or even lifelong.
>
> (c) *The nature of the employment*
>
> "Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.
>
> (d) *The nature of the illness or injury and how long it has already continued and the prospects of recovery*
>
> "The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.
>
> (e) *The period of past employment*
>
> "A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.
>
> "These factors are inter-related and cumulative, but are not necessarily exhaustive of those which have to be taken into account. The question is and remains: 'Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment?" Any other factors which bear on this issue must also be considered."

37 In Macken, McCarry & Sappideen's, The Law of Employment, Fourth Edition, the authors note that—

> "… However, the courts now appear to prefer the doctrine set out by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC*—
>
> > "… frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract ... It was not this that I promised to do."
>
> This position is now accepted as applying in Australia.
>
> Unlike repudiation … frustration puts an end to the contract automatically without action by the parties. This can be important; for example, it can mean the difference between receiving and not receiving an employment benefit, such as long service leave or a superannuation benefit, which depends on the contract being in existence for a particular time or at a particular date. It should be noted that for the parties to be discharged from liability under this doctrine it is not enough that the supervening incident has merely made performance of the contract difficult. There must be "the non-existence of the state of things assumed by both contracting parties as the foundation of the contract". "It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in the existence at that time." Or again "was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment?""

38 In this case, the appellant's physical condition as assessed by three medical practitioners was that the appellant should not continue to perform the work of a social trainer for which she was contracted. The passage of time, her experience of injuries and pain, and her unwillingness to perform a necessary part of her responsibilities in assisting Ms Gill out of her soiled bed on account of the appellant's fear for her back demonstrate very clearly that the appellant was no longer capable of performing her contractual obligations. There is no evidence that her condition was temporary or short term. On the contrary, there is no evidence of any real prospect of improvement. The circumstances in which she might have performed her obligations were radically different from those required by the contract. Accordingly, notwithstanding her many years of faithful service and her

desire to continue, the appellant could not reasonably perform the work of a social trainer for which she was contracted. The fact that the appellant is able to care for her home and family and to drive her vehicle is quite a different consideration from her being placed in the position of performing those sorts of tasks in an employment situation where the clients with whom she was dealing exhibit unpredictable behaviour. The fact that the appellant acknowledged that she could not and would not assist Ms Gill for fear of her back makes this entirely clear.

39 It may be that the appellant's back condition has not changed over recent years, or that the respondent employed her when she had previously had a back problem. However, by the time the employment was brought to an end, the appellant's back problem had recurred a number of times, and she had not met her obligation to assist Ms Gill because of fear for her back. Therefore, while the appellant had been engaged following problems with her back, the passage of time and events brought the situation to a head. The situation at termination was different to that when she commenced.

40 Accordingly, we conclude that the contract between the respondent and the appellant for her to work as a social trainer was frustrated.

41 However, the matter does not end there. The question arises as to whether or not it was unfair or unreasonable that the respondent should rely on frustration in these circumstances or whether the respondent should have made other arrangements to provide her with a fair go. The appellant believes that the respondent did not make real efforts to place her elsewhere because she says that there are different houses and different work in which she could be usefully engaged. According to her evidence, her belief in this regard arises from her discussions with "a social - - - social trainer" (transcript page 74).

42 Although the appellant made assertions that there was other work that she could perform, either as a social trainer or in some other capacity, and that there were other arrangements that could be made, she gave no evidence that would demonstrate that this was so beyond her assertions.

43 The evidence does not demonstrate that the employer has not made reasonable efforts, nor does it demonstrate that the appellant has not been given proper consideration. Other than the appellant's own assertions, the evidence contained in the documents, particularly Exhibit A14 which invites her to provide any reasons why the contract of employment has not been frustrated, and the respondent's letter of 18 November 2002, at least on their face, show that this is not so. In the letter of 18 November 2002 the respondent gave consideration to the appellant's apparent suggestions regarding work opportunities. There is no evidence to the contrary. We are not satisfied from the evidence called for the appellant that she has demonstrated that what the respondent has said in that letter as to the availability or reasonableness of an expectation of work in those areas is not so.

44 The social trainer positions in hostels or other facilities could not accommodate the appellant's physical restrictions. The same applies to her visiting clients in their homes. Where the appellant had suggested working with children, the respondent says that no such work is available within its operations due to a restructure in 1999. As to the question of retraining her for other work elsewhere in its operations, the respondent says that there is no such work available which could reasonably accommodate her physical restrictions, aptitude and work capacity. There is no evidence that the respondent has not taken account of practical and reasonable adjustments to the work environment which might assist the appellant.

45 The appellant has not demonstrated, other than merely asserting, that the respondent could have done more. The appellant bears the onus to prove her case. She has not demonstrated that she has been treated unfairly in the respondent's bringing the employment to an end by accepting the frustration of the contract or in not finding other work for her.

46 We also note in passing that the respondent has a duty of care to its employees including the appellant. Furthermore, it has a duty to its clients. It is bound not to place either its employees or its clients, and ultimately itself, in danger or jeopardy where it knows that there is a risk of such occurring. For the respondent to continue to employ the appellant in the capacity of a social trainer when clearly her performance of even basic duties such as opening a window, lifting a client's foot to put cream on her leg, or getting out of an arm chair are likely to cause her back pain and injury, would be foolish. There is no other work available for her.

47 In all of the circumstances, we are far from satisfied that the respondent has treated the appellant unfairly. We recognise that the appellant has been a long serving and faithful employee and she wished to continue to perform the duties which she obviously felt a desire to perform and to be of assistance. Even if she is prepared to bear the risk to her back by performing the duties, it would be quite unreasonable for the respondent to allow her to do so.

48 Having said that though, we note that the appellant in claiming that there was no basis for frustration, complained that the respondent had treated her unfairly by not providing her with notice in accordance with the Award.

49 According to Macken et al (op cit), frustration brings about termination of the contract. There is no notice required of either side. In this case, if notice were required, the respondent had informed the appellant in the letter of 18 November 2002 that it accepted the frustration of the contract and that it had come to an end. It was not until a month later that the respondent formally brought the contract to an end effective from 18 December 2002. Accordingly, if notice were required, it seems that a month's notice was given. Whether that was a month with pay, or with payment of sick leave or worker's compensation, or leave without pay is not before the Board.

50 In all of the circumstances, the Board formed the view that the appellant had not discharged the onus which fell to her of proving her case. Accordingly, we agreed that there was no requirement for the respondent to defend itself against the allegations by putting forward its case.

2003 WAIRC 09730

AGAINST THE DECISION TO TERMINATE MADE ON 18/12/2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARILYN JOYCE KISH, APPLICANT
	v.
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT – CHAIRMAN
	MR B HEWSON – BOARD MEMBER
	MR R MAY – BOARD MEMBER
DATE OF ORDER	FRIDAY, 17 OCTOBER 2003
FILE NO.	PSAB 1 OF 2003
CITATION NO.	2003 WAIRC 09730

Result Appeal dismissed

Order

HAVING heard Ms C Bowden and with her Mr M Sims on behalf of the appellant and Mr D Matthews and with him Ms T Babaeff on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this appeal be, and is hereby dismissed.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
On behalf of the Public Service Appeal Board

2003 WAIRC 09624

AGAINST THE DECISION TO TERMINATE MADE 17/6/2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE LINDA PULE, APPELLANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF COMMUNITY DEVELOPMENT, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT – CHAIRMAN
	MR B HEWSON – BOARD MEMBER
	MR K WRINGE – BOARD MEMBER
DATE	FRIDAY, 10 OCTOBER 2003
FILE NO.	PSAB 4 OF 2003
CITATION NO.	2003 WAIRC 09624

Result	Appeal dismissed
Representation	
Appellant	Mr J Dasey
Respondent	Mr D Matthews (of counsel) and with him Mr D West

Reasons for Decision

COMMISSIONER P E SCOTT AND MR K WRINGE—

1 The appellant appeals against the decision of the respondent to dismiss her following a disciplinary process pursuant to the Public Sector Management Act 1994 ("PSM Act"). This decision arose subsequent to the respondent calling upon the appellant to retire on the grounds of ill health pursuant to s.39(1) of the PSM Act. The appellant declined to retire, the respondent entered into the disciplinary process in respect of the appellant's failure to retire when called upon to do so and an alleged breach of discipline in disobeying a lawful order calling on her to retire. At the conclusion of this disciplinary process, the respondent dismissed the appellant on 17 June 2003.

2 The Public Service Appeal Board ("the Board") has heard evidence from a number of witnesses and has received into evidence a substantial number of documents including the correspondence between the parties over a significant period, reports from various medical practitioners as to the appellant's health and copies of documents generated by the appellant.

3 The witnesses called to give evidence included Dr Terry Buchan, a psychiatrist of many years standing, who had been requested to see the appellant by the Chief Psychiatrist of the Health Department as there were concerns about the appellant's mental health. Dr Robert Wolman, the appellant's general medical practitioner, who had been her treating doctor since 30 March 1998, examining her once or twice a month over that period, also gave evidence. The Board also heard evidence from Lex McCulloch, the Executive Director, Community Development and Statewide Services for the respondent, whose decision is the subject of the appeal.

4 According to Mr McCulloch the respondent's general responsibility is to protect children and support families. The families and children with whom the department comes into contact are normally in a state of distress. There is some crisis in their life at the time. They require to be dealt with with sensitivity, by someone who will listen and who has good judgement.

5 Taking account of all of the evidence before the Board, we note the following history and sequence of events. On 27 February 1995, the appellant was engaged by the respondent on a three month contract as a Graduate Welfare Officer – Kalgoorlie Branch, Goldfields District of the respondent. From 15 December 1995, the appellant was made a permanent public service officer as a Graduate Welfare Officer Level 2/4 in the Goldfields District.

6 The Job Description Form for a Graduate Welfare Officer (Exhibit R9) sets out the duties as follows—

> "1. Evaluates and acts to protect children considered disadvantaged or at risk.
>
> 2. Investigates, collates and presents information to Children's Court and other courts on behalf of the department, and acts as an advocate for clients on request.
>
> 3. Makes social assessments for the purpose of planning for children and families, including case conferences placements and adoptions.
>
> 4. Performs counselling in line with case management plans, or when appropriate, based on officer's judgement.

5. Arranges referrals to other agencies and professionals as required based on officer's judgement.
6. Co-ordinates specialists and other agency intervention in cases.
7. Supervises, counsels, and organises projects for juvenile offenders.
8. Convenes, participates, and adjudicates in Children's Panel proceedings.
9. Administers the provisions of the Welfare and Assistance Act and other appropriate Acts as required.
10. Performs a community development role as required.
11. Develops with, participates in, and advocates for groups seeking to redress situations of social disadvantage.
12. Undertakes research and evaluation on social issues.
13. Liaises with other agencies and represents the department on inter-agency committees concerned with the wellbeing of the community.
14. Receives monies and purchases goods within established controls.
15. Administers Government building and properties as required.
16. Recruits and supervises support staff as required.
17. Acts for department in State Emergency Services.
18. Assists in training personnel and students as required."

7 According to Mr McCulloch the job of a Graduate Welfare Officer includes taking calls from the public, issuing financial relief, doing child protection investigations, and carrying a case load of children in care. In respect of the care of children, the Graduate Welfare Officer makes contact with foster carers, schools, doctors, and the children in care. They make assessments and produce reports in preparation for planning processes referred to as case conferences. They may do case reviews, gathering information for child protection investigations. They may make application to the Children's Court, prepare evidence for the Children's Court and give evidence in such cases.

8 The Graduate Welfare Officer needs to be able to relate to foster parents, to analyse what people are saying and make judgements in relation to whether or not they are going to be suitable to care for a child in a foster care situation. The Graduate Welfare Officer may be involved with situations where there is teenage-parent conflict and domestic violence, perform counselling, and make referrals. In general, according to Mr McCulloch, the respondent's business requires sensitivity and good judgement because of the involvement in people's lives during difficult times. Accordingly, there is a need for good judgment.

9 The Department first became aware that the appellant had mental health problems in 1996 and Mr McCulloch gave evidence of the reports which followed from that time.

10 At some stage, the appellant was transferred to Mandurah. It appears that over the following years she was located in Perth and then back in Mandurah. She was transferred to Midland in 2000. She undertook work in the respondent's Community Skills Training Centre and prior to the termination had been doing work in the Provider Support Unit.

11 The appellant also worked at the West Coast College for approximately 9 months commencing in 1998 and also undertook Project Research work in the Office of Seniors, both of which placements were external to the respondent's operations.

12 During this period there were significant amounts of time off work, partly as a result of hospitalisation. The respondent does not have available for the Board's consideration the amount of sick leave taken by the appellant over the period of her employment. However, it appears that large periods of the leave taken by the appellant were at the respondent's request while the respondent was waiting for her to be assessed by a medical practitioner and psychiatrist, awaiting reports and finding suitable placements for her. A number of the internal placements were arranged by the respondent on the recommendation of the appellant's psychiatrists, to enable her to work in areas not involving contact with the respondent's clients.

13 The appellant's medical history is set out in a variety of reports including one of Dr Farooq Ahmad, a consultant psychiatrist, who reported on 27 May 1998 (Exhibit R15) that the appellant had had a first psychiatric breakdown in 1994, with three repeated admissions to Graylands Hospital. She had a relapse in 1996 and three repeated admissions to Fremantle Hospital. It appears from the evidence (Exhibit R12) that there were efforts made to return the appellant to work from 25 July 1997 under alternative working arrangements. On 17 April 1998, the appellant was admitted to Graylands Hospital. The report of Dr Ahmad indicates that she appears to have been unwell for at least one year. Five weeks later, on 25 May 1998, she was discharged. In his report of 27 May 1998, Dr Ahmad suggested that it was advisable that the appellant not be involved in tasks where she had direct contact with clients and these arrangements were made.

14 The appellant took up a placement at West Coast College in October 1998. On 22 April 1999, West Coast College brought that arrangement to an end. The appellant appears to have made application whilst at that placement for a Level 5 position. West Coast College reported to the respondent that her mental health deteriorated after she was not successful for that position (Exhibit R16) and reports indicate that she was hospitalised. Exhibit R19 is a report from Dr Peter Graham dated 22 June 1999. Dr Graham noted that the appellant was admitted to Graylands Hospital from 23 to 30 April 1999. He also indicated that it was very important that the appellant continue with the appropriate course of medication, and suggested a written agreement as a condition of re-employment that she continue receiving medical treatment and to take medication as prescribed.

15 On 21 December 2000, the appellant entered into a memorandum of understanding with the respondent (Exhibit R22) whereby she agreed to remain compliant with the treatment regime and medication and to provide the respondent with a certificate at three monthly intervals from the treating psychiatrist confirming that she remained compliant or otherwise noting any variation authorised to her treatment. The agreement was to be reviewed after 18 months. If after that time the appellant had complied with that commitment, the respondent agreed that it would cease the requirements set out in the agreement.

16 On 21 February 2001, Dr Lawrence D Terace, a Consultant Psychiatrist, wrote a report to the respondent in response to a request of 12 February 2001. In this report (Exhibit R24) Dr Terace noted that he had interviewed the appellant on 16 February 2001. She was on leave during the period because a Dr Veltman felt that she was not well and had certified her unfit from 9 February 2000 to 28 February 2001. (It appears that reference to 9 February 2000 should be reference to 9 February 2001 because it appears from the report that this certification of her being unfit arose from her making comments at work on 16 January 2001).

17 In the report Dr Terace recorded that the appellant advised him that she had complied with treatment. He refers to a relapse in November 2000.

18 At page 8 of the report, Dr Terace notes the following—

"6. Whilst Ms Pule is actively psychotic, she would lack the discretion and judgement required as a key feature of the duties performed by a Graduate Welfare Officer (as described in the generic job description in Attachment

B). I *particularly* reviewed duties 1 – 8 in that regard. Whilst Ms Pule is psychotic, she would have difficulty maintaining a clear and objective mind and discharging the above duties. Whilst Ms Pule is psychotic, she would lack the fundamental requirements of her position to enable objective assessment of the delicate situations that you say are a feature of her duties and may also, and probably has, acted inappropriately. During these episodes, Ms Pule probably would be less likely to act with the necessary sensitivity required to provide the essential service described and, yes, it is possible, if not likely that, during her psychosis, adverse impacts might occur upon carers and children with whom she has unsupervised contact.

7. *During* Ms Pule's recurrent psychosis, her state of health would thus interfere in her ability to discharge her duties *sensitively and appropriately* with regard to fellow officers or the public.

8. The extent of Ms Pule's mental illness is that it is currently in *remission.* It is, however, by nature an episodic disorder, and the frequency of episodes in the past *strongly supports that a further episode will also occur in the future.* During any future episode, it is likely that Ms Pule will be unable to discharge the duties of her position, as she has in the past.

9. Therefore the prognosis is that Ms Pule is most likely to have a future relapse. It is, however, difficult to determine *when* such a relapse will occur, and *how severe* it will be. Ms Pule perceives that the restrictions made upon her during the recent suspension were unreasonable, and found those distressing. Please note, that the *reasonableness* of those restrictions from an industrial standpoint or legal standpoint is, in itself, an industrial and legal matter outside of my determination. From a *psychiatric standpoint*, however, I would consider the suspension of those duties during active psychosis to be appropriate, because it protects Ms Pule during a period of psychosis, and minimises the impact of adverse events upon her.

10. <u>*In the present*</u>, Ms Pule is demoralised and frustrated and mildly distressed, but this is an adjustment to—

    10.1 Ms Pule's suspension from duties.

    10.2 Ms Pule's fears regarding employability in the future.

    This distress does not appear to be part of an active psychosis, and is not otherwise occupationally caused.

11. Otherwise, Ms Pule did not meet criteria for a psychosis or other recognisable psychiatric condition *in the present*, even if she was actively psychotic *in the past*.

…

14. From a *functional* standpoint, however, in the *present*, it is arguable that Ms Pule has full capacity for return to her normal duties *in the present*. This is not, whoever (sic), a statement of Ms Pule's capacity in the *future* and one needs to consider the following—

    14.1 It is likely that a further episode of psychosis or other recurrences will occur.

    14.2 That the number and frequency of former episodes is a strong predictor that further relapse will occur.

    14.3 During those episodes, Ms Pule would require vigilance and supervision, and would not be capable of carrying out or discharging her duties.

    14.4 <u>*In the present*</u>, Ms Pule has capacity for work, but will still require initial vigilance and supervision to ensure that the psychosis is well in remission.

15. I regret that I cannot predict when a future episode will occur. It is, however, a question of *when* rather than *if*, and this too needs to be considered. *In the present*, Ms Pule is in remission, and in the present she has the capacity for her normal duties based on psychiatric assessment."

(Exhibit R24)

19 Arrangements were then made for the appellant to return to work performing duties other than those of a Graduate Welfare Officer, as she had done previously.

20 On 24 May 2001, the appellant sent an email to Stephen Smith MP (Exhibit R26) which will be the subject of later comment.

21 It appears that around this time the appellant had a relapse and Mr McCulloch says she was admitted to Graylands Hospital.

22 On 22 July 2001, Dr Terace again reported to the respondent in response to a letter from Mr John Dean, the Zone Manager, Northwest Metropolitan Zone of the respondent (Exhibit R27). The letter to Dr Terace requested a comprehensive report addressing the issues canvassed in that letter. Dr Terace noted that he interviewed the appellant on 20 July 2001. At that time she reported to him that there had been a mix up with her medications, which appears not to have been through any fault of the appellant, and that she relapsed two weeks later. She described to Dr Terace that there had been a few relapses since she had last seen him and these appear to have been between the 24th May and 2nd July 2001. Dr Terace's key findings were as follows—

"6.1 Any *former psychosis* is in remission, and Ms Pule's mental state, at this time, is within the realms of normal mental and human experience.

6.2 At least one of the relapses appeared to relate to a medication error, not being by Ms Pule. This appeared to have been a *significant error* and probably *would have led to relapse in most people*. If this was the case, then I believe it to have been outside of Ms Pule's control.

6.3 Compliance with medication has been established, since Ms Pule has been started on a depot antipsychotic, and this is a very positive step in reducing the rate of relapse in the future.

6.4 A further factor in relapse was Ms Pule's bereavement of her grandmother. Ms Pule has since resolved that bereavement, and this is also a good prognostic factor, indicating that the likelihood of relapse is lower now than it was, in the past.

7. Given the history of relapse in the past, it is still more likely than not, that future relapse will occur. However, at this time, there are several factors signifying that the likelihood of relapse or the frequency and/or severity of relapse, *is now lower than it has ever been before* and this too, needs to be considered …

…

8. Therefore, Ms Pule's *prognosis has improved*, based on the above.

9. With regard to Ms Pule's capacity for work as a Public Services Officer, and her current position, I have the following comments—

    9.1 In the present, Ms Pule is free of psychosis. Ms Pule *currently* has capacity for her normal duties.

9.2 This means that, *in the present*, Ms Pule is fit to dispense the duties and responsibilities that are required of her as a Public Services Officer. It does not mean, however, that Ms Pule may be fit to dispense those duties and responsibilities in the *future*. It also needs to be considered that, when psychotic in the future, Ms Pule would have difficulty facilitating the Department's fundamental duty of care responsibilities with client staff and the community, given the problems of the past.

9.3 *However, at this time, the likelihood of relapse, in the future, is now lower than it was before.*

…

9.8 *If* the Department views my opinion that the likelihood of Ms Pule's relapse is now *lower than it was before* (although the Department must understand that relapse is still likely to occur in the future) as a positive one for her remaining in her current employment, *then* the Department would need to continue management of her employment in the manner in which it has in the recent past, and that structure, line of responsibility and supervision, all remain essential.

9.9 However, the Department must understand that the final decision as to whether the Department does or does not retire Ms Pule on account of ill health, is an industrial and legal determination. I am unable to lend support to the decision as to *whether* to retire Ms Pule on account of ill health or not to retire her on account of ill health. This is essentially an *industrial and legal* determination. *I can only state that at this time, my conclusions are as follows*—

9.9.1 That whilst Ms Pule is not psychotic, she remains fit to dispense her duties and responsibilities required of her as a Public Services Officer, albeit in the context of some restrictions.

9.9.2 That Ms Pule is likely to relapse again in the future and future problems are likely to occur. However, the rate, frequency and severity of those problems, may be anticipated to be *lower than they were before*. This means that there are precautions in place now to improve Ms Pule's prognosis and which I think have reduced the likelihood of relapse, and the rate, frequency and severity of relapse. This does not mean that future problems will not occur, because I still think that it is most likely that they will.

9.9.3 As a Consultant Psychiatrist, it would be my preference, because I believe it is in Ms Pule's best interests, to continue working, and to maintain her independence and autonomy. However, I do appreciate that the Department has a responsibility of duty of care towards it (sic) clients, staff and the community. Therefore, the Department needs to make the decision as to whether my *conclusion* that Ms Pule is less likely to have future problems (as opposed to not having problems at all which I think is unlikely) is *sufficient* to enable the Department to maintain Ms Pule's employment.

9.9.4 However, with consideration all the relevant matters, I am certain of the following—

9.9.4.1 That problems will arise in the future if Ms Pule maintains employment as an autonomous Graduate Welfare Officer, even if those problems are less likely to occur, or will occur with less frequency than before.

9.9.4.2 Ms Pule and the Department would be in a better position if she maintains her employment in administrative duties, as she is in the present, providing that any work with clients be supervised by another colleague. Even within administration, Ms Pule probably will have further difficulties, although it needs to consider that the frequency and likelihood of these difficulties should now be less than it was when I last saw her in February, 2001."

(Exhibit R27)

23 On 5 September 2001, in response to clarification sought as to that report, Dr Terace responded saying that the appellant was generally unfit for employment as a Graduate Welfare Officer on the basis that if and when her psychosis recurred, it would most likely interfere with her duties and obligations to clients. Dr Terace said—

"…

2. However, at this time, while Ms Pule is *well*, I consider her fit for *other administrative duties which do not involve unsupervised client contact*. However, it needs to be noted that since Ms Pule has had recurrent episodes of psychotic illness in the past, it is still likely that (despite her best efforts and the best efforts of her treating doctors) that one or more psychotic episodes will recur in the future. Therefore, at that time in the future, Ms Pule will then be disabled from most forms of employment, including administrative duties, until remission occurs again."

(Exhibit R29)

24 Following that report and clarification from Dr Terace, in December 2001, the respondent sought an administrative position within the Department for the appellant and the appellant was also applying for positions within the Department at the same time.

25 On 8 February 2002, Mr McCulloch wrote to the appellant saying that he had reached a provisional view that she should be required to retire from the public service on grounds of ill health pursuant to s.39(1) of the PSM Act (Exhibit R31). He wrote "the stage has now been reached where real doubt is held about your ability to effectively and efficiently discharge the duties of your substantive position of Graduate Welfare Officer at this time and into the future. Even if it were incumbent on the Department to find you alternative duties, such as purely administrative duties, those doubts would remain." Mr McCulloch gave the appellant seven days in which to respond. Following a meeting with the appellant and her union representative, Mr McCulloch decided not to proceed further with the matter.

26 On 16 July 2002, the appellant complained to Mr Phil Riley and to Mr Lex McCulloch of the respondent, alleging an employee, M, had an association with a satanic cult and that this may have some connection with issues of "satanic ritualistic abuse" and/ or "protected paedophile activities". She then responded to a memorandum of Mr McCulloch's of 31 July 2002 in which he requested that she detail her allegations in respect of the respondent's code of ethics. By letter of 31 July 2002, the appellant identified those in detail. By an email dated 13 November 2002 (Exhibit R33) addressed to Mr McCulloch and copied to 27 people, at least some of whom appear to be employees of the respondent, the appellant referred to complaints she had previously made regarding M. She sought that if anyone had any knowledge or information in respect of those concerns regarding that person or other employees involved in other activity, to contact Mr Phil Riley.

27 We make reference to this email and the letters on the basis that their connection will become clear when Dr Terace was later asked for his comment in respect to the appellant's mental health by reference to the letter of 16 July 2002. We will refer to that later.

28 On 17 January 2003, the appellant sent an email to Dr Jeremy Hyde, a consultant psychiatrist (Exhibit R34), which will be the subject of later comment.

29 In early 2003, the appellant was directed to attend an appointment with Dr Terace for him to undertake a review and provide a report to the respondent in respect of the respondent's request to Dr Terace on 20 January 2003. The appellant and the Civil Service Association of Western Australian Incorporated disputed the terms of that letter and accordingly the respondent wrote to Dr Terace again on 30 January 2003 modifying the letter of 20 January 2003. Dr Terace appears to have taken account of both letters in his response of 24 February 2003. He reported that he interviewed the appellant on 3 February 2003 and reviewed documentation provided by the respondent including comments from Dr Wolman and Dr Carter, a psychiatrist. Dr Terace noted that since he last saw the appellant in July of 2001, there had been no further psychiatric admissions to any psychiatric facility, that the appellant said that it was her decision to stop seeing her former consultant psychiatrist, Dr Veltman, after the last report of July 2001, and she sees Dr Wolman on a regular basis, once per week or once a fortnight. He recorded that the appellant had been referred to see consultant psychiatrist, Dr Carter, whom she first saw on 15 January 2003 and whom she had seen in the past, but no further arrangements had been made for her to see Dr Carter. The appellant reported that she had not been taking depot antipsychotics at the present as she had in the past. He reported that she had denied that there were any further medical problems since he had last seen her in July 2001.

30 In Mr McCulloch's letters to Dr Terace of 20 and 30 January 2003, he had included a range of documents and asked for Dr Terace to comment upon them. Those documents included the appellant's correspondence with Mr McCulloch, Mr Riley and others regarding allegations against M, the appellant's email to Dr Jeremy Hyde, and the appellant's email to Stephen Smith MP, all referred to earlier in these Reasons. Dr Terace's report notes that in respect of the great bulk of documents referred to him, he formed the view that they did not constitute substantial evidence to lead him to conclude that the appellant was psychotic when she had prepared those documents. He commented that a number of them appeared to be related to behaviours that might be considered abhorrent and unacceptable to the respondent, but that as the appellant might not have been psychotic at the time, those matters would be disciplinary matters rather than matters of a medical disability. However, he did conclude in respect of three matters that they, subject to other comments, may indicate that the appellant had been psychotic at the time she prepared the documents. The first such matter is in respect of the email from the appellant to Dr Jeremy Hyde, a consultant psychiatrist, of 17 January 2003. In respect of this particular document, Dr Terace noted that the appellant could not give him a satisfactory explanation as to why she had sent this document or explain its contents but insisted that it was about "networking". He says, though, that after review it was his view that the email,

> "… compels me to conclude that, at that time, Ms Pule was more likely than not, actively psychotic, in an intermittent way, and that it might be argued that she even had delusions of grandeur, at that time, believing she could influence world affairs", etc. like the US-Iraq situation …". (Exhibit R37)

31 The second such matter involved allegations by the appellant against another employee, M, that he was a member of a satanic cult. Dr Terace said of this issue that—

> "the question as to whether Ms Pule was actively psychotic, at this time, depends on the veracity of her complaint about (M). *If* there is no substantial evidence to support that (M) was, in fact, a member of a satanic cult, *then* it would be reasonable to argue that Ms Pule was actively psychotic at that time."

32 The evidence of Mr McCulloch was that an investigation was to have been undertaken as to the appellant's complaint. She had been asked to provide further information and evidence but had been unable to do so. On 13 November 2002, the appellant had sent an email to Mr McCulloch noting the Department's decision not to investigate her allegation. She copied this email to 27 other people calling on them to provide information "on issues of concern regarding" M and others. There is no evidence that such information was provided. In the circumstances it would appear that, in accordance with Dr Terace's report, as there was no substantial evidence to support the allegation that M was a member of a satanic cult, then it would be reasonable to argue that the appellant was actively psychotic in July 2002.

33 The next issue upon which Dr Terace expressed a view as to the appellant being psychotic at the time was in respect of the appellant sending the email to Stephen Smith MP on 24 May 2001. Dr Terace's report is that the appellant has no memory of this and stated emphatically:

> "*it's not relevant to the current situation*".

34 Dr Terace says that "The e-mail provides compelling evidence that Ms Pule *was psychotic* at that time".

35 Another such issue involved a letter from John Beverage, Acting General Manager, Western Operations, of the Australian Federal Police to Mr Riley, Acting Director, Statewide Services of the respondent dated 8 November 2002. Dr Terace commented that "whilst Ms Pule insisted that her anti-paedophilia project was a personal pursuit as a product of her political and social viewpoint, it would be reasonable to argue that, assuming the veracity of Mr Beverage's comments, and the report of Federal Agent Coyle, that on Monday, 4th November, 2002, Ms Pule *was then actively psychotic*."

36 Dr Terace then proceeded to draw conclusions. His conclusions included that when he had last seen the appellant in July 2001, he had found "that any former psychosis was in remission" and that "from a psychiatric standpoint, … it would be reasonable to argue that Ms Pule needed to remain restricted of client contact work, and to remain closely supervised with day-to-day activities," and he had "agreed with the Department's implementation of a structured management regime facilitating return to work". The remainder of his conclusions include that—

> "3.1 Ms Pule denied any *specific psychiatric symptoms*, in the present. It is on that basis and, assuming the *veracity* of her account to me, that I *could not* describe her as being actively psychotic, in the *present*. This means that, at the time of interview, *if* I assume that she gave a true account of herself, I would have to consider her former psychosis to have been in remission.
>
> 3.2 *This does not mean that Ms Pule may not have been intermittently psychotic in the period since I last saw her*. There are certain documents provided by you on this occasion, which substantially support the presence of intermittent psychosis, those being—
>
> 3.2.1 E-mail from Michelle Pule to Jeremy Hyde (Dr Jeremy Hyde, Consultant Psychiatrist), dated the 17th January, 2003.
>
> 3.2.2 Michelle Pule's letter to Phil Riley, Human Resources, Department for Community Development, re complaint about M, dated the 16th July, 2002.

3.2.3 The letter of John Beveridge, Acting General Manager, Western Operations, (Australian Federal Police), to Mr Riley, Acting Director, Statewide Services, Department for Community Development, dated the 8th November, 2002.

3.3 At interview, Ms Pule insisted that these letters and documents were statements of her *political views*, that they were not the product of *psychosis*, and that her problems with the Department represent *pure industrial grievances*, which have been *medicalised* for the Department's purposes of terminating her employment.

3.4 However, in relation to the specific documents listed above (POINTS 3.2.1, 3.2.2, 3.2.3, and 3.2.4), these seem to provide reasonable evidence to support that Ms Pule *was intermittently psychotic, at that time, and that since I last saw her, she has not been in complete remission*.

3.5 It needs to be considered that a psychosis can fluctuate, and can be episodic, such that—

3.5.1 In Ms Pule's case, these periods of intermittent or episodic psychosis, show that she was medically disordered, at that time, during her employment, but –

3.5.2 If the psychosis was, in fact, intermittent or episodic, then in between these episodes, her behaviours in the Office and her political viewpoints, and any industrial grievances she held with the Department with which the Department disagrees, are *industrial and legal issues* and matters between Ms Pule and the Department.

3.5.3 This means that *any behaviours considered aberrant and unacceptable to the Department in between these episodes of psychosis*, thus become disciplinary matters, without recourse to issues of medical disability.

3.6 Therefore, this case is complicated by periods of medical disability (episodic psychosis) and inter-morbid periods (between the intermittent psychosis) where Ms Pule's behaviour is in question, but not a product of psychosis, and is *solely* a disciplinary matter, the reasonableness of that discipline then being an industrial and legal, rather than a medical or psychiatric matter."

4. Whilst the aforementioned evidence supports the presence of intermittent psychosis over the period since I last saw her, the other consideration is the possibility that Ms Pule does have *chronic and stable encapsulated delusions or systematised delusions*. This means aberrant convictions and beliefs, which she holds despite reflection or evidence to the contrary, being stable and enduring, which she carefully conceals from others, as she may have concealed from myself at interview. The apparent *intermittent or episodic* nature of the psychosis would, in these circumstances, be artificial, and simply represent brief times in which Ms Pule is caught off guard, and unable to conceal these delusions.

5. However, the distinction between *stable, encapsulated, and systematised delusions* in Ms Pule and *intermittent psychosis*, is difficult to determine.

Further evidence is required, in a collaborative way, from—

5.1 Dr Wolman, and

5.2 Ms Pule's present Consultant Psychiatrist, Dr C Carter.

I thus wrote to them with the expressed informed consent of Ms Pule, but neither letter assisted me in this distinction, and it should be noted that neither doctor had found Ms Pule psychotic clinically over the time in question.

6. The other issues, however, remain the same, that—

6.1 Some of Ms Pule's behaviours represent the consequence of medical disability, being psychosis, and

6.2 Other behaviours appear to be the product of personal, social and political viewpoints, which are not the product of psychosis. Any disagreement about these particular behaviours, which are not the product of psychosis, thus represents a matter of—

6.2.1 Ms Pule's industrial grievance against the Department, and/or

6.2.2 The Department's discipline of Ms Pule without recourse to the psychiatric issues.

Thus, the reader can see that *both* issues appear to be relevant in this case.

7. I would agree with Ms Pule in her position that there is a danger in automatically assuming that a person is psychotic where an individual's personal, social and political viewpoint appears eccentric to other individuals or agencies or organisations who do not share those viewpoints and who find that individual's behaviours intolerable.

8. However, having carefully considered the interview findings and the documentation provided, in the context of the history reported in my previous reports dated the 21st February, 2001 and the 22nd July, 2001, I found—

8.1 Reasonable *documentation* evidence that Ms Pule has been actively psychotic (either in an intermittent or sustained way) since I last saw her in the context of her employment, and that such medical disability has driven behaviours which have been intolerable to the Department, and

8.2 That there are times when Ms Pule's behaviours are driven *solely* by her personal, social and political viewpoints, independent of psychosis, and these matters represent industrial issues without recourse to medical or psychiatric issues, and the reasonableness of any discipline applied essentially is also an industrial and legal matter here.

…"

37 Dr Terace also made the following comments—

"12. You asked my professional opinion of Ms Pule's present and ongoing capacity to consistently fulfil the requirements of her substantive position of Graduate Welfare Officer, as detailed in the *Summary of Duties*, in the attached Job Description form (Attachment B).

13. However, if there has been either an intermittent or sustained psychosis over the period since I last saw Ms Pule (as described in my report dated the 22nd July, 2001) then I could not find her to be capable of consistently fulfilling the requirements of her substantive position as Graduate Welfare Officer consistent with the Job Description form.

> 14. Furthermore, you ask whether given Ms Pule's conduct in recent times while in non-client contact positions, it is my professional opinion that her present ongoing capacity enables her to consistently fulfil the requirements of any position within the Department.
>
> I would answer that a history of intermittent psychosis supported by the documents suggests that there has not been a sustained remission, and would appear to medically prevent Ms Pule from consistently fulfilling the requirements of any position within the Department."
>
> (Exhibit R37)

38 Dr Terace also referred to a list of issues which had been described by the respondent in page 1 of both the letters of 20 and 30 January 2003. Of these, he said that it was reasonable to argue that in respect of an email copied to staff which made potentially defamatory allegations regarding M, "in the absence of sufficient evidence to support Ms Pule's contentions, it would be reasonable to argue that she was actively psychotic at that time". As to harassing and contacting a clerical/administrating officer both during and out of work hours, Dr Terace described that "this has probably been the *product of psychosis or medical disability*."

39 Mr McCulloch says that Dr Terace's report of 24 February 2003 was the ultimate trigger for him to form the provisional view that the respondent should call on the appellant to retire on the grounds of ill health.

40 Following his consideration of Dr Terace's report, Mr McCulloch decided that it was appropriate to call on the appellant to retire on the grounds of ill health pursuant to s.39(1) of the PSM Act, and he formally did so by letter dated 6 March 2003 (Exhibit R3).

41 On 18 March 2003, The Civil Service Association of Western Australia Inc., wrote to Mr McCulloch. This letter stated that the appellant had asked the union to advise him that she did not wish to retire and that she did not agree with Mr McCulloch's assessment. It also noted that the appellant was out of the country and that this created difficulties for her and the union in properly considering and responding to any action the respondent might take.

42 The appellant was absent for a period of unauthorised leave, and during this period the respondent decided not pursue any matters relating to retirement or discipline until the appellant returned. The respondent continued to pay the appellant during this time.

43 The respondent became aware that the appellant had returned when she telephoned Mr Phil Riley on 17 April 2003. Correspondence then passed between the respondent and the union regarding the call to retire on the grounds of ill health, including that the union confirmed that its correspondence to Mr McCulloch of 18 March 2003 rejected the call to retire and reiterated that its position remained "that Dr Terace's report is insufficient grounds for any action which would lead to the terminate (sic) of Ms Pule's position. You should consider this as the formal response on behalf to Ms Pule" (Exhibit R7).

44 On 6 May 2003, Mr McCulloch wrote to the appellant advising her of a suspected breach of discipline (Exhibit R38). On 7 May 2003, by email, addressed to Mr McCulloch, the appellant denied breaching the lawful order to retire. She expressed dissatisfaction with departmental officers regarding that matter and said that she would not "under any circumstances comply with directions from DCD to retire, or of my own choice leave the Department for Community Development." She said that she would provide any response or information required at a conference before the Commission on 9 May 2003. (Exhibit R39)

45 On 9 May 2003 (although the letter was dated 9 May 2002), Mr McCulloch wrote to the appellant informing her that he suspected that she had contravened s.39(2) of the PSM Act by failing to retire on the grounds of ill health when required to do so. He gave her until the close of business on 13 May 2003 to respond (Exhibit R40). By email dated 13 May 2003 (Exhibit R41), the appellant communicated to Mr McCulloch that she denied the alleged breach of discipline. She said the decision to call on her to retire was not valid. On 19 May 2003, Mr McCulloch charged the appellant with a breach of discipline pursuant to s.83(1)(b) of the PSM Act in that she had failed to retire when called on to do so pursuant to s.39(1) of the PSM Act. On the same day, the appellant was charged with a breach of discipline in disobeying a lawful order calling on her to retire. She was given seven days to admit or deny each of those charges (Exhibit R42).

46 On 20 May 2003, the appellant replied to Mr McCulloch denying both charges and saying that the call to retire was unjustified, discriminatory and illegitimate (Exhibit R43). On 23 May 2003, Mr McCulloch advised the appellant that he would conduct a disciplinary enquiry for the purpose of deciding if she had committed breaches of discipline regarding the two matters referred to in the charges (Exhibit R44). The evidence indicates that on 28 May 2003, the appellant met with Mr McCulloch and discussed the matter in detail. On 13 June 2003, Mr McCulloch wrote to the appellant informing her of his findings that she had committed two breaches as charged. He proposed that she be dismissed pursuant to s.86(3)(b)(vi) of the PSM Act and he gave her two working days to respond to that proposal to dismiss (Exhibit R45).

47 Mr McCulloch has given evidence that Phil Riley invited the appellant to provide any evidence or reports she wished him to consider in his decision making process, however, she did not. It is only after the decision to terminate that she sought any reports from her general practitioner Dr Wolman, and the report from Dr Buchan arose as a result of another enquiry from a different source as to her mental health.

48 By letter dated 17 June 2003, Mr McCulloch informed the appellant that he had considered the views that she had expressed in her email on 16 June 2003 where she had once again suggested that the handling of the matter had been discriminatory and wrongful. In her email, the appellant had noted that she had been unable to get access to the union representative for advice within the timeframe specified and did not agree that she had disobeyed orders. Mr McCulloch's letter of 17 June 2003 informed her that her communications had not addressed the question of penalty but did not cause him to alter his provisional view that she be dismissed. Accordingly, he advised that her failure to retire in accordance with his instructions and the provisions of the PSM Act constituted a fundamental breach of the contract of employment and she was thereby dismissed effective immediately (Exhibit R48).

49 Mr McCulloch gave consideration to Dr Terace's report, and to a report from Dr Carter that she was currently fit for work. Dr Carter's report was not before the Board. He says that if Dr Wolman or Dr Buchan had provided him with reports at the time he cannot say whether they would have changed his mind but he would have considered them.

50 In dealing with the evidence, we conclude that Mr McCulloch's evidence is reliable, albeit that he was inconsistent as to what he considered in the disciplinary process. We will make further comments in respect of Mr McCulloch's conduct of that process in our conclusions.

51 The evidence of Dr Buchan was that he had conducted two interviews with the appellant after the decision had been made to require her to retire, firstly on 6 May 2003 and then again on 20 May 2003. The second interview was to discuss Dr Terace's report. Dr Buchan could not find any evidence of psychotic behaviour. He did describe the appellant as having an abrasive personality with unusual beliefs. He did not think that it would prevent her from working. However, in expressing that view he had not seen her job description. As to Dr Terace's report, Dr Buchan said that there was no doubt that the appellant behaved strangely, but it was not clear to him if that was a mental illness or a personality coping style and he said that it was necessary

to determine a number of other things before coming to a conclusion. He said that he had not known the appellant long enough to know if there was any likely future relapse, he could not give any opinion regarding her future health and said that it was difficult to make predictions. He says medical opinion is not capable of determining whether she is capable of performing her duties but says that the grounds for retirement by the Department are not sufficient. He says that Dr Wolman, her general practitioner, is likely to have a better understanding of her condition and he has spoken to Dr Wolman on the telephone. Interestingly, Dr Buchan was asked to see the appellant by the Chief Psychiatrist of the Department of Health because she had made representations to the Australian Federal Police, mainly telephone calls and letters which he, Dr Buchan, had not seen. He says that he has a number of letters that the appellant had given to him. He had read reports from Dr Hyde and Dr Ahmad, as well as Dr Graham. Dr Buchan was not happy with any conclusion as to the appellant being paranoid schizophrenic but there could be personality aspects which have an impact on her behaviour. He said that he was of the view that this was not an intractable psychotic illness. He said that if the appellant has episodes of psychotic thinking then it is likely to be related to stress but that those episodes should not prevent her working in the long term. He said that it is possible that those episodes could recur but there is no certainty as to that. He said that the situation of her capacity to work could not be differentiated from, say, someone with epilepsy who between episodes, functions normally. Given Dr Buchan's lack of knowledge or understanding of the appellant's role or of the respondent's work and obligations, it is difficult to accept his evidence.

52 Dr Wolman, the appellant's general practitioner, was a most defensive witness. It was clear that he did not want to give evidence; he would not give any opinion as to Dr Terace's report, and he could not comment on other doctors' opinions, saying that psychiatry is not an exact science. However, Dr Wolman believes that the appellant is not a danger to herself or others, her capacity to work is good and it depends on her level of stress. He says that there are no grounds to terminate her employment on the grounds of ill health. He says that he thinks that she is a difficult person but could not speculate further on the situation. He did not know much about the job the appellant held as Graduate Welfare Officer. He believed that in 1998, the appellant had a delusion disorder but does not believe that this is so now. He says that she may have been psychotic in the period 2001 to 2002, but not to his knowledge. The appellant is meant to take medications but Dr Wolman believes that she had not taken any for the last eighteen months. Interestingly, in his report of 12 February 2002, (Exhibit R2) Dr Wolman said that the appellant was taking medication and encouraged her to do so, and that she told him that she was taking the medication. Subsequently, two months prior to his giving evidence, when Dr Wolman questioned the appellant about it, the appellant said that she felt the medication was making her ill and told him she had not taken it for a long time. Dr Wolman had not seen any difference in her behaviour between when she was taking medication and when she was not.

53 We noted during the course of his evidence that Dr Wolman did not have all of the information and could only assume things on the basis of what he was told. He was not aware of whether the appellant was taking medication or of her duties. In these circumstances, we find Dr Wolman's evidence not reliable.

54 Interestingly, Dr Wolman says that once a person has been diagnosed as psychotic, every other medical practitioner who sees that person falls in behind that opinion and does not consider the matter for themselves nor do they genuinely observe the situation as it is at the time. He says that he is different. Dr Wolman says that the view of Dr Hyde and others as to schizophrenia and psychosis are their opinions but he does not agree with them. Dr Wolman agrees that as her employer, the respondent had a right to make an assessment about the appellant's performance, but he characterised this situation as the respondent telling the appellant that "she is too mad to work". He does not believe that she has not performed her contractual duties because of mental illness but rather he believes that it is because she is a difficult woman.

Conclusions

The Call to Retire

55 It is not appropriate that the Board attempt to act as psychiatrist and make its own conclusions. The Board can only take account of the information and evidence before it.

56 The first question is whether Mr McCulloch's decision in the first instance to call upon the appellant to retire is soundly based, reasonable, fair and lawful. Mr McCulloch says that Dr Terace's report of February 2003 was the "ultimate trigger". We make the following comments regarding Dr Terace's report. The first is that the report takes account of all of the appellant's history, other medical opinions and the appellant's advice to Dr Terace. It appears to be objective, in that it looks at whether the issues raised by the respondent were related to the appellant's health or to other non-health related behaviour. Dr Terace refuses to be drawn into discipline related matters. The report clearly identifies the appellant's history, and the issues which tend to indicate episodes of illness. The report relates to the appellant's position as a Graduate Welfare Officer, but also deals with issues as they impact on the appellant's role as an employee "in non-client contact positions" and on the respondent's obligations. Most significantly, the report identifies that a number of specific incidents are most likely evidence of psychosis, and that remission had not been sustained. He concludes that it "would appear to medically prevent Ms Pule from consistently fulfilling the requirements of any position within the Department."

57 We observe that, interestingly, Dr Terace in his report of 8 February 2003 at page 10, point 7, agreed with the appellant that there is a danger in automatically assuming that a person is psychotic when their views appear eccentric to others who do not share whose views, and who find that person's behaviours intolerable. Having noted that, Dr Terace then went on to draw his conclusions. This demonstrates that Dr Terace was alive to the possibility of pigeonholing the appellant, as suggested by Dr Wolman, and he took it into account.

58 Our second comment regarding Dr Terace's report is that, having invited the appellant to provide any other medical reports, the respondent was entitled to rely on this report, taken in context, in the absence of any alternative being provided by the appellant.

59 It is clear that the appellant could not continue in a position requiring her to deal with clients of the respondent in an unsupervised manner. Clearly, the appellant has a history of psychosis. When experiencing a psychotic episode, the appellant is not necessarily aware of her mental state. During this time, it is clear from the evidence, it is "less likely" that she will "act with the necessary sensitivity required" of the position of a Graduate Welfare Officer, and that "during Ms Pule's recurrent psychosis, her state of health would thus interfere in her ability to discharge her duties *sensitively and appropriately* with regard to fellow officers or the public." (see Dr Terace's report of 21 February 2001 at page 9)

60 While Dr Terace recommended in February 2001 that the appellant not perform the duties of a Graduate Welfare Officer while actively psychotic because it protected the appellant, and "minimised the impact of adverse events on her", it is clear that the appellant is not necessarily aware of when she is actively psychotic.

61 From Dr Terace's report of 24 February 2003, it is clear that a person who is not a psychiatrist may not be able to distinguish between the appellant's behaviour which would be a consequence of a psychotic episode and other behaviour which might simply be aberrant. Accordingly, it would not be possible for the employer to predict or to draw conclusions about any current behaviour, or to distinguish between aberrant behaviour which might warrant discipline, and that which is an indicator of a psychotic episode. That being the case, i.e. that neither the appellant nor the respondent is able to predict or diagnose the

situation at the time, it is not practicable to remove the appellant from duty while this is occurring and until she is in remission. This is particularly so given Dr Terace's optimism in July 2001 that the likelihood of relapse and the frequency of episodes recurring was then lower than it had been before, yet a number of likely episodes have occurred since then and the appellant appears to have ceased taking medication around 18 months ago.

62 This situation is quite different to that of an employee who suffers a physical illness which is apparent to the employee, and, most likely, to the employer.

63 Further, the appellant's episodes of illness, while affecting her capacity to properly perform her duties as a Graduate Welfare Officer, also have the real potential to adversely affect employees and others outside the organisation. This is not merely a situation of the performance of work being delayed by the absence of the employee while sick. This situation brings with it an added dimension of potential for damage to the respondent's clients and employees, to the respondent itself, and, not insignificantly, to the appellant.

64 One needs to bear in mind the appellant's history of illness and the respondent's attempts to accommodate her requirements in accordance with the recommendations of medical experts, including Dr Terace. The respondent removed her from duties involving unsupervised client contact. It was important that the appellant not be in such a position when suffering a psychotic episode. She needed to be able to act with the necessary sensitivity required to provide the essential service required of that position and it was likely that during her psychosis she would have an adverse impact upon carers and children with whom she had unsupervised contact. Further, it was noted at that time that she was likely to have further episodes.

65 Dr Terace's report indicates quite clearly that on 17 January 2003, in an email to Dr Hyde, it was more likely than not that the appellant was actively psychotic with delusions of grandeur. There being no substantial evidence to support the allegation that M was in fact a member of a satanic cult, it was reasonable to argue that the appellant was actively psychotic in mid 2002 in respect of that matter. Her email of 24 May 2001 to Stephen smith MP tends to indicate "compelling evidence" that she was psychotic at that time. (However, we note that this last issue arose during a period where the relapse was said to have been due to a medication error not of the appellant's making.) The letter of John Beverage of 4 November 2002 was evidence, in Dr Terace's view, that it was reasonable to argue, assuming the veracity of Mr Beverage's comments, that the appellant was then actively psychotic. Given the appellant's history and Dr Terace's comments, we think it fair to say that those episodes demonstrate that it is more likely than not that the appellant was psychotic at those times. Even if the appellant was not actively psychotic in February 2003 when Dr Terace interviewed her, and there is no evidence as to her state of health at the time she was actually called on to retire, there was a strong likelihood that she would have future psychotic episodes. Accordingly, she could not perform her duties as a Graduate Welfare Officer. The evidence also demonstrates that the respondent attempted to facilitate her work in other areas over a considerable period. She had not worked in her substantive position for some years prior to the termination.

66 However, it is also clear that those psychotic episodes arose in the appellant's dealings with other members of staff and persons external to the organisation and therefore moving her away from dealing with clients did not resolve the issues of difficulty which arose on account of ill health.

67 This is not merely a situation where an employee, through his or her ill health and thus incapacity, is physically or mentally incapable of being at work and performing the job. Rather, this is a question of whether or not the appellant's ill health meant that she was unable to continue to be employed by the respondent, interacting with other staff in the way that she did, having access to and using communication systems with other staff and with outside persons in which she is acting either in her official capacity or purporting to do so.

68 Section 39 of the PSM Act provides—

> **"39. Retirement of public service officers on grounds of ill health**
>
> (1) A public service officer may retire, or an employing authority may call on a public service officer to retire, from the Public Service on the grounds of ill health.
>
> (2) A public service officer who is called on to retire from the Public Service under subsection (1) shall forthwith so retire."

69 The respondent called on the appellant to retire in accordance with that section; the call to retire was on the grounds of ill health. It is clear to us that the appellant's health is subject to episodes of psychosis. It is the appellant's history of ill health, its unpredictability and likely future relapses, the lack of the appellant's or the respondent's ability to identify a psychotic episode, and its consequences on her, the respondent, the respondent's employees and others which justifies the call to retire from her position as Graduate Welfare Officer. The fact that episodes are intermittent and that between episodes the appellant is well, is not to the point. It is simply not reasonable to put in place systems to overcome the possible consequences of, at the time, unidentifiable episodes. If the appellant or the respondent were able to identify an episode when it occurred and the appellant withdrew from work until she is well again, this may be possible. However, all of the evidence suggests that it is not.

70 The question then arises as to whether it was fair and appropriate to call on the appellant to retire, rather than to allocate other duties to her. We note that the three likely episodes of psychosis referred to by Dr Terace occurred while the appellant was performing duties other than those of a Graduate Welfare Officer. Although those episodes do not bring with them any risks to the respondent's clients, they do have an effect on the respondent's efficient management of its operations, on the employees of the respondent, and on others.

71 In all of the circumstances, we conclude that the decision to call on the appellant to retire in accordance with s.39 of the PSM Act was not unreasonable, unfair or unlawful.

72 The appellant refused to retire according to that direction. That is clear and not in contention. That refusal was a refusal to obey a lawful direction. It also constituted a refusal to comply with s.39(2) of the PSM Act. The respondent's findings in respect of those matters, following the disciplinary process, were correct.

The Conduct of the Process

73 The second issue is whether the conduct of the disciplinary process by Mr McCulloch has been flawed by his conducting the whole process himself. The process of the investigation and enquiry was in relation to whether the appellant had complied with her employer's direction and had complied with the PSM Act s.39(2). It might seem that in a process such as this, with issues before the investigator and the enquirer such as there were, that it would be unsafe for one person to handle that whole process. The PSM Act does not prevent it. However, we conclude that it is most imprudent and perhaps foolish that the person who made the original decision to require an employee to retire should then conduct that process. The process involved forming a suspicion that the decision had not been complied with, investigating whether or not it had been complied with, charging the employee with non-compliance, and then enquiring into the decision in the first instance by way of review and making a final decision. That is what Mr McCulloch has done. We must say that we believe that Mr McCulloch has attempted to be fair, reasonable and of assistance to the appellant taking into account all of the circumstances. However, it was quite inappropriate

of him to have entered into and conducted the whole process having already made the decision to require her to retire. It could be seen as Mr McCulloch not being able to bring an open mind to the issues.

74 The Board should require the disciplinary processes set out in the PSM Act to be complied with appropriately. However, the manner of compliance with the process in the circumstances of this case could not be said to render unfair the initial decision of the employer when the decision is otherwise fair and reasonable. If the decision of the Board is that the decision to require the appellant to retire in the first instance was not unfair, unreasonable or unlawful then, albeit that Mr McCulloch's participation throughout the subsequent process was imprudent and foolish, we would not be prepared to conclude that the decision to require the appellant to retire should be unseated. The role of the Board is not to simply deal with the lawfulness of the process, but is to bring to finality the dispute between the parties (see *Gary Mark Raxworthy v The Authority for Intellectually Handicapped Persons* (69 WAIG 2066). By virtue of s.80L of the Industrial Relations Act, 1979, s.26(1) of the Act applies to the exercise of the jurisdiction of the Board. Section 26(1)(a) requires that the Board "act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal form."

75 In our view it would not be equitable to overturn a fair and lawful decision to call on the appellant to retire on account of flaws in the process of considering the appellant's clear and unambiguous rejection of and refusal to comply with that call to retire.

76 Accordingly, we would dismiss the appeal.

MR B HEWSON—

77 I have had the benefit of reading the Reasons for Decision ("Reasons") of Commissioner Scott and Mr Wringe. I agree with those Reasons; however, I wish to make some additional comments.

78 I believe the crux of the whole case is summarized in paragraphs 59 and 63 of the Reasons. It is absolutely vital for the respondent's business that officers exercise sensitivity and good judgement in all their dealings.

79 Similarly, I acknowledge Mr McCulloch's point in this regard, which is first raised in paragraphs 7 and 8 of the Reasons. I accept that the appellant's inability to show discretion and make assessments or judgements, at certain times, makes her unsuited for tasks considered essential to the position of Graduate Welfare Officer.

80 The position necessarily demands a certain degree of autonomy and independence. However, operating without direct supervision also brings with it an expectation that trust is a critical component of the job. Sadly, the fact that the appellant's inability to provide assurance to her employer in this regard, during her psychotic episodes, renders her unemployable at these times with respect to duty of care liability. I strongly agree with paragraphs 61 and 63 of the Reasons in relation to this point.

81 Transferring the appellant from her substantive position, both inside the Department of Community Development and externally, apparently did not assist the appellant with her episodes of ill health. In evidence presented, the appellant had difficulty not only with colleagues, but also with persons and organizations outside the department. This would make it intolerable for any employer to consider ongoing employment. Paragraphs 66, 67 and 70 of the Reasons are therefore strongly supported.

82 In my view, the unpredictable nature of the appellant's health presented the biggest potential for problems to the respondent. I concur strongly that the intermittent aspect of the appellant's health is not the issue, but the unreasonable burden placed on an employer to anticipate and prevent unknown consequences from future relapses is.

83 There are, however, elements of the respondent's handling of the investigation with which I have concerns. I refer to the apparent involvement of Mr McCulloch in every stage of the process, from beginning to end, and the consequential lack of procedural propriety. It is my firm opinion that Mr McCulloch has behaved arrogantly, has done himself no credit in this investigation and is deserving of censure. In his attempts to facilitate the process, and his admission that it was more convenient for the process not to be delegated, Mr McCulloch has seemingly failed to fully understand the import of his actions. He has acted most unwisely and it is disappointing to witness the apparent lack of commonsense in a person of such seniority and experience. Whether Mr McCulloch has difficulty with the concept of perceived conflict of interest or the basic requirement for transparency and openness in dealing with such matters is unclear, but his behaviour in this case has left a lot to be desired, in my view.

84 I generally agree with the thrust of paragraph 73 of the Reasons. Because of the obvious absence of checks and balances in the process, I believe that it is unsafe for one person to handle that whole process. In my opinion, the fact that the PSM Act does not prevent it does not necessarily make it acceptable. If the case had been delegated to other officers in the department, or another department, during the various stages of the investigation, I have little doubt that the outcome would have been much different, based upon the evidence presented. From my perspective as a Member of the Board, however, the real difference would have been that justice would have been seen to be done.

85 I have considered paragraph 74 of the Reasons at length. I strongly agree that the Board should require the disciplinary processes set out in the PSM Act to be complied with appropriately. I accept that the role of the Board is not to simply deal with the lawfulness of the process, but is to bring to finality the dispute between the parties. I am also satisfied that the action taken by the respondent simply displayed a lack of judgement, with no other sinister motive attached. I reiterate that the substantial merits of the case do not affect the decision to require the appellant to retire.

COMMISSIONER P E SCOTT—

86 For those reasons, the appeal is dismissed.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 6 of 2003	Leah Ann Phillips	Fremantle Hospital	Scott C.	Withdrawn by Leave	17/10/03
PSA 32 of 2003	David John Gibson	Dapartment of Planning and Infrastructure	Coleman CC	Withdrawn by Leave	03/11/03

NOTICES—Union matters—

NOTICE

FBM No. 009 of 2003

NOTICE is given of an application by the "Civil Service Association of Western Australia (Incorporated)" to the Full Bench of the Western Australian Industrial Relations Commission for an alteration to the eligibility rule,– Membership at Rule 6 (12) (b).

The existing sub-rule and the proposed amendment are set out below:

Existing Eligibility Sub-Rule

6- MEMBERSHIP

(b) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned.)

Proposed Amendment to the Eligibility Sub-Rule

6 - MEMBERSHIP

(b) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned.) Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of the Civil Service Association of WA (Inc.).

The matter has been listed before the Full Bench on Friday 23rd January 2004 at 10.30 am in the President's Court.

A copy of the Rules of the organisation and the proposed rule amendment may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation registered under the Industrial Relations Act 1979, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection in accordance with the "Industrial Relations Commission Regulations 1985".

D. MacTIERNAN

Deputy Registrar 13th November 2003