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LONG SERVICE LEAVE—Standard Provisions—

(As Consolidated at a Hearing before the Commission in Court Session on 15 December 1977)*

1.—Right to Leave.

A worker shall, as herein provided, be entitled to leave with pay in respect of long service.

2.—Long Service.

(1) The long service which shall entitle a worker to such leave shall, subject as herein provided, be continuous service with one and the same employer.

(2) Such service shall include service prior to the 1st day of April 1958, if it continued until such time but only to the extent of the last 20 completed years of continuous service.

(3) (a) Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called "the transmittor") to another employer (herein called "the transmittee") and a worker who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee the period of the continuous service which the worker has had with the transmittor, (including any such service with any prior transmittor shall be deemed to be service of the worker with the transmittee.

(b) In this subclause "transmission" includes transfer, conveyance, assignment or succession whether voluntary or by agreement or by operation of law and "transmitted" has a corresponding meaning.

(4) Where, over a continuous period, a worker has been employed by two or more companies each of which is a related company within the meaning of section 6 of the Companies Act 1961 the period of the continuous service which the worker has had with each of those companies shall be deemed to be service of the worker with the company by whom he is last employed.

Section 6 reads—

(1) For the purposes of this Act, a corporation shall, subject to the provisions of subsection (3) of this section, be deemed to be a subsidiary of another corporation, if,

(a) that other corporation—

(i) controls the composition of the board of directors of the first mentioned corporation;

(ii) controls more than half of the voting power in the first mentioned corporation; or

(iii) holds more than half of the issued share capital of the first mentioned corporation excluding any part thereof which carries no right to participate beyond a specified amount in a distribution of either profits or capital; or

(b) the first mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary.

(2) For the purpose of subsection (1) of this section, the composition of a corporation's board of directors shall be deemed to be controlled by another corporation if that other corporation by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove all or a majority of the directors; and for the purposes of this provision that other corporation shall be deemed to have power to make such an appointment if—

(a) a person cannot be appointed as a director without the exercise in his favour by that other corporation of such power; or

(b) a person's appointment as a director follows necessarily from his being a director or other officer of that other corporation.

(3) In determining whether one corporation is subsidiary of another corporation—

(a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to paragraphs (c) and (d) of this subsection, any shares held or power exercisable—

(i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary which is concerned only in a fiduciary capacity,

shall be treated as held or exercisable by that other corporation;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first mentioned corporation or of a trust deed for securing any issue of such debentures shall be disregarded; and

(d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c) of this subsection) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is so exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) A reference in this Act to the holding company of a company or other corporation shall be read as a reference to a corporation of which that last mentioned company or corporation is a subsidiary.

(5) Where a corporation—

(a) is the holding company of another corporation;

(b) is a subsidiary of another corporation;

(c) is a subsidiary of the holding company of another corporation,

that first mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other.

(5) Such service shall include—

(a) any period of absence from duty on any annual leave or long service leave;

(b) any period of absence from duty necessitated by sickness of or injury to the worker but only to the extent of 15 working days in any year of his employment;

(c) any period following any termination of the employment by the employer if such termination has been made merely with the intention of avoiding obligations hereunder in respect of long service leave or obligations under any award in respect of annual leave;

(d) any period during which the service of the worker was or is interrupted by service—

(i) as a member of the Naval, Military or Air Forces of the Commonwealth of Australia other than as a member of the British Commonwealth Occupation Forces in Japan and other than as a member of the Permanent Forces of the Commonwealth of Australia except in the circumstances referred to in section 31 (2) of the Defence Act 1903-1956, and except in Korea or Malaya after 26 June 1950;

(ii) as a member of the Civil Construction Corps established under the National Security Act 1939-1946;

(iii) in any of the Armed Forces under the National Service Act 1951 (as amended).

Provided that the worker as soon as reasonably practicable on the completion of any such service resumed or resumes employment with the employer by whom he was employed immediately before the commencement of such service.

(6) Service shall be deemed to be continuous notwithstanding—

(a) the transmission of a business as referred to in paragraph (3) of this subclause;

(b) the employment with related companies as referred to in paragraph (4) of this subclause;

(c) any interruption of a class referred to in paragraph (5) of this subclause;

(d) any absence from duty authorised by the employer;

(e) any standing down of a worker in accordance with the provisions of an award, industrial agreement, order or determination under either Commonwealth or State law;

(f) any absence from duty arising directly or indirectly from an industrial dispute if the worker returns to work in accordance with the terms of settlement of the dispute;

(g) any termination of the employment by the employer on any ground other than slackness of trade if the worker be re-employed by the same employer within a period not exceeding two months from the date of such termination;

(h) any termination of the employment by the employer on the ground of slackness of trade if the worker is re-employed by the same employer within a period not exceeding six months from the date of such termination;

(i) any reasonable absence of the worker on legitimate union business in respect of which he has requested and been refused leave;

(j) any absence from duty after the coming into operation of this clause by reason of any cause not specified in this clause unless the employer, during the absence or within 14 days of the termination of the absence notifies the worker in writing that such absence will be regarded as having broken the continuity of service, which notice may be given by delivery to the worker personally or by posting it by registered mail to his last recorded address, in which case it shall be deemed to have reached him in due course of post.

Provided that the period of absence from duty or the period of any interruption referred to in placita (d) to (j) inclusive of this paragraph shall not (except as set out in paragraph (5) of this subclause) count as service.

3.—Period of Leave.

(1) The leave to which a worker shall be entitled or deemed to be entitled shall be as provided in this subclause.

(2) Subject to the provisions of paragraphs (5) and (6) of this subclause—

Where a worker has completed at least 15 years' service the amount of leave shall be—

(a) in respect of 15 years' service so completed—13 weeks' leave;

(b) in respect of each 10 years' service completed after such 15 years—eight and two-thirds weeks' leave;

(c) on the termination of the worker's employment—

(i) by his death;

(ii) in any circumstances otherwise than by his employer for serious misconduct;

in respect of the number of years' service with the employer completed since he last became entitled to an amount of long service leave, a proportionate amount on the basis of 13 weeks for 15 years' service.

(3) Subject to the provisions of paragraph (6) of this subclause, where a worker has completed at least 10 years' service but less than 15 years' service since its commencement and his employment is terminated—

(i) by his death; or

(ii) in any circumstances, otherwise than by his employer for serious misconduct;

the amount of leave shall be such proportion of 13 weeks' leave as the number of completed years of such service bears to 15 years.

(4) In the cases to which paragraphs (2) (c) and (3) of this subclause apply the worker shall be deemed to have been entitled to and to have commenced leave immediately prior to such termination.

(5) A worker whose service with an employer commenced before 1 October 1964, and whose service would entitle him to long service leave under this clause shall be entitled to leave calculated on the following basis:—

(a) For each completed year of service commencing before 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 20 years' service and

(b) for each completed year of service commencing on or after 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 15 years' service.

Provided that such worker shall not be entitled to long service leave until his completed years of service entitle him to the amount of long service leave prescribed in either paragraph (2) (a) or paragraph (2) (b) of this subclause as the case may be.

(6) A worker to whom paragraphs (2) (c) and (3) of this subclause apply whose service with an employer commenced before 1 October 1964, shall be entitled to an amount of long service leave calculated on the following basis—

(a) For each completed year of service commencing before 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 20 years' service; and

(b) for each completed year of service commencing on or after 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 15 years' service.

4.—Payment for Period of Leave.

(1) A worker shall, subject to paragraph (3) of this subclause, be entitled to be paid or each week of leave to which he has become entitled or is deemed to have become entitled the rate of pay applicable to him at the date he commences such leave.

(2) Such rate of pay shall be the rate applicable to him for the standard weekly hours which are prescribed by this award (or agreement), but in the case of casuals and part-time workers shall be the rate for the number of hours usually worked up to but not exceeding the prescribed standard.

(3) Where by agreement between the employer and the worker the commencement of the leave to which the worker is entitled or any portion thereof is postponed to meet the convenience of the worker, the rate of payment for such leave shall be at the rate of pay applicable to him at the date of accrual, or, if so agreed, at the rate of pay applicable at the date he commences such leave.

(4) The rate of pay—

(a) shall include any deductions from wages for board and/or lodging or the like which is not provided and taken during the period of leave;

(b) shall not include shift premiums, overtime, penalty rates, special rates, disability allowances, fares and travelling allowances or the like.

(5) In the case of workers employed on piece or bonus work or any other system of payment by results the rate of pay shall be calculated by averaging the workers' rate of pay for each week over the previous three monthly period.

5.—Taking Leave.

(1) In a case to which placita (a) and (b) of paragraph (2) of subclause (3) apply:—

(a) Leave shall be granted and taken as soon as reasonably practicable after the right thereto accrues due or at such time or times as may be agreed between the employer and the worker or in the absence of such agreement at such time or times as may be determined by the Special Board of Reference having regard to the needs of the employer's establishment and the worker's circumstances.

(b) Except where the time for taking leave is agreed to by the employer and the worker or determined by the Special Board of Reference the employer shall give to a worker at least one month's notice of the date from which his leave is to be taken.

(c) Leave may be granted and taken in one continuous period or if the employer and the worker so agree in not more than three separate periods in respect of the first 13 weeks' entitlement and in not more than two separate periods in respect of any subsequent period of entitlement.

(d) Any leave shall be inclusive of any public holidays specified in this award (or agreement) occurring during the period when the leave is taken but shall not be inclusive of any annual leave.

(e) Payment shall be made in one of the following ways:—

(i) In full before the worker goes on leave;

(ii) at the same time as his wages would have been paid to him if the worker had remained at work, in which case payment shall, if the worker in writing so requires, be made by cheque posted to an address specified by the worker; or

(iii) in any other way agreed between the employer and the worker.

(f) No worker shall, during any period when he is on leave, engage in any employment for hire or reward in substitution for the employment from which he is on leave, and if a worker breaches this provision he shall thereupon forfeit his right to leave hereunder in respect of the unexpired period of leave upon which he has entered, and the employer shall be entitled to withhold any further payment in respect of the period and to reclaim any payments already made on account of such period of leave.

(2) In the case to which paragraph (2)(c) or paragraph (3) of subclause (3) applies and in any case in which the employment of the worker who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon

termination of his employment otherwise than by death pay to the worker, and upon termination of employment by death pay to the personal representative of the worker upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he is entitled to deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

6.—Granting Leave in Advance and Benefits to be Brought into Account.

(1) Any employer may by agreement with a worker allow leave to such a worker before the right thereto has accrued due, but where leave is taken in such case the worker shall not become entitled to any further leave hereunder in respect of any period until after the expiration of the period in respect of which such leave had been taken before it accrued due.

(2) Where leave has been granted to a worker pursuant to the preceding paragraph before the right thereto has accrued due, and the employment subsequently is terminated, the employer may deduct from whatever remuneration is payable upon the termination of the employment such amount as represents payment for any period for which the worker has been granted long service leave to which he was not at the date of termination of his employment or prior thereto entitled.

(3) Any leave in the nature of long service leave or payment in lieu thereof under a State Law or a long service leave scheme not under the provisions hereof granted to a worker by his employer in respect of any period of service with the employer shall be taken into account whether the same is granted before or after the coming into operation hereof and shall be deemed to have been taken and granted hereunder in the case of leave with pay to the extent of the period of such leave and in the case of payment in lieu thereof to the extent of a period of leave with pay equivalent thereof of the entitlement of the worker hereunder.

7.—Records to be Kept.

(1) Each employer shall during the employment and for a period of 12 months thereafter, or in the case of termination by death of the worker for a period of three years thereafter, keep a record from which can be readily ascertained the name of each worker, and his occupation, the date of the commencement of his employment and his entitlement to long service leave and any leave which may have been granted to him or in respect of which payment may have been made hereunder.

(2) Such record shall be open for inspection in the manner and circumstances prescribed by this award (or agreement) with respect to the time and wages record.

8.—Special Board of Reference.

(1) There shall be constituted a Special Board of Reference for the purpose hereof to which all disputes and matters arising hereunder shall be referred and the Board shall determine all such disputes and matters.

(2) There shall be assigned to such Board the functions of—

(a) the settlement of disputes of any matters arising hereunder;

(b) the determination of such matters as are specifically assigned to it hereunder.

(3) The Board of Reference shall consist of one representative or substitute therefor nominated from time to time by the Confederation of Western Australian Industry (Incorporated) and one representative or substitute nominated from time to time by the Trades and Labor Council of Western Australia together with a chairman to be mutually agreed upon by the organisations named in this paragraph.

9.—State Law.

(1) The provisions of any State Law to the extent to which they have before the coming into operation hereof conferred an accrued right on a worker to be granted a period of long service leave in respect of a completed period of 15 or more years' service or employment or an accrued right on a worker or his personal representative to payment in respect of long service leave shall not be affected hereby and shall not be deemed to be inconsistent with the provisions hereof.

(2) The entitlement of any such worker to leave in respect of a period of service with the employer completed after the period in respect of which the long service leave referred to in paragraph (1) of this subclause accrued due shall be in accordance herewith.

(3) Subject to paragraphs (1) and (2) of this subclause the entitlement to leave hereunder shall be in substitution for and satisfaction of any long service leave to which the worker may be entitled in respect of employment of the worker by the employer.

(4) An employer who under any State Law with regard to long service leave is exempted from the provisions of that law as at 1 April 1958, shall in respect of the workers covered by such exemptions be exempt from the provisions hereof.

10.—Exemptions.

The Special Board of Reference may subject to such conditions as it thinks fit exempt any employer from the provisions hereof in respect of its employees where there is an existing or prospective long service scheme which in its opinion, is, viewed as a whole, more favourable for the whole of the employees of that employer than the provision hereof.

*Editor's Note.

The Judgment and General Order as prescribed by section 94A was published in 58 WAIG Part 1 Subpart 2 at Page 116.

There was no Schedule of Exemptions.

INDUSTRIAL APPEAL COURT—Appeals against decision of Full Bench—

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	JONES -v- CIVIL SERVICE ASSOCIATION INC [2003] WASCA 321
CORAM	:	HASLUCK J (DEPUTY PRESIDING JUDGE) MCKECHNIE J PULLIN J
HEARD	:	1 DECEMBER 2003

DELIVERED	**:**	16 DECEMBER 2003
FILE NO/S.	**:**	IAC 10 of 2003
BETWEEN	**:**	NEVILLE JOHN JONES Appellant AND CIVIL SERVICE ASSOCIATION INC Respondent
FILE NO/S.	**:**	IAC 12 of 2003
BETWEEN	**:**	DIANE MARGARET ROBERTSON Appellant AND CIVIL SERVICE ASSOCIATION INC Respondent

Catchwords—

Industrial law - President of Commission making orders continuing officers of an organisation in office - Whether power in s 66(2) of the *Industrial Relations Act 1979* a general power which could not be exercised because of the existence of specific powers - Whether intervener denied the right to be heard - Whether proceedings commenced on behalf of organisation without authority could be ratified by the organisation

Legislation—

Industrial Relations Act 1979, s 66(2), s 71

Result—

Appeals dismissed

Category: B

Representation—

IAC 10 of 2003

Counsel—

Appellant	:	Mr G McCorry
Respondent	:	Mr D H Schapper

Solicitors—

Appellant	:	Labourline
Respondent	:	Ilberys

IAC 12 of 2003

Counsel—

Appellant	:	Mr G McCorry
Respondent	:	Mr D H Schapper

Solicitors—

Appellant	:	Labourline
Respondent	:	Ilberys

Case(s) referred to in judgment(s)—

Alexander Ward & Co Ltd v Samyang Navigation Co Ltd [1975] 1 WLR 673

Australian Liquor Hospitality & Miscellaneous Workers Union (WA Branch) v Gay-Dor Plastics Ltd (1994) 74 WAIG 961

Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672

Perlman v Perlman (1984) 155 CLR 474

Robertson v Civil Service Association [2003] WASCA 284

Rosenberg v Percival (2001) 205 CLR 434

Victoria Teachers Credit Union v KPMG (2000) 1 VR 654

Case(s) also cited—

Burswood Resort (Management) Ltd v Australian Liquor, Hospitality & Miscellaneous Workers Union (1997) 72 IR 180

Moore v Doyle (1969) 15 FLR 59

Re Murdoch University Academic Staff Association [2000] WAIRComm 44 (3 March 2000)

Registrar v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union (1997) 76 IR 425

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1 **HASLUCK J (DEPUTY PRESIDING JUDGE)**: I have had the advantage of reading in draft the reasons for judgment of Pullin J in this matter. I agree that the appeals should be dismissed for those reasons.

2 **MCKECHNIE J**: For the reasons given by Pullin J, with which I am in agreement, these appeals should be dismissed.

3 **PULLIN J**: These two appeals arise out of decisions made by the President of the Western Australian Industrial Relations Commission and the Full Bench of the Commission to sort out perceived defects in the appointment of office bearers in the respondent. An order was made that both appeals be heard together.

4 Before setting out the chronology of events, I refer to s 71 of the *Industrial Relations Act 1979* ("*Act*") which contains provisions relating to State branches of Federal organisations. Section 71 authorises the Full Bench of the Commission to express an opinion that the rules of a State organisation and its counterpart Federal body are substantially the same and

authorises the Registrar of the Commission to issue a certificate that provisions of the *Act* relating to elections do not apply in relation to the State organisation and that office holders in the State organisation may be those who hold office in the counterpart Federal body.

5 The precise terms of s 71 are as follows—

> "(1) In this section—
>
> **'Branch'** means the Western Australian Branch of an organisation of employees registered under the Commonwealth Act;
>
> **'Counterpart Federal Body'**, in relation to a State organisation, means a Branch the rules of which—
>
> (a) relating to the qualifications of persons for membership*;* and
>
> (b) prescribing the offices which shall exist within the Branch,
>
> are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter*;* and
>
> **'State organisation'** an organisation of employees that is registered under Division 4 of Part II.
>
> (2) The rules of the State organisation and its Counterpart Federal Body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same.
>
> …
>
> (5) Where, after the coming into operation of this section—
>
> (a) the rules of a State organisation are altered pursuant to section 62 to provide that each office in the State organisation may, from such time as the Committee of Management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's Counterpart Federal Body, holds the corresponding office in that body*;* and
>
> …
>
> the Registrar shall issue the State organisation with a certificate which declares—
>
> (c) that the provisions of this Act relating to elections for office within a State organisation do not, from the date referred to in paragraph (b), apply in relation to offices in that State organisation*;* and
>
> (d) that, from that date, the persons holding office in the State organisation in accordance with the rule referred to in paragraph (a) shall, for all purposes, be the officers of the State organisation,
>
> and the certificate has effect according to its tenor."

Chronology of Events

6 The following chronology of events is not in dispute.

4 November 1993	Pursuant to s 71(2) of the *Act*, the Full Bench made a declaration that the rules of the respondent and its counterpart Federal body, the State Public Services Federation ("SPSF"), were the same.
22 November 1993	The Registrar, pursuant to s 71(5), issued a certificate to the effect that the provisions of the Industrial Relations Act relating to elections in the respondent did not apply and that persons holding office in the SPSF should be the office holders of the respondent.
1 July 1994	By an order of the Australian Industrial Relations Commission, the SPSF amalgamated with another federally registered organisation, which amalgamated organisation was registered as the Community and Public Sector Union ("CPSU").
1 July 1994	The SPSF was then deregistered by the same order, as a result of which it ceased to exist and the new amalgamated organisation the CPSU came into existence.
28 November 2001	Ms Walkington and Ms Gaines were appointed Branch Secretary and Assistant Branch Secretary of the WA Branch of the CPSU.
26 February 2003	Mr Jones, the appellant in IAC 10 of 2003, made an application in PRES 3 of 2003 for an enquiry pursuant to s 66(2)(e) of the *Act* into the election of the offices of General Secretary and Assistant General Secretary of the respondent. The appellant then discovered that there had been no election, and accordingly amended the application. The grounds of the amended application read that "the actions of the Council of the Respondent in purporting to appoint Ms Walkington and Ms Gaines to the offices of General Secretary and Assistant General Secretary respectively were in breach of the rules of the Respondent …". It is not clear from the amended application what order was being sought, but it was treated at the hearing as an application for an order under s 66(2). Section 66(2) is set out below.
10 April 2003	The decision in PRES 3 of 2003 was handed down and orders made—

> "(1) THAT Ms Toni Walkington and Ms Joanne Gaines were not validly appointed or elected nor did they validly hold office in the respondent organisation at any time since 28 November 2001 as General Secretary and Assistant General Secretary, respectively, of the respondent organisation.
>
> (2) THAT any purported appointment or election of Ms Toni Walkington and Ms Joanne Gaines to such offices was contrary to and/or in breach of and/or ultra vires the rules of the Civil Service Association of Western Australia Incorporated, and particularly rules 19, 20 and 22.
>
> (3) THAT any such appointment be and is hereby declared void.
>
> (4) THAT the said offices have been vacant since 28 November 2001.
>
> (5) THAT this matter be listed for further hearing and determination on or before the 15th day of April 2003."

The reasons of the President leading to his decision that Ms Walkington and Ms Gaines did not validly hold office was based upon the deregistration of the SPSF and the President's conclusion that the Registrar's 22 November 1993 certificate was invalid. The President said in his reasons—

"h) The certificate … even if it were valid ab initio, which is doubtful, can only apply to the SPSF, and could not outlive it. Therefore, and, in fact, there is nothing in either act to constitute the CPSU, the Counterpart Federal Body of the CSA, currently, or at the time Ms Walkington and Ms Gaines were appointed. Thus, they could not be rendered office holders of the CSA merely because they became, however properly, officers of the CPSU.

i) The s.71 certificate issued by the Registrar on 22 November 1993 ceased to have an effect on and from the date of de-registration and cancellation of the SPSF, namely 1 July 1994.

j) The only means by which a person can attain office in the CSA is by appointment or election under its rules (see rules 19, 20 and 22), and that has been the only means since 1 July 1994.

k) There is no evidence that any person has been appointed or elected its General Secretary or Assistant General Secretary, and certainly no evidence that Ms Walkington and Ms Gaines have been. In fact, it was conceded that they have not been.

l) The CSA has failed to comply with its rules in permitting Ms Walkington and Ms Gaines to hold office as General Secretary and Assistant General Secretary without appointment or election in accordance with the rules of the CSA, since 28 November 2001."

15 April 2003 — An application was then filed in the name of the respondent, and signed by an Industrial Officer, Mr Dasey, in FBM 4 of 2003, seeking a declaration pursuant to s 71 that the rules of the respondent and the CPSU as the counterpart Federal body were deemed to be the same.

16 April 2003 — Orders were made in PRES 3 of 2003, *inter alia*, as follows—

"(5) THAT Toni Beverley Walkington and Joanne Margaret Gaines hold the offices of General Secretary and Assistant Secretary of the above-named respondent organisation for all the purposes of its rules for as long as they hold the corresponding offices in the Community and Public Sector Union, pending the obtaining of a s.71 certificate by the respondent in relation to the said Community and Public Sector Union WA Branch, as counterpart federal body, or until a state election for those offices is held, or until further order.

(6) That not withstanding the terms of paragraph (a) hereof, this order will expire and cease to operate on 17 July 2003, unless it is renewed."

5 May 2003 — In other proceedings, PRES 5 of 2003, the President of the Commission declared that all persons holding office in the CPSU shall hold or continue to hold offices in the respondent until the application number FBM 4 of 2003 was heard and determined or until further order.

12 May 2003 — The hearing of application FBM 4 of 2003 was listed. The appellant in IAC 12 of 2003 and the appellant in IAC 10 of 2003 sought leave to intervene and were granted leave to intervene pursuant to s 27 of the Act. A Ms In de Braekt purported to appear. The Commission denied Ms In de Braekt the right of audience.

As a result, the case was adjourned until the afternoon – about 90 minutes later – and then Dr J J Hockley and a Mr Jackson instructing Dr Hockley appeared and sought an adjournment. The adjournment was refused.

23 May 2003 — Reasons were published by the Commission in FBM 4 of 2003 and orders and declarations made—

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

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

Grounds of Appeal – IAC 10 of 2003

7 This appeal concerns the order made in PRES 3 of 2003, whereby Ms Walkington and Ms Gaines were continued in office.

Ground 1

8 This ground complains about the finding of the President in par 15 of his supplementary reasons for decision that—

> "Because of that section and s.56(1)(e) it follows in this case that no person can hold office when elected to office within the organisation, the CSA, for a period exceeding four years. (See s.56(1)(e)). (The rules must so provide. If they do not they are, ipso facto, unlawful and disallowable under s.66 (see s.66(2)(a))). In any event, the rules of the CSA provide that the principal officers shall be elected for four years only and all other members of the Council and proxy councillors, for two years only. (See rules 12(b)(ii), 13(a), 14, 15, 16, 17 and 20). Thus, officeholders of the CSA elected before 1993 all cease to hold office four or two years after their election."

9 Complaint is made about this finding on the basis that this allegedly erroneous conclusion led the President to consider that it was necessary to appoint someone to fill the void which was created by his decision that Ms Walkington and Ms Gaines did not hold office and the decision in PRES 5 of 2003 that office holders were also not validly appointed. The appellant argued that she had previously been an office holder, namely a former President, and that she continued in office.

10 Ground 1 reads—

> "The Hon President erred in law in construing the provisions of the (Act) … to find that persons elected to offices in the Respondent or in the Respondent's Counterpart Federal Body prior to 1 July 1994, did not remain in office at the date of the proceedings, when on a proper construction of section 56 of the … Act and the Respondent's rules, the effluxion of time does not operate to bring to an end the occupation of any office."

11 This ground of appeal seeks to question the President's reasons set out above insofar as they concern s 56. It is, however, unnecessary to deal with this ground, because, as is apparent from the reasons quoted above, the President also found that the rules provided for finite terms for principal officers. No complaint is made about that part of the reasoning, and therefore the finding about officers ceasing to hold office remains a decision supported by unchallenged reasons. These latter reasons could not be challenged under s 90 of the *Industrial Relations Act*.

12 Ground 1 must therefore be dismissed.

Grounds 2 and 3

13 Grounds 2 and 3, in effect, contend that the only permissible method of dealing with the extraordinary vacancies was to order that an election be conducted and that there was no power under s 66(2) of the Act to make the orders continuing Ms Walkington and Ms Gaines in office, even for the limited period provided for in the order.

14 The appellant submitted that an order that persons be deemed to hold office could only be made under s 66(f) and that order could only be made in connection with an enquiry under s 66(2)(e), which concerned an enquiry into elections for office. The appellant correctly pointed out that this was not an enquiry into any election for an office.

15 In my opinion, that argument must fail. Section 66(2) opens with the following words—

> "(2) On an application made pursuant to this section, the President may make such order or give such directions relating to the rules of the organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case, as he considers to be appropriate and without limiting the generality of the foregoing may—
> …"

16 This general conferral of power is then followed by paragraphs authorising the President to make certain specific orders, such as disallowing rules, directing the alterations of rules, declaring the interpretation of rules, and enquiring into elections.

17 The appellant referred to ***Leon Fink Holdings Pty Ltd v Australian Film Commission*** (1979) 141 CLR 672 at 678, where Mason J said—

> "It is accepted that when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power."

18 That statement, however, while applicable in many cases is not so in this case for the reasons given by Mason J in the ***Leon Fink*** case at 679, where he said—

> "In this case the words 'without limiting the generality of the foregoing' evince an intention that the general power should be given a construction that accords with the width of the language in which it is expressed and that this construction is not to be restricted by reference to the more specific character of that which follows. The clause therefore operates to negative the restrictive implication which might otherwise have been derived from the presence of the specific power …"

19 The opening words to s 66(2), which contain the general power in this case, make it clear that orders can be made "relating to the rules of the organisation, their observance or non-observance or the manner of their observance … as [the President] considers to be appropriate …". The words "relating to" are words of the widest import and should not, in the absence of compelling reasons for the contrary, be read down: ***Perlman v Perlman*** (1984) 155 CLR 474 at 489. The orders made by the President in this case relate to the non-observance of the rules of the respondent.

20 A second aspect of ground 2 was that it was "not appropriate" for the President to have made the orders which he did. I take this to be a complaint that if the President did have power to make the orders he did under s 66(2), that he erred in the exercise of his discretion. It was argued by the appellant that this was a ground of appeal open under s 90 of the *Act* by reason of the decision of this Court in ***Robertson v Civil Service Association*** [2003] WASCA 284. I disagree with that submission. ***Robertson's*** case is authority for the proposition that if facts had been proved justifying the exercise of discretion under s 66(2), the President does not then have a discretion to refuse relief. The case is not authority for the proposition that an appeal lies under s 90 of the *Act* whenever there has been an exercise of the discretion. Grounds 2 and 3 must fail.

Appeal IAC 12 of 2003

Ground 1

21 Ground 1 is a complaint about the denial of the right to be heard.

22 The ground reads—

> "The Full Bench, without any valid basis for doing so, denied the Appellant the right to be heard, in that a failure to afford the Appellant an opportunity to fully and properly be heard amounts to a denial of the right to be heard."

23 Section 31 of the *Act* states that a party to proceedings or a person permitted to intervene may appear either in person, by an agent, or, in certain circumstances, by a legal practitioner. The appellant filed written submissions contending that the Full Bench erred in refusing Ms in de Braekt a right of audience. It is not necessary to consider those submissions because this ground does not complain about the decision of the Full Bench to refuse to hear Ms in de Braekt. The ground is that the appellant was "denied … the right to be heard, in that [there was] a failure to afford the Appellant an opportunity to fully and properly be heard …". The complaint is therefore that in circumstances where the Commission, having decided that it would not permit Ms in de Braekt to address the Court, refused an adjournment in order to have someone else properly briefed to make submissions about the case.

24 As to whether procedural fairness is denied because an adjournment is not granted in a case, will depend upon the circumstances of the particular case.

25 The application before the Full Bench was, in effect, *ex parte*. Section 71 does not expressly state who may institute proceedings asking the Full Bench to express the opinion referred to in s 71(2), or who may make the application for the Registrar to issue a certificate under s 71(5). However, it may be inferred from a reading of s 71 that the State organisation is the party which may apply. Such an application is not *inter partes*, because no order is sought against another person. It may be important in some such cases, and of assistance to the Commission, to give leave to a person to intervene. An intervener is not a party against whom, or in favour of whom, orders may be made. In this case, leave was granted to the appellant to intervene. The application asking the Full Bench to express the opinion under s 71(2) was a matter which had to be dealt with as a matter

of relative urgency. The point had been reached where the President had declared that all of the office holders ceased to hold office, and he had made orders which temporarily continued those who purported to hold office only for a short time.

26 An outline of submissions was prepared by Ms in de Braekt. It consists of nine pages of detailed submissions. The Full Bench ruled that Ms in de Braekt was not entitled to appear and the case was then adjourned for an hour-and-a-half. In that time, Ms in de Braekt instructed counsel and a solicitor to appear, namely Dr J J Hockley and Mr B Jackson. They did appear, made some brief submissions, and asked for an adjournment. This application was refused. The reasons of decision of the President and Commissioner P E Scott said that notwithstanding that Ms in de Braekt was denied a right of audience, that counsel appeared and that—

> "… counsel was able to make oral submissions on behalf of the interveners and to put before the Full Bench, in addition, an already prepared and full set of written submissions in relation to the interveners' case. Some of the written submissions were irrelevant to the notice of intervention even before it was amended by the Full Bench, and certainly some were irrelevant to it after that notice was amended by the Full Bench. However, the remainder were considered."

27 The application before the Full Bench required it to form an opinion about whether the rules of the two organisations relating to the qualifications of persons for membership were substantially the same or not, judged in the context of the information required to be provided by reg 101 of the Industrial Relations Regulations. At the hearing of this appeal, enquiries were made of counsel for the appellant what it was the appellant had not been able to put before the Full Bench. In other words, what was it that a fully prepared representative would have put before the Full Bench and which was not put? Counsel suggested that evidence would have been led, but for my part I do not see what evidence could have been led. The task of the Full Bench was to compare the two sets of relevant provisions in the context of the information required by reg 101. I cannot see how this would produce an issue on which evidence might have been led by the intervener. I am satisfied that the appellant was able to put the substance of what she wished to put before the Full Bench, even if the appellant was denied the right to make detailed oral submissions. In a case *inter partes* in a common law court where a party may be subjected to orders, the present circumstances may have amounted to procedural unfairness. The common law tradition is an oral tradition and based on a tradition of oral hearings. See ***Rosenberg v Percival*** (2001) 205 CLR 434 at [41], but even in *inter partes* cases, the right to make oral submissions may be restricted.

28 In this case, however, the hearing is in a statutory tribunal and s 27(1)(hb) authorises the Commission to require argument to be presented in writing and to decide matters on which it will hear oral evidence or argument. In the face of that provision, and the fact that detailed written submissions were received and considered and some oral submissions were made, this ground cannot succeed.

29 I would dismiss this ground.

Ground 2a

30 The application for the s 71 order was made on behalf of the respondent by a Mr John Dasey, an industrial officer of the respondent. The submission is that there could be no valid application because there were no validly appointed officers on the council who could issue instructions. This application was lodged on the day before the order was made in PRES 2003 continuing Ms Walkington and Ms Gaines in office. Subsequently, however, the decision to make the application for the s 71 order was ratified by the council of that body. The council included persons who were continued in office by an order in PRES 5 of 2003, and that order has not been appealed.

31 In my opinion, the subsequent ratification of the institution of proceedings validated the commencement of proceedings: ***Victoria Teachers Credit Union v KPMG*** (2000) 1 VR 654; ***Alexander Ward & Co Ltd v Samyang Navigation Co Ltd*** [1975] 1 WLR 673; ***Australian Liquor Hospitality & Miscellaneous Workers Union (WA Branch) v Gay-Dor Plastics Ltd*** (1994) 74 WAIG 961.

32 In any event, the Full Bench's decision about authority and ratification is not reviewable by the Industrial Appeal Court under s 90 of the *Act*. This ground should therefore be dismissed.

Ground 2(b)

33 This ground reads that—

> "The Full Bench in construing section 71(4) of the … Act considered that it was only required to determine whether the rules of the respective organizations had offices therein with the same or substantially the same description, whereas on a proper construction of section 71(4), the Full Bench was required to consider whether the functions to be performed by the respective offices, the powers capable of being exercised by the holders of the respective offices and the qualifications for election or appointment to the respective offices were the same."

34 Section 71(4) of the *Act* reads—

> "(4) The rules of a Counterpart Federal Body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch."

35 In my opinion, it is quite correct to say, as the appellant does, that the task is not one merely of seeing whether the names of the offices held in one organisation are the same or substantially the same as the offices in the other organisation. It is necessary for the Full Bench to consider at least the functions and powers of the office based upon a consideration of the similarity or otherwise of the content of the rules. It is clear, however, that the content of the rules was considered by the Full Bench. A statutory declaration was made by Ms Gaines, setting out the information required by reg 101. Schedule 2 of the statutory declaration contained a statement comparing the offices which existed in the respondent and within the CPSU and the qualifications for office and appointment, along with a reproduction of what were seen to be the relevant rules. There was also a summary of what these rules provided. The rules stated what the qualifications for office were.

36 The criticism that the Full Bench decided the matter "only" by determining whether "the rules of the respective organisations had offices" therein with the same "description" and that the Full Bench did not "consider" whether the powers and functions to be performed and the qualification for election and appointment were the same, cannot be sustained. It is not suggested that the Full Bench did not read the statutory declaration, and in the absence of any such suggestion the only proper conclusion to draw is that the Full Bench did consider the material before it and did not limit itself to deciding merely that the two organisations had offices with the same description.

37 In my opinion, both appeals should be dismissed.

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2003 WAIRC 10409

AGAINST THE DECISION OF THE PRESIDENT OF THE WAIRC ,PRES 3 OF

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	NEVILLE JOHN JONES, APPELLANT
	v.
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENT
CORAM	HASLUCK J (DEPUTY PRESIDING JUDGE)
	MCKECHNIE J
	PULLIN J
DATE OF ORDER OR DECLARATION	WEDNESDAY, 31 DECEMBER 2003
FILE NO/S.	IAC 10 OF 2003
CITATION NO.	2003 WAIRC 10409

Result	Appeal dismissed
Representation	
Appellant	MR G McCorry
Respondent	MR D H Schapper (of Counsel)

Order

HAVING HEARD Mr G McCorry for the Appellant and Mr D H Schapper (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT—

The Appeal be dismissed.

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

2003 WAIRC 10410

APPEAL AGAINST THE FULL BENCH OF THE WESTERN AUSTRALIAN

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	DIANE MARGARET ROBERTSON, APPELLANT
	v.
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENT
CORAM	HASLUCK J (DEPUTY PRESIDING JUDGE)
	MCKECHNIE J
	PULLIN J
DATE OF ORDER	WEDNESDAY, 31 DECEMBER 2003
FILE NO/S.	IAC 12 OF 2003
CITATION NO.	2003 WAIRC 10410

Result	Appeal dismissed
Representation	
Appellant	MR G McCorry
Respondent	MR D H Schapper (of Counsel)

Order

HAVING HEARD Mr G McCorry for the Appellant and Mr D H Schapper (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT—

The Appeal be dismissed.

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

FULL BENCH—Appeals against decision of Commission—

2003 WAIRC 10238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN EAST, APPELLANT and INTEGRAL BUSINESS SYSTEMS PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S J KENNER COMMISSIONER S WOOD
DELIVERED	MONDAY, 8 DECEMBER 2003
FILE NO/S.	FBA 22 OF 2003
CITATION NO.	2003 WAIRC 10238

Catchwords	Industrial Law (WA) - Application for unfair dismissal and outstanding contractual benefits dismissed – Appeal to the Full Bench from the decision of a single Commissioner – Clear and adequate verbal warnings of poor sales performance given to employee – Reduction of employee's bonus payments accepted by employee – Appeal dismissed – *Industrial Relations Act* 1979 (as amended), s29(1)(b)(i) and (ii)
Decision	Appeal dismissed
Appearances	
Appellant	Mr P E Mullally, as agent
Respondent	Ms J H Auerbach (of Counsel), by leave

Reasons for Decision

INTRODUCTION

1 These are the unanimous reasons for decision of the Full Bench.

2 This is an appeal brought by the above-named appellant, Kevin East (hereinafter called "Mr East"), against a decision of the Commission, constituted by a single Commissioner, given on 5 August 2003 in matter No 199 of 2002.

GROUNDS OF APPEAL

3 The appeal is on the following grounds (see pages 2-7 of the appeal book):-

"**UNFAIR DISMISSAL**

GROUND 1

1. The Learned Commissioner erred in the exercise of his discretion when he made a finding that the dismissal of the Appellant by the Respondent on or about 25th January 2002 was not an unfair, harsh or oppressive dismissal within that meaning pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act*.

Particulars

1.1 There was no evidence before the Learned Commissioner to support the finding that he made, that the Appellant had not responded to the entreaties of the Respondent through it's Director Guido Torelli to be on the road more and to promote the sale of computers. The Respondent company on the incontrovertible evidence was not in the business of selling computers, nor was it even probable on the evidence that the Respondent had asked the Appellant to sell computers.

1.2 The finding by the Learned Commissioner that the Respondent had a genuine belief that the sales performance of the Appellant was a problem and that the Respondent had given the Appellant every opportunity and chance to improve, was fatally flawed because—

1.2.1 There was no evidence before the Learned Commissioner on which he could have safely relied to make such a finding;

1.2.2 In particular there was no evidence that the Respondent had in place a system of monitoring the Appellant's sales performance or his progress;

1.2.3 There was no evidence of any written records being made of warnings or counselling which the Respondent asserted had been given and made to the Appellant throughout 2001;

1.2.4 Having regard to the oral evidence of Guido Torelli on behalf of the Respondent, with respect to such warnings arid counselling, it was vague, evasive, and totally unsatisfactory;

1.2.5 The Appellant's denial on oath of any such warnings or counselling;

1.2.6 It was glaringly improbable that the Respondent on that basis had been able throughout the performance of the contract of employment to say anything to the Appellant about his sales performance;

and therefore the finding by the Learned Commissioner was against the weight of the evidence, and caused a miscarriage of the exercise of his discretion.

1.3 There was no evidence that the Appellant had become completely ineffective as the Learned Commissioner found. It was common ground between the parties that on or about the 2nd January 2002 the Respondent through it's Director Guido Torelli had told the appellant that if sales failed to improve during the month of January 2002 then his services would be terminated. It was common ground supported by the evidence that the Appellant was certified unfit for work on medical grounds from the 7th January 2002 for 2 weeks. The Learned Commissioner correctly found that

this would have returned him to work on the 2lst January 2002. Upon his return he was given a written notice of termination dated the 18th January 2002, and on that incontrovertible evidence the dismissal notice was prepared during the Appellant's absence on sick leave, and there was therefore no opportunity during his absence on sick leave for the Appellant to work at all in January 2002 given that he was on sick leave for 2 weeks after his warning. The Learned Commissioner failed to act on these facts in reaching his judgment as to whether there had been "a fair go", and it was glaringly improbable on that evidence that the Appellant could have made any difference to his sales during the month of January 2002.

ANNUAL LEAVE

GROUND 2

2. The Learned Commissioner erred in law when he failed to consider the claim and the evidence before him concerning the Respondent's obligation under the contract of employment to pay the outstanding annual leave due to the Appellant at the date of termination, and make any findings or award with respect to the claim made by the Appellant for payment in lieu of annual leave.

Particulars

2.1 The application before the Learned Commissioner included an application for a denied benefit under the Appellant's contract of employment;

2.2 By his Further and Better Particulars of Claim filed in the Commission on the 8th October 2002, and served on the Respondent, the Appellant sought a sum of $630.00 in lieu of annual leave owing to him at the date of termination;

2.3 The Learned Commissioner failed to deal with this claim referred to him by the Appellant under Section 29(1)(b)(ii) of the *Industrial Relations Act*.

CLAIM FOR PRODUCTIVITY BONUS

GROUND 3

3. The Learned Commissioner erred when he dismissed the Appellant's claim for a productivity bonus of 5% of gross profit per month in the unpaid amount of $10,062.

Particulars

3.1 It was a written term of the Appellant's contract of employment that he was to be paid a productivity bonus of 5% of gross profit of the company each month;

3.2 The Learned Commissioner ought not to have found, as he did, that the Appellant had accepted two decisions of the Respondent in April 2001 and September 2001 to firstly reduce and then secondly extinguish the productivity bonus;

3.3 Both the Appellant and Respondent testified that the said decisions were unilateral and taken by the Respondent on the basis of "take it or leave it";

3.4 The finding by the Learned Commissioner that the Appellant's invoices after the decisions to extinguish the bonus, did not claim the bonuses, is demonstrably wrong in fact, as the invoices on the evidence were requested by the Respondent from the Appellant at termination on or about the last day of work, and therefore cannot be said to be evidence to support acceptance of the decisions to reduce and then extinguish, the productivity bonus.

4. The Learned Commissioner erred in law when he failed to apply the provisions of Sections 41 of the *Minimum Conditions of Employment Act* to the decisions by the Respondent to reduce the productivity bonus from 5% to 3% in April 2001 and then from 3% to 0% in September 2001, because on the totality of the evidence the Learned Commissioner ought to have found that the Respondent had failed to comply with the provisions of Section 41(2) of the *Minimum Conditions of Employment Act*.

5. The Learned Commissioner erred in law when he failed to find that the Respondent had breached Section 41(2) of the *Minimum Conditions of Employment Act* and therefore that the contract of employment so varied by the said decisions was unlawful because of the Respondent's failure to comply with Section 41(2) of the *Minimum Conditions of Employment Act* and could not therefore be relied upon by the Respondent.

6. The Learned Commissioner erred in law in not finding as he ought to have done on the evidence, that due to the breach of Section 41(2) of the *Minimum Conditions of Employment Act* the terms of the employment contract as varied in April 2001, and September 2001 to firstly reduce the productivity bonus, and then to extinguish it in total was null, void and to no effect.

ORDERS SOUGHT ON APPEAL

1. That the appeal be upheld;
2. That the matter be referred back to the Commission at first instance to be dealt with according to law."

4 The appeal also would seem to be against the whole of the decision.

BACKGROUND AND FINDINGS

5 Mr East applied to the Commission for orders on 5 February 2002 pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act* 1979 (as amended) on the grounds that he had been harshly, oppressively and unfairly dismissed by the above-named respondent (hereinafter called "Integral"), and that when he was dismissed there were outstanding benefits, being non-award entitlements, which remained unpaid to him.

6 Mr East was, at all material times, an employee, and Integral, at all material times, an employer.

7 The company, Integral, was "taken over" by Mr Guido Eduardo Torelli on 30 October 1997. Before that, Mr East had worked for Integral and its previous "owners". Mr East claimed that he worked consistently from 30 October 1997 until 25 January 2002 when he was dismissed, as he alleged. Whatever Mr Torelli's capacity was, he certainly ran Integral's business.

8 Mr East's claim was that, at all material times, there was an employment relationship between him and Integral whereby he was paid $800.00 per week, together with commission or bonus of 5% based on the gross profit earnings of Integral. He claimed that in April 2001, the agreed rate of commission was varied unilaterally by Integral and there were other unilateral variations to his remuneration. He said that he had protested against this to Mr Torelli, but ultimately the situation changed

until he was receiving no commission payments at all. He said this change to the contract occurred without his consent and without his approval.

9 The application was opposed and evidence given by a salesman employed by Integral, Mr Peter Jacobus De Wewver, and by Mr Torelli.

10 The Commissioner at first instance found that Mr East was an employee, and that he had jurisdiction to hear and determine the matter.

11 That finding was not the subject of any challenge on appeal. He also considered the credibility of the witnesses, namely that of Mr East, Mr Torelli and Mr De Wewver, the latter two giving evidence on behalf of Integral. The Commissioner said that he had some doubts about Mr East's evidence, but found that Mr De Wewver was a credible witness. He also found that the evidence of Mr Torelli "also presents some difficulties".

12 The Commissioner therefore treated the evidence of both of the main witnesses, as he called them, with caution, and was, as he said, unable to make a positive finding that Mr East's evidence ought to be favoured in preference to the evidence of Integral "on a blanket basis", but said that he would make his assessment of the evidence on the balance of probabilities "given all of the evidence before me".

13 The Commissioner therefore found that, in the last nine months of 2001 and into January 2002 issues were raised with Mr East by Mr Torelli about the concerns he had about the volume of sales being made. Mr East was told that he should be out on the road more, but he did not respond. Mr Torelli said that he thought that Mr East was not promoting items for sale such as computers which were more profitable rather than standard supply consumables such as ink. The Commissioner also found that Mr East did not respond to any of these entreaties, and that at the same time it was clear, on the evidence, that the business was not running well.

14 Competition increased for Integral in 2002 twofold. Mr Torelli said that the end result of this competition was that he began losing money, and not only did he talk to Mr East about his performance, but he told him that he was not able to pay the production bonus that had been agreed and it was gradually reduced to nothing.

15 Both parties, the Commissioner at first instance found, saw that there was a need to increase sales. The Commissioner also accepted that the reduction of the bonus payments were because Integral could not afford to meet those payments, and this was reasonable in the circumstances. That finding was not in dispute upon the appeal.

16 Mr Torelli ultimately told Mr East that Integral would be terminating the "employment of Nils Pty Ltd" if things did not get better. He expressed concern to Mr East about the way he went about placing his orders. He eventually became concerned about the diminishing sales and Mr East's lack of performance in the achievement of those sales. He informed Mr De Wewver accordingly, assuring Mr De Wewver that because of his performance in increasing business he should not be too concerned about his employment. Indeed, Mr De Wewver then took on all of the sales representative work with newsagents which Mr East had been doing.

17 Eventually Nils Pty Ltd was given a notice of termination because Integral wanted to terminate the contract of Nils Pty Ltd due to shortage of sales.

18 The Commissioner at first instance found that Integral was really terminating the contract of Mr East, because he was an employee, but there was no unfairness.

19 Mr Torelli had tried to ensure that Mr East changed his ways and did something about the poor sales, and decided that Mr East was making no real contribution to remedy the situation. Thus, the Commissioner found that there was no unfair dismissal.

20 The Commissioner found, as he was entitled to find, since it was the clear evidence of both Mr Torelli and Mr East, that Mr East in the last nine months of 2001 and into January 2002, had been counselled by Mr Torelli. Mr Torelli had been making complaints and counselling Mr East about poor sales, about not attending a seminar, informing him about the financial difficulties of Integral, requesting him to spend more time on the road, and, indeed, warning him in April and September 2001 that, if the financial position remained bad or deteriorated, then he would have to terminate the contract with Mr East's company, Nils Pty Ltd, which the Commissioner found was, in fact, the termination of a contract of employment. This was because, as the Commissioner correctly found, the contract between Integral and Nils Pty Ltd was a sham adopted for tax amelioration.

21 Mr East failed to respond to any of this counselling and what the Commissioner called "entreaties".

22 The Commissioner found, and found correctly, that the business was not going well. That evidence was not controverted.

23 The substantial increase in competition over four years or so was obviously one factor in affecting the profitability of the company.

24 It should also be observed, although it was not found, that the clear credible evidence was that in four and a half years Mr East had written only 79-80 new "clients" on the books of the company, whereas in two years Mr De Wewver had "enrolled" 150 new "clients" on the books. Mr East himself admitted that his priority, if not his whole modus operandi, was maintaining existing well paying clients, even though he also said quite clearly that part of his job as sales manager was getting new customers as well. In any event, there is no evidence that Mr East increased sales, and, as the Commissioner found, he did not spend more time on the road, or sufficient time on the road. It is clear that the financial situation of Integral deteriorated to the extent that in April 2001 Mr Torelli sought to reduce the bonus payments because the company could not afford them. That evidence was not challenged, and, indeed, seems to have been accepted. Although his evidence was that he had accepted the reduction of the percentage of gross profit which constituted the bonus, from 5% to 3% in April 2001, which is what occurred, and, further, that in September 2001 when the bonus was extinguished he did not protest, Mr East sought to justify this course of action on the basis that there was nothing else he could do. The fact of the matter is that Mr East continued to work for Integral, notwithstanding that counselling and the warnings were given to him. The fact of the matter is that he accepted the reduction and then the extinguishment of the bonus. The fact of the matter is that he continued to work for reduced salary without the bonus, and the fact of the matter is that there was no evidence that he protested and no evidence that he intended to leave his employment in dissatisfaction. In fact, he remained, as he had remained for some years. In September 2001, he was specifically advised by Mr Torelli that he would have to be let go if the financial situation did not improve. He did not deny that the financial position of the company was not good.

25 There is, as we have said, no evidence that he protested also against the extinguishment of the bonus which followed that discussion, which was the discussion which occurred in the food hall. The Commissioner found, and it was not challenged, that Integral could not afford to pay the bonus payments and that the reduction or extinguishment of bonus payments was therefore reasonable in the circumstances.

26 The Commissioner found that the repudiation of the contract by the unilateral reduction of the bonus was accepted by Mr East. Mr East said that he continued to work on because he had no other option.

27 The whole of the application was therefore dismissed.

ISSUES AND CONCLUSIONS

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

29 The Full Bench has no warrant to interfere with the decision at first instance, and, in particular, cannot substitute its decision for that of the Commissioner at first instance unless the appellant establishes that the exercise of the discretion at first instance miscarried according the principles laid down in *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* 73 WAIG 220 (IAC).

30 In matters of credibility findings, too, there is a well known principle many times applied by Full Benches of this Commission, which is the principle laid down in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 per Brennan, Gaudron and McHugh JJ at page 479, which reads as follows:-

> "....a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage", or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable"."

31 (See its adoption and explanation in *Fox v Percy* (2003) 197 ALR 201 at 208-209 (HC) per Gleeson CJ, Gummow and Kirby JJ).

Unfair Dismissals

32 General principles relating to unfair dismissals have been laid down in a whole number of cases and firstly and primarily in *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC) (see also the discussion of detailed matters in *RRIA v CMEWU* 69 WAIG 1027 (FB) ("Parker's Case")).

33 Of course, it is trite to observe that the onus of establishing that the dismissal was unfair lies upon the applicant in any case. That onus therefore lay upon Mr East in this case.

Ground 1

34 The main ground in the appeal which alleged that the exercise of discretion at first instance miscarried was that the Commissioner at first instance found that the dismissal of Mr East by Integral on or about 25 January 2002 was not harsh, oppressive or unfair.

(a) First, it was submitted that there was no evidence that Mr East had not responded to the entreaties of Integral through its director, Mr Torelli, to be on the road more and to promote the sale of computers since, inter alia, Integral, on the evidence, was not in the business of selling computers, nor was it even probable, on the evidence, that Mr Torelli had asked Mr East to sell computers. However, there is the evidence of Mr De Wewver, who was accepted as a credible witness by the Commissioner, and the evidence of Mr Torelli that both Mr De Wewver and Mr East were selling all items including ink, computers, etc, but that old stock like computers and modems had not been sold and were cleaned out by Mr De Wewver's selling them when he started his employment.

There was also clear evidence that Mr Torelli spoke to Mr East about being on the road more to increase sales and that Mr De Wewver was only in the office for an hour or two but that Mr East was there a lot.

In any event, there is no denial (see page 75 of the transcript at first instance (hereinafter referred to as "TFI")) by Mr East that he was told by Mr Torelli to get out on the road and sell more computers.

(b) There was a submission attacking the finding that Integral had a genuine belief that the sales performance of Mr East was a problem and that Integral had given Mr East every opportunity and chance to improve. It was submitted that there was no evidence on which such a finding could have been made.

There was clear evidence from Mr Torelli, which was open to be accepted by the Commissioner, that there was a problem with the sales performance of Mr East which was borne out by the comparative figures relating to the results handed in by Mr De Wewver and the results achieved by Mr East to which we have referred above.

At page 97 (TFI), Mr East acknowledged that he had slowed down in bringing in new customers over the four and a half years of his employment. He also refused to take directions from Integral concerning increasing the customer base since he considered it good enough to maintain the current customers, and, indeed, it is clear on the evidence that that latter approach was the modus operandi which he favoured and practised, as Mr Torelli's evidence reveals.

In any event, he was also not interested in carrying out proper instructions, to complete various sheets handed to him to be completed. (The evidence at page 157 (TFI) also supports this view). He was alleged to be lax in attending seminars. He attended two out of four.

(c) It was also submitted that there was no evidence that Integral had in place a system of monitoring Mr East's sales performances or his progress, but that is not the case because Mr East's own evidence about the code used for processing orders was contradictory and inconsistent (see pages 63 and 94 (TFI)). He did not ring his orders in, but, more often than not, came into the office personally to process them using his number, and, indeed, Mr Torelli himself monitored new accounts and advised Mr De Wewver that he was doing well and had written a great deal of new business. Further, there is the important evidence, which we have referred to above, of the increase of work at the rate of three new accounts per week, totalling 150 new accounts achieved by Mr De Wewver, compared to an increase by 79-80 accounts over a period of four years achieved by Mr East. It is quite clear, therefore, that not only was he monitored in his performance, but that his performance was unsatisfactory and he was so informed.

(d) It was also submitted that there was no evidence of any written records being made of warnings or counselling. That, of course, is true, but Mr Torelli's evidence is that there were numerous verbal warnings which set out the consequences clearly. It was not denied by Mr East that the most serious verbal warnings had been given in April and September 2001 and in January 2002 and that Mr East was on notice about the expectations of him by his employer and as to the jeopardy in which his position would be placed if the financial position of Integral did not change and by implication his performance did not improve. It was open to so find.

Mr De Wewver's evidence in relation to Mr East's mood change in November/December 2001 is some corroboration of what was said to be occurring.

(e) Next, it was submitted that the evidence of Mr Torelli with respect to such warnings was vague, evasive and totally unsatisfactory. That is not so, either in cross-examination or in evidence in chief. He is quite clear as to the discussions he had with Mr East and the warnings given (see pages 152, 153 and 171 (TFI)). It is then necessary to contrast the different approach taken in some cases by Mr East who was somewhat evasive from time to time.

(f) It was submitted that it was improbable that Mr Torelli had said anything to Mr East about his sales performance. However, in cross-examination Mr Torelli reaffirmed what he had said in evidence in chief (see pages 168, 169 and 171 (TFI)). In addition, Mr Torelli said that he monitored new customer credit applications every week and spoke to Mr De Wewver about it. It is clear, too, that Mr Torelli told Mr East to be out on the road more according to Mr De Wewver's evidence (see page 194 (TFI)) which was accepted by the Commissioner.

(g) It was submitted that there was no evidence that Mr East had become completely ineffective. It is probably right to say that he had not become completely ineffective. He was, however, bringing about too few sales over about two years. As confirmed by his own evidence, the number of new customers whom he brought in decreased. It is clear, and it was not denied, that Mr East was warned in early January 2002 that in the event of his sales not increasing for the next month so as to break even, his services would be terminated. It is clear that it was open to be found that Mr East's performance did not improve despite specific warnings, and, indeed, he spent, on the evidence, even more time in the office than "on the road".

35 When Mr East went on sick leave he made no attempt to contact Integral to advise of the reasons for his absence and to address the ultimatum put to him, despite the fact that he had always, in the past, rung to advise that he was ill, it is submitted on behalf of Integral, but that we think is not relevant in the circumstances of this case to that point. Certainly, on a fair reading, it was open to find that he would not have improved sufficiently to avoid a fair dismissal after the warning given to him in early January 2002 because he had simply not done so in the past and it was thoroughly unlikely that he would improve. Further, given the lack of communication in relation to his illness and the failure to provide precise medical details of his illness and his attitude on his return from sick leave, it is fair to say that his dismissal on return was, for that reason, as well as for the other reasons which we have expressed, not unfair.

36 Nothing has been submitted which would lead us to the view that the Commissioner at first instance found incorrectly that Mr East was not a credible witness in some respects. It is also clear that, on a fair reading of the evidence, particularly since it was corroborated by Mr De Wewver, a witness whose evidence was not shaken, as, indeed, Mr Torelli's was not, that the evidence for Integral should have been accepted by the Commissioner. Mr East's denials on oath about warnings or counselling have been contradicted either by his own evidence or the evidence of other witnesses, which other evidence it was open to the Commissioner to accept. His credibility was called into question on a number of occasions in evidence, and, on a fair reading of the transcript, revealed his evidence not to be reliable. In part, Mr Torelli's evidence was corroborated by that of Mr De Wewver whose evidence was accepted and who in evidence was not shaken.

37 However, on a fair reading of all of the evidence and having regard to the innate inconsistencies in Mr East's evidence, it was open to the Commissioner to find that he was given numerous chances to improve his sales, that his sales procuration performance was defective, that he was given warnings and notice over a period of several months, especially in and after September 2001, and that he was not able to achieve any improvement, and further that this was all the more serious because of the unsatisfactory financial condition of Integral, which he knew of.

38 There then was, of course, the final and serious warning in January 2002. It was open to find that for about 10 months before Mr East's dismissal, Mr Torelli raised his concerns about the decrease in sales with Mr East, that Mr East was at least reluctant to perform as he required him to do, that he counselled Mr East and warned him more adequately of the jeopardy to his employment if things did not improve, given Integral's financial problems. It was also open to find that the reductions in remuneration were "reasonable in the circumstances", as the Commissioner found. It was also open to find that Mr East's performance did not improve, that he was not sufficiently diligent, and that he had become so ineffective that his dismissal was fair, even if he were not "completely ineffective" as the Commissioner found at first instance.

39 The dismissal occurred after adequate and clear warnings and counselling, after a lengthy period within which no improvement or no sufficient improvement was achieved in the performance of his duties by Mr East. That is highlighted by the fact that on the uncontroverted evidence, Mr De Wewver performed well.

40 It is therefore open to find that the dismissal was not harsh, oppressive and unfair according to the principles laid down in *Miles and Others t/a Undercliffe Nursing Home v FMWU* (op cit), and further that in viewing the witnesses the Commissioner at first instance did not abuse or misuse his advantage when he made the findings he made, nor made findings which were glaringly improbable or contrary to incontrovertible fact.

Ground 2 - Claims for Contractual Entitlements

41 We now turn to the claim for annual leave. There was no claim at first instance for any outstanding leave entitlements. There was no evidence to support it. Mr East clearly invoiced Integral for the amount of annual leave agreed between them following some discussions and emails and never brought up the issue again, and, indeed, said expressly that the matter should be resolved by Integral depositing in his account what it considered he was owed for annual leave entitlements. There was no proof, on the balance of probabilities, that any other amount was owed other than what was paid.

42 Indeed, this ground failed too, because there was no claim for outstanding leave entitlements at first instance, in any event, because an amendment enabling the claim to be made was not allowed by the Commissioner. Accordingly, there was no evidence in support of any such claim which was itself not part of the applicant's case at first instance.

Ground 3 – Claim for Productivity Bonus

43 We now turn to the claim for payment of a productivity bonus so called. It is not always clear, of course, whether an employment relationship is going to continue after a consensual change or whether what the parties have done is to vary or cancel a contract. That was the situation in this case. It is not, of course, open to an employee or employer to unilaterally vary the terms of the contract of employment. If a party to a contract varies or attempts to force upon some other party some alteration in the contract which is not contracted for or agreed to, the party so attempting will very likely commit a breach of the contract. It is not always clear, if there is a consensual change, whether the parties have varied or cancelled the existing contract. If the breach amounts to repudiation, it will confer on the other party the right to regard the contract as at an end and to sue for damages. Working under changed arrangements for a time will not necessarily constitute acceptance of any purported variation or substitution of a new contract. More than mere acquiescence in any purported variation in the terms is required. Whether the changes result in the new contract being created is, of course, a matter of fact and law (see generally the reference to these principles in *Byrne v Twaddle t/a Mount Hospital Pharmacy and Twaddle t/a Mount Hospital Pharmacy v Byrne* (2003) 83 WAIG 5 at 12 (FB)).

44 In this case, there was evidence that the parties had discussions which resulted in a reduced bonus being paid after the discussions in April 2001. It was also clear from the discussions held that, on several occasions, from at least April 2001 to January 2002, Mr East was made well aware that Integral was in financial difficulty. It was also made clear in evidence, and it was open to find, that the background to the reduction of the bonus of 5% to 3% in April 2001, and subsequently, the non-payment of the bonus after September 2001, arose as a result of the financial difficulties which Integral was experiencing. Mr East, on the evidence, it was open to find, and should have been found, continued to work without any bonus being paid after September 2001 and whilst he was in receipt of the reduced bonus between April and September 2001.

45 Mr East was not threatened or coerced into accepting these reductions in remuneration. He knew or ought to have known of the financial difficulties which gave rise to them. He accepted the reductions. He did not deny that the financial difficulties existed. He did not give evidence that he intended to leave the employment of Integral before or after his dismissal. There is no evidence that he protested, although he gave some evidence of a counter-offer in April 2001. He also continued to work for a long enough period after the reductions in remuneration occurred. There is evidence of some acceptance in that he did not invoice the bonuses for payment by Integral after April or September 2001, except in the reduced amount agreed in April 2001. Most cogently, he pressed no claim for payment of bonuses upon his dismissal (see page 59 (TFI)). It was open to find, and it should have been found on the balance of probabilities, that he accepted the variations to the contract which first reduced and then extinguished the bonus payments. They were, in our opinion, and ought to be found, to be agreed variations. Alternatively, of course, it was open to be found that he had entered into a new contract which was different from the first in that it provided for reduced remuneration and firstly for a reduced bonus and then for no bonus at all.

46 As a further alternative to that, if the proposed variation, which was in fact effected by Integral, was a repudiation of his contract of employment, then he accepted the breach by continuing to work on the varied terms for five months between April and September 2001, and then on the further varied terms without any bonus at all for the period of about four months from September 2001 to January 2002.

47 Mr East's own evidence was quite clear too. His evidence was that he accepted the change in the contract terms. He said that he did so (and continued to work for a further period of nine months until his dismissal) because he had to.

48 For those reasons, it is open to find that it should have been found that there was and had been no contractual entitlement to a bonus since September 2001 and that such an entitlement certainly did not exist at the time of his dismissal. His claim, in that respect, was clearly not made out and the Commissioner at first instance was right in finding as he did.

Finally

49 For all of those reasons, there was no miscarriage of the exercise of the discretion. No ground is made out. We would dismiss the appeal.

Order accordingly

2003 WAIRC 10237

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN EAST, APPELLANT and INTEGRAL BUSINESS SYSTEMS PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S J KENNER COMMISSIONER S WOOD
DELIVERED	MONDAY, 8 DECEMBER 2003
FILE NO/S.	FBA 22 OF 2003
CITATION NO.	2003 WAIRC 10237

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

Order

This matter having come on for hearing before the Full Bench on the 3rd day of November 2003, and having heard Mr P E Mullally, as agent, on behalf of the appellant, and Ms J H Auerbach (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 8th day of December 2003, it is this day, the 8th day of December 2003, ordered that appeal No. FBA 22 of 2003 be and is hereby dismissed.

By the Full Bench

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

2003WAIRC 10285

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM STEELE, APPELLANT and STEVEN PHILIP CLARKE AND SCOTT JAMES NICHOLLS, RESPONDENTS
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 12 DECEMBER 2003
FILE NO/S.	FBA 23 OF 2003 AND FBA 24 OF 2003
CITATION NO.	2003 WAIRC 10285

Catchwords	Industrial Law (WA) – Appeal against the decision of a single Commissioner – Application to adduce fresh evidence dismissed – Claim for compensation for losses incurred in travel and accommodation in new employment – General principles of loss and compensation – Purpose of a speaking to the minutes – No error in the exercise of discretion at first instance – Appeal dismissed – *Industrial Relations Act* 1979, (as amended), s49, s23A, s26(1)(c), s32A, s35
Decision	Appeals dismissed
Appearances	
Appellant	Mr P G Brunner (of Counsel), by leave
Respondents	Mr S J Nicholls, on his own behalf and as agent for Mr S P Clarke

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 These are two appeals brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*"). The appeals are against the decisions of the Commission, constituted by a single Commissioner, the Senior Commissioner, on 12 August 2003, in application Nos 1391 and 1392 of 2002. The appeals were heard together by consent.

ORDERS AT FIRST INSTANCE

2 The Senior Commissioner made the following orders, formal parts omitted, in application No 1391 of 2002:-

> "(1) THAT Steven Phillip (sic) Clarke was an employee of Kim Steele trading as K and S Shearing;
>
> (2) THAT Steven Phillip (sic) Clarke was dismissed by Kim Steele on 21 July 2002;
>
> (3) THAT the dismissal was unfair;
>
> (4) THAT reinstatement or re-employment is impracticable, and
>
> hereby orders—
>
> (A) THAT Kim Steele pay Steven Phillip (sic) Clarke within 28 days of the date of this order the sum of $3,840.27 as compensation for the loss caused by the dismissal."

3 The Senior Commissioner made the following orders, formal parts omitted, in application No 1392 of 2002:-

> "(1) THAT Scott James Nicholls was an employee of Kim Steele trading as K and S Shearing;
>
> (2) THAT Scott James Nicholls was dismissed by Kim Steele on 21 July 2002;
>
> (3) THAT the dismissal was unfair;
>
> (4) THAT reinstatement or re-employment is impracticable, and
>
> hereby orders—
>
> (A) THAT Kim Steele pay Scott James Nicholls within 28 days of the date of this order the sum of $3,044.50 as compensation for the loss caused by the dismissal."

GROUNDS OF APPEAL

4 The appellant employer now appeals against those decisions on the following grounds, as amended at the hearing of the appeal:-

> "**Jurisdiction—**
>
> 1. The Senior Commissioner erred in law in determining that the compensation payable to the Applicant include an amount of $280.00 ($228.00 in appeal No FBA 24 of 2003) for loss of accommodation when the Commission does not have the jurisdiction to make such an award.
>
> 2. The Senior Commissioner erred in law in determining that the compensation payable to the Applicant include an amount of $1,605.00 ($1,526.25 in appeal No FBA 24 of 2003) for loss of fuel when the Commission does not have the jurisdiction to make such an award.
>
> **In the alternate—**
>
> 3. The Senior Commissioner erred in fact and law in determining an amount of compensation for loss of accommodation and fuel when—
>
> (a) The Senior Commissioner found at first instance that "the evidence of the (A)pplicants do not sufficiently particularise that loss";
>
> (b) The Applicant failed to produce any documentary evidence to establish such expenses where such documentary evidence is reasonably capable of being produced;

(c) The Senior Commissioner determined, in his Further Reasons for Decision, that—

(i) "There can be little doubt that ... there is some uncertainty in the resulting figure".

(ii) "There is uncertainty ... regarding the various sheds to which he travelled ..."

4. The Senior Commissioner erred in fact and law in determining—

(a) That it is not reasonable or fair to find no loss for accommodation and fuel expenses where the evidence lacks precision;

(b) That the estimate of $75.00 for a tank of fuel was not unrealistic;

(c) That the estimate that the Applicants used a tank of petrol every 200 kilometers is not unbelievable.

5. The Senior Commissioner erred in fact and law in determining that "payment (of the compensation) by instalments ... provides too long a period of time for the implementation of the orders" when—

(a) The Industrial Relations Act 1979 expressly provides for such payment by instalments;

(b) The right of the Applicant to be paid is not abrogated by the proposed method of payment by instalments;

(c) There was no express or implied argument raised by the Applicant against such a proposed method of payment;

(d) The Senior Commissioner took into account an email from the Applicant which could not form part of the record of proceedings;

(e) The Senior Commissioner was pre-disposed of a decision before the alleged Speaking to the Minutes on 8 August 2003;

(f) The Senior Commissioner did "not regard the request for time to pay as unreasonable in the circumstances".

6. The Senior Commissioner erred in fact and law in determining that no further material could be put before it at the alleged Speaking to the Minutes on 8 August 2003 when—

(a) The Commission was not "functus officio";

(b) The material was put forward to address an error in the Senior Commissioner's reasoning;

(c) To allow the material would have been proper and desirable and in the interests of the administration of justice.

And the Appellant seeks that the amount of compensation contained in the Order of the Senior Commissioner be reduced by $1,754.25."

5 The appeals were against the award of compensation only, and not against that part of the decision whereby the dismissals of the applicants at first instance were found to be harsh, oppressive or unfair.

6 I refer to the respondents hereinafter as "Mr Clarke" and "Mr Nicholls" respectively and the appellant as "Mr Steele".

FRESH EVIDENCE

7 There was evidence sought to be adduced by the respondents who were represented, on the appeal, by Mr Nicholls, in the form of a letter from a shearing contractor in Tasmania, directed to "proving" the claims by the respondents for the cost of travelling and accommodation as heads of loss.

8 However, I was satisfied that that evidence was procurable at first instance by reasonable diligence and should have been adduced at first instance. Therefore, within the principles laid down in *FCU v George Moss Limited* 70 WAIG 3040 (FB) and the authorities cited in that case, the letter was not admissible as fresh evidence, even given that it could be accorded any weight. The Full Bench declined, therefore, to admit that letter as evidence, and those were my reasons for joining my colleagues in so deciding.

CHRONOLOGY OF HEARING

9 This matter was heard on 30 April 2003 and thereafter on 2 May 2003. The reasons for decision, being the main reasons for decision, issued on 1 July 2003. On 16 July 2003, there was a further hearing on matters of proof of loss where evidence was given and both sides addressed the Commission. Minutes of the proposed orders issued on 5 August 2003, accompanied on that same day by further reasons for decision, in relation to the claim for loss constituted by travel and accommodation expenses.

10 On 8 August 2003, there was a speaking to the minutes of the proposed orders where the question of time within which to pay the amount of compensation was raised because the orders were that the amount of compensation be paid forthwith.

11 Further, the Senior Commissioner on that day refused to admit the tender of documents. (There was no appearance at the speaking to the minutes on behalf of Mr Nicholls and Mr Clarke, or by them, and Mr Brunner continued to appear for Mr Steele).

12 The orders appealed against were dated 12 August 2003 and deposited in the office of the Registrar on that same day. Supplementary reasons for decision issued dated 12 August 2003 dealing with the question of payments by instalments and the attempt to tender new evidence.

BACKGROUND

13 Mr Clarke and Mr Nicholls made separate applications to the Commission, constituted by a single Commissioner, the Senior Commissioner, pursuant to s29(1)(b)(i) of *the Act*, complaining that they were harshly, oppressively or unfairly dismissed from their employment as shearers on 21 July 2002, by Mr Kimberley Michael Steele, their employer (incorrectly referred to in the notice and grounds of appeal as Kim Steele).

14 Both applications were heard together.

15 Mr Steele, the appellant in these proceedings, and the respondent at first instance, is and was, at all material times, a shearing contractor who conducts the Mundijong Peel Feedlot shearing business situated at Mundijong in this State. This business is called an "export shed". They shear sheep which are to be loaded onto live sheep transports at Fremantle for the Middle East market.

16 The Senior Commissioner, in the end, found that, at all material times, the respondents were employees of Mr Steele trading as K and S Shearing. The Senior Commissioner went on to find that they had been dismissed, and, indeed, that they had been unfairly dismissed.

17 There was a claim of loss and a claim for compensation for that loss which, relevantly to this appeal, included claims for the cost of accommodation and petrol for travelling, in the new employment of Mr Clarke and Mr Nicholls.

18 That the dismissals were unfair as found was not the subject of this appeal. The only questions raised by this appeal relate to the findings as to quantum and the orders for payment of compensation.

REMEDY, FINDINGS AND ISSUES

19 In relation to the remedy, the Senior Commissioner found that Mr Nicholls and Mr Clarke had taken reasonable steps to mitigate their loss. He then went on to find:-

(a) The nature of the respondents' employment was that when Mr Steele was notified that sheep would be coming in for a boat he has a list of shearers of which the first 15 that he rings are the shearers who he prefers because they are reliable and do the job.

(b) Until their dismissals, the respondents were part of the 15 shearers Mr Steele would initially contact.

(c) He accepted the evidence of Mr Steele that he would ask shearers if they were available.

(d) That a shearer who is contacted is able to say that he is not available but is unlikely to say that he is not available because of the prospect that he would not be contacted again.

(e) If they indicated they were available an understanding was reached between them and Mr Steele that they would then be employed from the commencement of shearing until all the sheep had been shorn. At that point employment ceased until the cycle repeated itself.

(f) The evidence of the respondents makes it clear that they would accept the offer of employment when it was made because they did not wish to risk losing their stand by not doing so.

(g) Their employment at the Mundijong Peel Feedlot was regular and ongoing.

(h) It had been for Mr Clarke since he commenced with Mr Shingles at the end of 2000 and for Mr Nicholls since May 2000.

(i) By the conduct of Mr Steele on the one part and the respondents on the other, it had been regular and ongoing for the six months they had worked for Mr Steele.

(j) That the employment was regular and ongoing is shown also from the letters written on the respondents' behalves to assist them with home loans. In the case of Mr Clarke, the letter (referred to by Mr Steele at page 22 of the transcript at first instance) is dated 26 June 2002 and confirms this. It says that Mr Clarke was a "permanent contract shearer for Kim Steele Shearing Contractors during the past three years" and is a "reliable worker who earns between $70,000 and $75,000 a year".

(k) In the case of Mr Nicholls, the letter is dated 5 March 2002 and states that "he has worked as a shearer for Shingles Shearing Contractors full-time for the past two years" and earns "approximately $70,000 per year".

(l) These letters were written by Mr Steele, and he had no difficulty describing the employment of Mr Nicholls as a shearer on a boat-by-boat basis full-time.

(m) The Senior Commissioner therefore did not accept the submission from Mr Brunner that a finding of continuous relationship would brush aside at least 150 years within the shearing industry.

(n) The evidence suggests that shearing at the Mundijong Peel Feedlot is quite different from shearing in the bush. Mr Steele's description of Mr Nicholls' employment as continuous is correct.

(o) The Senior Commissioner then went on to find that Mr Clarke is likely to have continued to shear too fast and that they would have continued to behave in a manner which upset Mr Steele. He assessed the probability to be quite high that Mr Steele would have ceased calling them sooner rather than later, and they would not have had employment after 28 August 2002.

(p) He therefore found that the loss to each respondent caused by their dismissals to be wages they would have earned for shearing the remaining sheep for the boat as at the time of the dismissals and for shearing sheep for those boats where 15 shearers had been engaged until the end of the boat "Maysora" on 23 August 2002. He then required the parties to confer to agree upon the figures resulting from this decision.

(q) On 5 August 2003, the Senior Commissioner noted that the agreed losses were $1,955.27 for Mr Clarke and $1,290.31 for Mr Nicholls, together with amounts to be assessed by the Commission for loss due to costs of travel and accommodation.

TIME TO PAY AND NEW DOCUMENTARY EVIDENCE

20 I have referred to the speaking to the minutes above. There was a request for time to pay to be included in the orders and that request was acceded to. There was also a complaint about the reasons for decision which was not entertained.

21 There was also a complaint which was not entertained since it was not part of a speaking to the minutes, that the Senior Commissioner's findings about the costs of fuel and on distances travelled were erroneous. There was also an attempt to tender new documentary evidence which tender was not accepted by the Commission.

BACKGROUND IN EVIDENCE

22 The evidence of loss was given by Mr Clarke and Mr Nicholls and was as follows, summarised.

23 Mr Clarke's evidence was as follows.

24 After his dismissal by Mr Steele, he obtained other shearing work. First of all, he worked for a week and a half in and around Williams, and then the rest of it, about three months, he spent up in Coorow, which he said was about four hours north of Perth in travelling time. Every weekend, he travelled home. He would work five days a week and then every Friday night he drove home. Each Sunday night he would drive from home to Coorow and start work on the Monday.

25 He said that it worked out that he used at least two tanks of petrol there and back. That probably did not include running around out to the shed every day, but the cost was about $150.00 a week. His accommodation cost at the "barracks" in Coorow, where he and Mr Nicholls stayed, was $70.00 a week which the proprietors took from their wages. Mr Clarke resided in Singleton. When he worked for Mr Steele he drove from Singleton to Mundijong, which was 20 kilometres there and back, and that was nothing compared to 450 kilometres one way to Coorow, Mr Clarke said. He had been travelling 200 kilometres a week prior to his dismissal. He said that he would get 200 kilometres out of a tank. Thus, one would need one tank's worth of petrol for a weeks work at Mundijong. He reiterated that he needed two tanks a week to travel to Coorow and back to his home. He drove to sheds in and around Williams when he was working there for a week and a half. He used about a tank and a half to get to Williams and back. Then he would travel to sheds from Williams some 20 kilometres away. He estimated that at

about 40 kilometres a day. He stayed in Williams in town in the shearers quarters and his accommodation there was free. Mr Clarke did not have receipts, but his contractor who was in Tasmania did, for accommodation. He did not have any receipts for fuel expenditure. When they worked at Mundijong he and Mr Nicholls travelled together. That was for the whole of the period of two years that they worked for Mr Steele. Mr Clarke gave no evidence about the sort of car which he drove.

26 Mr Nicholl's evidence, summarised, was as follows.

27 Mr Nicholls gave evidence that during the relevant period, he did not go down to Williams with Mr Clarke but went to Brookton. However, Mr Nicholls said that he was with Mr Clarke at Coorow. On one occasion they travelled together because one of the cars had broken down, that is Mr Nicholls car. However, he left it at Coorow to be repaired and it was repaired. On all of the other occasions they used their own vehicles because the contractor had a couple of teams going and they did not know where they would be working, that is whether they would be working together or not. The use of the cars was the same going and returning from Coorow but driving out to the sheds they were not necessarily travelling the same distances because one shed might be close to a town and another might be out at Greenheads which was about 100 kilometres away.

28 During the whole period, Mr Nicholls estimated that his petrol costs were about $150.00 per week. His accommodation at Coorow was $70.00 per week and at Brookton $60.00 per week. He was at Brookton for only three or four days. He was at Coorow for two and a half weeks. When he worked for Shingles he travelled from Halls Head to Singleton. He said that it was not 30 kilometres but was only about 15 kilometres maximum. They alternated with their vehicles but mainly used his. Mr Nicholls said that he has a Ford panel van which holds 60 to 65 litres of petrol, approximately. He said that Brookton was about 100 kilometres from the Kelmscott turnoff. He was unable to give the price of the petrol which he purchased, nor was he able to say where he filled up. He had tendered no receipts for petrol or accommodation. He was at Greenheads at two sheds for about eight days. He travelled there from Coorow each day in his car. On one occasion he gave a lift to another shearer called Steve.

ISSUES AND CONCLUSIONS

29 That part of the appeal, insofar as it related to the compensation orders to be paid for fuel and accommodation claimed as a loss, was a discretionary decision. It was also a discretionary decision not to allow the tendering of evidence at the speaking to the minutes. It was also a discretionary decision to fix a time for payment of the amount ordered to be paid by way of compensation.

30 The decisions in these matters were discretionary decisions as that term is defined in *Norbis v Norbis* [1986] 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194.

31 The question of what the loss or injury is, is not answered by the exercise of discretion. It is a question of fact or of mixed fact and law and requires a finding accordingly (see *Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 (FB) and the cases cited therein).

32 The Senior Commissioner found that the evidence of the applicants at first instance, Mr Nicholls and Mr Clarke, was not wild or unreliable.

33 It was submitted that in evidence there was no mention made by Mr Clarke of a trip to Albany, nor, or on the other hand, did he claim it, I might add.

34 There were four complaints in the grounds of appeal.

35 The first was that there was no jurisdiction to award compensation for a loss caused by the need for Mr Clarke and Mr Nicholls to pay an extra amount compared to what they had paid in their old employment for the cost of travelling and namely purchasing petrol and accommodation.

36 In other words, the claim was that because of the added cost to them in travelling expenses and accommodation, which had not existed in the employment from which they had been unfairly dismissed, they had suffered a loss quantified by the amount of the expenses for travelling and accommodation incurred in their new employment. The submission for the appellant was that no "loss" was established within the meaning of s23A of *the Act*. There is, of course, no definition of "loss" in *the Act*. It might be said that, on a fair reading of *the Act*, as it was and as it now is, that that was because there was never a need to specifically prescribe a jurisdiction or power to order the payment of compensation for loss in industrial matters. However, that is another matter.

37 I turn to the submission that there was no jurisdiction to order the payment of the amount of compensation claimed because the loss established was not "a loss" within the meaning of s.23A of *the Act*. That submission was founded on the dicta of Scott J, with whom Parker and Pullin JJ agreed, in *Epath WA Pty Ltd v Ihann Adriansz* (2003) 83 WAIG 3048 at 3051 (IAC).

38 Mr Brunner, as I understood his submissions, submitted, that, because there was no provision in an award, express or implied and no term of the contract of employment in this case which entitled Mr Clarke or Mr Nicholls to claim accommodation and petrol expenses as a loss caused by the harsh or oppressive unfair dismissal, that the claim was incompetent. (The principles applying to the proof and establishment of loss are now long standing in this Commission (see *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit) and the other cases cited above and the cases cited in *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit)).

39 Further, the clear entitlement to compensation for a loss caused by harsh, oppressive or unfair dismissal was recognised and articulated by E M Heenan J in *Garbett v Midland Brick Co Pty Ltd* (2003) 83 WAIG 893 at 903 (IAC) and cited to us by Mr Brunner. His Honour said:-

> "This does not mean that the compensation which the Commission may order under s23A(1)(ba) of *the Act* is restricted to the damages which might be recovered at law for wrongful dismissal, but it does mean that payments ordered under s23A 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." (My emphasis).

40 That is a clear recognition of what s23A in very clear and unambiguous terms prescribes. What His Honour says is that one basis for a claim of loss is that there is a loss unrelated to any so called lawful entitlement which can be claimed and for which compensation can be ordered provided that it is caused by the harsh, oppressive or unfair dismissal. This was such a case.

41 If I might say so, with respect, to construe the section otherwise would lead to ambiguity, absurdity and render that provision inconsonant with the purpose and prescription of *the Act* otherwise.

42 On a fair reading, *Epath WA Pty Ltd v Ihann Adriansz* (IAC) (op cit) does not say otherwise. *Epath WA Pty Ltd v Ihann Adriansz* (IAC) (op cit) is authority only for the proposition that an applicant cannot claim as compensation, or as a "loss" within the meaning of s23A, an amount by way of a severance or redundancy payment which is not due under an express or implied term of an award or of a contract of service. To hold that a claimant under s29(1)(b)(i) and under s23A cannot claim an amount of loss unless it is a loss arising from the breach of a term of a contract of employment would be to restrict claims of loss in "unfair dismissal matters" to claims for contractual benefits, which claims can be made, heard and determined pursuant

to s29(1)(b)(ii) of *the Act* under a separate statutory head of power, and would do violence to the plain words of the statute. It is trite to observe that claims for compensation for a loss caused by a harsh, oppressive or unfair dismissal are separate and distinct claims from those for contractual benefits and are made under a separate and distinct statutory provision conferring separate powers and prescribing separate remedies specific to and confined to claims of unfair dismissal. The separateness and distinctiveness of the two powers conferred by s29(1)(b)(i) and s29(1)(b)(ii) is emphasised by the fact that the primary remedy for "unfair" dismissal is not compensation. It is and was reinstatement and pursuant to s23A(6) as amended is re-employment also. Both, however, are remedial provisions and are to be interpreted liberally (see *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit)).

43 However, in clear unambiguous language, in s23A(6) of *the Act*, the remedy available for loss or injury caused by an unfair dismissal is prescribed. It is not a claim for contractual benefits and should not be so construed. I do not think that the dicta in *Epath WA Pty Ltd v Ihann Adriansz* (IAC) (op cit) properly read, say otherwise.

44 The *remedy* is compensation for loss if reinstatement or re-employment are not ordered as a remedy. A loss is not a loss of contractual benefits. The loss claimed in this case was the loss of monies caused by greater work expenses which were not incurred in the jobs from which the respondents were dismissed. It was sought, by the respondents, as applicants at first instance, to establish in the words of E M Heenan J in *Garbett v Midland Brick Co Pty Ltd* (IAC) (op cit), that there should, in the case at first instance, be "compensation for a demonstrated loss or injury caused by the harsh, oppressive or unfair dismissal". Thus the losses claimed were alleged to be caused by the unfair dismissal and if so established were therefore compensable as such. There was clear power and jurisdiction in the Commission to entertain the claim for loss, to make the findings which the Senior Commissioner made and to make the orders which he also made, for those reasons. That ground has no merit.

Loss

45 The next complaint was that, expressed in the alternative, and as expressed in grounds three, four and five, that the Senior Commissioner erred, to paraphrase the grounds, in finding that the respondents had established any losses which were caused by the unfair dismissals on the balance of probabilities. The substance of the evidence was that Mr Clarke and Mr Nicholls had travelled certain distances and paid certain expenses and had paid also for board or accommodation.

46 Of course, not only was there evidence that certain approximate kilometrages had been travelled but also that to do so required the purchase of certain quantities of petrol and its use.

47 There was a gap in the evidence of Mr Clarke in that he did not identify what vehicle he was driving. Neither respondent had any or any sufficient documentary evidence to tender in the proceedings and to substantiate their claims for accommodation and petrol use. That much is clear. On the other hand, the claims for the cost of accommodation were not seriously challenged nor the witnesses shaken in their evidence of the quantum of those claims. Further, as a measure of the reliability of the evidence, Mr Nicholls gave evidence that he had received free board at Williams. In any event, too, on a fair reading of all of the evidence, there was straightforward oral evidence of the cost of board, naming what would seem to be fairly low tariffs and no attempt to claim what they were not entitled to claim, the evidence of that being the evidence that free board had been obtained at Williams.

48 There was also quite detailed evidence of how many tanks of petrol were required for certain journeys to Coorow and in its environs, and to Mundijong also, and to Williams and its environs. I do not agree on a fair reading of the evidence that the evidence of the journeys to Greenhead was uncertain. The distances, of which evidence was given, were not contradicted by evidence at first instance and the evidence given about those distances was not seriously shaken. The claims for petrol used did not encompass all of the petrol used and that evidence was volunteered by the respondents. There was not, in fact, a claim for the travel, or all of the travel, from shearers' accommodation to sheds and outside Williams and Coorow. There was also evidence given by Mr Nicholls of a weekend when his car broke down and he was unable to use his car. Therefore, he returned with Mr Clarke from Coorow to his home at Singleton. Again, he volunteered that, and it was not part of this claim. The distances and the quantity of petrol were not effectively, as evidence, shaken by cross-examination. No evidence was adduced to challenge the basis of the evidence of petrol used and miles travelled nor the cost attributed to it. There was no suggestion in cross-examination that these witnesses were fabricating the evidence or exaggerating. There was no suggestion that the evidence that the need to travel and the locations to which they travelled was wrong. True it is that the figures were somewhat imprecise as the Senior Commissioner recognised. However, they were not so imprecise having regard to the evidence in some detail of the travel distances and the frankness about the claims to which I have referred to above, as well as some under claiming, that they were not credible and that, therefore, the amount was not quantifiable on the evidence.

49 The case before the Full Bench relied to some extent on an attempt to have the Full Bench, which had not dealt with the matter at first instance, use judicial notice to contradict findings made at first instance in relation to distances travelled and costs of petrol. That was not permissible.

50 Further, it was sought by Mr Brunner to submit that the failure to cross-examine on certain evidence was justified on the basis that the applicants at first instance, Mr Clarke and Mr Nicholls, bore the onus of proof. I do not understand that submission. Unchallenged evidence in chief can often mean the difference between a claim being proved and not being proved. If evidence is not challenged then the party who fails to challenge it in cross-examination bears the consequences of that failure. True it is that there was no documentary evidence, no evidence of petrol prices, etc, however, it is not inconsistent with the modus operandi of the respondents moving from shed to shed as directed by contractors and picking up petrol as they went. Had there been contrary evidence or had they been shaken in evidence the lack of documentary evidence might have been telling, but that was not the case at first instance. Therefore, the somewhat overemphasised imprecision of the evidence complained about was not a bar to finding the loss proven on the balance of probabilities as is required by the authorities (see *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit)).

51 It was clearly open on the evidence given to find that the estimates of $75.00 for a tank of fuel was not unrealistic as the Senior Commissioner found and that the use of a tank every two hundred kilometres was not incredible either. Further, the Senior Commissioner enjoyed the advantage of seeing and hearing the witnesses. It should be borne in mind that he had heard a matter which involved not only the hearing of evidence relating to part of the loss which this particular claim was, but a hearing related to the merits of the matter during which he had seen and heard the witnesses. It is to be borne in mind, too, that the Senior Commissioner accepted some of the evidence which was significant in the whole of this application and which was given by Mr Nicholls and Mr Clarke. This included the finding that Mr Clarke and Mr Nicholls had taken steps to mitigate their losses, which they had done. It is noteworthy that having made the findings contained in paragraphs 22 and 28 (see pages 45-46 and page 47 of the appeal book (hereinafter referred to as "AB")) of the further reasons for decision issued on 5 August 2003, that the Senior Commissioner then found the losses claimed to be established. Certainly there was some lack of particularity, but insufficient to lead to the Full Bench concluding that in finding as he did, the Senior Commissioner erred. Further, there was not such uncertainty as to constitute error in the findings made, on the balance of probabilities. Those

findings sufficiently relate to and were open to be made on the evidence for the reasons which I have expressed, so as to reflect what was established by that evidence on the balance of probabilities.

52 I reproduce the findings made in the reasons for decision of the Senior Commissioner hereunder in detail.

53 Paragraph 22 reads as follows:-

> "Mr Clarke also gave evidence of the cost of his accommodation. In Coorow, the cost was $70.00 per week. For the period of 28 days I have calculated on the basis of a seven day week that cost as being $280.00 which equates to three complete weeks plus seven extra days. There was no cost for accommodation at Williams. Accordingly, I find that the loss of accommodation and fuel to Mr Clarke embraced by this decision is $1,605.00 plus $280.00 equalling $1,885.00".

54 Paragraph 28 reads as follows:-

> "I now consider accommodation costs for the 3-4 days at Brookton at $60.00 per week which I find to be a cost of $48.00. For Coorow, 2 ½ weeks at $70.00 gives a cost of $180.00 being two complete weeks at four days. If the cost of accommodation of $48.00 for Brookton and $180.00 for Coorow is added to the travelling cost of $1,526.25 it gives a total of $1,754.25 being the loss for travel and accommodation".

55 The calculations made derive from the facts established on the balance of probabilities as the Commissioner found them. There was, within the principles laid down in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472, and approved and explained in *Fox v Percy* (2003) 197 ALR 201 at 210-211 per Gleeson CJ, Gummow and Kirby JJ (HC), nothing on a fair reading of the evidence which would demonstrate that the Senior Commissioner had not used or had palpably misused his advantage or had acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable. The Senior Commissioner did not err in his finding of loss and his award of compensation for it as a matter of the exercise of his discretion and it was certainly not established on this appeal that he had.

Time to Pay

56 The third complaint was that the Senior Commissioner had erred in that he had determined that the payment of compensation by instalments provided no fair or proper time for the implementation of the orders. (The detailed chronology above sets out the procedural course which took place). Minutes of the proposed orders herein issued to the parties dated 5 August 2003. The minutes contained orders that the amounts to be ordered to be paid for compensation be paid forthwith. It is common ground that Mr Steel then sought by letter to the Senior Commissioner, a speaking to the minutes in which he advised that he would be seeking a "period of 28 days to effect payment, consistent with Section 23A(11) of *the Act*".

57 The speaking to the minutes was then listed for hearing and duly held on 8 August 2003. In the meantime there was some communication between the chambers of the Senior Commissioner by email and Mr Brunner in the course of which he advised that Mr Steele would consider 21 days as time within which payment could be made (see the email of 5 August 2003). The speaking to the minutes occurred on 8 August 2003 at which time submissions were made by Mr Brunner. There was no appearance by or on behalf of Mr Clarke and Mr Nicholls on the speaking to the minutes.

58 I should advise that the Commission could not make any decision and did not make any decision in relation to the minutes until the speaking to the minutes. It was, in my opinion, inappropriate to purport to make submissions to the Senior Commissioner ahead of the hearing and determination of matters on the speaking to the minutes by way of email or other document. As recognised in the supplementary reasons for decision (see pages 48-49 (AB)), there were full submissions made and heard at the speaking to the minutes in relation to an entirely new proposition to that ventilated in the above-mentioned correspondence and emails for the fixing of a period within which the amounts of the orders were to be paid. The submission by Mr Brunner, at first instance, was that the amount should be paid over a period of three months by instalments. There was also a submission to the Full Bench that because of communications about this, it seemed that a decision had been made in the absence of a speaking to the minutes. There was no evidence of that, in fact the contrary was the case. As I have said, the submission was an entirely new one and was dealt with on the record accordingly, and on its merits, as a new submission (see pages 2-5 of the transcript at first instance, 8 August 2003). It is quite clear that there was no predisposition. A submission was made and ruled upon. The submission clearly states also that if the Commission was not disposed to accept the submission that there be a payment by instalments over three months then there should be allowed 28 days within which to pay. The submission therefore that the Commission was predisposed was baseless and should not have been made because Mr Steele's own alternative for time for payment, namely within 28 days, was accepted by the Commission and orders made accordingly.

59 In any event, if it were to be seriously argued that the Senior Commissioner was predisposed, he should have been asked by the appellant to disqualify himself for bias. Of course, such a submission could not correctly have been acceded to. No such application or submission was made, not simply because there was not basis for it as there was not, but because the appellant's submissions were, in fact, acceded to in the alternative.

60 Next, in any event, the amount of the monies ordered to be paid, have been paid, as Mr Brunner advised us from the bar table, in compliance with the orders, within the 28 days ordered, demonstrating both a capacity to do so and a compliance with the orders which constitutes a waiver of any complaint of the type made in this particular complaint in the grounds of appeal. Thus, because of that fact and because the period sought in the first place has now expired and the orders have been complied with within the period ordered, the entire question is moot. "Courts will not decide a question that is academic in the sense that it is useless, merely hypothetical, raised prematurely or a dead issue; although they preserve a discretion to determine a question which is ceased to be a live issue inter partes where the determination would be in the public interest" (see per Lockhart J in *Veloudos v Young* (1981) 56 FLR 182 at 190 and also *SECWA v CEWU and Another* (1992) 72 WAIG 2512 (FB) and *CWAI v FMWU and Others* (1990) 70 WAIG 1281 at 1282 (IAC)). This question was entirely academic, had no quality of public interest, was hypothetical and a dead issue. This ground is misconceived, has no merit at all and is not made out.

Speaking to the Minutes – New Evidence

61 Next and finally, the complaint is that the Senior Commissioner erred on 8 August 2003 at the speaking to the minutes when (see page 49 (AB)) the Senior Commissioner rejected a tender as evidence of new documents said to relate to fuel costs and fuel tank capacities. The Senior Commissioner ruled that the documents were evidence which should have been and could have been adduced in the course of the hearing. The hearing had concluded sometime before the Senior Commissioner had issued minutes of proposed orders having occupied time over several months, and there were two sets of reasons for decision issued before the speaking to the minutes. The Senior Commissioner also held that the question of this new evidence should not and could not have been raised on a speaking to the minutes.

62 The purpose of a speaking to the minutes is entirely limited. The process exists pursuant to s35 of *the Act* to enable the parties to put to the Commission matters directed to ensuring that the orders do issue to properly reflect the Commission's decision and the reasons therefor.

63 It is not at all clear why this ground has been pleaded.

64 It was submitted to the Full Bench that the Commission was not functus officio and could therefore have admitted the evidence. It was also submitted that since the material was put forward to address an error in the Senior Commissioner's reasoning, it should have also been admitted. In my opinion, on a speaking to the minutes, it would be quite incompetent for the documents to be admitted on that basis for the reasons and on the authorities which I refer to hereinafter. There was also a submission that to admit the material would have been "proper and desirable" and "in the interests of the administration of justice".

65 There was also reliance on s32A of *the Act* which reads as follows:-

> "Conciliation and arbitration functions of Commission to be unlimited
>
> (1) The functions of the Commission under this Act as to the resolution of matters by conciliation ("conciliation functions") and the determination of matters by arbitration **("**arbitration functions")—
>
> (a) are to and may be performed at any time and from time to time as and when their performance is necessary or expedient; and
>
> (b) are not limited by any other provision of this Act.
>
> (2) Without limiting subsection (1), nothing in this Act prevents the performance of conciliation functions merely because arbitration functions are being or have been performed."

66 I think I should, however, say what is quite clear. The arbitration hearing had been completed. The parties had been heard. The matter had been determined. The Commission had made its decision. The Commission had in accordance with s32A performed its arbitration function and completed it and in accordance with s35 had, as mandatorily required by that section, committed its decision to minutes and fixed a time at which the parties were afforded their opportunity to take advantage of the entitlement to speak to the minutes. That was the process before the Commission. The Commission had no other statutory function to carry out at that time other than to hear and determine, on the speaking to the minutes, the final form which the Commission's decision would take when it issued to be perfected by depositing in the office of the Registrar (see s36 of *the Act*). At the time fixed by the Commission the parties are entitled to speak to matters contained in the minutes (see s35(3) of *the Act*). It is not the time to bring fresh evidence or make submissions as to substance. It is not the time to argue an appeal or complain about the decision (see *Grade Pty Ltd v McCorry* (1993) 73 WAIG 2016 (FB) and also *CSA v Public Service Commission* (1937) 17 WAIG 22 at 23 per Dwyer P and *WA Government Tramways, Motor Omnibuses and River Ferries Employees Union of Workers, Perth v Commissioner of Railways* (1947) 27 WAIG 517 at 523 per Dunphy J).

67 If there were a power to reopen the proceedings on a speaking to the minutes, and I would need to be persuaded that such a power exists, and was certainly not on this appeal, then it was for the appellant to establish that the hearing should be reopened. However, no express application was made to reopen and accordingly no express submissions were made or evidence adduced in support of such an application. For that reason alone that ground of appeal is not made out.

68 Assuming that, however, the attempt to tender the documents constituted a de-facto application to reopen the hearing, which was unsatisfactory given that it was left until the speaking to the minutes to make the application, then nothing was submitted to counter the principle that any discretion to allow a case to be reopened should be exercised sparingly (see *Jingellic Minerals NL v Beach Petroleum NL* (1991) 55 SASR 424 at 426-427). Indeed, there was no convincing attempt and no attempt at all to make out a case for the reopening, having regard to the incalculable prejudice to any party in having a question reopened and a determination made, as was the case here (see *McCarthy v McIntyre BC* 200005302 [2000] FCA 1250 at paragraphs 32 and 33 (FC)).

69 There was no attempt in particular to explain why the evidence was not adduced at the hearing which had taken place on various days over several months. It is not in the interests of justice to allow a party to reopen to adduce further evidence unless it is abundantly clear that evidence of that type is not capable of being obtained earlier (see *Dragut v Western Australian Conference of The Seventh Day Adventist Church* (SC) (WA) Full Court Library No 9505235, 29 September 1995 (unreported)). It was not in this case made clear, and certainly not abundantly clear, that that was so. When a determination has been made, as it was in this case, and reasons given as it was in this case, leave to reopen should certainly not be given to enable further evidence to be called or to cover points which in the light of the courts remarks could have been covered more fully. That also applies to this matter. It was not established pursuant to s26(1)(c) of *the Act* that the interests of the respondents should be swept aside in these circumstances in favour of the appellant. Further, the application was made orally, without notice to the Commission or the other parties and without particulars. It was entirely unsatisfactory that it should have been so and for that reason alone the Commission was right not to consider the application.

70 Next, a speaking to the minutes is precisely and narrowly that. It will be rare that without the direction of the Commission another matter will be permitted to be raised at a speaking to the minutes. In particular, a speaking to the minutes is not an occasion for a party to debate the rights and wrongs of what the Commission has decided. Such an approach is improper and impermissible.

71 Finally, I do not understand why s32A of *the Act* was relied on. It is not authority for the reopening of the case at first instance. The arbitration in this case had been completed, a determination had been made and the Commission was in fact functus officio, except for the narrow purposes of the speaking to the minutes and issuing of its orders in proper form. That ground was not made out.

Finally

72 There was no error in the exercise of the discretion of the Senior Commissioner at first instance established according to principles in *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC). There was no warrant therefore for the Full Bench to interfere with the exercise of the discretion. The complaints in the grounds otherwise, which do not relate to any misuse of the exercise of the discretion, are not made out either. For those reasons, I would dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

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

COMMISSIONER J F GREGOR—

74 I have had the benefit of reading the Reasons of Decision of His Honour the President. I respectfully agree with the conclusions that he reached and have nothing further to add.

THE PRESIDENT—

75 For those reasons the Full Bench dismissed the appeal.

Order accordingly

2003 WAIRC 10284

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM STEELE, APPELLANT and STEVEN PHILIP CLARKE AND SCOTT JAMES NICHOLLS, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 12 DECEMBER 2003
FILE NO/S.	FBA 23 OF 2003 AND FBA 24 OF 2003
CITATION NO.	2003 WAIRC 10284

Decision	Appeals dismissed
Appearances	
Appellant	Mr P G Brunner (of Counsel), by leave
Respondents	Mr S J Nicholls, on his own behalf and as agent for Mr S P Clarke

Order

This matter having come on for hearing before the Full Bench on the 4th day of November 2003, and having heard Mr P G Brunner (of Counsel), by leave, on behalf of the appellant, and Mr S J Nicholls, on his own behalf, and Mr S J Nicholls, as agent, on behalf of Mr S P Clarke, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 12th day of December 2003, it is this day, the 12th day of December 2003, ordered that appeal No. FBA 23 of 2003 and appeal No. FBA 24 of 2003 be and are hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

FULL BENCH—Appeals against decision of Industrial Magistrate—

2003 WAIRC 10300

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, APPELLANT and BENCHMARK RECRUITMENT (WA) PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 12 DECEMBER 2003
FILE NO/S.	FBA 17 OF 2003
CITATION NO.	2003 WAIRC 10300

Catchwords	Industrial Law (WA) – Appeal against the decision of the Industrial Magistrate – Interpretation of award – Scope clause – Respondent employer not bound by the *Electrical Contracting Industry Award* No R22 of 1978 – Respondent employer in the business of labour hire – No error at first instance – Appeal dismissed – *Industrial Relations Act* 1979 (as amended), s7, s37, s83, s84 – *Electricity Act* 1945 – *Electricity (Licensing) Regulations* 1991, Reg 3, Reg 33
Decision	Appeal dismissed
Appearances	
Appellant	Mr C F Young, as agent
Respondent	Mr J H Brits (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal brought pursuant to s84 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*") against the decision of the Industrial Magistrate sitting in the Industrial Court at Perth made on 25 June 2003 in claim No M165 of 2002.

2 The claim was made pursuant to s83 of *the Act* and, according to the statement of claim, the defendant employer, Benchmark Recruitment (WA) Pty Ltd (hereinafter called "Benchmark"), failed to pay its employee, Mr Justin Fulton, entitlements due to him in accordance with the *Electrical Contracting Industry Award* No R 22 of 1978 (hereinafter called "*the award*"). There was therefore a claim for $442.22 and interest.

3 The appeal is brought on grounds which are particularised at pages 2-3 of the appeal book (hereinafter referred to as "AB")), and which I will not reproduce in detail in these reasons.

4 The appeal was directed to the finding that the area and scope clause (clause 3) of *the award* did not bind the above-named respondent, Benchmark, which was not an electrical contractor for the purposes of and within the meaning of the area and scope clause.

5 The decision appealed against consists of an order (see page 16 (AB)) dismissing the claim at first instance.

6 A minute of agreed facts was filed at first instance and was accepted by the parties, it being further accepted by the parties that the only issue in the matter was whether or not Benchmark was bound by *the award*.

7 The reasons for decision were given extemporaneously (see pages 17-21 (AB)).

***THE AWARD*, THE *ELECTRICITY ACT* 1945 AND THE *ELECTRICITY (LICENSING) REGULATIONS* 1991**

8 Clause 3 of *the award* is the area and scope clause, which reads as follows:-

> "This award relates to the Electrical Contracting Industry within the State of Western Australia and to all work done by employees employed in the classification shown in the First Schedule - Wages and employed by the respondents in connection with the wiring, contracting, maintenance and the installation and maintenance of electrical light and power plants, and the installation of all classes of wiring, repair and maintenance of electric and electronic installations and equipment including switchboards and appliances carried out by the respondents as electrical contractors …."

9 The proviso to that clause is that *the award* does not apply to the manufacturing section of the business of any of the respondents.

10 The Industrial Magistrate was referred to the *Electricity (Licensing) Regulations* 1991 which, for the purposes of the regulations made under the *Electricity Act* 1945 defines "electrical contractor" in regulation 3 as meaning:-

> "a person who carries on business as an electrical mechanic but does not include an electrical mechanic when acting in the capacity of an employee"

11 "Electrical mechanic" is defined as meaning:-

> "an electrical worker who is authorised under these regulations to carry out electrical installing work"

12 Regulation 33(3) prescribes as follows:-

> "A person is taken to carry on business as an electrical contractor whether or not electrical installing work is only part, or is not a principal part, of the business carried on by him or her."

FINDINGS AT FIRST INSTANCE

13 The Industrial Magistrate found as follows:-

a) That the work of an employee would not "drag" a respondent into an award.

b) That there is no merit in that submission because it is clear from the authorities that the exercise to see whether an employer or employee is bound by an award requires a separate consideration for both the employee and the employer.

c) It does not follow that if an employee does the work of those employees in the employee classifications in an award an employer is bound by the award.

d) An employee of an employer is not bound by the award as a matter of course because the employer comes within the scope of an award.

14 The Industrial Magistrate referred to *Bell-A-Bike Rottnest Pty Ltd v AFMEPKIU* (2002) 82 WAIG 2655.

15 His Worship decided that the test applicable in this case was that in *R J Donovan and Associates Pty Ltd v FCU* (1977) 57 WAIG 1317, which was applied in *Shenton Enterprises Pty Ltd t/a John Shenton Pumps v CEEEIPPU* (2000) 80 WAIG 2842.

16 His Worship decided that the plain ordinary words are "who contract to do electrical work".

17 Finally, His Worship decided as follows.

18 Benchmark does not contract to do electrical work. It contracts to provide labour to, in this case, Interlec Electrical and Instrument Contractors (hereinafter called "Interlec") who no doubt carry out electrical work for its clients, with whom Interlec has a contract or agreement. Benchmark does not contract with anyone to do electrical work. It contracts to provide labour, albeit at times, qualified licensed electricians. Benchmark is a licensed employment agent and there is nothing in what it does which would interest the Electrical Licensing Board or require Benchmark to be licensed under the *Electricity Act* 1945 or the regulations made thereunder, it was decided by the Industrial Magistrate.

19 He therefore found that the claim had not been established, that Benchmark was not bound by *the award* and that the claim would be dismissed.

ISSUES AND CONCLUSIONS

20 The appellant organisation (hereinafter called "the CEPU") is an organisation as that term is defined in s7 of *the Act*. Mr Justin Fulton was the CEPU's member. The CEPU, as was accepted, is a named party to *the award*. Benchmark was and is not a named respondent to *the award*.

21 Mr Fulton was and is a qualified electrical mechanic and holds an "A" grade electrical mechanics licence.

22 At the material times, Mr Fulton was a temporary employee of Benchmark, a company engaged in the hiring of employees to other persons (see the employees' agreement at pages 25A and 26 (AB)).

23 From 27 September 2000 until 5 October 2000, Benchmark placed Mr Fulton "on assignment". He was one of a number of employees placed "on assignment" in the electrical contracting industry by Benchmark.

24 Interlec is and was an electrical contractor holding an electrical contractor's licence, No EC003907. Mr Fulton worked under the direct supervision of Interlec doing Interlec's work. The work which he performed for Interlec was as an electrical installer. The classification of electrical installer is one contained in *the award* (First Schedule (2)(a)(iii) of *the award*).

25 Whilst working for Interlec, Mr Fulton maintained and repaired electrical equipment and connected fixed wiring to electrical equipment.

26 This appeal is an appeal from the finding of the Industrial Magistrate that Benchmark was not bound by the area and scope clause of *the award*, and therefore was not bound by *the award* pursuant to s37, the common rule section of *the Act*.

27 The learned Magistrate decided that the area and scope clause therefore did not apply to or bind Benchmark. The sole point on this appeal was whether that was erroneous. The basis of the appeal was that Mr Fulton's employer, Benchmark, employed him to do work identified in *the award* carried out by it as an electrical contractor.

28 In this case, the industry to which *the award* applied was to be identified by reference to the words used to describe that industry in the area and scope clause (the Donovan test – *R J Donovan and Associates Pty Ltd v FCU* (op cit)).

29 These matters were considered by the Full Bench in detail in *Shenton Enterprises Pty Ltd t/a John Shenton Pumps v CEEEIPPU* (op cit). I apply the reasoning and principle in that case and the cases cited therein to this appeal.

30 The words in clause 3 of *the award* are plain and unambiguous. I construe them as directed by the ratio in *Norwest Beef Industries Ltd and Derby Meat Processing Co Ltd v AMIEU* (1984) 64 WAIG 2124 (IAC) per Brinsden J. Employees are covered by *the award* if their employers are bound by *the award*. *The award* applies to employers by virtue of s37(1) of *the Act* if they are "electrical contractors" as defined above. The industry identified by clause 3 is the "electrical contracting industry" therefore.

31 The relevant definitions as they apply to *the award* appear in the *Electricity Act* 1945 and the *Electricity (Licensing) Regulations* 1991 and I have reproduced them above.

32 The question here is not which person employed Mr Fulton, but whether Benchmark, his employer, was bound by *the award*. If it was, then *the award* applied to its employee, Mr Fulton.

33 There was no evidence in this case that Benchmark did any electrical installation, was an electrical mechanic as defined, or did electrical installing work as defined. In short, there was no evidence that Benchmark was an electrical contractor and that it was engaged in the electrical contracting industry.

34 In this case, even more cogently, it is quite clear that, as described, Benchmark was not an electrical contractor ((ie) an employer who contracts to do electrical work as defined). This is because there was clear evidence that its name described its business, that is a hirer of employment to other employers. Further, Benchmark hired Mr Fulton out as an employee, and was never said to be an electrical contractor. There was no evidence that it held a licence, as required by the provisions referred to above, or that it did electrical work. There was no evidence that Benchmark carried on any of the business of an electrical contractor or was engaged in electrical installation as defined (see regulations 3 and 33 of the *Electricity (Licensing) Regulations* 1991).

35 The question was whether the work carried out by Benchmark was that of an electrical contractor and whether that was the industry in which it was engaged. The answer is that there was no such evidence, that the area and scope clause of *the award* did not apply, that *the award* did not apply, and therefore that Benchmark was not bound *the award*, that Benchmark was engaged in the hiring business or industry, and that whilst employed by it, Mr Fulton had no entitlements under *the award*.

36 The claim was therefore properly dismissed and the learned Industrial Magistrate did not err in so finding.

37 The appeal was not made out for those reasons, and I would dismiss it.

CHIEF COMMISSIONER W S COLEMAN—

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

COMMISSIONER J F GREGOR—

39 I have had the benefit of reading the Reasons of Decision of His Honour the President. I respectfully agree with the conclusions that he reached and have nothing further to add.

THE PRESIDENT—

40 For those reasons the Full Bench dismissed the appeal.

Order accordingly

2003 WAIRC 10286

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, APPELLANT
	and
	BENCHMARK RECRUITMENT (WA) PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 12 DECEMBER 2003
FILE NO/S.	FBA 17 OF 2003
CITATION NO.	2003 WAIRC 10286

Decision	Appeal dismissed
Appearances	
Appellant	Mr C F Young, as agent
Respondent	Mr J H Brits (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 25th day of November 2003, and having heard Mr C F Young, as agent, on behalf of the appellant, and Mr J H Brits (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision having been delivered on the 12th day of December 2003, it is this day, the 12th day of December 2003, ordered that appeal No. FBA 17 of 2003 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

FULL BENCH—Coal Industry Tribunal Reviews—

2003 WAIRC 10339

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	- and -
	WESFARMERS PREMIER COAL LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER P E SCOTT
	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 18 DECEMBER 2003
FILE NO/S.	FBM 5 OF 2003
CITATION NO.	2003 WAIRC 10339

Decision	Application discontinued by consent
Appearances	
Applicant	Mr L Edmonds (of Counsel)
Respondent	Mr G Bull (of Counsel)

Order

The notice of application herein having been filed on the 13th day of June 2003, and the parties herein having forwarded a minute of consent orders to the Full Bench on the 10th day of December 2003, and the Full Bench having determined that the orders proposed by the parties should be made and that the Full Bench should refrain from hearing the matter further, 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 18th day of December 2003, ordered by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for application No. FBM 5 of 2003 to be discontinued.

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

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2003 WAIRC 10315

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE SHANE O'BYRNE, APPLICANT and THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 15 DECEMBER 2003
FILE NO/S.	PRES 17 OF 2003 AND PRES 19 OF 2003
CITATION NO.	2003 WAIRC 10315

Catchwords	Industrial Law (WA) – Applications pursuant to s66 – Structure of the organisation's governing bodies – Interpretation of rules – Management and control of union funds – Applications dismissed – *Industrial Relations Act* 1979 (as amended), s6, s66, s71
Decision	Applications dismissed and refrain from hearing
Appearances	
Applicant	Mr C F Young, as agent
Respondent	Mr D H Schapper (of Counsel), by leave

Reasons for Decision

INTRODUCTION

1 These were two applications by the above-named applicant, Mr Laurence Shane O'Byrne, (hereinafter called "Mr O'Byrne") made against the above-named respondent, The Secretary, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch (hereinafter called "the CEPU"). The applications were brought pursuant to s66 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*"). These applications were heard together by consent.

2 It was conceded that the CEPU is an "organisation" as that term is defined in s7 of *the Act*. That is, it is an "organisation" registered under *the Act* in this state.

3 It was also conceded that Mr O'Byrne is a member of the CEPU within the meaning of s66(1) of *the Act*.

4 I am therefore satisfied and find, on those grounds, that I have jurisdiction to hear and determine the applications.

5 It was common ground that there exists a s71 certificate, issued under *the Act*, whereby the CEPU has a counterpart federal body, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Engineering and Electrical Division, WA Branch, which is the state branch in this state of a federal organisation ("the counterpart federal body"), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the federal organisation").

6 It is, I think, common ground that an election for offices took place in the counterpart federal body recently which was the 2003 quadrennial election to offices. In that election, the applicant and one James Murie were candidates for the office of assistant state secretary and member of council. Mr Murie was the successful candidate.

7 Mr O'Byrne, it is common ground, was declared ineligible to stand for those offices. As a result, he commenced proceedings in the Federal Court, at Perth, seeking to have that decision reviewed. In those proceedings, the federal organisation and Mr Murie separately intervened.

8 On Wednesday, 1 October 2003, at a meeting of the state council of the CEPU, the following resolution was passed (see exhibit 2):-

> "That the application cost of $141 be re-imbursed to the Assistant Secretary on production of a receipt.
>
> That the Assistant Secretary's actions of engaging legal counsel of Mr D. Schapper and Ms Catherine Crawford of Wickham Chambers for the purpose of making application and to represent the interests of the union on 2nd October 2003 at an expected cost of between $500 and $750 be endorsed.
>
> Considering the court accepts the application of the CEPU and dependent on W170 of 2003 continuing beyond 2nd October, Counsel continue to be engaged to represent the interest of the union, the cost to be negotiated but not greater than $250 an hour."

9 Mr O'Byrne sought a declaration in application No PRES 17 of 2003 "that the resolution of State Council on 2nd October 2003 contained in item 9.1 of the CEPU Engineering & Electrical Division – WA State Council Minutes is beyond power, and is void". Orders were sought also in application No PRES 19 of 2003 directed to and arising from allegations of the invalidity of the resolution and the actions directed by it.

10 Those parts of the two applications were settled by an undertaking given in the following terms, by Mr Schapper, of counsel, from the bar table on behalf of the respondent, the CEPU, which was accepted by Mr O'Byrne through his agent, Mr Young:-

> "The respondent undertakes not to give effect to the resolution of the state council of 1 October 2003 whereby the state council resolved to pay the legal costs incurred in Federal Court proceeding W170 of 2003 and further undertakes not to pay those costs."

The undertaking was given on the basis that it cannot affect the federal branch of the federal organisation.

11 As a result, I will refrain from hearing that part of each application further, and will order accordingly.

12 However, there remained to be heard a complaint that the above-mentioned resolution was in breach of rule 15.2.6 because state council does not have the power under the rule to expend the funds of the union. This was, of course, restricted in practice

to the question as to which governing body had control of current accounts in the union. The assertion for Mr O'Byrne was that it was the executive committee exclusively.

13 As I understand what I was asked to determine, this did not involve any determination of the validity of the resolution qua the purpose for which the monies were to be expended by the CEPU.

14 The question which required some resolution under s66(2)(d) of *the Act* by way of declaration of the true interpretation of the rules was a simple one - Is state council, the state conference or the executive committee the body within the union which controls the current account or accounts of the CEPU?

THE RELEVANT RULES

15 First, in interpreting the rules it is necessary to consider s6(f) of the objects of *the Act* which reads as follows—

> "To encourage the democratic control of organisations so registered and the full participation by members of such an organisation in the affairs of the organisation."

16 However, one must now construe the organisation's rules as a whole, but as with any legal document allowing for some generosity in the interpretation (see *R v Aird; Ex parte AWU* [1973] 129 CLR 654 and see also *Jeakings and Ward v SSTUWA* (1998) 78 WAIG 1136). The rules required to be interpreted are also required to be construed in the context of the rules as a whole (see *Schmidt v WALECDU* (1996) 76 WAIG 642 and see also *Hospital Salaried Officers' Association (Union of Workers) v The Honourable Minister for Health* (1981) 61 WAIG 616 at 618 per Brinsden J, Smith J agreeing (IAC)).

THE OBJECTS

17 The objects of the union, expressed generally in rule 3, "shall be to protect and further the interests of members by lawful means and in particular . . .".

18 The object rule 3.1 reads as follows:-

> "To uphold the rights of the organisation of labour and to improve, protect and foster the best interests of its members".

MANAGEMENT AND GOVERNMENT

19 Rule 5 which is headed "Management" prescribes by rule 5.1:-

> "THE UNION, UNLESS OTHERWISE PROVIDED IN THESE RULES, SHALL BE GOVERNED AND ADMINISTERED BY—
>
> 5.1.1 State Conference.
>
> 5.1.2 State Council.
>
> 5.1.3 Executive Committee."

20 It is to be noted, too, that, pursuant to rule 5.5, the control of the state conference, state council and executive committee by members exists by virtue of the use of referenda upon petition by five percent of the total financial membership on no more than two occasions in any one calendar year. In those circumstances, the executive committee is required to make arrangements for the conduct of the referendum and the decision of such referendum shall be binding on the union. That role in the executive committee is merely a facilitative and logistical role, and confers no power on the executive committee. The sub-rule confers an obligation, however. That obligation is to make arrangements for the conduct of the referendum.

STATE CONFERENCE

21 The state conference is the "policy making" body of the union and is also empowered by rule 5.2.1.1 "To make all necessary decisions to strengthen the Union and advance the interests of its members within the State".

22 The state council is, indeed, required by that sub-rule to exercise the other powers which I refer to herein, as well as the general power.

23 By rule 5.2.1.2, the state conference is empowered "To take all steps within the State necessary to achieve any and all the objects of the Union".

24 State Conference meets at least once in each alternate year and is constituted by delegates elected by all of the regional sub-branches of the CEPU. It is quite clear from the conferral of those wide powers and the requirement that state conference exercise them, that it is not just the supreme policy making body, but the supreme governing body of the CEPU. Rule 5.2.1.1 and rule 5.2.1.2 make that abundantly clear. As will be clear from the rules to which I refer hereinafter, the executive committee and state council exercise their powers under the rules only subject to state conference. State conference exercises its powers subject to no other body or review except referenda under rule 5.5 (supra).

STATE COUNCIL

25 The next major governing body of the union is the state council. State council consists of the state president, the state secretary and a number of state councillors elected by their respective sections (see rule 5.3.2.1).

26 The state council is required to meet bi-monthly and at such other times as the state council itself may decide or when decided by the executive committee, or when requested by majority of the members of the state council (see rule 5.3.2).

27 Importantly, rule 5.3.1.1 reads as follows:-

> "The State Council shall, subject to the powers of the State Conference generally direct the work of the Union carry out particular responsibilities allocated to it under these Rules and take all steps necessary and in accordance with these Rules to strengthen the Union and further the interests of the members."

That is a mandatory provision which requires the state council to govern, manage and administer the union, but most importantly, subject to the powers of state conference.

28 In particular, state council is given the wide and almost unlimited power within the rules "to take all steps necessary" (my emphasis) to "strengthen the union and further the interests of the members", as well as "to direct the work of the union" (see rule 5.3.1.1).

29 The breadth of that power is further expressed by the power conferred, inter alia, to "determine the Policy in the period between State Conferences, provided that such determinations do not conflict with previous conference decisions" (see rule 5.3.1.2).

30 However, the state council is bound because it is subject to the decisions of state conference.

31 Further, because rule 5.3.1.1 provides that state council can only exercise its powers "subject to the powers of the State Conference", state council is obviously and unambiguously subject to state conference. Nevertheless, that its powers are wide and important within that limit is borne out by a reading of rule 5.3 as a whole.

32 Subject to that limitation, and within the four corners of the rules, the state council is required to govern the union. To further and clearly express the wide ambit of power and duty to govern the union conferred on and imposed upon the state council, it is required by the mandatory use of the word "shall" to "supervise, overall, the work of all full-time officers and employees, all Sub-Branches and Committees". In other words, the state council is the supervisor of all committees, officers and employees with the powers and duties which "supervision" connotes. "To supervise" means "to oversee (a process, work, workers, etc) during execution or performance; superintend; have the oversight and direction of" (see *The Macquarie Dictionary (3rd Edition)*). That means, of course, that it is the supervisor of the executive committee.

33 Further, as well as rule 5.3.1.3, there are other particular powers conferred by rule 5.3 on the state council. The only specific power concerning expenditure is in rule 5.3.1.8, which reads as follows:-

> "State Council shall be empowered to determine the amount of expenses to be paid (other than full time paid Officers) Delegates attending State Conference, elected members when attending State Council, Executive Committee, Sub-Branch Executive and Delegates representing the Union on other bodies."

34 Given the clear words of rule 5.3.1.1 and the wide general power conferred on state council, I do not see that specific power as being any indication that that is the only power in financial matters conferred on the state council. It is simply not, on a fair reading of the rule, in the context of the rules as a whole, not the only such power.

EXECUTIVE COMMITTEE

35 Rule 5.4 constitutes a body called "executive committee". That committee consists of the state president, the state secretary and one member from all of the sections represented on the state council (see rule 5.4.3.1).

36 The executive committee is required to meet fortnightly, and at such other times as the executive committee itself may decide, or when requested by a majority of the members of the executive committee (see rule 5.4.2).

37 Most important of all is rule 5.4.1.1 which prescribes the purpose and powers of the committee.

38 Rule 5.4.1.1 reads as follows:-

> "The Executive Committee shall generally serve the purpose of an executive body of the State Council. It shall, subject to the powers of the State Conference and the State Council, carry out particular responsibilities allocated to it under these Rules and take all steps necessary and in accordance with these Rules to strengthen the Union and further the interests of the members." (my emphasis)

39 No other power or obligation is conferred upon or prescribed for the executive committee by rule 5.5 other than the requirement that it make arrangements for the conduct of the referendum, which is a purely logistical role.

40 There are two important limitations on its powers. First, the executive committee is required to carry out all of its responsibilities under the rules, and rule 5.4.1.1 in particular, "Subject to the powers of the State Conference and the State Council". That is, the executive committee is entirely subject to and must obey and implement directions, resolutions and decisions of state conference and state council. Indeed, the executive committee is also supervised by the state council.

41 Second, the executive committee is no more than, and is expressly constituted as an executive body of the state council. In other words, the executive committee derives its powers only because it is an executive body of the state council to which, of course, as an executive body, it is subject. It is, however, also expressly subordinate to and subject to the state council, and, of course, the state conference, as I have observed.

42 If it were not, it would certainly not further the object expressed in s6(g) of *the Act*, and encourage the democratic control of the organisation and the full participation of its members in its affairs.

43 Further, I should also say that it is subject to the right of the members by referendum.

MANAGEMENT OF PROPERTY AND FUNDS

44 Rule 15 is the Property and Funds rule. Rule 15.2.1 prescribes how the property and funds are to be managed and controlled, namely that they are to be administered by the CEPU "union", as it is called in the rules, and managed and controlled in accordance with its rules. That means that they are to be managed and controlled by whoever is prescribed to manage and control them, subject to state council and state conference.

45 Rule 15.2.1 reads as follows:-

> "The funds of the Union which are allocated to and the expenditure of which is administered by the Union, and which shall be managed and controlled in accordance with the Rules of the Union shall consist of …"

46 There follows reference, inter alia, to such property or funds which are deemed to be part of the union funds and banking and investments.

47 Rule 15.2.3 reads as follows:-

> "Where a current account is opened with a bank in the name of the Union, withdrawals shall be by cheque, signed by the President, or Vice President and countersigned by the Secretary. Provided that, the State Council may authorise current accounts for petty cash purposes. Such accounts shall be operated on the imprest system of banking and withdrawals shall be by cheque signed by the Officers authorised by the State Council."

48 The rule prescribes those officers who are to sign cheques drawn on the current account as the prescribed means of withdrawing monies from such an account, making it clear that this is all subject to authorisations by council. In my opinion, on a fair reading of that sub-rule, there is nothing which detracts from the authority of state council to authorise the opening of accounts, although the prime responsibility and power is vested in state conference. The control of expenditure from bank accounts is vested in state council subject to the limits referred to in sub-rule 15.2.4 to which I refer hereinafter.

49 The state council itself may authorise current accounts for petty cash purposes (see rule 15.2.3).

50 Rule 15.2.6.1 requires the secretary, as directed by state council, to deposit all monies accruing to the union, in a bank account to the credit of the union, at least once a week.

51 Rule 15.2.4 expressly and clearly limits the power of state council or executive committee to vote monies for expenditure to a maximum of $1,000.00, except for administration expenses. That rule reads as follows:-

> "The State Council or Executive Committee shall have no power to vote a sum exceeding five (5) per centum of its accumulated funds, with a maximum of one thousand dollars ($1,000.00), for any purpose other than that of administration, provided that upon application by the Union the CEPU Electrical Division Divisional Executive may authorise expenditure in excess of the abovementioned amount."

52 Accordingly, the right of expenditure out of current account or otherwise by the state council or executive committee is limited by that rule.

53 Rules 15.2.6.3 reads as follows:-

> "Except in case of extreme urgency all proposals to commit the Union to new expenditure shall be referred to the Executive Committee for report."

It is to be noted that such proposals are to be referred only for report inferably to state council, but not for decision by the executive committee.

54 Rule 15.2.6.4 reads as follows:-

> "A summary of income and expenditure shall be tabled at each Executive Committee Meeting."

However, that confers no express power to exclusively manage the current account.

CONCLUSIONS

55 It is quite clear on a fair reading of the rules that the supreme governing body of the union is the state conference and that it is not merely a policy making body. It is also clear that state council governs the union otherwise subject to state conference. It is also clear that the executive committee is no more than a committee of state council to which it is expressly subject in all of its functions.

56 Executive committee decisions can be reviewed by and revoked by state council and by state conference. The executive committee has no express or implied power to control or operate current accounts contrary to or independent from the function of state council or state conference and can do nothing in relation to those accounts which in the end is not approved by state council or state conference. The limitation on expenditure by the executive committee and the state council reinforces that.

57 The executive committee does not manage the current account. It has no power to act which is not subject to the state council and state conference. It is supervised by state council as a committee in all of its positions under the rules.

58 There is a clear hierarchy of government of the CEPU. The state conference is charged with governing the CEPU overall. The state council and the executive committee can only carry out their functions and powers subject to that power to govern on the part of the state conference. The state council and/or the executive committee have no power, in relation to current accounts or otherwise, to expend more than $1000.00 on any one item, except administrative expenses. The executive committee, by the express words of the rules, is subject to the supervision of the state council, and, in addition, can only exercise its powers under the rules wherever expressed in the rules, subject to both the state council, of which it is after all only an executive committee, and state conference. I have already referred to the express words of the rules in relation to those matters.

59 Accordingly, for those reasons, I find, the state council has the right and power to determine what occurs in relation to the current account or any current account of the union and to supervise the executive committee and the CEPU's officers and employees in the operation of that current account. There is no separate independent power conferred on the executive committee to do anything in relation to current accounts. Even express conferrals of power can only be exercised subject to the right to supervise the committee, of the state council, and, further, of the state conference. Accordingly, the applicant has not established its case for a declaration in the terms sought.

60 I will therefore dismiss the applications, save and except for my order refraining from hearing and determining part of the same referred to in paragraph 11 above.

2003 WAIRC 10342

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE SHANE O'BYRNE, APPLICANT and THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 15 DECEMBER 2003
FILE NO/S.	PRES 17 OF 2003, PRES 19 OF 2003
CITATION NO.	2003 WAIRC 10342

Decision	Applications dismissed and refrain from hearing
Appearances	
Applicant	Mr C F Young, as agent
Respondent	Mr D H Schapper (of Counsel), by leave

Order

These applications having come on for hearing before me on the 26th day of November 2003, and having heard Mr C F Young, as agent, on behalf of the applicant, and Mr D H Schapper (of Counsel), by leave, on behalf of the respondent organisation, and the respondent having given an undertaking which was accepted on the 26th day of November 2003 in the following terms, "The respondent undertakes not to give effect to the resolution of the state council of 1 October 2003 whereby the state council resolved to pay the legal costs incurred in Federal Court proceeding W170 of 2003 and further undertakes not to pay those costs", and I having reserved my decision on these matters, and reasons for decision having been delivered on the 15th day of December 2003, 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 15th day of December 2003, ordered as follows:-

(1) THAT I refrain and do hereby refrain from further hearing and determining those parts of application No. PRES 17 of 2003 and application No. PRES 19 of 2003 which call into question the validity of the resolution included under item 9.1 recorded in the minutes of the meeting of state council of the respondent held on the 1st day of October 2003 and quoted in paragraph 8 of the reasons for decision herein.

(2) THAT applications No. PRES 17 of 2003 and PRES 19 of 2003 be and are hereby otherwise dismissed.

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

2003 WAIRC 10020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE SHANE O'BYRNE, APPLICANT and THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 12 NOVEMBER 2003
FILE NO/S.	PRES 19 OF 2003
CITATION NO.	2003 WAIRC 10020

Decision	Orders and Directions given
Appearances	
Applicant	Mr C Young, as agent
Respondent	Mr J Murie, Assistant State Secretary

Order

This matter having come on for a directions hearing before me on the 12th day of November 2003, and having heard Mr C Young, as agent, on behalf of the applicant, and Mr J Murie, Assistant State Secretary, on behalf of the respondent organisation, and having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having consented to the waiving of the requirements of s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 12th day of November 2003, ordered and directed as follows:-

(1) THAT application No. PRES 19 of 2003 be and is hereby adjourned for hearing and determination to 10.00am on Wednesday, the 26th of November 2003.

(2) THAT the hearing date of application No. PRES 17 of 2003, fixed for hearing on Monday, the 17th day of November 2003, be and is hereby vacated.

(3) THAT application No. PRES 17 of 2003 and application No. PRES 19 of 2003 are hereby ordered to be heard and determined together at 10.00am on Wednesday, the 26th day of November 2003.

(4) THAT leave be and is hereby granted to the respondent to file and serve any answer to application No. PRES 19 of 2003 within 10 days of the date of this order.

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

2003 WAIRC 09768

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE SHANE O'BYRNE, APPLICANT and THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 17 OCTOBER 2003
FILE NO/S.	PRES 17 OF 2003
CITATION NO.	2003 WAIRC 09768

Decision	Orders and directions made
Appearances	
Applicant	Mr C Young, as agent, and with him Mr L S O'Byrne, applicant
Respondent	Mr J Murie, Assistant State Secretary

Order

This matter having come on for hearing before me on the 17th day of October 2003, and having heard Mr C Young, as agent, and with him Mr L S O'Byrne, on behalf of the applicant, and Mr J Murie, Assistant State Secretary, on behalf of the respondent organisation, and the respondent organisation having undertaken to the Commission that it will expend or pay no monies for or relating to representation by counsel and /or solicitors for itself or any officers of the respondent in or relating to the proceedings W/170 in the Federal Court of Australia at Perth between the applicant, Mr Laurence Shane O'Byrne, The Australian Electoral Commission and Others, until the completion of the hearing and determination of this application, or further order of the

Commission as presently constituted, and I having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having waived their rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 17th day of October 2003, ordered and directed as follows:-

(1) THAT the said undertaking having been given and the applicant having withdrawn his application for interim orders, the Commission as presently constituted does hereby refrain and refrains from hearing such application on that basis.

(2) THAT the applicant do have leave to file and serve any amended particulars of its application herein on or before the 22nd day of October 2003.

(3) THAT the respondent do have leave to file and serve its answer and counterproposal within 10 days thereafter.

(4) THAT application No. PRES 17 of 2003 be and is hereby adjourned for hearing and determination to 10.00am on Monday, the 17th day of November 2003.

(5) THAT there otherwise be liberty to apply in respect of these orders and directions.

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

2003 WAIRC 10391

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE SHANE O'BYRNE, APPLICANT - and - THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 24 DECEMBER 2003
FILE NO/S.	PRES 21 OF 2003
CITATION NO.	2003 WAIRC 10391

Decision	Application discontinued and refrain from hearing matter further
Appearances	
Applicant	Mr C F Young, as agent
Respondent	Mr D H Schapper (of Counsel), as agent

Order

This matter having come on for hearing before me on the 24th day of December 2003, and having heard Mr C F Young, as agent, on behalf of the applicant, and Mr D S Schapper (of Counsel), by leave, on behalf of the respondent organisation, and the applicant herein having filed a notice of discontinuance in the Registry of the Commission on 23 December 2003, and I having determined that the matter should be discontinued, and the parties herein having waived their rights pursuant to s.35 of the Industrial Relations Act 1979 (as amended), it is this day, the 24th day of December 2003, ordered and declared as follows:-

THAT the Commission as constituted by the President refrain and do hereby refrain from hearing the matter further upon the filing of the notice of discontinuance.

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

2003 WAIRC 10338

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE SHANE O'BYRNE, APPLICANT - and - THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 12 DECEMBER 2003
FILE NO/S.	PRES 21 OF 2003
CITATION NO.	2003 WAIRC 10338

Decision	Application adjourned
Representation	
Applicant	Mr C F Young, as agent
Respondent	Mr D H Schapper (of Counsel), by leave

Order

This matter having come on for hearing before me on the 12th day of December 2003, and having heard Mr C F Young, as agent, on behalf of the applicant, and Mr D H Schapper (of Counsel), by leave, on behalf of the respondent, and the applicant having made an application to adjourn the matter, and I having determined that the application to adjourn should be granted, and 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 12th day of December 2003, ordered as follows—

THAT application No. PRES 21 of 2003 be and is hereby adjourned for hearing and determination to 10.00am on the 24th day of December 2003.

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

2003 WAIRC 10150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE SHANE O'BYRNE, APPLICANT
	- and -
	THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 28 NOVEMBER 2003
FILE NO/S.	PRES 21 OF 2003
CITATION NO.	2003 WAIRC 10150

Decision	Orders and Directions
Appearances	
Applicant	Mr C Young, as agent
Respondent	Mr L McLaughlan, as agent

Orders and Directions

This matter having come on for hearing before me on the 28th day of November 2003, and having heard Mr C Young, as agent, on behalf of the applicant, and Mr L McLaughlan, as agent, on behalf of the respondent, and I having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having waived their rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 28th day of November 2003, ordered and directed as follows:-

(1) THAT application No. PRES 21 of 2003 be and is hereby adjourned for hearing and determination to 2.15pm on Friday, the 12th day of December 2003.

(2) THAT leave be and is hereby granted to the applicant to file and serve any amended application on or before 4.00pm on Monday, the 1st day of December 2003.

(3) THAT leave be and is hereby granted to the respondent to file and serve any answer on or before Friday, the 5th day of December 2003.

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

AWARDS/AGREEMENTS—Variation of—

2003 WAIRC 10379

BUILDING TRADES AWARD 1968

No. 31 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	CRYSTAL SOFTDRINKS AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 23 DECEMBER 2003
FILE NO.	APPLICATION 1392 OF 2003
CITATION NO.	2003 WAIRC 10379

Result	Award varied.
Representation	
Applicant	Ms K Scoble
Respondents	Mr K Richardson (Master Builders' Association of Western Australia (Union of Employers))
	Ms S Howard (Western Australian Hotels and Hospitality Association Incorporated (Union of Employers))
	Ms A Haldane (Chamber of Commerce and Industry of Western Australia)

Order

Having heard Ms K Scoble on behalf of the Applicant and Mr K Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers), Ms S Howard on behalf of the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) and Ms A Haldane on behalf 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 Building Trades Award 1968 No 31 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 22 December 2003

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

SCHEDULE

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

(4)	Tool Allowance: (Per Week)	$
	(a) Bricklayers and Stoneworkers	15.60
	(b) Plasterers	18.20
	(c) Carpenters and Joiners	22.10
	(d) Joiners - Assembler A or B	11.10
	(e) Plumbers	22.10
	(f) Painters	5.40
	(g) Signwriters	5.40
	(h) Glaziers	5.40

Note 1: The tool allowance prescribed in paragraphs (a) to (h) inclusive of this subclause, each include an amount of 5 cents for the purpose of enabling the employees to insure their tools against loss or damage by theft or fire.

Note 2: The abovenamed allowances shall not be paid where the employer supplied the employee with all necessary tools.

2. Clause 19 – Overtime: Delete the first paragraph of subclause (6) of this clause and insert the following in lieu thereof—

(6) Any employee who is required to continue working for more than two hours after his usual knock-off time on any day shall be supplied by the employer with a reasonable meal or, in lieu of such meal, shall be paid an allowance of $9.90 for that meal.

3. Clause 23 – Distant Work: Delete the first paragraph of subclause (4) of this clause and insert the following in lieu thereof—

(4) The employer shall pay all fares which shall be deemed to include the cost of transporting the employee's tools, in connection with such travelling, and shall pay the cost of each ordinary meal actually and reasonably required during such travelling but the minimum allowance for such meal shall be $9.90.

2003 WAIRC 10288

ELECTRONICS INDUSTRY AWARD

No. A 22 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT
	v.
	ACTION ELECTRONICS PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 12 DECEMBER 2003
FILE NO.	APPLICATION 1304 OF 2003
CITATION NO.	2003 WAIRC 10288

Result	Award varied
Representation	
Applicant	Mr J Murie
Respondents	Ms A Haldane (as agent)

Order

HAVING HEARD Mr J Murie on behalf of the Applicant and Ms A Haldane as agent on behalf of Respondents and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Electronics Industry Award No. A22 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 12 December 2003.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 9. – Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following—

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $8.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $6.00 for each meal so required.

2. Clause 13. - Car Allowance: Delete subclause (3) of this Clause and insert in lieu thereof—

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
Rate per kilometre (cents)	**Over 2600cc**	**1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	66.8	59.7	51.8
South West Land Division	68.3	61.0	53.2
North of 23.5^{o} South Latitude	74.8	67.4	58.7
Rest of the State	70.2	63.2	54.8
MOTOR CYCLE (IN ALL AREAS)	22.8 cents per kilometre		

3. Clause 15. - Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu thereof—

(4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $28.15 for any weekend that the employee returns home from the job, but only if—

(a) The employee advises the employer or the employer's agent of the employee's intention no later than Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.35 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 20. - Special Provisions: Delete subclauses (1) - (4) and insert in lieu thereof the following—

(1) **Dirt Money**: An employee shall be paid an allowance of 42 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) **Confined Space:** An employee shall be paid an allowance of 51 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) **Hot Work:** An employee shall be paid an allowance of 42 cents per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) **Height Money:** An employee shall be paid an allowance of $2.05 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

5. Clause 20. - Special Provisions: Delete subclauses (6) - (8) and insert in lieu thereof the following—

(6) **Diesel Engine Ships:** The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 70 cents per hour whilst so engaged.

(7) **Percussion Tools:** An employee shall be paid an allowance of 26 cents per hour when working pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

(8) **Chemical, Artificial Manure and Cement Works:** An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $10.50 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

6. Clause 20. - Special Provisions: Delete subclause (14) and insert in lieu thereof the following—

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $8.10 per week in addition to their ordinary rate.

7. Clause 33. - Wages: Delete subclause (2) and insert in lieu thereof the following—

(2) **Leading Hands—**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid—

(a)	If placed in charge of not less than three and not more than ten other employees	$21.50
(b)	If placed in charge of more than ten but not more than twenty other employees	$32.90
(c)	If placed in charge of more than twenty other employees	$42.40

8. Clause 33. - Wages: Delete subclause (5) and insert in lieu thereof the following—

(5) **Tool Allowance**

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of—

(i) $12.00 per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of $12.00 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of technicians, servicepeople, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II - CONSTRUCTION

9. Clause 5. - Special Rates and Provisions: Delete subclause (2) and insert in lieu thereof the following—

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of $251.20.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

10. Clause 6. - Allowance for Travelling and Employment in Construction Work: Delete paragraphs (a), (b) and (c) of subclause (1) of this Clause and insert in lieu thereof—

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $13.45 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 69 cents per kilometre.

(c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 69 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

11. Clause 7. - Distant Work: Delete subclauses (6) and (7) respectively and insert in lieu thereof—

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $27.45 for any weekend that the employee returns home from the job, but only if—

(a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $12.10 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

12. Clause 10. - Wages: Delete subclauses (5), (6) and (7) of this clause and insert in lieu thereof the following—

(5) **Construction Allowances—**

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid—

(i) $38.10 per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) $34.40 per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $20.20 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) **Leading Hand—**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid—

(a)	If placed in charge of not less than three and not more than ten other employees	$21.50
(b)	If placed in charge of more than ten but not more than twenty other employees	$32.90
(c)	If placed in charge of more than twenty other employees	$42.40

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of—

(i) $12.00 per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of $12.00 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2003 WAIRC 10287

LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973

No. 9 of 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT
	v.
	KONE ELEVATORS (AUST) PTY LIMITED AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 12 DECEMBER 2003
FILE NO.	APPLICATION 1303 OF 2003
CITATION NO.	2003 WAIRC 10287

Result	Award Varied
Representation	
Applicant	Mr J Murie
Respondents	Ms A Haldane (as agent)

Order

Having heard Mr J Murie on behalf of the Applicant and Ms A Haldane as agent on behalf of the Respondents and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Lift Industry (Electrical and Metal Trades) Award 1973 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 12 December 2003

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 12. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following—

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $8.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $6.05 for each meal so required.

2. Clause 16. - Special Rates and Provisions: Delete subclauses (5) and (6) and insert in lieu thereof the following—

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $17.20 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $8.40 per week in addition to his/her ordinary rate.

3. Clause 17. – Car Allowance: Delete subclause (3) and insert in lieu thereof the following—

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (In Cubic Centimetres)**		
Rate per Kilometre (Cents)	**Over 2600cc**	**Over 1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	66.4	59.3	51.5
South West Land Division	67.7	60.7	52.7
North of 23.5' South Latitude	74.5	67.0	58.3
Rest of the State	70.0	62.8	54.7
Motor Cycle (In All Areas)	22.8 cents per kilometre		

4. Clause 18. – Fares & Travelling Allowance: Delete subclauses (2), (3) and (4) and insert in lieu thereof the following—

(2) An employee to whom subclause (1) of this Clause does not apply and who is engaged on construction work or regular repair service and/or maintenance work shall be paid an allowance in accordance with the provisions of this subclause to compensate for excess fares and travelling time from the employee's home to his/her place of work and return—

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $13.70 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 75 cents per kilometre.

(c) Subject to the provision of paragraph (d), work performed at places beyond a 60 kilometres radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this Clause, in which case an additional allowance of 75 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres radius.

(d) In respect to work carried out from an employer's depot situated more than 60 kilometres from the G.P.O., Perth, the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.

(e) Where transport to and from the job is provided by the employer from and to his/her depot or such other place more convenient to the employee as is mutually agreed upon between the employer and employee, half the above rates shall be paid; provided that the conveyance used for such transport is provided with suitable seating and weatherproof covering.

(3) For travelling during working hours from and to the employer's place of business or from one job to another, an employee shall be paid by the employer at ordinary rates. The employer shall pay all fares and reasonable expenses in connection with such travelling.

(4) Where Clause 19. - Distant Work of this award applies to the majority of the employees employed under the award on any construction work the provisions of this Clause do not apply but the provisions of subclause (7) of the said Clause 19 shall be applied to each employee as if they were supplied with board and lodging.

5. Clause 19. – Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following—

(6) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $27.90 for any week-end they return home from the job, but only if—

(a) The employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

(b) The employee is not required for work during that week-end;

(c) The employee returns to the job on the first working day following the week-end; and

(d) The employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.40 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

6. Clause 28. - Lift Industry Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $80.50 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

7. First Schedule - Wages: Delete subclause (3) and insert in lieu thereof the following:

(3) **Leading Hands**—

In addition to the appropriate total wage prescribed in this Clause, a leading hand shall be paid—

		$
(a)	If placed in charge of not less than three and not more than ten other employees	21.70
(b)	If placed in charge of more than ten and not more than twenty other employees	33.10
(c)	If placed in charge of more than twenty other employees	42.70

8. First Schedule - Wages: Delete subclause (6) and insert in lieu thereof the following:

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of his/her work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-

(i) $12.00 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $12.00 being the percentage which appears against his/her years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant of paragraph (a) of this Clause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

(c) An employer shall provide for the use of tradesperson or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by his/her employer if lost through his/her negligence.

AWARDS/AGREEMENTS—Application for variation of— No variation resulting—

2004 WAIRC 10429

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSAA 3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE TOTALISATOR AGENCY BOARD OF WESTERN AUSTRALIA, APPLICANT
	v.
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INC, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 7 JANUARY 2004
FILE NO.	P 21 OF 2003
CITATION NO.	2004 WAIRC 10429

Result Application dismissed

Order

WHEREAS this is an application to vary the Government Officers Salaries, Allowances and Conditions Award 1989, PSA A 3 of 1989; and

WHEREAS this application was listed for hearing and determination on the 7th day of January 2004; and

WHEREAS on the 6th day of January 2004, the Applicant advised the Public Service Arbitrator that the parties had reached agreement in principle and requested that the hearing dates be vacated; and

WHEREAS on the 6th day of January 2004, the Applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

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

[L.S.]

2003 WAIRC 09898

IRON ORE PRODUCTION AND PROCESSING (HAMERSLEY IRON PTY LTD) AWARD 1987

No. A 20 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	
APPL 959 OF 2003	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD, RESPONDENT
APPL 968 OF 2003 **APPL 969 OF 2003**	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	HAMERSLEY IRON PTY LTD & oTHERS, RESPONDENTS
APPL 1216 OF 2003	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD AND ANOTHER , RESPONDENTS
APPL 1230 OF 2003	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 31 OCTOBER 2003
FILE NO/S.	APPLICATION 959 OF 2003, APPLICATION 968 OF 2003, APPLICATION 969 OF 2003, APPLICATION 1216 OF 2003, APPLICATION 1230 OF 2003
CITATION NO.	2003 WAIRC 09898

Catchwords	Industrial Law (WA) – Application to adjourn substantive applications – Concurrent federal preliminary proceedings in relation to a federal award – Discretion not exercised to grant adjournment – Application dismissed – *Industrial Relations Act 1979* (WA) s 6(aa), s 6(ad), s 6(ag), s 6(c), s 26(1)(a), s 26(1)(c), s 27(1)(f), s 42H, s 42I, s 42J(3); *Workplace Agreements Act 1993* (WA); *Labour Relations Reform Act 2002* (WA); *Workplace Relations Act 1996* (Cth) s 89A, s 111AAA, s 111(1)(g), s 152, s 170LK; *Commonwealth of Australia Constitution Act 1900* (Cth) s 109.
Result	Application to adjourn substantive applications dismissed
Representation	
Unions	Mr D Schapper of counsel on behalf of the applicants, and Mr A Herbert and with him Mr J Fiocco of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers
Employers	Mr R Allen of counsel

Reasons for Decision

1 A number of applications have been made by unions including the AFMEPKIU, the CEPU, and the CFMEU against Hamersley Iron Pty Ltd ("Hamersley") and Robe River Iron Associates ("Robe River"). The AWU is also a party to these applications. They include applications pursuant to ss 42H and 42I for declarations that bargaining between the applicants and the respondents have ended, and enterprise orders are sought. Furthermore, the applicant unions have also made two applications to vary the Iron Ore Production and Processing (Hamersley Iron Pty Ltd) Award 1987 ("the Award") firstly to vary the Award in relation to wages and conditions of employment and secondly, to add Robe River as a party to the Award. Hamersley and Robe River object to the applications to vary the Award and moreover, in conjunction with the AWU, have made application to the Commission to adjourn all of these applications, pending proceedings which have been brought by Hamersley, Robe River and the AWU in the Australian Industrial Relations Commission ("AIRC"), for the making of a consent federal award.

2 These reasons for decision deal with the application to adjourn, which is strongly opposed by the other union parties. Those unions were represented by Mr Schapper of counsel. Hamersley and Robe River were represented by Mr Allen of counsel. Mr Herbert of counsel represented the AWU. As I have already observed, the AWU supported the application to adjourn,

notwithstanding that it consents to the applications to vary the Award, subject to its right to be heard on the substance and form of the variations to be made. Furthermore, this consent is conditional upon, according to the notice of answer filed by the AWU, no federal award arising from the proceedings before the AIRC.

Background to Applications

3 The background to the present applications before this Commission was not in controversy and broadly is as follows. The iron ore industry in this State has been regulated by industrial instruments of this Commission, by way of awards and registered industrial agreements, in the case of Hamersley since January 1967 and in the case of Robe River, since May 1972. Additionally, between about 1993 and this year, both Hamersley and Robe River have utilised State workplace agreements made pursuant to the Workplace Agreements Act 1993 (WA) ("the WPA"). These agreements have recently come to an end, by reason of the terms of the Labour Relations Reform Act 2002 (WA) ("the LRRA"). Effectively therefore, industrial regulation of Hamersley and Robe River has been State based since the inception of the industry in the late 1960s or thereabouts.

4 In March 2002, Hamersley and Robe River announced their intention to pursue a s 170LK federal certified agreement under the Workplace Relations Act 1996 (Cth) ("the WRA"). This was successful for Robe River but employees of Hamersley rejected the proposed agreement. Subsequently, in late 2002, in response to legislative changes occurring in this State in relation to labour relations matters, Hamersley commenced offering individual workplace agreements under the WRA ("AWAs") to its employees.

5 Subsequently in November and December 2002, the CFMEU and AWU served federal logs of claims on both Hamersley and Robe River and disputes were found in November 2002 and January 2003 respectively by the AIRC.

6 It appears that following in early February 2003, both Hamersley and Robe River announced their intention to commence discussions for a federal award to cover both Hamersley and Robe River. This proposal would appear to have been in the nature of a "safety net" award, given that the Commission was informed that some 88 per cent of the Hamersley workforce has entered into AWAs and of course, employees of Robe River are covered by a s 170LK certified agreement under the WRA.

7 Shortly after and in the same month of February this year, the CFMEU, the CEPU, the AFMEPKIU and the AWU served notices on Hamersley initiating bargaining for an industrial agreement pursuant to the terms of s 42H of the Act.

8 It appears to be common ground, that discussions took place between all parties between about February to late June this year, when Hamersley and Robe River announced that they had reached agreement with the AWU's counterpart federal organisation on the terms of a proposed federal award. From what is before the Commission, this would appear to have not been known to the State unions who were engaged in discussions pursuant to the bargaining notices served on the companies in February 2003.

9 Between 24 and 26 June 2003, the AFMEPKIU and the CEPU filed applications in this Commission for declarations pursuant to s 42H of the Act that bargaining between them and Hamersley has ended and enterprise orders are sought pursuant to s 42I of the Act. Furthermore, in early August 2003, the applicant unions made the applications to vary the Award, referred to above.

10 Through the evidence of Mr Harben, a solicitor employed by Freehills, contained in an affidavit, sworn 17 September 2003, the Commission was informed of the progress of the federal proceedings. In relation to those proceedings, the Commission was informed that a Full Bench of the AIRC is dealing with applications pursuant to s 111AAA and s 111(1)(g) of the WRA, that the AIRC firstly cease dealing with the federal proceedings in respect of employees governed by the Award, and secondly and in any event, that the AIRC refrain from further hearing and determining the federal matter. The grounds of the latter application, as variously put, are that the subject matter of the dispute is presently governed by an award of this Commission; that there are presently proceedings on foot in this Commission dealing with terms and conditions of employment between the employers and employees; that historically industrial regulation has been State based; and that the relevant employees do not wish to be party to a federal award.

11 As at the date of these proceedings to adjourn the substantive applications, the Commission was informed that the AIRC had taken submissions and evidence from the parties as to relevant classes of employees who may fall within the terms of s 111AAA(1) of the WRA.

Contentions of the Parties

12 Counsel for Hamersley and Robe River made a number of submissions as to why the Commission should grant its application to adjourn these proceedings. The submissions dealt were put on five bases as follows. Firstly, it was submitted by Mr Allen, that the proceedings before this Commission and the AIRC dealt with the same issues. Secondly, it was submitted that the federal proceedings were first in time. Thirdly, Mr Allen submitted that the federal proceedings were largely advanced, because Hamersley and Robe River and the AWU, had reached an agreement on the terms of a proposed federal award. Fourthly, it was submitted that the applications brought by the unions in this Commission, were merely a reaction to the developments federally. Finally, counsel submitted that the unions in this jurisdiction had taken no steps to modernise the awards applicable to Hamersley and Robe River in the decade between 1993 and this year, and submitted that the unions had effectively abandoned the employees concerned.

13 Counsel submitted that there would be prejudice to Hamersley and Robe River because of the prospect of concurrent arbitrations in both jurisdictions, in particular in light of the submission that the unions had taken no action in the State jurisdiction for many years.

14 Mr Herbert on behalf of the AWU, put submissions generally in support of the submissions of counsel for Hamersley and Robe River. However, Mr Herbert disputed that the unions had abandoned employees of Hamersley and Robe River, and referred to the effect of entering into workplace agreements by employees under the WPA, as imposing a form of hiatus on the ability of unions to access and service their members in the industrial system.

15 In summary, Mr Herbert submitted that there may be a lengthy and costly arbitration if the adjournment application was not granted and along with Mr Allen, referred to the likelihood of any federal award being made, completely and comprehensively covering the field in relation to employees of Hamersley and Robe River.

16 Mr Schapper, on behalf of the applicant unions in these proceedings, submitted that a heavy onus lies on Hamersley and Robe River and the AWU, to persuade the Commission that it should grant the adjournments sought. Counsel submitted in response to the submissions from Mr Allen and Mr Herbert, that the proposition that proceedings in this Commission and in the AIRC in dealing with the same issue, that is terms and conditions of employment, may be the case in a general sense however, given the limitations imposed by s 89A of the WRA, the AIRC cannot deal with all of the issues arising. Secondly, the submission that the federal proceedings are first in time is, according to Mr Schapper, incorrect. Alternatively if this were the case, then that issue is of no consequence to the exercise of the Commission's discretion. Thirdly, Mr Schapper resisted the proposition that these State proceedings are in any way a reaction to the federal proceedings. He submitted they reflect the exercise by the State unions of their statutory rights. Finally, counsel for the applicant unions strenuously rejected the suggestion by Hamersley and

Robe River, that the applicant unions had, in any way, abandoned their members in the decade between 1993 and the present. In this respect, Mr Schapper referred to the existence of workplace agreements in the industry but submitted that notwithstanding this, the applicant unions had been active in servicing their members in areas such as unfair dismissal claims, proceedings in 1997 and 1998 in this Commission in respect of engine drivers, and committing resources to union organisation in the Pilbara region of the State.

17 Furthermore, counsel for the applicant unions submitted that in initiating bargaining in February 2003, the applicants were genuinely pursuing bargaining with Hamersley and Robe River with a view to entering into industrial agreements to be ultimately registered in this Commission.

18 In relation to the federal proceedings presently on foot, Mr Schapper submitted that it was unlikely that the AIRC would make a federal award covering all three groups identified in those proceedings, including Award employees, so called "statutory contract" employees, and those covered by AWAs. Counsel referred to the terms of s 111AAA, and the decision of the High Court in *Attorney-General (Qld) and Another v Australian Industrial Relations Commission and Others* (2002) 117 IR 52 which dealt with the meaning and effect of s 111AAA of the WRA. Mr Schapper submitted that the federal proceedings have many further steps in their progress and it could be a considerable period of time before any outcome is determined. He submitted it would be wrong for the adjournment application to be granted in these circumstances, particularly in light of the entire history of industrial regulation of the iron ore industry being in the jurisdiction of this Commission.

Consideration

19 An application to adjourn proceedings before the Commission pursuant to the Commission's powers under s 27(1)(f) of the Act, involves the exercise of a discretion by the Commission, according to the injunction placed on the Commission in the exercise of its jurisdiction under the Act, to act according to equity, good conscience, and the substantial merits of the case: s 26(1)(a) Act. Furthermore, in the exercise of its jurisdiction under the Act, the Commission is to have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole: s 26(1)(c) Act.

20 Also relevant, are the considerations referred to in *Myers v Myers* [1969] WAR 19, a judgement of the Supreme Court of Western Australia, cited with approval by this Commission over many years, in relation to the grant or refusal of adjournments.

21 In the case before the Commission, the applicant unions and the employers have been parties to industrial instruments in this jurisdiction since the inception of the iron ore industry in this State. In the context of the present proceedings, it is significant to observe that the present situation is not one in which parties are attempting to impose State industrial regulation in circumstances where federal industrial regulation already exists. On the contrary, the present circumstance is one in which the employers and the counterpart federal body of one of the registered organisations have reached an agreement to impose federal industrial regulation, not consented to by any of the other parties, on a field hitherto governed entirely and exclusively by State law. The Commission makes that observation, notwithstanding the recent existence of individual agreements registered under the WRA.

22 In my opinion, in those circumstances, a heavy onus falls on those making application to the Commission for it to adjourn the substantive proceedings, to persuade the Commission that it should do so. Prima facie, the applicant State organisations, having exercised their statutory rights to bring these proceedings under the Act for relief, are entitled to expect, as with any employer that brings proceedings in this Commission that claims will be heard and determined by the Commission, unless good cause is shown to the contrary. Likewise the Commission, having cognisance of the present applications, is duty bound to hear and determine them. In particular, objects in s 6 of the Act include the provision of rights and obligations in relation to good faith bargaining; the promotion of collective bargaining; the encouragement of employers, employees and their organisations to reach agreements appropriate to the needs of enterprises and to provide the means for preventing and settling industrial disputes with the maximum of expedition and the minimum of legal form and technicality: ss 6 (aa), (ad), (ag), and (c).

23 Furthermore, it has never been the case that the mere existence of two sets of proceedings in a State jurisdiction and the federal jurisdiction, gives cause to adjourn the State proceedings.

24 Presently, the Commission was informed that dispute findings have been made by the AIRC between the employers and the CFMEU and the AWU. Whether or not an award is to be made between Hamersley, Robe River and the AWU, is the subject of preliminary proceedings pursuant to s 111AAA and s 111(1)(g) of the WRA. It seems to be conceded that at least for the purposes of s 111AAA of the WRA, there are a small number of employees whose terms and conditions are "governed by" the Award. There is another group of employees, of a not insubstantial number, whom are classified as the Commission was informed, as "statutory contract" employees, whose terms and conditions were previously governed by workplace agreements under the former WPA, and whose terms and conditions of employment are now subject to the transitional provisions of the LRRA. From the materials before the Commission contained in the affidavit of Mr Harben, it seems that the AWU is of the opinion that such group of employees are persons whose terms and conditions of employment are governed by the Award. This view is not shared by Hamersley or Robe River. Those matters are of course, for the AIRC to determine.

25 The Commission is not satisfied that the institution of the substantive applications was a mere reaction to the course taken by Hamersley, Robe River and the AWU, to pursue a consent federal award. The other State union applicants, plainly on the material before the Commission, instituted bargaining processes as they are entitled to do under the Act, earlier this year. The Commission can only assume for present purposes, that all parties were bargaining in good faith in accordance with the statutory requirements of the Act, unless it is subsequently established to the contrary. Those processes are entirely regular and consistent with the amendments to the statutory scheme made to the Act in late 2002. The Commission is also not persuaded that the applications to vary the Award fall into the same category as submitted by counsel for Hamersley and Robe River.

26 Furthermore, I am not satisfied that the proceedings in the AIRC can be regarded as so first in time such that this ought be regarded as a significant factor for the Commission to consider in this adjournment application. I am not persuaded that the mere finding of a dispute in the proceedings before the AIRC should be regarded as the commencement of the proceedings, for practical purposes, in terms of the desire by Hamersley and Robe River and the AWU, for a federal consent award. Plainly, on the materials contained in exhibit R1, which no party took issue with, the negotiations between the parties, in relation to proposed State industrial agreements and a possible federal instrument, occurred virtually simultaneously. The finding of a dispute federally, as is well settled, is to provide the jurisdictional foundation for any subsequent proceedings which may involve the making of a federal industrial instrument or its variation far into the future. I am not therefore persuaded that this factor is of any significance.

27 As against this submission by Hamersley, Robe River and the AWU, is the very simple proposition that the Award, as an instrument of this Commission, has been on foot since 1987. The Award, from the Commission's record, has been varied for the purposes of safety net adjustments, during its currency. That is to say nothing of the Award's predecessors in time.

28 As to the submissions of the applicants for the adjournment that the State unions have effectively abandoned their members in the Pilbara region of this State, there is no evidence before the Commission to support such a proposition. However, it is of course, as a matter of record, the fact that the chosen form of industrial regulation by Hamersley and Robe River in the decade 1993 to most recently, necessarily, as a consequence of statutory effect, precluded the application of industrial instruments of this Commission. In my view, it does not necessarily follow, as implicitly contained in the submissions from Hamersley and Robe River that lack of activity in relation to award matters and the like, necessarily means that there has been any form of "abandonment" of employees. On what is before the Commission presently, the Commission simply cannot make any particular findings in that regard however it is a matter of record as pointed out by Mr Schapper, that his clients have not been entirely inactive in relation to the provision of assistance to union members during those periods of time. It is also relevant to note, that on the material before the Commission, both Hamersley and Robe River adopted a stance, as they were entirely entitled to do, of the promotion of direct relationships between the companies and their employees, with minimal "third party" intervention.

29 Counsel for all parties made various submissions in relation to the prospects arising from the proceedings before the AIRC, and what possible outcomes there may be. In my opinion, plainly, the outcome of any proceedings before the AIRC is a matter for the AIRC, just as the outcome of any proceedings before this Commission is a matter for it. It would not be in my opinion, appropriate to speculate as to what may or may not be the outcome of future proceedings before the AIRC. However, in this context, it is relevant to have regard to , as enunciated in decisions of the AIRC itself, the scope and effect in particular, of s 89A of the WRA, and the limitations imposed upon the AIRC's award making powers: *Award Simplification Decision* (1997) 43 AILR 3-683; *Application by the Metal Trades Industry Association of Australia and Ors* (1998) 43 AILR 3-744; *Application by FSU* (1997) 74 IR 446; *Australian Collieries Staffs Association v Newlands Coal Pty Ltd* (1997) 42 AILR 3-577.

30 In my opinion, even if, with due respect, as somewhat presumptuously suggested by counsel for Hamersley, Robe River and the AWU any federal award is made, whether it would "comprehensively cover the field" as was the submission, given the terms of the Award, and the relevant provisions of the WRA, is a proposition that is by no means certain. However, and most importantly, at this point in time, those submissions are based upon speculation as to what may or may not occur in the proceedings before the AIRC, and in this Commission.

31 In any event, even if at some point in the future, there exists a degree of co-regulation and conflict between State and federal industrial instruments, then the mechanisms enshrined in s 109 of the Commonwealth Constitution and in turn the terms of s 152 of the WRA, are intended, within the federation, to resolve any such issues.

Conclusion

32 From what is before the Commission in these proceedings, I am not persuaded that the Commission should effectively injunct the State union applicants, from the prosecution of their claims, legitimately and lawfully brought under the Act, merely because there is the existence of federal proceedings that may or may not, lead to the making of a federal award, the scope of which is presently indeterminate, at some point in the future. For the Commission to adjourn these proceedings for a period of time which may be lengthy on present indications, would be for the Commission to abrogate its statutory responsibility and would be acting in my opinion, contrary to equity and good conscience and the interests of the persons directly concerned.

33 On the authority also of *Myers*, I am not persuaded that any prejudice to the employers and the AWU in not adjourning the applications, would outweigh the prejudice to the applicants in not being able to prosecute their claims expeditiously before the Commission.

34 The applications to adjourn the substantive proceedings are therefore dismissed.

35 One final matter remains. The applications made pursuant to s 42H and 42I of the Act, carry with them the potential consequence of the operation and effect of s 42J(3) of the Act. That statutory provision provides that to the extent that an enterprise order is in conflict with an award or industrial agreement, the enterprise order prevails. On the foundation that the applicant unions have also sought substantial variations to the Award, in my opinion, given the terms of s 42J(3) of the Act, the applicant unions must elect which proceedings they intend to pursue, they being either the proceedings to vary the Award, or those dealing with the termination of the bargaining periods and the making of enterprise orders. In my opinion, the applicants cannot maintain both sets of proceedings simultaneously.

36 Therefore, the Commission directs the applicant unions to elect, within 14 days of the date of these reasons, which applications they intend to pursue. Following that election, the Commission will consider the making of appropriate programming orders and directions, for the purposes of future proceedings.

2003 WAIRC 10093

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

APPL 959 OF 2003	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD, RESPONDENT
APPL 968 OF 2003 **APPL 969 OF 2003**	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	HAMERSLEY IRON PTY LTD & oTHERS, respondents
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 19 NOVEMBER 2003
FILE NO/S.	APPLICATION 959 OF 2003, APPLICATION 968 OF 2003, APPLICATION 969 OF 2003 ("THE APPLICATIONS")
CITATION NO.	2003 WAIRC 10093

Result	Order issued
Representation	
Unions	Mr D Schapper of counsel on behalf of the unions, and Mr A Herbert of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers
Employers	Mr R Allen of counsel

Order

WHEREAS the unions sought and were granted leave to discontinue the applications, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the herein applications be and are hereby discontinued by leave.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

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2003 WAIRC 09903

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	
APPL 959 OF 2003	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD, respondent
APPL 968 OF 2003 **APPL 969 OF 2003**	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	HAMERSLEY IRON PTY LTD & oTHERS, respondentS
APPL 1216 OF 2003	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD AND ANOTHER, respondentS
APPL 1230 OF 2003	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD AND OTHERS, respondentS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 31 OCTOBER 2003
FILE NO/S.	APPLICATION 959 OF 2003, APPLICATION 968 OF 2003, APPLICATION 969 OF 2003, APPLICATION 1216 OF 2003 & APPLICATION 1230 OF 2003
CITATION NO.	2003 WAIRC 09903

Result	Applications to adjourn substantive applications dismissed
Representation	
Unions	Mr D Schapper of counsel on behalf of the applicants, and Mr A Herbert and with him Mr J Fiocco of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers
Employers	Mr R Allen of counsel

Order

HAVING heard Mr D Schapper of counsel on behalf of the applicants, Mr A Herbert and with him Mr J Fiocco of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers, and Mr R Allen of counsel on behalf of Hamersley Iron Pty Ltd and Robe River Iron Associates the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the applications to adjourn the substantive applications be and are hereby dismissed.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

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2003 WAIRC 09335

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	
APPL 959 OF 2003	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD, respondent
APPL 968 OF 2003 **APPL 969 OF 2003**	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	HAMERSLEY IRON PTY LTD & oTHERS, respondentS
APPL 1216 OF 2003	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD AND ANOTHER, respondentS
APPL 1230 OF 2003	CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS & OTHERS, APPLICANTS
	v.
	HAMERSLEY IRON PTY LTD AND OTHERS, respondentS
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 8 SEPTEMBER 2003
FILE NO/S.	APPLICATION 959 OF 2003, APPLICATION 968 OF 2003, APPLICATION 969 OF 2003, APPLICATION 1216 OF 2003, APPLICATION 1230 OF 2003 ("THE APPLICATIONS")
CITATION NO.	2003 WAIRC 09335

Result	Direction issued
Representation	
Unions	Mr D Schapper of counsel on behalf of the applicants, and Mr J Fiocco of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers
Employers	Mr R Allen of counsel and with him Ms E Hartley of counsel

Direction

HAVING heard Mr D Schapper of counsel on behalf of the applicants and Mr J Fiocco of counsel on behalf of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers and Mr R Allen of counsel and with him Ms E Hartley of counsel on behalf of Hamersley Iron Pty Ltd and Robe River Iron Associates the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the herein applications for the purposes of the application to adjourn by Hamersley Iron Pty Ltd ("Hamersley") and Robe River Iron Associates ("Robe River") filed 18 August 2003 ("adjournment application") be joined and heard and determined together.
2. THAT the applicants serve upon the Transport Workers' Union of Australia, Industrial Union of Workers, WA Branch ("TWU") the notices of application in relation to applications 1216 and 1230 of 2003 and file declarations of service by 4pm 12 September 2003.
3. THAT the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers ("AWU") file and serve upon the applicants and Hamersley and Robe River notices of answer in relation to applications 1216 and 1230 of 2003 and file declarations of service by 4pm 12 September 2003.
4. THAT the AWU be and is hereby joined as a party to the adjournment application.
5. THAT the applicants and the AWU file submissions by way of reply to the adjournment application by 15 September 2003.
6. THAT Hamersley and Robe River file any written submissions in reply to the submissions of the applicants and the AWU by 25 September 2003.
7. 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.
8. THAT Hamersley and Robe River file and serve upon the applicants and the AWU any signed witness statements upon which they intend to rely no later than 18 September 2003.
9. THAT the applicants and the AWU file and serve upon Hamersley and Robe River any signed witness statements upon which they intend to rely no later than 25 September 2003.
10. THAT the matter be listed for hearing for one day.
11. THAT the parties have liberty to apply on short notice.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

2003 WAIRC 10188

NURSES' (ANF-RFDS WESTERN OPERATIONS) AWARD

No. A 18 of 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RFDS WESTERN OPERATIONS, APPLICANT
	v.
	THE AUSTRALIAN NURSING FEDERATION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	APPLICATION 868 OF 2003
CITATION NO.	2003 WAIRC 10188

Result Application to vary Award dismissed

Order

WHEREAS this is an application to vary the Nurses' (ANF-RFDS Western Operations) Award, No. A 18 of 1982; and

WHEREAS on Tuesday, the 2nd day of December 2003, the applicant's agent filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

(Sgd.) P. E. SCOTT,
Commissioner.

[L.S.]

2003 WAIRC 10376

WATER CORPORATION (CSA) AWARD

No. PSA A1 of 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT
	v.
	THE BOARD OF THE WATER CORPORATION OF WESTERN AUSTRALIA, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 23 DECEMBER 2003
FILE NO.	PSAA 1 OF 2000
CITATION NO.	2003 WAIRC 10376

Result Application dismissed

Order

WHEREAS this is an application to create a new award named The Water Corporation (CSA) Award 2000; and

WHEREAS on Tuesday, the 4th day of July 2000, the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties sought time to have further discussions between themselves in an attempt to resolve the matter; and

WHEREAS on the 22nd day of December 2003, the Applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

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

[L.S.]

AGREEMENTS—Industrial—Retirements from—

2003 WAIRC 10251

RESIDENTIAL SUPERVISORS STAFF AGREEMENT 1995

No. PSAAG 1 of 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	THE HONOURABLE MINISTER FOR EDUCATION AND DIRECTOR GENERAL DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 10 DECEMBER 2003
FILE NO/S.	APPLICATION 937 OF 2003
CITATION NO.	2003 WAIRC 10251

Result Order issued

Order

WHEREAS on 18 June 2003 the Civil Service Association of Western Australia Incorporated ("the Applicant") filed a Notice of Intention to retire from the *Residential Supervisors Staff Agreement 1995* PSAAG 1 of 1995, ("the Agreement") under s41(7) of the *Industrial Relations Act 1979*; and

WHEREAS the Notice of Intention to retire from the Agreement expired as at 19 July 2003; and

WHEREAS on 4 July 2003 the respondents filed a Notice of Answer and Counter Proposal stating that difficulties would arise if the applicant retired from the Agreement; and

WHEREAS on 19 November 2003 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the applicant advised the Commission that it held the view that the Agreement was no longer in force and the applicant understood that there would be no impact on employees covered by the Agreement as their terms and conditions were preserved by the terms of the *Department of Education Public Service, Government and Ministerial Officers Agency Specific Agreement 2003* ("the Agency Specific Agreement"); and

WHEREAS the Commission is aware that discussions between the parties are ongoing for an agreement to establish new terms and conditions for employees covered under the Agreement in accordance with the terms of Clause 18 of the Agency Specific Agreement; and

WHEREAS the respondents maintain that the terms of the Agreement remain in place by virtue of Clauses 5 and 18 of the Agency Specific Agreement; and

WHEREAS it is the intention of the parties that the terms and conditions of the Agreement continue to apply to employees covered by the Agreement whilst negotiations for a new agreement are continuing; and

WHEREAS the Commission has formed the view that in order to ensure certainty for employees and for the respondents covered by the Agreement (PSAAG 1 of 1995) and so that ongoing negotiations and conciliation and or arbitration in relation to a new agreement can take place an order should issue preserving the existing terms and conditions of employees covered by the Agreement pending the outcome of those negotiations and conciliation and or arbitration;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979 hereby orders—

1) THAT employees covered by the scope of the Agreement (PSAAG 1 of 1995) shall retain all of the existing terms and conditions of the Agreement in addition to the terms and conditions of the other industrial instruments normally applying to these employees for the period 19 July 2003 until 29 February 2004;

2) THAT either party has liberty to apply in relation to this order.

(Sgd.) J. L. HARRISON,
Commissioner.

[L.S.]

WESPINE INDUSTRIES PTY LTD (DARDANUP SITE) ENTERPRISE BARGAINING AGREEMENT 2001

No. AG 193/01

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 1816 of 2003

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the
Office of the Registrar of a
Notice of Retirement from Industrial Agreement
in accordance with section 41(7) of the said Act

Wespine Industries Pty Ltd will cease to be a party to the Wespine Industries Pty Ltd (Dardanup Site) Enterprise Bargaining Agreement 2001 No. AG 193/01 on and from the 8th January 2004.

Dated at Perth this 10 December 2003.

J.A. SPURLING,
Registrar.

CANCELLATIONS—OF AWARDS/AGREEMENTS/RESPONDENTS

2003 WAIRC 09646

ADVANCE DRILLING AND SAWING/BLPPU COLLECTIVE AGREEMENT 1999

No. AG 16 of 2000

ADVANCED DRILLING AND SAWING / CFMEUW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	KYPICA NOMINEES PTY LTD AND KARDEL HOLDINGS PTY LTD T/A ADVANCE DRILLING & SAWING, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	AG 60 OF 2003
CITATION NO.	2003 WAIRC 09646

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Advance Drilling and Sawing/BLPPU Collective Agreement 1999*, AG 16 of 2000, be and is hereby cancelled.

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

2003 WAIRC 09684

AGORA TILING/CFMEUW COLLECTIVE AGREEMENT 2002

No. AG 119 of 2002

AGORA TILING SERVICES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	JNJ ENTERPRISES PTY LTD T/A AGORA TILING, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 49 OF 2003
CITATION NO.	2003 WAIRC 09684

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Agora Tiling/CFMEUW Collective Agreement 2002,* AG 119 of 2002 be and is hereby cancelled.

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

2003 WAIRC 10246

AIRDUCTOR INDUSTRIAL AGREEMENT

No. AG 301 of 1997

AIRDUCTOR/CFMEUW COLLECTIVE AGREEMENT 2002

No. AG 43 of 2002

AIRDUCTOR / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	VERNON SHANE PLANE & JULIE ANN PLANE T/A AIRDUCTOR, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 9 DECEMBER 2003
FILE NO.	AG 94 OF 2003
CITATION NO.	2003 WAIRC 10246

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Airductor Industrial Agreement*, AG 301 of 1997 and the *Airductor/CFMEUW Collective Agreement 2002*, AG 43 of 2002, be and are hereby cancelled.

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

2003 WAIRC 09645

ANSWER ENGINEERING / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

No. AG 14 of 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	ANSWER ENGINEERING (WA) PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	AG 61 OF 2003
CITATION NO.	2003 WAIRC 09645

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	Mr B Lane on behalf of the respondent

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and Mr B Lane on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the Answer Engineering/CFMEUW Collective Agreement 2002, AG 14 of 2002, be and is hereby cancelled.

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

2003 WAIRC 09683

AUSTRALASIAN PILING COMPANY/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2000

No. AG 147 of 2000

AUSTRALASIAN PILING COMPANY / CFMEUW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	MICHAEL CHRISTOPHER VADASZ T/A AUSTRALASIAN PILING COMPANY, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 50 OF 2003
CITATION NO.	2003 WAIRC 09683

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the Australasian *Piling Company/BLPPU and the CMETU Collective Agreement 2000*, AG 147 of 2000, be and is hereby cancelled.

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

2003 WAIRC 09682

B & N UPTON /BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2000

No. AG 211 of 2000

B & N UPTON ROOFPLUMBING AND MAINTENANCE / CFMEUW INDUSTRIAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	THE UPTON FAMILY TRUST & THE RAYNER FAMILY TRUST T/A B&N UPTONS ROOF PLUMBING & MAINTENANCE, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 51 OF 2003
CITATION NO.	2003 WAIRC 09682

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *B & N Upton /BLPPU and the CMETU Collective Agreement 2000*, AG 211 of 2000, be and is hereby cancelled.

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

2003 WAIRC 10239

BISSCHOPS INDUSTRIES INDUSTRIAL AGREEMENT

No. AG 339 of 1997

BISSCHOPS INDUSTRIES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BISSCHOPS INDUSTRIES PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	AG 78 OF 2003
CITATION NO.	2003 WAIRC 10239

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Bisschops Industries Industrial Agreement*, AG 339 of 1997, be and is hereby cancelled.

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

2003 WAIRC 09644

BOVIS LEND LEASE / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

No. AG 55 of 2001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BOVIS LEND LEASE PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	AG 64 OF 2003
CITATION NO.	2003 WAIRC 09644

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Bovis Lend Lease Pty Ltd Industrial Agreement,* AG 55 of 2001, be and is herby cancelled.

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

2003 WAIRC 09695

CDI CERAMICS/BLPPU COLLECTIVE AGREEMENT 2001

No. AG 196 of 2001

CDI CERAMICS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	STOFFELS FAMILY TRUST & JOHAN & MARY BOVENKERK T/A CDI CERAMICS, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 15 OCTOBER 2003
FILE NO.	AG 39 OF 2003
CITATION NO.	2003 WAIRC 09695

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *CDI Ceramics/BLPPU Collective Agreement 2001*, AG 196 of 2001, be and is hereby cancelled.

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

2003 WAIRC 10406

CHILD CARE (SUBSIDISED CENTRES) AWARD

No. A26 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 29 DECEMBER 2003
FILE NO/S.	APPLICATION 1895 OF 2003
CITATION NO.	2003 WAIRC 10406

Result	Order issued

Order

HAVING READ and considered the documents relating to this matter and there being no party desiring to be heard in opposition thereto;

NOW WHEREAS being satisfied that the requirements of the *Industrial Relations Act, 1979* have been complied with, I the undersigned, Chief Commissioner of the Western Australian Industrial Relations Commission, acting on my own motion pursuant to the powers contained in section 47 of the *Industrial Relations Act, 1979* do and hereby declare;

THAT from the date of this Order the following employer will be struck out of Schedule B. – Respondents, to the Childcare (Subsidised Centres) Award A 26 of 1985—

Beechboro Family Centre Inc.

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

2003 WAIRC 09681

COASTAL CONTRACTORS / BLPPU and the CMETUCOLLECTIVE AGREEMENT 2002

No. AG 197 of 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	COASTAL CONTRACTORS PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 52 OF 2003
CITATION NO.	2003 WAIRC 09681

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Coastal Contractors/BLPPU and the CMETU Collective Agreement 2000*, AG 197 of 2000, be and is hereby cancelled.

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

2003 WAIRC 09676

COMBINED ROOFING INDUSTRIES INDUSTRIAL AGREEMENT

No. AG 149 of 1996

COMBINED ROOFING / BLPPU and the CMETU COLLECTIVE AGREEMENT 2000

No. AG 151 of 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	KARO HOLDINGS PTY LTD ATF THE MULLER FAMILY TRUST T/A COMBINED ROOFING INDUSTRIES, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 53 OF 2003
CITATION NO.	2003 WAIRC 09676

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Combined Roofing Industries Industrial Agreement*, AG 149 of 1996 and the *Combined Roofing /BLPPU and CMETU Collective Agreement 2000*, AG 151 of 2000, be and are hereby cancelled.

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

2003 WAIRC 10233

CREATIVE ROOFING INDUSTRIAL AGREEMENT

No. AG 242 of 1998

CREATIVE ROOFING/BLPPU AND THE CMETU COLLECTIVE AGREEMENT

No.AG 203 of 1999

CREATIVE ROOFING / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	DELAVERIS CONSTRUCTIONS PTY LTD ATF THE PAUL DELAVERIS TRUST T/A CREATIVE ROOFING, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	AG 114 OF 2003
CITATION NO.	2003 WAIRC 10233

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Creative Roofing Industrial Agreement,* AG 242 of 1998*,* and the *Creative Roofing/BLPPU* and the *CMETU Collective Agreement,* AG 203 of 1999, be and are hereby cancelled.

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

2003 WAIRC 10247

DANICA CARPENTRY/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2000

No. AG 26 of 2000

DANICA CARPENTRY / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	AG HANSEN & NM HANSEN T/A DANICA CARPENTRY, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 9 DECEMBER 2003
FILE NO.	AG 98 OF 2003
CITATION NO.	2003 WAIRC 10247

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Danica Carpentry/BLPPU and the CMETU Collective Agreement 2000*, AG 26 of 2000, be and is hereby cancelled.

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

2003 WAIRC 10232

DEREK ROWLAND CONCRETE PUMPING INDUSTRIAL AGREEMENT

No. AG 220 of 1997

DEREK ROWLAND PTY LTD/CFMEUW COLLECTIVE AGREEMENT 2002

No. AG 194 of 2002

DEREK ROWLAND PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	DEREK ROWLAND PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	AG 116 OF 2003
CITATION NO.	2003 WAIRC 10232

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Derek Rowland Concrete Pumping Industrial Agreement,* AG 220 of 1997 and the *Derek Rowland Pty Ltd/CFMEUW Collective Agreement 2002*, AG 194 of 2002, be and are hereby cancelled.

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

2003 WAIRC 09694

DRILLING AND GROUTING SERVICES / CFMEUW COLLECTIVE AGREEMENT 2001

No. AG 254 of 2001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	DRILLING AND GROUTING SERVICES PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 15 OCTOBER 2003
FILE NO.	AG 43 OF 2003
CITATION NO.	2003 WAIRC 09694

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Drilling and Grouting Services/CFMEUW Collective Agreement 2001*, AG 254 of 2001, be and is hereby cancelled.

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

2003 WAIRC 09696

DUCT FIXING SERVICES/CFMEUW COLLECTIVE AGREEMENT 2000

No. AG 219 of 2002

DUCT FIXING SERVICE / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	DUCT FIXING SERVICES PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 15 OCTOBER 2003
FILE NO.	AG 35 OF 2003
CITATION NO.	2003 WAIRC 09696

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Duct Fixing Services/CFMEUW Collective Agreement 2000*, AG 219 of 2002, be and is hereby cancelled.

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

2003 WAIRC 09643

FLOORING SOLUTIONS/CFMEUW COLLECTIVE AGREEMENT 2002

No. AG 105 of 2002

FLOORING SOLUTIONS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	SEATTLE HOLDINGS PTY LTD ATF THE VINCENT FAMILY TRUST T/A FLOORING SOLUTIONS, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	AG 66 OF 2003
CITATION NO.	2003 WAIRC 09643

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Flooring Solutions/CFMEUW Collective Agreement 2002*, AG 105 of 2002, be and is hereby cancelled.

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

2003 WAIRC 10361

FREMANTLE PORT AUTHORITY (PILOTS') AWARD 1964

No. 3 of 1964

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

ON THE COMMISSION'S OWN MOTION

CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 22 DECEMBER 2003
FILE NO/S.	APPLICATION 1893 OF 2003
CITATION NO.	2003 WAIRC 10361

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 22nd day of October 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 21st day of November 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—

Fremantle Port Authority (Pilots') Award 1964, No 3 of 1964

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

2003 WAIRC 09667

INNER CITY BUILDERS INDUSTRIAL AGREEMENT

No. AG 93 of 2001

INNER CITY BUILDING CO PTY LTD / CFMEUW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	INNER CITY BUILDING CO PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 55 OF 2003
CITATION NO.	2003 WAIRC 09667

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Inner City Builders Industrial Agreement*, AG 93 of 2001 be and is hereby cancelled.

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

2003 WAIRC 09698

NEW CONCRETE / BLPPU and the CMETU COLLECTIVE AGREEMENT 1999

No. AG 229 of 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	REMJADE PTY LTD T/A NEW CONCRETE COMPANY, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 15 OCTOBER 2003
FILE NO.	AG 34 OF 2003
CITATION NO.	2003 WAIRC 09698

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *New Concrete/BLPPU and the CMETU Collective Agreement 1999*, AG 229 of 1999, be and is hereby cancelled.

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

2003 WAIRC 09699

NORTH COAST CONCRETE / BLPPU and the CMETU COLLECTIVE AGREEMENT 1999

No. AG 13 of 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	THE BEVIS FAMILY TRUST T/A NORTH COAST CONCRETE, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 15 OCTOBER 2003
FILE NO.	AG 33 OF 2003
CITATION NO.	2003 WAIRC 09699

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *North Coast Concrete/BLPPU and the CMETU Collective Agreement 1999*, AG 13 of 2000, be and is hereby cancelled.

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

2003 WAIRC 10234

PARISE STEEL/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2001

No. AG 101 of 2001

PARISE STEEL FABRICATIONS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	PARISE STEEL FABRICATIONS PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	AG 111 OF 2003
CITATION NO.	2003 WAIRC 10234

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Parise Steel/BLPPU and the CMETU Collective Agreement 2001*, AG 101 of 2001, be and is hereby cancelled.

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

2003 WAIRC 09666

PCB HOLDINGS ASBESTOS ERADICATION INDUSTRIAL AGREEMENT

No. AG 107 of 1999

PCB HOLDINGS/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2000

No. AG 125 of 2000

PCB HOLDINGS PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-20053

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	PCB HOLDINGS PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 56 OF 2003
CITATION NO.	2003 WAIRC 09666

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *PCB Holdings Asbestos Eradication Industrial Agreement*, AG 107 of 1999 and the *PCB Holdings/BLPPU and the CMETU Collective Agreement 2000*, AG 125 of 2000, be and are hereby cancelled.

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

2003 WAIRC 09693

PLASTERWISE PLASTERING/BLPPU COLLECTIVE AGREEMENT 2000

No. AG 99 of 2000

PLASTERWISE PLASTERING CONTRACTORS / CFMEUW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	FORMGROW PTY LTD ATF THE ROBERTSON FAMILY TRUST T/A PLASTERWISE PLASTERING CONTRACTORS, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 15 OCTOBER 2003
FILE NO.	AG 46 OF 2003
CITATION NO.	2003 WAIRC 09693

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Plasterwise Plastering/BLPPU Collective Agreement 2000*, AG 99 of 2000, be and is hereby cancelled.

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

2003 WAIRC 10360

PORT HEDLAND PORT AUTHORITY MARINE PILOTS' AWARD 1984

No. A 11 of 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

ON THE COMMISSION'S OWN MOTION

CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 22 DECEMBER 2003
FILE NO/S.	APPLICATION 1882 OF 2003
CITATION NO.	2003 WAIRC 10360

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 22nd day of October 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 21st day of November 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—

Port Hedland Port Authority Marine Pilots' Award 1984, A 11 of 1984

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

2003 WAIRC 09642

PRESTIGE CRANES / BLPPU and the CMETU COLLECTIVE AGREEMENT 2001

No. AG 94 of 2001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	PRESTIGE CRANES PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	AG 68 OF 2003
CITATION NO.	2003 WAIRC 09642

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	Mr P Lloyd on behalf of the respondent

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and Mr P Lloyd on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Prestige Cranes/BLPPU and CMETU Collective Agreement 2001*, AG 94 of 2001, be and is hereby cancelled.

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

2003 WAIRC 09687

PWD CONSTRUCTION PTY LTD BRICKLAYING INDUSTRIAL AGREEMENT

No. AG 126 of 1995

PWD CONSTRUCTION/BLPPU AND THE CMWTU COLLECTIVE AGREEMENT 1999

No. AG 194 of 1999

PWD CONSTRUCTION / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	PWD CONSTRUCTION PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 47 OF 2003
CITATION NO.	2003 WAIRC 09687

Result	Agreement cancelled
Representation	
APPLICANT	MR T DIXON (OF COUNSEL) AND WITH HIM MS L DOWDEN ON BEHALF OF THE APPLICANT UNION
RESPONDENT	NO APPEARANCE

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *PWD Construction Pty Ltd Bricklaying Industrial Agreement*, AG 126 of 1995 and the *PWD Construction/BLPPU and the CMWTU Collective Agreement 1999*, AG 194 of 1999, be and are hereby cancelled.

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

2003 WAIRC 09665

SIGN SUPPLIES/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2001

No. AG 78 of 2001

SIGN SUPPLIES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	SIGN SUPPLIES (1986) PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 57 OF 2003
CITATION NO.	2003 WAIRC 09665

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Sign Supplies/BLPPU and the CMETU Collective Agreement 2001*, AG 78 of 2001, be and is hereby cancelled.

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

2004 WAIRC 10434

TEACHERS ACCOMODATION ALLOWANCE AWARD 1982

No. TA 1/1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

ON THE COMMISSION'S OWN MOTION

CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 8 JANUARY 2004
FILE NO/S.	APPLICATION 17 OF 2004
CITATION NO.	2004 WAIRC 10434

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 26th day of November 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 29th day of December 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—

Teachers Accommodation Allowance Award 1982, No TA 1/1982

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

2004 WAIRC 10435

TICKETWRITERS' AWARD

No. 29 of 1958

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

ON THE COMMISSION'S OWN MOTION

CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 8 JANUARY 2004
FILE NO/S.	APPLICATION 18 OF 2004
CITATION NO.	2004 WAIRC 10435

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 26th day of November 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 29th day of December 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—

Ticketwriters' Award No 29 of 1958

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

2003 WAIRC 09663

TJF-EBC/BLPPU COLLECTIVE AGREEMENT 2000

No. AG 96 of 2001

TJF SCAFFOLDING MAINTENANCE & HIRE / CFMEUW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	TJF SCAFFOLDING MAINTENANCE & HIRE PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 58 OF 2003
CITATION NO.	2003 WAIRC 09663

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	Mrs E Domican on behalf of the respondent

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and Mrs E Domican on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *TJF-EBC/BLPPU Collective Agreement 2000*, AG 96 of 2001 be and is hereby cancelled.

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

2003 WAIRC 10231

UNDERCUT INDUSTRIAL AGREEMENT

No. AG 27 of 1998

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	KAREL KIVITS T/A UNDERCUT, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	AG 117 OF 2003
CITATION NO.	2003 WAIRC 10231

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Undercut Industrial Agreement*, AG 27 of 1998, be and is hereby cancelled.

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

2003 WAIRC 09662

UNICA INDUSTRIAL AGREEMENT

No. AG 308 of 1995

UNICA MARBLE AND GRANITE INDUSTRIAL AGREEMENT

No. AG 358 of 1997

UNICA TILING / BLPPU COLLECTIVE AGREEMENT 2000

No. AG 154 of 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	UNICA PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 59 OF 2003
CITATION NO.	2003 WAIRC 09662

Result	Agreements cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Unica Industrial Agreement*, AG 308 of 1995, the *Unica Marble and Granite Industrial Agreement*, AG 358 of 1997 and the *Unica Tiling/BLPPU Collective Agreement 2000*, AG 154 of 2000 be and are hereby cancelled.

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

2003 WAIRC 10244

VENTARA HOLDINGS INDUSTRIAL AGREEMENT
No.AG 6 of 1995

VENTARA HOLDINGS INDUSTRIAL AGREEMENT
No.AG 214 of 1997

VENTARA HOLDINGS INDUSTRIAL AGREEMENT
No. AG 267 of 1997

VENTARA HOLDINGS PTY LTD/BLPPU AND CMETU COLLECTIVE AGREEMENT 2000
No. AG 181 of 2000

VENTARA HOLDINGS PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	VENTARA HOLDINGS PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 9 DECEMBER 2003
FILE NO.	AG 72 OF 2003
CITATION NO.	2003 WAIRC 10244

Result	Agreements cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Ventara Holdings Industrial Agreement*, AG 6 of 1995, the *Ventara Holdings Industrial Agreement,* AG 214 of 1997, the *Ventara Holdings Industrial Agreement*, AG 267 of 1997 and the *Ventara Holdings Pty Ltd/BLPPU and CMETU Collective Agreement* 2000, AG 181 of 2000, be and are hereby cancelled.

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

2003 WAIRC 09640

VIS FORMWORK /BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2001
No. AG 82 of 2001

VIS FORMWORK PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	VIS FORMWORK PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	AG 73 OF 2003
CITATION NO.	2003 WAIRC 09640

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *VIS Formwork /BLPPU and the CMETU Collective Agreement 2001*, AG 82 of 2001, be and is hereby cancelled.

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

2003 WAIRC 09641

WA BUILDING SERVICES/CFMEUW COLLECTIVE AGREEMENT 2002

No. AG 28 of 2002

WA BUILDING SERVICES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	DIAMOND HOUSE AGENCIES PTY LTD T/A WA BUILDING SERVICES, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 13 OCTOBER 2003
FILE NO.	AG 74 OF 2003
CITATION NO.	2003 WAIRC 09641

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *WA Building Services/CFMEUW Collective Agreement 2002*, AG 28 of 2002 be and is hereby cancelled.

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

2003 WAIRC 10240

WA SLICK FIX / BLPPU AND THE COLLECTIVE AGREEMENT 2000

No. AG 183 of 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	WILLISFORD INTERIORS PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	AG 76 OF 2003
CITATION NO.	2003 WAIRC 10240

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *WA Slick Fix/BLPPU and the Collective Agreement 2000*, AG 183 of 2000, be and is hereby cancelled.

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

2003 WAIRC 10241

WEST AUSTRALIAN WATERPROOFING / BLPPU COLLECTIVE AGREEMENT 2001

No. AG 215 of 2001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	CHRISTOPHER DAVID GRAHAM T/A WEST AUSTRALIAN WATERPROOFING, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	AG 75 OF 2003
CITATION NO.	2003 WAIRC 10241

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *West Australian Waterproofing/BLPPU Collective Agreement 2001*, AG 215 of 2001, be and is hereby cancelled.

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

2003 WAIRC 10354

WESTERN AUSTRALIAN COLLEGE OF ADVANCED EDUCATION NON-ACADEMIC SALARIED STAFF AWARD 1981

No. R 3 of 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

ON THE COMMISSION'S OWN MOTION

CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	FRIDAY, 19 DECEMBER 2003
FILE NO/S.	APPLICATION 1881 OF 2003
CITATION NO.	2003 WAIRC 10354

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 22nd day of October 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 21st day of November 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—

Western Australian College of Advanced Education Non-Academic Salaried Staff Award 1981, R 3 of 1979

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

2003 WAIRC 09685

WESTLAND BRICKLAYING CONTRACTORS/BLPPU AND THE CMETU COLLECTIVE AGREEMENT 2001

No. AG 177 of 2001

WESTLAND BRICKLAYING CONTRACTORS / CFMEUW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	WESTLAND BRICKLAYING CONTRACTORS PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 14 OCTOBER 2003
FILE NO.	AG 48 OF 2003
CITATION NO.	2003 WAIRC 09685

Result	Agreement cancelled
Representation	
Applicant	Mr T Dixon (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Dixon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders—

THAT the *Westland Bricklaying Contractors/BLPPU and the CMETU Collective Agreement 2001*, AG 177 of 2001, be and is hereby cancelled.

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

NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 300 of 2003

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "BEENYUP WWTP, (O'DONNELL GRIFFIN) CERTIFIED AGREEMENT 2003"

NOTICE is given that an application has been made to the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

1.4 AREA AND SCOPE

This Agreement shall cover all electrical installation, erection and associated commissioning works at the Beenyup Waste Water Treatment Plant site that is undertaken by the Employees engaged by the Company in the classifications detailed in Section 3 of this Agreement.

SECTION 3 WAGE RATES AND ALLOWANCES

3.1 EMPLOYMENT CLASSIFICATIONS

CONSTRUCTION WORKERS—

3.1.1 Construction Worker Grade I

- Tradesperson's Assistant with less than 3 months experience in the construction industry

3.1.2 Construction Worker Grade 2

- Assistant Rigger
- Assistant Scaffolder
- Tradesperson's Assistant

3.1.3 Construction Worker Grade 3

- Lagger

3.1.4 Construction Worker Grade 4

- Certified Dogman
- Certified Rigger
- Certified Scaffolder

3.1.5 Construction Worker Grade 5
- •Boilermaker
- •Pipefitter
- •Mechanical Fitter
- •Tradesperson
- •Welder

3.1.6 Construction Worker Grade 6
- •Electrical Fitter/Mechanic

3.1.7 Construction Worker Grade 7
- •Special Class Electrician
- •Instrument Fitter

3.2 APPRENTICES

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

[L.S.]

(Sgd.) J. A. SPURLING,
Registrar.
22 December 2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION No. P33 of 2003

APPLICATION FOR REGISTRATION OF AN AWARD ENTITLED "PUBLIC SERVICE AWARD 2004"

NOTICE is given that an application has been made to the Commission by Commissioner for Aboriginal Affairs and others under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

3. - AREA OF OPERATION

This Award shall apply throughout the State of Western Australia.

4. - SCOPE

This Award shall apply to all public service officers, other than those listed in (a), (b) and (c) of this clause, appointed under Part 3 or Part 8 Section 100, of the Public Sector Management Act 1994 or continuing as such by virtue of clause 4(c) of Schedule 5 of that Act, who are members of or eligible to be members of the Civil Service Association of Western Australia (Inc).

(a) A public service officer whose remuneration payable is determined or recommended pursuant to the Salaries and Allowances Act 1975.

(b) A public service officer whose remuneration is determined by an Act to be at a fixed rate, or is determined or to be determined by the Governor pursuant to the provisions of any Act.

(c) An employing authority as defined in section 3(1) of the Public Sector Management Act 1994.

SCHEDULE A. - SALARIES

(1) Officer classifications:

Level 1
Level 2
Level 3
Level 4
Level 5
Level 6
Level 7
Level 8
Level 9
Class 1
Class 2
Class 3
Class 4

SCHEDULE B. - SALARIES – SPECIFIED CALLINGS

(1) Officers, who possess a relevant tertiary level qualification, or equivalent determined by the employer, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Community Corrections Officer, Dental Officer, Dietitian, Educational Officer, Engineer, Geologist, Laboratory Technologist, Land Surveyor, Legal Officer, Librarian, Medical Officer, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the employer.

Officer Classifications:

Level 2/4
Level 5

Level 6
Level 7
Level 8
Level 9
Class 1
Class 2
Class 3
Class 4

A copy of the proposed Award may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J. A. SPURLING,
Registrar.

31 December 2003.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A1 of 2004

APPLICATION FOR REGISTRATION OF AN AWARD ENTITLED "VEHICLE INDUSTRY AWARD 2004"

NOTICE is given that an application has been made to the Commission by Peter Wilkinson & Co Pty Ltd under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

3. - AREA AND SCOPE

This award shall apply throughout the State of Western Australia to:-

(a) every employer and premises within or in connection with any undertaking principally concerned with the repairing, maintaining and servicing of vehicles of all kinds, motor cycles, farm machinery, motorised machinery, caravans, trailers or the like and equipment or parts or components thereof or the supply of running requirements for such vehicles and the like; and

(b) in other establishments principally concerned with the building, manufacturing, assembling or repairing of vehicles of all kinds, motor cycles, farm machinery, motorised machinery, caravans, trailers or the like;and.

(c) Occupations listed in Certificates II, III, & IV under the National Automotive Training Package (AUR 03), except those occupational sectors covered under another Award in relation to (a) and (b) above; and

(d) This award removes the coverage and/or application from the Metal Trades Award (General) No 13 of 1966 of those employees and employers whose primary focus was the service maintenance and repair of motor powered vehicles and equipment (e.g. Automotive Electrical, Automotive Mechanic, Automotive Motor Cycle Mechanic, Automotive Trades Assistant, and Automotive General Labourer) and transfers coverage to this Award.

CLAUSE 8. – CLASSIFICATIONS & COMPETENCIES

Job Classifications

Advanced Vehicle Industry Tradesperson Level II
Advanced Vehicle Industry Tradesperson Level I
Vehicle Industry Tradesperson Level IV
Vehicle Industry Tradesperson Level III
Vehicle Industry Tradesperson Level II
Vehicle Industry Tradesperson Level I
Vehicle Industry Employee Level IV
Vehicle Industry Employee Level III
Vehicle Industry Employee Level II
Vehicle Industry Employee Level I

N.B. The designation of Vehicle Industry Employee Level I excludes Trainee employees as defined in Clause 33.

A copy of the proposed Award may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J. A. SPURLING,

[L.S.] Registrar.

12 January 2004.

INDUSTRIAL MAGISTRATE—Complaints before—

2003 WAIRC 10243

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	LORRAINE FIELD, Department of Consumer and Employment Protection, COMPLAINANT
	v.
	ANTHONY KELLY, DEFENDANT
CORAM	MAGISTRATE WG TARR IM
DATE	THURSDAY, 4 DECEMBER 2003
COMPLAINT NO	CP 7 OF 2003
CITATION NO.	2003 WAIRC 10243

Representation	
Complainant	Mr R Bathurst (of Counsel) of the *Crown Solicitor's Office*
Defendant	Ms K Scoble (of Counsel) of *The Construction, Forestry, Mining and Energy Union of Workers*

Reasons for Decision

1 The Defendant in these proceedings faces a prosecution brought pursuant to section 96E(1) of the ***Industrial Relations Act 1979*** (the Act).

2 Section 96E is a section of Part VIA of the Act which is headed **Freedom of association**.

3 Section 96B of the Act provides—

> *(1) An award, industrial agreement or order under this Act, or any arrangement between persons relating to employment must not —*
>
> *(a) require a person —*
>
> *(i) to become or remain a member of an organisation;*
>
> *(ii) to cease to be a member of an organisation;*
>
> *(iii) not to become a member of an organisation; or*
>
> *(iv) to treat another person less favourably or more favourably according to whether or not that other person is, or will become or cease to be, a member of an organisation;*
>
> *or*
>
> *(b) confer on any person by reason of that person's membership or non-membership of an organisation any right to preferential employment or to be given preference in any aspect of employment.*
>
> *(2) The prohibition in subsection (1) extends to awards, industrial agreements, orders and arrangements that are in force at the commencement of section 28 of the Industrial Relations Amendment Act 1993.*
>
> *(3) A requirement that is contrary to this section is of no effect.*

4 It is clearly the intention of the legislation that whether or not a person joins an organisation (union) is the choice of that person.

5 Section 96E creates an offence under the heading of **Discriminatory and injurious acts against persons because of non-membership of employee organisation**.

6 Section 96E(1) provides—

> *(1) A person, including an organisation of employees, must not threaten that —*
>
> *(a) discriminatory action will or may be taken against a second person; or*
>
> *(b) the free and lawful exercise of a second person's trade, profession or occupation will or may be interfered with,*
>
> *by reason of the circumstance that the second person or a third person is not a member of an organisation of employees.*

7 The section provides for the following penalty for any breach—

> *Penalty applicable to subsections (1), (2) and (3)—*
>
> *(a) in the case of an individual not less than $400 nor more than $5 000;*
>
> *(b) in any other case, not less than $1 000 nor more than $10 000; and a daily penalty of $500.*

8 The allegation against the Defendant is that on 28 November 2002 at Hillarys he—

> *"threatened that the free and lawful exercise of the occupation of Jeffrey Robert Gomm would be interfered with by reason of the circumstance that Jeffrey Robert Gomm was not a member of an organisation of employees."*

9 At the commencement of proceedings the following was agreed—

> *(a) the Construction, Forestry, Mining and Energy Union of Workers ("**CFMEUW**") is an organisation of employees registered under the Industrial Relations Act 1979(WA);*
>
> *(b) the Construction, Forestry, Mining and Energy Union ("**CFMEU**") is an organisation of employees registered under the Workplace Relations Act 1996 (Cth);*
>
> *(c) Mr Kelly is a member of the CFMEU and the CFMEUW; and*
>
> *(d) Mr Kelly is a workplace delegate for the CFMEU and the CFMEUW.*

10 There was no issue with the evidence that the Whitford City Shopping Centre at Hillarys was being developed by Westfield Ltd and that the Defendant was employed as a workplace delegate on that site.

11 Jeffery Robert Gomm, the person referred to in this complaint, gave evidence that he was a registered builder and tile fixer. He resides in Albany and usually works in the Great Southern region.

12 During November 2002 Mr Gomm contracted to do some tiling work in the Jeans West store on the Whitford City Shopping Centre building site. He gave evidence of his attendance at the site, the preliminary work he carried out and his dealings with Steven Evans, a site safety representative.

13 There appears little doubt on the evidence that Mr Gomm had entered the site and carried out work without complying with the site requirements or Westfield policy in relation to reporting to the site office, attending an induction session, taking part in an inspection of the work area or having his tools, particularly electrical items, and equipment checked and tagged. There was also an issue with deliveries of products onto the site without being properly labelled.

14 I also accept that Mr Gomm received assistance from site safety officers to satisfy some of those requirements.

15 It was during this time that Mr Gomm attended at a union site office with the safety officer where he met the Defendant and another safety officer, Robert Thomson. Mr Gomm has given evidence that it was then that the Defendant spoke about union membership. He was told, he said, by the Defendant—

> *"If you want to work here you have to join up. You are not exempt because you come from Albany."*

16 Mr Gomm said the Defendant went on to say—

> *"Everyone here has good conditions and we don't want that undermined. If you want to work here you can join up or fuck off back to Albany to work for scabby builders."*

17 He said the Defendant was quite aggressive and raised his voice. Mr Gomm gave evidence that he felt intimidated and bullied and the others in the site office joined in supporting the Defendant's views.

18 After telephoning the organisation which was employing him, Mr Gomm said he came to an agreement that they would reimburse him for the cost of joining the union so he returned to the site office and paid to join the union himself and for the person who would be helping him and who would be arriving the next day.

19 Mr Gomm gave evidence that he had never been a member of any union explaining that there was no need to because "*I negotiate my own rates and arrange my own conditions*". He was on the Whitford site because he had "*won a contract*" to do some tiling at the Jeans West shop.

20 The Defendant, Mr Kelly, denies the allegation that he made any threats to Mr Gomm forcing him to join the union. In effect his evidence is that Mr Gomm joined the union of his own free will and because he wanted to.

21 Three witnesses were called to give evidence in support of the Defendant's case. All gave evidence about their responsibilities on site and their dealings with Mr Gomm, including the problems each experienced and the resolution of certain issues including safety issues.

22 Mr Stephen Evans, a site safety representative, gave evidence of his involvement with Mr Gomm. He was not involved with Mr Gomm joining the union and, while he admits he was in the union site office, he could not remember any conversation between the Defendant and Mr Gomm.

23 Likewise, Mr Robert Thompson, the other site safety representative involved, remembers the Defendant and Mr Gomm in conversation but does not remember what they were talking about. As he said, he was "*busy doing other things*".

24 The Defendant readily admitted his strong belief in the CFMEU and unionism generally. He agreed in cross-examination that he believed unionism works best if every eligible member joins a union and said they should join. He also agreed that it was his belief that there should not be any non-unionists on site.

25 When the Defendant was asked what was meant by the "NO ticket NO start" notices around the site and on the union site office he explained—

> "*It just basically means what it says. The members choose to work on the job, they want - - they are fully unionised and they put those stickers up to give that message to people*"
>
> (Transcript page 38)

26 While there can be no criticism of the Defendant for his strong beliefs in regard to union membership and the benefits it might provide to those who join, the reality is that his beliefs can not override the legislative right of worker's choice.

27 Much of the evidence given during the hearing of this case related to matters peripheral to the issue of Mr Gomm joining the union and were not particularly relevant to that issue.

28 It is clear from the evidence that Mr Gomm left the site because of problems he had complying with the legitimate site and safety requirements.

29 In view of the evidence generally, however, I do not believe it supports a credible finding that Mr Gomm had a choice whether or not he joined the union. I accept Mr Gomm's evidence that he would not have joined the union had he had a choice and that he did join because, as he said, he "*felt really intimidated and felt bullied during his discussions with the Defendant about joining the union*".

30 It was Mr Gomm's evidence that he "*didn't think there was any way out of it*" so he telephoned the shop fitters he was working for and that they agreed to reimburse him for two union tickets. He then completed an application form to join the union and wrote out a cheque for $604.00 to pay for himself and Mr Brand who was to start work with him on the following day.

31 It is interesting, I believe, that Mr Brand's fees were paid in his absence and before he had applied to join the union. It is consistent with Mr Gomm's conclusion that neither he nor Mr Brand could work on site unless they both were union members.

32 An element of the complaint is that the Defendant threatened Mr Gomm. I have been referred to a decision of the Industrial Magistrate's Court in ***Allan Graham Shuttleton v James Wilson*** ***76 WAIG 1175*** where my brother Whitely IM considered the meaning of the word "*threat*". I agree with his conclusion that—

> "*… the legislative intent in regard to the word "threaten" as it appears in section 96E(1)* (of the Act*) was to cover those instances of acts and words made for the purpose of intimidating, pressuring or coercing a person to join a Union.*"
>
> (at page 1179)

33 He went on to conclude that the word was intended to convey a wider meaning than an intimidation of violence or injury.

34 I am satisfied on the evidence that the Defendant did threaten Mr Gomm to the extent that he had no choice but to join the union if he wanted to carry out the work he was contracted to do on the Whitford City Shopping Centre building site.

35 I find the complaint proven.

W. G. TARR,
Industrial Magistrate.

2003 WAIRC 10245

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT
PARTIES	COLIN ROBERTS, MITCHELL IAN CHOPPING, DARRELL VINCENT HARRISON, CLAIMANTS
	v.
	MIDLAND BRICK COMPANY PTY LTD, RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 4 DECEMBER 2003
CLAIM NO/S	M 166 OF 2002, M 167 OF 2002, M 169 OF 2002
CITATION NO.	2003 WAIRC 10245

Representation	
Claimant	Mr T Kucera (of Counsel) of *The Construction, Forestry, Mining and Energy Union of Workers*
Respondent	Mr A Power (of Counsel) and with him Mr R Curry (of Counsel) instructed by *Messrs Mallesons Stephen Jaques*

Reasons for Decision

The Claims

1 On 10 May 2002 the Claimants filed their respective claims alleging breaches by the Respondent of the ***Brick Manufacturing Award 1979*** (the Award). Each of Mr Roberts and Mr Chopping allege that as a consequence of the breaches that they have been underpaid $21,079.63, whereas Mr Harrison alleges he has been underpaid $20,602.08.

2 On 9 August 2002 the Claimants filed their amended Particulars of Claim. The amended Particulars detail the basis for the claims, which in essence are, in each instance, that the Respondent has breached clause 9(4) of the Award for each pay week commencing the fortnight ending 20 May 1996 to the fortnight ending 29 December 1997 inclusive. In that regard the Claimants alleged there was an express or, in the alternative, an implied requirement that they be present for duty for the whole of the shift for every shift worked except for those shifts occurring on maintenance days. In so far as the allegation is that there was an express requirement, the Claimants say that the Respondent's agents Ron Caruso and Tim Tipping communicated the same. In so far as the allegation relates to an implied requirement, the Claimants rely on the fact that their respective supervisors, team leaders and managers failed to advise them to take a break, unlike the situation in other sections of the Respondent's operation. Further it is alleged that by virtue of the way the Respondent conducted its manufacturing operations that there was an implied requirement that the Claimants not take a meal break. The Claimants also allege that the machinery used in the manufacture of bricks, which they operated, could not be turned off and that the Claimants were required to remain at their machines without a meal break because there was not sufficient staff to facilitate the taking of meal breaks.

3 The Claimants allege that as a result of the way that the Respondent operated its brick manufacturing process that they did not have a meal break at all and as a consequence they are entitled to be paid penalty rates for the entirety of the balance of each shift worked exceeding five and a half hours.

Responses

4 The Respondent denies that it has breached clause 9(4) of the Award as alleged or at all. In that regard it denies that the Claimants were during the relevant period expressly or impliedly required to be present on duty for the whole of their shift without a meal break. The Respondent also contends that it was not required to advise the Claimants of the time that they should take a break. Further, and in the alternative, the Respondent denies that it impliedly required the Claimants not to take a break by failing to advise them to take a break.

5 The Respondent says that it adopted a "*flexible break system*" due to its requirement to maintain a continuous operation of machinery in the area in which the Claimants worked. The system facilitated the requirements of both the Respondent and its employees, including the Claimants. Employees were granted the responsibility and flexibility of leaving their workstation unattended or to be relieved for the purpose of taking breaks, including meal breaks, whenever they wanted. Those working at *Brick Machine 4* could not take their lunch breaks together as only one or two workstations could remain unattended for any significant period. The Respondent says that there were generally a sufficient number of employees to cover for the employees taking breaks. In that regard the Respondent contends that the shift supervisor was also able to relieve the Claimants for the purpose of taking meal breaks. The Respondent also points out that not only were facilities provided away from the workstations for the taking of meal breaks but that they were utilised by the Claimants. It is contended that the Claimants took meal breaks during the relevant shifts and that the continuous operation of machinery did not impede the Claimants' ability to take meal breaks.

6 The Respondent acknowledges that the Claimants' situation with respect to the taking of meal breaks differed from other employees employed by it. It says that in that regard different practices applied to different sections of the workplace. They differed dependant upon either or both operational or other considerations. By way of example, maintenance days represented an exception to the operational requirements for continuous operation of machinery and enabled the taking of meal breaks at a common time.

7 The Respondent denies that the Claimants were required for duty for the entirety of their shifts including their usual meal breaks. It accordingly denies that the Claimants are entitled to penalty rates for working without a meal break for beyond five and a half hours from commencement of their respective shifts.

8 Finally the Respondent points out that some of the claims are entirely without merit as it is quite evident from the available records that the Claimants in such instances were absent from work either on account of being on annual leave or being on sick leave.

Award Provisions

9 The Claimants allege a breach of subclause (4) of clause 9 of the Award entitled *"Overtime*" which provides—

> *(4) When a worker is required for duty during his usual meal time and his meal time is thereby postponed for more than one hour he shall be paid at overtime rates until he is able to take his meal time.*

10 The Claimant contends that clause 16 should also be relevantly considered in giving effect to clause 9(4). Clause 16 states—

16. - MEAL INTERVAL

> *(1) Not less than thirty minutes nor more than one hour shall be allowed for a meal each day.*

(2) No worker shall be compelled to work for more than five and a half hours without a break for a meal.

(3) When a worker is required for duty during any meal time whereby his meal time is postponed for more than one hour he shall be paid at overtime rates until he gets his meal.

Description of the Workplace and Duties of the Claimants

The Brick Manufacturing Process

11 At all material times each Claimant performed work within the Respondent's *Brick Machine 4* situated within the section that comprises the Kilns 7 and 8 building. The brick machine consists of four distinct but integrated sections used to produce green bricks for removal to the kilns for drying. The four sections comprise the following—

1) Brick Machine (sometimes referred to as the extruder machine).
2) *Claytex* Machine.
3) Setter Machine
4) Transfer Cars

12 The *Brick Machine 4* process for brick manufacture consists of using clay transported by conveyor belt from bins situated outside the building to the mixer which forms part of the brick machine situated within the building. The clay is then mixed with liquid additives. The resultant mix is then forced forward and falls down a vacuum tower into the extruder. The raw material is then pushed out through a die box, which shapes the clay into a column. The column then runs on rollers to the *Claytex* area where additives are applied in the case of a production run requiring the additives. It suffices to say in that regard that certain "*face bricks*" require additives, whereas other bricks such as "*commons*" or "*maxi bricks*" do not. The additives are located in bins and the nature and extent of the application of the additives in slurry form, if any, is dependant upon the type of brick being made. Generally speaking the additives consist of varying types of substances including sawdust. The column then moves forward from the *Claytex* area to the slug cutter which cuts the column to set lengths. The lengths depend upon the brick size and type then in production. The cut portion of the column is referred to as a slug. The slug is usually about two to three metres long. Each slug then continues on conveyor belts in groups of three. They travel along a series of conveyors to the slat conveyor. At that point the slugs are moved at right angles from the conveyor, pushed across by an arm to the wire frame. The slugs are then pushed through the wire frame, which cuts them into brick sizes. The wire frame is sometimes referred to as the cutter frame. The bricks then move to the inverter, which inverts the bricks so that they sit face to face. That is done in order to stop the additives being blown off in the drying process. Not all bricks are inverted but most face bricks are. After the inverting process the bricks are pushed onto the spreader table. The spreader table is the place where bricks are spread apart to form a pattern for the setter head to pick up. A hydraulically operated pick-up head then picks up the bricks. The head operates by an injection of air being forced into the head, which causes the head to hold the bricks. The bricks are then lifted and taken across to the transfer car (sometimes called the kiln car). The air holding the bricks is then suddenly evacuated so that the bricks remain on the kiln car. Each tier of the kiln car is loaded in a two-stage process. The first head of bricks is loaded onto the kiln car at its farthest point from the setter machine control panel. The second head is then loaded on the kiln car at its closest point to the setter machine control panel. That process completes the partial loading of the kiln car. The process then continues with the next kiln car. Each full kiln car is actually loaded in a complementary two-stage process. Initially only the bottom third of the kiln car is loaded. The partially loaded kiln car then goes off on tracks to the pre-drier. Once pre-dried, it returns to have a second tier of bricks loaded on it for eventual removal to the kilns. Pre-drying only dries part of the car. The reason for pre-drying is to stop the weight of extra layers of bricks compressing the bottom layer of bricks. In that way the green bricks become hard and able to support the top layers of bricks. The loading process operates in a continual alternate setting pattern by which an empty car is partially set followed by the setting and completion of a pre-dried car. The process is one of loading an empty car followed by a partially set car followed by an empty car followed by a partially set car and so on. The partially set car is taken for pre-drying. The full set car is taken to be kiln dried. Sometimes, prior to being taken to the kiln for drying, the fully loaded cars are held on holding lines on the transfer tracks. Indeed there are two tracks dedicated for holding. There are also a number of other tracks dedicated to various other functions including loading, storage, pre-drying, drying, and car repair.

Operators

13 At the material times there were four operators appointed to work within *Brick Machine 4. E*ach operator was appointed to perform a dedicated function. The operators were multi-skilled and able to operate each of the sections within that brick machine. There was a requirement for each section of the brick machine to be manned with the only exception being that the extruder machine could in appropriate circumstances be remotely controlled from the control panel at the setter machine.

14 In addition to the four operators who worked as a team, the shift supervisor was also in attendance overseeing the operation and was well able to man any of the stations if required. Additionally a fitter was also on duty to take care of any maintenance or breakdown problems that might occur during the shift. The operators worked a twelve hour shift commencing at either 7.00 am or 7.00 pm depending upon the type of shift worked. A typical roster would consist of starting on Monday and continuing on Tuesday worked as day shifts. Wednesday and Thursday would be taken off with the Friday, Saturday and Sunday night shift being worked. Monday and Tuesday would then be taken off and so on.

15 Colin Roberts and Mitchell Chopping worked together as part of one team whilst Darrell Harrison worked with another team. The teams were encouraged to meet production targets and were paid bonuses for production above those targets within the requisite quality guidelines. A production programme governed the nature of the operators' duties. There was a continual production process with operators from one shift handing over to the operators of the next shift with the hand over process taking in the order of five to ten minutes. Any particular difficulties occurring during any shift might impact on the next shift. Accordingly all difficulties were recorded in a production log particularly for the benefit of the next shift.

16 In order to gain an appreciation of the actual duties of the operators it is important to review the respective duties of those working on their respective sections.

Brick Machine (or Extruder) Operator

17 The brick machine operator controls its functions from the instrumentation panel situated in the immediate vicinity of the extruder. He monitors the production program and is responsible for product changes. Sometimes the production program is revised at the direction of the supervisor. His duties include checking the vacuum tower through a glass-viewing panel to ensure that materials within the tower do not build up. A build-up in the extruder tower might result if the augers, which have the function of pushing the clay forward, become worn. Indeed even with new augers clay, sometimes builds up. If a build-up

occurs then a back-flow of clay is caused resulting in the process being interrupted. Accordingly regular checking is imperative and is conducted every hour. The operator also monitors a screen image of the box feeder, which is situated halfway between the extruder and the clay bins situated outside the building. The aim is to ensure that the box feeder does not overflow and for that reason it also needs to be regularly monitored. The monitoring of the box feeder can take an aggregate of up to two or three hours per day.

18 Other duties of the brick machine operator include the procurement of replacement dies, cores and cut face blades for those damaged or worn out in the manufacturing process. The die is the instrument through which the clay column if forced. The core punctures holes into the column so that the bricks are cored. The cut face blade takes away the smooth surface from the column so as to produce a roughened texture to the face of the brick. The worn cut face blades are replaced several times during a shift. They are also replaced when there is a production change. The replacement of the blades takes an average of about ten minutes to perform but can take as long as half an hour. Another responsibility falling upon the operator is that of setting up a spare door. There are two interchangeable hinged doors that cover the extruder pipe. One is in use whilst the other remains prepared to be swung into position. As the door is swung open the reset door takes its place. The opened door is then reset. Its configuration depends entirely upon the product being manufactured. The resetting process entails the replacement of the faceplate, the setting of the die box and ensuring that the core is centralised. The door resetting process might take up to forty minutes to complete and would occur two or three times a shift.

19 The operator is also responsible for controlling the moisture content of the column by controlling the mix and feed rate. The moisture control is continuously monitored. Sometimes the column needs to be hardened by reducing the moisture content. That takes about five minutes. The hardness of the column is gauged by the use of a penetrometer. The operator may also need to polish the core and die in order to produce a shiny finish. Polishing, which takes about twenty minutes, occurs two or three times each shift.

20 Another function that the brick machine operator has is the resetting of the metal detector located in the conveyor coming from the bins. The metal detector is designed to prevent loose bolts, nuts, bits of metal plating or other metal particles emanating from the bin from getting into the clay in the brick making process. If metal is detected a siren goes off and the conveyor stops. The metal needs to be found and recovered. Thereafter the process is reset. That occurs at least twice per shift.

21 The aforementioned constitutes an overview of the tasks carried out by the brick machine (extruder) operator. It is to be appreciated that the aforementioned is not an exhaustive list of the duties of that operator.

Claytex Operator

22 The *Claytex* machine operator begins his shift by consulting with the operator from the previous shift. The time taken in that regard is very much dependant upon whether additives are being used at the time. Some bricks, being mainly the internal bricks such as Commons, Fast Wall, Maxi Brick and Longreach, do not require additives. It is his duty to check on the production program to ascertain the type of brick to be produced during the shift.

23 When face bricks are in production the operator's main function is one of monitoring the additives being applied to the column and making any necessary adjustments thereto. That is an ongoing requirement that occurs quite regularly. When not performing that function the operator is required to carry out other tasks such as procuring bulk bags for the mixing of materials. He is also required to prepare drums of slurry or glaze to be sprayed onto the face bricks. The mixing of such materials varies dependant upon the mix. Slurries take in the order of about fifteen to twenty minutes to prepare and are used at the rate of two to three drums per hour. Accordingly during any shift when additives are being applied an amount of twenty four to thirty drums of slurry would be used. It is acknowledged however that additives are applied to less than fifty percent of the entire production.

24 Another of the operator's duties is that of checking the sawdust hopper. That occurs three times per shift and takes about ten minutes to perform. The operator is also responsible for filling the sawdust hopper by use of a bobcat. The feeding of the sawdust through screens by use of the bobcat is done about twelve times per shift and takes in each instance in the order of ten minutes to complete. The screens need to be cleared of any bark or debris. That occurs about eight to twelve times per shift and takes about ten minutes in each instance. During any breaks the operator engages in general cleaning including the cleaning of sawdust screens. If internal bricks are being made and there is no need for *Claytex* application then the operator attends to other duties such as cleaning up any mess outside caused by the use of a bobcat or loader and returning reclaimed clay to the clay shed. As part of his general cleaning duties he also cleans up any mess around the slurry-mixing tank. When the operator is not engaged in additives application he is required to clean up under the brick machine. The length of time taken in performing that task is very much dependant upon the particular product under production.

25 This overview of the *Claytex* operator's duties is by no means exhaustive and is simply designed to assist in the consideration of the types of duties performed.

Setter Operator

26 Each shift commences with a handing over from the previous shift's operator. That takes about five minutes. Following that the setter operator is required to check the production program so as to acquaint himself with what will be required during the shift. Part of the setter operator's duties includes the monitoring of brick size. He does that by taking sample bricks, measuring and weighing the same. That is done about eight times per shift taking an average of about ten minutes to complete. He is also required to monitor the quality control of the *Claytex* application and inform the *Claytex* operator of any difficulties in that regard. Also included in his duties is the monitoring of the track conveyor that conveys the slugs to the setter machine. That sometimes runs out of alignment causing a hold up in production. In such circumstances the fitter is called to realign the conveyor. However, if the fitter is busy or is otherwise not available, the setter machine operator carries out that function.

27 Another function of the setter operator is to write out tickets for the transfer cars. The tickets are placed on the transfer cars as they travel along by the side of the setter machine. The ticket details the brick type then in production, the batch number and the car number. If there is any problem with the quality of the bricks, the nature of the problem is recorded on a separate coloured ticket and placed on the car. The ticket follows the car through the process.

28 Another of the operator's duties is to push in the top row of bricks on a fully set kiln car. That is done in order to stabilize the bricks so as to avoid the bricks falling over in the kiln. That is done in the case of all bricks except modular bricks, which are more intrinsically stable. The process of pushing in bricks is carried out up to eighteen times per shift. It takes about a couple of minutes on each occasion. An output of about fifteen kiln cars per shift was more typical for the "*Shift 1 Team*" which included Mr Roberts and Mr Chopping. The record production claimed for any shift was twenty-one cars.

29 The kiln cars over which the setter operator has control travel along the tracks pulled by "*dogs*". Sometimes the process fails in that a car does not come up. Sometimes a car over-runs. In each instance it is the setter machine operator's responsibility to sort it out so that the cars can be appropriately set. In extreme cases the bobcat needs to be utilised in order to push the car

back to its correct position. The setter operator is also required to maintain a written log detailing the time that the car started, the time it finished and any problems experienced with it, including details as to down time. That process enables a complete production record to be kept.

30 Other responsibilities of the setter operator relate to the adjustment of the brick cutting process and include the adjustment of the markers on the pre-groove rubbers. When the slug is cut and moves onto the slat conveyor it is pre-grooved before it goes through the wire frame. Essentially the pre-groove rollers mark the slug as to where the wires should cut them. Adjustment is necessary to ensure that the bricks are cut where marked; otherwise it results in the bricks being flawed. The operator also has the responsibility for the clearing of "*off-cut chutes*" if they are blocked. The chutes can block up to eight times a shift, but on average it occurs about four times per shift. It usually takes two to three minutes to clear. If the chute is badly jammed it can take up to five or six minutes to clear.

31 Another duty that the setter operator performs and which is peculiar to the manufacture of Florentine Specials is that he is required to turn the bricks over on the setter table. Florentines were at the material times produced for two weeks, every two months, which included a run of Specials within that period. Special bricks include bricks with a splayed face, which by virtue of their shape does not allow the inverter to pick them up. They have to be manually turned over. That process of manually turning the bricks takes about an hour. Either the extruder operator or the *Claytex* operator usually assists the setter operator in turning over the bricks.

32 Again the aforementioned is not intended to provide an exhaustive list of the operator's duties.

Transfer Cars Operator

33 The transfer cars operation, which facilitates the movement of bricks on kiln cars, requires a significant amount of human intervention. It is the responsibility of the transfer cars operator to ensure that the transfer car moves along the designated track, for holding, pre-drying or removal to the kiln. The operator has to ensure the efficient transportation of product on the cars. Holding lines 1 and 2 did not, at the material times, have dog haulage facilities. The cars had to be pushed further up the line or to the front of the line by the operator using a bobcat.

34 Apart from his own duties the transfer cars operator often assists the setter operator in pushing in the top row of bricks on the kiln cars. Another of his responsibilities when doing the maxi brick run requires him to leave the transfer cars so that he can attend empty cars in order to line their bottoms with plastic so as to stop moisture being sucked up and thereby preventing losses in the bottom layer of bricks.

35 At times when the transfer cars are not moving, the operator helps out other operators in their jobs.

Operation Generally

36 It suffices to say that the operators are multi-skilled, and when able, do leave their particular station in order to help out other operators. That of course is dependant upon circumstance, but generally speaking it is the *Claytex* operator and the transfer cars operator who have the greatest amount of disposable time available which enables them to help out their colleagues.

37 An appreciation of the production process and the duties of the operators are essential in the consideration of the issues in this matter. With the benefit of such an appreciation I will now turn to address the testimony given in this matter.

Witnesses

38 Each Claimant, namely Colin Roberts, Mitchell Chopping and Darrell Harrison gave evidence. They also called their former supervisor David Green, their work colleague Paul McGlinn and union representative Rod Reynolds to give evidence in support of their case.

39 The Respondent called Craig Yerbury who at the material time was Mr Roberts and Mr Chopping's shift supervisor. Also called on behalf of the Respondent was Olivier Girardin who at the material time was its Works Manager. Mr Girardin is familiar with the duties of the operators and has had first hand experience in that regard. He worked as a machine operator when he first started in 1981. Other witnesses called by the Respondent included its Payroll Officer Mark Radford, its Shift Supervisor Steven Stribley, its Production Manager Graeme Marshall, its former Operations Manager Vincenzo Scarvaci, and Timothy Tipping who, at the material times, was the Respondent's Production Manager.

Evidence

Colin Malcolm Roberts

40 The Respondent currently employs Mr Roberts as a production operator. He first commenced work with Midland Brick in 1994. He was initially engaged through a labour hire company. After about seven or eight months Graeme Marshall offered him permanent employment with the Respondent to work at *Brick Machine 4*. Prior to his moving to that area he had worked in another section of the Respondent's production plant. Whilst working within that other section he usually worked a ten-hour day punctuated by both a morning tea and lunch break. Upon being appointed to his permanent position the paymaster informed him that he would be working a twelve-hour shift from 7.00 am to 7.00 pm on day shift and 7.00 pm to 7.00 am on night shift. His immediate superiors were, at that time, Paul Moyle and Tim Tipping.

41 Mr Roberts testified that he was required to learn the necessary skills to enable him to operate each of the four areas within the section. He started off on the transfer cars and then moved to the setter. Thereafter he moved onto the brick machine followed by the *Claytex* machine.

42 Mr Roberts testified that there were about five different sorts of bricks manufactured in the Kilns 7 and 8 area. They included internal bricks, slim bricks for export, modular face bricks and pavers. He described the functions of each of the operators and the process involved in the manufacture of those bricks. He testified that all four operators were required to run the manufacturing process. He described the transfer cars operator's job as the easiest and the setter's job as the most difficult. He said trainees would usually start working in the transfer cars operation and then move through the various operations. Once fully trained the operators rotated between the four workstations.

43 Mr Roberts said that he continued to work at *Brick Machine 4* until 1998 when he went to Whiteman's in order to commission the new Kiln 10. During the period May 1996 to December 1997, and whilst he worked at *Brick Machine 4*, Craig Yerbury and David Green supervised him. Mr Roberts testified that his first job within that area was to operate the transfer cars. He did that for seven shifts over a fortnight before moving on. He said that he did not take breaks when he worked on the transfer cars. Indeed nobody stopped for breaks. Thereafter he trained as a setter operator. He described the setter as being complex to learn. Whilst working at the setter he never took a break because the machine needed to be monitored at all times. Consequently he had to eat at the machine. Mr Roberts testified that he initially queried the lack of a meal break with Mr

Moyle, his then supervisor, early on in his employment. However he did not address the issue again until about late 1995 when an Enterprise Bargaining Agreement (EBA) was then being considered. Mr Roberts said that given that the draft EBA provided for a half hour meal break to be taken after five and a half hours he took the opportunity to raise the issue of meal breaks with Mr Tipping. In that regard Mr Tipping is alleged to have told him—

"We pay you for 12 hours, you will work for 12 hours."

(Transcript page 18)

44 When Mr Roberts continued in his query Mr Tipping is alleged to have responded—

"We pay you for the meal break, you will work through the meal break. If you don't like it, you know where the gate is."

(Transcript page 18)

45 Thereafter Mr Roberts did not raise the issue again as he saw it as being a futile exercise.

46 Mr Roberts said that if he wanted to eat during the shift he would eat whilst close to the workstation. There was an urn, fridge and microwave near the setter to facilitate meal preparations. He said that even taking a toilet break was problematic, particularly when working on the brick machine. It was difficult to leave the machine unattended. Supervisors did not provide relief coverage. In essence, Mr Roberts testified that the operators did not have breaks. In that regard he denied that a *"flexible break system"* was in place. He said that the only time that a lunch break was sometimes taken was on a maintenance day when the plant was shut down for regular routine maintenance. On those days the fitters would work on the machinery and the operators were only expected to assist the fitters and to clean up. Maintenance days occurred twice per week with each shift experiencing a maintenance day each fortnight. Although there were no scheduled meal breaks on maintenance days, meal breaks could be slotted in. Even then the operators were challenged about taking a meal break.

47 Mr Roberts acknowledged that operators were paid production bonuses for the manufacture of an amount in excess of a targeted number of bricks measured in car lots produced each shift. In that regard he denied working through the lunch break in order to increase production so as to meet the criteria for bonus payments. He said that the failure to take meal breaks had nothing to do with productivity issues. He said that operators were expected to eat at their machines because management did not like turning the machines off. Turning the machines off led to delay and loss of production. The aim was to keep the machines running constantly each day of the year subject to routine maintenance shut downs.

48 When cross-examined Mr Roberts maintained that for each of the shifts worked during the relevant period he worked a twelve-hour shift without a break. He agreed that the requirement to work during the lunch break was not reduced to writing. Further he also agreed that a written complaint was never made about his inability and that of the other operators to take a lunch break. He maintained that he was verbally instructed by Mr Tipping not to take a lunch break. He said any denial of that by Mr Tipping would be a lie. He was particularly questioned about his recollection as to how and when Mr Tipping made his statement. In that regard he said that the statement was made after a meeting held in late 1995 to discuss an EBA. Mr Tipping made the comment to Mr Roberts in the presence of Mitchell Chopping. Mr Roberts said that he accepted the situation because he wanted to keep his job. He denied the suggestion that he fabricated evidence on the issue.

49 Mr Roberts conceded under cross-examination that the process with respect to commencement and cessation of a shift was informal. He agreed that there was no clocking on or off and, further, there was no formal recording of start and finish times. He also conceded that the manufacturing process was such that, at times, the plant was able to run without the need for human intervention. He maintained, however, that the machines had to be monitored at all times. He said it was not correct to say that operators had spare time on their hands that could be utilised for helping colleagues. They could only do that if they stopped monitoring their machines. In any event the setter machine operator could not, at any stage, leave his position, as the setter machine required constant manning. It was suggested to him that the operators could relieve each other in order to facilitate the taking of breaks however that was denied by Mr Roberts. He reiterated, "*We didn't take breaks*". He said the only form of break taken was a toilet break. He further denied that there was plenty of opportunity to take breaks from the machines. He said on occasions the supervisor might assist if an operator had to go to a medical appointment, for example, but not otherwise. The supervisors did not assist to facilitate the taking of meal breaks.

50 Mr Roberts was challenged on his evidence and it was put to him that his time was not continuously dedicated to his job. In that regard it was suggested to him that he had taken a television in to work so that he could watch the motorcycle racing. Although agreeing that he took a television in to work with him so that he could watch the motorcycle racing, he said that the reality was that he did not and could not sit down and watch the races. He only caught a glimpse of the races.

51 Mr Roberts testified that he always had his meal at the machines and that he never was able to eat his meal in the lunchroom. He did, however, concede that it was possible to leave the work premises in order to obtain meals. That was most often done on night shifts. Meals were sometimes obtained from Alfred's Kitchen in Guildford. He also agreed that barbecues were sometimes held on Sunday shifts. In that regard he said that the food was cooked up by employees on other shifts and then taken to the operators at their workstations, who proceeded to eat their meals at their stations. He denied eating away from the workstation.

52 Another line of cross-examination related to the issue of the need to have a full complement of four operators to run *Brick Machine 4.* In that regard Mr Roberts conceded that a shift might well from time to time be short of operators on account of annual leave, sick leave or absences on workers compensation. He agreed that on occasions three rather than four operators manned the machines. That, he agreed, could go on for several days or even longer. He agreed that when internal bricks were being produced, three operators could easily maintain production. He said however that that could not be achieved when "*Florentine Limestone*" bricks were in production.

53 Mr Roberts was also questioned about maintenance days. In that regard he conceded that the plant would typically shut down for five to six hours whilst maintenance was carried out. He agreed that each operator would assist the fitter, clean up and/or assist others. After the clean up had finished a meal break would be taken. In those circumstances an hour-long lunch break would be taken.

54 Finally it was put to Mr Roberts that the alleged conversation with Mr Moyle which occurred in March or April of 1995 when he was told that he had to man the machine at all times and eat at the machine did not occur. His response was that it did.

55 In re-examination Mr Roberts reaffirmed that he and the operators were unable to take breaks—

"... Because we had to continuously monitor the process. There was some instances when things weren't going very well that you never even got to eat your lunch at your machine, and sometimes you took it home after your 12 hour break, unopened, you never had a chance to eat it. The pressure was always on for tonnage, that was the catch cry of the place. Tonnage, tonnage, tonnage".

(Transcript page 121)

David Grant Green

56 The Respondent formerly employed Mr Green for a period of about eighteen and a half years commencing in 1984. In about 1987 or 1988 he started working at *Brick Machine 4* after having worked in various other areas of the Respondent's operation. Whilst at *Brick Machine 4* he performed the duties of a brick machine operator, setter operator, *Claytex* operator and transfer cars operator. He remained within that section for about five years before moving to the kilns area. He then went backwards and forwards between the kilns and *Brick Machine 4*, often in a relieving capacity. In 1996 he started supervising in a relief capacity. He continued in that role for a little over two years. In 1998, as a result of restructuring, he became a "*packaging supervisor*" covering all areas of Midland Brick and Whiteman's Kiln 10 area. For a period of about six months he had the dual roles of packaging and production supervisor. He, at various times, supervised each of the Claimants and indeed was a relief shift supervisor during part of the material period.

57 Mr Green testified that Colin Roberts, Mitchell Chopping and Paul McGlinn and one other worked as the Shift 1 team. Mr Harrison was a member of the Shift 2 team. He described the functions of each operator. Thereafter he was taken to address the issue of whether any breaks were taken by the operators working under his supervision. In that regard he was asked—

"Did you direct employees on when to take breaks? --- No.

And why not? --- Because just we work 12 hours and we did 12 hours. There's --- no one ever had a break."

(Transcript page 235)

58 He said that by the term "break", he meant break away from the machine. He went on to say that no one took breaks—

"… Because to keep the machine running; it was just the way life was; you keep that machine running, no ifs no buts no maybes."

(Transcript page 236)

59 Mr Green testified that any delay, which caused the kiln to shut down, would result in a "*mega dollar*" problem. Accordingly the emphasis was one of ensuring a continuous process that never resulted in kiln shut down. As a consequence no one ever had a smoko break. Mr Tipping, who was his immediate superior, was simply concerned at keeping the machines going. There was never any discussion about breaks. They did not have breaks because that was "*just the way life was*" (Transcript page 236). He said although in theory a flexible break system was in operation, the available manpower did not permit its operation.

60 He further testified also that although it was preferable to have four operators running *Brick Machine 4*, it was possible for it to be done with only three operators. In those circumstances the operators would "*run around like chooks with their heads cut off to cover up the extra gap*" (Transcript page 237).

61 Mr Green acknowledged in his evidence in chief that production incentives were in place and received by operators, however, he denied that they worked through their breaks in order to achieve those production bonuses. He said, in that regard, that there were no breaks to work through. The only conceivable breaks taken were toilet breaks. When he was supervising he had occasion to cover for operators if they needed to go to the toilet, but that was about it.

62 With respect to the issue of taking breaks on maintenance days, Mr Green testified that only occasionally could that be done. Generally the operators were required to clean up and take part in consultative meetings in the smoko hut during which various issues were discussed including matters appertaining to safety.

63 When cross-examined, Mr Green conceded that during the material period he was competing with Mr Yerbury for the position of Shift 1 supervisor. Each had a six-month stint in that position and was attempting to impress Mr Tipping that he was the right man for the job. As it turned out Mr Yerbury was successful. Mr Green agreed that the result was a source of great disappointment for him as he saw himself as the better man for the job. Apart from that disappointment he also suffered further disappointment in May of 2001 when he was demoted two levels from the position of "*production packaging supervisor*" to machine operator. That was done for disciplinary reasons. Consequently Mr Green took legal action against the Respondent, which was eventually settled by the parties.

64 Mr Green was next cross-examined about his knowledge of the "*flexible break system*". In that regard he reaffirmed its existence but said he could not recall speaking to anyone else about it. He only assumed that others had knowledge of it.

65 Mr Green was next taken to consider the role of each operator. More particularly he made comment concerning the amount of time that each operator needed to man his station. He dealt firstly with the extruder operator. He said that the extruder machine had to be kept under observation for the whole of the twelve-hour shift. In that regard, he refuted the contention put to him that he was lying. Secondly with respect to the *Claytex* operation, he proffered the view that that was the busiest job in the process and that similarly it was necessary for the operator to man the machine for the full twelve hours. Thirdly he pointed out that the setter operator also needed to keep his machine under constant observation, as was the case also with the transfer cars operator. Consequently no one had breaks. Only very short interludes were taken in order to go to the toilet and make coffee but that was about it. He also reaffirmed that there was not even the opportunity to take breaks on maintenance days. Notwithstanding that, he conceded that there were times when the machines operated without human intervention and they could, and did, operate without them being monitored. Mr Green denied that the reason why he did not direct the operators to take a meal break was because that there was no need, particularly given that they had plenty of time within which to take breaks.

66 Mr Green was questioned whether any reduction in the number of operators from four to three had an impact on production. In that regard he said that it inevitably did. He denied its impact was dependant upon the type of bricks then in production.

67 Finally Mr Green refuted the proposition that he has tailored his evidence against the interests of the Respondent because he has an "*axe to grind*".

Paul Anthony McGlinn

68 Mr McGlinn is thirty-one years of age and is currently employed by the Respondent as a machine operator. He commenced in that role in 1994. Prior to that he worked as a de-hacker for a year and previous to that as a brick packer. Whilst working as a packer he was able to take meal breaks.

69 Mr McGlinn testified that when he was undergoing his induction for the de-hacker job at Kilns 7 and 8 he enquired about his lunch break. He said that his then supervisor, Mr Jim Heaton, informed him—

"*We don't get a smoko room break down here. If there's cars on the line, we don't stop*".

(Transcript page 132)

70 He also queried the situation with his leading hand, David Moon, who confirmed that the workers in that section did not receive meal breaks.

71 After a year of working as a de-hacker he moved on to be a machine operator. He was initially trained as a transfer cars operator and thereafter as a setter operator. Mr Yerbury trained him. When Mr McGlinn asked him about "smoko", Mr Yerbury is alleged to have responded—

"*We don't shut down for smoko here*".

(Transcript page 133)

72 Mr McGlinn subsequently went on to be trained in the operation of the *Claytex* machine and brick machine.

73 Mr McGlinn testified that he never took a break when operating the various machines forming *Brick Machine 4*. He said it was virtually impossible to take a break given all of the duties he had to perform. All of the operations required constant monitoring. He contended that it was a fallacy to suggest that there were sufficient operators to enable breaks to be taken. If breaks were taken there would be an inevitable reduction in production, which was not acceptable to management who constantly hounded them about keeping up production. He said that it was not until 2002 that he was informed that he was to have a smoko break even if it resulted in reduced production.

74 He went on to describe in some detail, the various duties of each operator. It was his evidence that the minimum manning requirement for the operation of *Brick Machine 4* is four. If someone were off sick or away for some other reason, an attempt would be made to find a replacement operator however if that could not be achieved, the process would still continue but that would inevitably result in a slowdown in production.

75 Mr McGlinn testified however that he was able to take meal breaks on days that routine maintenance took place. It was his evidence that when Mr Yerbury was supervising he made sure that meal breaks were taken on maintenance days.

76 When cross-examined Mr McGlinn conceded that Mr Moon's position could have been not that he could not take a meal break but rather that the meal breaks varied and could not be taken at set times.

77 Further Mr McGlinn conceded under cross-examination that it was not always the case that working with one less operator would necessarily affect production. He said that production was very much dependant upon the skill level of the operators and the type of brick then in production. He agreed that in many instances the process and output could continue normally even if the complement of operators were one short. However later in cross-examination he clarified his position on the issue by saying that although production in such circumstances could be maintained it could not be done with safety.

78 Mr McGlinn denied being relieved by Mr Yerbury so that he could take breaks. He did, however, concede that other operators relieved him so that he could go to the toilet.

79 Mr McGlinn was questioned about the need to constantly remain at *Brick Machine 4*. In that regard he conceded that there were occasions when one of the crew would leave the site and obtain meals and bring them back. He said that in those instances meals would be picked up from Alfred's Kitchen or other places. He agreed that he was one of the persons who would on occasions leave the site to do that. He said that in order to do that he would stock up the machine with sufficient materials in order to allow him to go. That would usually see him through. He was unaware if his colleagues attended to his machine or not during his absence. He also agreed that the machines could be left to run on their own thereby giving opportunities for operators to leave the machines to do something else. He also agreed it was not accurate to say that the workstations required constant monitoring by their respective operators. Indeed he agreed that in certain circumstances an operator could be away from his station for between forty and sixty minutes. There were also periods when there was nothing to do at the machines. Although conceding that he had time to take a break he said that he never took a meal break. Mr McGlinn also conceded that it was possible to take a break outside the Kilns 7 and 8 building and indeed completely off site provided that he informed his supervisor of his whereabouts.

80 Mr McGlinn denied that he attended barbecues during the Sunday shift saying that the cooked food was taken to his workstation.

81 It was put to Mr McGlinn that Mr Roberts brought in a television set so that he could watch the motorcycle races. In that regard he could recall the television set being brought in but could not recall what Mr Roberts watched. He agreed that on occasions he read a novel, listened to the radio and engaged in chat with his colleagues.

82 Finally Mr McGlinn confirmed that he has a similar claim to that of the Claimants on foot in this jurisdiction.

Mitchell Ian Chopping

83 Mr Chopping is aged forty years and is currently employed by the Respondent as an acting team leader. He commenced working with the Respondent on 27 April 1989. He started as stick machine operator and thereafter in about February 1994 moved to *Brick Machine 4*. He continues to work in that area. When he first went to *Brick Machine 4* he used to work an eight-hour shift but later that changed to a twelve-hour shift.

84 Mr Chopping said that *Brick Machine 4* operates twenty-four hours per day every day of the year. He described the function of each station and the duties of each operator. He said that as a consequence of the requirements placed on operators there was no opportunity for breaks to be taken. When he first started working in the de-hacker area within Kilns 7 and 8, which was prior to his move to *Brick Machine 4*, he was informed that no one got breaks. Consequently he did not take breaks. That entrenched view that no one took breaks followed him to the adjoining *Brick Machine 4*. Mr Yerbury, who trained Mr Chopping, did not take breaks and accordingly Mr Chopping proceeded on the basis that breaks were not taken. Indeed Mr Chopping's view was so firmly held that when he instructed others in the job he advised them that meal breaks were not to be taken because they were not allowed.

85 Mr Chopping was next taken to describe what occurred on maintenance days. It suffices to say in that regard that although he agreed that a lunch break could be taken on those days, he nevertheless said the operator's ability to take a break was always subject to his routine duties having priority. Often he would have to leave his lunch break so that he could attend to his duties.

86 Mr Chopping was next taken to testify about an incident involving Mr Tipping in about April or May 1996 when Mr Chopping had cause to complain to him about the unrelenting nature of the job. The unrelenting pressure of work resulted from a staff shortage, which was consequential to the unexpected accidental off-site death of a work colleague. He said that Mr Tipping told him in that regard—

"It's a 12-hour day. You get paid for 12 hours. Just do your job."

(Transcript page 184)

87 Mr Chopping testified that he complained on several occasions about his inability to take breaks. He said that if he wanted to eat he would simply eat his meal at the machines. If he wanted to go to the toilet he might leave his machine temporarily but if working on the setter machine and he was busy and there was no one else to help him out he would just go around the corner and "*have a leak*". Mr Chopping said that he has never heard of a flexible break system.

88 Mr Chopping testified that it was not until June 2002 that Mr Marshall instructed him that he should take a meal break.

89 When cross-examined Mr Chopping was complimentary in his description of his supervisor, Mr Yerbury. He said that Mr Yerbury was a meticulous person who was not so much concerned with the quantity of output but rather the quality of it. He was also concerned with safety issues and stuck up for the guys on the shift even if that made him unpopular with management. Having said that he implied that Mr Yerbury would nevertheless tailor his evidence in order to achieve an outcome which best suited his own position with the Respondent.

90 Mr Chopping made it clear under cross-examination that it was not the case that operators had considerable free time. He reaffirmed that each operator's job entailed constant monitoring and involvement. He reaffirmed also that meal breaks were not taken and that he had never taken a break except to go to the toilet. He was never relieved on the machines except for the purpose of taking toilet breaks. Notwithstanding that he agreed that there were times when the operators went off site to buy food. All that was required in that regard was that the supervisor be advised at the time of leaving and return. It was also conceded by him that there were times when *Brick Machine 4* was only manned by three operators rather than four.

91 Mr Chopping was also asked whether Mr Roberts ever brought a television set into work. He said that he had.

92 With respect to the barbecues, which were held on the Sunday shifts Mr Chopping said that Fred, the fitter, would cook the meat, which would then be taken back to the operators. It was his evidence that no operator other than the transfer cars operator had the opportunity to stand near the barbeque whilst the meat was cooked. Even the transfer cars operator's opportunity was limited. He denied that he himself would stand around watching the meat being cooked.

93 Mr Chopping was cross-examined about the meeting between Mr Moyle and himself during which the issue of taking breaks was discussed. In that regard Mr Chopping readily conceded that he could not recall the date of the meeting. He agreed that he did not take any notes. He also agreed that he cannot now recall the exact words used. Further he agreed with Counsel that Mr Moyle and Mr Tipping may well have been pointing out that the operators did not get fixed breaks at fixed times except where the machines stop for routine maintenance.

94 The cross-examination of Mr Chopping revealed him to be quite argumentative.

Darrell Vincent Harrison

95 The Respondent currently employs Mr Harrison who is forty-two years of age. He works on the Respondent's *Brick Machine 4* as machine operator. He secured permanent employment with the Respondent in 1995 after having worked for the Respondent as a contractor engaged by Skilled Engineering.

96 Mr Harrison testified that he is competent in operating each of the four machines, which comprise *Brick Machine 4*. He currently works as a team member of Shift 4. He is a past member of the Shift 2 team. The move from one team to the other has been non-consequential in that his work has always remained the same. It has simply meant that he has worked with different personnel.

97 Mr Harrison testified that no one had a break from his station. Meals were always eaten at the workstation. Sometimes even the act of eating of a meal would be interrupted by the requirement to immediately attend to duties. It was his evidence that each of the machines needed to be constantly monitored. They could never remain unattended.

98 He testified that it was not until June 2002 that he heard Graham Marshall, his production manager, tell Mr Chopping—

"As of now you must have a half an hour meal break".

(Transcript page 258)

99 When cross-examined Mr Harrison agreed that the *Brick Machine 4* operation could run with a crew of three rather than four. He said that the diminution of available crewmembers might result in lower production but that was not always the case. The determinative factor was the type of brick in production.

100 Mr Harrison conceded that during the material period operators would relieve each other for the purpose of going to the toilet and other reasons. He agreed that on one occasion he left his workstation to go to the front gate to collect a pizza.

101 He said that no one on his shift ever left the premises in order to go and collect food off-site without first obtaining the supervisor's approval. However operators did go off-site for that purpose with the supervisor's approval.

102 Mr Harrison admitted that when things were running well there was ample time for him to leave his workstation to make a cup of tea or coffee or have a chat. He maintained, however, that he never took meal breaks except on maintenance days.

Rodney Patrick Eric Reynolds

103 Mr Reynolds is a wage claims officer employed by the Construction, Forestry, Mining and Energy Union of Workers and was responsible for the preparation of the underpayment schedules with respect to each Claimant's claim. He testified as to his methodology in calculating the claims by reference to clause 9(2) of the Award.

104 Mr Reynolds conceded in his evidence in chief that he failed, in his calculations, to make allowance for the fact that the Claimants had meals on maintenance days. He said that he was not aware at the time of making his calculations that meal breaks were taken on maintenance days.

105 When cross-examined Mr Reynolds admitted that his calculations contain certain errors such as claims for payment of penalty rates for periods when the Claimants were away for various reasons including holidays.

Craig James Yerbury

106 Mr Yerbury is and was at all material times an employee of the Respondent. He has been an employee of the Respondent for a total period of about eleven and a half years. He commenced his employment with the Respondent as a *Claytex* operator within the *Brick Machine 4* operation and worked in the capacity of an operator for about eighteen months prior to leaving the Respondent's employment to work for another employer. He worked for the other employer for about four years before returning to the Respondent on 12 March 1993. At that time he regained the position of machine operator at *Brick Machine 4*. He subsequently worked in each of *Brick Machine 4's* sections namely, extruder, *Claytex* and setter machines as well as the transfer cars. He was eventually promoted to the position of relief shift supervisor in 1995. At that time he became responsible for *Brick Machine 4*, which also encompassed Kilns 7 and 8 including the de-hacker 1 and 2 areas. Mr Yerbury explained that the de-hackers role is to unload the fired bricks at the packaging end and make them into packs of relevant size products. In 1997 he was offered the position of full time shift supervisor. Mr Yerbury remained a shift supervisor until February of 1999 at which time a restructure took place with the result being that there were four brick machine supervisors appointed to supervise the site including all brick machine and packaging areas. There is no need to discuss Mr Yerbury's evidence concerning his new role.

107 Mr Yerbury testified that whilst working as a supervisor he necessarily was always in contact with and around operators. He consulted with them as to who operated the various machines and from time to time when required also relieved them. He said that schedulers predetermined the operators' daily tasks. They worked in accordance with a schedule which was prepared having regard to a number of considerations including stock levels, demand, forecast trends and the like. He said that the

highest demand was for an internal utility brick called the "Maxi brick". He also testified that in order to maintain continuity it was essential that the plant ran smoothly thereby enabling compliance with the scheduling program. In that regard records were kept of both production levels and down time so that the schedulers could accurately monitor production.

108 During the relevant period between May 1996 and 30 April 1997 Mr Yerbury was the supervisor of the Shift 1 team. For part of that period he shared that role with David Green. He supervised the crew for about twelve months of that period with Mr Green supervising the rest. He said that during the relevant period the mainstays of the Shift 1 team were Colin Roberts, Mitchell Chopping and Paul McGlinn. Others came and went as the fourth party of the team. They were only part of the entire shift crew for Kilns 7 and 8. The total compliment was eleven comprising the four operators on *Brick Machine 4*, a tunnel kiln operator, a kiln car decker, four de-hacker operators and a forklift operator.

109 Within the *Brick Machine 4* operation the operators rotated from station to station except when training was taking place, in which case the operator would remain at a particular station until fully trained. Mr Yerbury went on to describe the function of each section and the operator controlling it. He said that the extruder machine did not need to be continuously manned. Indeed it could be left unmanned for periods ranging between half an hour and one and a half hours. Although the machine needed to be monitored, it did not require constant monitoring. Monitoring was essential only when new augers or lining were in place or, alternatively, when they had become worn. It was possible to monitor the extruder operation from the setter panel, which had remote control capabilities. Further the brick machine operator would often keep an eye on the *Claytex* area whilst the *Claytex* operator was doing other things. Similarly the *Claytex* operator was not required to be constantly monitoring his machine. Once the process had begun and was functioning properly he could leave his area to assist in cleaning up under the brick machine, assisting the kiln car decker or the transfer cars operator. He could also relieve the extruder operator if needed. The *Claytex* operator was in the best position to assist others because quite often additives were not required in the particular manufacturing process, thereby significantly reducing the *Claytex* operator's involvement. He also described the other operators' functions. His comprehensive review of each operator's functions need not be recited. It suffices to say that his evidence suggests that operators were not constantly required at their workstations and that they were in a position to be relieved for the purpose of taking a break. He testified that he was in a position to relieve and did, in fact, relieve machine operators. In that regard he said that the operators took breaks when they wanted. The arrangement for the taking of breaks was informal. Breaks were permitted at any time and there was no restriction on the taking of breaks.

110 Whilst Mr Yerbury supervised the Shift 1 team he saw Mr Roberts and Mr Chopping taking breaks. He recalled seeing each of them in the smoko room. He recalls eating with Mr Chopping. He recalls seeing Mr Roberts heating up his meal in the smoko room. Mr Yerbury also confirmed that on occasions operators left the site to go and pick up food. It was usually Mr McGlinn who did that. He estimated that Mr McGlinn would leave the site at least four times a month. Alternatively the shift fitter, Fred Elsasser, would be sent. Sometimes two or three operators would sit around the setter machine and have their meals together to keep the setter operator company. They did not work whilst having their meals.

111 With respect to the Sunday barbecues Mr Yerbury agreed that more often than not it would be Fred Elsasser who would cook. However on occasions Mitchell Chopping or Paul McGlinn would do the cooking. Mr Roberts was never seen cooking. Often the operators, with the exception of the setter operator, would just stand around the barbecue watching the meat being cooked and thereafter eat the same. He said that they would gather around the barbecue about fifty per cent of the time. Mr Yerbury testified that the operators would usually remain around the barbecue for about half an hour. The setter operator would always be looked after and relieved so that he could have a meal. Someone would usually take a meal back up to the setter operator and on occasions they would have their meals together. The operators would return to their workstations at their own leisure having regard to their own particular situation.

112 Mr Yerbury said that he never received any complaints about operators being unable to take a meal break, but conceded that on rare occasions, because of the production circumstances, the operators would not have been able to take a break. That occurred when there was a break down or when troubleshooting was required. On maintenance days operators were permitted to take an extended break. On occasions they took breaks of between forty-five minutes to an hour. Mr Yerbury said that on occasions he found Mr McGlinn to be asleep in the lunchroom when it was time to restart after the maintenance break. After lunch, toolbox meetings would be held in order to discuss issues of concern. There was never any mention at those meetings that there was a concern about the operators' inability to take breaks. Mr Yerbury testified that he was not aware of any communication, whether verbal or written, which in effect required that operators not take meal breaks. He said that meal breaks could be taken. Indeed *Brick Machine 4* could operate with a crew of three or even two. In fact there were occasions when all four stations were run single-handedly for periods of up to two hours.

113 Mr Yerbury was asked whether he recalled saying to Mr McGlinn; *"We don't shut down for smoko here"* to which he replied,*" No."* (Transcript page 442) He conceded, however, that he might have said that to him in another context when he may have said,

> *"Because the machines aren't shut down for smoko. We take a flexible break system."*
>
> (Transcript page 443)

114 Mr Yerbury, in reference to documentary evidence, confirmed that the operation often continued with a complement of crew of less than four. Operators would not be replaced when one would go on annual leave or otherwise was away for other reasons.

115 Mr Yerbury described his relationship with Mr Roberts and Mr Chopping as good. On the occasions that he had the duty of supervising Mr Harrison he experienced no problems at all.

116 When cross-examined Mr Yerbury reaffirmed that it was possible for *Brick Machine 4* to run with one operator for a period of up to two and a half hours. He also agreed under cross-examination that the "*flexible break system*" was not at all publicised by the Respondent. He also accepted that the "*flexible break system"* was not known as such.

117 Mr Yerbury reaffirmed under cross-examination that he saw each of Mr Roberts and Mr Chopping taking meal breaks. He could not, however, recall the length of their breaks or whether their entire break was taken within the smoko room. He also agreed that he saw operators eating at their workstations. Mr Yerbury said that the evidence of Mr Green, Mr Roberts, Mr Chopping and Mr McGlinn that they were not able to take meal breaks is simply not true. Indeed he said that he took breaks with them.

118 The cross-examination of Mr Yerbury resulted in the reaffirmation of the evidence that he gave in chief. He was not shaken at all in the process.

Olivier Francois Girardin

119 Mr Girardin is currently based in Brisbane and is employed by Boral Ltd being the Respondent's parent company. He worked for the Respondent between 1981 and 2001. His first job with the Respondent was that of a setter operator within *Brick Machine 4*. In 1986 Mr Girardin was promoted to the position of Plant Manager, which made him responsible for all

production areas within the Respondent's operation. Much of his work in that regard entailed walking around the plant, meeting and talking with the workers and supervisors. All of his direct subordinates from the various kiln areas reported to him. They included Tim Tipping who was the manager of the Kilns 7 and 8 complex. Mr Girardin in turn reported directly to the Operations Manager, Vincent Scarvaci.

120 Mr Girardin explained that the twelve-hour shift was introduced in early 1990. He said that it proved to be very popular because it had a number of advantages for both the workers and the Respondent. Mr Girardin testified that operators were during their shifts able to leave their workstations for the purpose of taking breaks, including meal breaks. He said that the flexible meal break system was always in operation and had been in operation at the time that he started working for the Respondent in 1981. It continued to operate so as to enable operators to take breaks when convenient having regard to the continuous production process. The process required the machines to operate continuously except for when they were turned off during routine maintenance periods.

121 Mr Girardin testified that if an operator wanted a break and there was a need for his machine to be attended that he would call upon one of his colleagues, the fitter or the supervisor to cover for him. He could otherwise leave the machine unattended. He could do that when he wanted and did not need the shift supervisor's permission to do so. He said that it was not the case that the machinery had to be continuously manned. In fact the significant changes made to the machinery in 1996/1997 made the whole process less labour intensive. He said the more experienced the operator, the greater the likelihood that the operator was on top of his job, allowing for the process to continue without interruption and enabling a greater amount of time that could be utilised for other purposes, including meal breaks. That was the situation across each of the four operations within *Brick Machine 4*. Mr Girardin also told the Court that the process could be managed by a complement of three operators, and even two for short periods. In one or two instances he ran the plant single-handedly for periods of up to half an hour. He conceded, however, that that situation was not typical.

122 Mr Girardin said that he was not aware, until relatively recently, of complaints by operators concerning their inability to take meal breaks. He said that there had been ample opportunity to complain. There were regular occupational health and safety meetings during which such issues could have been brought up but it was never raised. He said he received no complaints from Mr Roberts about meal breaks notwithstanding that he had received complaints from him about other issues. Similarly Mr Chopping also did not complain about not being able to take meal breaks. That was so notwithstanding that they had a particularly good relationship and it would have been quite easy for Mr Chopping to speak to him about the matter. The same was the case with Mr Harrison.

123 Mr Girardin said that he did not see any instruction issued by anyone else nor did he issue any instruction or policy that forbade the taking of meal breaks. He was not aware of any express direction given by Mr Tipping or others that the operators should work through their meal breaks.

124 Mr Girardin said that given that the Respondent paid for the meal breaks he would not have expected that the meal break in each instance would be any longer than thirty minutes. However there was no strict policing of the length of meal breaks taken. He agreed that the process was informal and there was no method of recording the start and finish times of meal breaks taken.

125 When re-examined Mr Girardin reaffirmed that the Respondent was not so much concerned with how and when the operators took meal breaks but rather to ensure that the whole process continued without disruption.

Mark Stephen Radford

126 The Respondent employs Mr Radford as its "*payroll specialist*". The payroll records relating to Mr Roberts, Mr Chopping and Mr Harrison were introduced into evidence through Mr Radford.

127 Mr Radford's evidence disclosed that each Claimant had, during the material period, as part of their pay, received payment of overtime, which comprised a component of their pay for working a twelve-hour shift. Indeed they were paid a total of 1.14 hours at double time. It became evident therefore, given Mr Radford's evidence, that the Claimants are claiming penalty rates for periods for which they have already received penalty rates. Other discrepancies highlighted by Mr Radford's evidence include the fact that part of the claims are for penalty rates for periods when the Claimants were on annual leave, sick leave or workers compensation.

128 I do not otherwise propose to recite Mr Radford's evidence. The cross-examination of Mr Radford was uneventful.

Steven Jay Stribley

129 The Respondent employs Mr Stribley as a shift supervisor. He has held that position since 1997. He has been an employee of the Respondent since 1987. Mr Stribley initially started working in the Respondent's yard as a labourer and then moved on to brick making. He worked as a de-hacker for four to five years within the Kilns 7 and 8 complex prior to moving to work as a machine operator on *Brick Machine 4*. In 1996/1997 he became a shift supervisor.

130 During the material period Mr Stribley supervised Shift 4. He said that his shift was the most productive of all the shifts. He said that Shifts 1 and 3 were the least productive. He testified that the way in which operators carry out their work has changed little from the material times to the present. Each of Mr Roberts, Mr Chopping and Mr Harrison, together with Andrew Potter, have all come under his supervision as part of the Shift 4 team. That of course has occurred subsequent to the material period.

131 Mr Stribley testified that all the Shift 4 operators took breaks. He said in that regard that they took breaks; *"For coffees, for meal breaks, for anything.* (Transcript page 607)

132 He said by "anything" he meant; *"Going down the shop … (t)o get smokes, to get some lunch."* (Transcript page 608)

133 Mr Stribley went on describe each operator's ability to take a break in light of his duties. In that regard he said that if an extruder operator wanted a meal break either the transfer cars operator or the *Claytex* operator could quite easily relieve him. Indeed there were occasions when he did not need a relief. He said that the extruder machine did not need to be manned for the whole twelve hours because once the machine had been set up it could be left unattended for an hour to an hour and a half. He said that operators would leave the extruder unattended to have a meal break. Whilst the extruder operator was absent the setter operator and/or the *Claytex* operator would keep an eye on his machine.

134 Similarly the *Claytex* operator was not required to monitor the *Claytex* machine for the entire twelve hours. That was the case even when the most difficult bricks to produce were being manufactured. He said that the *Claytex* operator's work could be structured so as to facilitate the taking of a meal break. In such circumstances, if the operator wanted a meal break he would simply tell the extruder operator that he would be going to have a meal break. He said the only time that the *Claytex* operator could not leave his machine unattended was when "*Restoration Reds*" or "*Florentine Limestone Bricks*" were being produced in which case a relief was usually organised.

135 Mr Stribley testified that the setter machine needed to be manned for the full twelve hours of the shift. The setter operator would however be relieved by another team member so that he could take his meal break. Who relieved him was very much

dependant upon the type of brick then in production and of course the particular circumstances then prevailing. Similarly the transfer cars operator would also be relieved so that he could have his meal.

136 Mr Stribley testified that there was slack built into the operation to facilitate the taking of meal breaks, annual leave, sick leave and other absences. He said that the transfer cars operator had so much time on his hands that he would often sit and talk with the setter operator or alternatively play cards or yahtzee with him. He said that such activities did not interfere with the operator's ability to man the setter. In such circumstances the setter operator was still able to control the process and oversee the operation. The machine continued to run and at those times no human intervention was required.

137 Mr Stribley testified that meal breaks were usually taken for half an hour except in the case of maintenance days when they would be of an hour's duration. He said that it was entirely up to the individual operator to decide when to take a meal break. There were no hard and fast rules as to how, where and when the meal breaks were taken. The flexible break arrangement did not have a particular label. Employees were told—

"You can have it when you want it".

(Transcript page 619)

138 Mr Stribley also testified that during induction new employees were informed about the flexible meal breaks. They would be told—

"...there's no set times there; you can have it whenever you feel hungry, to have your lunch."

(Transcript page 616)

139 Mr Stribley further testified that he worked alongside David Green as a shift supervisor. He said Mr Green took breaks when working as a shift supervisor. He said that he recalled Mr Green going off-site to the shop to get his lunch. On those occasions he would eat his meal down at the park across the road from the Respondent's plant. He recalled a particular incident when Mr Green went to the park to have his lunch and had accidentally reversed his "*Ute*" into a tree.

140 Mr Stribley testified that the full complement of operators were only necessary at critical times during production such as times when "specials" that could not be inverted needed to be turned over and also at times when there was a product change.

141 He also went on to testify that he never heard any complaints about an inability to take lunch breaks. He said that operators had ample opportunity to raise complaints of that nature during safety meetings. He said Mr Roberts, Mr Harrison and Mr Chopping never made complaints to him about not being able to take lunch breaks during the period that he supervised them.

142 Finally, Mr Stribley informed the Court that he could not recall the argument alleged to have occurred on 8 June 2002 to which Mr Chopping referred in his evidence.

143 When cross-examined Mr Stribley agreed that his evidence was almost entirely based on his experience with the Shift 4 team. He agreed that he was unable to comment about what happened on other shifts during the material period. He said that at the material times he was answerable to Tim Tipping who oversaw the area. However Mr Tipping did not usually work on weekends or at night and would only be available on weekends or public holidays if he was rostered as the duty manager. That occurred about once every second month. Accordingly Mr Tipping's ability to monitor what was happening on the shifts was somewhat limited.

144 Mr Stribley confirmed under cross-examination that he did not instruct the operators as to when to take their breaks. He said that the decision as to when to take their breaks was made by the operators entirely at their own discretion. It was pointed out to Mr Stribley that on occasions operators did work through breaks. He agreed and surmised that that was because they otherwise had plenty of breaks during their shifts.

145 Mr Stribley also reaffirmed that the setter machine could not be left unattended for more then ten to fifteen minutes at the most. He said that any suggestion that the setter machine could not be left unattended at all was simply not true.

146 Mr Stribley was also asked about whether the operators ever had their meals together in the smoko room. He said in that regard that when the machines were not running due to break down or maintenance three or four operators would join together. Whilst the machines were running two operators, sometimes three would have their meals together in the smoko room. He reaffirmed that in some circumstances one operator could be left alone to run the whole process but for no more than a couple of hours at a time. He conceded however that that did not happen very often. He also agreed that the best safe practice would usually require two operators to be working at the same time.

147 Mr Stribley reaffirmed under cross-examination that the operators on Shift 4 had breaks whenever they wanted and that they all knew that was the case. He said that the operators on his shift had quite a few breaks during each shift. Those breaks were usually for a half an hour or more.

Graeme Walter Marshall

148 Mr Marshall is the Respondent's Production Manager. The Respondent has in various capacities employed him since 1985. He is currently responsible for overseeing all green brick manufacturing including scheduling, planning, making and firing of the product. At the material times he was Production Manager of Kilns 1 to 6. In that capacity he had the responsibility to prepare and crush clay for all brick machines on site including *Brick Machine 4*.

149 He testified that Mr Harrison formerly worked in the areas for which he had responsibility but transferred to Kilns 7 and 8 on 28 April 1997.

150 Mr Marshall testified that he had knowledge of the "*flexible meal break system*" which enabled the "*guys (to) ... sort out amongst themselves when and how they would take their meal breaks*" (Transcript page 657).

151 Mr Marshall next went to describe the manufacturing process employed on *Brick Machines 1 and 2*. He also addressed issues concerning breaks taken by operators who worked at those machines. That evidence does not particularly assist in my consideration of the matter and accordingly I will not review it. It suffices to say in that regard that Mr Marshall's experience in other areas of the Respondent's plant is of little relevance in this matter.

152 Mr Marshall was next taken to give evidence about the meeting that occurred on 27 June 2002 in which he told all present that they should take meal breaks. He said that that was said in the context of his being aware of these and other claims against the Respondent. He raised the issue because he never wanted it to be said that he expected people to work through a meal break. He said in that regard—

" *... And I just wanted it documented, and these people told that if they could not organise a flexible meal break, with the permission of their supervisor they had my permission to shut the machine down.*"

(Transcript page 669)

153 He said that when he first heard about these and similar claims he went into a state of "*disbelief*". Asked why, he said—

"*It never entered my mind that anybody working a 12 hour shift, for whatever reason, would not have a meal break.*"

(Transcript page 670)

154 Prior to the claims being made he had never heard anyone complain about not having their meal breaks.

155 When cross-examined Mr Marshall confirmed that he had no knowledge of what happened at *Brick Machine 4* during the relevant period. As to his edict in June 2002 he said he wanted the operators to understand that he did not expect them to run the machines without meal breaks.

Vincenzo Scarvaci

156 Mr Scarvaci is currently employed by BGC Australia as General Manager of Block Pave and Clay Brick Operations. His employer is a competitor of the Respondent. The Respondent formerly employed Mr Scarvaci for a period of about twenty-three years from November 1978 until 19 August 2002. He started off in the laboratory as a chemist and eventually was promoted to the position of Operations Manager. He was the Operations Manager during the material period. He was responsible for all aspects of production including budgets, expenditure, safety and industrial relations. Mr Girardin, Mr Tipping, Mr Marshall and other managers all reported to him. Apart from the production managers, engineering and purchasing managers also reported to him. In essence he had ultimate responsibility.

157 Mr Scarvaci said that he was initially opposed to the introduction of the twelve-hour roster because he was concerned that it may be too demanding upon the employees. However following a trial of the roster he agreed to its implementation upon being assured that it did not place any unnecessary strain upon the Respondent's employees. He said that the introduction of the twelve-hour shift brought no tangible benefits for the company but brought certain advantages for employees.

158 Mr Scarvaci testified that breaks taken during the twelve-hour shifts were paid breaks. Employees were paid for the entire period that they were at work. He said that it was left to the employees to sort it out amongst themselves as to when breaks were taken. He would have expected at least three major breaks to be taken during a twelve-hour shift with the first comprising ten minutes, the second twenty minutes, and the third fifteen minutes.

159 Mr Scarvaci testified that during the material period the setter machine in *Brick Machine 4* was the least reliable piece of equipment in that part of the plant. The Kilns 7 and 8 plant was critically important to the production output required. Accordingly there was an emphasis upon that machine running smoothly. The emphasis was on that machine running continually and all unnecessary stoppages being avoided. He said that at the material times the issue of when operators took their meal breaks was of no concern, as it was never raised as an issue. He testified that the whole operation ran informally. Operators were not required to clock on or off at the start and finish of their shifts and further were not required to clock off when they stopped for any reason.

160 Mr Scarvaci told the Court that the need for kilns to run continuously was imperative as it could take up to two weeks for the kiln to get back up to an optimum level. Each time the kilns stopped the bricks in the kilns would be put at risk as would several hours of production, which followed.

161 Mr Scarvaci informed the Court that *Brick Machine 4's* complement comprised four shifts of four operators each with a supervisor. Each team would be required to cover for absences on leave, long service leave and other absences.

162 He next addressed the functions of each operator. He said that the extruder operator, once having started the process, could leave the machine. In that regard he said that there were remote facilities available on the setter machine, which enabled the setter operator to intervene if necessary. The essential tasks of the extruder operator would only take about an hour or an hour and a half of the twelve-hour shift. Similarly the *Claytex* operator could leave his machine after having filled the hoppers. He just needed to check the process from time to time. Only some ten to thirty per cent of the operator's time needed to be spent on the *Claytex* machine. Indeed only thirty to forty per cent of the bricks produced needed additives in any event. However the setter operator's involvement was critical. He was expected to be at his machine to check on the product and react if there was any problem with the additives or with the clay column. So far as the transfer cars operator was concerned, only ten to fifteen per cent of his time would involve the operation of machinery. Accordingly in view of the time available to them there was an expectation on the part of the Respondent that all operators would assist other operators when necessary. There was in all the circumstances sufficient time available to enable a colleague to be released for the purpose of taking a meal break. He said that he witnessed that relief process in operation. He said that he often saw operators going off and having their meal (Transcript page 702). He also said that during the material period he saw that operators had sufficient spare time available so as to enable them to read newspapers and/or books.

163 Mr Scarvaci said there were regular consultative committee meetings held when general issues of concern could be raised in discussion. At no stage during those meetings or at any other times prior to the institution of these proceedings was the alleged inability to take meal breaks ever raised. He said if the operators could not take their meal breaks he would have expected them to be knocking on his door in regards to what would have been in his view an intolerable work situation. However that did not happen.

164 When cross-examination Mr Scarvaci conceded that it would not have been permissible to leave the setter machine for any extended period. Indeed he said that leaving the machine unattended for periods of about half an hour would have been in contravention of operational and safety guidelines. He agreed that it was expected that setter operators be at or around their machine at all times.

165 Furthermore he told the Court under cross-examination that *Brick Machine 4* operated at about eighty per cent efficiency. He said that the machine was broken down for about twenty per cent of the time. At those times operators were not required to man their machines.

166 Mr Scarvaci was next asked about how often he saw operators take a meal break. In that regard he said he saw it happen quite often.

167 Mr Scarvaci also told the Court that he was confident that all supervisors were aware that operators were entitled to a paid meal break. He said that,

> "(he) *was there often enough to see evidence that they* (the operators) *were taking breaks; and no one complained so* (he) *concluded that they were* (taking breaks)."
>
> (Transcript page 718).

168 He said that there was ample opportunity to take a break. If the operators chose not to take a break then they chose not to take a break, however, they were never precluded from taking a break. The fact that they sometimes ate near the setter machine was not a problem. He had witnessed operators having meals, sometimes in the smoko room and at other times near the machines. He conceded however that he took no particular note of or interest in the particular circumstance of the meal break. The matter was simply never an issue for him (Transcript page 724).

169 When cross-examined Mr Scarvaci reaffirmed his earlier evidence that it was feasible for only one operator to safely run the entire production process at *Brick Machine 4* provided however that it was only for a short period of time.

170 Finally he said that the operators could have had an uninterrupted thirty-minute meal break on each shift if they chose to do so.

Timothy Peter Tipping

171 Mr Tipping is currently employed by the Respondent as its Packaging Manager. He commenced working for the Respondent in 1978 or 1979 as a brick packer. In 1996 he was appointed Production Manager for Kilns 7 and 8. He was Production Manager between 1996 and 1999. Prior to that time he worked as a machine operator within *Brick Machine 4*. He carried out all the different tasks in each of the different sections therein. He has also held a number of other positions between 1999 and 2001 until such time as he was appointed to his current position. His responsibilities in the past have included ensuring that his supervisors were carrying out their tasks correctly. He said he used to walk around the plant each day to monitor what was happening.

172 Mr Tipping was asked to testify, based on his experience, concerning the role of each operator, and in particular the amount of time that each operator needed to be at his machine. In that regard he said that the extruder operator would, on average, be required to be at his machine for about thirty per cent of the time. He would otherwise be relieving other operators, cleaning up his area and other areas, and assisting others with their duties. So far as the *Claytex* operator is concerned, he said that additives were only applied to about forty per cent of total production. As a consequence the *Claytex* operator was only required at his station for about fifty per cent of the time.

173 Mr Tipping went on to testify that operators could take a break whenever they wanted. There was no need to obtain permission in order to take a meal break. Furthermore, more than one break per shift could be taken. He said that he was never concerned with how many breaks were taken. Meal breaks were never in issue. He said that in his twenty-five years with the Respondent he has never seen or heard of a directive, which required the operators to work through their shift without taking a break for meals or refreshments. He said further that whilst engaged in his managerial position he has never told anyone not to take a meal break. He said that he could not recall telling Mr Harrison, Mr Roberts or Mr Chopping in December 1995 or January 1996 that they were to work through their whole shift without taking a break for meals or refreshments.

174 He said that he never received any complaints about operators not being able to take meal breaks. He said he encouraged dialogue with employees and would have expected to hear about a problem if there was one. Further there were consultative meetings during which matters of concern to employees were raised. The issue of an inability to take a meal break was never raised at those meetings.

175 When cross-examined Mr Tipping reaffirmed that the operators could effectively choose when they took their meal break. He agreed that they were not directed to take their meal breaks. Further he accepted that operators sometimes ate at their machines. Further he confirmed under cross-examination that there was no method of recording when meal breaks were taken or for how long they were taken.

176 Mr Tipping said that he could not recall ever telling Mr Roberts in 1995 with respect to the issue of meal breaks—

"We pay you for 12 hours, you will work for 12 hours."

177 Further he denied ever saying to Mr Roberts—

"We pay you for the meal break, you will work through the meal break."

178 He also denied saying—

"If you don't like it, you know where the gate is."

179 In re-examination Mr Tipping said that he could not recall, in his time with the Respondent, ever telling an employee—

"Look, there's the gate."

Evaluation of the Evidence

180 The evidence given in this matter on all contentious issues sits in two camps, diametrically opposed. There is critical dispute in respect of a myriad of different factual matters. Those disputes on such critical issues can only be resolved upon my proper assessment of the credibility and reliability of witnesses. However the evidence given by Mr Reynolds and that given by Mr Radford is not subject to my assessment of credit. In each instance the question is simply one of whether their evidence can be said to be reliable. In all other instances both credit and reliability are necessarily considered.

181 The basis for the Claimants' claims, albeit with slightly differing emphasis in each instance, is that they, during each twelve-hour shift, excepting maintenance days, worked without taking or being permitted to take a meal break.

182 Each of the Claimants and the witnesses called by them, with the exception of Mr Reynolds, testified concerning matters that occurred between 6 May 1996 and 29 December 1997, being the relevant period. The same is to be said about the witnesses called by the Respondent, with the exception of Mr Radford. It is axiomatic therefore given that the events occurred a long time ago that an assessment must be made about the witnesses' ability to recall events that occurred about six years ago or more. Accordingly in those circumstances the issue is one of reliability rather than credibility.

183 In assessing the evidence as it is before me it is quite apparent that much of the evidence given by the Claimants and the witnesses called by them suffer from internal inconsistency on critical issues such as whether the Claimants had time to take a meal break. In most instances the strong position put forward in chief in that example that breaks were never taken was resiled from when subjected to cross-examination. That can be said of each of the Claimants, Mr Green and Mr McGlinn. I intend to cite a few examples reflecting such internal inconsistency. It will be unnecessary to detail an exhaustive list of internally inconsistent evidence. All references to the transcript hereunder used in highlighting such inconsistencies are made with respect to the Court's copy of the same, which I understand differs in numbering from the copies in the hands of the Respondent's representatives.

Internal Inconsistencies

Mr Roberts

184 Mr Roberts gave internally inconsistent evidence about manning levels. In chief he said there was a minimum requirement of four operators (Transcript pages 11 and 21) but when cross-examined (Transcript page 108) he conceded that in certain circumstances production could be maintained with a manning level of three. He also gave inconsistent evidence concerning assisting other operators. In chief he testified that operators would not, as a general rule, assist other operators except when the setter was down (Transcript page 42). However when cross-examined he agreed with respect to a number of different examples put him that other operators helped out as part of a team (see specific examples - Transcript pages 91 to 98). There were also examples of inconsistency within cross-examination such as the one that relates to the production levels. Initially Mr Roberts said that the Shift 1 team produced eighteen cars per shift, but then resiled to concede that usually fifteen cars per shift were produced (Transcript pages 81 and 82).

Mr Chopping

185 Mr Chopping gave inconsistent evidence within his evidence in chief concerning being relieved on the setter so that he could take a toilet break on the one hand and not being able to be relieved resulting in him urinating on the shed on the other hand

(Transcript page 185). There was inconsistency in his evidence on issues relating to the requirement to assist the fitter (Transcript page 214).

Mr Harrison

186 The internal inconsistency in Mr Harrison's evidence is exemplified by his testimony that no one had a break on the one hand when compared to his admissions on the other that the operators left the work site to collect food (Transcript pages 256 and 274). Another example is his evidence concerning operators not collecting food from the front gate as opposed to his admission that he left his station to collect a pizza from the front gate (Transcript page 272).

Mr Green

187 Mr Green gave inconsistent evidence concerning the change over of operators. At Transcript page 250 he said that the outgoing operator sometimes left before the oncoming operator arrived, thereby leaving the machine unattended however on page 251 of the transcript he said , "*you waited till your relief got there*".

Mr McGlinn

188 Mr McGlinn's evidence was the most striking for its internal inconsistency. By way of example, he testified that he was unable to take a break except to go to the toilet but then conceded leaving the work site to go and collect food (Transcript pages 152 to 154). That is the most striking example of a number of inconsistencies within his evidence.

External Inconsistencies

189 A review of the evidence reveals a number of inconsistencies between the evidence given by the Claimants in each instance and the witnesses called by them. The following examples illustrate the inconsistencies and are not meant to represent an exhaustive list of inconsistencies.

Mr Robert's Evidence Compared to Other Witnesses Called by the Claimants

190 Mr Roberts testified that the process needed to be monitored at all times whereas Mr Green testified that the machines operated without being monitored (Transcript pages 118, 119 and 250). He also testified that he was able to sometimes manage to squeeze in a break on maintenance days (Transcript page 20) compared with the evidence of Mr McGlinn who said that maintenance days were easy (Transcript page 133), Mr Chopping who said as a rule operators had breaks on maintenance days (Transcript page 183) and Mr Harrison who said there was plenty of opportunity to take a break on maintenance days (Transcript page 284).

Mr Chopping's Evidence Compared to Other Witnesses Called by the Claimants

191 Mr Chopping's evidence concerning the fitter requiring the operator's assistance is inconsistent with what Mr Harrison had to say on the issue, being that the operator was not always required to assist the fitter (Transcript pages 206 and 285).

Mr Green's and Mr Harrison's Evidence Compared to Other Witnesses Called by the Claimants

192 Mr Green's evidence concerning there being no opportunity or limited opportunity to have breaks on maintenance days (Transcript page 238) sits in contrast with Mr McGlinn's, Mr Chopping's and Mr Harrison's evidence on the issue (Transcript pages 133,183 and 284). It is axiomatic that Mr Harrison's evidence in that regard is also inconsistent with Mr Green's.

193 Mr Green's evidence that the *Claytex* operator had the busiest job (Transcript page 246) is inconsistent with evidence given by Mr Roberts, Mr McGlinn and Mr Chopping.

Mr McGlinn's Evidence Compared to Other Witnesses Called by the Claimants

194 Mr McGlinn testified that Mr Yerbury was prepared to allow unsafe practices (Transcript page 152) whereas Mr Chopping testified that Mr Yerbury was focused on "*occupational health and safety"* (Transcript page 196).

195 Having reviewed specific instances of inconsistency in the evidence of the Claimants and their witnesses I move on to consider whether their evidence can be considered reliable. In my view the evidence of Mr Roberts, Mr Chopping, Mr Harrison, Mr Green and Mr McGlinn on critical issues is to be considered unreliable. In each instance they tended to remember specific details of matters, including conversations, which assisted their claims yet could not recall other matters not critical to their claims. I find it difficult to accept that any of them who professed to recall conversations in specific terms are accurate in their recollections. Quite frankly it appears to be all too convenient.

196 Apart from their own evidence, the Claimants rely on the evidence of Mr McGlinn, Mr Green and Mr Reynolds. It is noted that Mr McGlinn has his own claim on foot relating to the very same issue in dispute. Mr Green on the other hand parted with the Respondent on less than amicable terms. Given the history of the issues between him and the Respondent there can be little doubt that his evidence is imbued by bitterness. So far as Mr Reynolds is concerned it is obvious that his evidence lacks reliability. I say that because there are certain self evident errors that were made in the preparation of the schedules of claim. They include, the failure to account for maintenance days with respect to which it is conceded meal breaks were taken, the incorrect assumption that the Claimants did not receive overtime rates when in fact each Claimant received 1.14 hours of overtime for each twelve-hour shift and the fact that the claims relate to periods when the Claimants were off work for various reasons. Quite frankly the Claimants' case concerning their calculated entitlements is nothing short of a mess.

197 The witnesses called by the Respondent gave generally credible evidence. It is noted that each of Mr Yerbury, Mr Girardin, Mr Stribley, Mr Marshall, Mr Scarvaci and Mr Tipping gave evidence based upon their own experiences as operators and managers. Having said that it is to be noted that Mr Stribley did not, at the material times, work with the Shift 1 team. His evidence therefore is entirely based on his experiences with his own shift. Mr Marshall's evidence is of a similar nature. To some extent Mr Scarvaci's evidence on the role of operators during the relevant period was also very much generalised and non-specific to Shift 1. Further it is noted that there are some internal inconsistencies in the evidence given by Mr Scarvaci concerning the number and length of the meal breaks. He gave evidence in chief that his expectation was that operators would have three breaks during the shift being of ten minutes, twenty minutes and fifteen minutes duration (Transcript page 691). Under cross-examination however he said that breaks taken were far in excess of thirty minutes. Further his evidence concerning his expectation that three structured breaks would be taken sits at odds with the evidence of Mr Tipping on the issue.

198 Mr Yerbury, Mr Girardin and Mr Stribley were particularly impressive witnesses. Their evidence was, in my view, credible. Mr Tipping came across as somewhat defensive in approach but having said that, I have no particular reason to disbelieve him or otherwise reject his evidence. Mr Chopping made comment about Mr Yerbury's credibility but by the same token was suggestive of the fact that Mr Yerbury would tailor his evidence to suit his own ambitions. I found it difficult to reconcile those two positions because they appear, to me, to be in conflict.

199 Having reviewed the evidence and assessed the witnesses I now move to determine whether the claims have been proved.

Onus and Standard of Proof

200 The Claimants in each instance bear the onus of proving their respective claims on the balance of probabilities. It is trite to say that the Respondent has no obligation upon it other than to meet the evidentiary burden placed on it by virtue of matters raised in evidence by the Claimants and their witnesses.

The Law

201 The claims in each instance are brought pursuant to clause 9(4) of the Award relating to "*Overtime*" which provides—

> *"When a worker is required for duty during his usual meal time and his meal time is thereby postponed for more than one hour he shall be paid at overtime rates until he is able to take his meal time."*

202 The Claimant argues that the provision must be read with clause 16 of the Award, which provides—

16. - MEAL INTERVAL

(1) Not less than thirty minutes nor more than one hour shall be allowed for a meal each day.

(2) No worker shall be compelled to work for more than five and a half hours without a break for a meal.

(3) When a worker is required for duty during any meal time whereby his meal time is postponed for more than one hour he shall be paid at overtime rates until he gets his meal.

203 The Respondent argues against the two provisions being read together saying that although similar clauses 9(4) and 16(3) are different in that the expression "*his usual meal time*" is used in clause 9(4) whereas "*any meal time*" is used in clause 16(3). It is argued in that regard that the provisions have been deliberately drafted that way because they are intended to serve a different purpose and to perform a different function. Accordingly clause 16 should not be used as an aid to the construction of clause 9(4).

204 The Respondent's counsel argues at paragraphs 13 and 14 of his written submissions dated 28 July 2003 that—

> *13. An employee's usual meal time (which includes both day and night 12 hour shifts), may not be within 5½ hours of the commencement of such a shift. For example, an employee commencing a 12 hour shift at 7.00 pm may have had his evening meal before commencing work and may not choose to have his next meal until the early hours of the morning. If that was his usual meal time and it was not postponed for more than 1 hour, there would be no requirement to pay overtime rates under sub-clause 9(4) of the Award. Arguably, in those circumstances, there might be a breach of sub-clause 16(2), entitling a payment under sub-clause 16(3). As previously indicated, the claimants have decided not to and have not made any claim alleging a breach of sub-clause 16(2) of the Award.*
>
> *14. Moreover, if sub-clause 9(4) of the Award was intended to be read subject to any overriding requirements under clause 16 of the Award—*
>
> *(a) there would be no need for sub-clause 9(4), because the concept of an employee's usual meal time would come within the meaning of the expression any meal time in sub-clause 16(3) ; and*
>
> *(b) it would have been very straightforward for any draftsman, even one without legal training, to have made such an intention clear by expressing sub-clause 9(4) as being subject to clause 16 .*
>
> *The very existence of sub-clause 16(3) **and** the absence of any attempt to make any connection between sub-clause 9(4) and subclause 16(3) is a clear indication that the latter should not be used as an aid to construing the meaning and effect of the former.*

205 That argument has a degree of attraction. Indeed it seems almost incomprehensible as to why both provisions would otherwise be included within the Award. On the face of it, clause 9(4) would seemingly be superfluous if one were to accept the Claimants' construction of the provision. However I do not think it is superfluous because I take the view that clause 16 is intended for a different purpose. Clause 16(1) provides—

> *"Not less than thirty minutes nor more than one hour shall be allowed for a meal each day."*
>
> (my emphasis added)

206 It could be construed therefore that the provision relates only to non-shift employees who work during the day, whereas clause 9(4) has application to shift workers and others not only working during the day. Hence the deliberate use of the words "*usual meal time*" which implies discretion as to when the meal break is taken as opposed to the structured circumstance provided by clause 16.

207 I accordingly find myself in general agreement with the submissions made by the Respondent with respect to the construction of the provision. I accept the provisions, when read as a whole and given their common sense meaning, (See ***Norwest Beef Industries Ltd and Anor v AMIEU (1984) 64 WAIG 2124 at 2133***) result in the conclusion that the provisions were aimed at different situations and are intended to perform different purposes.

208 It follows therefore that the Claimants are required to prove the following—

1. What their respective usual meal times were in the period 6 May 1996 to 29 December 1997;
2. That their usual meal time was postponed for more than one hour because in each instance they were required for duty; and
3. That each of them "*was required for duty*" during their usual mealtime.

Conclusions

209 The issue of the Claimants' *"usual meal time"* is of critical importance. In each instance they need to establish what their usual meal times were. However there is simply no evidence going to that issue. It is obvious from the evidence as a whole and, in particular from the evidence of Mr McGlinn and Mr Stribley that the times when meals were taken could and did vary significantly. Given the state of the evidence it is impossible to arrive at any conclusion as what the usual meal time was for each Claimant for each day of the relevant period.

210 The Claimants rely on the allegation of express requirements made that they work through their usual mealtime. The alleged express requirements were alleged to have been made by Mr Tipping to Mr Roberts and Mr Chopping in December 1995, by Mr Ron Caruso to Mr Chopping in May or June 1989, by Mr Tipping to Mr Chopping in April or May 1996, by Mr Moyle to Mr Roberts in about March or April 1995, by Jim Heaton to Mr McGlinn in early 1993, by Mr Moon to Mr McGlinn in 1993 or 1994, and by Mr Tipping and Mr Moyle to Mr Chopping in June 1996. It is also alleged that Mr Marshall following the material period has also made express requirements.

211 The Respondent's witnesses Mr Yerbury, Mr Girardin, Mr Stribley, Mr Scarvaci and Mr Tipping denied that express requirements were made that the Claimants work their entire shift without a meal break. It suffices to say that I do not accept the evidence of Mr Roberts, Mr Chopping and Mr McGlinn in that regard. It runs contrary to the evidence given by Mr

Yerbury, who was a most impressive witness, to the effect that meal breaks were taken. I formed the view that each of Mr Roberts and Mr Chopping structured their evidence in such a way as to best suit their claims. Mr McGlinn was, on the other hand, so inconsistent in his testimony that it is difficult to accept his evidence in support of the Claimants' case on this issue and indeed on other issues.

212 Further, and in the alternative, the Claimants rely on an implied requirement of their employer that they be present for duty during their usual meal break. Mr Roberts in particular maintained that there was no meal breaks taken because the production circumstances simply did not permit the taking of the same. The evidence of Mr Chopping, Mr Harrison and Mr Green on that issue was in similar vein. However the evidence given by Mr Yerbury, Mr Girardin, Mr Stribley, Mr Marshall, Mr Scarvaci and Mr Tipping, which I prefer, enables the conclusion to be reached that there was a flexible meal break system in operation during the relevant period. I accept their evidence that the systems that operated during the relevant period facilitated the operators relieving each other for the purpose of taking breaks including meal breaks. I also accept; based on the evidence of Mr Yerbury, Mr Girardin and Mr Stribley that in some instances and from time to time supervisors relieved operators so that the operators could take meal breaks. In any event the Claimants in their own testimony accept having taken meal breaks on maintenance days.

213 The evidence overwhelmingly supports a finding that operators including the Claimants were not required to remain at their stations throughout their shifts. Further it also supports the finding that they were not required to work for the entirety of their twelve-hour shift. Such findings are made upon my acceptance of Mr Yerbury's evidence in preference to other evidence on the issue that stands in dispute with his. Indeed Mr Stribley, whom I also consider to be an impressive witness, supports Mr Yerbury's evidence. Although Mr Stribley's evidence does not relate to Shift 1, I am nevertheless satisfied that it is demonstrative of what occurred on Shift 1. The testimony given by Mr Stribley, Mr Yerbury, Mr Girardin, Mr Scarvaci, and Mr Tipping demonstrate such a high degree of commonality of approach between the different shifts that Mr Stribley's evidence ought to be accepted as being indicative of what occurred across all shifts. Indeed the fact that there was commonality in approach is established when a comparison is made between the evidence of Mr Yerbury and that of Mr Stribley. Mr Harrison's testimony also supports that. It is the case therefore that the manufacturing process, the duties of operators and the systems employed was consistent from shift team to shift team. Accordingly I find that the extruder operator, the *Claytex* operator and the transfer cars operator were not always required to operate their machines for the whole shift and accordingly had spare time to assist others and to take breaks. Further I accept and find that the operators were not, with the exception of the setter operator, required to continuously monitor the machines. In fact the machines did, on occasions, run smoothly and without the need for human intervention. Indeed the whole process was aimed at maintaining production and whether or not the operators were working was only relevant in that context. Indeed I accept that operators including the Claimants by way of a flexible arrangement took breaks. In those circumstances there was no need for the Claimants to be instructed to take breaks. The staffing levels were more than adequate to enable operators to take such breaks.

214 The fact that the Claimants had meal breaks, in my view, is almost undeniable having regard to the evidence of Mr Yerbury and in the light of admissions made. Having said that I accept that there is some evidence by way of admission to prove that on occasions operators did work through their meal breaks. However that occurred very occasionally when the production circumstances required it. In any event those specific instances have not been identified to the extent required to enable the Claimants' claims to be made out for those particular rare instances. However, in general terms, the claims simply do not sit comfortably with admissions made, such as, that operators often left the work site in order to purchase food from external outlets. The Claimants had opportunities to take meal breaks and did in fact do so. It follows that the Claimants have not made out their contention that their meal breaks were postponed for more than one hour, thereby entitling them to overtime payments.

215 The conclusions that I have reached apply equally to each Claimant, including Mr Harrison, notwithstanding that most of the evidence coming from the Respondent's witnesses was particular to the Shift 1 team. In that regard the evidence given by Mr Girardin in particular traverses Mr Harrison's evidence and permits the finding that the processes for Mr Harrison's shift and indeed other shifts, with respect to meal breaks, were the same.

216 Finally even if I am wrong in my construction of the Award provisions and it could be said that clause 9(4) needs to be construed by reference to clause 16 of the Award, the evidence does not, for the reasons previously given, in any event support the allegation that each Claimant was compelled to work for more than five and a half hours without a meal break. Accordingly, even on the best possible construction of the Award so far as the Claimants are concerned, the claims cannot be made out.

217 Overall I find it extremely difficult to be persuaded that the alleged failure to provide a meal break during a twelve-hour shift was just simply accepted by the Claimants as a fait accompli. I would have thought that such an unfair and intolerable situation would have necessarily resulted in ongoing comment and complaint. However the issue of meal breaks was never a contentious issue. Indeed I accept Mr Scarvaci's evidence that it was not an issue at all. In my view that explains why there has been such an extraordinary delay in bringing these proceedings.

218 What I fear has happened in these matters is that the Claimants have, in concluding that they did not receive a structured meal break, failed to recognise that they took breaks to have their meals at a time which was convenient and best suited them. In each instance how and when they took their meal breaks resulted from their own decision rather than any compulsion or necessity thrust upon them by the Respondent. The failure to have a structured meal break as envisaged by clause 16 of the Award did not derogate from the fact that they had meal breaks. Given that they had meal breaks at their own convenience undermines their ability to succeed in these matters.

219 The Claimants have not discharged the onus of proof, which rests with them, and each claim should accordingly be dismissed.

G. CICCHINI,
Industrial Magistrate.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2003 WAIRC 10345

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBBIE-LEE ALLEN, APPLICANT
	v.
	TELSTRA CORPORATION, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 18 DECEMBER 2003
FILE NO.	APPLICATION 932 OF 2003
CITATION NO.	2003 WAIRC 10345

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Acceptance of referral out of time not granted – Industrial Relations Act 1979 (WA) s 29(3)
Result	Application dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr D Fewster

Reasons for Decision

1 On 17 June 2003 the applicant, Ms Debbie-Lee Allen, made application to the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") alleging that she had been harshly, oppressively and unfairly dismissed by the respondent, Telstra Corporation. The date of termination in the application is 26 March 2003 and the application was lodged in the Commission on 17 June 2003. On the papers the application would appear to be 54 days out of time.

2 Section 29(3) of the *Industrial Relations Act 1979*, is a provision inserted to provide for a discretionary decision by the Commission to accept an application beyond the 28 days time limit where, in the Commission's view, it would be unfair not to do so.

3 Section 29 of the Act, in part, reads as follows—

> "(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.
>
> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so".

4 Prima facie, however, by virtue of the time limit, a matter is required to be within time unless of course there is good reason for it not to be so, and in that sense all applications are to be treated expeditiously.

5 The considerations relevant to whether it might be considered unfair not to accept the application are covered in the decision of the Full Bench in *Director General of the Department for Education v Prem Singh Malik* 83 WAIG 3056 and the Senior Commissioner in *Anthony William Andrew v Metway Property Consultants and Auctioneers* 82 WAIG 3260. The factors to be taken into account, which are the factors that I consider relevant, are whether there is an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he or she contested the termination, and the prejudice to the respondent. They are factors that are well covered in those decisions, and should be applied in this instance.

6 The applicant Ms Debbie Lee Allen was employed as an Information Technology Graduate, Technical Specialist, Level 6, with Telstra from 14 January 2002 to 26 March 2003. The applicant says that given the manner in which she was treated she had no option other than to resign her employment. The applicant entered into her contract on 15 October 2001 under an Australian Workplace Agreement. The applicant says her career was focused on systems work and programming systems. Her employment was satisfactory to February 2003. On about 13 February 2003 Ms Allen says she was assigned to a role of Problems Manager that was, in her view, inconsistent with her career objectives, her development plan and her skills. At that stage she was advised by her supervisor in relation to her systems work "she could not do it like the guys". She then progressively sought to raise her concerns about the role with various supervisors. In her mind, she exhausted all possible avenues for being heard. Hence she decided that the purpose for which she had sought work and her career in the organisation had changed irretrievably. She resigned, having no alternative other than to do so in her mind. The applicant made an application to the Commission 54 days out of time alleging constructive dismissal. She says the delay incurred was caused by her solicitors.

7 The applicant's evidence is that she completed her Bachelor of Commerce in Information Systems at the Curtin University of Technology in June 2001. She achieved a distinction degree with an average of 81% and was awarded a prize for the best performance in the Information Systems school program. In her degree she focused on programming, databases and electronic commerce. Prior to that she was employed in the Department of Family and Children's Services and in the latter part of that employment was engaged in computing work to assist with Y2K compliance and implementing a records management system with an Oracle database. Whilst at university Ms Allen became aware of graduate opportunities with Telstra and applied to join the stream involving computing information technology information systems. She commenced with Telstra on 14 January 2002 and went to work in internet working solutions. More specifically she went into an area called Post Implementation Design. There was a development plan established for her [Exhibit A3]. She signed off to this development plan with Mr Phil Thomas, her supervisor. This plan was identified as such: "Graduate Technical Specialist, Level 6, IP Networking Skills, Server administration skills, Oracle/DB administration skills, understand and utilise development and change management framework for systems, understand the processes that the application team uses". She says reviews of her performance were done on a monthly basis. In September 2002 she says her performance report was favourable [Exhibit A4] and following that her assessments continued to be positive. She says the new program director Mr Nick Del Casale became the Project Director. She was then no longer allowed to continue with the project. She says she approached Mr Thomas her team leader in respect of being left out of the ODIN project. He advised her that she would have to approach Mr Del Casale and convince him of her

value to the project. She finally managed to meet with Mr Del Casale but did not manage to secure a role on the project. She says she was no longer invited to project meetings and did not receive any email updates on the project. She consequently stepped up work in the Net Health application and did a couple of other jobs that Mr Del Casale asked her to do.

8 On 13 February 2003 she met with Mr Phillip Thomas, her team leader. She says Mr Thomas was aware of the situation as she had kept advising him that she had been dropped from the ODIN project. She says that Mr Thomas advised her that—

> "we have got a new role being developed for the systems and application team. It's called problem manager, and it deals with area control, proactive problem management over the systems of the application and systems team and monitoring of trends of problems that are occurring" (Transcript pg 19-20).

Ms Allen's response was that she did not think that it was in line with their previous agreement. She advised Mr Thomas that she had been doing programming, databases and networking and that her qualifications were in programming, databases and networking. She says Mr Thomas replied that, "Debbie, you can't administer the computer systems like the guys do" (Transcript pg 20). Mr Thomas replied to Ms Allen that in terms of the Problem Manager role it was her job and she should do it.

9 Ms Allen also brought up with Gary Liney and Bob Gregory that her skills and degree were in programming, databases and networking. That was also the work she had done to date. Ms Allen also sought higher level systems access to advance her skills. She was advised that she would not be granted this access and did not have the skills to be able to do it. She says she was devastated by these comments as she had worked to prove that she could operate on those computer systems, ie in the UNIX system, and she says she was being limited by her lower access compared to her male colleagues.

10 Ms Allen says she continued to meet with the new manager she believed had the authority to take action on the situation. She also searched Telstra's internet for job description forms in the area of information technology and technical work stream. She found one which was the closest in description to the skills she had and the activity she had been doing. She provided this description to Mr Thomas on approximately 5 March 2003 [Exhibit A5].

11 Ms Allen says that she spoke to Gary Liney, the actual team leader of the systems and application team. He responded in similar fashion to Mr Thomas and indicated that Ms Allen could do the Problem Manager work but when technical implementation work was required the "guys would do that" (Transcript pg 23). Then in late March Mr Bob Gregory visited from Tasmania, she asked to meet him to discuss the directions of the systems and applications team. She indicated that she wanted to follow the technical stream. She says he made it clear that she would not progress from the levels at which she had already worked and at which she says she had shown very good competency. She would not be given access to the systems or equipment in order to do that. She says following that discussion she felt she had no option other than to resign. At that time she says she was also being expected to deliver on the Problem Manager role and she was being criticised for not achieving in that role as she says there was confusion about the priorities that she was doing. She says she attempted to offer explanations in the face of the criticism.

12 The week following her resignation she went to the Equal Opportunity Commission. She lodged a written application with the Commission and contacted Butcher Paull and Calder, Solicitors. She met with the solicitors on 14 April 2003. She says that Mr Paull indicated that she had the basis for a complaint under the Equal Opportunity legislation and she left her documents with Mr Paull who later assigned the matter to a colleague. Ms Allen says that she also contacted Wageline on 22 April 2003 and was advised that she may have a cause of action for constructive termination. She discussed this with her solicitor on 28 April 2003 who indicated that she would research the matter. She says that she gave instructions to her solicitors to proceed with an application before the Industrial Commission on 13 May 2003. She says that when she raised the issue of constructive dismissal with her solicitor she was already aware that any application was out of time before the Commission. Her solicitor was going to seek advice on that matter. The application was filed on 17 June 2003.

13 Ms Allen says that on 23 May 2003 she went to her GP because she was very depressed. She was distressed that the labour case would take longer than she initially thought and she was suffering a lack of confidence in her ability. She was then admitted into Bentley hospital for two months with a case of severe depression.

14 Under cross-examination Ms Allen says that the Problem Manager role was not defined. She says she had a weekly meeting with Mr Liney and Mr Thomas about the work. The work involved an audit of servers. She says she can only guess at what was expected of the Problem Manager role. However, she says she was definitely not going to do programming. She would not do development work, would not pursue Oracle database administration which had been previously listed in her development plan. She does say she was continuing to do Net Health, Oracle and ODIN work.

15 She says that most of the team members had access to the level requested by her on the system. She says her supervisor Mr Phillip Thomas did not. She says that Mr Thomas indicated to her that she could not administer the systems like the guys do.

16 She agrees that her contract requires her to do any work within her skills and abilities. Additionally, her contract requires that the reporting requirements and her duties would be varied from time to time in accordance with the needs of Telstra and that she could be reassigned at any time to work an equivalent role. She says however the work assigned to her was not in accordance with her skills and qualifications. The role which they had assigned to her was not equivalent to what she was doing when she joined the organisation.

17 Ms Allen says that she had been put back on the ODIN project after being dropped off for a three month period. She says that when she put in her resignation Mr Thomas asked her whether she wanted to speak to the counselling service or access the grievance procedure. Ms Allen did not want to do so. Mr Thomas suggested that she go home and consider her resignation and that he would contact her the next day. When Mr Thomas contacted her the next day she advised him that if her role was not primarily systems work then her resignation would stand.

18 Ms Allen says that her two main tasks involved Net Health and ODIN and the audit of servers. She says that Mr Thomas and Mr Liney had concerns about her performance in February/March 2003.

19 Ms Allen says that she was at the time of her resignation performing a full time load and the duties she was performing she was capable of doing. She says these duties would take approximately two or three weeks to complete.

20 Mr Phillip Thomas gave evidence that he is employed by the respondent as team leader in the Product Analysis and Implementation Group. He was originally the team leader of the applications team and led the ODIN project. He says Ms Allen commenced with his team in April 2002, about 3 months after she commenced with Telstra. She expressed her desire to work in his team as she was interested in systems development work. The work involved database and systems administration. It also involved some development work in the creation of a database. Ms Allen worked on the ODIN project and he says the applicant had just finished her university degree and her skills were fairly good on the theoretical side but she needed more experience, not only in Oracle skills but in general systems administration skills. He says her skills were lower than other members of the team which is what would be expected from someone just coming out of university. He says Ms Allen needed to gain Oracle skills as part of her work on the ODIN project as well as UNIX systems administration skills.

21 Mr Thomas denies that he ever indicated to Ms Allen that there are only jobs that boys can do in the area. Mr Thomas says that Ms Allen's most recent development plan [Exhibit R2] was entered into the system by him. Ms Allen's evidence was that she was not aware of that document. He denies that he did not allow Ms Allen to work in the areas identified in her development plan. Mr Thomas says that he was happy with Ms Allen's performance up to Christmas. He says after Christmas he detected some change in her behaviour. He discussed his concerns about Ms Allen's performance with his manager Mr Bob Gregory.

22 Mr Thomas says he intended to arrange a meeting with Ms Allen to discuss his concerns about her performance. This did not happen as Ms Allen asked to meet with him and advised him that she had some questions as she did not understand her role within the ODIN team. Mr Thomas was surprised by this as she had not given any previous indication, albeit she had been in the team for nine months. Mr Thomas had a meeting in late February with Ms Allen where he went through her options in terms of her work and her work aspirations. Mr Thomas says that they had a number of meetings with Ms Allen involving himself or Mr Liney and on occasion Mr Gregory about her work. In March she indicated that she could not work on the ODIN project any further as she had a personal dispute with one of the team members. He says that he attempted to discuss performance issues with Ms Allen but was interrupted by her.

23 Mr Thomas says at that time the respondent was going through a restructure. They were considering the creation of a new role of Problem Manager. This role involved looking at the faults and trends in their systems. This role was offered to Ms Allen as an option to consider. This happened in early March 2003. Mr Thomas says they were looking for "a suitable candidate to fill that position and really define that position and augment that position into the applications team" (Transcript pg 66). He says he gave Ms Allen a high level overview of the role and gave her some documentation which provided more information. He asked Ms Allen to look at the material and consider whether she wanted to do the role. He says it was an opportunity for her to develop her practical skills. Ms Allen considered the role and indicated that she was not interested in it. Mr Thomas says that he accepted that and she was not required to take on that role. He says that he went back to the original plan and continued her on Net Health and ODIN work. Mr Thomas says that he was satisfied that the tasks identified in [Exhibit R1] were the tasks that Ms Allen performed as of 18 March 2003 and were unchanged at the time of her resignation.

24 Mr Thomas says that on the day of her resignation she placed her resignation letter on his desk and walked away. He read the letter and sought out Ms Allen to talk to her. Ms Allen was visibly upset and he did not feel able to talk about the letter. He says he asked her to go home and calm down and would not accept the resignation until they had a chance to talk further. They spoke the next morning by telephone and Ms Allen indicated that she could not do the work that she wanted to do in the applications team. Mr Thomas says he advised her if she still felt like that then there was no choice but to accept her resignation. He asked to confirm whether she still wished to resign and she indicated that she did.

25 Under cross-examination Mr Thomas says that Ms Allen's services in September 2002 were at least satisfactory. He says that Ms Allen's development plan as represented in [Exhibit R2] was her development plan throughout January, February and March at the time of her resignation. Mr Thomas says that he did not at any time raise with Ms Allen his concerns over her attitude or complaints he had received from other staff members. Ms Allen arranged a meeting with him prior to him being able to raise his concerns and expressed her desire not to do the Problem Manager role. He agrees that he put the role of Problem Manager to her in February 2003 and talked to her in broad terms about the job. There was no job description for the position. Ms Allen indicated she did not want the job. In her view the role would have a potential negative impact on her career. He also indicated that she did not believe she had the skills for the position. He says Ms Allen put her concerns on more than one occasion for a period of five or six weeks after 13 February 2003. He was aware of her concerns about the proposed Problem Manager role and how it would impact on her career. He was also aware that she was concerned that she would not have an ongoing active role in the systems. Mr Thomas says the Problem Manager role would have given her direct systems experience. He says she continued to have user access on the system but she was not given super user access. This was discussed a number of times between Ms Allen, Mr Liney and Mr Thomas.

26 Mr Thomas says that the Problem Manager role was discontinued at the time in March when Ms Allen said she did not want to take on the role. At the time of her termination she was engaged in the Net Health task. He says they discussed with Ms Allen the level of her skill and her lack of practical experience and the need to tailor tasks to her appropriate level of skill. At that stage he had not discussed any future ongoing roles for Ms Allen beyond the four week time period.

27 Mr Thomas says that super user access is basically access to perform any function within the computer. He says unless someone is extremely skilled in the use and knowledge of that system it is extremely risky to allow a person to have that level of access.

28 In closing argument the respondent says that Ms Allen's contract of employment included that she was expected to undertake any work within her skills and ability, to work flexibly and that her duties and reporting requirements could be varied from time to time. She was a graduate employee who required further development in practical skills. She was given tasks consistent with the respondent's business requirements, her employment contract and her personal aspirations. In the latter part of her employment there were concerns about her performance and ultimately Ms Allen resigned. The application is 55 days out of time and the applicant did not take adequate steps to ensure the application was made promptly. The respondent says that the applicant sought advice from Wagenet and was aware of the need to comply with time limits on about 22 April 2003. The respondent says they did not have any knowledge of Ms Allen's intention to bring the application. The respondent says there is also no arguable case. Ms Allen left her employment voluntarily. She was asked at least on two occasions to reconsider her decision but did not do so. The applicant declined the Problem Manager role and hence continued to do her ordinary role.

29 The applicant in close says that after a discussion with Mr Gregory, having gone up the pecking order she could see no resolution to issues regarding her career. The applicant says that the test in matters such as this is whether on the merits there is a sufficiently arguable case. It is not that the applicant has to persuade the Commission that her case will succeed but that it is sufficiently arguable.

30 The applicant says that she sought advice from solicitors within the 28 day time limit. It was three days after the expiration of the time limit that she instructed her solicitors to progress the claim. Then no later than 13 May 2003 the applicant instructed her solicitors to proceed with filing the application, having earlier raised with them the prospect of a constructive dismissal case. The applicant says that this criterion it is a neutral matter before the Commission in light of the decision before the Full Bench in *Director General of the Department for Education v Prem Singh Malik* 83 WAIG 3056. The applicant says that she has pursued the matter with her representative with sufficient zeal. The applicant says that the test should be whether a reasonable person would conclude that in all the circumstances given the frustration to Ms Allen's career, she was forced to resign. The applicant's performance prior to Christmas was satisfactory. Then from 13 February 2003 onwards there was tension between the parties generated by uncertainty on the part of the applicant as to her role. The applicant says she was moved away from the core activity set out in the graduate program to a lesser and more marginalised role. There was no defined role for the applicant at the end of March. The Problem Manager's role was one that removed her from her core interests and core functions and skills. Nothing was done so as to resolve the applicant's issues.

31 I have weighed carefully the evidence of Mr Thomas and Ms Allen. There is evidence on behalf of the respondent which I indicated at hearing that I would pay no regard to as the applicant was not cross-examined on those matters. There is also some evidence-in-chief of Mr Thomas that has to be weighed carefully as he was led through that evidence. Nevertheless it is the case that Mr Thomas' evidence was both consistent and undiminished under cross-examination and I have confidence in his evidence. Mr Trainer for the applicant complains that Mr Thomas was not credible in respect of not pursuing further with Ms Allen the concerns which he held about her performance. Having seen Ms Allen and Mr Thomas give their evidence I formed the opposite view and that is that, as Mr Thomas says, the direction of the intended conversation changed given that Ms Allen raised other issues which she wanted addressed. Ms Allen's evidence is that there were regular discussions with her supervisors and that she knew they held concerns about her performance in the later part of her employment. She puts this down to being given tasks which either did not marry with her skills or were not of interest to her in a career sense. I put it in this way as the evidence she gave in response to questions from the Commission is that she was competent to do the tasks allocated to her at the time of her resignation. In simple terms I would prefer the evidence of Mr Thomas to that of Ms Allen where there is a conflict.

32 Having said that the prime area of conflict is that Ms Allen alleges that Mr Thomas precluded her from certain work only the male employees could do. Mr Thomas denies this serious allegation. I do not go to the precise comments that Ms Allen alleges were made by Mr Thomas. Ms Allen also complains that this discrimination extended to denying her super access on the system which other male colleagues had. Yet her own evidence is that her supervisor, Mr Thomas, also did not enjoy this access. Mr Thomas' explanation of this, which in my view makes sense and which I accept, is that by providing super access, that person then has access to all the functions on the system and if they err they can inflict serious damage on the system. Ms Allen was a graduate employee and needed to improve her practical skills and hence could not be given such access. In summary, whereas I have no doubt that Ms Allen was genuine in her perception of discrimination, the view I have formed is that it was just that, a perception. Similarly, Ms Allen's own evidence is that she was involved in work on ODIN and Net Health at the time of her dismissal. These on her evidence are areas which she wished to be involved in for the purposes of her career development and were areas that were part of her development plan. The complaint seems to be that this work was to last only three to four weeks. Mr Thomas confirms this but says relevantly that there was to be other work of a similar nature and that Ms Allen was not made to do the Problem Manager role after she declined that work.

33 I have dealt with each of these areas as they were points of contention in the evidence. However, at a more fundamental level Ms Allen's application has in my view little merit. Mr Trainer on behalf of the applicant says that for the purposes of section 29(3) Ms Allen only has to prove that she has a sufficiently arguable case. She does not have an arguable case in my view. Ms Allen says that she had to resign as her career was thwarted by the respondent, she had sought redress and after her discussion with Mr Gregory had come to the conclusion that there would be no change on the part of the respondent and hence was forced to resign. Her argument is that this amounts to a constructive dismissal. The argument is flawed in two ways. Firstly, her contract of employment makes it clear that she was a graduate employee whose duties could change at the discretion and dependent on the requirements of the respondent. I do not recite each term of the contract but this point is clear from the contract and Ms Allen's evidence. Obviously the range of duties to be performed were subject to them being within the competence of the employee and on Ms Allen's evidence they were. Mr Thomas, as indicated, maintained that Ms Allen was not required to continue in the Problem Manager role which Ms Allen complained was outside her skills and interests. In short the respondent was operating within the terms of the employment contract. Secondly, I cannot see how Ms Allen can sustain an argument that she was constructively dismissed. It is Mr Thomas' evidence that he asked Ms Allen to consider her position and to go home and calm down. She was upset at the time she submitted her resignation. They then spoke by telephone the next day and Ms Allen had another chance to retract her decision and indeed to pursue a grievance or counselling without having to resign. She chose to resign and I so find. She maintains that there was no other option as the employer would not change their mind about her role and duties. In my view her circumstances are very far from warranting a claim of constructive dismissal (*The Attorney General v Western Australian Prison Officer's Union of Workers* 75 WAIG 3166).

34 I should add that in relation to the other factors to be considered in deciding whether it would be unfair not to accept the application for referral under section 29(3) (*Anthony William Andrew v Metway Property Consultants & Auctioneers* 82 WAIG 3260) it is the case that the prejudice to the respondent would be the normal prejudice of having to defend the merits of the application, which as I have found are not substantial. The delay in making the application is significant and even though the applicant became aware of the time limit there was still some tardiness in actually making the application. The applicant blames the delay on her solicitors and says that the evidence on this point is at least neutral between the parties. I consider that a better course of action for the applicant would have been to submit the application in time or at least near to time, to protect her position, and then more fully explore the matter. Nevertheless, what in my view is of more significance is that the applicant at no time in the discussions leading to her resignation or at the time of her resignation indicated to the respondent that she would make a challenge in this jurisdiction. I take that matter no further as it is not necessary to do so.

35 Given the reasons which I have expressed I find that it would not be unfair not to accept a referral of Ms Allen's application pursuant to section 29(3) and hence I would dismiss the application.

2003 WAIRC 10346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBBIE-LEE ALLEN, APPLICANT
	v.
	TELSTRA CORPORATION, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 18 DECEMBER 2003
FILE NO.	APPLICATION 932 OF 2003
CITATION NO.	2003 WAIRC 10346

Result	Referral out of time not accepted; application dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr D Fewster

Order

HAVING heard Mr K Trainer on behalf of the applicant and Mr D Fewster on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that it would not be unfair not to accept Ms Allen's referral under s.29(1)(b)(i).

(2) ORDERS that the application be dismissed.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2003 WAIRC 10384

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROLYN ANGWIN, APPLICANT
	v.
	WHALEBACK GOLFCOURSE MANAGEMENT, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 24 DECEMBER 2003
FILE NO.	APPLICATION 1433 OF 2003
CITATION NO.	2003 WAIRC 10384

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – casual employment – summary dismissal – evidentiary onus of proof upon employer – evidentiary onus discharged – application dismissed – *Industrial Relations Act, 1979 s.29, s.23A*
Result	Dismissed
Representation	
Applicant	Ms C. Angwin appeared on her own behalf
Respondent	Mr K. Morgan appeared on behalf of the Respondent

Reasons for Decision
(Extempore)

1 On 26th September 2003 Carolyn Angwin, the Applicant, applied to the Commission pursuant to section 23A of the *Industrial Relations Act 1979* (the Act) for orders on the grounds that she had been unfairly dismissed from employment with Whaleback Golf Course Management Pty Ltd (the Respondent).

2 The facts are reasonably common between the parties. It is agreed that there were two separate periods of employment, the first from 2nd April 2003 to 4th June 2003 (Exhibit M2). Mr Hopkins, the Respondent's Principal, has said, and I accept his evidence that the reason for that transition was he decided to reduce his staff for business reasons for that time. I also accept his evidence that a new position became available and it was offered to the Applicant on or about 25th June 2003. Mr Hopkins' evidence is that he spoke to the Applicant and offered her the position. It would be casual. The records indicate that was the case with hours varying from 27½ up to 35½ over a period until the day of termination on 17th September 2003.

3 The Applicant concedes that she was a casual employee and I will return to the significance of that later in these reasons for decision.

4 The issues which gave rise to this application came to a head on 17th September 2003, or more correctly on the day before Mr Morgan, who appeared for the Respondent and who was, at that time, involved in a consulting position in the Respondent's employ, had noticed that the Applicant appeared to have left early. He then examined her time sheet. He was not satisfied with the recording methodology. He went about an investigative process which involved examining the time sheets and comparing the times claimed against the "Alarm close" records which he obtained from the Respondent's security company, VIP. On making those comparisons, he found that there were differences on 2nd August 2003, on 16th August 2003, on 6th September 2003, on 10th September 2003 and 13th September 2003. Some of the discrepancies were small but the major one was up to an hour.

5 The chronology of the matter is that after the investigation Mr Morgan invited the Applicant to attend a meeting, which was witnessed by another employee who did not give evidence in these proceedings. Mr Morgan's evidence of what happened in that meeting was given under oath. Although he was not cross-examined about the sequence of events, I find him to be a witness of truth and his version of the events that occurred at the meeting the Commission accepts. He says that the issues were raised and presented to the Applicant. She was given a chance to explain what had happened. He had in his possession at the time documents from the security company. In her evidence the Applicant says that she knew those documents were on the table but she chose not to look at them.

6 The evidence is that Mr Morgan then told the Applicant words to the effect that her conduct went to the root of the contract of service, that it was untenable to continue it and that he was bringing the contract of employment to an end by dismissing the Applicant.

7 There is then conflicting evidence about what happened but what can be assumed in all of these circumstances is that when a termination occurs, the worker is invariably upset and sometimes words are exchanged. This is a 'knock-on' effect that happens in those circumstances. So precisely what happened after termination was effected is not germane to whether there was fairness or not in the dismissal itself.

8 There was evidence given in cross-examination of Mr Morgan by the Applicant about her performance in general. I accept that the issues which did occur were dealt with at the time and had nothing to do with the termination and I accept the evidence that the employer, through Mr Morgan, accepted that in a general sense the Applicant was doing her job to their satisfaction for the time being and they did not feel it necessary to raise any of those issues with her.

9 The other matter I should comment on is that the evidence of Mr Morgan is that this matter has lately been notified to the police. It has been given an offence report number and may or may not be investigated. I make it clear that this Commission will not make any findings about whether or not in fact the Applicant did falsify her time records.

10 This matter is decidable without making such a finding and I make that clear; that in the finding I make it is not to be taken as an indication that a properly constituted court applying the test of beyond reasonable doubt would reach the same conclusion,

11 In any event, because the matter's been reported to the police I will specifically avoid making a finding on the balance of probabilities, about that matter because, as I say, it is decidable on the law by reference to other authorities.

12 What the Commission has to do here is make a determination about what was the real relationship between the parties and it does that because if it is later to make a finding that there has been unfairness, it must be able, in assessing compensation, to make a judgment about what is the real loss.

13 In these circumstances there is an admission that the Applicant was a casual employee. That is asserted by the Respondent to be the case and I note for the parties' interests only that if that be the case, if I were to make a finding of unfairness, any compensation would be extremely limited because of the casual nature of the employment.

14 The second part of the finding deals with whether or not there has been unfairness in the decision to dismiss. The tests the Commission is to apply are set out in the *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385. An employer has the right to hire and fire and that right will not be interfered with by a tribunal unless that right is abused.

15 Essentially in the application of the test what the Commission is to do is ensure there has been a fair go all round. So the test is not jurisprudentially difficult. It is what has been fair to the Applicant and what is fair to the Respondent.

16 In assessing whether the Respondent has abused the right to dismiss, the Commission has to apply the facts to the law. Here is an allegation which raises serious questions about the viability of the relationship between the parties on the basis of trust.

17 It is clear that conduct which goes to the root of the contract of service and involve trust can lead to termination for misconduct instantly.

18 In ascertaining whether such conduct has occurred an employer has to make reasonable steps to conduct an investigation and to allow the person who is accused of something to answer what they have been accused of. In making those investigations, an employer does not have to meet the rigorous standards of investigation that a police officer or a lawyer might. What they have to do is make take reasonable steps to ascertain whether the event about which they complain occurred or not.

19 So in this case what happened? There was an allegation of falsification of the time sheets. Clearly on the face of the documents there have been alterations and therefore it was justifiable to investigate why those alterations may have been made. The employer set about the task of testing whether those alterations may or may not be legitimate and they did that by obtaining their "Alarm close" records and comparing those records with sign-off times.

20 Mr Morgan then put those matters to the Applicant in an interview. That interview was conducted in the presence of someone else. I accept the evidence that the Applicant was given the opportunity to answer those claims. She of course disagreed with them but she was given the opportunity.

21 The Respondent then decided that it would not accept her answers. I find that was reasonable in the circumstances and it decided to effect the termination. It did so by paying the Applicant for the hours she had worked in that week and no more. That appears to me to be in accordance with the casual contract of employment and there were no further moneys to be paid if the termination was effected.

22 The question is, after all of that, was the employer's conduct in bringing the termination into effect reasonable? In cases such as this the onus to establish if there is a summary dismissal, the onus in establishing the evidentiary facts is upon the employer. In my view that evidentiary onus has been discharged. The facts were properly established and then the onus to prove whether there had been a fair dismissal or not switches back to the Applicant. I have listened to her arguments carefully. I accept that she truly believes that she should not have been dismissed.

23 But on the balance of all of the facts before me, I have to reach the conclusion that the onus of proof has not been discharged. She has not established that she has been unfairly dismissed upon the tests that have to be applied. I specifically do not make any finding about whom, if anybody made the alterations to the time records.

24 The application will have to be dismissed.

2003 WAIRC 10385

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROLYN ANGWIN, APPLICANT
	v.
	WHALEBACK GOLFCOURSE MANAGEMENT, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 24 DECEMBER 2003
FILE NO.	APPLICATION 1433 OF 2003
CITATION NO.	2003 WAIRC 10385

Result Dismissed

Order

HAVING heard Ms C. Angwin who appeared on her own behalf and Mr K. Morgan 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.

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

2004 WAIRC 10436

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRUCE STEPHEN CAMPBELL, APPLICANT *v.* NR & NJ GARDINER & SONS PTY LTD T/A GARDINER TRANSPORT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 8 JANUARY 2004
FILE NO.	APPLICATION 1576 OF 2003
CITATION NO.	2004 WAIRC 10436

Result	Application to accept referral pursuant to section 29(1)(b)(i) dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr K Gardiner

Reasons for Decision

(Given extemporaneously and edited by the Commissioner)

1 The applicant seeks that his application in which he claims that he was harshly, oppressively or unfairly dismissed be accepted although it was lodged more than 28 days after the date of termination of employment. The Industrial Relations Act 1979 ("the Act") makes provision for such an application to be made, and the Commission can grant such an application. Section 29(3) of the Act reads as follows—

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

2 It seems to be agreed that the applicant's employment with the respondent ended on 28 December 2002. The application was lodged with the Commission on 5 November 2003, some 10 months after the termination of employment and 9 months after the expiration of the 28 day time frame allowed for the making of these applications.

3 As I understand the applicant's evidence, the basis of his claim that he ought be allowed to make an application beyond the 28 days is two-fold. Firstly, he appears to be claiming that he had a lack of knowledge of the processes for making an application, and he also says that he lacked the funds to enable him to pay the filing fee. He also says that his dismissal was not justified, that it was carried out in an unfair manner and he was given no reason for the termination.

4 The tests to be applied in a case of this nature are those set out by the Full Bench in the *Director General of Education and Prem Singh Malik*, a decision of the Commission of the 20 August 2003 (83 WAIG 3056). At page 3064, Commissioner Kenner, who wrote the leading decision, noted the following matters—

> "In this State, this Commission and the Industrial Appeal Court, have established and applied relevant principles in relation to extensions of time from mandatory statutory time limitations imposed by the Act. In this respect, I refer to the well known decisions in *Tip Top Bakery v TWU* (1994) 74 WAIG 1189; *Ryan v Hazelby and Lester t/as Carnarvon Waste Disposals* (1993) 73 WAIG 1752 (both of which referred to and applied *Gallo v Dawson* (1990) 64 ALJR 45*8)* and *Robowash Pty Ltd v Michael* (1997) 78 WAIG 2323.
>
> Additionally, the Full Court of the Supreme Court in this State, in the often quoted judgement in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, held that four factors needed to be considered by the court exercising a discretion to extend time including the length of the delay; the reason for the delay; whether there was an arguable case and the extent of any prejudice suffered by the respondent.
>
> Having regard to the principles referred to in these cases, and considering the nature of ss 29(1)(b)(i) and 23A of the Act in my opinion, for the purposes of s 29(3) of the Act as it now is, consideration by the Commission of whether it ought extend time for the purposes of this subsection should include the following—
>
> (a) Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;
>
> (b) An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;
>
> (c) It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;
>
> (d) Considerations relevant to whether it would be unfair to not extend time include—
>
> (i) the length of any delay;
>
> (ii) the explanation for the delay;
>
> (iii) steps taken if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested;
>
> (iv) the merits of the substantive application in the sense that there is a sufficiently arguable case; and
>
> (e) Whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent, without more, is not a sufficient basis of itself, to grant an application for an extension of time."

5 In this case the length of the delay is greater than 9 months. Where in a jurisdiction such as this it is necessary for claims to be dealt with expeditiously, and the legislation sets out a time limit of 28 days, a delay of more than 9 months is an inordinate delay.

6 As to the explanations for the delay, the applicant says that it was not until March or April 2003 that he had any knowledge, through the Legal Aid Commission, that he might have the capacity to make an application to the Commission, and he says that he made inquiries of the Commission at that time but was unable to afford the filing fee of $50. He says that he was not aware of the opportunity for him to make an application to waive the fee.

7 He says that he has had difficulty with his finances due to problems associated with Centrelink querying his identity, and him having to address that problem over a lengthy period of time.

8 In those circumstances, though, I note that the applicant made no inquiries about making an application to the Commission until the application would at least have been 2 months out of time. He took no further action between March/April and November 2003 to pursue the matter.

9 As to the issue of lack of funds, Regulation 8 of the Industrial Relations (General) Regulations 1997 provides that—

> "(1) The Registrar or a Deputy Registrar may waive a fee referred to in Schedule 1 when the Registrar or Deputy Registrar considers it reasonable to do so."

10 I note that the fee referred to in schedule 1 includes the fee for filing an application claiming unfair dismissal. I am of the view that if the applicant had diligently pursued the matter he would have discovered that he could make an application to waive the fee.

11 I form the view that neither of the two reasons given by the applicant for his failure to file an application within time justifies the inordinate delay, and both matters could have been clarified by the applicant making reasonable inquiries.

12 As to the test as to whether or not the applicant had taken steps to evidence non-acceptance of the termination of employment and that it would be contested, he says that he telephoned a person, Colin, at the respondent's business about a week or two after the termination of employment, seeking the reasons for dismissal; and he says in cross-examination that he also said that if he did not get those reasons he would pursue the matter and bring the company before this Commission, which I must say sounds unusual if the applicant also says that he had no awareness of his capacity to bring such a claim at that time. In any event, if that occurred within 2 weeks of the termination of employment, it is reasonable for the respondent to then have assumed, after some further 9 months of not receiving an application, that no application would be made against it.

13 As to the merits of the application and whether or not there is a sufficiently arguable case, the applicant has said that no explanation was given to him, no warnings were given to him, the company has a three written warning policy in respect of inadequate performance; and he challenges the reasons that were later given. Prima facie, it may be that there is merit in the application sufficient to constitute an arguable case. However, the respondent says that it is unable to challenge the claim adequately, on the basis that the other employees who were involved in the applicant's dismissal left the business in around April. In those circumstances, it could be somewhat difficult for the respondent to respond to that arguable case. Nonetheless, it would appear on the surface that there may be an arguable case.

14 The next test, then, is the prejudice to the respondent should the application to extend time be granted. Once again, I note that the respondent would have difficulty in defending the application in that the employees involved in the termination left the business some 9 months ago, and that it would be expensive and time-consuming for the respondent to pursue those persons for the purpose of being able to defend the application. In those circumstances, there would be prejudice to the respondent beyond that which would normally apply in a case of this nature.

15 In all of the circumstances, then, I form the view that, on balance, the applicant has not demonstrated that there was good reason for the delay in the filing of the application, certainly not good reason to justify the inordinate delay and further, there would be prejudice to the respondent in the application being allowed to proceed.

16 There has also been no real pursuit by the applicant of the respondent such as to enable a finding that the applicant had evidenced non-acceptance of the termination of employment and that it would be contested.

17 In all of those circumstances, then, it is my decision to dismiss the application that the application be allowed to be filed out of time.

2004 WAIRC 10437

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	BRUCE STEPHEN CAMPBELL, APPLICANT
	v.
	NR & NJ GARDINER & SONS PTY LTD T/A GARDINER TRANSPORT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	THURSDAY, 8 JANUARY 2004
FILE NO.	APPLICATION 1576 OF 2003
CITATION NO.	2004 WAIRC 10437

Result	Application to accept referral pursuant to section 29(1)(b)(i) dismissed

Order

HAVING heard the applicant on his own behalf and Mr K Gardiner on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the application to receive the application under section 29(1)(b)(i) out of time be dismissed.

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

2004 WAIRC 10428

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRUCE STEPHEN CAMPBELL, APPLICANT
	v.
	BROOME TRANSPORT T/A GARDINER TRANSPORT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	WEDNESDAY, 7 JANUARY 2004
FILE NO.	APPLICATION 1576 OF 2003
CITATION NO.	2004 WAIRC 10428

Result Name of Respondent Amended

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS at the commencement of the hearing on Tuesday, the 6th day of January 2004, 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 "NR & NJ Gardiner & Sons Pty Ltd t/a Gardiner Transport";

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 NR & NJ Gardiner & Sons Pty Ltd t/a Gardiner Transport.

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

2003 WAIRC 10264

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SALLY ANNE GAUNT, APPLICANT
	v.
	EDITH COWAN UNIVERSITY STUDENT GUILD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 8 DECEMBER 2003
FILE NO.	APPLICATION 1573 OF 2003
CITATION NO.	2003 WAIRC 10264

Result	Claim of unfair dismissal out of time accepted.
Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles applied – Commission satisfied applying principles that discretion should be exercised – Referral out of time granted – Industrial Relations Act 1979 (WA) s 29(1)(b)(i),(2)&(3)
Representation	
Applicant	Mrs S.A. Gaunt
Respondent	No appearance

Reasons for Decision
(Extemporaneous)

1 This application is a claim by Mrs Gaunt that she was unfairly dismissed and also that she has been denied benefits under her contract of employment. When the matter came on for hearing on 8 December 2003 there was no appearance on behalf of the respondent. The Notice of Hearing set the matter down to commence at 10:30am. The Commission waited for 10 minutes. The Commission also noted that the Notice of Hearing had been sent to the respondent directly at the address given in the Notice of Application and no mail had been returned. The Commission noted that s.27(1)(d) of the *Industrial Relations Act 1979* allows the Commission to proceed in the absence of a party who has been given due notice of the proceedings. Accordingly, the matter proceeded in the absence of the respondent.

2 At the conclusion of the hearing, the Commission adjourned briefly and then gave the following extemporaneous decision: I am satisfied that the day Mrs Gaunt's employment was terminated was, as she has stated in the Notice of Application, 20 September 2003. I therefore find that the application is 16 days out of time.

3 The delay of 16 days is not an insignificant time in that a period of 28 days is allowed by the legislation to refer a claim of unfair dismissal to the Commission. In that context a further 16 days is more than half the period of time again that the Parliament has seen as being appropriate.

4 The decision that I have reached does not depend upon solely considering the number of days and I am prepared, in the context of what is to follow, not to regard the length of the delay as being the principal reason for the decision which I have reached.

5 Mrs Gaunt's evidence is that she was waiting for a letter from the Guild stating the reasons for the dismissal. Mrs Gaunt's evidence is that that letter did not arrive. I am not entirely persuaded that the letter is critical to Mrs Gaunt's fundamental reason for claiming unfair dismissal, that is that her dismissal was illegal. I am not sure that the letter would necessarily affect

whether or not her dismissal was illegal. However, I have taken into account that Mrs Gaunt waited for the Guild to do something which it in turn did not do. I therefore see that some responsibility for the delay arose from the lack of action on the Guild's part.

6 Secondly Mrs Gaunt stated that her last account had not been paid. I do not regard this as being a significant reason why the delay occurred because that issue would result in a claim for denied contractual benefits and is not a reason why she claims that her dismissal was unfair. I am not persuaded that that of itself is a reason excusing why the claim of unfair dismissal was delayed.

7 Thirdly Mrs Gaunt stated that she was intimidated by telephone calls. The evidence that she gave in relation to this I have found, with the greatest respect to Mrs Gaunt, to be sketchy. It is not clear to me from the example Mrs Gaunt has given, how a call from Mr O'Callaghan at 11:00pm one evening stating that it was urgent, can fit that description especially when, as I understood Mrs Gaunt's evidence, it was Mr O'Callaghan's usual practice to call around the clock (I think they were the words Mrs Gaunt used) and indeed that those calls had been received previously on the basis that there was a good relationship between Mrs Gaunt and Mr O'Callaghan. Similarly, the evidence that a dead rat had been left on her path does not without more establish any link between that occurrence and the Guild. I have not found Mrs Gaunt's evidence in relation to alleged intimidation to be satisfactory.

8 The fourth reason is the issue of the trust monies held by her. I am prepared to accept Mrs Gaunt's evidence that the issue of her retaining the trust monies was a complicated issue in her mind and that it was not until she had repaid those trust monies (which I add was very properly done by her) that she was able to concentrate more on what should happen in relation to her dismissal.

9 On balance I am prepared to accept Mrs Gaunt's reasons relating to her waiting for the letter from the Guild and also clearing up the issue of the trust monies as being reasons that can justify the late lodging of the claim.

10 In relation to the likely merits of the claim, there is on the paperwork a preliminary issue as to whether or not Mrs Gaunt was an employee or a solicitor acting in her own capacity. I find that if, when the time comes, Mrs Gaunt's evidence can show that she was under the direction or the control of the Guild in such matters as where and when to attend meetings and which student to see, that she was paid hourly as distinct from being paid a lump sum, that she used Guild stationery, Guild logo and had her expenses reimbursed, they are all matters that could establish that in truth Mrs Gaunt was an employee. In saying that I do not minimise the fact that her contract (which was tendered and which will become exhibit No. 1) does not use the term employee within its language and also is headed "Consultancy". Those matters on the face of it might indicate a finding to the contrary. It does at least seem to me that it is arguable on the evidence that Mrs Gaunt has foreshadowed she will give that she was an employee.

11 In relation to the other merits of the claim, I note that Mrs Gaunt's application states that the principal reason for claiming unfair dismissal is because the dismissal is said to be illegal. I pass the comment that a wrongful dismissal is not the same thing as an unfair dismissal and that a wrongful dismissal may not necessarily be unfair, although I suspect that the authorities would suggest that a wrongful dismissal may very well be an unfair dismissal.

12 I am not entirely sure therefore that the principal reason that Mrs Gaunt puts forward for claiming her dismissal was unfair is necessarily strong. However, it may be that if her dismissal was illegal that fact would go a substantial way to also showing unfairness.

13 In considering the prejudice to Mrs Gaunt if I reject her claim, I find that would be the end of her unfair dismissal claim with its attendant possibilities of compensation or, as she now intends to claim, reinstatement. As against that, even if the claim of unfair dismissal is dismissed then what Mrs Gaunt this morning described as the main reason for the lodging of the claim, that is the non-payment of the last account, would remain. Her claim of non-payment of entitlements is a claim that is not caught by the 28 day period. However, there would be prejudice to Mrs Gaunt in the sense that she would not be able to pursue the reinstatement that she says she now wishes to pursue.

14 The prejudice to the respondent if I accept the claim of unfair dismissal is that it would have to defend a claim it would not otherwise have to defend. I note Mrs Gaunt's evidence that it is her understanding that the Guild did not know of her intention to take a claim of unfair dismissal until the claim was referred to the Commission and served upon it. However, I do note that there was a meeting between Mrs Gaunt and her legal adviser (or her then legal adviser) and the Guild on 10 October 2003 where issues between them were canvassed. Although on Mrs Gaunt's evidence, the legality or otherwise of the dismissal was not canvassed, that meeting at least goes some part to allowing me to conclude that although any intention to challenge the fairness or otherwise of the dismissal was not raised by Mrs Gaunt at that meeting on 10 October 2003, the fact that the meeting occurred placed the respondent on notice that Mrs Gaunt did not consider all of the issues that arose from the events which she describes as her dismissal were closed.

15 I have not necessarily found the balancing of these issues to be an easy task for the reasons that I have given. However, I have ultimately reached the decision that it would be unfair not to accept Mrs Gaunt's claim on the basis of the respondent's failure to provide the letter that it stated to her it would provide and also the circumstances of the complications of the trust monies.

16 For those reasons I have decided that a Declaration should issue that it would be unfair not to accept the referral of the claim of unfair dismissal.

17 Mrs Gaunt has stated that if I issue the Order in the form of a Declaration that it would be unfair not to accept her referral of a claim of unfair dismissal and secondly that the claim of unfair dismissal is accepted, she would not wish to speak to the Minutes.

18 Order accordingly.

2003 WAIRC 10250

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SALLY ANNE GAUNT, APPLICANT
	v.
	EDITH COWAN UNIVERSITY STUDENT GUILD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 10 DECEMBER 2003
FILE NO.	APPLICATION 1573 OF 2003
CITATION NO.	2003 WAIRC 10250

Result	Claim of unfair dismissal out of time accepted.
Representation	
Applicant	Mrs S.A. Gaunt
Respondent	No appearance

Declaration

HAVING HEARD Mrs S.A. Gaunt on her own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby declares—

(1) THAT it would be unfair not to accept Sally Anne Gaunt's referral of a claim of unfair dismissal.

(2) THAT the claim of unfair dismissal is therefore accepted.

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

2003 WAIRC 10382

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT PAUL HANTSCHE, APPLICANT
	v.
	ALS CHEMEX, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 24 DECEMBER 2003
FILE NO.	APPLICATION 342 OF 2003
CITATION NO.	2003 WAIRC 10382

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – reinstatement not sought – serum blood lead levels – expert evidence called - matter dismissed - *Industrial Relations Act, 1979 s.29, s.23A*
Result	Dismissed
Representation	
Applicant	Mr P. Mullally appeared on behalf of the Applicant
Respondent	Ms L. Gibbs, of Counsel, appeared on behalf of the Respondent

Reasons for Decision

1 On 17th March 2003 Robert Paul Hantsche (the Applicant) applied to the Commission for orders pursuant to s.23A of the *Industrial Relations Act, 1979* (the Act) on the grounds that he had suffered a harsh, oppressive or unfair dismissal from employment with ALS Chemex (the Respondent) where he had been employed as a fire assayer doing duties involving weighing, fluxing, fusion and cupellation of exploration drill samples for the purpose of determining gold values. The Applicant had been employed by the Respondent on two separate occasions the last, the subject of these proceedings, commencing in September 2000.

2 In the documentation supporting the application the Applicant claimed that he was unfairly dismissed on the basis of a complaint of verbal abuse directed at a work colleague. He admitted while there was some substance in the complaint the incident was reciprocation for abuse he had received. He also asserted that his dismissal was the result of a concerted and relentless campaign of harassment and victimisation from both work colleagues and management alike to induce him to quit his position with the Respondent at Kalgoorlie.

3 He had received a final written warning while on annual leave. On his return to work he questioned the validity and strength of the complaint as well as the legality of the final warning. He was told that if further incidents of abuse happened he would be dismissed. Approximately two months later on 7th March 2003 he was unfairly dismissed on the basis of a frivolous and unsubstantiated complaint.

4 In his application he asserted that reinstatement would be untenable because harassment from his colleagues is always present due to his decision not to interact with them on a social after work basis. The harassment and victimisation was due to his pursuance of a back pay issue as well as workplace health and safety issues. He believed harassment and victimisation would continue and intensify if he were reinstated.

5 Also in his application the Applicant refers to an alleged cavalier attitude of management towards occupational health issues which may have affected his general health due to inadequate monitoring of exposure to hazardous chemicals. He was going to change his career path and sought compensation as assistance in the transition into alternative work.

6 As the case developed the Applicant's agent, Mr Mullally, focused his attention on an allegation that rising levels of lead in the Applicant's blood during the period of his employment with the Respondent was the cause of repeated behavioural issues which arose during his employment. Mr Mullally claims that during the period of his employment the Applicant did not have his serum blood lead level monitored in the way required by the law and that was the fault of the employer. Those lead levels were high enough to cause the behaviour exhibited by the Applicant during his employment. For instance his aggression and failure to get on with his workmates led to continued arguments with them and therefore his dismissal in the circumstances must be unfair. In a nut shell that is the case. Its success or not depends upon two things; whether the Respondent has a legal obligation to ensure serum blood lead levels are monitored in the industry in which it operates and if it does not whether if a

worker suffers a health effect as a result of high serum blood lead levels it can be said to be unfair because the employer did not monitor the worker's serum blood lead levels as is required by the occupational health and safety laws of the State.

7 It should be said first of all that it is common ground between the parties that over the Applicant's period of employment with the Respondent he has had a series of arguments, displayed aggression and failure to get on with his workmates to such a state that he had been warned on a number of occasions. Ultimately he received a final warning for abuse and when that final warning was eventually being discussed with him that there was a further outburst by him which led to his dismissal.

8 It is only if there is an explanation for this behaviour that the Applicant's case might be successful.

9 The evidence before the Commission is that the Applicant is in an industry where the occupational health and safety law require serum blood lead levels to be taken. The Commission heard from Mr Paidra an experienced Workplace Inspector who on the complaint of the Applicant had attended the Respondent's premises and had issued improvement notices regarding the exposure of employees to chemical risks.

10 The Applicant had also submitted to the Commission a graph that he had prepared which set out the serum blood lead levels that he had since 1998.

11 For this case to succeed the Applicant will have to show that the serum blood lead levels that were measured were or were likely to have the effects upon his behaviour that he claims. In respect of that the medical evidence produced by the Applicant is from Dr. M. Hodsdon who is general practitioner in practice in Kalgoorlie. He has medical qualifications and did six months training in obstetrics and gynaecology but has no qualifications in occupational medicine. He has no particular knowledge about toxicology and the only dealings that he had had with lead levels in patients was through general practice. Dr Hodsdon wrote a letter in which he said that the Applicant was or had been exposed to lead in his workplace. He observed that had been documented that his blood serum lead levels had been in an unacceptable range of more than 30ug/dcl over a period of time. He also observed "*it is well known that lead can cause behavioural and mood changes*" (Exhibit M6). During his cross examination by Ms Gibbs of Counsel, who appeared for the Respondent, Dr Hodsdon frankly admitted that he accepted guidance from the pathology centre as to what should be regarded excessive serum lead blood levels. He admitted that some laboratories vary as to how they interpret results, but nevertheless he receives guidance from them. As a result it is clear that he had no particular knowledge about the affects of high lead levels in the blood other than a general knowledge and the perusal of some literature on the web.

12 Dr Hodsdon's involvement with the Applicant began when the Applicant visited him after he had been involved in some domestic violence. He told Dr Hodsdon that he thought he may be suffering behavioural effects of high lead levels. This caused the Doctor to seek records of his testing which were sparse. Of those available one that shows an amount of 47ug/dcl which was recorded in February 2002. There was a level 36ug/dcl on 20th July 2001 a further reading of 30ug/dcl on 26th October, 32ug/dcl on 16th December 2002 and 34ug/dcl in March 2003.

13 All of this information relating to the Applicant's blood levels were referred to Dr Martin Flahive who is a specialist in occupational medicine. He is a fellow of the Australasian Faculty of Occupational Medicine, has completed post graduate studies in occupational health and safety.

14 It is clear from the curriculum vitae of Dr Flahive, who gave evidence on 8th December 2003, that he is an expert in occupational medicine and who has undertaken considerable study in the area of toxicology. He has worked with a number of employees and employers in relation to monitoring lead exposures and has developed a Hatsvan Program for the purpose of measuring serum blood lead levels. He has also reviewed workers that have either thought they were exposed and actually had high levels of exposure as evidenced by the blood levels and conducted medical examinations on them. Dr Flahive was shown the chart prepared by the Applicant (Exhibit M30). He identified them as plot points on a time line. In his opinion the thinking behind the graph was flawed and drew the conclusion that the readings are within a reasonable range for what he would see as risk workers, although there would be need for ongoing monitoring for that individual. At the levels recorded he would not have expected to see any abnormal cognitive or health effects that would have been presented as behavioural effects within the workplace. These sort of behavioural effects can be seen but at much higher levels in the area of 60-70ug/dcl.

15 At the levels measured in the Applicant, on the research, any effect would be subclinical and were not at a range where one could expect abnormal cognitive or behavioural effects. All of the levels that the Applicant measured were at the low end of the range.

16 In pages 234, 235 and 236 of the transcript Dr Flahive detailed the extensive medical investigations which would be necessary to establish whether the Applicant was suffering from the effects of high serum blood lead levels. He described how a detailed history of the type of work he did and his exposure outside of work would need to be developed. A clinician would be looking for signs of drug use, whether the patient was depressed or had alcohol problems, whether he had financial problems. It would be necessary to do a zinc protoporphyrin test to see whether the blood enzymes were being affected by lead. There would need to be kidney function test, neuro-analysis and to detect any signs of plural peripheral neuropathy the doctor would order an electromyography. There are other tests which need to be done and other diseases and effects which needed to be isolated.

17 It is clear from the evidence that Dr Flahive, whose evidence by weight of his speciality and studies should be preferred over the evidence of Dr Hodsdon, has concluded that the serum blood lead levels of the Applicant could not lead to the abnormal behaviour exhibited by him.

18 The Commission heard from a number of witnesses from the Respondent about the behaviour of the Applicant. There is nothing in any of their evidence which would indicate to me that they were not telling the truth. In fact, as I have recorded earlier, there is some common ground as to his behaviour. Importantly for whether the Commission should inquire further having found that the evidence of Dr Flahive should be accepted, is the behaviour of the Applicant himself. He presented in the witness box as loud and aggressive. He was combative when being cross examined by Ms Gibbs. Interestingly from the Commission's point of view he seemed to relish the repetition of the type of abusive language that he had used in the workplace. This type of behaviour in a witness is quite unusual, witnesses often confronted with bad language will make an admission of it but they rarely repeat it with the type of relish that the Applicant seemed to in this case.

19 I have concluded that his behaviour in the witness box gave the Commission a good opportunity to assess the likelihood that he had predisposition to aggressive and agitated behaviour and it is very clear that he had. There is no submission on his behalf that his behaviour during the time of the hearing was caused by a high serum blood lead level. Coupled with this the evidence from the Respondent's witnesses is that he behaved no differently in his second employment period than he did during the first period when he worked for the Respondent in Kalgoorlie. When asked why he was re-employed the Commission was told by the Respondent's witnesses they were short of experienced fire assayers and they were prepared to take him on knowing his behaviour.

20 The question of the effect of the alleged high serum blood lead levels on the Applicant's behaviour was not the substantive issue raised by him in his application. He had directed his contentions of unfairness as a base of his dismissal to verbal abuse. There were allegations of a cavalier attitude of management towards occupational health matters and inadequate monitoring of

hazardous chemicals but that was a periphery issue until the case proper commenced when particulars were sought about the lead levels. The Commission cannot find that this was an opportunity taken to build a case but it does observe it arose late in the proceedings. There is also the allegation of the Respondent that the Applicant had alleged that there was a plot to get rid of him and that he would cause the Respondent to spend hundreds of thousands of dollars on lawyers over the dismissal and that he asked for 'a deal' for him to leave. The Respondent did not offer any inducements for him to leave it though on the advice of its human resources staff paid out monies which were due to the Applicant.

21 There were legitimate issues raised in this case about the Respondent's poor compliance with occupational health rules concerning the use of hazardous chemicals however when the complaint was made, Worksafe through Inspector Paidra, immediately attended upon the complaint. He conducted a thorough investigation and took strong action to ensure that the Respondent did comply with its obligations. Worksafe did not think it necessary to prosecute the Respondent. It is also relevant to note that notwithstanding allegations to the contrary by the Applicant the Worksafe investigation showed that the Respondent did have the necessary safety equipment available in the form of masks, filters and other equipment necessary for protection of people who may be exposed to lead compounds.

22 I do not intend to make findings about the conduct of the Applicant and whether absent the allegation that he suffered erratic behaviour because of high lead levels he may have been dismissed. It is unnecessary to do so because the Applicant has said that the unfairness arises not in the dismissal in the normal course of events but of the dismissal when the employer allegedly failed to comply with its monitoring obligations and that lead to the Applicant sustaining high serum blood lead levels which caused his behaviour. I find that he has not established that to be the case. I accept the evidence of Dr Flahive over Dr Hodsdon and for that reason the application put must fail.

23 An order of dismissal will issue.

2003 WAIRC 10383

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT PAUL HANTSCHE, APPLICANT
	v.
	ALS CHEMEX, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 24 DECEMBER 2003
FILE NO.	APPLICATION 342 OF 2003
CITATION NO.	2003 WAIRC 10383

Result	Dismissed

Order

HAVING heard Mr P. Mullally who appeared on behalf of the Applicant and Ms L. Gibbs (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.

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

2003 WAIRC 10235

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTINE RUTH HINDS, APPLICANT
	v.
	BRUMAR SERVICES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 9 DECEMBER 2003
FILE NO/S.	APPLICATION 1512 OF 2002
CITATION NO.	2003 WAIRC 10235

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms J Auerbach (of counsel)

Reasons for Decision

1 This is an application by Christine Ruth Hinds ("the applicant") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that she was unfairly dismissed from her employment with Brumar Services Pty Ltd ("the respondent") on 6 August 2002**.** The respondent denies that the applicant was unfairly terminated and claims that the applicant was terminated due to a redundancy situation.

Background

2 On 21 February 2001 the applicant commenced employment as a console operator with Novek Pty Ltd and her contract of employment with both Novek Pty Ltd and the respondent was governed by the terms and conditions of a registered workplace agreement (Exhibit A1) and by an offer of employment given to the applicant on 21 February 2001 (Exhibit A2).

3 In November 2001 Novek Pty Ltd was taken over by the respondent and all existing employees were transferred to positions with the respondent effective 28 November 2001. Annual leave, sick leave and long service leave entitlements accrued by employees whilst working for Novek Pty Ltd were transferred across to their employment with the respondent.

4 On 12 October 2001 the applicant resigned from her position with Novek Pty Ltd but within a short period of time after that date she was reinstated on a permanent basis without any loss of entitlements or service. It was common ground that when the applicant was reinstated she was unable to return to her existing position at the Singleton site as this position had already been filled by another permanent employee. The applicant was aware that between April and July 2002 the respondent reviewed and restructured its operations and the applicant concedes that when she was terminated on 6 August 2002 it was due to a genuine redundancy situation. The respondent had no issues with the applicant's performance and it was not in dispute that the applicant was a valued employee as she accepted numerous additional shifts at short notice at various sites.

5 When the applicant was terminated on 6 August 2002 she was paid two weeks' pay in lieu of notice in accordance with her contract of employment. No redundancy entitlements were paid to the applicant at termination as there was no provision in the applicant's contract of employment for a redundancy payment to be made to her.

Applicant's evidence

6 The applicant stated that she resigned on 12 October 2001 because of the way in which her employer at the time Novek Pty Ltd handled a harassment complaint made about her by another employee. As a result of the applicant being unhappy with how this complaint was handled a meeting was convened and her employer agreed to reinstate the applicant. The applicant stated that after she was reinstated in October 2001 she worked at various sites. As the applicant was a permanent employee she was given an undertaking that relief work would be allocated to her until another position could be found. She undertook ongoing relief work until she was offered a relief position in late January/February 2002 at Golden Bay on a shift covering four days on/four days off usually working from 8.00am to 6.00pm. The applicant also undertook overtime at other sites.

7 The applicant stated that from May 2002 onwards she was allocated less and less hours. This is confirmed in the summary of the shifts she undertook during this period (Exhibit A5). As the applicant was concerned about her reduced hours she approached the respondent's Retail Area Manager, Ms Jenny May. Ms May informed the applicant that the respondent was undergoing a restructure and this could result in changes to employees' rosters and hours. The applicant expressed interest in continuing to work shifts at the Golden Bay site. The applicant gave evidence that Ms May told her that another employee working at Golden Bay, Ms Michelle Christmas was being allocated to the restructured day shift position at Golden Bay in preference to the applicant as Ms Christmas was a permanent employee and had greater service than the applicant. The applicant gave evidence that Ms May also told the applicant that Ms Christmas was selected because the applicant was a casual employee. The applicant told Ms May she was employed as a full-time permanent employee and not a casual employee. Ms May undertook to review the situation however the applicant heard nothing further from Ms May about this issue.

8 On 23 July 2002 the applicant had a meeting with Ms May at the respondent's Thomas Road site. The applicant again told Ms May that she was unhappy with the hours she was working and that she wanted to work regular, not casual shifts. She stated that Ms May then offered her a position at the Singleton site. The applicant told Ms May that this offer was unsuitable as the staff member that she had the altercation with in October 2001 continued to work at this site. Ms May then offered the applicant an afternoon shift position at the Golden Bay site. The applicant explained to Ms May that as she needed to be at home when her son came home from school she was unable to take up this afternoon shift at Golden Bay. She stated that at this point Ms May acknowledged the applicant's inability to work afternoon shifts. Ms May told that applicant that she would check further on the situation and get back to the applicant.

9 The applicant stated that on 5 August 2002 she met with Ms May at the Waikiki site. Ms May informed the applicant that she was to be made redundant as there were no other positions for the applicant available with the respondent. She was then handed a letter terminating the applicant (Exhibit A8).

10 After she was terminated the applicant applied for a number of positions involving working with vertical blinds, travel and a curtain business. The applicant also signed up with Centrelink. The applicant obtained some casual work at the curtain shop but this business was eventually sold. The applicant undertook some casual weekend employment at a delicatessen and she purchased this business in July 2003. The applicant stated that since termination she has earned approximately $6,000.

11 The applicant stated that she was a dedicated employee. She did not take sick leave apart from being away for one operation, she worked all of the shifts that were required of her and she worked additional shifts when asked by the respondent. It was the applicant's view that she should have been allocated Ms Christmas's roster at the Golden Bay site as the position was Monday to Friday from 7.00am to 3.00pm and that the respondent did not consider her for this position.

12 The applicant stated that given her good employment history with the respondent she believed that there was no impediment to her being reinstated.

13 Under cross-examination the applicant confirmed that when she commenced employment with Novek Pty Ltd she worked the afternoon shift from 12.30pm to 10.30pm. She also confirmed that on her employment application form she indicated that there were no restrictions on the hours that she was available to work.

14 The applicant was asked about the incident which occurred in October 2001 at the Singleton site. The applicant stated that even though she was not given a formal warning about this incident she felt she was targeted as a result of this incident as other employees involved in this matter were not disciplined. The applicant stated that the person who complained about her continued to make accusations against her after the incident was resolved. The applicant agreed that she had worked at the Singleton site subsequent to this incident and that she occasionally worked with the person who had made the accusations against her.

15 It was put to the applicant that she was aware that the shift position she was undertaking at Golden Bay from January 2002 was not an ongoing position as the person for whom she was filling in was away due to a workers' compensation injury. The applicant stated that she was aware that this employee would come back at some stage. The applicant stated that she complained about being offered less hours in May 2002 because her daily shifts had been reduced from ten hours to eight and a half hours. She stated that throughout June 2002 she was only being allocated relief shifts and not regular shifts. The applicant agreed that she was aware that as a result of the respondent restructuring its operations the existing shift pattern of four days on and four day off was to be abolished.

16 The applicant was asked if she recalled Ms May informing her that one of the two positions at Golden Bay was to be made redundant and that Ms Christmas would be given preference for the remaining position due to her length of service with the

respondent. The applicant maintained that Ms May told her that she was a relief employee at Golden Bay and that Ms Christmas was a permanent employee. It was put to the applicant that she was informed by Ms May that a position would be available at either Singleton or Golden Bay for her as one of the respondent's employees was going to be promoted from one of these two sites. The applicant confirmed that she was offered a permanent position at Singleton but she told Ms May that she couldn't work there because the person at the centre of the October 2001 incident remained at this site. She reiterated that when she was offered the position at the Singleton site she told Ms May at this point that she was unable to work afternoon shifts and requested that she be allocated day shifts.

17 The applicant was asked why she did not take up the position created for her at Golden Bay. The applicant stated that she was unable to undertake this position as the job was on the afternoon shift from 12.45pm to 10.15pm she would not be home when her son returned home from school. It was put to the applicant that she frequently worked for the respondent in the evening. She stated that she only worked evening hours when her husband was at home and thus able to look after their son. It was put to the applicant that the respondent moved an employee from Golden Bay to create a position for the applicant and that the respondent would not have done this if it had know that the applicant did not wish to work afternoon shifts. The applicant stated that the respondent did not discuss moving this employee with her. The applicant agreed that Ms Christmas had longer service than her and that Ms Christmas was as well qualified as the applicant. She agreed that as at July 2002 the respondent had offered her two permanent positions and that up to that point she had always worked the afternoon shifts offered to her. The applicant agreed that Ms May advised her at some point that relief work was no longer an option for her and that her only other option was to be employed on a casual basis. She also agreed that Ms May told her that a number of other respondent's staff wished to work day shifts.

18 The applicant confirmed that at a meeting held with Ms May on 23 July 2002 at Thomas Road she was informed that apart from the two positions which the respondent had offered her there were no other permanent positions available with the respondent at that time. She stated that she did not recall being told at this meeting that she was to be made redundant, however the applicant recalled being informed that she could consider taking on casual employment with the respondent. The applicant confirmed that when the applicant was handed her termination letter she informed Ms May that she was not in a position to work on a casual basis.

Respondent's evidence

19 Ms May is responsible for rostering, employing staff, and for general human resource responsibilities covering the 14 service stations operated by the respondent. She commenced in this position in mid February 2002. Ms May understood from the applicant's original employment application that there was no restriction on the hours that the applicant was available to work for the respondent. Ms May confirmed that in January 2002 the applicant was undertaking the roster of an employee who was on workers' compensation at Golden Bay and that the applicant worked this shift on the basis that she was aware that it was a temporary relief position. She confirmed that the applicant worked this shift and additional shifts when they became available. She stated that she was unaware that the applicant had a problem with working with the employee at Singleton who was involved in the dispute with the applicant in October 2001. Ms May understood that this matter had been resolved.

20 Ms May stated that when the applicant was reinstated in October 2001 she understood that she would then be filling in as and where required as a permanent position was not available for the applicant at a specific site.

21 Ms May stated that in April 2002 the respondent restructured its operations and reduced the number of hours to be worked on each shift at its various sites. The Golden Bay site was given a set number of hours to reduce and in order to achieve this shifts were reduced from ten hours to eight and a half hours, four days on and four days off. Ms May stated that employees complained about this change as the reduction in hours was reasonably significant. In June 2002 the respondent decided to further restructure its operations and the hours worked at each site were again reduced. She stated that the respondent attempted to cut back hours without effecting any redundancies. She stated that even though there were no problems with the applicant's performance it was decided to retain Ms Christmas in the position at the Golden Bay site in preference to giving the position to the applicant as Ms Christmas had worked at the site on a permanent basis for five to six years and had longer service than the applicant. Ms May stated that for these reasons she did not specifically compare Ms Christmas' skills with those of the applicant for the position at Golden Bay. Ms May also stated that she did not compare the applicant and Ms Christmas because she was aware that a position was to become available for the applicant at the Singleton site as one of the respondent's employees there was due to be promoted.

22 Ms May stated that she had discussions with the applicant at this time about a possible transfer and it was discussed with the applicant that Singleton was an option for her. Ms May stated that at no stage was she informed by the applicant that she would not work an afternoon shift nor was she informed that the applicant would not accept a permanent transfer to the Singleton site. It was not until a permanent position at Singleton was offered to the applicant and the applicant rejected this offer that Ms May became aware that the applicant was not prepared to work with one of the other employees at this site. Ms May stated that she had never told the applicant that she was a casual employee.

23 Given the applicant's commitment to the respondent and her willingness to work flexibly the respondent felt that it had an obligation to retain the applicant in its employ. This led to Ms May negotiating with an existing employee who worked from 1.30pm to 10.30pm at the Golden Bay site to transfer to the respondent's Myaree site. This afternoon shift position at Golden Bay was then offered to the applicant. Ms May was surprised when the applicant declined this position. After being offered this job the applicant informed Ms May that she did not want to work the afternoon shift due to family commitments. Ms May stated that she would not have negotiated to transfer the employee to Myaree if she had known that the applicant would not be available to take up this position at Golden Bay. Ms May stated that up to that point the applicant had never refused the opportunity to work an afternoon shift. Ms May stated that on 3 July 2002 she had a discussion with the applicant at the Singleton site about the lack of positions available for the applicant at the time. Ms May stated that as the applicant had rejected two positions offered to her she was asked to consider casual employment. The applicant indicated her concern about working on a casual basis as she may not be allocated sufficient hours. Ms May informed the applicant that at that stage there was not a permanent morning shift position available with the respondent and she told the applicant that several employees with longer service than the applicant wanted to work the morning shift. When asked why the applicant was not allocated to Ms Christmas' position when she resigned Ms May stated that this position was allocated to a senior customer service officer who was returning to work with the respondent after being on workers' compensation and he was appointed to Ms Christmas's position as he had longer service than the applicant.

24 On 23 July 2002 Ms May met with the applicant at the Thomas Road site. As no suitable alternative position had been identified for the applicant, the applicant was informed that the respondent had no other option than to make her redundant. Ms May stated that there was a further discussion about the applicant working on a casual basis but the applicant was unhappy about this. In early August 2002 Ms May again met with the applicant in Waikiki and terminated her (Exhibit A8).

25 Under cross-examination Ms May was asked why she preferred Ms Christmas to the applicant for the day shift position at Golden Bay. Ms May maintained that at that stage there was no necessity to compare the two employees because she was aware that another job was going to become available for the applicant at either Singleton or Golden Bay.

26 It was put to Ms May that she should have offered Ms Christmas's shifts to the applicant once it became clear that Ms Christmas was no longer returning to work with the respondent. Ms May maintained that when the alternative positions at Golden Bay and Singleton were offered to the applicant she was unaware that Ms Christmas was not returning to work. Ms May stated that by the time she was aware that Ms Christmas was not returning to work the respondent had already made the decision to make the applicant redundant. She stated that she did not offer the applicant Ms Christmas's shifts whilst Ms Christmas was on leave because she understood the applicant wanted a permanent position. Ms May was asked why the applicant was not put into the position of an employee called Lisa who left around May 2002. Ms May stated that the applicant was not put into this position as this position was to be restructured.

27 Ms May stated that it would be difficult to reinstate the applicant because one site had closed and the respondent had staffing issues at another site. She said that the respondent had an abundance of employees available for work. She stated that it was her view that all of the requirements under the applicant's workplace agreement had been met in relation to redundancy as the applicant was paid two weeks' pay in lieu of notice and discussions had taken place with the applicant about alternatives to termination and the impact of the redundancy on the applicant. Ms May stated that the respondent did not want to make anyone redundant as part of its restructure, and at all times she was operating on the understanding that the applicant would take up a position at either Singleton or Golden Bay.

Submissions

28 The applicant maintains that the respondent should have considered her for Ms Christmas's position prior to offering the applicant alternative positions at Singleton and Golden Bay. The respondent should have retained the applicant in Ms Christmas's position when she went on leave while further attempts were made to find a permanent position for the applicant. The respondent should not have allowed the person who was returning from workers' compensation to be given the position at Golden Bay in preference to the applicant. The applicant maintains that the respondent did not use a fair and transparent selection process when deciding who should be allocated to various shifts and the Applicant argues that the respondent should have had more discussions with the applicant prior to deciding to make the applicant redundant.

29 The applicant maintains that the positions offered to her at Singleton and at Golden Bay were unsuitable and the option of casual employment was inappropriate as the hours of work were not guaranteed. The applicant is seeking reinstatement or in the alternative compensation as she has satisfied the onus on her to mitigate her loss.

30 The respondent submits that it is not in issue that the applicant was terminated due to a genuine redundancy situation. What is in issue is whether the respondent adopted appropriate selection criteria in choosing the applicant for redundancy. The respondent maintains that it properly considered which employees should be retained before choosing to make the applicant redundant. The respondent took into account each employee's length of service, whether or not each employee was allocated to a permanent position and the skills of each employee. The applicant was always aware that her job at the Golden Bay site between February 2002 and June 2002 was not a permanent position as the applicant was filling in for an employee who was on leave due to a workers' compensation injury.

31 The respondent argues that it is an employer's prerogative to determine who should be retained in a redundancy situation and in the circumstances it was appropriate for the respondent to choose to retain Ms Christmas at the Golden Bay site in preference to the applicant because Ms Christmas had been in this permanent position at this site for some time and had longer service than the applicant. If the respondent was to transfer the applicant to the day shift position at Golden Bay it would lead to Ms Christmas's termination. The respondent took the view that this action was not appropriate. The respondent argues that the applicant has not satisfied the onus on her to identify an alternative employee who should have been made redundant in preference to the applicant.

32 The respondent maintains that it adopted a proper process when terminating the applicant. The applicant agreed that she was advised both in April 2002 and in June 2002 that the respondent was restructuring its operations. Even though the respondent was undergoing changes and reducing working hours, the applicant was offered permanent positions at both its Singleton and Golden Bay sites. When the applicant was initially offered the position at Singleton she did not raise any issues at the time about any hours that she was unavailable to work. If the applicant had raised her unavailability to work the afternoon shift Ms May would not have created the vacancy for her at Golden Bay by transferring another employee to the respondent's Myaree site. It was not unreasonable for the respondent to assume the applicant would be available for afternoon shifts as up until June 2002 the applicant had always been flexible in the shifts she had worked.

33 The respondent did everything it could to retain the applicant's services. Even though the respondent did not want to terminate the applicant she was part of a group of employees many with longer service than the applicant who wanted to work a morning shift. When the applicant rejected the offers of placement at the Golden Bay and Singleton sites the respondent offered the applicant casual employment. When this offer was rejected the respondent had no alternative but to make the applicant redundant as at 6 August 2002. The applicant was lawfully terminated as the requirements under the applicant's contract of employment were met when the applicant was paid two weeks' pay in lieu of notice at termination.

Findings and Conclusions

Credibility

34 In my view each witness gave their evidence to the best of their recollection. However, where the evidence conflicts I accept the evidence of Ms May in preference to that given by the applicant. I do so on the basis that Ms May's recollection of events on significant issues was more detailed and more consistent that that of the applicant. For example I accept that Ms May would not have arranged for an employee who worked the afternoon shift at Golden Bay to transfer to the respondent's Myaree site in order to create a position for the applicant if she was aware that the applicant was unavailable to work the afternoon shift. In contrast, the applicant gave evidence, which I find to be implausible, that Ms May was aware that the applicant was unable to work the afternoon shift prior to Ms May transferring the employee to Myaree to create a position for the applicant. I also find it difficult to accept the applicant's assertion that she rejected work at the Singleton site due to difficulties with the employee involved in the altercation in October 2001 when the applicant conceded in her evidence that she had undertaken the occasional shift at this site subsequent to October 2001 when this employee was also working.

35 I turn now to the principles in relation to these matters and my findings and conclusions.

36 It was not in dispute that the applicant was terminated due to a genuine 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 it was conceded by the applicant that she

was terminated due to a genuine redundancy situation. I accept the respondent's evidence that it reviewed its operations in early 2002 and made a decision to restructure its operations and this included reducing the number of hours worked by employees which resulted in a reduction in the number of employees required to work on a permanent shift basis. I therefore find that the respondent had a valid reason for terminating the applicant.

37 Having said that it is appropriate to consider any unfairness in relation to the process used in effecting a redundancy, as well as all of the circumstances surrounding the termination of the employment having regard to s.26 of the Act. The question to be determined by the Commission is whether the legal right of the respondent to dismiss the applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right *(Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386). An employee who has been made redundant must also show that his or her selection was unfair in comparison to other workers (see *Amalgamated Metal Workers and Shipwrights Union of Western Australia and Or v Australian Shipbuilding Industries (WA) Pty Ltd* (op cit)).

38 The applicant's contract of employment in relation to redundancy was governed by Clause 22 of the applicant's workplace agreement and by the provisions of Part 5 of the Minimum Conditions of Employment Act 1998 ("the MCE Act") which are implied into the applicant's contract of employment. Clause 22 of the applicant's workplace agreement reads as follows—

> "**22. REDUNDANCY.**
>
> Any significant change to the employers (sic) business which may impact on the employees (sic) job should be discussed with the employee. An employee who is to be made redundant must be told as soon as practically possible.
>
> Up to eight hours (sic) paid leave must be provided during the notice (sic) to be interviewed (sic) for other employment. This leave does not have to be taken at any one time, and reasonable evidence of the entitlement must be provided."

A failure to comply with the applicant's contract of employment and 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).

39 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."

40 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.

41 Section 41 of the MCE Act and Clause 22 of the applicant's workplace agreement provides that when 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 it is my view that these requirements on the respondent were met. It is clear that the applicant was aware that the respondent was reviewing its operations between April 2002 and June 2002. I accept Ms May's evidence that a number of discussions were held with the applicant about the effect of the respondent's re-organisation on the applicant and it is clear that alternative positions were canvassed with the applicant once a decision was made by the respondent to make the applicant's position redundant. Even though the applicant was not allocated to a specific site, so as to retain the applicant and not make her redundant the respondent held discussions with the applicant and offered her permanent positions on the afternoon shift at both Singleton and Golden Bay and when these opportunities were rejected by the applicant she was then offered casual employment. On the basis of Ms May's evidence, which I prefer to that of the applicant, I find that the respondent was unaware that the applicant was not available to work afternoon shifts or that the applicant had personality issues such that she could not accept employment at the Singleton and Golden Bay sites. It is my view that the respondent engaged in the discussions required of it under s.41 of the MCE Act and the applicant's workplace agreement and canvassed what I consider to be suitable alternative options with the applicant. At the end of the day there was no agreement between the parties which would have enabled the applicant to remain employed with the respondent. In the circumstance I find that the respondent adopted a fair process when making the applicant redundant.

42 Even though the applicant did not avail herself of the option of paid leave for job interviews, in my view she was given sufficient notice at termination (two weeks) to have enabled this option to be taken up.

43 I do not accept the applicant's argument that the respondent did not apply proper selection criteria when selecting which employee was to be made redundant. I accept that it is open to the respondent to manage its operations and to decide which employee or employees it wished to retain as a result of the necessity to effect redundancies as long as fair selection criteria and processes are utilised. It is clear that employees who were retained by the respondent had greater service than the applicant (in Ms Christmas' case she had been employed continuously for five to six years) and Ms Christmas was in a permanent position at a specific site. On the other hand when the applicant resigned in October 2001 she did not have a permanent

position at a specific site to which to return. It was also not in dispute that the applicant and Ms Christmas had equivalent skill levels.

44 In my view the applicant has not satisfied the onus on her to demonstrate that another employee should have been made redundant instead of herself and no evidence was presented in support of the applicant's contention that another employee should have been made redundant instead of her. No evidence was given about the length of service of other employees who were retained by the respondent, nor was any evidence given as to why other employees should have been chosen for redundancy in preference to the applicant.

45 In all of the circumstances I find that the applicant was not unfairly terminated when she was made redundant by the respondent on 6 August 2002. An order will now issue dismissing this application.

2003 WAIRC 10236

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTINE RUTH HINDS, APPLICANT
	v.
	BRUMAR SERVICES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 9 DECEMBER 2003
FILE NO/S.	APPLICATION 1512 OF 2002
CITATION NO.	2003 WAIRC 10236

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms J Auerbach (of counsel)

Order

HAVING HEARD Mr K Trainer as agent on behalf of the applicant and Ms J Auerbach of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) J. L. HARRISON,
[L.S.] Commissioner.

2004 WAIRC 10420

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN JOHNSTON, APPLICANT
	v.
	M G KAILIS PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 JANUARY 2004
FILE NO.	APPLICATION 589 OF 2003
CITATION NO.	2004 WAIRC 10420

Result	Application dismissed
Representation	
Applicant	Ms J Barber (of counsel)
Respondent	Mr J Brits (of counsel)

Reasons for Decision

1 The applicant claims that he was unfairly dismissed by the respondent and he seeks compensation for the loss suffered and an order that the respondent offer him a contract for the 2004 season. At the time of the termination of employment, the applicant was engaged by the respondent as a diver/deck-hand and had worked for the respondent for approximately 9 years.

2 The respondent is engaged in the pearling industry operating approximately 8 vessels and employing around 140 people. The operations of the respondent include drift diving, seeding shell, harvesting and transporting shell.

3 The Commission heard evidence from Alan Greivulis, the fleet operations manager for the respondent. Mr Greivulis had been employed by the respondent for approximately 16 years, the last 3 of which were in the position of fleet operations manager. Evidence was also given for the respondent by Mark Gregory Winters, employed by the respondent for approximately 15½ years and at the time of the hearing, skipper of a pearling vessel called the Parmelia K. This was the vessel upon which the applicant was working at the time he and Mr Winters had an altercation associated with the applicant's termination of employment. The applicant also gave evidence.

4 The evidence demonstrates that the applicant was a good worker in terms of his work performance. However, it is clear from the evidence, including the applicant's own evidence, that his attitude in respect of those in authority has been the subject of a warning and other discussions. On 2 September 2000, a Steve Espe, whose title at the time appeared to be manager or skipper of the vessel Parmelia K, issued the applicant with a disciplinary reprimand in the following terms—

> "Adrian—
>
> This reprimand is being forwarded to you for the following reasons—
>
> - Constantly challenging my authority, this has a direct effect on the rest of the crew in that they feel it must be ok to challenge their superior's decisions.
> - And a permanent attitude that if its (sic) not accomplished the way you would like it to be done, that its (sic) the wrong way, this also carries into other areas which other people are in charge of and don't need your negative opinions, then carrying on with a poor work ethic toward the job.
> - Also your abuse and neglect of company equipment.
> - I've also made numerous comments on the way in which you continually force open shell and you have made little effort in changing your ways, I feel strongly on this point and believe that this is detrimental to the health and condition of the shell presented to the technician, especially in our smaller spat shell.
> - Your constant complaining about the job at hand lowing (sic) the crew moral and creating a bad work environment.
>
> All these points will be under constant review and if such events continue our employment contract will be terminated as I feel it would not be in the interest of Broome Pearls to continue with it."
>
> (Exhibit R2)

5 Soon thereafter, on 16 October 2000, the applicant was issued with a letter by Mr Espe dated 16 October 2000 which formal parts omitted stated—

> "You will soon be presented with your new contract for the coming season and you will notice that your retainer has been reduced. I have done this because I feel that you do not meet the requirements of a diver grade 1.
>
> You have already been issued with a written warning regarding your attitude to my authority and your disruptive influence on the other members of the crew.
>
> In a recent discussion about the Parmelia K's trip to Perth, you stated that you would not follow Mark Winters' requests, if in your opinion they were stupid, however as he will be the vessels' skipper for the period, I feel it would be inappropriate to send a crew member who may inhibit the skippers ability to complete the trip safely. I now feel this limits my choice in determining what future roles I can assign you to.
>
> Your own competence and performance as a watch keeper was found to be sub standard by the board of inquiry after the Simone K collision and as a consequence, I would not be prepared to allow you to be a relief skipper on Parmelia K.
>
> You will remain as a diver grade 2 until you can demonstrate to me that you are prepared to be part of my team. This means that you cease your disruptive behaviour, that you accept the authority of those persons placed in positions as your supervisor and that you are prepared to change your work practices to reflect the standards required by Broome Pearls management.
>
> If you demonstrate a substantive change to reflect the above during the next contract period you may be eligible to be paid as a diver grade 1 for the following period (season 2002)(sic)"
>
> (Exhibit R3)

6 Mr Winters gave evidence that when he was skipper of the vessel Montoro in early 2002, he and the applicant had what he described as a run-in.

7 According to Mr Greivulis the applicant received an increase in his salary or base retainer for the year 2003 because he had shown improvement in his attitude and relationships in his work environment. The applicant is a hard worker and well qualified. Mr Greivulis says that the applicant has had problems with skippers apart from himself because he is argumentative and disruptive to the crew. However, over the last year when he was working with the applicant, Mr Greivulis says that they got on well, and in the year 2003, the applicant took on the role of first mate on the Parmelia K.

8 Also in 2003, Zarek Lusman was the head diver appointed on the vessel for the season. According to the applicant, the distinction between the roles of head diver and first mate is that while diving is taking place on the vessel, the head diver indicates to the skipper the speed at which the vessel should operate and determines how long the dives are to last. The head diver is in overall charge of the safety of the divers under water. When the vessel is taking part in drift diving operations, the skipper is in charge and then the head diver, followed by the first mate. If the vessel is not involved in active diving operations, the line of authority would be the skipper, then first mate. According to Mr Greivulis, Mr Lusman was re-appointed head diver because of his experience as head diver the previous year on the vessel and had worked for the respondent for nearly 7 years.

9 The applicant was of the view that in late 2002 he had been offered the combined role of head diver and first mate by Mr Greivulis, after Mr Lusman had left his employment because of personal difficulties. The applicant believed that the arrangement had been finalised. However, in January 2003, Mr Lusman sought to have his position back and this was agreed to by Mr Greivulis on the basis that he would do so on a casual basis until he proved himself.

10 Mr Greivulis has given evidence that, in having discussions with the applicant regarding the roles of first mate and head diver, he had spoken with the applicant to discuss with him the applicant's relationship with the skipper of the vessel, Mark Winters, as they had had difficulties in the past and Mr Greivulis was hoping that they would be mature enough to work together. Mr Greivulis says that he never offered the applicant the position of both head diver and first mate but merely discussed the option with him. However, it seems that having decided to appoint Mr Lusman as the head diver, he did not formally convey this to the applicant. Mr Winters says that he thought that Mr Greivulis had informed the applicant that Mr Lusman had been appointed as head diver and Mr Winters did not inform the applicant himself. The applicant had some grievance in that regard, feeling that he had had the position given to him then taken from him, whereas Mr Greivulis says that he was only sounded out about the position.

11 The applicant has also raised a number of other disappointments or frustrations he says occurred in his relationship with Mr Winters, including that Mr Winters allegedly passed him over in obtaining a crew to bring a vessel up from Fremantle, did not offer him lifts to work and other matters which he says lead him to believe that Mr Winters had a problem with him.

12 Prior to the first trip of the year in 2003, Mr Winters asked the applicant to contact other crew members to tell them of the departure arrangements. The applicant told Mr Winters that it would be easier if Mr Winters did it himself because he had the contact telephone numbers. Mr Winters was annoyed at this response, as he had contacted other crew members in his previous role as first mate.

13 The applicant accepts that he was counselled by Mr Winters after the first trip in 2003 about the way he spoke to crew members. The applicant says that if people on the vessel needed direction he would give them direction and maybe he spoke to them in a slightly raised voice.

14 The essence of the dispute between the parties is the circumstances of what occurred on 11 April 2003. The applicant and Mr Winters were part of the crew aboard the vessel Parmelia K off the coast of Broome with a view to undertaking drift diving. The parties agree that the conditions associated with a cyclone at the time meant that diving was not terribly successful. According to Mr Winters, on that day, he had commented to the applicant that he was concerned that the applicant, as a diver, was late in the water. Mr Winters says that the other divers had already been in the water for up to 5 minutes. The evidence indicates that divers may be in the water for a limited period of time, and the head diver is responsible to ensure that they are all out of the water within a specified time. The applicant says that he is usually the last in the water for the purpose of being the last up and making sure that everyone goes before him. On 11 April 2003, the applicant was last in the water, which he says is usual. In fact, he was still on deck when Mr Winters approached him and indicated to the applicant that he was not going to catch any shell on deck. The applicant replied that he was not going to catch any shell "down there either". According to Mr Winter, he said to the applicant, "Would you like a day out of the water", to which he says the applicant replied with a mouthful of abuse, acted in a provocative way, put his regulator in his mouth while still carrying on, and then jumped into the water. Mr Winters intended to have the applicant spend the next day out of the water and asked Mr Lusman, the head diver, to advise the applicant of this but also said that he wanted to speak to the applicant himself. The applicant denies that he was late in the water or that his behaviour to Mr Winters was untoward.

15 Later that afternoon the applicant attended in the wheelhouse as directed. There are conflicts between the evidence of Mr Winters and the applicant as to the sequence of events and what was said. The applicant says that Mr Winters said to him that he was calling him up there to give him a warning but later in his evidence, the applicant said that he was called up to be asked for his resignation. He says that Mr Winters then said that he had decided that because the applicant was only employed on a trial run, that he was sacked and he wanted him off the boat, and to get out of the wheelhouse. The applicant says that when he asked for an explanation as to why he was being sacked, Mr Winters said that he would put it in writing in his own time. The applicant wanted to know the reason then and said that he would write the reasons down then. The applicant accepts that this happened while the boat was at sea and moving, and there were other boats in the area. He says that he was then leaning over the desk and writing on the writing pad. He says that he was verbally abused by Mr Winters who shook his finger in the applicant's face. He says that although he is quite a bit taller than Mr Winters, Mr Winters was standing over him because Mr Winters was standing upright and the applicant was bending over writing. He says Mr Winters ripped the writing pad out of his hand, grabbed his collar and pulled him around. Mr Winters said to him "if you don't get out of here, I am going to fucking smash you". The applicant says that he asked for an explanation as to why he was being sacked and he would have gladly left the wheelhouse if he had been given an explanation. The applicant says that his reaction to Mr Winters ripping the writing pad out of his hand, grabbing his collar and telling him that if he did not get out of the wheelhouse he would hit him, was to brush Mr Winters's arm away and he struck Mr Winters with such force that Mr Winters fell to the floor. The applicant acknowledges that during this altercation Mr Winters told him to leave the wheelhouse 5 to 6 times.

16 The applicant says that he needed a reason for being sacked on the spot, demanded those reasons and wanted to write then down.

17 Mr Winters says that after he called the applicant to the wheelhouse they discussed the applicant having a day out of the water because he had been late getting in the water. He also said that he was sick of hearing the applicant whinge and complain all the time. Their discussion became heated. He says that he then asked the applicant to leave the wheelhouse. He did so because of his growing safety concerns that they were arguing while he was controlling the vessel which was moving and there were other vessels in the vicinity. The applicant refused to do so a number of times. He told the applicant to leave the wheelhouse now or else he would have him sacked. Mr Winters says that his comment was that he would have the applicant sacked, not that he was sacked. Mr Winters says he did not have authority to sack the applicant himself. The applicant demanded to know why Mr Winters would have him sacked. When asked for reasons, Mr Winters said that it was for not doing as he was told and for arguing, that he did not like the applicant's attitude, and that he did not like the applicant and nor did the crew. He told him to get out. The applicant became very aggressive and said that he would write their conversation down. The applicant moved to the office to get a pad to make notes, and started writing. Mr Winters told him to take the pad and get out or he would belt him. The applicant still would not leave so Mr Winters grabbed the writing pad and pulled it out from under the applicant's hand as the applicant hit him in the left eye with his fist. Mr Winters dropped to his knees. The applicant left the wheelhouse. The evidence is that the applicant went to Mr Lusman and told him to go up to the wheelhouse as he had just "snotted" the skipper.

18 Mr Greivulis gave evidence that he was in Robuck Bay on the vessel the Montoro K when at approximately 1900 hours on 11 April 2003, he received a telephone call from the fishing fleet master, Steve Davies, who was in charge of the two vessels, who advised him of the incident. Mr Greivulis arranged for Mr Davies to collect the applicant from the Parmelia K, to take him onto Mr Davies's vessel and then later to bring him to shore. The applicant was taken to shore at the 80 mile beach approximately 200 km south of Broome where he was picked up and taken back to Broome.

19 The applicant says that he prepared a report on the evening of the incident, and that his report is accurate. He provided it to Mr Greivulis on 15 April 2003. Mr Winters prepared a report and also submitted it to Mr Greivulis. Mr Winters said that he prepared his report on the incident whilst on the vessel on the return trip to Broome and submitted it to Mr Greivulis on 16 April 2003. Mr Greivulis spoke with Mr Winters on the afternoon of 16 April 2003 for approximately 30 minutes. He says that Mr Winters was very concerned because there were approximately 14 vessels moving around the beach, the conversation with the applicant had become heated and abusive, he was concerned for the safety of the vessel, he asked the applicant to leave the wheelhouse because he had to concentrate on driving the vessel and the applicant refused to leave.

20 Mr Greivulis interviewed the applicant on the afternoon of 17 April 2003, also for 30 minutes. He says that they discussed the issues involved and the applicant claimed that he was provoked. Mr Greivulis says that at the end of the interview with the applicant, he told the applicant that he would be dismissed because of the incident which had taken place on the vessel. The main reason was for disobeying the skipper; if he had left the wheelhouse when he was asked to do so the incident would not have taken place and his refusing to leave had placed the skipper under pressure because he was concentrating on driving the vessel.

21 The applicant was immediately issued with a letter of dismissal stating that his employment had been terminated as of 12 April 2003. In evidence Mr Greivulis says that the date of 12 April 2003 was probably a mistake on his part and that was the day the applicant was taken off the vessel. Mr Greivulis says that the letter of termination was written just before the interview with the

applicant. He says that if the applicant could not explain himself then he would issue him with the letter. If he had a valid explanation then he would not have given him the letter.

22 The letter of dismissal sets out the reasons for dismissal as being—

> "Because of the incident that took place in the wheel house of the Parmelia K at 1820 on the 11-4-03, your employment with Broome Pearls has been terminated as of 12-4-03 for the following reasons.
>
> Failing to obey the command of the master of the vessel.
>
> Assaulting the master of the vessel."

(Exhibit R6)

23 Mr Greivulis says that because of the isolation associated with being engaged to work on the vessels the respondent will not tolerate violence on board.

24 The tests for a dismissal of this nature being a summary dismissal is set out in *Bi-Lo Pty Ltd and Hooper* [1992] 53 IR 224 at 229-230, and referred to by the Full Bench in *Western Mining Corporation Limited v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1997) 77 WAIG 1079 at 1084. This states—

> "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."

25 The onus rests on the applicant to demonstrate that the dismissal was harsh, oppressive or unfair.

26 Having noted the evidence and observed the witnesses as they gave their evidence I have no doubt whatsoever that the applicant is a person who is very strong in his opinions, very convinced as to the rightness of his opinions and is likely to express his opinions whether they are called for, welcome or otherwise. The applicant has no reservations in expressing his views as to the appropriate manner in which work ought be conducted with a view to educating and informing others who might, in his view, benefit from his advice, even if they are superiors and of significant experience. He is inclined to want to have the last say. The applicant acknowledges that, following discussions associated with the reprimand he received in 2000, he was asked for an undertaking that he would comply with directions given to him by his skipper. He was not able to simply give what most people would give, being a commitment that he would obey instructions, but said that he would not obey stupid instructions. Interestingly, the applicant says that he does not challenge authority "all the time". He also gave an example that a new skipper needed to be told the way of running the boats and how things were done. The applicant accepted that he had received a warning and when asked if he was argumentative and challenged authority his answer was "not always".

27 One can certainly imagine that the applicant, with those views as to his own opinions and his tendency to express them whether they are welcome or not, is likely to be a challenge for any supervisor. He is likely to answer back and not take things at face value. That is not to say that in a modern workforce employees are expected to kowtow to their supervisors and to accept all instructions whether they are lawful and reasonable or not. In this case though, the applicant appears to have reserved to himself, at all times, the right to exercise his own judgement on all matters whether that is appropriate or not.

28 Having observed the applicant, I have no doubt that the applicant has tailored both his statement in the incident report and his evidence to his own advantage, that it is not an objective assessment or recounting of the situation. It is designed to make Mr Winters appear to be aggressive from the outset and to appear to be the one who was provocative and abusive. I conclude, however, that the reality is quite different from that. That is not to say that Mr Winters's evidence is entirely accurate either. Mr Winters did not write his statement until some time after the incident and has given evidence that immediately after the applicant struck him and for some hours he was dazed and confused but that his memory of the incident soon became clear. I also note that, in preparing their respective statements for Mr Greivulis, neither the applicant nor Mr Winters attributed to themselves any swearing, but both attributed swearing to the other. However, in all of the circumstances, where there is conflict between the evidence of the applicant and Mr Winters, I prefer the latter evidence. Mr Winters gave a clear impression of being open and honest, and of having tried to deal with a difficult employee. The applicant made clear that he had an axe to grind over a range of perceived injustices.

29 I form the view that the incident occurred in the following way. The applicant and Mr Winters did not have a cordial relationship but rather they worked together as best they could bearing in mind that Mr Winters was the skipper and the applicant was someone with whom he had previously had a run in and who was known to have the sort of attitude I have described earlier. I am satisfied that on 11 April 2003 Mr Winters was frustrated at the poor conditions, that the shell catch was down and that this was causing part of his aggravation. He was annoyed with the applicant because the applicant had not gone into the water as promptly as Mr Winters thought he ought. When Mr Winters raised this with him, perhaps in a short tempered aside, the applicant responded in his usual smart-mouthed manner. As a result of this, Mr Winters wished to discipline him for his conduct and discuss it with him with a view to sorting the matter out for the future. On that basis Mr Winters asked that the applicant come and see him in the wheelhouse. When the applicant arrived in the wheelhouse Mr Winters told the applicant that he was not happy with the way things were and that he was tired of the applicant whinging and complaining. Mr Winters told the applicant that he thought the applicant should have a day out of the water and asked him what he thought about this disciplinary action. The applicant became agitated and the discussion deteriorated. In Mr Winters attempting to have what ought to have been a reasonable discussion between skipper and first mate, the applicant, responded unreasonably and both the skipper and the first mate became agitated and angry. The vessel was steaming and there were other vessels in the vicinity. Mr Winters became concerned and directed the applicant to leave the wheelhouse because he could see the situation was deteriorating. The applicant refused to leave the wheelhouse, Mr Winters directed him to leave the wheelhouse or he would have him sacked. The applicant demanded to know the grounds upon which he would be sacked and Mr Winters responded with reasons. The applicant then undertook what must be regarded as an infuriating action of getting a writing pad and wanting to write then down there and then, notwithstanding that he had been directed to leave the wheelhouse and he knew the vessel was steaming and the circumstances of other vessels being around. Having been so provoked, in shear frustration, Mr Winters went to grab the writing pad out of his hand. The applicant struck him with such force as to knock him to the ground.

30 On 15 April 2003, Mr Greivulis received a report from the applicant about the incident. On 16 April 2003, he received a report from Mr Winters when he returned to shore. He interviewed Mr Winters that afternoon. The next day, he interviewed the applicant. In anticipation of the possibility that the applicant could not explain himself, he prepared a letter of dismissal. If the applicant had a valid explanation, he would not issue the letter. Mr Greivulis gave the applicant Mr Winters's report to read.

They discussed the matter. It is clear from the applicant's evidence that he had the opportunity to explain his side of the story, and he did so. Given his nature, previously described, it would have been unlikely that he would not have expressed his views.

31 Mr Greivulis considered the matter and decided to accept Mr Winters's version of the event. He says that if the applicant had left the wheelhouse when he was instructed to, the incident would not have escalated to violence. I accept his evidence. He decided to terminate the applicant's employment. The letter mistakenly says that the employment terminated as of 12 April 2003, however, it is clear that this date was in error, and the employment actually terminated on 17 April 2003. The letter confirms that the reasons for the termination were "failing to obey the command of the master of the vessel" and "assaulting the master of the vessel" (Exhibit R6).

32 I am satisfied that the respondent has met the tests set out in *Western Mining Corporation Limited v The Australian Workers' Union* (supra). In this case the applicant has clearly misconducted himself. He refused a reasonable direction from this employer on a number of occasions in that he refused to leave wheelhouse when he was so directed by the person in charge of a moving vessel at sea. His conduct was provocative and although Mr Winters was also angry and frustrated, it is easy to appreciate why. Mr Winters may not have handled the matter as well as he might, but in any event the applicant was intent on continuing his own agenda and his actions were very provocative. Not only did he refuse to leave the wheelhouse but he assaulted the vessel's master, his supervisor, and did so in circumstances which might have placed the safety of the vessel in jeopardy.

33 I have considered whether or not in all of the circumstances it was appropriate to have terminated the employment or to have taken some other action, in particular bearing in mind the applicant's length of service being some 9 years. It is true that he was a hard worker and there was no issue with his work performance. However, this incident of refusing to leave the wheelhouse was clearly indicative, if not a somewhat extreme example, of his attitude to those in authority. This attitude had been the subject of a formal disciplinary process earlier, albeit a couple of years before, and of informal discussions earlier in the season. I am satisfied that it would have been inappropriate for the respondent to have continued to employ an employee who so challenged the skipper of the vessel while the vessel was underway as to infuriate the skipper, refuse to leave the wheelhouse, continue with his provocation and then strike the skipper, leaving the skipper on the floor of the wheelhouse in a dazed state while the vessel was underway. How the applicant could have been disciplined in any other way than by the termination of employment is difficult to envisage. This is not a circumstance which would have warranted a warning.

34 In all of those circumstances, I find that the applicant clearly misconducted himself and engaged in unlawful disobedience such as to justify the termination of his employment.

35 The application will be dismissed.

2004 WAIRC 10421

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN JOHNSTON, APPLICANT
	v.
	M G KAILIS PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	TUESDAY, 6 JANUARY 2004
FILE NO.	APPLICATION 589 OF 2003
CITATION NO.	2004 WAIRC 10421

Result Application dismissed

Order

HAVING heard Ms J Barber (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 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 10129

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBBIE LARKIN, APPLICANT
	v.
	BORAL RESOURCES (WA) LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 19 NOVEMBER 2003
FILE NO/S.	APPLICATION 290 OF 2002
CITATION NO.	2003 WAIRC 10129

Catchwords	Termination of employment – Unfair Dismissal – Determination of quantum of compensation – Principles applied – Prospect of ongoing employment with the respondent considered – Compensation for loss to be ordered – No compensation for injury ordered – *Industrial Relations Act 1979* (WA) s 23A
Result	Order issued
Representation	
Applicant	Mr M Richardson as agent
Respondent	Mr D Jones as agent

Reasons for Decision
(Ex Tempore)

1 This matter has been remitted to the Commission as presently constituted by the Full Bench of the Commission, by a decision dated 20 March 2003. In that decision the Full Bench upheld an appeal by the applicant in these proceedings from the Commission as otherwise constituted. The Full Bench concluded that the applicant's dismissal was harsh, oppressive and unfair. On the basis of that finding, the Full Bench remitted the matter back to a Commissioner at first instance to determine the question of remedy.

2 In these proceedings some further evidence was adduced by leave of the Commission by the applicant and I merely provide a brief summary of that evidence as follows. The applicant testified that shortly after the last day of the hearing of the substantive proceedings in this matter she felt unwell. As a consequence of that she received medical attention from her general practitioner and subsequently was referred to counselling services at which she received assistance over a period of time, which was indeterminate on the evidence before the Commission. The applicant testified that she suffered some psychological and physical difficulties. The Commission also heard from the applicant that as a consequence of the events following the termination of her employment, in January 2002, she has been unable to, despite endeavours to do so, obtain alternative employment. Although, I pause to observe that the question of mitigation of loss was not raised or pressed as an issue in these proceedings.

3 Additionally evidence was led from a Mr Taylor. Mr Taylor is a counsellor who the evidence discloses was assisting the applicant, Ms Larkin, in dealing with difficulties that she presented over a period of time. The applicant and Mr Taylor indicated to the Commission in evidence, in particular Mr Taylor, that whilst he was counselling her he formed the view that she was suffering some distress and had difficulty in getting responses from her during the period of time which he was assisting her through counselling. To his credit, however, Mr Taylor accepted that he was not qualified to offer any opinion to the Commission as to the causation of the applicant's difficulties. Whilst trained as a mental health nurse, Mr Taylor conceded he was not qualified to make psychiatric or psychological assessments and in my view he properly conceded that to his credit.

4 The evidence was led also from the respondent through Messrs Townsend and Firios, however that evidence was confined solely to the question of the prospect of the applicant being re-engaged on a short-term basis or casual basis after the contract of employment came to an end in January 2002. In light of that evidence the applicant's agent conceded that there was no basis for a claim for ongoing loss subsequent to the events of the dismissal, therefore the Commission does not deal with that evidence any further.

5 The applicant submits that she has suffered a loss at least for three and one half days, being loss of income for the balance of the applicant's employment to the anticipated termination of it on 25 January 2002. Additionally the applicant makes a claim for compensation for injury.

6 Principles in relation to compensation for loss and injury in this jurisdiction are well settled and I merely refer to the decision of the Full Bench of this Commission in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8. An important ingredient, I pause to observe, for both loss and injury is that the same be causally connected to the dismissal.

7 Turning firstly to the question of loss: The Commission is satisfied on the evidence and I find that but for the applicant's dismissal she had the prospect at least of ongoing employment for three and one half days and I accept the applicant's evidence in that respect and, indeed, that was the evidence at first instance. I also refer to findings of the Full Bench at par 33 of its reasons for decision when reference is made to the evidence adduced through Ms Watkinson, that the job which Ms Larkin was engaged to do was not finished at the time she was dismissed and Ms Watkinson's evidence was that she had expected it to take one to two weeks to complete.

8 On the evidence before me, however, I am not able to find that there was a likelihood of employment beyond three and one half days as, in my opinion, to so find would be speculative on all of the evidence. I refer to the finding which I have just mentioned by the Full Bench. Therefore I am satisfied and I find that the applicant has suffered a loss of three and one half days remuneration at her hourly rate of $21.00 per hour in respect of the agreed working hours of eight and one half hours per day which inclusive of the eight per cent superannuation statutory contribution leads to a figure of $680.28.

9 I deal now with the question of injury. For the purposes of compensation for injury, it is settled that there must be proof before the Commission that injury is causally connected to an employee's dismissal, and again, I refer to *Bogunovich*. On the evidence, the Commission has no doubt that as at September 2002, some seven months or thereabouts after the applicant's dismissal the applicant has obviously encountered some difficulties and has received medical and counselling assistance for this. The difficulty for the Commission is that there is no verifiable evidence that these matters were causally connected to the dismissal and/or the manner of it, such that the Commission may satisfactorily conclude on the balance of probabilities, that the dismissal was responsible for such events. Whilst the Commission has considerable sympathy for the applicant, as she has given evidence as to her problems before the Commission this morning, I am not able to conclude on balance that other factors may not have been at work to contribute to this state of affairs. Therefore the Commission is not in a position to make any finding of injury for which compensation ought to be awarded. The Commission will order the respondent pay to the applicant by way of compensation for loss the sum of $680.28 within 21 days of today.

2003 WAIRC 10200

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBBIE LARKIN, APPLICANT
	v.
	BORAL RESOURCES (WA) LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 4 DECEMBER 2003
FILE NO/S.	APPLICATION 290 OF 2002
CITATION NO.	2003 WAIRC 10200

Result	Order issued
Representation	
Applicant	Mr M Richardson as agent
Respondent	Mr D Jones as agent

Order

HAVING heard Mr M Richardson as agent on behalf of the applicant and Mr D Jones as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act"), hereby orders—

THAT the respondent pay to the applicant as compensation for her loss the sum of $680.28 gross less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid by no later than 10 December 2003.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 08586

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEAN OSBOIRNE, APPLICANT
	v.
	J P BARNES, B DOWNEY AND G ORR TRADING AS J P BARNES CONTRACTING (ABN 29 360 317 984), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 16 MAY 2003
FILE NO/S.	APPLICATION 1519 OF 2002
CITATION NO.	2003 WAIRC 08586

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Whether applicant an employee or independent contractor – Principles applied – Summary dismissal – Lack of procedural fairness – Applicant harshly, oppressively and unfairly dismissed – Application upheld – Compensation ordered – *Industrial Relations Act 1979* (WA) s 7, s 26(1)(a), s 26(1)(c) & s 29(1)(b)(i)
Result	Order and declaration issued
Representation	
Applicant	Mr A Gill of counsel
Respondent	Mr J Barnes

Reasons for Decision
(Ex tempore)

1 The application before the Commission is one by Dean Osboine, by which he alleges that J.P. Barnes, B. Downey and G. Orr trading as JP Barnes Contracting unfairly dismissed him from his position as a ceiling fixer on or about 7 August 2002.

2 The applicant alleges in short, in his particulars of claim, that he was employed on duties involving erecting plasterboard walls and ceilings; that on 6 August 2002 a Mr Brian Downey, the applicant's supervisor, informed the applicant that he was required to work overtime; that the applicant was unable to work overtime due to his family responsibilities; that on 7 August 2002 at approximately 7.30 am Mr Downey requested of the applicant as to why overtime was not performed on 6 August as particularised, to which the applicant says he explained his family responsibilities. It is then claimed that Mr Downey, a partner of the respondent, handed the applicant a final cheque indicating that the employment relationship was then terminated because he had not worked overtime.

3 Finally, the applicant says that during the applicant's employment relationship with the respondent, no performance issues were raised, and for those reasons the applicant asserts that his dismissal was harsh, oppressive and unfair.

4 The applicant was called to testify on his own behalf, he being the only witness called in support of his allegations against the respondent. He gave evidence that he is 28 years of age, has two children to support in a de facto relationship. He testified that he was employed by the respondent towards the end of November 2001 as a wall and ceiling fixer. His evidence was that he obtained the employment with the respondent through his de facto wife who apparently knew Mr Barnes business.

5 The applicant's evidence was when he was employed he did not sign a written contract with the respondent. However, his evidence also was that he was paid, at least initially, some $100 net per day. Subsequently, it is common ground that the applicant received pay rises including up until July 2002 a total weekly payment of some $625 per week. The applicant also testified that the respondent shortly after he commenced employment requested him to provide an ABN number which he subsequently did through contacting his previous employer.

6 The evidence is that the applicant was paid on the surrender of invoices for each day's work and the invoice book was tendered through the applicant as exhibit A2. Exhibit A2 discloses that the applicant was to be paid a daily rate over the period of his employment and a total weekly rate was thereafter submitted, plus an account of some 10 per cent, it seems, for GST each week.

7 It was the applicant's evidence that he was required to request payment in this way, by request or direction from the respondent and in particular from Mr Barnes. The applicant's evidence was that he understood he had his employment for as long as he wanted it. However, I note subsequently Mr Barnes's evidence was that the engagement was for as long as the respondent had contracts to perform.

8 The applicant testified that he attended jobs as directed by the respondent, either as provided for on a previous day or alternatively worked as directed when attending sites, under the direction of either Mr Downey or Mr Barnes as the case may be. His evidence was that he did not work always under supervision, but either Mr Downey or Mr Barnes regularly visited his work site as he was attending to his duties on various sites. The applicant's evidence also was that the respondent supplied all relevant materials for the purpose of the performance of his work, although he did say he also provided some basic tools of trade himself.

9 In terms of transportation arrangements it seems that the applicant in the main was transported to and from the respondent's various sites through the assistance of the respondent. At some stage, perhaps towards, it seems on the evidence, the end of his engagement by the respondent he acquired his own motor vehicle. However, I note the evidence of Mr Barnes that despite that he continued, it seems, to be transported in the main by the respondent to and from work.

10 The applicant's evidence was also that he worked regular hours, either 7.00 to 7.30 am to 3.30 pm each day, five days per week, sometimes working Saturdays and on occasions working overtime when required. The applicant's evidence also was he did not work for anyone else, only the respondent, and when he had a period of absence he was required to notify the respondent accordingly. In those cases, the applicant's evidence was there was no requirement upon him to obtain a substitute for the duties he was required to perform.

11 I now turn to the events of 6 August 2002. The applicant testified that he was working on what was described as the Perth train station job with a few others it seems, on that site. At some time, undisclosed on the evidence, in the afternoon the applicant said Mr Downey entered the area where he and others were working and said that they were required to remain at that location until all the ceilings were fixed that day. The Commission takes that evidence, and it was not controverted by the respondent, as being in effect a direction to work overtime beyond the applicant's normal ceasing time of 3.30 pm.

12 The applicant testified that he was not able to work beyond 3.30 pm, his normal ceasing time, because of his family responsibilities, it being common ground that the applicant's de facto wife was in late stages of pregnancy and also he was required to collect children from childcare on that day. The applicant's evidence also was that he had no opportunity to explain his position at that moment to Mr Downey who, according to the applicant, promptly left the location where they were working.

13 The next morning on 7 August, at approximately 7.15 am the applicant testified Mr Downey approached him and told him that he was not going to be working for the respondent any further and handed him a cheque which it transpires was a final payment of income up until that day. The applicant said he received no notice or payment in lieu of notice according to his evidence.

14 His evidence also was that on previous occasions he had been required to leave work early and accepted he was paid for such. However, he said that he did so with the permission of supervision at all times. The applicant says as a result of the events on the morning of 7 August he was shocked and he had no prior warnings that his employment was in jeopardy. I pause to note however that the applicant conceded that he had been previously spoken to by the respondent, it seems, in relation to the use of marijuana, although it is not necessary for the Commission to make findings in that respect for the purposes of these proceedings.

15 The applicant's evidence also was that he was complimented previously on his work performance by the respondent and had never been warned that his employment was in jeopardy through leaving the workplace earlier than the designated ceasing time of 3.30 pm.

16 In response to questions from the Commission as to his manner of remuneration and taxation arrangements, the applicant informed the Commission that he was advised by his accountant that the question of addition of GST payments was problematic and his accountant had informed him when he submitted his taxation returns that he should be declaring he was an employee, although I pause to note those taxation returns are not in evidence.

17 Mr Barnes gave evidence on behalf of the respondent. His evidence was that from the respondent's point of view the applicant had demonstrated a degree of poor attitude, it seems, when the applicant obtained his own motor vehicle. There was not detailed evidence as to those incidents. It appears to the Commission that the respondent had a more general concern about a fall off it seems, in the applicant's performance.

18 As to the events of 6 August 2002, Mr Barnes was not present and his evidence was based upon what he was informed by Mr Downey, his partner, as to the events of that day. However, Mr Barnes said he backed his partner's decision that in the circumstances the applicant's employment was to be terminated.

19 Mr Barnes did concede however, quite properly in my view, that at no stage had the applicant been previously advised that his employment was at risk or that for any reason, including absence from the workplace, he faced the prospect of dismissal before it was effected on 7 August.

20 The evidence of Mr Barnes also was that he gave directions to the applicant as to his duties day to day and that generally all tools and equipment and materials for the work to be performed were provided by the employer, and also that the applicant worked regular hours, approximately 7.30 am to 3.30 pm. When it was put to him in cross-examination, Mr Barnes denied that the payment and taxation arrangements were a sham and considered that what he was doing was simply what was the industry norm as a subcontract labour arrangement.

21 The evidence of Mr Barnes also was that in relation to the Perth railway station job, that job had only some two weeks or so to run after the applicant left that site and his evidence was that the applicant would not have been kept on beyond the completion of that job, observing that at that time the employer had some 27 employees and they now have two. His evidence also was that, like other contractors, the respondent bids for work on a competitive basis.

22 Mr Downey, Mr Barnes' partner, also gave some brief evidence. He referred in general terms to what he described in evidence as being a decline in the applicant's work attitude apparently. Again, it seems when the applicant acquired a motor vehicle, although there were no specific instances cited as to these events in terms of particular issues, although Mr Downey did refer to a request on some date unknown for the applicant to complete finishing work on a wall which, in Mr Downey's view, took far too long for the applicant to complete.

23 However, it also is the case that Mr Downey confirmed in evidence that the applicant was not expressly warned that his employment was at risk, either as a result of the respondent's general complaints or the events as they unfolded the day previous to his dismissal.

24 The Commission now turns to its conclusions and findings. Firstly, the question is whether the applicant was an employee or a contractor to enliven the Commission's jurisdiction for the purposes of this claim pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). There is ample authority of this Commission, in particular decisions of the Full Bench, setting out relevant principles in relation to the indicia by which the status of a person is to be determined as an employee, agent or independent contractor.

25 Mr Gill, counsel for the applicant, has referred the Commission to a decision of the Full Bench in the *Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v RB Exclusive Pools Pty Ltd trading as Florida Exclusive Pools* (1996) 77 WAIG 4, and in particular the observations of the Full Bench at pages 6 - 8. I also refer to a recent decision of the Full Bench in *Brian Ryder v Beaulieu of Australia Limited* (2003) WAIRC 08203 where the Full Bench set out at paras 44 to 59 of that judgment, the relevant principles in relation to determining whether a person is an employee, an agent or an independent contractor, and I say no further about those authorities at this stage.

26 In relation to the evidence before the Commission in this matter, I am satisfied and I find that the applicant was at all material times subject to the control of the respondent in the day to day work that he performed and, not only that, in the manner and performance of that work. He was also directed and required to attend work at set hours each day of the week over five days of the week and, it seems, also was required to attend on an occasional Saturday and to work overtime, at least, on occasions, on the applicant's evidence. I am also satisfied on the evidence that the applicant was subject to general direction of the respondent through the partners of the business as to his work and the quality of his work.

27 In relation to the method of remuneration it is noted on the evidence that the applicant was paid a daily rate and submitted invoices each week, it seems, including an allowance for goods and services tax, as made clear by exhibit A2. However, the rate of remuneration and method of remuneration is not a determinative factor, especially where, on the evidence, I am satisfied the manner of remuneration was as a result of a request from the respondent and I find accordingly.

28 I have already observed that the applicant's hours of work were set. He regularly worked for the respondent and it seems provided his services only to the respondent on an exclusive basis and did not provide services to any other entity, corporation or business. I am also satisfied that apart from the provision of the basic tools of trade, all of the relevant materials and requirements for the work performed by the applicant were supplied by the respondent. It is also plain in my view, on the evidence, that the applicant did not conduct a business in his own right as an independent contractor in the sense that he held himself out to be available to provide services to all and sundry on a competitive tender or market basis.

29 On all of the indicia on the evidence, I am satisfied that the applicant was an employee for the purposes of s 7 of the Act and was therefore employed under a contract of service between the applicant and the respondent and therefore the Commission has jurisdiction to deal with the substantive allegation that he was unfairly dismissed by the respondent.

30 I now turn to that question. The relevant principles in relation to whether an employee has been harshly, oppressively or unfairly dismissed are well settled. In cases such as these that the test as to whether a dismissal is harsh, oppressive or unfair is whether the right of the employer to dismiss an employee has been exercised so harshly or oppressively such as to constitute an abuse of that right. I refer to a decision of the Industrial Appeal Court well known in this jurisdiction in the matter of *Miles v Federated Miscellaneous Workers' Union of Australia Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385 in that regard.

31 Additionally, in assessing a claim such as the present matter, it is not the province of the Commission to assume the role of the manager but to consider the dismissal objectively and in accordance with the obligations imposed on the Commission pursuant to s 26(1)(a) and s 26(1)(c) of the Act. Moreover, in objectively assessing the circumstances of the case the practical realities of the workplace need to be considered and a commonsense approach to the application of the statutory provisions should be adopted, in my opinion. In that regard I refer to a decision of the Industrial Relations Court of Australia in *Gibson v Bosmac* (1995) 60 IR 1.

32 It is also the case in this jurisdiction that the lack of any procedural fairness in matters such as these, whilst not the only factor, can be an important consideration and in that regard I refer to the decision of *Shire of Esperance v Mouritz* (1991) 71 WAIG 891.

33 In this case, in my opinion, the fairness or otherwise of the applicant's dismissal is to be judged largely on the events that occurred on or around 6 August 2002. I am satisfied on the day in question that the applicant was told to work overtime to complete work on that particular day. The applicant, on his evidence, was not able, because of family commitments, to satisfy the request by the employer and I am satisfied on the evidence that there was no real opportunity for him to raise this matter with the respondent at the time that the request was put.

34 I do however accept the respondent's evidence that there were some concerns expressed previously as to the applicant's attitude on the job, but I also find on the evidence that there has been no reference made by the respondent to the applicant to the applicant possibly losing his employment as a consequence of those issues or in the absence of any improvement.

35 In this case, it is common ground that the applicant was not told of the possibility of his dismissal prior to the morning of 7 August 2002 as a consequence of the events the previous afternoon. I also find on the evidence that the applicant was effectively dismissed summarily without notice, or payment in lieu of notice. I have also observed already that the applicant on the evidence was afforded no prior warnings as to this or any other events prior to 6 August 2002 that his employment was at risk.

36 Whilst accepting the respondent, being a small business, may not have the facilities and structure of a larger business in terms of a human resource management function that may be the case with a larger concern, nonetheless in my view, established principles of industrial fairness require a degree of warning or counselling before an employee can be fairly dismissed. Whilst no degree of technicality is required in this regard, basic principles of industrial fairness still require an employee to be given a "fair go", to at least be forewarned of the prospect of dismissal and be given an opportunity of improving his or her performance before dismissal takes effect. In this case, clearly on the evidence, that was not the case and I find that the applicant was effectively summarily dismissed without proper or prior forewarning that he was to be dismissed.

37 Accordingly, I am satisfied on all of the relevant authorities well known in this jurisdiction, some of which I have referred to already, that the applicant's dismissal was harsh, oppressive and unfair for the purposes of s 29(1)(b)(i) of the Act.

38 I turn to the question of remedy. The applicant, it is common ground on the evidence, now has employment and in my view it would therefore be impracticable to consider reinstatement. Moreover the evidence from the respondent was, as I have referred already, that the work at the Perth railway station job had approximately two weeks to run and it was the respondent's evidence that thereafter more than likely in any event the applicant would not have been afforded further work.

39 The principles in relation to assessing compensation are well settled in this jurisdiction and I simply refer to the decision of the Full Bench in *Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 and in particular the observations of mine in that judgment at p 13 as to the relevant factors to consider, one of which being the likelihood of ongoing employment as to considerations of loss and injury.

40 I am satisfied on the evidence, and I find in this case, that the prospects of ongoing employment of the applicant beyond two weeks after the date of termination of employment were not high. In my view, the Commission is entitled and ought to take that into account in any findings of fact and as to loss for the purposes of compensation.

41 Accordingly, having regard to my finding in that regard and in the absence of any other claim for injury, I am satisfied that there ought to be an order of compensation for loss in respect of two weeks remuneration for the applicant. The only indication of remuneration is that contained in exhibit A2 and the Commission is satisfied that it ought to take the rate of $625.00 per week for the purposes of determining compensation. I find therefore that the rate of pay will be $625.00 per week and secondly, that there will be an order of compensation for loss sustained by the applicant in the sum of $1250.00

42 I also wish to add the following. In light of the evidence before the Commission in relation to the various taxation arrangements that were entered into between the respondent, it seems, by its request, and the applicant, I am concerned as to the issue as to whether there may have been contraventions of the Income Tax Assessment Act (Cth). Accordingly a copy of the Commission's reasons for decision and transcript of proceedings in this matter will be forwarded to the Commission of Taxation for his consideration in due course.

43 A declaration and order will issue.

2003 WAIRC 08867

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEAN OSBOINE, APPLICANT *v.* J P BARNES, B DOWNEY AND G ORR TRADING AS J P BARNES CONTRACTING (ABN 29 360 317 984), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 28 JULY 2003
FILE NO/S.	APPLICATION 1519 OF 2002
CITATION NO.	2003 WAIRC 08867

Result	Declaration and order issued
Representation	
Applicant	Mr A Gill of counsel
Respondent	Mr J Barnes

Declaration and Order

HAVING heard Mr A Gill of counsel on behalf of the applicant and Mr J Barnes on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act"), hereby—

(1) DECLARES that Mr D Osboine was an employee for the purposes of the Act.

(2) DECLARES that Mr D Osboine was harshly, oppressively and unfairly dismissed from his employment by the respondent on or about 7 August 2002.

(3) ORDERS THAT the respondent pay to the applicant the sum of $1,250.00 gross less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 7 days of the date of this order.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 10291

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRANT DOUGLAS PATERSON, APPLICANT *v.* QUALITY WHOLESALE PRODUCTIONS LTD T/A BOATLAND MANDURAH, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 12 DECEMBER 2003
FILE NO.	APPLICATION 1456 OF 2003
CITATION NO.	2003 WAIRC 10291

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –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),(2)&(3)
Result	Claim of unfair dismissal lodged out of time dismissed.
Representation	
Applicant	Mr P. Mullally (as agent)
Respondent	Mr G.M. Chapman

Reasons for Decision

1 On 1 October 2003 Mr Paterson lodged a claim of unfair dismissal against the respondent. The date of the termination of his employment was 29 August 2003 and his application is therefore five days out of time. In Mr Paterson's Notice of Application the grounds are set out as follows—

2 (1) The time for extension is short;

3 (2) The applicant has a very strong case as he was dismissed summarily without notice or any reason;

4 (3) The respondent wrongfully described the applicant's employment as "casual", when he was a full time worker, but this gave rise to the impression in the applicant that he had no right to seek relief;

5 (4) The applicant made it known to the respondent at the date of dismissal that he was not happy with the termination;

6 (5) The applicant was shocked and depressed by the termination and did not recover sufficiently from that to seek advice, and when he did the time for an application under Section 29 had expired;

7 (6) It would be unfair not to allow the referral time to be enlarged.

8 The Commission therefore listed the application for hearing in order for him to show why it would be unfair for the Commission not to accept his claim.

9 The background facts are that Mr Paterson was employed as a yard hard doing general duties in the respondent's retail sales yard. He commenced his employment on 28 January 2003 as a casual employee although he seems to have worked close to full-time hours. From July 2003 Mr Paterson was employed full-time.

10 The evidence of the respondent's Director, Mr Chapman, is that from that time on, he started noticing that Mr Paterson became slack at his work. Mr Chapman's evidence is that this resulted in his speaking to Mr Paterson three days before his eventual dismissal telling him to lift his game. Mr Chapman did not tell Mr Paterson that if he did not do so, he might lose his job.

11 Three days later, Mr Chapman gave Mr Paterson a job to do which would have lasted approximately four hours. He did so to test Mr Paterson. He had asked other staff not to give any additional work to Mr Paterson on that day. At the end of the full working day, Mr Paterson had still not completed the job and had left work without completing it. Mr Chapman's evidence is that he therefore had to complete the job himself. He then telephoned Mr Paterson and dismissed him over the telephone. Mr Paterson was paid one week's pay in lieu of notice.

12 Mr Paterson's evidence is not substantially different although he stated that when Mr Chapman spoke to him three days prior to his dismissal about taking too long to paint a trailer, Mr Paterson had disagreed. He stated that he was shocked to have been dismissed over the telephone on a Friday afternoon. He believed he had worked hard over the previous two months and did not know what he had done wrong. He stated that he was never slack. He stated that on that last day he had been given a number of jobs. He had been told to finish off fitting a targar, seat and rear lounge on a boat, wash the boat and adjust the trailer. He also had been given another job but he could not quite recall in the hearing what it was. He stated that he was working all day although he gave no further detail of what that work was.

13 The Commission has a discretion to exercise in deciding whether or not it would be unfair not to accept Mr Paterson's claim of unfair dismissal. The Commission is obliged to take a number of factors into account (*Director General of Education v Malik* (2003) 83 WAIG 3056). I find in relation to those factors as follows.

14 The delay of five days is not a significant period of time. Indeed, I agree with Mr Mullally's comment that it is only three working days. Further, Mr Chapman admits that the delay has not caused him any particular prejudice. Nevertheless, the 28 day limit set by the legislation is there for a purpose and is not to be disregarded.

15 Mr Paterson's evidence regarding the reason for the delay is as follows. He stated that shortly after the dismissal he contacted "industrial relations" and was given one or two telephone numbers. He is not now quite sure what they were, and believed one of them was Wageline. His evidence was that he got through to an answering machine but that no one ever returned his call. He spoke about his situation with some friends but by the time one person suggested that he speak to Mr Mullally the 28 days had passed.

16 I have not found Mr Paterson's reasons for the delay convincing. Whilst I find that he made enquiries promptly regarding his dismissal, he did not attempt to follow it up in any meaningful way other than speaking informally to friends. He made no attempt to follow the matter further with Wageline or with "industrial relations". That does not suggest to me that Mr Paterson took all reasonable steps to act promptly.

17 Further, although I am prepared to accept that Mr Paterson's evidence that he felt shocked when he was dismissed, that shock cannot be said to be a reason for any delay because he contacted "industrial relations" within a few days of his dismissal. Mr Paterson has provided no excuse for not investigating further his dismissal. His evidence does not show that he was under the impression that his "casual" status meant he had no right to claim unfair dismissal, as his grounds suggest.

18 Further, he had not informed Mr Chapman of his intention to take a case of unfair dismissal at any time prior to actually lodging it either when Mr Paterson spoke to Mr Chapman on the Wednesday following his dismissal to ask for a separation certificate, or so in a later call he received from Mr Chapman. Contrary to the grounds in this application, he did not at any stage say anything regarding the dismissal. Had he done so, and Mr Chapman had been aware that Mr Paterson was unhappy regarding the dismissal and may be taking it further, the delay of five days would not have mattered at all. I therefore find the explanation for the delay unsatisfactory.

19 Mr Paterson has a somewhat stronger case in relation to the merit of his dismissal. On the evidence, Mr Paterson was dismissed over the telephone and without having been asked for any explanation why he had not completed the work he had been given. It has all the hallmarks of a hasty decision. I make no finding whether or not the dismissal was unfair. I merely observe that Mr Chapman did not ask Mr Paterson for any explanation and acted in the absence of it.

20 Further, although Mr Chapman had told Mr Paterson to "lift his game" it is not clear whether that was a warning of impending dismissal. I am not satisfied on the limited evidence before me that Mr Paterson was "on trial" as Mr Chapman suggests. In the context of the overall length of Mr Paterson's employment and, if as Mr Paterson suggests, Mr Chapman had willingly made him permanent only three weeks before and may even given him a raise anyway, I suspect that Mr Paterson's claim that he was unfairly dismissed is arguable on the basis that Mr Chapman followed an unfair procedure in dismissing him as he did.

21 However, the unfairness of the procedure is only one factor which will need to be considered. I do not overlook the possibility that if the evidence to be brought by Mr Chapman does show that Mr Paterson had been slack on the job, then the fact that he was dismissed over the telephone without being given an opportunity to explain the position might not be sufficient to show that overall his dismissal was unfair.

22 If I do not accept Mr Paterson's claim of unfair dismissal, then he will lose the right to claim that his dismissal was unfair. He stated that his loss is that he was unemployed for possibly two months after which he is now attempting to become self employed. Mr Mullally submitted on Mr Paterson's behalf that this was a serious prejudice to him.

23 Correspondingly, if Mr Paterson's claim is accepted, the prejudice to Mr Chapman is that his company will have to defend a claim which it otherwise would not have to defend. While the five days' delay has not caused any prejudice, Mr Chapman points out that his is a small business which has only been going for approximately 12 months. He himself works 7 days a week and would find it difficult to take time off work for the purposes of defending the case and also to present evidence from possibly six other persons.

24 In balancing these issues, I find that there is no prejudice to the respondent presently because Mr Paterson lodged his claim out of time. Therefore, to now accept the claim out of time will in turn cause a significant prejudice to the respondent.

25 Further, although the manner of the dismissal did leave much to be desired, and Mr Chapman himself stated that he did not like to dismiss Mr Paterson over the telephone, it is merely that he had no choice, this, of course, will not of itself decide whether or not the dismissal was fair or unfair. While the manner of Mr Paterson's dismissal may have left much to be desired, Mr Paterson did not take any significant or real steps to contest his dismissal for at least three, if not almost four weeks from his dismissal. He did not follow up on the telephone calls that he had made. He did nothing more than speak about his circumstances to friends. That does not suggest to me a strong intention to challenge his dismissal. There is no evidence to the contrary. That, together with my impression that the overall merit of his case is not strong, particularly as he is not able to remember even now the other job which he had been asked to do on that day, has not persuaded me that it would be unfair not to accept his claim. Rather, I suspect the prejudice to the respondent in granting the claim is, on balance, equal to or greater than the prejudice to Mr Paterson if the claim is not accepted. I therefore decline to exercise my discretion and an order now issues that dismisses Mr Paterson's claim.

26 Order accordingly.

2003 WAIRC 10292

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRANT DOUGLAS PATERSON, APPLICANT *v.* QUALITY WHOLESALE PRODUCTIONS LTD T/A BOATLAND MANDURAH, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 12 DECEMBER 2003
FILE NO.	APPLICATION 1456 OF 2003
CITATION NO.	2003 WAIRC 10292

Result	Claim of unfair dismissal lodged out of time dismissed.
Representation	
Applicant	Mr P. Mullally (as agent)
Respondent	Mr G. M. Chapman

Order

HAVING HEARD Mr P. Mullally (as agent) on behalf of the applicant and Mr G.M. Chapman on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT the application is hereby dismissed.

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

2003 WAIRC 07882

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS DAVID PICTON-WARLOW & OTHERS, APPLICANTS *v.* SEALCORP HOLDINGS LIMITED (ABN 28 009 143 597), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 12 FEBRUARY 2003
FILE NO/S.	APPLICATION 1598 OF 2002, APPLICATION 1603 OF 2002, APPLICATION 1608 OF 2002, APPLICATION 1609 OF 2002, APPLICATION 1620 OF 2002
CITATION NO.	2003 WAIRC 07882

Result	Application to be dealt with under the Act
Representation	
Applicant	Mr J Picton-Warlow of counsel in relation to applications 1598, 1603, 1608, 1609 & 1620 of 2002 Mr G Grey as agent in relation to application 1620 of 2002
Respondent	Ms L Gibbs of counsel

Reasons for Decision

1 These applications were referred to the Commission pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") variously between 23 and 27 September 2002. All claims allege that the applicants were unfairly dismissed by the respondent on either 28 or 30 August 2002.

2 A preliminary issue has arisen in these proceedings in relation to jurisdiction. The matter of jurisdiction goes to amendments to the Act effected by the Labour Relations Reform Act 2002 ("the LRRA") in relation to unfair dismissal claims for employees employed pursuant to workplace agreements under the Workplace Agreements Act 1993 ("the WPA"), not containing provision for their referral pursuant to the former s 7G of the Act.

Submissions of Parties

3 In short, the contentions of the parties were these. Counsel for the respondent submitted that Part 3 of the LRRA came into effect on 15 September 2002, which repealed ss 18(2) and 51 of the WPA and s 7G of the Act in relation to employees employed under workplace agreements. The submission therefore was that as the applicants' workplace agreements contained no s 7G provisions, the appropriate jurisdiction that should have been invoked in these matters was the Industrial Magistrates Court and not that of the Commission.

4 It was also submitted by the respondent that as the amendments to the Act should be regarded as prospective, in these circumstances the applicants, having been dismissed prior to the commencement of the amendments, cannot maintain these proceedings, as the Commission understood the submission: *Maxwell v Murphy* (1957) 96 CLR 261; *Azzalini v Perth Inflight Catering* (2002) 82 WAIG 2992.

5 Counsel for the applicant submitted that the applications were properly before the Commission because as at 15 September 2002, by the effect of the amendments, the applicants were no longer able to refer their claims to the Industrial Magistrates Court, as that jurisdiction had ceased, save for proceedings actually already commenced. It was submitted therefore, that the present claims were filed in the appropriate jurisdiction and were so filed within the 28 day time limit imposed by the Act.

Conclusions

6 In my opinion, the present applications have been properly referred to the Commission and are within jurisdiction for the following reasons.

7 The effect of the amendments to the Act and the WPA, arising from the LRRA, was effectively to transfer the unfair dismissal jurisdiction from the Industrial Magistrates Court to the Commission, for employees employed pursuant to workplace agreements, on and from 15 September 2002. That is, on and from 15 September 2002, no proceedings were capable of being commenced in the Industrial Magistrates Court, in relation to unfair dismissal claims by employees under workplace agreements. From that date, all such proceedings were to be commenced in this Commission. The only exception to such a proposition is contained in s 84 of the LRRA, providing that proceedings actually commenced in the Industrial Magistrates Court would continue to be heard and determined in that jurisdiction, as if the amendments had not been made. This is not an unusual provision, in circumstances where jurisdiction is transferred from one court or tribunal to another.

8 There is no question of retrospectivity that arises in my view. The circumstances that were before the Commission in *Azzalini* are distinguishable from those presently before the Commission. In *Azzalini* the question was the date from which time runs for the purposes of the 28 day time limit and any extension of time, brought pursuant to s 29 (2) and (3) of the Act as it now is. In that case, the Commission held that the amendments to s 29 were prospective, such that the datum point for determining the commencement of the 28 day time limit, and the ability to extend it, was on and from 1 August 2002, that being the commencement of the amendments to the Act in that case.

9 In the present circumstances, there is no question that the amendments to the Act and the WPA effected by Part 3 of the LRRA are not retrospective. That is, the amendments in my opinion are to be taken to have operation and effect on and from 15 September 2002. From that date, employees could commence proceedings in this Commission, if they were employed pursuant to workplace agreements alleging they were unfairly dismissed. The relevant amendments arising for consideration in these matters do not concern themselves with the operation of the 28 day time limit, as did the amendments considered in *Azzalini.*

10 Reference was also made by the respondent to s 37 of the Interpretation Act 1984 specifically subsections (1)(c), (d) and (f) dealing with the savings of accrued rights. However, in my opinion, those provisions must be interpreted subject to "any contrary intention appearing" and the focus should be on the text of the subject legislation and not other aids to construction. This matter of principle was recently dealt with by the High Court in *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 76 ALJR 1502. For present purposes, in my opinion, the effect of s 84 of the LRRA, containing the savings provision for existing proceedings commenced in the Industrial Magistrates Court, discloses such a contrary intention. That is, it indicates that it is only proceedings actually commenced as at 15 September 2002, in relation to which any legal right, liability or proceeding, is preserved. Thereafter, from the amendments taken in their entirety, the jurisdiction of the Industrial Magistrates Court in relation to matters such as these is transferred to this Commission and otherwise ceases to exist.

11 Additionally, the repeal of s 56(2) of the WPA, dealing with the 28 day time limit for unfair dismissal claims for workplace agreement employees is also supportive of this construction.

12 The applications will now be dealt with in accordance with the terms of the Act.

2003 WAIRC 09327

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS DAVID PICTON-WARLOW & OTHERS, APPLICANTS
	v.
	SEALCORP HOLDINGS LIMITED (ABN 28 009 143 597), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 10 SEPTEMBER 2003
FILE NO/S.	APPLICATION 1598 OF 2002, APPLICATION 1603 OF 2002, APPLICATION 1608 OF 2002, APPLICATION 1609 OF 2002, APPLICATION 1620 OF 2002
CITATION NO.	2003 WAIRC 09327

Result	Direction issued
Representation	
Applicants	Mr J Picton-Warlow of counsel in relation to applications 1598, 1603, 1608 & 1609 of 2002
	Mr K Trainer as agent in relation to application 1620 of 2002
Respondent	Mr G Bull of counsel

Direction

HAVING heard Mr J Picton-Warlow of counsel and Mr K Trainer as agent on behalf of the applicants and Mr G Bull 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 paragraphs five and six of the Commission's direction dated 29 May 2003 be and are hereby revoked.
2. 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. A copy of a document(s) referred to in any witness statement is to be annexed to that statement. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
3. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 15 September 2003.
4. THAT the parties file and serve upon one another any signed witness statements in reply by no later than 22 September 2003.
5. THAT the parties have liberty to apply on short notice.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 08438

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS DAVID PICTON-WARLOW & OTHERS, APPLICANTS
	v.
	SEALCORP HOLDINGS LIMITED (ABN 28 009 143 597), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 29 MAY 2003
FILE NO/S.	APPLICATION 1598 OF 2002, APPLICATION 1603 OF 2002, APPLICATION 1608 OF 2002, APPLICATION 1609 OF 2002, APPLICATION 1620 OF 2002
CITATION NO.	2003 WAIRC 08438

Result	Direction issued
Representation	
Applicants	Mr J Picton-Warlow of counsel in relation to applications 1598, 1603, 1608 & 1609 of 2002
	Mr G Gray as agent in relation to application 1620 of 2002
Respondent	Ms L Gibbs of counsel

Direction

HAVING heard Mr J Picton-Warlow of counsel and Mr G Gray as agent on behalf of the applicants and Ms L Gibbs of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the applicants file and serve further and better particulars of claim by 12 June 2003.
2. THAT the respondent file and serve further and better particulars of answer by 26 June 2003.
3. THAT each party shall give an informal discovery by serving its list of documents by 10 July 2003.
4. THAT inspection of documents shall be completed by 17 July 2003.
5. 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.

6. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 21 days prior to the date of hearing.
7. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 7 days prior to the date of hearing.
8. THAT the applicants and respondent file an agreed statement of facts (if any) no later than 7 days prior to the date of hearing.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 10148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORI-ANN SHIBISH, APPLICANT *v.* ASSOCIATED NURSERY TRADERS PTY LTD T/A TREES A GREEN GARDEN CENTRE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 28 NOVEMBER 2003
FILE NO.	APPLICATION 458 OF 2003
CITATION NO.	2003 WAIRC 10148

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Probationary 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	Ms L A Shibish
Respondent	Mr P L Fraser of Counsel

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act"). The applicant, Ms Lori-Ann Shibish, states in her application that she worked as a Garden Centre Worker and Till Operator, for the respondent from 24 February 2003 to 2 April 2003. She says she was under probationary employment and worked 42.5 hours per week for a wage of $566 per week. She seeks compensation for unfair dismissal and for the harsh manner in which she says she was terminated.

2 Ms Shibish gave evidence that on 11 February 2003 she attended an interview with Mr Colin Taylor, who offered her a job and requested her to start the following day. She was unable to commence then and instead started the following Thursday and worked Friday also. She says at that time he presented her with the contract of employment [Exhibit A1] and had her sign it. There is no date on the contract. After working on 13 and 14 February she was asked by Mr Taylor to work the following week. She recalls this specifically as on 19 February she had to be dropped off as her car was in for service. On 21 February 2003 she asked to leave work early as she had a prior engagement. She worked for the respondent until Wednesday 2 April 2003.

3 The applicant says that during the week of 19 February she was given taxation forms to complete and the following week the respondent commenced deducting taxation from her pay. She worked eight and a half hours a day, 5 days a week, Monday to Friday. However, after the third week this was changed from Sunday to Thursday. Her remuneration was approximately $566 gross per week, and more on long weekends. In relation to the staff assessment form [Exhibit A4] she says of the 20 criteria, 18 were pertinent to the work and that of those 15 were marked "competent". Specifically she refers to number 11, "Complete given tasks accurately in minimum of time", which has been marked as competent. She says the respondent's answer states that the reason for termination was not being able to complete tasks on time. She says this contradicts the assessment form.

4 On the day of termination, ie 2 April 2003, she brought in a mud cake for all of the staff as it was her 40th birthday. At the conclusion of the day she was called to the office where Ms Julie Garrod advised her that she had been terminated, asked her to sign for her pay and presented her with a separation certificate. She asked Ms Garrod a number of times why she had been dismissed and was advised that she was unsuitable, that she was not required to give her a reason and that she should leave. Ms Shibish says she responded by saying that it was unfair and that she was going to the labour board. She left the office and gathered her things and asked Ms Sandy Peden, her supervisor, why she had been terminated. Ms Peden advised that she could not tell her.

5 Ms Shibish telephoned the respondent the following day and spoke to one of the girls on the till and was advised that she had been dismissed as a result of talking back to Julie about the trolleys. During this conversation she obtained the address of Mr Taylor for the purposes of sending him a letter. She considers her dismissal to be unfair as she was not given a reason and was not advised there were problems with her performance that could lead to her dismissal.

6 In regards to the trolley incident on 18 March 2003, she says that while she was working on the till, Ms Garrod started yelling at her because a handle of a trolley was sticking out. They then had a conversation during which Ms Garrod advised her that she was no longer an employee. She waited to see if anything happened and asked the other girls whether she had been fired. She believes nothing occurred at that time as a result of Mr Doug Bolton being away. After Mr Bolton's return on the Sunday her employment was terminated.

7 After the trolley incident there was a staff barbeque at Ms Deborah Slater's home. Invitations were printed up and handed to all staff, however the applicant was not invited. On the following Monday employees asked her why she had not attended and she advised them it was as a result of not being invited. Some employees then spoke to Mr Taylor who did not agree with what had happened. One of the girls bought her some chocolates the following day.

8 On 19 March 2003 Ms Shibish was called into the office for her staff assessment which was performed with Mr Taylor, Ms Garrod and Ms Peden present. There were comments at the bottom of the form which caused some discussion. She felt these comments were unfair as they were not specific and no one was able to point to any specific incidents. She says that she had been given one task by a supervisor and then called off by another supervisor to complete a different task. She says Mr Taylor suggested better communication was needed and she wrote notes to that effect on the form.

9 In mitigation, on 26 May 2003 the applicant commenced employment with Ballajura Veterinary Hospital in a full time capacity working 42 hours per week for $14 per hour. Between 3 April and 25 May 2003 she received no income. She says that she actively searched for employment. The issue of mitigation was not challenged by the respondent.

10 Under cross examination Ms Shibish confirmed that she believes her dismissal to be unfair as no explanation was given and she was never told that her position was in jeopardy. In relation to not being invited to the staff barbeque she says that it had something to do with the perception that she was no longer an employee.

11 In relation to the trolley incident on 18 March 2003, she says the incident occurred at the front of the garden centre. Trolleys were parked in a line and one had a handle that was not flush with the wall. She says that Ms Garrod said to her "how many times did she have to be told". She says she was standing at the till when this occurred and that Ms Garrod yelled at her. She does not know if Ms Peden or Ms Kraft were present. She says that during the incident she told Ms Garrod not to treat her as a child. She did not yell this out but said it very matter of factly.

12 She says that there are three main areas in the nursery, the receival bay, the undercover greenhouse and the till area. When she was working as the backup till operator it was expected that when the store became busy she would leave what she was doing and help on the tills, the same would occur when the till operators went on their lunch breaks.

13 She denies that during the review she was advised by Mr Taylor and Ms Garrod that they had received complaints from other staff and supervisors. She says that she asked for specifics, but that none could be given. She says that during the review she discussed with Mr Taylor the fact that there was a communication problem as she was being pulled off one job to do another. She reiterated that she did not accept the comments at the bottom of the staff assessment. She says that she followed supervisors' instructions. When asked to leave one job and do another that is what she did. Immediately following the performance review she said there was an incident with Mr Taylor that highlighted the problem of her being taken from one job to another. She says that in her remaining two weeks she ensured that when she was leaving a job to go somewhere else she advised Ms Slater.

14 Ms Shibish is adamant that her recall of the dates of employment are correct. She says that after her interview with Mr Taylor she had a two day trial period and the contract was signed at the interview. She denies that her commencement date was 24 February 2003. She says that she had to ask for Friday 21 February off as her fiancé had booked them into the Rendezvous hotel so that he could propose to her. When filing the initial application she went off the information on the separation certificate supplied by the respondent. She denies that there is any confusion and says that when she filed out the application on 3 April 2003 she was angry as she had just been terminated and was writing out of anger.

15 She denies the propositions put to her by Mr Fraser that she would refuse to unload stock, that she disliked unloading La Mandra, that she was difficult to find, that messages went out over the loudspeaker enquiring of her whereabouts and that she took it upon herself to decide what tasks she would do. She says that in relation to an incident of cleaning cupboards, when Ms Garrod asked her to go work at the back of the centre she asked whether she was to finish the cupboards and was told to leave it, which she did. She denies acting aggressively to other staff who instructed her post the review. She says that she thought she was performing well in the job as other staff gave her positive feedback. She later says that she did not recall receiving any feedback from supervisors.

16 Mr Colin Taylor, the assistant manager, gave evidence that he is responsible for overseeing staff on a daily basis, ordering shelf stock and keeping things running. He interviewed the applicant and went through with her what was expected of an employee. She came in for a trial period on 13 and 14 February 2003. He says that following the trial period she was offered a position as a probationary employee. He believed that she started that position on 24 February 2003. The employment agreement [Exhibit A1] was signed on 24 February 2003 or no later than 25 February.

17 In relation to the staff assessment form it was completed in consultation with Ms Garrod. The comments at the bottom of the document are his own. He bases these comments, namely that the applicant was not doing what she had been asked to do, on his own observation and complaints from other staff members. During the assessment it was raised with the applicant that on several occasions she had been doing things other than what she was supposed to be doing; that her priorities were moving stock from the receivals bay and working on the till. Her response was that she did not accept any of the criticisms as valid and that she was going to write on the bottom of the form to negate what had been said about her. He says that during the assessment it was raised with the applicant that she was not doing the job she had been employed to do.

18 Suggestions were made at the meeting that the applicant should listen to instructions first thing in the morning and if other instructions were given during the day she should ask which task was the priority. He says that following the review the applicant's performance declined and her attitude when given instruction seemed to worsen. He says that both Ms Slater and Ms Kraft approached him complaining that the applicant was being given tasks to perform which were not completed.

19 Mr Taylor says in relation to the barbeque at Ms Slater's house that it was a private function. The decision to terminate the applicant's employment was made in conjunction with Ms Garrod and Mr Bolton. He says there was no discussion about extending the applicant's probationary period. He says that during the initial interview, when he was queried by Ms Shibish in regards to the probationary period, he said as follows—

> "If you're doing something wrong it will be pointed out to you at the time. You will also have a staff assessment. If you have not rectified the problematic behaviour then it would be brought up at the assessment and if you still fail to do the job as we ask, then there's no point continuing". (Transcript pg 45)

20 Under cross examination Mr Taylor says that there are guidelines used when interviewing prospective employees which he followed when interviewing the applicant. These guidelines involve informing the person of the three month probationary period and providing them with a copy of the staff agreement. He says that when a person is offered a trial position the staff agreement is usually presented. He says that the agreement could either have been signed on 11 February 2003 or at the commencement of the trial period.

21 Ms Shibish appeared at first to be suitable for the position. Her termination was a result of her being deemed no longer suitable for the position. At the interview the applicant was told that she would be employed on a probationary basis, there would be a

staff assessment and if there was anything wrong at that assessment or at any other time then her employment would be terminated. He says that during the assessment interview the applicant was advised that if her attitude did not change her employment would be terminated. In regards to why there were no written concerns on the staff assessment form he says that there was not enough room on the form. She was not told after the performance assessment of any concerns about her performance.

22 He says that he cannot recall asking the applicant to work the week following her two day trial but it may have happened. He says that he recalls the applicant raising an issue to do with being engaged. He does not recall an incident involving the applicant sitting outside the gates.

23 Ms Julie Garrod gave evidence that she has been the manager at the respondent's business for about six years. She is responsible for overseeing the staff and the running of the nursery. She had no direct dealing with the employment of the applicant and is unaware of the exact starting date of the applicant. Her own observations of the applicant's performance were that she was unable to focus on one job at a time and had difficulty working under supervision. There was an incident involving the cleaning of a cupboard behind the till when the applicant should have been in the receival bay. Ms Shibish was pulled up on the matter. The applicant stated that she wanted to finish cleaning the cupboard.

24 A further incident occurred in relation to a nursery trolley. Ms Garrod says that she noticed that a trolley handle was sticking out into the main aisle. Ms Shibish was coming in the door with a trolley in her hand and Ms Garrod reminded her to make sure the handle was turned in. She says that Ms Shibish flew off the handle in the presence of customers. She was loud and aggressive and a number of staff witnessed the event. Ms Garrod says that in response to Ms Shibish's outburst she shrugged her shoulders and walked away.

25 Ms Garrod says that she completed the staff assessment forms by ticking the relevant boxes. The comments on the bottom of the form are Mr Taylor's. Her evidence in regards to point 11 of the staff assessment is enlightening—

> "Okay. Now, perhaps you can just clarify one point. If I can refer you to point 11 on the form - -?---Mm hm.
>
> - - she has a tick for "Competent for complete given tasks accurately in minimum of time"?---Mm hm.
>
> Which would appear to be inconsistent with the handwritten comment at the bottom?---Mm hm.
>
> What's your understanding in relation to how that item came to be ticked?---It's a very grey area. It's not a question that can be answered by a tick. Writing the comment explained the problems that were inherent". (Transcript pg 59)

26 She says that during the assessment she went through the points and the comments at the bottom. Ms Shibish disagreed with it all and wanted to write a comment on the bottom. She says there was discussion about how the applicant's performance could be improved as they went through the points. A suggestion was made that Ms Shibish should focus on one job at a time and work under the direction given.

27 The decision to terminate the applicant was made in consultation between Mr Taylor, Mr Bolton and herself. Ms Garrod had the authority to terminate the applicant but she consulted Mr Taylor and Mr Bolton as it was custom and practice to do this. She advised Ms Shibish on the day of termination that she was not suitable for the nursery. She was asked by Ms Shibish to go into details but she simply repeated that she was unsuitable. She says that she did not provide further details as it was not company policy to do so. She says that following the staff assessment Ms Shibish's performance went downhill. The applicant lacked interest in the job and did not want to take orders from anybody.

28 Under cross examination Ms Garrod says that Ms Shibish was terminated due to being unsuitable for the job. She denies that during the trolley incident she advised Ms Shibish that her services were terminated. She further denies that she mentioned termination during the staff assessment. She says that between the staff assessment and the time of termination Ms Shibish was not called in to discuss job performance or given any warnings that her termination was imminent.

29 Ms Garrod says that she was not required to give Ms Shibish a reason as to why she was being terminated. At the time of termination the applicant was on a 6 week probationary period. She says that other staff complained to her about Ms Shibish, although she did not put these complaints to the applicant because when spoken to, the applicant would always disagree and would not listen.

30 Ms Deborah Slater, a nursery hand with the respondent, gave evidence that she works in the receivals bay and is responsible for taking stock from trucks when they come in and preparing the stock for the shelves. She worked with Ms Shibish and found her performance at the beginning to be good but after a while she did not follow instruction and found other things to do. She says that on one occasion some La Mandra came in and she asked the applicant to assist. Ms Shibish went off and worked on the seedlings which were another employee's area. Ms Slater says that if someone wanted to take Ms Shibish away from the receivals area they would ask her. She says that on another occasion, when trucks came in and it was expected that everyone would assist, Ms Shibish disappeared. Ms Slater advised her supervisor, Ms Garrod, of this.

31 She says that following Ms Shibish's staff assessment, Ms Shibish treated other staff as if they were not there and she got worse before she left. She says that the barbeque was not a work event and invitations were printed and left at work on a table and were all taken.

32 Under cross examination Ms Slater says that it is possible that Mr Taylor had a discussion with Ms Shibish relating to him asking her to work on the seedlings.

33 Ms Karen Kraft gave evidence that she is employed as a nursery hand with the respondent and is in charge of the shade house. She worked with Ms Shibish and found that Ms Shibish did not always complete her jobs. She had to locate the applicant and get her to finish jobs. Ms Kraft never had a conversation with Ms Shibish in relation to her performance. She says that she spoke to Mr Taylor and Ms Garrod concerning Ms Shibish's performance.

34 During the trolley incident Ms Kraft was in the shop marking stock. She says that Ms Garrod had asked Ms Shibish and the staff around not to leave trolley handles out. In response Ms Shibish flew off the handle and said she was not to be treated like a 2 year old. Ms Slater says that Ms Shibish knew the trolleys had to be turned around and she had not done it. Ms Shibish was quite loud and there were customers present. She says following Ms Shibish's staff assessment the applicant was quite angry and was unhappy with the review.

35 Under cross examination she says that she did not know when Ms Shibish had her staff review, although all staff were reviewed at the same time. In relation to the trolley incident she says Ms Shibish yelled at Ms Garrod in the retail section of the shop and Ms Garrod had turned and walked away.

36 Mr Douglas Bolton gave evidence that he is the director/owner of the respondent. He played no part in the initial employment of Ms Shibish. He says that he relies on the feedback of his supervisors in relation to staff performance. His part in the termination of Ms Shibish was to advise that if it was not working out, and she is on probation, then to call it quits. He does not know when the probationary period commenced.

37 Under cross examination, he says he instructed RM Legal to prepare his notice of answer and counterproposal and that the statement "By oral agreement, acknowledged by the applicant, the probationary period was extended for the three month period" is accurate.

38 Ms Shibish was a good witness; clear and consistent in her evidence and unaltered under cross-examination. Mr Taylor's recall of events and dates is less clear. He does remember Ms Shibish mentioning something about an engagement. This is relevant as there is a difference between the parties concerning Ms Shibish's start date. In her application she says 24 February 2003. However, she says that she took this from the separation certificate and filled out the application when angry. It is common evidence that she worked 13 and 14 February 2003 under a trial period. She says she then started the following week and remembers clearly working that week as she had to drop her car off for service and had to finish early on the Friday as she had a prior engagement. Mr Taylor, who employed her, is less sure and concedes that it is possible Ms Shibish started the week after her trial period. Mr Bolton says that Ms Shibish's probationary employment was extended. This appears in the respondent's notice of answer and counterproposal. There were no pay advices tendered by either party to indicate what days the applicant had been paid. The respondent says that notwithstanding that Ms Shibish's probation was extended to 3 months, her services were terminated within the initial 6 week period. I favour the evidence of Ms Shibish as more certain and less contradictory and find that she was employed with effect from 17 February 2003 and was terminated within her period of probation being 3 months. Her probationary employment was then due to finish on 16 May 2003. She was dismissed on 2 April 2003 and hence missed out potentially 6 weeks and 2 days of probationary employment.

39 I need to say something further about my general impression of the evidence given. It is my view that Ms Shibish was a good, consistent and coherent witness who had a clear recall of events and was undiminished in cross-examination. I have already indicated that Mr Taylor's recall of events was in my opinion not as clear. Ms Shibish, in cross-examining witnesses, did a very good job. Having said that the witnesses for the respondent maintained their respective views that, in summary, Ms Shibish did not properly follow instruction, and was at times found wanting in that she would not complete the tasks expected of her. Ms Shibish, in summary, would have the Commission believe that she was a conscientious worker, who was sometimes given conflicting instructions and who was excluded from a work function, leading to a suspicion that she was not liked by some person or persons of the workplace. I must say that when I weigh all the evidence and I add that to the impressions gained at hearing of the respective evidence for the applicant and respondent, I have greater confidence in the applicant's evidence and where there is conflict, I would favour her evidence.

40 In saying this I am particularly guided by certain events. It is common ground that Ms Shibish underwent her performance review on 19 March 2003 [Exhibit A4]. A simple reading of that review would suggest that Ms Shibish was performing competently. She received this rating on 15 out of the 18 issues upon which she was assessed. Relevantly the issue of "process routine instructions and respond accordingly" was assessed as "needs further instruction". That assessment is backed by the comment at the bottom of the form which reads, "You appear to have an inability to follow instructions from supervisors. You tend to wander to other jobs instead of completing one task at a time." Ms Shibish disagreed with this and says that in effect she was tasked with competing priorities, that Mr Taylor accepted it was an issue requiring better communication and that a case in point arose following the performance review interview.

41 Certainly the complaint of the respondent noted in the performance assessment is consistent with one of their overall complaints about Ms Shibish. However, she is not rated as "not competent" and the assessment is generally good. More importantly, however, there is evidence on behalf of both parties, that Ms Shibish and Ms Garrod were involved in an incident the day prior to the performance review. Ms Shibish was questioned about the date of this incident and I find that it occurred on 18 March 2003. Ms Garrod complained that the handle of the trolley had not been positioned properly and that when challenged Ms Shibish yelled at her and that Ms Garrod walked away. It would seem that the incident occurred in the presence of customers. That is the evidence of Ms Kraft and Ms Peden. Ms Shibish says instead that it was Ms Garrod who yelled at her and reprimanded her in an inappropriate way. I would have expected commonsensically that if a probationary employee had yelled at a supervisor in a challenging manner, and in front of customers, that she would have been reprimanded. There is no evidence this occurred and no suggestion in the performance review that this was a problem. Indeed there are several customer related criteria in the performance assessment, yet no mention of this incident or Ms Shibish's alleged behaviour.

42 There are some differences in the evidence concerning Ms Shibish being excluded, on her evidence, from a staff function out of hours. Ms Shibish became suspicious that something was amiss as a result of this. Ms Slater says that the invitations were left on a table. The inference being that it was open to all staff. Ms Slater says also that it was not a work event, so seemingly it was a private function; but invitations were left on the table for staff to take. Importantly no one says that there were other staff who did not attend.

43 Further Ms Garrod's evidence about the staff assessment, as quoted previously, was equivocal and unconvincing. There is also a uniform view that Ms Shibish's performance worsened after her performance review. However, Ms Kraft was not involved and was not clear when the review occurred.

44 These issues have bearing for me in assessing the credibility of the evidence and as I say I favour the evidence of Ms Shibish. It is common ground that the applicable award is the Horticulture (Nursery) Industry Award no. 30 of 1980. Clause 7 of that award provides for probationary employment of not longer than three months and termination by either party within the probationary period of one day's written notice or one day's pay in lieu. The applicant was not paid for the day's notice. She was simply dismissed at the end of the day's work.

45 It is Ms Shibish's unchallenged evidence that she was dismissed without reason on her 40th birthday. She had brought in cake that day for her fellow employees, as was custom, and at the end of the day, without any warning or earlier indication, was dismissed, given her separation certificate, advised that she was unsuitable for the work and that the manager, Ms Garrod, did not need to give her a reason. Ms Garrod confirmed this later in her evidence and this statement appears also in the respondent's notice of answer and counterproposal.

46 It is the case that approximately two weeks after receiving what I view as a reasonable performance assessment, Ms Shibish's services were terminated. Her termination was without notice and that is in itself an aspect of unfairness. However, there is no reliable or specific evidence, in my view, that Ms Shibish was warned that her performance needed to improve or that her employment would not continue. Certainly it is clear that Ms Shibish was surprised by her dismissal. She had celebrated her birthday with fellow staff that day and nothing had been said to her to suggest that she was to be dismissed, or that her probation was ending. She was simply called in at the end of the day's work and dismissed without any reason being given. That too is an aspect of unfairness. The respondent acted suddenly as if Ms Shibish's probationary employment period was about to end. This, as I have found, was wrong and is not consistent with the respondent's notice of answer and counter proposal.

47 It is the case that probationary employment is but a step in the selection process and should be distinguished from permanent employment (*Charles William Westheafer v Marriage Guidance Council of W.A.* 65 WAIG 2311). However, a probationary employee is still entitled to be advised when their performance is not adequate and given instruction and a chance to improve.

This is also part of probationary employment in my view. More importantly however Ms Shibish's performance overall would seem to have been adequate. I suspect strongly that a personality clash led to the demise of her employment.

48 For the reasons stated I do not consider that Ms Shibish was somehow an employee who, by virtue of her inadequate performance and inability to follow instructions, was unsuitable for that type of work. This is the only reason indicated on the Separation Certificate [Exhibit A5]. Ms Shibish says that she was told by a fellow employee after her dismissal that her services were terminated due to the trolley incident. Ms Shibish says they chose to wait until Mr Bolton, the owner returned to the state. On the evidence before me I consider that it is open to infer that this was indeed at least a factor in Ms Shibish's dismissal. Having said that, and having preferred Ms Shibish's version of events concerning that incident, then I do not consider there to be a reason for her dismissal arising from her performance. It may be the employer thought that Ms Shibish would not fit into the workplace. If that be the case then in my view she was entitled to be advised of this and given the opportunity to address the employer's complaint.

49 In all the circumstances I do not consider that she has received a fair go all round (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). I find that she was dismissed unfairly on 2 April 2003. Reinstatement is not practicable in my view. The loss suffered by Ms Shibish is the income she could have gained from the remainder of her probationary employment. This is a further 6 weeks and 2 days employment at the unchallenged rate of $566 per week. This amounts to a total of $3,622.40 which is the amount I would order be paid to the applicant by way of compensation, less any taxation payable to the Commissioner for Taxation. The payment to be made within 7 days of the order.

2003 WAIRC 10228

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORI-ANN SHIBISH, APPLICANT *v.* ASSOCIATED NURSERY TRADERS PTY LTD T/A TREES A GREEN GARDEN CENTRE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 8 DECEMBER 2003
FILE NO.	APPLICATION 458 OF 2003
CITATION NO.	2003 WAIRC 10228

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Ms L A Shibish
Respondent	Mr P L Fraser of Counsel

Order

HAVING heard Ms L A Shibish on her own behalf and Mr P L Fraser of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, Lori-Ann Shibish, was unfairly dismissed by the respondent on the 2nd day of April 2003;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the said respondent do hereby pay within 7 days of this order, as and by way of compensation the amount of $3,622.40 to Lori-Ann Shibish, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2003 WAIRC 10303

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PARRISH SMITH, APPLICANT *v.* TUNGSTEN GROUP PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 12 DECEMBER 2003
FILE NO.	APPLICATION 1983 OF 2002
CITATION NO.	2003 WAIRC 10303

Catchwords	Termination of employment – Summary dismissal - Harsh, oppressive and unfair dismissal - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) & (ii) – Fair go all round – Application dismissed
Result	Application dismissed
Representation	
Applicant	Mr S Kemp of Counsel
Respondent	Ms SE O'Brien of Counsel

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 Mr Parrish Smith alleges that he was summarily dismissed on 21 November 2002 in a manner and for reasons that were harsh, unfair and oppressive. He seeks compensation for his loss of income and seeks payment of reasonable notice equal to six months pay.

2 Mr Smith was engaged as a senior consultant with the respondent between 11 June 2001 and 21 November 2002. His duties involved architectural design, consultancy and project management. He received a salary of $65,000 per annum plus superannuation. His employment contract is at [Exhibit A3] and he also signed a document in relation to the Information Technology policy which is [Exhibit A4]. Mr Smith was dismissed at a meeting on 21 November 2002 which he was called to attend with Mr Parnell, a Director of the respondent company and Mr Don Koontz, the Principal Consultant. At that meeting he was handed a letter of termination [Exhibit A5] and was dismissed summarily for transmitting and receiving unacceptable pornographic material. The respondent viewed this as both a breach of the IT policy and a breach of his contract of employment.

3 The grounds alleged by the applicant are as follows—

1. The summary dismissal is in breach of contract.
2. There was no good reason for the dismissal.
3. The respondent failed to investigate the incident leading up to the dismissal properly and failed to accord the applicant procedural fairness.
4. The respondent failed to take into account all relevant circumstances prior to deciding to dismiss the applicant.
5. Dismissal of the applicant was not warranted in all the circumstances.

4 There were numerous emails and attachments and a computer disk exhibited at hearing. For the sake of clarity I will list all the relevant emails exhibited. They are as follows—

A1	Email P Smith to E Tabb 12/12/2001 - **Priceless**
A2	Email P Smith to P Kellick & Others 11/08/02 **Heineken**
A6	Email P Smith to P Kellick & Others 10/24/02 **Not normal**
A7	Email P Smith to P Kellick & Others 11/08/02 **Sun Dial**
A8	Email P Smith to P Kellick & Others 10/24/02 **Weird**
A9	Email P Smith to P Kellick & Others 10/24/02 **Joys of Marriage**
A10	Email P Smith to P Kellick & Others 11/11/02 **Merry go round**
A11	Email P Smith to P Kellick & Others 11/04/02 **Lifting Weights**
A12	Email P Smith to I Melotte 10/29/02 **Check this shit out J**
A13	Email P Smith to A Smith & Others 11/13/02 **Anyone for scrabble**
A14	Email P Smith to Bowser & Others 06/13/02 **He He**
A15	Email P Smith to Amy Nicholls 11/13/02 **Irish Birth Control**
A16	Email P Smith to I Melotte 11/01/02 **Tennis Anyone**
A17	Email P Smith to A Weinbauer & Others 11/15/02 **MMMM**
R2	Email A Smith to P Smith & Others 15/11/02 **Perfect Wedding Cake**
R3	Email A Smith to P Smith 13/11/02 **Irish Birth Control**
R4	Email E Tabb to P Smith & Others 09/14/02 **The perfect woman**
R5	Email A Smith to P Smith & Other 10/24/02 **Not normal**
R6	Email N Tyler to P Smith & Others 12/11/02 **Night Attire**
R7	Email M Sarachik to G Parnell 14/11/02 **Breach of IT Policy**
R8	Email D Koontz to G Parnell 05/11/02 **IT Policy reminder**
R9	Email Administrator to G Parnell 18/11/02 **Forwarded Emails**
R10	Email T Lyon to P Smith 10/23/02 **Waterslide anyone**
R11	Email A Smith to P Smith 13/11/02 **Irish Birth Control**
R12	Email G McGowan to P Smith 07/11/02 **Grandpaville**
R13	Email J Pye to P Smith 15/11/02 **Irish Birth Control/Unitedwayhelp**
R14	Email J Pye to P Smith and Others 18/11/02 **Oldie but very**

5 There is no issue with the work performance of Mr Smith. The respondent takes no issue with the question of mitigation or the calculation of loss by the applicant. The issues then are whether the actions of Mr Smith justified summary dismissal or dismissal at all and whether the manner of dismissal and investigation by the respondent leading to dismissal were inadequate so as to be deemed to be unfair.

6 Evidence was given by Ms Amy Nicholls, an employee of the respondent from March 2000 to July 2003. Ms Nicholls says that she signed the IT agreement and that nothing further was said by the respondent about that policy. Ms Nicholls' evidence is that she has not read the policy. She received emails from the applicant which she treated just as jokes and were not offensive to her. This material was sexually explicit. Ms Nicholls says she forwarded these emails on to others but did this by forwarding them to her hotmail address and then on forwarding them from there. She did not complain about getting the emails. She did receive the email of 11/13/02 [Exhibit A15] but was not offended by that. She is not aware whether other employees were sending emails of this nature. Ms Nicholls was shocked that Mr Smith had been dismissed.

7 Under cross-examination Ms Nicholls reiterated that she sent emails to her hotmail address and on forwarded from there. She explained this to Mr Parnell. She thought that Mr Smith had been fired simply for sending the email of 11/13/02 [Exhibit A15]. Ms Nicholls deleted emails from her system for storage reasons.

8 Mr Edmond Tabb gave evidence that he worked previously for Nortronics, a company which contracted Tungsten to do work for them. In this capacity he had met Mr Smith and forwarded and received emails from Mr Smith. He says these emails were treated as jokes and were the usual exchange that he had seen in most offices. There was nothing detrimental in the emails in

his view. Exhibit A1 is the email he received from the applicant and he considered this to be funny and a typical office email. Exhibit A2 he received from the applicant and while this was not typical and he did not see a lot of these, he did see some and did not complain about it or find it offensive. He says he sent some emails to the applicant and he had got worse from other sources. In relation to [Exhibit A12] he does not recall this email but as it was copied to him he assumes that he received it.

9 Mr Smith gave evidence that he commenced doing some work for the respondent in May 2001 from his home. He then commenced work with the respondent in June 2001 and signed the employment contract [Exhibit A3]. Nothing was said about an email policy on his engagement. He later signed the Information Technology policy [Exhibit A4]. This policy was given to him and he was told to read it and sign it. No further training or explanation was given on the policy. He says this policy is standard of the types used by other companies but nothing was said by the respondent about the repercussions or importance if the policy was breached. At the time of his employment Tungsten had only 3 other employees and the Directors. He says when he commenced, emails of the type being considered in this matter were passed around by other employees who treated them as a joke. He says the IT policy was not applied by others in the office. These employees had been with the respondent longer than he. He sent these emails to colleagues and to clients. Neither objected to receiving the emails. In relation to clients he says he only sent to clients who had sent similar emails to him. He chose which clients to send the emails to and only to those who were on the same par as him. This was done openly and another employee Mr Weinbauer had asked him to on forward emails to him. He did not know that his actions were wrong. In relation to the email of 5 November 2002 from Mr Koontz, his supervisor, Mr Smith says he does not recall this email. He did not think this email applied to him as he was not downloading or storing material. Mr Koontz' email was simply a subtle reminder in relation to the IT policy.

10 Mr Smith says he was never warned in respect of sending emails. He was called into the office to speak with Mr Parnell and Mr Koontz on 21 November 2002. Mr Parnell advised him that they had discovered emails of a sexually explicit nature on Mr Smith's computer system. Mr Smith replied there were others who were sending such emails and he would not do it again. He was shocked that he was being terminated and asked whether any complaint had been made. He was advised that no complaint had been made. Mr Smith offered to sign a reprimand or final warning and this suggestion was rejected. Mr Smith asked that the decision to terminate be reconsidered. Mr Parnell advised that the directors had made their decision.

11 Mr Smith refused to sign his termination letter. No emails were shown to him and it was not made clear to him over which emails he was fired. Mr Smith wanted to obtain legal advice on his termination. After discussion he was told that he could get a few things from the office and he was then escorted out of the office by Mr Don Koontz. Mr Smith questioned Mr Koontz about his termination and Mr Koontz said he was a good worker but that the policy had been breached. The directors made a decision and he had to go. Mr Smith went to the doctor immediately as he was not feeling well. He was quite shocked by his dismissal.

12 In relation to the emails Mr Smith says he sent emails exhibited as A1, A2, A8, A9, A10, A11, A13, A14, A15 and A17. In relation to [Exhibit A6] he says he had not seen the attachment to this document. In relation to [Exhibit A7] he does not recall seeing this email and that others have access to his computer and have used his computer. In relation [Exhibit A12] he says he did not send the email and he does not send any emails of that nature. He says he did not see that email. In relation to [Exhibit A16] which is a video clip, Mr Smith says he was requested by Mr Weinbauer, a colleague, to send that email to him and he did. The applicant says that he is not aware of who Mr Ian Melotte is and is not aware of Mr Melotte's email address.

13 I will not detail the evidence in relation to mitigation as it is not challenged by the respondent.

14 He says he has not ever seen before the email of 10/23/02 [Exhibit R10] or the email of 10/24/02 [Exhibit A6]. He has seen Exhibit R3. He thinks he may have received from Mr Tabb [Exhibit R4]. He also does not recall receiving [Exhibit R5]. He does not recall receiving an email of 7/11/02 [Exhibit R12]. He did receive [Exhibit R6]. He does not acknowledge opening an email of 15/11/02 [Exhibit R13]. He does not remember seeing or opening [Exhibit R2]. He does not remember opening an email of 18/11/02 [Exhibit R14]. At transcript p.47 Mr Smith denies knowing the email address or the name of Mr Ian Melotte. He says "Of all the names on here, that's the only name I am not familiar with." He says further at transcript p.48 "

> "As I said, some time emails are sent and I don't get a chance to look at them or open them or view them. They just sat on the computer or - - either I was too busy or I just didn't get a chance to open them. Some emails - - as I express, it's - - I'm familiar with the type of emails that would come from a party and agreed that they might have sent them, but whether I opened them or not I'm not sure."

He says anyone can get on the computer and could have used his computer while he was away. He says the computers were not secure and he never used a password. Mr Smith says everyone was breaching the policy. He says that he did not view his actions as a breach of the IT policy. He acknowledges receiving the IT policy and signing that policy. He was asked to read it at the time. He says at the time he started working for Tungsten "Everyone was emailing the type of emails that I was sent. It was reciprocated." (transcript p.60). He says he told Mr Parnell and Mr Koontz this at the time of his termination interview. He mentions specifically Mr Weinbauer and Ms Amy Nicholls (transcript p.60).

15 Mr Smith says he does not recall reading an email from Mr Koontz of 5 November 2002 [Exhibit R8] to himself and other workers reminding them about adhering to the IT policy. He says that email is simply a soft reminder about downloading or storing material on the company's computers. He says no one ever mentioned being terminated or disciplined for breach of the IT policy. He says the IT policy had not been raised at the weekly meetings and he was not downloading or storing materials so he did not think the memorandum applied to him.

16 Under cross-examination the following exchange occurred—

> "And it's your evidence that the particularly graphic emails were the ones that you just happened not to open?---Not particularly. I just know the emails that I would've sent out. They - - they wouldn't have contained anything that - - that hard." (transcript p.66)

17 At the meeting with Mr Parnell and Mr Koontz of 21 November 2002, Mr Smith says he was advised that they had a problem with the slowness of the computer due to pornographic files being sent by him. They explained that this was a breach of the IT acceptable use policy and his contract of employment. Mr Smith said he does not recall them saying that but he remembers reading it in the letter of termination and querying it. Mr Smith queried Mr Parnell about how his actions could result in damage to the company's reputation as there had not been any complaints. Mr Smith says he advised Mr Parnell that he could stop it and that it was not anything that was out of hand. He did not require immediate termination. However, he was advised that was a course of action the directors had decided due to the number of emails and the extent of the inappropriate materials. He acknowledged that he had sent emails to clients and they had been reciprocated. His clients did not see it as offensive. They saw them as jokes and what normally occurred in corporate emails systems. He did not ask to see the emails and he was not shown them.

18 Mr Parnell raised an incident of complaint made by two Woodside employees regarding Mr Smith's behaviour at a golf day organised by Tungsten group for Woodside. Mr Smith says two women complained that he had said something inappropriate and he disagreed. He denies that he made lewd comments to them. He denied this to Mr Parnell.

19 In re-examination Mr Smith confirmed that he was shown no emails on 21 November 2002.

20 Mr Geoffrey Parnell gave evidence that he is a director and major shareholder of the respondent company. He operates from Perth offices and is responsible for Western Australia and the Northern Territory. The company has 113 employees Australia-wide of which six including himself reside in Perth. He says that employees are given the IT policy to read on their first day of employment and ask any questions that they may have. He says Mr Smith commenced on 11 June 2001 and signed the IT policy on 20 June 2001. He did not ask any questions. He says on the company's computers there is a password required to open the computer and secondly a password to access Lotus Notes which is the email system that the company uses. He agrees that people at times use other computers but this is to access specific programs, eg. Microsoft Project. He says that for some time in the company he experienced problems with the slowness of the email system. He asked the General Manager, Finance and Administration, Mr Mark Saracik to investigate this. This occurred in mid October 2002. He discovered that Mr Smith had been transmitting some fairly large picture emails. Mr Saracik advised Mr Parnell of this in the first week of November 2002. He indicated that he was investigating further the issue. Then on 14 November 2002 he advised him that he had located numerous pornographic emails. He had also gone back over other employees emails over the previous three weeks and indicated to Mr Parnell that he did not source any emails of this nature from any other employees in the company.

21 Mr Saracik's findings were sent to Mr Parnell in summary form [Exhibit R7] and he states: "Further investigation has revealed that the employee has received a number of emails of pornographic nature and in some cases has forwarded the emails to outsiders. These outsiders include staff members of clients as well as staff members of competitors." Mr Saracik continued to monitor Mr Smith's emails and further emails were sent in addition to those in Exhibit R7.

22 Mr Parnell says on two previous occasions there had been instances of employees transmitting pornographic material. One employee had already been made redundant and left. The other was dismissed.

23 He said the directors of the company had a meeting on 19 November 2002 which Mr Parnell and Mr Saracik attended. They discussed, in light of Mr Saracik's investigation, what action should be taken on Mr Smith and discussed whether it should be a warning or dismissal and came to the conclusion that given the unacceptable nature of the emails and the number of times the emails were being received and sent to other people that he should be dismissed. They decided that the company's reputation needed to be protected. He says he is aware that a number of his major clients have a negative attitude to misuse of the email system.

24 Mr Parnell says that in his subsequent discussion with Mr Smith he would have reconsidered the directors decision if Mr Smith had put forward some explanation for his actions. He says Mr Smith did not indicate that someone else had used his computer instead he indicated that "everyone does this, therefore it is not a problem". He says they were also concerned that there had been no correction of action following Mr Koontz' memorandum to staff. In that discussion Mr Smith indicated that other staff within the organisation were similarly involved in sending emails and he said, "If I am going down, they are going down with me". He did not specify any names at that stage. Mr Parnell responded that the investigation by Mr Saracik had not indicated that anyone else within the organisation was sending similar information. Mr Smith was in disbelief. Mr Parnell says he got the very clear impression from Mr Smith that he felt that what he was doing was acceptable behaviour. Mr Smith was not shown the actual emails during the interview. Mr Smith did not indicate that he had not read the company's IT acceptable use policy or did not understand the policy. He did say that he did not believe the outcomes of sending such emails would result in dismissal. Mr Parnell says Mr Smith was given the choice of collecting his things or alternately coming back after hours to collect these if he felt more comfortable. Mr Parnell says he spoke to Ms Nicholls at the time of Mr Smith's dismissal and she indicated she had a good relation with Mr Smith and was not fazed by receiving such emails.

25 Under cross-examination Mr Parnell says that at the time he got Mr Koontz' memorandum on 5 November 2002 he was aware that there was concern about Mr Smith sending inappropriate emails. Mr Parnell says that the impression given to him on 5 November 2002 is that Mr Koontz had seen some pornographic material. His expectation was that once Mr Koontz' memorandum had been sent out that people would stop the practice. He says by 5 November 2002 he was aware that the applicant's emails fell into the pornographic category which breached the policy and justified summary dismissal. He had not seen these emails at that stage. Mr Parnell says sending a pornographic email is unacceptable irrespective of the reaction of the receiver. He says no complaint had been made about receipt of the emails. Mr Parnell then went on to explain his reasons for not giving a warning.

> "Okay. Now, why wasn't the warning given?---The warning wasn't given for a number of reasons. One of the key elements in working as we do is - - is the trust and integrity of our - - our personnel. There were not a situation where there was one instance that maybe a genuine mistake and error of judgment had been made but a continual sequence of emails coming in and - - and going out over a relatively short period. And as I said, we didn't go back at that stage more than the 3 or 4 weeks. Subsequent discoveries have indicated it went on much longer and may have gone on even longer than what we know. The second element was the fact that Don Koontz had issued a reminder to Mr Smith on the 5th of November and he continued to send emails right through up until the 15th of November in terms of - - of the same sort of nature. So we figured and we made - - had a feeling that he wouldn't - - he was given a reminder, he didn't respond to that reminder and that concerned us about our ability to trust him in terms of doing future things, as well as the circumstances of the issue that arose, that we became aware of on the 15th of November, in relation to concerns of one of our clients about his behaviour". (Transcript 124)

26 He says it had come to their knowledge since Mr Smith's termination that Mr Alan Weinbauer did send similar types of emails and received such emails.

27 He says he does not consider that Exhibit R10 was the worst picture among the emails. He says it is particularly distasteful but there are a lot of pornographic images amongst the emails. Mr Parnell says in terms of his decision and the letter of termination the IT policy is connected to the contract and he picked section 21.3.7.2 which relates to conduct "conduct which causes imminent and series risk to the reputation, viability or profitability of the Company's business" as the most relevant one.

28 Mr Parnell says that at the time he spoke to Mr Smith about his termination he did not show him the emails. He says that they talked about pornographic material having been found and at no stage did Mr Smith ask to see those emails. He said he considered that it was a normal thing that everyone did.

29 Mr Koontz, the Principal Consultant for the respondent gave evidence that when someone is employed they are given the company's policies and employment contract to read and to sign. In relation to the email he sent to employees in November 2002 concerning the policy on internet use he says that he overheard some people in the office speaking about email attachments and he considered that it was necessary that he remind them they had signed a policy not to send anything unacceptable on the email system and he wanted them to stop that. He acted on this a few days after he had overheard them. This occurred after he had seen a partially clothed woman on Mr Smith's computer monitor. That prompted him to send the memorandum to his staff ie [Exhibit R8]. He then sent the memorandum to Mr Parnell at his request. His intention in sending the memorandum was that if employees were sending anything that was in contravention of the Acceptable Use Policy then they would stop the practice. He says he wanted to make this clear to them but he did not want to act or come across as a policeman.

30 He says he became aware of the investigation into Mr Smith's emails after he had sent the memorandum to Mr Parnell and Mr Parnell mentioned that an investigation was being undertaken into unacceptable emails causing problem on the system. He says as the investigation progressed he was advised on occasion by Mr Parnell of progress and that the investigator had identified that Mr Parrish Smith had sent a large number of unacceptable emails. He met with Mr Smith and Mr Parnell on 21 November 2002. At that time Mr Parnell advised Mr Smith that they had found on his email a number of emails in gross contravention of the policies of the company and it was the directors' decision to terminate him immediately. He says Mr Smith appeared quite stunned. He asked why he could not receive a warning. He says, "You could tell me not to do this and I would never do it again." Mr Parnell advised him that the decision had already been made. He says Mr Smith at no time denied sending any of the emails or denied the nature of the emails or asked to see the emails. He does not recall Mr Smith accusing any one else in the office of sending emails nor did Mr Smith say he was not aware of the IT Acceptable Use Policy.

31 Under cross-examination Mr Koontz confirmed that he escorted Mr Smith to the front door. He said he felt sorry for Mr Smith as he was stunned and it seemed abrupt to have him walk out the front door on his own. He says he was sorry to see him go. He had mostly been a good worker. There was no disciplinary action against him. He does not regard the image that he saw briefly on screen as pornographic. He could not believe that that picture would have resulted in dismissal. He does however consider that it is in breach of the policy but not a serious breach. He says he sent his memorandum to everyone because he did not wish to single out anyone. He said he did not know the extent of what was going on at the time by either Mr Smith or anyone else in the office. He was not aware that people in the office were exchanging these types of emails.

32 Mr Koontz' evidence also included the following exchange under cross-examination—

> "Was Mr Smith at his computer when you saw that?---Yes.
>
> Why didn't you say anything to him at the time?---I assumed it would've been covered in this email.
>
> Why not say something to him at the time? You're his supervisor. You're walking past. Why not just say "Parrish, get that off the screen. It's not acceptable"?---Well, I wouldn't have said that because he took it off the screen as soon as I came around the corner but, to be honest, I don't know." (Transcript p.152)

33 Mr Koontz says that he gave Mr Smith no indication that the meeting on 21 November was a meeting that could have had serious consequences for Mr Smith. In that meeting Mr Smith was not shown or offered to be shown emails.

34 I need to say something about the credibility of Mr Smith's evidence. I do not have confidence that he was fully frank in giving his evidence. He maintains that he has not seen a number of the emails and that he does not know a Mr Melotte. His denials in respect of this were not convincing and belie commonsense. He says that he was careful who he sent the emails to and only sent them to like minded clients, yet emails are addressed to Mr Melotte who Mr Smith claims he does not know.

35 The images attached to the emails include pictures of naked women mainly. There are also images and graphics of group, homosexual and oral sexual activity. I do not seek to characterise the images except that clearly some are more explicit and more likely to offend. Mr Smith's evidence is that he had nothing to do with several of the more explicit emails. Additionally, his evidence in effect is that Mr Melotte remained on his mailing list but he did not know Mr Melotte. I do not have confidence in Mr Smith's denials.

36 The overall impression I formed of Mr Smith's evidence is that he saw nothing wrong or harmful about engaging in these emails. He says he restricted his distribution of them to those persons of a like mind. These people, including his fellow workers, were not offended by the images. Clearly his other concern was that he had been singled out unfairly as he alleges his work colleagues were also involved in similar activity. I do not have similar concerns about the credibility of the evidence of Mr Parnell and Mr Koontz. I would clearly prefer their evidence to that of Mr Smith.

37 The emails were discovered by an audit of the computer system. The company had become concerned about the performance of their computing system and on investigation found that the system was being hampered by the transmission of large documents. Included in this group of documents were these sexually explicit emails. This investigation eventually led to Mr Smith's dismissal. There had been no complaint from customers or business associates. The only other incident where management became aware of such material was when Mr Koontz noticed an image on Mr Smith's computer. Mr Koontz's evidence is that he did not perceive this as being particularly serious but he issued a general instruction to staff not to breach the company policy.

38 The company policy relevantly states—

> TUNGSTEN Acceptable use policy
>
> **"2. SCOPE**
>
> Employees should be aware that violations of this policy might subject an individual to disciplinary action.
>
> **8. ELECTRONIC MAIL (E-MAIL) & INTERNET ACCESS**
>
> **Unacceptable Uses (not all inclusive)**
>
> - To download, display or transmit sexually explicit materials.

The policy was accepted and signed by Mr Parrish Smith on 20/06/01. The acknowledgement is: "that I have read Tungsten Group Information Systems Acceptable Use Policy and I agree to abide by the terms defined therein."

39 It is clear in my view that Mr Smith's actions in transmitting the emails contravened the company's policy. Counsel for the applicant concedes that Mr Smith breached the IT policy. There is no evidence that Mr Smith's actions adversely affected the company's business and reputation. There is evidence to the contrary from Mr Tabb. However, such actions are rightly prohibited by the company as they understandably could have such an impact. Likewise there is no evidence that Mr Smith's actions offended his colleagues. In fact there is evidence to the contrary from Ms Nicholls. She was not offended by the emails which she saw. She did not forward these emails to others from her work computer but she did send them to her home computer for future use. It is also the uncontradicted evidence of Mr Smith that others in the workplace were engaged in similar activity. In my view, even though there is no evidence about the extent of such activity, this point has relevance in terms of how seriously the respondent may have treated Mr Smith's actions and how fairly he was treated. It does not alter the fact that he breached the company's policy. I should add that Mr Smith's evidence and that of Ms Nicholls is that they were not properly aware of the respondent's policy. Yet Mr Smith signed the policy and does say it is similar to policies he has seen at other workplaces. Mr Smith also complains that he was not aware of the consequences of breaching the policy.

40 Mr Smith's employment contract relevantly states—

> **"21 Termination of Employment**
>
> ***21.1 Termination by the Employee***
>
> The Employee is required to give one (1) month's notice of termination of employment. If the Employee leaves the employment before the expiry of the notice period, the Company may deduct

from any monies owing to the Employee, an amount equivalent to the salary of the Employee would have earned if the Employee had worked during the notice period.

21.2 Termination by the Company for Unsatisfactory Performance

If, at any time, the Company is dissatisfied with the Employee's performance, the Company must provide to the Employee—

21.2.1 written details of the areas of the Employee's performance that the Company considers have not been satisfactory—

21.2.2 an opportunity for the Employee to respond to these matters;

21.2.3 time lines during which the Company expects those areas of performance to be improved to a specified standard; and

21.2.4 whatever counselling, advice, training and assistance are reasonably necessary to improve the Employee's performance to the required standard during that period.

At the end of the specified time lines, the Company may;

21.2.5 take no further action;

21.2.6 extend the time lines for specified improvement for a further specific period; or

2 1.2.7 if the Employee's performance is still unsatisfactory, take disciplinary action against the Employee. Disciplinary action may include dismissal upon one month's notice, or payment in lieu, (except where the Employee is over 45 years of age and has been employed for over two years, the period of notice shall be 5 weeks) after giving notice in writing to the Employee of the details of the unsatisfactory performance and the action which the Company proposes to take.

21.3 Summary Termination by the Company

The Company may immediately terminate the Employee's employment without notice if—

21.3.1 the employee has used up any accrued sick leave entitlements and is absent due to illness or injury (other than an illness or injury which is compansable under the relevant workers compensation legislation) for—

21.3.1.1 an aggregate period of three months in any period of 12 calendar months; or

21.3.1.2 such longer period as maybe specified by the Company in its discretion;

21.3.2 The Employee is declared bankrupt;

21.3.3 the Employee is found guilty of any criminal offence, other than an offence which in the reasonable opinion of the Company does not affect the Employee's position or ability to carry out the Duties properly;

21.3.4 the Employee engages in conduct that causes or may cause imminent and serious risk to the health or safety of a person;

21.3.5 the Employee fails or neglects to carry out the Duties or commits any act of serious misconduct or breach of this agreement (including the Company policies and operating procedures);

21.3.6 the Employee commits an act of gross disobedience or willful neglect in respect of lawful instructions regarding the performance of the duties; or

21.3.7 the Employee commits an act detrimental to the best interests of the Company including—

21.3.7.1 theft or misuse of the property of the Company;

21.3.7.2 conduct which causes imminent and series risk to the reputation, viability or profitability of the Company's business;

2 1.3.7.3 breach of Company confidentiality; or

2 1.3.7.4 misrepresentation or dishonesty in dealing with clients, the Company, or any person or entity external to the Company in relation to the Duties or other Company business.

22. Rules, Policies and Procedures

The Employee will be subject to all relevant Group policies and procedures in force from time to time, which are hereby incorporated as terms of this Agreement."

41 Mr Smith's letter of termination relevantly states—

"21 November, 2002

RE: SUMMARY TERMINATION

This letter serves as notification of summary termination of employment (effective 21 November 2002), based on your acknowledgement of the following—

- Breach of the IT policy (in particular the download, display or transmission of sexually explicit material); and
- The breach of clause 21.3.7.2 of your employment contract (conduct which causes imminent and serious risk to the reputation, viability or profitability of the Company's business).

The above has come to our attention as a result of your storage and transmission of sexually explicit material to Tungsten personnel, clients and other third parties

I take this opportunity of reminding you of the following clauses in your employment agreement (signed 26 April 2001)"

42 Mr Parnell's evidence is clear. He dismissed Mr Smith on the grounds expressed in the letter of termination as that was the closest ground which, in his view, expressed properly the breach made by Mr Smith. In acting as he did Mr Smith, in the respondent's mind, had put the company's reputation at risk and breached his contract of employment. It is also clear that the factors which Mr Parnell based his decision and that of his fellow directors included the extent and nature of the material transmitted, the fact that Mr Smith had continued to transmit material after having received, in conjunction with other staff, a

memorandum from Mr Koontz reminding them of the policy, and the complaint made by Woodside about Mr Smith's behaviour toward two of their female staff members at a function.

43 On this last point I limited, during the course of the hearing, the evidence to be adduced. In doing so, whilst it became apparent that the Woodside complaint had influenced Mr Parnell in his decision, it was clear in my view that this issue was not stipulated as being part of the reasons for termination and that no full investigation of the allegations had taken place prior to Mr Smith's dismissal. The allegations were also not part of respondent's notice of answer and counterproposal. In that sense I did not consider it a fair process to allow the respondent to seek to potentially bolster their defence by reference to the allegations. The allegations had previously been put to Mr Smith and he had denied that he acted in anyway inappropriately. I leave that issue there and it is then the case that unless the respondent can justify summarily dismissing Mr Smith based on his actions in respect of sexually explicit emails then the respondent's case must fail.

44 Counsel for the applicant says that Mr Smith was in breach of the IT policy in regards to the emails which he says he transmitted. There was some evidence and submission about storage and display, as well as transmission, of the material. Each of these points were incorporated briefly in the letter of termination. Each of these points would I consider be a breach of the policy. However, I will focus only on the transmittal of the material as the company says that it was concerned about risk to reputation or business. It is hard to see how the storage of material could lead to this. In respect of the display of material this could offend fellow workers, but the evidence is that Mr Parnell knew at the time of dismissal that Ms Nicholls was not offended, and Mr Koontz had recently issued a gentle warning to staff about retaining and presumably viewing such material. This does not somehow mean that staff should be entitled to breach the policy, but it does bear on how severe the employer may be in remedying the situation.

45 As is evident from what I have said I consider that Mr Smith was aware of and involved in the transmittal of emails other than simply the ones he admitted to sending. As I have also said I do not seek to characterize the material in the emails other than to say that some are more sexually explicit than others and thus are more likely to offend. Having said that it is the case, as Mr Kemp rightly concedes, that all the emails would in my view offend the company policy. The prime issue then is whether the breach of the company policy was sufficient to warrant Mr Smith's summary dismissal. For a variety of reasons Mr Smith says that such a harsh penalty is not warranted. The respondent says that they were within their rights to terminate his services immediately. They also say that Mr Smith did not provide a valid reason in the discussion on 21 November 2002 which would have caused Mr Parnell to change his mind.

46 The following findings in my view are clear on the evidence. It is the case that Mr Parnell and his fellow directors decided prior to the meeting on 21 November 2002 to dismiss Mr Smith. Their decision was guided by the results of an investigation conducted by Mr Saracik over several weeks into the computer records and activity of staff. Mr Smith was advised that because of his actions in sending emails to staff employed by clients and to staff of the respondent he was to be dismissed. Mr Smith did not deny sending sexually explicit emails. He was not shown the emails that he was accused of sending. He asked that a different penalty be applied and this was rejected. The discussion was a reasonably lengthy discussion. The discussion occurred without prior advice as to what the discussion was to be about. The dismissal in that sense was sudden and Mr Smith was shocked by the dismissal. Mr Smith was escorted from the premises that day.

47 Given these findings, there are aspects of the procedure which Mr Parnell and Mr Koontz followed that I consider could have been handled in a better and fairer manner. I consider that Mr Smith should have been forewarned about the purpose of the meeting. He should have been allowed to view the material at the meeting and respond, at least with a degree of specificity, to the allegations. The respondent submits that Mr Smith did not ask to see the material, was aware generally of the nature of the material and did not deny sending such emails. This is correct in my view but does not mean that he should not have been provided with the product of the employer's investigation. As is evident from hearing Mr Smith has denied being aware of or transmitting certain material. I have already expressed my views about his denial of these emails.

48 I do not quibble with Mr Smith being escorted from the building. On one hand there is no evidence that Mr Smith was other than a good employee and hence no reason to suspect that he would do anything untoward on his departure. On the other hand his departure was sudden but not poorly handled. The evidence is that Mr Koontz sympathized with Mr Smith's situation and shock.

49 I also do not quibble with Mr Parnell's evidence that if Mr Smith had provided an adequate explanation then he would have altered the decision to terminate his services. Whilst the directors had already decided, and Mr Koontz told this to Mr Smith, in reaching this view I have weighed the following points. I consider that Mr Parnell was genuine in giving his evidence. Mr Parnell was directly responsible for Mr Smith and was a director and shareholder. The discussion was not short. Mr Smith was given the opportunity to air his views. Mr Smith complained that others were engaged in such practices. Mr Saracik's investigation had covered other staff's computer records for the preceding three to four weeks and not discovered any irregularities. There is no evidence that the respondent condoned such practices as implied by Mr Smith. The evidence is that the company was not aware of the practice until Mr Saracik commenced his investigation and Mr Koontz overheard some staff in conversation. Finally, as Mr Parnell has indicated, it was Mr Smith's approach that even though he would not "do so again", it was a normal activity and everyone did it. In other words there was nothing wrong with what he had done. I should add that that is the precise impression which I gained at hearing of Mr Smith's attitude to sending such emails. I say this because it is Mr Smith's unchallenged evidence that he asked for another penalty to be imposed. This in my view does not mean that he somehow comprehended and agreed that he had transgressed the company policy. He simply asked for a more lenient penalty as he was advised that his services were terminated.

50 In short then whilst there are aspects of the procedure followed in dismissing Mr Smith which could have been better handled I do not consider that they alone make the dismissal of Mr Smith unfair (*Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891). I turn then to the central question and that is whether Mr Smith's actions justified his summary dismissal. There was clearly reason for disciplinary action to be taken against Mr Smith, but did it warrant him being dismissed and dismissed without notice? I have no doubt that the frequency and nature of the material sent, coupled with Mr Smith's expressed attitude about his actions being normal or typical, were sufficient to damage the trust between the employer and employee, such as to justify dismissal.

51 The test then to be applied is that expressed by Kennedy J in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385. He says—

> "Nevertheless, it has long been acknowledged that the power to order reinstatement is one to be exercised only where the employer's action is harsh or unjust in relation to that employee. No doubt it could, in such a case, be said that the employer was not simply exercising his managerial prerogative. The following principle, stated in In *re* Barrett and Women's Hospital, Crown Street (1947) A.R. 565, at pp. 566-567 was cited with approval by Walsh J. in North West County Council v. Dunn (1971) 126 C.L.R. 247 at p. 262—
>
> > It is not the province of the Commission, in the exercise of the jurisdiction conferred on it by the Industrial Arbitration Act, to take over the functions of the employer in relation to the selection and retention of employees,

and it will intervene only when its intervention is necessary to protect an employee against an unjust or unfair exercise of the employer's right of dismissal, a right which is as fundamental in the relationship of employer and employee as is the right of an employee to leave his employment.

As Walsh J. went on to stress at p. 263, it is not a question as to the parties' respective legal right, but a question as to whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right. He accepted, citing McKeon J. in Western Suburbs District Ambulance Committee v. Tipping (1957) A.R. 273, at p. 280, that a proper test is to ask the question: "Has there been or has there not been oppression, injustice or unfair dealing on the part of the employer towards the employee?"

52 Mr Kemp on behalf of the applicant submits that there should have been clarity in the policy, so that if a breach of the policy was such that it warranted summary dismissal in the view of the employer, then this should have been made explicit in the policy. Once again this may have been a better approach however the absence of such prescription does not in my view negate, and cannot negate, the employer's right to terminate summarily the services of an employee if the situation warrants such action. It is also the case that it is not for the Commission to supplant its view of the employer's actions, and for example order that dismissal on notice was appropriate, unless the employer's actions are unfair, harsh or oppressive such that they are an abuse of their right. Taking account of all the circumstances of this matter I do not conclude that the employer was not entitled to summarily dismiss Mr Smith for his actions and hence I do not find that Mr Smith was dismissed harshly or unfairly.

53 In my view Mr Smith has not been direct about his actions at hearing. The material he forwarded to clients of the respondent clearly has the potential to offend, is a breach of the respondent's policy and he continued to send such emails after Mr Koontz had reminded staff generally of the policy. In these circumstances, added to the impression I gained at hearing and Mr Parnell's evidence of Mr Smith's comments at the meeting of 21 November 2002, it is the case that Mr Smith does not believe that his actions are wrong and instead considers that it is simply what everyone does. The employer at the time, and after extensive investigation, did not find evidence of other employees breaching the policy. It is the case that the employer has the right to prohibit such use of their computing facilities to prevent damage to their reputation and business. In my view, it is the case that the employer could rightly hold the view that they could not trust Mr Smith in the circumstances. I would dismiss the application.

2003 WAIRC 10301

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PARRISH SMITH, APPLICANT
	v.
	TUNGSTEN GROUP PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 12 DECEMBER 2003
FILE NO.	APPLICATION 1983 OF 2002
CITATION NO.	2003 WAIRC 10301

Result	Application dismissed
Representation	
Applicant	Mr S Kemp of Counsel
Respondent	Ms SE O'Brien of Counsel

Order

HAVING heard Mr S Kemp of Counsel on behalf of the applicant and Ms SE O'Brien of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2004 WAIRC 10441

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARGARET WEBB, APPLICANT
	v.
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 9 JANUARY 2004
FILE NO.	APPLICATION 347 OF 2003
CITATION NO.	2004 WAIRC 10441

Catchwords	Reduction in classification – Penalty imposed on deputy principal – Allegations of sub standard performance – Statutory scheme in relation to discipline - procedural fairness –Application dismissed – Industrial Relations Act 1979 (WA) s 23A & 29(1)(b); Public Sector Management Act 1994 (WA) s 78 & s 79
Result	Application dismissed
Representation	
Applicant	Mr M Farrell as agent
Respondent	Ms K Jack and with her Mr J Steadall

Reasons for Decision

1 This is an application made pursuant to s.78(2) of the *Public Sector Management Act 1994* ("the PSMA") seeking redress for Ms Margaret Webb, previously a deputy principal at the Cable Beach Primary School, against the decision by the Director General Department of Education and Training to reduce her own classification to that of class room teacher level 2.3. This reduction took effect on 10 March 2003 and since that time Ms Webb has been able to teach at Looma Remote Community School. The application says as follows:

> "To appeal under s.29b of the Industrial Relations Act by virtue of the provision of s.78(2) of the Public Sector Management Act 1994, for orders to reverse the decision of the respondent to reduce the classification of the applicant."

2 The schedule to the application is as follows—

> "1. In a letter dated 15 January 2003 the Director-General of Education advised the applicant that he was about to impose a finding and intended penalty because of alleged substandard performance. [**attachment 1**]
>
> 2. The applicant responded in a letter dated 7 February 2003. [**attachment 2**]
>
> 3. By letter dated 24 February 2003 the Director-General of Education reduced the classification level of the applicant from Deputy Principal (3.3), to that of a classroom teacher (2.3). [attachment 3]
>
> 4. The applicant maintains that throughout the process she was denied natural justice.
>
> 5. The decision of the Director-General of Education is wrong."

3 The matter was brought on for conference on 13 May 2003 and could not be settled in conciliation. The matter was then listed with the consent of the parties for 16 and 17 September 2003 in Perth as the location and timing was convenient to both parties. On 29 August 2003 the applicant filed an outline of submissions which state as follows—

> "1. Ms Webb was not afforded natural justice in the process of evaluation of her alleged unsatisfactory performance by the Principal of Cable Beach Primary School in that—
>
> • Despite there being a performance improvement plan there was no regular review of the plan.
>
> • There was little discussion throughout the evaluation process.
>
> • The focus of the Principal's assessment only concerned issues detrimental to Ms Webb.
>
> 2. In conducting the review of Ms Webb's performance the Principal formed a view that Ms Webb had not demonstrated satisfactory performance prior to giving Ms Webb the opportunity to respond to a number of incidents.
>
> 3. Ms Webb's responses were not discussed by the Principal with Ms Webb to either clarify or provide feedback.
>
> 4. There was not an objective assessment by the Principal of the performance improvement plan agreed at the commencement of the process.
>
> 5. The investigation by Mr Yates was deficient in that he was guided by a flawed process.
>
> • Mr Yates' conclusion that the process "appeared procedurally fair" lacks rigor in that in that there should have been an objective assessment as to the fairness of the process.
>
> • Mr Yates adopted the confirmation by Ms Saunders that the statutory requirements had been met instead of making his own determination.
>
> • Not all matters considered by Mr Yates in his determination were put to Ms Webb.
>
> • Some issues were put to Ms Saunders and not to Ms Webb.
>
> • One issue was put to Mr Laurie Andrew and not Ms Webb.
>
> • Mr Yates adopted the view of Mr Andrews with regard to the process and the officers involved.
>
> 6. No credit was given for any demonstrated improvement whatsoever.
>
> 7. It is because of the above flaws in the process, in particular the denial of natural justice that Ms Webb seeks an order to quash the decision of the Director General of Education and Training."

4 The parties at hearing submitted a statement of agreed facts [Exhibit A1]. These agreed facts are as follows—

> 1. Ms Margaret Webb commenced employment as a Level 1 teacher on 9 April 1980 at Kalumburu Remote Community School until 7 September 1980.
>
> 2. Ms Webb's service history following her initial appointment follows—
>
> *08/09/1980 - 31/01/1983 Level 1 Teacher at North Tom Price Primary School*
>
> *01/02/1983 - 31/01/1988 Level 1 Teacher at La Grange Remote Community School*
>
> *01/02/1988 - 30/01/1989 Level 1 Teacher at Sorrento Primary School*
>
> *31/01/1989 - 28/01/1991 Level 1 Teacher at Fitzroy Crossing District High School*
>
> *29/01/1991 - 31/12/1991 Acting Level 3 Principal at Glen Hill Primary School*
>
> *01/01/1992 - 31/12/1993 Level 3 Principal at Glen Hill Primary School*
>
> *01/01/1994 - 31/01/1995 Level 3 Principal at Jungdranung Remote Community School*
>
> *01/01/1996 - 31/12/1997 Level 3 Deputy Principal at Fitzroy Crossing District High School*

01/01/1998 - 09/03/2003 Level 3 Deputy Principal at Cable Beach Primary School

10/03/2003 - Current Level 2 Teacher at Looma Remote Community School

3. On 31 January 2001 Ms Linda Saunders commenced as Principal of Cable Beach Primary School.

4. Ms Saunders provided a letter dated 28 January 2002 to Ms Webb prior to the commencement of the 2002 school year.

5. Ms Webb received a letter dated 3 May 2002 from Ms Saunders.

6. Ms Webb was Acting Principal whilst Ms Saunders was on leave from 26 June 2002 to 21 July 2002.

7. Ms Webb received a letter dated 26 July 2002 from Ms Saunders.

8. Ms Saunders handed a letter to Ms Webb on *5* August 2002.

9. Ms Webb furnished an undated response, which was received by Ms Saunders at 8:30am on 8 August 2002. A meeting was held at 9:00am same date and attending were Ms Saunders with support person Dean Finlay from District Office, and Ms Webb with nominated Union support person Mr Herzog (on speaker phone). Meeting suspended at the request of Mr Herzog and next meeting scheduled for 9 August 2002.

10. By letter dated 15 August 2002 to Ms Saunders, Ms Webb requests withdrawal of letter dated *5* August 2002.

11. Ms Webb received a letter dated 19 August 2002 from Ms Saunders.

12. On 26 August 2002 an Unsatisfactory Performance Meeting was held with Ms Webb, Ms Saunders, Mr Herzog (Telephone) and Mr Finlay present.

13. On 3 September 2002 the first review meeting took place with Ms Webb, Ms Saunders, Mr Herzog (telephone) and Mr Finlay present. The purpose of the meeting was to review the plan, review weekly activities, establish and review strategies and discuss support.

14. Ms Saunders changed the review meeting to 16 October 2002 by written correspondence dated 20 September 2002.

15. By letter dated 16 October 2002, Ms Saunders advised Ms Webb that after monitoring and reviewing her performance from 26 August 2002 to 15 October 2002, that Ms Webb had not demonstrated satisfactory performance. Ms Webb was given copies of specific incidences numbered 1-15 and provided with an opportunity to respond. All incidences contained a description of the incident, the area of concern, the recommendations for improvement and an area for Ms Webb to respond.

16. By memorandum to Ms Saunders dated 17 October 2002, Ms Webb requested an extension to address incidences after her computer malfunctioned.

17. Mr Laurie Andrew, District Director sends letter to Director General dated 22 October 2002 informing of the report on Ms Webb's unsatisfactory performance.

18. On 22 October 2002, the Ms Saunders received an undated letter from Ms Webb furnishing a response to the performance incidences, in reference to the letter dated 16 October 2002.

19. By letter dated 22 October 2002, Ms Saunders advised Ms Webb that after consideration of her response, she had not demonstrated satisfactory performance and that a recommendation to the Director General to investigate her performance will be made.

20. By letter dated 12 November 2002, Ms Webb writes to the Director General regarding the 22 October 2002 letter.

21. By letter dated 22 November 2002, the Director General authorised an independent investigator, Murray Yates, to investigate and report on the allegations of substandard performance raised against Ms Webb

22. By letter dated 22 November 2002 the Director General advised Ms Webb that an independent investigator had been authorised to investigate the allegation of substandard performance raised against her.

23. On 24 December 2002, the independent investigator submitted a report and findings to the Director General. The investigator formed the view that the performance of Ms Webb was substandard, in accordance with s 79 of the *Public Sector Management Act 1994,* and that the process has been procedurally fair.

24. By letter dated 15 January 2003, the Director General advised Ms Webb—

- that having received and considered the report of the independent investigator and Ms Saunders, it had been determined that her performance was substandard within the meaning of section 79(1) of the Act.
- that he intended to impose an action of a reduction of classification for Ms Webb from deputy principal (Level 3.3), to that of a classroom teacher (Level 2.3).
- a copy of the report was provided and the opportunity to furnish a written submission in relation to either the report and/or intended penalty.
- if she wished to place any further matters before the Director General she should respond within 10 working days.

25. By letter dated 24 January 2003, Mr Peter Denton, Manager Complaints Management Unit (CMU) advised Ms Webb to commence work for term 1, 2003 at the Kimberley DEO, until such time that the matter of unsatisfactory performance had been finalised

26. By letter dated 4 February 2003, Mr Denton sent clarification to Ms Webb regarding comments and terminology used in the report by Murray Yates.

27. Ms Webb furnished a written response on 7 February 2003, through the SSTUWA, to the letter from the Director General dated 15 January 2003, requesting a review of the decision that her performance is substandard.

28. By letter dated 24 February 2003, the Director General advised Ms Webb that—

- after considering her response to the matter, her employment classification would be reduced from deputy principal (Level 3.3), to that of a classroom teacher (Level 2.3) effective from 10 March 2003, pursuant to section 79(3) of the Act.
- she has a right to appeal the decision to the Industrial Relations Commission.
- confidential support services were available for her use.

29. Ms Webb commenced as a Level 2 Teacher at Looma Remote Community School 10 March 2003.

LEGISLATIVE

5 Section 78 of the PSMA is contained in part 5 of that Act headed substandard performance and disciplinary matters. Section 78 provides for appeal and reference. Subsection (2) reads as follows—

> "(2) Despite section 29 of the *Industrial Relations Act 1979*, but subject to subsection (3), an employee who —
>
> (a) is not a Government officer within the meaning of section 80C of that Act; and
>
> (b) is aggrieved by a decision referred to in subsection (1)(b),
>
> may refer the decision mentioned in paragraph (b) to the Industrial Commission as if that decision were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly."

6 Ms Webb is not a government officer for the purposes of the *Industrial Relations Act, 1979* ("the Act"). Section 80C of that Act makes it plain that the definition of a government officer does not include a teacher and hence is not subject to the Public Sector Arbitrator. Section 78(2)(b) refers to subsection 1(b) of the PSMA. For the purposes of this matter the decision taken within 1(b) is the decision under s.79(3)(b). Section 79(3) of the PSMA reads as follows—

> "(3) Subject to subsections (4), (5) and (6), an employing authority may, in respect of one of its employees whose performance is in the opinion of the employing authority substandard for the purposes of this section —
>
> (a) withhold for such period as the employing authority thinks fit an increment of remuneration otherwise payable to that employee;
>
> (b) reduce the level of classification of that employee; or
>
> (c) terminate the employment in the Public Sector of that employee."

7 Clearly the matter before the Commission is a decision by the Director General to reduce the level of classification of Ms Webb.

8 On 6 August 2002 my fellow Commissioner, Kenner C issued a decision in *Geoffrey Johnston v Ron Mance, Acting Director General of Department of Education* WAIG 83 WAIG 1553, whereby the parties sought declaration by the Commission in respect of a number of jurisdictional questions. I respectfully agree with Kenner C's reasoning in that judgment. Specifically Kenner C says:

> "I adopt this approach for the purposes of this matter. In my opinion, the reference to s 29(b) in s 78(2) of the PSMA must be regarded as a drafting or printing slip, and should be read as s 29(1)(b), which in my opinion, would accord with the intention of the parliament when the PSMA was enacted."

This in my view is clearly the case and for the purposes of the matter before me is a matter pursuant to s.29(1)(b)(i) of the *Industrial Relations Act* being a claim of unfair dismissal and not a claim for denied contractual benefits pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act*. This point is not obvious by the *Act* however, seemingly s.29(1)(b)(i) could only operate in respect of a matter within s.79(3)(c) of the PSMA being a decision to "terminate the employment in the Public Sector of that employee." It may be in some context seen that a decision within s.79(3)(b) namely, a decision to "reduce the level of classification of that employee" may be seen somehow as a denied contractual benefit by virtue of a breach of some contractual obligation. However, I consider it unlikely that this was what was intended. It would appear more likely that the intention of the Act was to apply s.29(1)(b)(i) to the provision of s.79(3)(b) and treat the reduction in the level of classification as if the employee had been dismissed from the earlier and superior classification.

9 The applicant at hearing was questioned by the Commission as to the remedy sought. This is not apparent in the application. Other than the applicant seeks the Commission to "reverse" the decision of the Director General. At hearing the applicant sought that the Commission quash the decision of the Director General. This is the remedy apparent in matters of appeal before the Full Bench as per s.49(5)(b) of the Act. However, the remedies that the Commission may apply in matters of unfair dismissal are contained within s.23A of the *Act*. These remedies are—

> "(1) The Commission may make an order under this section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair.
>
> (2) In determining whether the dismissal of an employee was harsh, oppressive or unfair the Commission shall have regard to whether the employee —
>
> (a) at the time of the dismissal, was employed for a period of probation agreed between the employer and employee in writing or otherwise; and
>
> (b) had been so employed for a period of less than 3 months.
>
> (3) The Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.
>
> (4) If the Commission considers that reinstatement would be impracticable, the Commission may order the employer to re-employ the employee in another position that the Commission considers —
>
> (a) the employer has available; and
>
> (b) is suitable.
>
> (5) The Commission may, in addition to making an order under subsection (3) or (4), make either or both of the following orders —
>
> (a) an order it considers necessary to maintain the continuity of the employee's employment;
>
> (b) an order to the employer to pay to the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.
>
> (6) If, and only if, the Commission considers reinstatement or re-employment would be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.
>
> (7) In deciding an amount of compensation for the purposes of making an order under subsection (6), the Commission is to have regard to —
>
> (a) the efforts (if any) of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal;

(b) any redress the employee has obtained under another enactment where the evidence necessary to establish the claim for that redress is also the evidence necessary to establish the claim before the Commission; and

(c) any other matter that the Commission considers relevant.

(8) The amount ordered to be paid under subsection (6) is not to exceed 6 months' remuneration of the employee.

(9) For the purposes of subsection (8) the Commission may calculate the amount on the basis of an average rate received by the employee during any relevant period of employment.

(10) For the avoidance of doubt, an order under subsection (6) may permit the employer concerned to pay the compensation required in instalments specified in the order.

(11) An order under this section may require that it be complied with within a specified time.

(12) The Commission may make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this section."

10 The parties were requested by the Commission to make submission as to the powers of the Commission to effect a remedy in this application. The applicant seeks an order to quash the decision of the Director General of Education and Training. The order in the applicant's view would include an order to reinstate Ms Webb to the position of Deputy Principal of Cable Beach Primary School and be paid an amount of money being the difference in salary rates between the levels. This would reinstate the applicant to her former position without loss. Therefore, in the applicant's mind, s.23A of the Act must be followed and provides that Ms Webb is to be reinstated to her Level 3.3, as the Deputy Principal of Cable Beach Primary School, without loss of pay from 10 March 2003. The respondent argues that the remedies are limited to those in s.23A of the Act and that reinstatement is impracticable. They submit that if the Commission finds for the applicant then the applicant should be re-employed as a Level 3 Deputy Principal, the location to be determined.

11 There are aspects of this matter which do not seem to fit comfortably within the s.23A of the *Act*. Similarly a decision under s.79(3)(a) of the PSMA would not comfortably fit the remedies provided in s.23A of the Act. With this in mind I consider that the provisions taken together must logically be read so as to provide for the Commission to simply, if the merits of the application warrant such action, quash the decision of the Director-General (as per a normal appeal process) or to effect any of the remedies as provided for under s.23A of the Act. I note that the prime remedy under s.23A is reinstatement and subsections 3 and 5 enable the Commission to ensure that the employee concerned has not lost remuneration in the period between the decision of the employer and the decision of the Commission. This would seemingly lead to the same result as a quashing of the decision. However, this is not the only remedy provided and it is clear in my view that the provisions when taken together do not in any way limit the remedies available under s.23A. This could mean simply that compensation is ordered or re-employment in another position, or any other ancillary or incidental order that the Commission thinks necessary.

12 Kenner C in the *Johnston* decision deals with this matter more eloquently and states:

> "Given that s 78(2) is a deeming provision enabling individual employees to refer the prescribed matters to the Commission, in my view, those matters are not limited to claims of unfair dismissal or contractual entitlements. This construction is also supported by the use of the words "Despite section 29 of the Industrial Relations Act 1979" in the introductory part of ss 78(2) and (3), to the effect that the matters able to be referred are not limited to those specified in s 29(1)(b)(i) and (ii) of the Act."

He then addressed the question

> "*what approach should be taken to a referral to the Commission of a matter pursuant to section 78(2) PSMA? In particular is it the case that the Commission may only interfere with the decision of the employer where it is considered that the employer acted unreasonably or may the Commission review the decision de novo and substitute its own view?"*

Kenner C states:

> "Whilst s 78(2) does not refer to an "appeal" to the Commission, it seems plain enough from the language in the section as a whole, that it is concerned with challenges to a decision taken by the employer in relation to which the employee is "aggrieved". Reference to "aggrieved" is made in s 78(1)(b) dealing with appeals to the Public Service Appeal Board, and also in ss 78(2)(b), (3) and (4) dealing with referrals to the Commission. In my opinion, given the nature of the proceeding contemplated by s 78 of the PSMA, a matter referred to the Commission pursuant to s 78(2) by an aggrieved employee from one of the nominated decisions, is to be dealt with in the same manner as a matter referred under s 78(1) of the PSMA. That is, I do not consider that such a proceeding ought to be regarded as an "appeal" in the strict sense, as that issue was discussed by the Full Bench in *Milentis.* Nor is it the case in my opinion, that the Commission is limited to determining only the reasonableness of the employer's decision.
>
> In other words, depending upon the nature of the challenge to the decision under review, such a proceeding may involve the Commission re-hearing the matter afresh or it may only be necessary to consider the decision taken by the employer "on such record of the proceedings below as comes up to it, supplemented or not by evidence": *Ormsby*. It would seem to be the case therefore, that consistent with the reasoning of the Full Bench in *Milentis*, the decision of the employer is not to be totally disregarded in the Commission hearing and determining the matter.
>
> Furthermore, it also seems to me that if the referral to the Commission pursuant to s 78(2) of the PSMA involves an allegation of harsh, oppressive or unfair dismissal, then, consistent with the referral of such a matter to the Commission pursuant to s 44 of the Act, s 23A should apply to such matters in terms of the relief to be granted. Such a matter, although referred to the Commission under s 78(2) of the PSMA, would nonetheless constitute "a claim of harsh, oppressive or unfair dismissal" for the purposes of s 23A of the Act and any relief to be granted. In my opinion, it would be incongruous if this were not to be the case, as claimants commencing proceedings under ss 29(1)(b)(i) and 44 would be entitled and limited to the remedies under s 23A if successful, whereas those under s 78(2) of the PSMA would not be so limited, for example, as to matters of compensation for loss and injury. Given the scheme of the Act in relation to such matters, I do not think parliament could have intended such an outcome. Different considerations may apply of course in cases where it is alleged that a dismissal was unlawful, for example, on the grounds of a failure by the employer to comply with a mandatory statutory requirement."
>
> "Therefore, matters referred to the Commission pursuant to s 78(2) of the PSMA are not restricted to consideration by the Commission of the reasonableness of the employer's conduct, but the Commission may review the employer's decision de novo, as the circumstances warrant and determine the matter afresh and substitute its own decision for the employer's decision if that is appropriate."

I respectfully agree with the reasoning of Kenner C.

13 I cover this ground also because this matter involves a finding on behalf of the employer of sub-standard performance by Ms Webb and her subsequent reduction in classification. Ms Webb was removed from her position at that time, not her employment. The PSMA requires that the employer follow a number of steps when dealing with such a question. I do not recite the provisions as it is not necessary to do so. The applicant does not allege that these steps were not followed and hence the decision of the employer may somehow be unlawful. The applicant instead alleges that Ms Webb was denied procedural fairness in a number of ways. The applicant's case is based solely on these grounds. Matters that come to the Commission under s.29(1)(b)(i) often give rise to the considerations expressed in the decision of the Industrial Appeal Court in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385; and *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891. Put simply a broader consideration applies in determining the fairness of the matter and issues of procedural unfairness may not of themselves be sufficient to warrant an overturning of an employer's decision by the Commission.

EVIDENCE

14 Ms Webb says that she acted as principal of the school from 26 June to 21 July 2002. Her duties in that time included those of principal plus her "students at educational risk" brief which she performed as deputy principal. There was a red card system which operated for the 127 of 475 student population who were identified as students in the educational risk category. She says that this task comprised 0.6 of her brief in terms of time. She says the principal Ms Saunders had no issues with her performance prior to her acting as principal. She says Ms Saunders indicated to her "she wanted me to take up the principalship to prove to the rest of the staff that she had total confidence in me" (Transcript p.18). She says Ms Saunders had also not given her any indication that her performance was unsatisfactory at the beginning of the year or prior to a letter sent to her on 3 May 2002.

15 On 26 July 2002 Ms Saunders handed Ms Webb a letter. Ms Webb did not respond to the letter but responded to a subsequent letter of 5 August 2002, she says within two to three days. She says Ms Saunders did not discuss her response with her.

16 Ms Saunders wrote to Ms Webb on 16 October 2002. In that letter she states:

> "Having monitored and reviewed your performance over the period of 26th August to the 15th October 2002, I wish to inform you that you have not demonstrated satisfactory performance.
>
> In particular, I consider your performance remains unsatisfactory in the following areas: Interpersonal skills and professionalism, organisation skills, effective working relationships."

Attached to that letter were a series of incident reports, totalling 15 in all. Ms Webb says that Ms Saunders had not gone through with her and discussed those incident documents prior to receiving that letter. Ms Webb said that she responded to Ms Saunders letter on 22 October 2002.

17 Ms Webb says that a red card incident is where someone comes and advises administration that a teacher urgently needs assistance with a student. Then the principal or one of the deputies attends to the matter immediately. The red cards involved about 10 to 12 of the most "pointy" children in the school who could cause this trouble. Ms Webb says that she invariably had to handle most of the red cards because Mr Green's office was inaccessible and in another block. Hence the registrar and secretary would bring the matters straight to her. She says she was the first port of call for a red card student. This required her to drop everything and each red card generated about two to three hours of work. Ms Webb says after her initial response on 22 October, Ms Saunders did not discuss her performance with her about the incidences. She says that she handed a letter to Ms Saunders at 7:30am on 22 October and received a reply from Ms Saunders about 1:30 pm that day. Ms Saunders came in and gave her the letter and said "I'm sorry to do this, Margie, to you." And Ms Webb says Ms Saunders burst into tears. In relation to incident 13 Ms Webb says that she discussed with Ms Saunders her approach at the time of the incident. This discussion happened over a period of time as it involved a number of incidences of a child attacking another. She says Ms Saunders did not discuss the matter with her after she received the incident report.

18 Ms Webb received a letter on 22 November advising her that an investigator, Mr Yates, had been appointed to investigate her alleged substandard performance. She says Mr Yates rang her and advised her that he was coming to Broome and she could talk to him about anything that she needed to. She says the next time she spoke to Mr Yates was in the conference room at the Mangrove Hotel and he asked her to tell him her perspective. She proceeded to read through the whole process of what had happened and put her case. The interview went for about 4 hours and it was taped. She says she spoke to Liz Parriman who advised her Mr Yates had indicated to her that he had given Ms Webb and Ms Saunders the right to furnish a list of people who had to be interviewed. Ms Webb says she felt dumbfounded by this and felt that everything was going bad. She rang Mr Yates and advised him what Ms Parriman had said. She said "you did'nt give me that right" and Ms Webb says that Mr Yates replied "Don't you dare tell me who to interview and how to do my job. Who do you think you are?" (Transcript p.32). She says that Mr Yates was rude to her and hung up.

19 Ms Webb says that in relation to the incidences Mr Yates simply made one comment and said, "well don't you think you were inefficient" in relation to leaving a piece of paper on the photocopier. Ms Webb replied that she was only human. She says his manner shocked her as he struck her as a very polite professional person up to that point. She says that Mr Yates did not ask her opinion on the procedures followed. He did indicate to her that whatever she wanted to talk about they would talk about.

20 In Mr Yates' report at item 4.4 it says:

> "Ms Parriman's observation and opinion is that Ms Webb does not always attain, and does not maintain the standard expected of a deputy principal".

Ms Parriman was a teacher's aide in the educational risk team. Ms Webb says that Ms Parriman's comments were not put to her when Mr Yates interviewed her. Ms Webb says that Ms Parriman felt that she was out of her depth in the role because she had no educative or theoretical framework to make judgments about her performance. Ms Webb complains that certain comments that Ms Parriman was alleged to have made were not put to her by Mr Yates. Ms Webb says also that Ms Parriman later clarified in a statutory declaration to the Director General that she did not say that. She says that Ms Parriman indicated to her that she told Mr Yates that Ms Webb likes to partake in alcohol two or three times a week.

21 Ms Webb says that Mr Yates' report is also incorrect in that he indicated that Ms Parriman had been involved in the process at Ms Webb's request. Ms Webb says that Ms Parriman refused to be her support person because it was too difficult between Ms Webb and Ms Saunders.

22 In Mr Yates' report at item 4.7 he refers to, "reports from Cable Beach Primary School about the intent of a number of teaching staff to walk out of the school if Ms Webb returns there in 2003". Ms Webb says this was not put to her.

23 Ms Webb with the assistance of the union representative, Mr Frank Herzog, signed off on a performance improvement plan with Ms Saunders. Ms Webb says that she fulfilled the requirements of the performance improvement plan under continued counselling, including anger management by attending sessions with Sister Leone. She says that Sister Leone advised her that she did not need to attend any more. Ms Webb says that she asked Sister Leone to confirm that for her just prior to the date of

hearing [Exhibit A2]. Ms Webb says that she also was required to and did give feedback to her line manager when dealing with students at educational risk.

24 In relation to the strategy "to revisit strategies for managing custodial or court issues for students" Ms Webb says Ms Saunders and she did not discuss strategies in their weekly meeting; they only discussed pressing issues concerning students. In relation to developing guidelines for case conferences Ms Webb says she spoke to Ian Monger and Ann Lord and a document was developed. Ian Monger was the district office psychologist. Ann Lloyd was the acting psychology team leader at district office. Ms Webb says that she would speak to Mr Monger daily about issues. She says Mr Monger did not talk to her about her role being ineffective or inefficient at any time. Ms Webb says that Ms Saunders was always welcome to attend the SAER team and she often used to duck in and out and lend her knowledge or support to a situation. Ms Webb was to journal her activities regarding SAER and she says she did so for every incident with a student. She would also do a yearly report on students. Her document was an overview which was done twice a year.

25 Ms Webb says also that the item, "reschedule admin meetings, two per week" was done, however, Ms Saunders and her did not discuss issues of Ms Webb's ineffectiveness or inefficiency but just issues to do with students. Ms Webb says also that Ms Saunders was to document any accusations but this did not happen and Ms Webb says she did not even know about them. Ms Webb says—

> "she would tell me who - - "Four or five staff members said this, this, and this about you," not who, when or where. And I saw no documentation." (Transcript p.52-53).

She says the process was to have one formal meeting per week and that did not occur.

26 Ms Webb says that during the monitoring period she received one instance of positive feedback from Ms Saunders regarding the handling of the behavioural problem with a little boy. Ms Webb says that she would get on average four or five red cards a day and sometimes up to eight. In relation to what happened with red cards Ms Webb says—

> "You would drop everything that you were doing, go to the classroom, consult with the teacher, release the teacher and take the class if it was of such a nature. If it was too - - if it was too hard for the teacher you would take the scenario yourself and remove the child into the admin area. You would consult the parents. You would consult with the teacher. You would do research into the situation. You would set up a behaviour modification plan in consultation with the parents, the team - - SAER, psych and other relevant experts depending on the issue. If it was a severely disabled child you would have the paediatrician and the other support people so then you would, of course, be documenting the whole scenario and working with the teacher." (Transcript p.55, 56-57).

27 Ms Webb says it was extremely stressful working with the situation. She says parents were very happy with her performance in relation to the students at educational risk. She says they trusted her. Ms Webb says she does not recall any real complaints being put to her by Ms Saunders from any parents over the monitoring period.

28 Under cross-examination Ms Webb says that she did not ask to be acting principal. She says she was acting principal for 9 working days as vacation fell within the period of time when she acted. She said during that time an incident arose regarding Mrs Cilia. She says this matter was mentioned in the incidences report.

29 Ms Webb says that a meeting did not occur with Ms Saunders on 29 April 2003 where her performance was discussed. She has no recollection of a letter regarding this meeting. Ms Webb denies that Ms Parriman was her support person in the performance review between August and October 2002. She says Ms Saunders listed her as such but she was not.

30 Ms Webb says that a meeting did occur on 6 May 2002 between Ms Saunders and herself. Ms Webb says that Ms Saunders did comply with point 6.1 of the policy which requires that any concern about a performance of a member of the teaching staff shall be addressed by the principal during the course of normal performance management process. In relation to a later letter of 26 July 2002 Ms Webb says that she was given a chance to respond in writing to allegations about substandard performance. But Ms Webb says that matters were not discussed with her.

31 Ms Webb says in early August she tried to get a meeting with Ms Saunders to discuss her performance but she was busy and their working relationship was very strained at that stage. She says she wanted to give her documentation on the Mrs Cilia issue but she could not get any time with her. She says Ms Saunders would not meet with her. Ms Webb says she would not meet without a support person with her, ie Mr Herzog. In relation to the matter of 19 August 2002 Ms Webb says that—

> "I understand what this says, but I did give her an explanation and she did not discuss those explanations, so how does she know they're adequate" (Transcript p.77).

Ms Webb challenged the instigation of the performance improvement plan. She says there was a strain between Ms Saunders and herself and hence the department put in an ancillary principal Mr Gary Sanderson. There was a meeting scheduled for 10 September 2002. Ms Webb says she was unable to attend due to ill health. Ms Webb says she did not take up the opportunity to reschedule that meeting because she was too busy. Ms Webb says that Ms Saunders had already made a decision so there did not seem to be any point. Ms Webb says she was still talking to Ms Saunders about the SAER process but not the improvement plan. She says the SAER process was part of the performance appraisal plan. She says she was talking to her everyday about this. She says she was receiving support in relation to her role as the SAER manager. Ms Webb says she was provided with instant reports from Ms Saunders throughout her performance review. She said she was responding to them in her note book computer but her note book computer broke down. She was also too busy in her job to respond to Ms Saunders straight away. Ms Webb says she gave her responses to Ms Saunders on 22 October and then to the district director.

32 Ms Webb says she was not opposed to an investigator being appointed. She trusted that a fair process would happen. Ms Webb says that after she had been interviewed by Mr Yates she said that she felt that the time that he had afforded her was fair and good but she felt that something was amiss. Apart from one little incident he had been polite and respectable. Then her concerns were alerted when Ms Parriman indicated that Mr Yates had told her that she was supposed to be given an opportunity to furnish a list of people whom he could speak to. She says that she was satisfied that she put all that she wanted to Mr Yates.

33 Ms Webb says that Ms Saunders met her obligations under the performance improvement plan by providing support outlined in the plan. However, Ms Webb says that she did not have time to discuss with Ms Saunders about the incidences (transcript p.93). She was talking to Ms Saunders all the time about the SAER students and other issues in the school. Ms Webb agrees that there was a file kept with records of her ongoing performance. She says that she looked at it three or four times. However, she says:

> "It was so negative, I needed to keep on going, I didn't even bother to go back into her office again" (Transcript p. 94-95).

She says she did not bother talking to Ms Saunders as "I already knew where she was coming from with the first couple of incidences".

34 Ms Webb says in answer to whether there was any discussion about her performance during the regular administration meetings—

> "Well, that's a really hard one, really, Ms Jack, because my whole job was being done every day and the - - the performance improvement plan was based on my job so I guess you could say elements of my performance in my role related to this anyway, and it was discussed in the context of it, but we were not formally looking at my performance appraisal in those meetings and that made us both very comfortable to talk about things with a better degree of respect and a better rapport." (Transcript p.97-98).

35 Ms Webb says that she responded to the report of the independent investigator through her union on 10 February 2002. Ms Webb says that these tests required in the departmental policy on managing satisfactory and substandard performance appeared to be complied with on paper (Transcript p.100).

36 Under re-examination Ms Webb says the letter of 5 August 2002 from Ms Saunders was withdrawn. At the meeting of 9 August Ms Saunders hung up on Mr Herzog. The meeting on 3 September 2002 was the last meeting which everyone participated. There was no meeting after that because she says they were very busy and Frank was very busy on the road. She says as matters were not raised by Ms Saunders with her she assumed that she had given a satisfactory explanation and things were fine. Ms Webb says that she assumed there was going to be a meeting at some stage to finalise the process. Ms Webb says that she has been given procedural fairness on paper but in reality she was not.

37 Mr Murray William Yates gave evidence that he was appointed to investigate the matter by the Director General of the Department of Education (DOE) on 22 November 2002. He was provided with a package of documents from the Complaints Management Unit of the DOE and a booklet from DOE entitled managing unsatisfactory and substandard performance of teaching staff and school administrators.

38 Mr Yates says that his understanding of the statutory requirements regarding substandard performance is that in accordance with section 79 of the PSMA the employee must maintain and sustain performance levels and if the department feels that this is not occurring, the department can then put to the employee that they are not achieving those standards and appoint a person to undertake an investigation into the performance issues and provide a report.

39 At the end of the investigation he determined that the process was fair and met all of the requirements set out by statute and the department's policies. Mr Yates' view was that Ms Webb's performance had been substandard. He formed that view with some comfort and also that the process conducted by the department was correct.

40 Upon being given the package Mr Yates says that he spent a few days going through the documents to obtain an understanding of what the documents contained. He travelled to Broome and conducted a series of interviews with relevant persons. He says that he was satisfied from the weight of evidence, from the documents and the persons interviewed that the process was fair and that Ms Webb's performance seemed to be substandard.

41 Mr Yates says that in his initial conversation he advised Ms Webb of who he was, that he had been appointed by the Director General, that he would be coming to Broome to conduct an investigation and that he wished to obtain her views on the allegations that had been made. He told her that she could have a support person. He indicated to Ms Webb that it was an opportunity for her to put her side across.

42 In relation to the first paragraph at page five of his report Mr Yates says that as far as the process and the fairness of the process went the statutory requirements and the department's policy had been met. He says that in discussions with Ms Saunders he asked her about the process, which got her talking about the process. He was satisfied that every effort was made to follow the process and this was supported by the documents. He says that he formed the view based on what Ms Saunders said rather than in response to a direct question.

43 Mr Yates says that the documents speak for themselves, however he did not wish to accept them in isolation and so he spoke to persons in Broome about the process. Their answers supported the documents which made him believe the documents were truthful. He did not think it would be prudent to reinvestigate every incident and the idea of the investigation was to determine whether there had been substandard performance. He says integral to this was being satisfied with the documentation. He says that he saw no good purpose in interviewing and raising issues with staff, parents and students. He took a holistic approach—

> "So I did take the view that the holistic approach was the only way to do it so that we didn't lose things in the detail, and that holistic approach was to say, "Well, putting aside all of the specifics of the incidents, here are the incidents; here are how they've been handled? Do they stack up?" And by "stack up" I'm saying do they stack up to the - - the procedures that needed to be met, and I arrived at a firm and comfortable view that they had been" (Transcript p.179).

44 He says that during the investigations a person had put to him that Ms Webb may have a drinking problem. He put this to Ms Webb who responded by saying that she had a medical condition that made her very sick very quickly and that prevented her from drinking too much. He also says that he challenged Ms Webb's statements in relation to some of the incidents but he did not put any accusations to her.

45 He says he has a standard script to remind Ms Webb that she was entitled to copies of the tapes. He says that he asked her if she had anything further to put and after a long discussion she was satisfied she had put all she needed to. He says that she used words to the effect that she was happy with the way she had been dealt with. A few days after leaving Broome he received a call from Ms Webb complaining of the process. He says he tried to discuss the matter with Ms Webb, was unable to and terminated the call. He says that conversation did not impact upon his report and that he had already worked on a draft of the report. He says that he raised it as an issue in his report at 5.3 as he believed it would be remiss not to, but that it played no part in the report.

46 Under cross examination he says that his investigation tested the documentation against the department's policy and he was satisfied that procedural fairness had been afforded against the policy and the statutory requirements. He also says that he did not dig into the events of incidents, he did however speak to selected witnesses including Ms Webb about the incidents and how they had been addressed. He says—

> "what I'm talking about there is if there's a note of a meeting, I was satisfied that that note was made by Ms Saunders and that that accurately reflected what happened" (Transcript p.184).

He further says that Ms Webb provided details of the incidents.

47 In relation to the letter of 16 October he says that perhaps Ms Saunders could have worded the letter better, but that it did not raise any alarm bells in his mind as he was looking at the overall fairness of the process. He says that he cannot isolate that one letter from the overall process. He says following discussions with Ms Saunders he concluded that she had gone about the process fairly and capably and that she had done a good job and had not predetermined the matter.

48 In his discussion with Ms Webb he says that he said to her "the floor is yours" and asked her to put all matters to him. He says that he challenged her along the way and at stages asked her for further information. He says that she gave him a lot of

information and that not all of it was relevant. He says that he cannot remember if he asked her whether there were other person that he should interview, but that it is something that he does ask. He says that he did not record all of the interviews as he was only testing the veracity of the documents and the people associated with them.

49 Ms Linda Joy Saunders gave evidence that in the previous year she had dealt with an employee with unsatisfactory performance and that she is familiar with the department's policy on managing unsatisfactory and substandard performance.

50 She wrote to Ms Webb on 28 January 2002 outlining her concerns regarding emotional responses to situations. She says that she raised performance concerns informally throughout term 1 and also at a meeting on 19 April in regards to an incident the previous day. At that meeting she provided to Ms Webb the same letter of 28 January with some hand written notes on it. She says that the letter was given as the same issues were involved, that is emotional responses to matters. Ms Saunders says that she became concerned over the school holidays and spoke to the district office. She held a meeting with Ms Webb at the school on 5 May and handed her a letter dated 3 May and a copy of the 2001 performance improvement plan. Ms Saunders said that she revisited that plan and showed Ms Webb that she had concerns even though she had been satisfactory and highlighted areas that were still of a concern.

51 She says that the running records are very detailed notes and they document every interaction. It records when incidents occur, whether it is positive or negative, it also records whether any action was taken, ie calling a meeting or handing out information.

52 She says that Ms Webb responded to her letter of 26 July on 8 August. Following receipt of that response a meeting was held with Ms Webb and Frank Herzog on 9 August, she says that several issues were discussed but Mr Herzog became hostile and the meeting was terminated with a further meeting to be conducted the following day. She says that on the following day Ms Webb did not attend the meeting as she had been advised by her union not to. In relation to the running record during the monitoring period there should be opportunities for Ms Webb to get support from various persons, through admin meetings and any tasks that Ms Saunders is to attend to. She says that whenever there was an incident it would be written down and provided to Ms Webb. She says that Ms Webb was to provide any positive factors about her performance and these were placed into the file. When there was a good action from Ms Webb it was termed "record" and was written on the sheet. In regards to the administration meetings she says that there were to be two a week and that it was difficult to get all the people along to the meetings. Ms Webb missed a number of meetings due to being double booked and she noted this.

53 She says that on 2 September 2002 she provided to Ms Webb incidents 1 to 6 and they were discussed. Incidents 7-11 were provided on the 13th and incidents 12 to 14 on the 27th. On 16 October she went to Ms Webb's office and handed her a letter [Exhibit A1, tab 15]. They had a discussion about the matter and Ms Webb asked her to leave. Ms Saunders denies bursting into tears. She says that Ms Webb was given time to compile a response. She says that she contacted the district office to advise that Ms Webb's response would be delayed and was advised that they had received a response. She says she then went to the district office and went through Ms Webb's response in relation to each incident and the notes and found that the response was vexatious and more of a personal attack than a response to the incidents. She says that she went through each incident to see if there was some explanation for Ms Webb's behaviour but there was not one. After going through Ms Webb's response and spending some time going through things and through the action she says that she could see no other decisions but to find Ms Webb unsatisfactory. She says that she was already at the district office and she informed Laurie of her decision, put part of the report to him and went back to school.

54 Under cross examination Ms Saunders says that in relation to the performance management process she documented everything that she thought was relevant. In relation to [Exhibit R2] she says that to pick out the positives in the list one needs to look for the phrase "record" or to look at the comments that speak for themselves. On 27 August she says Ms Webb was working on the SAER risk register and responded to a number of red cards and that she was working well, it was positive. She says that the tick relates to her following through the action. On 30 August she says that the prior administration meeting things had been "awful" between Ms Webb and "Bob". The administration meetings were part of Ms Webb's performance management plan and this one had gone well, it was positive and she noted "Record". On 2 September she says that Ms Webb had planned lessons for the year 1's, which was good to see as in the past Ms Webb arrived late to class and her lessons were haphazard.

55 In regards to being late for class Ms Saunders questioned Ms Webb. Some of the reasons were that Ms Webb had double booked herself and another was that she had taken a boy home. She says that Ms Webb was to attend to class and an admin meeting but instead took a boy home on the basis that he was sick when in fact he had stolen a wallet. Ms Saunders says that she advised Ms Webb that she disagreed with her strategy and the matter remained unresolved. She says that Ms Webb failed to act on the advice that she gave her and simply did what she wanted.

56 She says that it was not possible to get closure on any incidents to do with Ms Webb's performance as she did not accept any advice. Ms Saunders says that very few matters were resolved due in the main to Ms Webb's inability to get along with other staff. She says an incident would occur, there would then be a meeting between herself and Ms Webb where the matter would be discussed and the parties would attempt to reach some sort of understanding. She says, "I'd think there was some understanding and after that there wasn't" (Transcript p.138).

57 She sought advice from the district office on alternative strategies on a regular basis and she says through the performance improvement plan she encouraged Ms Webb to seek assistance elsewhere. She says that she spoke to Steve Dean and Dean Finlay at the Complaints Management Unit and their response to her was to "keep trying, you're the expert", or, "try this". Ms Saunders says that she came to the view that she was unable to see how she could help Ms Webb, however, she kept trying. She had been through the process the previous year with Ms Webb when she was helpful and constructive. However during this process Ms Webb had been obstructive, difficult and unwilling to accept any advice.

58 She says in relation to [Exhibit R2] record means to write down, it records both positive and negative matters. She says that Ms Webb did not improve her performance she simply did something in line with her duties, but her performance did not improve. Ms Saunders says the [Exhibits R1 & R2] are the running record of what occurred at each of the steps of the Departments Policy on managing unsatisfactory and substandard performance of teaching staff and school administrators. She says that she was frustrated during the process as she was unable to have open communication with Ms Webb and the interaction became very negative. She says that three meetings were held on 26th, 3rd and 10th, however Ms Webb was not in attendance for the meeting on the 10th. She says that she did not call any further meetings as Ms Webb did not follow through on them.

59 In relation to the 10 September meeting Ms Webb was away from the 9th to the 20th when she returned it was to difficult to schedule a further meeting in the last week of school as Ms Webb and she were very busy and Ms Saunders did not feel she needed to call one. She says that the monitoring period had ended by the next term. She says that she did not call meetings as she believed that Ms Webb had had enough opportunity to respond and improve her performance if she wished to.

60 Ms Saunders says that her responsibility as a principal was to provide Ms Webb with all the support she could in terms of people, resources and time and she openly encouraged her to obtain some counselling. She says that she was no longer her counsellor or mentor. She says that she was unable to help Ms Webb, that she could not provide the help that Ms Webb

needed. Ms Webb needed a counsellor that she could talk to and help her through her emotional responses and Ms Saunders was not prepared to do that. She was prepared to do everything within a principal's responsibilities.

61 At the conclusion of the process Ms Saunders did not call any meetings to review the performance improvement plan. Ms Saunders says that she reviewed the plan comprehensively in making the final determination. She used the monitoring column to conduct the review.

62 In relation to the letter of 16 October the attachments relate to matters that were put to Ms Webb on previous occasions. Ms Saunders says that her intention was for Ms Webb to respond and discuss the issues to do with her interpersonal organisation and effective working relationship skills. She says that Ms Webb had not responded to the 15 incidents throughout the process and she was quite surprised when she responded at the end. On each of the incidents there is a recommendation. She says that she encouraged Ms Webb to give a response to each incident but she did not.

CONCLUSION

63 Having seen each witness give evidence I conclude that I have some considerable confidence in Ms Saunders' evidence and much less confidence in the evidence of Ms Webb. Ms Saunders directly answered each question and was clear and consistent in her views. Ms Webb in my view was less direct and consistent. I accept also the evidence of Mr Yates which was undiminished by cross-examination.

64 The case made by the applicant is that she suffered a lack of procedural fairness in terms of the process adopted by firstly Ms Saunders and then the investigator, Mr Yates. In summary, Ms Webb says that Ms Saunders followed the procedure as outlined in the departmental policy only on paper but not in practice. She complains that whilst Ms Saunders and she would on a daily basis discuss issues to do with the SAER program, Ms Saunders would not discuss matters related to Ms Webb's performance improvement plan. She says also that their relationship was very strained.

65 The denial of procedural fairness in relation to Ms Saunders is based, on the submission of the applicant, on three points. The applicant submits that Ms Saunders did not complete a regular review of the plan, did not engage in much discussion with Ms Webb during the evaluation process and concentrated only on issues detrimental to Ms Webb. In saying this the applicant complains that Ms Saunders had not given Ms Webb proper opportunity to respond before completing her review, had not undertaken sufficient formal discussions (the last being on 3 September 2002), had made up her mind about Ms Webb's performance before the review period had completed and had not been sufficiently supportive of Ms Webb.

66 Exhibit R2 is a running record of events kept by Ms Saunders during the performance review period. Ms Saunders says that issues marked "record" were examples of positive comment. From a plain reading of the document there are a number of positive comments registered. So clearly Ms Saunders was, at least for the purposes of assessment, keeping track of both the positive and negative aspects of Ms Webb's performance. Whether these matters were communicated directly to Ms Webb as positive encouragement is a different matter. But again there are comments in that document (for example on 29 August 2002) which indicate also that Ms Webb was advised of her positive endeavours. Irrespective, the review period is clearly a period of weighing up the overall performance of an employee and on the face of [Exhibit R2], this is exactly what Ms Saunders was engaged in doing.

67 It is clearly a source of real complaint by Ms Webb that Ms Saunders did not discuss matters with her on a regular basis. My impression of Ms Webb, having seen her give her evidence, is that she was offended by this approach of Ms Saunders. Ms Webb says that they did discuss work issues but not specifically the problems with her performance and the incidences recorded about her performance. I have greater confidence in the evidence of Ms Saunders and in the documents which record the flow of behaviour. I am confident that there was ongoing discussion about Ms Webb's performance. There was clearly little discussion about the recorded incidences. Ms Saunders says that Ms Webb was in effect not interested in discussing these. There was also no formal meeting after 10 September 2002. I consider that Ms Webb's protest about a lack of discussion must be seen as either exaggerated or wrong.

68 The applicant submits that the, "whole purpose of the Performance Improvement Plan therefore is to provide an opportunity for the parties to have an ongoing dialogue in a supportive manner". I consider that this submission is misguided. The whole purpose of the Plan is to ensure that the employee's performance returns to an adequate level. Whilst it may be more appropriate that this occurs through encouragement and support, this can often be a subjective thing which focuses attention on the process of review rather than the intended outcome, namely to improve performance. The Department's policy gives managers instruction as to how to manage unsatisfactory performance. It is clear and obvious when one reads the whole of the policy that the use of a Plan is a formal step in ensuring that performance which has not improved previously, is given special attention and assessment in a formal way. If that does not work then other steps are to be undertaken.

69 I make this distinction as I consider that it is important in this matter. One could normally expect a manager to encourage and support a subordinate in attaining the desired level of performance. However, this approach may not be possible under a Plan where the employee is formally under challenge. Put bluntly the onus under a Plan is on the employee to improve or else other corrective action may be taken. Ms Webb complains that Ms Saunders was purely negative and did not address matters in discussion with her. Ms Saunders says that she did everything she could as a principal to assist Ms Webb. Having now had the opportunity to read all of the information and records I consider that Ms Saunders account to be a much more accurate summary of what transpired between Ms Webb and her. I am less concerned about whether a number of formal meetings occurred; the absence of which must in part be attributed to Ms Webb's attitude to the process.

70 The Department's policy on "Managing Unsatisfactory and Substandard Performance" is contained within Exhibit A1. I do not go to all the detail of the policy, however, the policy outlines the steps to be taken in managing substandard performance and the purpose behind each step. Step 4 in relation to the Plan states—

> "This Plan must be in place for a minimum of 20 working days for teaching staff before their performance is formally reviewed. The principal or line manager may choose to extend this period. Such a decision rests with principals and line managers and will depend upon the nature and extent of the unsatisfactory performance and what constitutes a reasonable period in which to improvement.
>
> The requirement for formal review should not preclude more regular monitoring and feedback. This may consist of less-structured interactions, formal meetings, memoranda, notes or records of discussions. Records must be kept of all observations or interactions."

And later—

> "Advice and assistance may take the form of counselling, training, mentoring, district office advice, central office advice, or relief for teaching staff to allow them to address areas of concern. Monitoring may include examination of work reports, evaluation of written work, evaluation of plans, classroom observation, discussion of relevant issues or observation of specific tasks."

This all serves as a guide only

71 It is not clear to me how in a procedural sense any of the components of the policy were not followed by Ms Saunders. Certainly the Plan was formulated in conjunction with Ms Webb, all observations were recorded, all material was available to be viewed by Ms Webb and she had the opportunity to respond to any material. The policy calls for review of the performance and suggests regular feedback or clarification but does not mandate some arrangement whereby formal and regular meetings must be conducted by the line manager.

72 The policy also refers to the requirements for procedural fairness and states that it involves a process in which—

- "decision makers act fairly and provide reasons for decisions;
- the person affected is given a fair hearing;
- all parties to a matter have the opportunity to put their case where an adverse decision or finding is made; and
- all relevant arguments are considered and irrelevant arguments excluded."

73 Ms Webb says that there were two meetings between Ms Saunders, Mr Hertzog and her in formulating the Plan; a third meeting was postponed as Mr Hertzog was not available and that she was advised by him not to meet Ms Saunders without him being present. Ms Webb complains that Ms Saunders never sat down and discussed the incidences with her (except incidence 13). She also complains that on 22 October 2002 Ms Saunders, without any discussion about the letter which Ms Webb had submitted that morning, handed a reply to Ms Webb. The letter informed Ms Webb that her performance was not adequate and the matter would be referred to the Director-General. At first sight and given the evidence of Ms Saunders in cross-examination, which is highlighted by the applicant in closing submissions, these complaints would appear to have some force. However, one must view the circumstances as a whole. Ms Saunders was clearly experiencing some frustration in her dealings with Ms Webb and in arranging meetings to discuss progress on the Plan. In addition it is Ms Webb's evidence that the relationship between them was strained and Ms Webb considered all the comments to be negative. My conclusion on having heard the evidence is that Ms Webb was less than receptive to entertaining discussion on her performance.

74 As to the serious issue of Ms Saunders having concluded her assessment prior to having Ms Webb's response to the allegations against her, again this complaint would on its face appear to have substance and be counter to affording Ms Webb procedural fairness. However, Ms Saunders' evidence which I accept is that she read all of Ms Webb's response and it was vexatious and did not explain Ms Webb's behaviour. It is noteworthy that a theme in Ms Webb's response is the untruthfulness of Ms Saunders. Ms Webb replied on 22 October 2002 to Ms Saunders letter of 16 October 2002 in which she informed Ms Webb that her performance during the review period had not been adequate and outlined the areas of substandard performance and the incidences involved. Ms Webb stated—

> "I am shocked at your use of power as the principal to always cloud the truth in an *(sic)* out of context manner to reflect what you want to say. A principal can say what ever they like about a staff member and has the power to manipulate staff and other variables to show one up in what ever light that suits. All the incidents that follow will high light how the process was based on lies and a whole lot of negatives thrown together to make me look bad."

75 Ms Webb then went on to provide her comments on the majority of the incidences. The two points that I would make are that firstly on a reading of Ms Webb's responses whilst there are a number of detailed responses as to how she viewed the actual incidences, there are also many challenges to Ms Saunders in terms of effectively accusing Ms Saunders of concocting the situations or allegations. Ms Saunders evidence is that Ms Webb was obstructive, difficult and unwilling to accept advice. Having seen both give evidence, having read all the material and especially Ms Webb's response of 22 October, I would have to conclude that I have considerable sympathy for Ms Saunders' view of the approach adopted by Ms Webb. It is a view that found resonance with Mr Yates as well, albeit put in much stronger terms. The other point is that given this context and the responses of Ms Webb then there was little presented by Ms Webb that could legitimately alter Ms Saunders view of her performance. I do not therefore conclude that somehow Ms Saunders has prejudged Ms Webb in the manner in which she engaged in the review of the Plan.

76 More fundamentally, I would have to conclude that it is more probable that Ms Webb's performance, on all the material before me, was in fact substandard. Now this is not how the parties present the matter. The applicant's complaint centres entirely on a denial of procedural fairness on several grounds. For the reasons expressed I do not find that Ms Saunders afforded Ms Webb a lack of procedural fairness. However, the other point which must be addressed is whether if Ms Saunders could be said to be right then does it matter and would the result be different in any event if a better process had been adopted. I note that the applicant is not arguing that there was anything unlawful in the process. This comment applies equally to the process of investigation. Put simply I consider the result would have been the same and it is Ms Webb's view of the situation, her performance and her approach to her assessment that needed to alter.

77 The policy covers the requirements of an investigation and specifies that it must be conducted by a suitably qualified person who must review the process to ascertain whether it was procedurally fair, must review all records including the Plan and correspondence, must interview the parties concerned and must "form an opinion as to whether the employee's performance is substandard". It is said by the respondent that Mr Yates is experienced in the process of investigation and his qualifications to undertake the investigation are not challenged by the applicant.

78 The applicant instead complains that—

> "The investigation by Mr Yates was deficient in that he was guided by a flawed process.
>
> - Mr Yates' conclusion that the process "appeared procedurally fair" lacks rigor in that in that there should have been an objective assessment as to the fairness of the process.
> - Mr Yates adopted the confirmation by Ms Saunders that the statutory requirements had been met instead of making his own determination.
> - Not all matters considered by Mr Yates in his determination were put to Ms Webb.
> - Some issues were put to Ms Saunders and not to Ms Webb.
> - One issue was put to Mr Lauire Andrew and not Ms Webb.
> - Mr Yates adopted the view of Mr Andrews with regard to the process and the officers involved."

79 Ms Webb's chief complaint in evidence is that Mr Yates did not advise her that she could submit a list of people for him to interview and that matters which were adverse to her were not put to her. She was mostly commendatory of the discussion which he undertook with her and considers that she had adequate opportunity to put to him all the issues which she wanted to. The discussion went for about four hours.

80 The comments which I have made in respect of whether one could conclude that Ms Webb's performance was in fact substandard are appropriate to the investigation aswell. However, in relation to whether Mr Yates afforded Ms Webb procedural fairness in his investigation I would conclude that he did for the following reasons.

81 Mr Yates completed the task he was mandated to do. He needed to make his own determination as to the fairness of the process and whether Ms Webb's performance was substandard. His conclusions are stated in section 5 of his report as follows—

> "**5.1.Investigator's opinion**
>
> In relation to the allegation of the substandard performance of Ms Margaret Webb I am satisfied that her performance is substandard in accordance with s 79 of the *Public Sector Management Act 1994*, and that the process has been procedurally fair with demonstrable good will and intent having been exhibited by the Cable Beach Primary School Principal Ms Linda Saunders.
>
> **5.1.1. Comments and Observations – Ms Webb**
>
> The following comments and observations about Ms Webb are made to assist the Director General in his deliberations.
>
> Mr *(sic)* Webb expressed a number of times in our interview that she has a love of her profession and is committed to her students. She also sees herself as a role model for Aboriginal students and members of the school community. This is an admirable and ideal role. It is sad and unfortunate that Ms Webb's conduct does live up to her view of herself as a role model, and does not demonstrate an ability to attain and maintain her own declared standards and ideals.
>
> The evidence analysed and gathered indicates that Ms Webb falls short of being an effective deputy principal.
>
> It is an observation of Ms Webb that her conduct is impulsive, capricious and lacking in judgement.
>
> Another observation of Ms Webb is that she makes many claims about the conduct and thoughts of other people, but when challenged to provide evidence (even anecdotally) to support her claims she is found to be making hollow and unfounded assertions.
>
> It is probable that Ms Webb will never understand or accept that she has conducted herself in such a manner as to bring allegations about her performance."

82 Leaving aside some difference on the specific wording used by Mr Yates, I would agree with his overall consideration as stated in 5.1 of his report. It cannot be said that he failed to make up his own mind in respect of the question he was asked to address. Instead he expressed his concluded view both simply and forcefully.

83 It is the case that a circumstance could arise whereby a principal has been unfair and biased in their conduct toward a staff member. The process of investigation is designed in part to overcome this possibility before a final judgement is made by the Director-General. Mr Yates' approach to the investigation was fairly comprehensive and certainly an adequate basis for flushing out whether some bias or contrivance was displayed by Ms Saunders. He concluded to the contrary. I do not conclude that somehow Mr Yates has offended the dicta concerning the role of an investigator expressed in the decision of *Trudy Ruth Cull v Commissioner, State Revenue Department* 82 WAIG 377.

84 I equally do not consider it relevant, nor the task of Mr Yates, to put directly to Ms Webb each and every complaint made about Ms Webb during the process of investigation. Ms Webb knew the case which she faced and had approximately four hours to put across her views. A process which, at its conclusion, she was largely happy with.

85 For all the reasons expressed I would dismiss the application.

2004 WAIRC 10442

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARGARET WEBB, APPLICANT
	v.
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 9 JANUARY 2004
FILE NO.	APPLICATION 347 OF 2003
CITATION NO.	2004 WAIRC 10442

Result	Application dismissed
Representation	
Applicant	Mr M Farrell as agent
Respondent	Ms K Jack and with her Mr J Steadall

Order

HAVING heard Mr M Farrell on behalf of the applicant and Ms K Jack and with her Mr J Steadall 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,
Commissioner.

[L.S.]

2003 WAIRC 10348

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARMAINE WHEILDON-MAYNE, APPLICANT
	v.
	BIRDANCO NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 11 DECEMBER 2003
FILE NO.	APPLICATION 1286 OF 2003
CITATION NO.	2003 WAIRC 10348

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Acceptance of referral out of time not granted – Industrial Relations Act 1979 (WA) s 29(3)
Result	Application dismissed
Representation	
Applicant	Ms C Wheildon-Mayne
Respondent	Mr G Bartlett of Counsel

Reasons for Decision

(Given extemporaneously and subsequently edited by the Commissioner)

1 Section 29(3) of the *Industrial Relations Act 1979*, is a provision inserted to provide for a discretionary decision by the Commission to accept an application beyond the 28 days time limit where, in the Commission's view, it would be unfair not to do so.

2 Section 29 of the Act, in part, reads as follows—

> "(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.
>
> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so".

3 Prima facie, however, by virtue of the time limit, a matter is required to be within time unless of course there is good reason for it not to be so, and in that sense all applications are to be treated expeditiously.

4 The considerations relevant to whether it might be considered unfair not to accept the application are covered in the decision of the Full Bench in *Director General of the Department for Education v Prem Singh Malik* 83 WAIG 3056 and the Senior Commissioner in *Anthony William Andrew v Metway Property Consultants and Auctioneers* 82 WAIG 3260. The factors to be taken into account, which are the factors that I consider relevant, are whether there is an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he or she contested the termination, and the prejudice to the respondent. They are factors that are well covered in those decisions, and should be applied in this instance.

5 The matter before me has in some ways been misconstrued and was clarified at the beginning of the hearing that it is an application alleging unfairness by way of constructive dismissal on 18 July 2003. The essential complaint, in substance, is about the lack of return to full-time employment back in late 2001 after a period of maternity leave.

6 The matter concerning the non-return to full-time employment in 2001, and whether that could be deemed to be an unfair dismissal, is as I indicated at the beginning of hearing, a matter that could not be considered further under section 29(3); it being at a date well before the amendment to the legislation was, in fact, made and it not being a retrospective provision. So the matter before me is whether the termination on 18 July 2003 can, in some way, be considered to be unfair and primarily whether it can be considered to be a constructive dismissal.

7 The delay in making the application is approximately 12 days and albeit that is not an extensive delay, by virtue of there being a 28-day limit it is the case that any delay must be considered to be just that, a delay, and there must be good reason for the delay. The reason given, and I do not challenge the reason, is simply lack of knowledge about the 28-day time limit. The lack of knowledge about legislation is not of itself an adequate reason.

8 The next criterion to be considered is the prejudice to the respondent. The prejudice to the respondent is the normal prejudice that the respondent would have to face a full hearing on the substance of the application if the application under 29(3) were granted. Ms Wheildon-Mayne did not at the time of leaving advise the respondent that she was challenging the fairness of her termination and hence again on that criterion the balance is against her.

9 The final criterion to be considered in matters such as this is the merits of the claim. I should say that I do not challenge the credibility of the evidence. There are matters of fact that are in conflict but they are not matters that I would consider relevant to the determination of this particular issue. What is being said is that there was no alternative other than to resign. The law on this issue is whether the applicant was pushed or whether she jumped from employment. It is clear in my view that the applicant completely of her own volition decided to end her employment. She was offended by Kylie being employed on a full-time basis and that precipitated the applicant's resignation.

10 Given this finding it is the case that the Commission does not have the jurisdiction to deal with the matter. The Commission can only deal with matters of dismissal. In other words, matters of termination at the hand of the employer.

11 Let me go back into the detail then of the resignation. There is no evidence to suggest that the applicant was going to be sacked at the time and, in fact, both the letter of resignation and [Exhibit A2], which is a aide-memoire made by the applicant at that time of a meeting with Mr Taylor, would suggest otherwise. I do not go to all the record of those documents except that there are positive comments by the applicant in relation to work at Bird Cameron in both those exhibits.

12 I note also that in matters of constructive dismissal you would expect typically that the person would leave work immediately, because it is such a fundamental action that would cause them to do so. The applicant chose to remain in employment on 18 July and, again, I refer to [Exhibits A1 and A2] as the rationale given by the applicant for agreeing to do so, rather than leaving and being paid out in lieu. Both those issues must count against this being a constructive dismissal.

13 Let me then just deal with one other point and that is the issue of the contract. The issue of the contract is one which is somewhat more complex. I refer to the Full Bench decision in *Catherine Joan Byrne v Brian Twaddle t/as Mount Hospital Pharmacy* (2003) 83 WAIG 5. If a contract is changed, and clearly in December 2001 the respondent says that the applicant's contract was changed to a part-time contract, then one must judge by the actions of the parties whether the change was agreed to or somehow otherwise complied with. It takes more than mere acquiescence for that to occur.

14 It is clear from the evidence that the applicant acceded to the new contract and I refer to many of the exhibits attached to the statement of Mr Taylor whereby the applicant clearly continued to contest and seek full-time employment with the respondent. But equally, in those attachments there is mention of the applicant seeking other employment, choosing not to take up that employment, and choosing to stay with the respondent in a part-time role. On that basis alone, it must be found that there is more than a simple acquiescence to the part-time contract. The fact also is that there was a substantial delay of about a year and a half after the contractual change in December 2001 (signed by the applicant) and her actual resignation. On that basis then it cannot be said that there has been somehow a dismissal from a full-time contract, that somehow continued in force until July 2003, and that the applicant was forced out because of the lack of full-time work. The contract at that time must be said to have been a part-time contract.

15 The merit of the application must fall in the respondent's favour. It must be seen to be a resignation at the applicant's hand and hence the application would undoubtedly fail if it were referred under s.29(3).

16 For all those reasons I find that it is not unfair not to accept the referral and the application will be dismissed.

2003 WAIRC 10349

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARMAINE WHEILDON-MAYNE, APPLICANT
	v.
	RSMI BIRD CAMERON, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 18 DECEMBER 2003
FILE NO.	APPLICATION 1286 OF 2003
CITATION NO.	2003 WAIRC 10349

Result	Referral out of time not accepted; application dismissed
Representation	
Applicant	Ms C Wheildon-Mayne
Respondent	Mr G Bartlett of Counsel

Order

HAVING heard Ms C Wheildon-Mayne on her own behalf and Mr G Bartlett of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that it would not be unfair not to accept Ms Wheildon-Mayne's referral under s.29(1)(b)(i).

(2) ORDERS that the application be dismissed.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

CONFERENCES—Matters arising out of—

2003 WAIRC 08348

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	HAMERSLEY IRON PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 16 MAY 2003
FILE NO/S.	C 65 OF 2003
CITATION NO.	2003 WAIRC 08348

Result	Recommendation issued
Representation	
Applicant	Mr J Murie
Respondent	Ms E Hartley of counsel

Reasons for Recommendation

1 This matter is an application pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") for a compulsory conference. The application relates to the circumstances of a member of the applicant union Mr LeRoy, an electrician employed at the respondent's Parabpurdoo operations.

2 The matter has been the subject of two compulsory conferences before the Commission. At the conclusion of the second conference on 14 May 2003, the Commission advised the parties that given the stage reached in the proceedings, the Commission would issue a recommendation to the parties. These reasons are in support of the recommendation that follows.

3 This matter has a long history. Mr LeRoy commenced employment with the respondent in 1990 as an electrical fitter. In 1996 Mr LeRoy sustained an injury to his knee as a result of an incident that was the subject of a workers compensation claim. Mr LeRoy had some time off in relation to this matter but it appears that in about November 2001 Mr LeRoy further complained about right knee symptoms. At about the same time, he was suffering other conditions including morbid obesity, controlled non-insulin dependent diabetes, treated hypertension and a thyroid condition.

4 As a consequence of these matters, Mr LeRoy was under the care of occupational physicians, other general practitioners and orthopaedic surgeons.

5 As a consequence of these matters also, it is the position of the respondent that Mr LeRoy has not been able to perform his substantive role as an electrical fitter since in or about November 2001. Since that time, Mr LeRoy has undergone various fitness for work plans, a CRS work re-evaluation program and has generally performed light duties as available. It was common ground that during all of this time, Mr LeRoy has received his full remuneration from the respondent.

6 In August 2002, Mr LeRoy underwent knee surgery following which a return to work program was compiled, to endeavour to rehabilitate Mr LeRoy back to his position. Subsequent medical reports cast doubt on the overall physical health of Mr LeRoy and his ability to return to his full pre-injury position. The Commission observes however, that there is some conflicting medical opinion as to Mr LeRoy's present state of health and fitness for work. One body of medical opinion is to the effect that Mr LeRoy would be unable to return to his full capacity as an electrician at the respondent and that retirement on the grounds of total and permanent disability should be considered. On the other hand, further medical opinion, although recognising difficulties with Mr LeRoy's position, suggests a course of rehabilitation for a trial period of three months, performing normal duties.

7 The positions of the parties are essentially these. The respondent says that given that Mr LeRoy has not occupied his substantive position since November 2001, and the respondent has taken all reasonable steps to endeavour to rehabilitate him back into the workplace, it has reached the "end of the line" with him, and must consider alternatives to his ongoing employment. The applicant contends that Mr LeRoy desires to continue working and with rehabilitation, there is a prospect that he may be able to resume his pre-injury duties.

8 On what is before the Commission presently, and having regard to the entire history of this matter, which is lengthy, in my opinion, it cannot be said that the respondent has other than treated Mr LeRoy fairly and equitably during what has obviously been a difficult period for him. The respondent has gone to very considerable lengths in an endeavour to rehabilitate Mr LeRoy back to his pre-injury position, as well as providing alternatives in the interim, as a part of the rehabilitation process. It is difficult to see what more could have been done by the respondent during the course of this process. I hasten to add however, that the applicant has not submitted that during this lengthy period, the respondent has treated Mr LeRoy unfairly.

9 From the history of the matter, and in light of the medical reports before the Commission now, it appears that difficult decisions must be made. In my opinion, Mr LeRoy must also recognise himself, the definite prospect that he may not be able to return, due to his physical difficulties, to his former position to the extent that the requirements of the position are fully met, as the respondent employer is entitled to require.

10 In light of all of the foregoing, and in particular having regard to the rights of the respondent to require employees to perform all of the inherent requirements of a position, and recognising the difficult circumstances facing Mr LeRoy, the Commission recommends that Mr LeRoy be given one final opportunity to prove his full fitness for work by way of a 30 day only work trial, to ascertain whether he is able to meet the full range of duties required by the respondent of an electrical fitter.

11 In the event that this work trial is not successful, then it appears to the Commission that the respondent would have little alternative but to consider the status of Mr LeRoy's ongoing employment, in accordance with its established policies and procedures.

12 A recommendation now issues.

2003 WAIRC 08347

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	HAMERSLEY IRON PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 16 MAY 2003
FILE NO/S.	C 65 OF 2003
CITATION NO.	2003 WAIRC 08347

Result	Recommendation issued
Representation	
Applicant	Mr J Murie
Respondent	Ms E Hartley of counsel

Recommendation

HAVING heard Mr J Murie on behalf of the applicant and Ms E Hartley of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby recommends—

1. THAT Mr LeRoy undertake a work trial for a period of 30 days only to ascertain his fitness for resumption of full duties as an electrical fitter with the respondent.
2. THAT if at the conclusion of the work trial Mr LeRoy is unable to fulfil the requirements of the position of an electrical fitter the respondent determines Mr LeRoy's status in accordance with its established policies and procedures.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2003 WAIRC 10318

REDEPLOYMENT OF SURPLUS EMPLOYEES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH, APPLICANT
	v.
	PUBLIC TRANSPORT AUTHORITY, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 16 DECEMBER 2003
FILE NO/S.	CR 239 OF 2003
CITATION NO.	2003 WAIRC 10318

Catchwords	Redeployment of surplus employees; Hours of work; Whether positions come within the callings of AG 146 of 2003 – s 29, s 41, s 42, s 43, s 44 of the *Industrial Relations Act 1979* (WA); s 95 *Public Sector Management Act 1994*
Result	Declaration made
Representation	
Applicant	Mr G Ferguson
Respondent	Mr R Andretich (of counsel) Mr S Majeks

Reasons for Decision

1 On 26 November 2003, pursuant to s 44(9) of the *Industrial Relations Act 1979* ("the Act") the Commission referred the following matter for hearing and determination—

1. The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the Applicant) says that surplus employees of the Public Transport Authority (the Respondent) who have been offered redeployment to car park attendant positions and/or reserve maintainer positions should if they accept those positions and work in those positions retain their 38 hour week arrangement being a nine day fortnight in the case of the reserve maintainer positions and 38 hour week to be worked as a 19 day work cycle in the case of the car park attendant positions.
2. The Respondent offered the positions to the surplus employees on the basis that they were to work 38 hours a week over a 10 day fortnight. The Respondent advised the employees that they were required to indicate whether they would accept the offer by 20 November 2003.
3. There is no dispute between the Applicant and the Respondent that the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* ("the Regulations") apply to the employees the subject of this dispute. In particular there is no dispute that the car park attendant positions and reserve maintenance crew positions constitute "suitable employment" as defined by the Regulations.
4. The Applicant contends the Regulations prescribe the criteria for suitable employment but do not impose an obligation on maintaining work hour arrangements. However, the Applicant contends that the hours of work that are to apply to the positions of the car park attendants come within a memorandum of agreement entered into between the Applicant and the Respondent on 12 November 1984. That agreement provides that all those employed in Traffic Branch shall work a 38 hour week on a four weekly cycle with one day off in the four week cycle.
5. In relation to the reserve maintainer positions the Applicant contends that the nine day fortnight arrangement applies to those positions by operation of an Order made by Chief Commissioner Coleman in C 1304 of 1988 ((1988) 68 WAIG 2871). In particular that the reserve maintenance crew employees are employed in the locations specified in Schedule A to the 76 hour nine day fortnight agreement which forms part of the Order made by the Chief Commissioner.
6. The Applicant contends that the Memorandum of Agreement and Order C 1304 of 1988 remain current and in force.

7. Following a s 44 conciliation conference on 19 November 2003 the Respondent advised the Applicant and the Commission that the surplus employees concerned may accept the offers of employment, subject to arbitration by the Commission of the question of the conditions of employment, and particularly the determination of whether a nine day fortnight and a 19 day month (respectively) have application in relation to the positions offered.

8. The Respondent says the Commission has no jurisdiction to deal with this matter because of the operation of s 95 of the *Public Sector Management Act 1994*. In particular, the Respondent contends that there is an inconsistency between the Act and the Regulations and an award or an order under the *Industrial Relations Act 1979* and that by operation of s 95(1)(b) of the Act, the Act and the Regulations prevail. In particular, the Respondent contends that what constitutes "suitable employment" is defined in s 94(6) of the Act and the Regulations and the offering of a 10 day fortnight comes within those definitions so there is no scope for the operation of the memorandum of agreement or Order C 1304 of 1988.

9. Alternatively the Respondent contends that the positions come under Level 3 of the Railways Employees Award No 18 of 1969 and the Western Government Railways Commission Railway Employees Enterprise Agreement 2002 AG 146 of 2003. In particular, the Respondent contends that clause 7 applies to the positions. Clause 7 provides that unless otherwise specified in the agreement the ordinary hours of work should be 38 hours per week and the hours of work may be worked Monday to Friday or Monday to Saturday as the case may be.

10. The Applicant seeks an order that the surplus employees who are redeployed as—

    (a) reserve maintainers be provided with a 38 hour week worked as a nine day fortnight work cycle;

    (b) car park attendants be provided with a 38 hour week worked as a 19 day work cycle.

2 At the commencement of the hearing the Respondent's counsel advised the Commission that the Respondent wished to raise four jurisdictional arguments. These arguments are as follows—

(a) The employees to whom these proceedings relate are "railway officers" within the meaning of Division 3 of Part IIA of the Act and are within the exclusive jurisdiction of the Railways Classification Board, so that the matters in the Memorandum of Matters for Hearing and Determination cannot be dealt with by the Commission in its general jurisdiction.

(b) The Commission has no jurisdiction under s 29 of the Act to determine what offers of redeployment should be made by the Respondent to surplus employees.

(c) The orders sought by the Applicant are an attempt to enforce an order of the Commission and is a matter which the Industrial Magistrate has exclusive jurisdiction.

(d) The orders sought by the Applicant in relation to the application of the 1984 Memorandum of Agreement to the car park attendant positions constitutes an application to enforce a contractual agreement which should be brought to the Commission by way of applications by employees under s 29(1)(b)(ii) of the Act.

3 At the conclusion of the Respondent's case counsel for the Respondent advised the Commission that the Respondent abandoned its argument in paragraph (a). It conceded that the employees in question are wages employees and are not "railway officers" as defined in s 80M of the Act. No submissions were made in support of the Respondent's arguments in respect of paragraphs (c) and (d).

4 As to paragraph (b) it was submitted on behalf of the Respondent that the matters in dispute can only be heard and determined by the Commission under s 95(3) of the *Public Sector Management Act* and not under s 29 of the Act. Section 95 of the *Public Sector Management Act* provides—

"(1) Subject to subsection (2), to the extent that there is an inconsistency between —

(a) this Part or regulations referred to in section 94 or both; and

(b) any other provision of this Act other than section 7, 8 or 9, or an award or order under the *Industrial Relations Act 1979* (including a General Order made under section 50 of that Act),

this Part or those regulations or both, as the case requires, prevails or prevail.

(2) To the extent that there is an inconsistency between section 101 and this Part or regulations referred to in section 94 or both, section 101 prevails.

(3) Despite section 29 of the *Industrial Relations Act 1979*, an employee who is aggrieved by a decision made under regulations referred to in section 94 (other than a decision which is a lawful order by virtue of section 94(4)) may refer that decision within such period after the making of that decision as is prescribed to the Industrial Commission as if that decision were an industrial matter mentioned in section 29(b) of that Act, and, subject to subsection (4), that Act applies to and in relation to that decision accordingly.

(4) In exercising its jurisdiction in relation to a decision referred to in subsection (3), the Industrial Commission shall confine itself to determining whether or not regulations referred to in section 94 have been fairly and properly applied to or in relation to the employee by whom that decision was referred."

5 Section 29(1) of the Act provides—

"(1) An industrial matter may be referred to the Commission —

(a) in any case, by —

(i) an employer with a sufficient interest in the industrial matter;

(ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or

(iii) the Minister;

and

(b) in the case of a claim by an employee —

(i) that he has been harshly, oppressively or unfairly dismissed from his employment; or

(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,

by the employee."

6 It is contended by the Respondent that the offers made to the redeployees are not reviewable by the Commission because of the operation of s 80E(7) of the Act and the application of the Public Sector Standards in Human Resource Management ("the standards") which provides for a minimum standard of redeployment in terms of "merit, equity and probity".

7 Section 80E(7) of the Act provides—

> "Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act."

8 The Respondent's counsel advised the Commission that the Respondent sought to maintain its jurisdictional argument set out in paragraph 8 of the Memorandum of Matters for Hearing and Determination. However, Mr Andretich advised the Commission that it was his view that there was no merit in this argument as no inconsistency is raised in these proceedings between the provisions of the *Public Sector Management Act*, the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* ("the Regulations") and an award or order of the Commission. Clearly that concession is properly made as the *Public Sector Management Act* and the Regulations do not deal with patterns of work such as a nine day fortnight or a 19 day month. In any event the Full Bench has in a previous matter involving the parties in this matter determined the Regulations do not constitute a complete code in respect of redundancy in the public sector.

9 In *Metal and Engineering Workers' Union – Western Australian Branch and others v Western Australian Government Railways Commission* (1995) 75 WAIG 2929 ("the Redundancy Case") the Commission at first instance concluded the Commission had no jurisdiction to deal with a matter referred for hearing and determination under s 44 of the Act involving an offer of redundancy payments and their application to employees of the Respondent. The Full Bench found the Commission had erred. The Full Bench found the orders sought would not be inconsistent with the *Public Sector Management Act* or the Regulations and in particular the Full Bench found the Regulations do not constitute an exhaustive code in relation to redundancy. It was also argued in the Redundancy Case that s 6(2) and s 95(3) and (4) of the *Public Sector Management Act* deprived the Commission of its general jurisdiction in s 29(1)(a) of the Act because of the conferral of a special power in s 95(3) and (4).

Section 6(2) of the *Public Sector Management Act* provides—

> "(2) Except to the extent to which a provision of this Act specifies otherwise, the Industrial Relations Act 1979 applies to and in relation to matters dealt with by this Act."

The President (with whom Gifford C agreed) observed at page 2932—

> "An organisation has the usual right to apply under s.29 of the Act, and, indeed, s.44 of the Act, but limited by s.6(2) of the Public Sector Management Act 1994. In this case, the application was properly made by an organisation. It was not limited by s.95(3) and (4) of the Public Sector Management Act 1994. Even if I were wrong in saying that, then the application did not relate to a decision made under the Regulations. ..."

10 This matter, like the matters before the Commission in the Redundancy Case, has not come before the Commission under s 95(3) of the *Public Sector Management Act* but by a referral under s 44(9) of the Act. Consequently the Respondent's argument as to the application of s 80E(7) and the standards falls away. In any event, s 80E(7) applies only to the Public Service Arbitrator and not to a Commissioner sitting in their general jurisdiction under s 29(1)(b)(ii) or s 44 of the Act. Further this is not an application which comes to the Commission under s 95(3) of the *Public Sector Management Act* as there is no application before the Commission by an employee. This application came to the Commission pursuant to an application by the Union for an urgent conference in C 239 of 2003 under s 44 of the Act. Whilst the Applicant's advocate argued that the Commission could rely upon s 95(4) of the *Public Sector Management Act* to consider whether the Regulations have been fairly and properly applied to and in relation to the employees, in this matter the Commission is not confined to considering the matters in s 95(4) of the *Public Sector Management Act*. It is able to exercise all of its general powers under the Act including its powers under ss 26 and 27 of the Act. Further, it was conceded on behalf of the Respondent that the Commission has jurisdiction to make a declaration as to the conditions of employment that will apply to the employees once they commence work as car park attendants or reserve maintainers.

11 In this matter the issues for determination by the Commission do not relate to a decision made under the Regulations. As counsel for the Respondent and the advocate for the Union point out, the legal industrial instruments that are to apply to the employees once they commence work as reserve maintainers and car park attendants apply as a matter of law.

12 Having regard to all the matters set out above I am of the view that there is no merit in the Respondent's jurisdictional arguments.

13 In my view what is required to be considered by the Commission in this case is whether to make a declaration in relation to the following matters of law—

(a) Whether a nine day fortnight arrangement will apply to the reserve maintainer positions by operation of an order made by Coleman C.C. in C 1304 of 1988 (1988) 68 WAIG 2831;

(b) Whether a Memorandum of Agreement entered into between the Union and the Respondent on 12 November 1984 prescribes a 38 hour week on a four weekly cycle with one day off for all persons employed in the Respondent's Traffic Branch will apply to the car park attendant positions; or

(c) Whether the Western Australian Government Railways Commission Railway Employees Enterprise Agreement 2002 AG 146 of 2003 in particular clause 7 applies to the reserve maintainers and the car park attendants so as to require the employees to work 38 hours per week between Monday to Friday or Monday to Saturday.

Applicant's Evidence

14 In support of its case the Union tendered a copy of a letter from the Respondent's Acting Director of People and Organisational Development, Mr Cliff Gillam, dated 8 October 2003, addressed to Mr Bob Christison, the Branch Secretary of the Union. The letter from Mr Gillam to Mr Christison states as follows—

> "The position of Car Park Attendant is currently Award free. However, the duties of the proposed new position are not clerical or administrative in nature and it would appear that coverage under the Railway Employees' Award would be appropriate.
>
> An industry analysis has been undertaken and completed. The analysis reveals that the Car Park Attendant position would be appropriately placed at Level 3 under the Railway Employees (sic) Award. This is based on the role, responsibilities and remuneration of similar positions both in the private and public sector. A copy of the Comparative Table is at Attachment B.
>
> The PTA would like to monitor the station car parks from 7.00am to 9.00pm and is proposing 2 x 7.6 hour morning and afternoon shifts (38 hour week) with appropriate aggregates. The PTA intends to create 14 Car Park Attendant positions

immediately to fulfil the commitment given to the Public. We are intending to place our surplus employees into these positions as a means of resolving their redeployment status.

The Classification structure of the Railway Employees' Award will need to be updated to provide for the new positions. I would appreciate the opportunity to meet with you as soon as possible to discuss the development of an application for Award variation by consent of the parties."

Attached to the letter was a draft job description form.

15 The Union tendered a copy of the Memorandum of Agreement entered into by the parties on 12 November 1984. The Memorandum of Agreement states as follows—

"WHEREBY IT IS AGREED that notwithstanding the provisions of the Railway Employees' Award Consolidated 1977, the ordinary hours of work for all wages employees in the Traffic Branch with the exception of those employed at the East Perth Workshop and Road Service garages at Kewdale and Bunbury shall be 38 per week in accordance with the following provisions:-

1. The calendar year will be divided into thirteen 4 weekly cycles. The ordinary hours worked within a 4 weekly cycle shall be 152 hours comprising 3 weeks of 40 hours and 1 week of 32 hours and shall be arranged in such manner that will allow 1 full day in the week when 32 hours are worked to be observed as the extra day off."

16 The Union also tendered a copy of Order C 1304 of 1988. The material provisions of the Order are as follows—

"Whereby it is agreed that notwithstanding the provisions of the Railway Employees' Award No 18 of 1969 the ordinary hours of work for all wages grade employees employed in the locations specified in Schedules A, B and C to this Agreement shall be 38 hours a week and shall be arranged to provide nine working days exclusive of Saturdays and Sundays totalling 76 hours in each fortnight under the following conditions.

Schedule A

This Schedule shall apply to workers employed in the Civil Engineering Branch, but shall not apply to Length Runners and those who are engaged on "Special Teams Conditions" either on a permanent or temporary basis except that the Hours of Duty provisions in this Schedule shall also apply to those on "Special Teams Conditions"."

17 Mr Graham Sherrington has been employed by the Respondent since 1966. He is currently registered as a surplus employee and has been assigned to perform the task of a customer service assistant. Mr Sherrington testified that sometime in the year 2001 prior to the registration of the Western Australian Government Railway Commission Employees' Enterprise Agreement 2001, AG 271 of 2001 ("AG 271 of 2001") he attended a meeting of employees which included surplus employees and signals and communication workers. He said Mr Christison attended on behalf of the Union and Mr Slim Majeks and Ms Julie Hayman attended the meeting on behalf of the Respondent. The purpose of the meeting was to discuss whether the employees should vote to accept the terms of the industrial agreement. He said that Mr Majeks and Ms Hayman provided information on how the agreement would operate. He testified that he remembered a question being asked by another employee, Mr John Turner, whether the surplus employees' nine day fortnight arrangement would change. Mr Sherrington said that Mr Majeks replied by saying, "No, that would not be the case, we would just slot across, which meant no changes to any of our conditions, but it was a deal of a lifetime in as much as the surplus employees would retain their present entitlements but would be able to access the wage increase on offer."

18 It is common ground that at the time the meeting took place that there had been no discussion about the creation of the reserve maintainer positions or the car park attendant positions. It is also common ground between the parties that the removal of a nine day fortnight was one of the structural efficiency trade-offs in that agreement although some groups of employees retained a nine day fortnight. However for those that did, their right to a nine day fortnight was expressly preserved by the terms of AG 271 of 2001.

19 After that meeting AG 271 of 2001 was registered as an industrial agreement. AG 271 of 2001 was replaced in the year 2003 by the Western Australian Government Railways Commission Railway Employees Enterprise Agreement 2002, AG 146 of 2003 ("AG 146 of 2003").

20 After AG 271 of 2001 was registered the surplus employees were allowed to work a nine day fortnight despite not being authorised by the terms of AG 271 of 2001 or AG 146 of 2003. They, however, received the pay increases set out in those agreements.

21 Mr Sherrington testified that prior to the registration of AG 146 of 2003 he attended a meeting with Mr Bob Christison and Ms Julie Allen-Rana who represented the Respondent. That meeting was called because the reserve maintainer positions had been advertised and the advertisement stated that those who were successful would be required to work a 38 hour week spread over five days. Mr Sherrington said that Mr Christison advised Ms Allen-Rana that the nine day arrangement was still in place for the surplus employees and that the Union had not discussed the removal of those entitlements in any negotiations with the Respondent. Ms Allen-Rana then requested that Ms Hayman be called to the meeting to provide advice on the matters that had been the subject of negotiations which had led to the working hours arrangements for surplus employees. Mr Sherrington said that Ms Hayman came to the meeting and informed them that the nine day fortnight arrangements were in place, that the surplus employees already had those conditions which had not been taken away. In Mr Sherrington's examination-in-chief, in his witness statement or in his oral evidence, he did not testify that Ms Hayman stated that the reserve maintainer positions would be provided with a nine day fortnight. Mr Sherrington however said in re-examination that he understood from the meeting prior to the registration of AG 271 of 2001 that once the surplus employees went onto the EBA "that when the jobs were called and people filled those jobs they would take their conditions with them to those jobs."

22 Mr John Wilfred Turner testified that he has been employed by the Respondent for 27 years and he is registered as a surplus employee. He is currently assigned to work in the data and radio systems area. Mr Turner also testified that he attended a meeting in December 2001 which was addressed by Mr Majeks and Ms Hayman and Mr Christison from the Union in relation to the proposed enterprise bargaining agreement which became AG 271 of 2001. He said he was one of the employees who asked questions relating to the conditions and operation of the proposed agreement. He said that he could remember asking questions about who would retain the property of any inventions created by employees whilst at work and he also asked a question about sick leave. He said he cannot remember whether there were any questions asked about the nine day fortnight. He said, however, he could recall that it was discussed that the conditions they would lose were set out in the enterprise agreement and those were conditions related to sick leave and public holidays.

Respondent's Evidence

23 Mr Pasquale Italiano, the Business Manager of the Transperth Train Operations Division of the Public Transport Authority has been employed by the Respondent since 1973. He gave uncontradicted testimony on behalf of the Respondent that the Traffic Branch no longer exists. He testified that he participated in the development of the creation of the car park attendant positions. The need for such positions has arisen as part of the government's commitment to improve the safety and security on the

public transport system by providing secure car parks. The car park attendants will take up their positions on 15 December 2003. He said the positions require employees to monitor allocated station car parks for security, deal with customer service related matters, provide customer service to Transperth patrons whilst patrolling car parks and issue infringements for breaches of Public Transport Authority parking by-laws. He says these positions do not fall within the Traffic Branch as specified within the Memorandum of Agreement because the Respondent has never had car park attendants in the past, that the positions are security related. He said the positions are attached to the Security Branch of the Transperth Trains Operations Division and report to the monitoring control supervisor.

24 The Respondent tendered the job description form for the car park attendant positions. That document states that the positions are part of the Security and Customer Service Branch which is part of the Transperth Train Operations Division. The car park attendants will be required to report to the Monitoring Control Supervisor who in turn will report to the Co-ordinator Transit Guard Support. The responsibilities of the position are as follows—

"• Continually patrol and monitor allocated car parks for security related matters.

- Respond positively and appropriately to security related incidents within the bounds of the car parks
- Monitor CCTV security monitoring systems (where applicable) to optimise maximum security and customer service.
- Report any vandalism, graffiti, cleaning and infrastructure damage to Public Transport Authority property to ensure early rectification.
- Report malfunctioning or damaged pay and display machines.
- Ensure prescribed opening and closing procedures are undertaken in an efficient and timely manner.
- Issue parking infringements for breaches of the Public Transport Authority parking bylaws.
- Render first aid within the level of competence."

25 Mr Robert David Davies has been employed by the Respondent for a total of 27 years. He currently holds the position of Track Infrastructure Maintenance Manager. He says the reserve maintainer positions will report directly to the Per Way superintendent who in turn reports to him. He said that the current Track and Civil Branch of the Network and Infrastructure Division is a remainder of what was in 1988 the Civil Engineering Branch. Mr Davies pointed out that Schedule A of the 1988 Order in C 1304 states that it is not applicable to "Length Runners and those who are engaged on 'Special Teams Conditions' either on a permanent or temporary basis". Mr Davies gave uncontradicted evidence that Length Runners are now called Per Way Patrollers. He said that the role of a Per Way Patroller in the urban area is to inspect the track. The track is the Per Way. He said that this patrol is conducted on foot and that each one of the Per Way Patrollers work alone. They record any failures or potential failures in the track and prioritise work orders to be taken. These duties have to be performed during daylight hours outside peak periods whilst normal train services are operating. The Per Way Patrollers do not work a nine day fortnight.

26 Mr Davies says that the reserve maintainer positions were created because the Commissioner of Railways wanted to find permanent positions for surplus employees and that there is a growing problem of vandalism and sabotage on the railway. Mr Davies says to deal with vandalism and sabotage there is a need to inspect the reserve, clean the reserve of rubbish and remove major objects that could be placed on the track. He said there is also a need to make reports on the state of the fencing so that the fencing repairs can be undertaken to keep the public off the reserve and to inspect the crash barrier between the Per Way and the Mitchell freeway. It is also anticipated that two members of the team will lubricate points. Mr Davies testified that in the past the Per Way Patrollers have been asked to keep their eyes open and look for whether there are any holes in the fencing or large objects around the Per Way or on the reserve. He said that these tasks were distracting them from their core duties and that this is why a separate team was created to look after the reserve and allow the Perway Patrollers to focus on the track itself.

27 Mr Davies said that in the past the Respondent has had track maintainers and landscape maintainers. He said the role of track maintainers had been outsourced to John Holland in the urban area. He said the reserve maintainer positions constitute work of special teams because they will be required to concentrate on the safety of the railway.

28 Mr Slim Majeks testified that he is employed as a Labour Relations Advisor with the Respondent. He gave evidence that he attended the meeting with Ms Hayman in which the terms of the proposed 2001 enterprise agreement were explained to the employees. He said at no stage was the nine day fortnight mentioned at that meeting. He however agreed that although the wage increases contained in AG 271 of 2001 were applied to the surplus employees they were allowed to continue to retain their nine day fortnight despite the fact that it was part of the agreement struck between the Union and the Respondent to generally implement a five day week.

29 Ms Allen-Rana testified that she is the People Services Co-ordinator in the Transperth Trains Division. She said she has been employed by the Respondent for a period of about 18 months. She testified she attended a meeting with Mr Sherrington and Mr Christison to discuss the offer of the reserve maintainer positions to the surplus employees. She said that the meeting was called because the surplus employees did not wish to accept the withdrawal of the nine day fortnight. She said she called Ms Hayman to the meeting because there seemed to be an indication from Mr Christison that the nine day fortnight was sacrosanct for the surplus employees and Ms Allen-Rana wanted Ms Hayman to clarify about what was said at the previous information sessions. Ms Allen-Rana said that Ms Hayman attended the meeting and told them that at the earlier information session the employees were told that they would retain all of their conditions. It is Ms Allen-Rana's view that there was no clarification about what that meant although she understood that there was a gentleman's agreement that surplus employees would be allowed to retain their nine day fortnight . It is apparent from the evidence given by Ms Allen-Rana that she was not present at the earlier information session. It is clear from the evidence given by Mr Sherrington and Ms Allen-Rana that when the reserve maintainer positions were discussed with her the issue as to whether the reserve maintainers would work a nine day fortnight or a five day week was not resolved.

The Union's Submissions

30 The Union contends that the reserve maintainer positions are covered by the Railway Employees Award No 18 of 1969 ("the Award"). In particular, these positions come within the classification of Maintainer Level 3 and 3A of Clause 45 of the Award. In Clause 45 the classification definitions for a Maintainer Level 1, 2 , 3 and 3A are defined as follows—

"MAINTAINER LEVEL 1 (TRAINEE)

Undertakes routine manual duties to the level of training under direct supervision, usually in a team.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:-

* Performs general non-trade tasks as appropriate to relevant streams.

* Operates relevant hand tools, equipment and machinery associated with work area.
* Performs general cleaning duties.
* Drives light vehicles.
* Exercises safety within the workplace.

MAINTAINER LEVEL 2

Key Responsibilities

Utilises manual and mechanical aids, provides assistance and exercises basic skills on a wide range of non-trade tasks under direct supervision either individually or in a team to the level of training.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:-

* Performs general non-trade tasks as appropriate to relevant streams.
* Operates relevant hand tools, equipment and machinery associated with work area.
* Performs specific manual or machine assisted cleaning tasks.
* Recognises basic quality standards/faults/
* Maintains necessary records.
* Exercises safety within the workplace.
* Drives light vehicles.

MAINTAINER LEVEL 3 AND 3A

Key Responsibilities

Utilises manual and mechanical aids, motor trucks, mechanical plant and mobile and fixed overhead cranes, provides assistance and exercises basic skills on a wide range of non-trade tasks under direct supervision either individually or in a team to the level of training.

Indicative Tasks

An employer at this level may be required to perform all or some of the following tasks:-

* Performs general non-trade tasks as appropriate to relevant streams.
* Operates relevant hand tools, equipment and machinery associated with work area.
* Performs specific manual or machine assisted cleaning tasks.
* Recognises basic quality standards/faults.
* Maintains necessary records.
* Performs motor truck driving duties as required.
* Operates relevant licensed and/or certificated mechanical plant and mobile and fixed overhead cranes as appropriate.
* Performs routine maintenance and running repairs and basic fault finding to vehicles, mechanical plant, mobile cranes and other equipment as appropriate.
* Exercises safety within the workplace."

31 It is argued by the Union that the car park attendant positions are not covered by the Award, that they are award free. In relation to both positions the Union argues that the positions were not covered by AG 271 of 2001 or by the current agreement AG 146 of 2003. The argument put is that employees can only be covered by an industrial agreement if they have been contemplated within the terms of that agreement and they have had some say in reaching the agreement with the employer. It is conceded however that at all material times the employees in question received the pay increases that were on offer under the terms of those agreements. Further the Union's advocate described the agreement as a catch-all agreement for employees (Transcript page 29).

32 It is also argued on behalf of the Applicant that it had not been previously put forward by the Respondent that the Traffic Branch was not an appropriate section for the car park attendants to be attached to. This submission however is not supported by the letter tendered by the Union dated 8 October 2003 from Mr Gillam to Mr Christison in respect of the car park attendant positions. The draft job description form describes the branch as Security and Customer Service within the Transperth Train Operations Division.

33 It conceded by the Union's advocate that if the reserve maintainer positions are classified as a Level 3 under the Award then Clause 11. – Wages of AG 146 of 2003 would apply as a matter of law to those employees.

34 The Respondent contends that the Award does not apply to any of the positions. However, it argues that the terms of AG 146 of 2003 applies by operation of law to the positions, in particular the terms of AG 146 of 2003 override the Order in C 1304 of 1988 and the Memorandum of Agreement. It is also argued by the Respondent that even if the terms of Order C 1304 of 1988 are capable of being applied that the exclusion in Schedule A applies. Schedule A provides, "This Schedule shall apply to workers employed in the Civil Engineering Branch, but shall not apply to Length Runners and those who are engaged on 'Special Teams Conditions' either on a permanent or temporary basis.

35 It is said that although "Special Teams Conditions" are not defined in Schedule A or in the terms of the Order those words can be construed as *sui generis* to the functions of the Length Runners. In particular it is contended that the reserve maintainers are part of a special team because they are an extension of the work that is done by the Length Runners.

Conclusion

36 I accept that Mr Sherrington, Mr Turner and the other employees who attended the meeting to discuss the terms of the proposed 2001 agreement were informed that they would be paid the pay increases available under the agreement and that their conditions of employment, such as working a nine day fortnight, would not change whilst they were surplus employees. I do not however accept Mr Sherrington's contention that the surplus employees were told at that meeting that if redeployed into permanent positions they would retain their existing conditions, in particular a nine day fortnight. This seems to be an assumption made by him, but it is not supported by his own evidence about what was said at the meeting. Nor is his assumption supported by the evidence of Mr Turner. At the highest Mr Sherrington's evidence establishes that surplus employees were given an undertaking that they would work a nine day fortnight whilst they were "surplus".

37 Whilst the evidence establishes that surplus employees have:

(a) received wage increases provided for in AG 271 of 2001 and AG 146 of 2003; and

(b) been allowed to work a nine day fortnight,

the Union's case is not that the car park attendant positions should work a nine day fortnight.

38 In relation to the employees who have accepted positions to work as car park attendants, the Union does not argue that once redeployed the employees who were surplus should retain a nine day fortnight or that their conditions of employment should remain the same. Their case is that by operation of the Memorandum of Agreement the employees who take up positions as car park attendants should work a 19 day month.

39 Having heard the evidence, there is nothing before the Commission on which the Commission could reliably form a view that the car park attendant positions are positions within the "Traffic Branch". The evidence establishes they are positions in the Security and Customer Service Branch. Accordingly, that part of the Union's claim that the Commission should make a declaration that the employees who commence work as car park attendants be provided with a 19 day month fails. However I am of the view that the car park attendant positions are not covered by the Award or AG 146 of 2003.

40 Although under s 26 of the Act, the Commission is required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms that provision does not enable the Commission to determine the matter without resort to established legal principles where these are applicable (see *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 and the cases cited therein).

41 Pursuant to s 41(4) of the Act once an industrial agreement is registered an industrial agreement extends to and binds –

"(a) all employees who are employed —

(i) in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies; and

(ii) by an employer who is —

(I) a party to the industrial agreement; or

(II) a member of an organisation of employers that is a party to the industrial agreement or that is a member of an association of employers that is a party to the industrial agreement;

and

(b) all employers referred to in paragraph (a)(ii),"

and no other employee or employer, and its scope shall be expressly so limited in the industrial agreement.

"Calling" is defined in s 7 of the Act to mean "any trade, craft, occupation or classification of an employee".

42 The material provisions of AG 146 of 2003 are as follows—

(a) Clause 4.1 provides—

"This Agreement shall apply to all employees, other than those listed in subclause 4.3 of this clause, who are members of or eligible to be members of the Union."

(b) Clause 4.3 provides—

"This Agreement shall not apply to employees engaged under the—

- Public Transport (Railways) Salaried Officers Award of Western Australia 2003;
- Railway Professional Officers Award 2002;
- Westrail ASU/APESMA Salaries Certified Agreement; and
- Railway Salaried Officers s170MX Termination of Bargaining Period Award 1997."

(c) Clause 4.4 provides—

"This Agreement shall be read in conjunction with the Railways Employees Award No. 18 of 1969 and shall apply where there is inconsistency with the Award."

(d) Clause 7.1 provides—

"Unless otherwise specified elsewhere in this agreement, the ordinary hours of work will be 38 hours per week. The hours of work may be worked Monday to Friday or Monday to Saturday as the case may be."

43 There are no classifications definitions set out in the main body of AG 146 of 2003 other than a reference to the pay rates for classification Levels 1 to 10 in Clause 11.8 of AG 146 of 2003. It is clear from Clause 4.4 that the Award applies except where there is an inconsistency with AG 146 of 2003. In Clause 44 of the Award, a classification structure is set out which is arranged into Levels 1 to 10. Clause 45 sets out the classification definitions for each of those levels. There is no classification for a car park attendant in the Award. Consequently I agree with the submission that these positions are award free. If there is no classification of those positions under the Award or AG 146 of 2003 then by operation of s 41(4)(a)(i) of the Act the industrial agreement does not apply to those employees. There is no dispute that these positions constitute "suitable employment" within the meaning of s 94(6) of the *Public Sector Management Act* or the Regulations. It follows therefore that the Respondent is entitled to make an offer of redeployment which is a common law contract and requires an employee to work five days a week.

44 Having considered the key responsibilities and indicative tasks of a Maintainer Level 1, 2, 3 and 3A under the Award and in the duties set out in the job description form under the heading "Principal Responsibility and Tasks", I am of the view that the positions of reserve maintainer come within the definitions of Maintainer Level 1, 2, 3 and 3A under the Award. I have reached this conclusion because it is apparent from the key responsibilities and the indicative tasks that employees are required to perform all or some of the tasks set out in the definitions which match the description of Principal Responsibility and Tasks in the job description form.

45 The legal consequence that follows my finding that the reserve maintainer positions are covered by the Award is that by operation of Clause 4.4 of AG 146 of 2003 the classifications in the Award apply to AG 146 of 2003. Consequently, I am satisfied that AG 146 of 2003 extends to and binds the reserve maintainer positions as their classifications are callings mentioned in the industrial agreement within the meaning of s 41(4)(a)(i) of the Act. The reserve maintainer positions will be covered by Clause 7.1 of AG 146 of 2003. As Order C 1304 of 1988 is an order made by the Commission earlier in time than AG 146 of 2003, AG 146 of 2003 overrides Order C 1304 of 1988. In light of these findings I do not intend to deal with the Respondent's argument that the reserve maintainer positions are part of "Special Teams Conditions".

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2003 WAIRC 10363

REDEPLOYMENT OF SURPLUS EMPLOYEES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH, APPLICANT
	v.
	PUBLIC TRANSPORT AUTHORITY, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 22 DECEMBER 2003
FILE NO/S.	CR 239 OF 2003
CITATION NO.	2003 WAIRC 10363

Result	Declaration made.
Representation	
Applicant	Mr G Ferguson
Respondent	Mr R Andretich (of Counsel) Mr S Majeks

Declaration

1. Employees who will be employed as car park attendants do not come within the callings mentioned in the Railway Employees' Award No 18 of 1969 ("the Award") and the Western Government Railways Commission Railway Employees Enterprise Agreement 2002 AG 146 of 2003 ("AG 146 of 2003").
2. Employees who will be employed as car park attendants will be employed in the Security and Customer Services Branch of the Transperth Train Operations Division and not in the "Traffic Branch" within the meaning of a Memorandum of Agreement entered into by the Applicant and the Respondent on 12 November 1984.
3. Employees who will be employed as reserve maintainers come within the callings of Level 1, 2, 3 and 3A of Clause 44 and 45 of the Award and Clause 11.8 of AG 146 of 2003 and are bound by Clause 7.1 of AG 146 of 2003.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2003 WAIRC 10411

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WEST AUSTRALIAN BRANCH, AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION, INDUSTRIAL UNION OF WORKERS, PERTH, APPLICANT
	v.
	JADESTAR ENTERPRISES PTY LTD , RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 31 DECEMBER 2003
FILE NO.	CR 40 OF 2002
CITATION NO.	2003 WAIRC 10411

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –dismissal or abandonment of employment – Intent of parties considered – No dismissal at the initiative of the employer – Application dismissed – Industrial Relations Act 1979
Result	Application dismissed
Representation	
Applicant	Ms J Boots of Counsel
Respondent	Ms P Edward of Counsel

Reasons for Decision

1 This is an application pursuant to section 44 of the *Industrial Relations Act 1979* ("the Act"). The matter came on for conference on 26 March 2003, was unable to be resolved and was referred to hearing. The claim made by the applicant union and translated into the Memorandum for Hearing and Determination reads as follows—

"THE APPLICANT

1. The Applicant Union's member Mr Christopher McEwen was employed by the Respondent at their premises at 222 Lakes Road, Mandurah in the State of Western Australia up until 5 February 2002 when he was dismissed from that employment. It is noted that the Employment Separation Certificate provided by the Employer Respondent dated 19 February 2002 indicates that the date of termination was 7 February 2002.

2. Mr McEwen commenced employment with S & M Contracting Pty Ltd in October 1998 at the premises of Nebru Exports at 222 Lakes Road, Mandurah, Western Australia.

3. On or about 25 January 2002, the Applicant is unable to be precise about the date as it was not privy to this commercial transaction, S & M Contracting Pty Ltd transferred its business to Jadestar Enterprises Pty Ltd and the Applicant believes Mr McEwen continued in employment with S & M Contracting Pty Ltd until Friday 1 February 2002 and on Monday 4 February 2002 was employed by the new purchaser of the business Jadestar Enterprises Pty Ltd at 222 Lakes Road, Mandurah, Western Australia.

4. In the week before 4 February 2002 Mr McEwen had been presented with a document described as a Workplace Agreement and to the best of his recollection, the employer was described as Jadestar Enterprises Pty Ltd and was advised by his existing employer S & M Contracting Pty Ltd to read through the document over the weekend prior to 4 February 2002.

5. When Mr McEwen presented for work on Monday 4 February 2002 his Supervisor Mr Sinclair asked whether Mr McEwen had signed the Workplace Agreement to which Mr McEwen replied that he would be seeking advice regarding the document before signing the same.

6. When Mr McEwen presented for work the following day 5 February 2002 his Supervisor Mr Sinclair indicated that Mr McEwen's position had been filled and that his services were no longer required.

7. The Applicant states that the dismissal of Mr McEwen was unjust, oppressive and harsh in all the circumstances.

8. The Applicant claims for its member compensation for the loss and injury incurred as a result of the dismissal.

THE RESPONDENT

The respondent opposes the claim. The respondent in response states as follows—

1. The respondent denies that the applicant union's member ("Mr McEwen") was employed by the respondent at their premises at 222 Lakes Road, Mandurah up until 5 February 2002 when he was dismissed from that employment and says—

(a) The abattoir premises at 222 Lake Road, Mandurah are owned by Nebru Exports Pty Ltd which company up until 27 January 2002 employed inter alia Mr McEwen through its wholly owned service company S & M Contracting Pty Ltd.

(b) The employment of Mr McEwen and other abattoir staff employed by S & M Contracting terminated on or about 25 January 2002.

(c) On Tuesday 29 January 2002 all abattoir staff previously employed by S & M Contracting Pty Ltd recommenced employment at the abattoir as employees of the respondent, being a company unrelated in any way to either Nebru Exports Pty Ltd or S & M Contracting Pty Ltd but which engages in the business of the provision of labour to divers business enterprises.

(d) having commenced employment with the respondent on Tuesday 29 January 2002 Mr McEwen worked the following Wednesday, Thursday and Friday and was paid by the respondent for those days.

(e) He attended at the place of employment on the following Monday and Tuesday, being 4 and 5 February 2002, but on both days did not work and left again at approximately 7:15 am on both days.

(f) Mr McEwen did not attend again at the place of employment at any time.

(g) Other than with respect to the provision of labour the respondent has no interest whatsoever in the premises at 222 Lakes Road, Mandurah.

(h) Mr McEwen was not dismissed from his employment. He in fact abandoned his employment.

(i) The employment separation certificate provided by the respondent and which is dated 19 February 2002 does not indicate that the date of termination was 7 February 2002. It indicates that 7 February 2002 was the last date upon which Mr McEwen worked for the respondent but in any event was prepared in error by the respondent's administrator and should have stated that Mr McEwen commenced working for the respondent on 29 January 2002 with the last day of work being 2 February 2002.

2. The respondent has no knowledge of when Mr McEwen commenced employment with S & M Contracting Pty Ltd.

3. The respondent denies that S & M Contracting Pty Ltd transferred its business to Jadestar Enterprises Pty Ltd, being the respondent, and says that the respondent has no interest whatsoever in the business of S & M Contracting Pty Ltd. The respondent will lead evidence at the trial of this matter to the effect that on 4 January 2002 all employees of S & M Contracting Pty Ltd were given three weeks' notice of termination of their employment. All of these employees were advised that positions would be available for them with Jadestar Enterprises Pty Ltd. On 15 January 2002 all employees of S & M Contracting Pty Ltd completed application forms for employment with Jadestar Enterprises Pty Ltd through the employment agency of the Murray Regional Employment Service. On 25 January 2002 the applicant received a redundancy payout and all entitlements from S & M Contracting Pty Ltd.

4. As to enumerated paragraph 4—

(a) The respondent denies that in the week before 4 February 2002 Mr McEwen had been presented with a document described as a work place agreement and says that the document referred to therein was provided to Mr McEwen and all other abattoir staff then employed by S & M Contracting Pty Ltd on 23 January 2002.

(b) Admits that the employer was described as Jadestar Enterprises Pty Ltd, being the respondent.

(c) Denies that Mr McEwen was advised by his existing employer S & M contracting Pty Ltd to read through the document over the weekend prior to 4 February 2002.

(d) Says that Mr McEwen and all other S & M Contracting Pty Ltd staff were advised by Mr Kelvin Bickford of the respondent to read through the document.

5. As to enumerated paragraph 5, the respondent will say that Mr McEwen presented for work on Monday 4 February 2002, having previously worked from 29 January 2002 to 1 February 2002. He was asked by the foreman of the abattoir, Lloyd Sinclair, whether he had signed the work place agreement and was told that if he had not his rate of pay would be at the State award rate. Mr McEwen declined to work and left the abattoir stating that he wanted to have the work place agreement checked out notwithstanding that he had at that time already had the work place agreement in his possession from 23 January 2002.

6. As to paragraph 6, the respondent denies that Mr McEwen presented for work the following day being 5 February 2002 and was told that his position had been filled and his services no longer required and says—

(a) Mr McEwen attended at the abattoir on 5 February 2002 claiming that he had people checking out the work place agreement.

(b) He was reminded by the foreman of the abattoir that the agreement was that all former S & M Contracting employees who had signed the work place agreements would be paid their normal rate of pay for one week, those who had not signed would be paid as per the State award. Notice to this effect had been given to all S & M Contracting Pty Ltd employees on 24 January 2002 in writing. The applicant further had attended a meeting on 23 January 2002 called for the purpose of clarifying issues in relation to the work place agreement and evidence of his having signed a record of attendance at this meeting will be adduced at trial.

(c) He was given the respondent's telephone number and address by the foreman as well as the mobile telephone number of Kelvin Bickford. He was advised to make contact with the respondent and was told that his employer was the respondent and no other entity.

(d) Mr McEwen left the place of employment and never at any time returned.

(e) The respondent did not by itself, or through the abattoir's foreman, at any time advise Mr McEwen that his position had been filled and his services were no longer required. The respondent was in fact caused inconvenience and financial loss by the abandonment by Mr McEwen of his position. The position was not filled until 18 February 2002 and then only with a trainee because there was a shortage trained boners and slicers in this State.

7. As to enumerated paragraph 7, the respondent—

(a) Denies that it dismissed Mr McEwen.

(b) States that Mr McEwen abandoned his position.

(c) States that it never engaged any conduct towards Mr McEwen which was unjust, oppressive or harsh in any circumstance.

8. As to paragraph 8, the respondent says that Mr McEwen is not entitled to any compensation".

2 Mr McEwen gave evidence that in January 2002 he was employed by S&M Contracting at Nebru Exports as a slicer and boner. He says that the owner of Nebru was Mr Rob Nottle and that Mr Sinclair and Mr McDonald were behind S&M Contracting. Mr Sinclair was the foreman at the premises. In January 2002 his work colleagues and he were given a number of workplace agreements. At that time he was on a set wage of $850 per week. The work was changing to Jadestar and they were offering a piece rate payment. He says that he was given a final agreement on the Friday, 1 February 2002 and was asked to be ready to sign it by the following Monday.

3 Mr McEwen says he was given a copy of all the draft agreements. He went through them with his fellow workers. On 4 February he went to work with a colleague, Donny Gaden, and was immediately called to the office by Mr Sinclair. Mr Sinclair asked if he had signed the agreement and he replied that he had not and that he was sending it off for a second opinion. Mr Sinclair advised that by doing that Mr McEwen would go onto the state award. Mr McEwen left the office, then returned and advised that he would not be working that day and would seek a second opinion. Mr McEwen understood that by going on the state award he would receive a pay cut. Mr Sinclair did not say anything to Mr McEwen in reply. Mr McEwen simply left and sought advice from Mr Glen Ferguson. Mr McEwen says that he was going to send the final draft of the workplace agreement to Mr Ferguson and the union to "clarify things for me, to make sure that I was in a better position than I was prior".

4 Mr Ferguson could not see Mr McEwen that day but they spoke by telephone sometime during that morning and Mr Ferguson advised Mr McEwen to go back to work as things could then be sorted out a lot easier. That is Mr McEwen would still be in a job. Mr McEwen did not return to work that day and when he went to work the next day Mr Sinclair immediately called him into the office and advised Mr McEwen that by leaving the day before he had refused the state award and his job had been filled. Mr McEwen challenged this and said "Well, if I refused the state award then why am I here today" (Transcript pg 7). He handed over his locker key and collected his possessions. Mr McEwen sought advice from Mr Ferguson who told him to consult his union. The union then made this application to the Commission.

5 Mr McEwen found employment three or four weeks later as a casual labourer. He earned $9,171 in that employment from February to June 2002, and $34,832 for the full financial year to June 2003. Mr McEwen says that he earned $21.20 per hour when employed by the respondent. He says that the employees were told that they were "getting changed" from S&M Contracting to Jadestar. All staff received a redundancy payout when they finished with S&M Contracting. Mr McEwen was paid about $6,000 in redundancy. He says that as part of the condition of moving to Jadestar he had to sign up with Murray Regional Employment Services.

6 Under cross-examination Mr McEwen says that on 5 February 2002 Mr Sinclair asked him whether he had Mr Kelvin Bickford's telephone number. He says that he did not discuss with Mr Sinclair what he wanted to be paid but he simply wanted to earn more than he had been receiving. He says that he attended a meeting of employees on 23 January 2002 to discuss the workplace agreement proposal. However, he only saw the final workplace agreement on 1 February 2002 as the document was being changed. He also remembers a meeting with Mr Ferguson and other staff where they went through the agreement and Mr Ferguson advised that there was still work to be done on the agreement. He says he never saw [Exhibit R4], which is the respondent's advice of one week's employment.

7 Mr Glenn Ferguson gave evidence that he was contacted and asked to assist workers at Nebru Exports. He met several times with some of these workers, including Mr McEwen, at his home. S&M Contracting had been the supplier of labour to Nebru but this was to change and the employees had been advised that they were to be made redundant, and if they wished to continue in employment they could register with the Murray regional office and they would be picked up by Jadestar. He also attended a meeting of workers at the Nebru premises and advised them that the agreement was not good and did not meet award standards. He says that it was a piecework agreement and although he cannot remember the detail of the agreement as it was a long time ago, he does remember that the agreement was sub-standard in terms of award conditions. He says that he was also aware that the S&M Contracting arrangements were also not up to standard. He says that there was an enormous amount of pressure on the workers as the time for signing the agreement was not far away and if people did not sign then they would be unemployed.

8 Mr Ferguson says that he spoke to Mr McEwen on the Tuesday morning at about 9.30am and Mr McEwen was visibly upset. Mr McEwen advised that he had been terminated. He says that Mr McEwen was sacked for abandoning his employment without authorisation the day before. Mr Ferguson says that he told Mr McEwen to go back to work after his dismissal and ask why he had been dismissed. He had earlier told Mr McEwen that things could be sorted out a lot easier if he were still at work.

9 Mr Kelvin Bickford gave evidence that he is the manager and a director of Jadestar Enterprises. The company supplies contract labour. He says that Jadestar started supplying labour to Nebru in about August 2001 and ceased in June 2002 as workers compensation had increased the premiums and Mr Nottle did not want to pay Jadestar's increased rates. In December 2001 or January 2002 Mr Nottle asked Mr Bickford about transferring staff at his Maida Vale operation over to Jadestar. Mr Nottle was going to terminate the employees of Nebru and wanted Jadestar to provide labour. Mr Bickford says that he handed application forms to staff of Nebru for the Murray Regional Employment Service. These forms were handed out after employees were

given their notice from Nebru. He says that existing Jadestar employees were to continue on their existing rate if they chose not to adopt the workplace agreement; new staff were to go on the award if they chose not to adopt the agreement. All employees would continue to have a job.

10 He says that the workplace agreement was handed to all concerned in early January 2002 and Mr Nottle commenced the negotiations. These did not go far and Mr Bickford took over the negotiations, explained the rates to all concerned and did a comparison of the award to the agreement. This occurred over three to four weeks. Mr Bickford says that it was spelt out that if employees did not choose the agreement then they would be employed under the state award. Mr Bickford says that all employees were to commence employment with Jadestar on 29 January 2002. There was a meeting, which was minuted, to finalise negotiations on 23 January. Then on 24 January 2002 as negotiations were still taking some time Mr Bickford asked Mr Nottle if employees could stay on their existing rates, under Jadestar, and Mr Nottle would pay Jadestar for this for one week. This was agreed (Transcript p.51). He believed that he would have the agreements ready for signing by 1 February 2002. He says that this was confirmed in writing to staff [Exhibit R4].

11 Mr Bickford says that by Friday, 1 February 2002 all concerned had come to a fundamental agreement on the workplace agreement, including Mr McEwen. The agreements were to be signed and handed to Mr Sinclair by the Monday. Anyone who did not sign them would be under the state award. Mr Bickford was contacted at about 9.30am on the Monday by Mr Sinclair who advised that all had signed the agreement with the exception of Mr McEwen who had chosen to go and get some additional advice. Mr Bickford went and collected the agreements later that day.

12 Mr Bickford says that—

> "Okay, and what's your recollection of the events on the 5th of February?---On the 5th of February once again I was called by Lloyd into my office to say that Chris McEwen had chosen not to sign the workplace agreement again and had left site, and Lloyd said to me that he would be coming to visit me, or contact me. He'd given him directions and my phone number" (Transcript pg 53).

13 Mr Bickford says that Mr McEwen did not contact him at all. He says that Mr McEwen contacted Jadestar's offices on 13 or 14 February 2002 and a message was taken down incorrectly. Then on 19 Febrauary 2002 Mr McEwen contacted Jadestar's offices and asked for a separation certificate. Mr Bickford advised that the reason for termination should be abandonment of his job as Mr McEwen had not contacted him. He received notification of this application on that same day.

14 Mr Bickford says that Mr McEwen was replaced by Mr Woodcock on 18 February 2002 and that it had been hard to find boners and slicers at that time. He says that he had to employ people from a meatworks in Queensland that had closed down.

15 Under cross-examination Mr Bickford says Mr Nottle was his client and that Mr Sincliar was the supervisor and he (Mr Bickford) dealt with Mr Sinclair on staff matters. Mr Sinclair was responsible for time and wages records. He says that on 4 February 2002, after he had been contacted by Mr Sinclair about Mr McEwen, he expected Mr McEwen back at work the next day. The next day Mr Sinclair directed Mr McEwen to Mr Bickford and did not indicate that he had dismissed Mr McEwen. He says that the state award would have delivered a slightly lesser rate of pay for McEwen than the agreement. The agreement would have been more than Mr McEwen's rate of pay at the time.

16 Mr Lloyd Sinclair gave evidence that he worked as a supervisor for Nebru exports based in Mandurah. They shifted there from Maida Vale in 2001. He says that Nebru's employees were paid their wages through S&M Contracting of which he had previously been a director and shareholder, albeit he derived no benefit from the company. He says that on 4 January 2002 all employees were notified that they would be transferring to Jadestar. They were given three weeks notice. He handed each employee an application for employment, including Mr McEwen who signed the application. He says that there was an arrangement where employees were paid a week's pay by Jadestar. He says that—

> "when the extra week's pay was requested and given to the people, it was on the proviso that we could receive the document signed and delivered back to me on Friday the 1st" (Transcript pg 75).

17 If people did not sign the workplace agreement then they would be paid the state award. He says that on 1 February 2002 he received all signed workplace agreements except two. One was an oversight and was handed in on the Monday, the other was Mr McEwen.

18 On 4 February 2002 at about 7am he called Mr McEwen into his office and asked about the agreement. Mr McEwen stated that he wanted to get more advice and left to do so. Mr Sinclair says that he advised Mr McEwen that if he did not sign the agreement then he would be on the state award. He says:

> "Okay. Can you recollect the events of Tuesday the 5th of February?---Yeah, I noticed Chris again come in on the Tuesday morning around about the same time, 6.30. I called Chris in again. He said, "No," he still hadn't signed the document, and I said to him then, I says, "Well, you know, you have to be paid as per the state award. That was the agreement." He didn't agree with that. He expected to be paid the $800 a week, which once again I said to him, "That wasn't the agreement," and he said, "Oh, well, what options do I have now?" and I suggested, "Well, the only - - you know, if you don't want to work by this agreement and you don't want to be paid as per the state award, the only thing you can do is talk to Kelvin from Jadestar."
>
> Yes?---And being that early in the morning, he - - Chris actually asked me where Kelvin's office was. I give him directions to the office in Pinjarra, but as I said to him, I said, "Well, I don't think Kelvin will be in his office at this time of the day," and I wrote down on a piece of paper his mobile phone number and his work number" (Transcript pg 75 – 76).

19 Mr Sinclair says that he did not dismiss Mr McEwen and did not have the right to do so. He says that Mr McEwen simply left the workplace unhappy that he would not continue to be paid the same rate of pay. He says that there was no one replacing Mr McEwen at that time. He did not ask Mr McEwen for his locker key. He received a telephone call asking for a reference for Mr McEwen at Action Supermarkets. He says that they later recruited people from Rockhampton.

20 Under cross-examination Mr Sinclair says they wanted to make the transition of employment as painless as possible; the only thing that was going to change was the heading on the payslip. He denies that he ever said to Mr McEwen that he had abandoned his employment by walking off the job or that Mr McEwen had refused the state award. Mr Sinclair says that he did not and still does not understand what Mr McEwen's concerns about the agreement were. He does not believe that Mr McEwen handed him his locker key or any equipment. He denies that Mr McEwen said to him "why am I here if I am refusing the state award."

21 The applicant union submits that the termination of their member, Mr Christopher McEwen was unfair in all the circumstances, as Mr McEwen was dismissed for not agreeing to sign a workplace agreement. Mr McEwen became concerned when his employer changed to Jadestar and he was presented with a workplace agreement. He was concerned that his conditions of employment would be less. Ms Boots for the union submits that in fact Mr McEwen was employed at the time of termination by Jadestar on the same terms and conditions upon which he was employed with S&M Contracting. His continued

employment did not depend upon signing a workplace agreement. She submits that Mr McEwen was dismissed by Mr Sinclair on 5 February 2002. Mr McEwen never saw [Exhibit R4] which is an offer of employment to employees of S&M Contracting. He wanted to get advice about the workplace agreement on 4 February 2002, this was agreed and he did so. He returned to his employment the next day after receiving advice from Mr Glen Ferguson that he should attend work and attempt to resolve the matter. Mr McEwen says that he was advised by Mr Sinclair on that morning that he had walked away from his job the day before, had refused the state award and that his job had been filled.

22 Ms Boots submits that the evidence for the respondent is not to be believed as it was imperative for them that employees were signed to workplace agreements by 1 February 2002. Further if the respondent is correct and the workplace agreement contained superior rates to the award then there would have been no difficulty in continuing Mr McEwen on $21.20 per hour.

23 Ms Edward for the respondent submits that the respondent purchased the business which had previously employed Mr McEwen. The company which had previously employed Mr McEwen was not S&M Contracting which was simply a convenient way for Nebru to pay staff. Nebru was in fact the employer. S&M was a contract labour provider. Ms Edward submits that Mr McEwen was not dismissed on 5 February 2002. He did not even speak to anyone from his employer on that day despite being advised by Mr Sinclair to do so. He simply walked off the job without notice and then without contacting the employer; he failed to return to his employment. Mr McEwen's services were required and he was given the choice between the state award and the workplace agreement. He refused the offer of employment by walking away and not returning.

24 At its simplest level this matter relies on the credibility of the evidence of Mr Sinclair and Mr McEwen as to what transpired in their exchange on the morning of 5 February 2002. That is the last day of attendance by Mr McEwen at the premises of Nebru Exports where he worked. His last day of work was 1 February 2002. Mr McEwen says that Mr Sinclair told him that he had abandoned his job and that his job had been filled. He says that Mr Sinclair then asked for his locker key and that he return all items belonging to the company. Mr Sinclair denies that he dismissed Mr McEwen. He also denies that Mr McEwen's job had been filled or that he asked him to return the company's possessions. Mr Sinclair says that he asked Mr McEwen to contact Mr Bickford and ensured that Mr McEwen had Mr Bickford's telephone number. This is the only direct evidence as to whether Mr McEwen was dismissed or not. The evidence of Mr Ferguson is that Mr McEwen advised him later that morning that he had been dismissed for abandoning his employment. The evidence of Mr Bickford was that he was advised by Mr Sinclair that Mr McEwen was to call him but he never did.

25 Having seen the witnesses give their evidence and having had the opportunity to read through the transcript of evidence I have greater confidence in the evidence of Mr Bickford and Mr Sinclair than I do in the evidence of Mr McEwen. The evidence of Mr Bickford and Mr Sinclair was more certain and consistent than that of Mr McEwen. However, in addition to this when I review all the evidence I am reinforced in the view that the chain of events which the respondent describes is more probable than the picture which the applicant would have the Commission accept.

26 It is common ground that Mr McEwen was employed by Jadestar Enterprises at the time his employment finished. I note that neither party has argued that there was in fact no employment relationship at all on the date in question, ie 5 February 2002. I say this because on its face [Exhibit R4] simply states that Mr McEwen had employment with Jadestar for only one week. Jadestar had taken over the supply of contract labour for Nebru. Even though there is dispute as to the previous employer of Mr McEwen, for the purposes of this application that is not important to resolve. What is relevant is that Mr McEwen says that he was made redundant from his previous employer, had been paid a redundancy payment, filled out a new employment application form and was paid at his previous rate of pay by Jadestar at the time of his employment finishing. There is a payslip to that effect.

27 Mr McEwen says that he was not aware of [Exhibit R4] which advised employees that they would be employed by Jadestar for one week on their existing rates of pay whilst the issue of the workplace agreement was being finalised. Yet it is clear from Mr McEwen's evidence, aswell as the evidence for the respondent and exhibits that Mr McEwen was involved in discussions and was concerned about the employer's desire to settle and have signed new workplace agreements. Mr McEwen's evidence is that he wanted to achieve a higher rate of pay from the exercise. His evidence also is that he was concerned about the workplace agreement and he knew that if he did not sign it then the state award would apply to him. Put differently, he knew from the chain of events that he had a new employer and that his employment conditions were going to change and he was not happy about this. He also knew that he was facing a deadline to make a decision about the workplace agreement. Given this background I think that it is more probable than not that the events which Mr Bickford described are correct and that Mr McEwen knew that he would be employed for a week on his rate of pay and had to decide about his actual contract. Given the manner in which this matter has been argued it is possible to conclude that the contract was expected to be ongoing, it was simply a question as to whether the state award or the workplace agreement could be the basis of the contract. It cannot be said that there was a contract of employment between Jadestar and Mr McEwen that he would continue to be paid on an ongoing basis at his previous rate of pay.

28 It is common ground that Mr McEwen arrived at work on 4 February 2002 and when asked by Mr Sinclair whether he had signed the workplace agreement Mr McEwen chose to leave work for the whole day and seek further advice. It is common ground, or at least unchallenged, that he was not expected back that day and that it was accepted that he would go and get that advice. It is Mr McEwen's evidence that on that morning Mr Sinclair advised him that by not signing the workplace agreement then he would go onto the state award. It is clear from the giving of his evidence that Mr McEwen was not happy about this. Later that morning Mr Ferguson advised Mr McEwen to go back to work as that was the best way to sort out the matter. Mr McEwen made that decision and went back to work the next day. He then says that Mr Sinclair had in the interim simply filled his spot and effectively terminated his services. He says that Mr Sinclair stated that he had rejected the state award and had abandoned his employment. His evidence is also that Mr Sinclair asked if he had Mr Bickford's number, although he says he was not sure what that meant.

29 Weighed against this is the evidence of the respondent that they needed slicers and boners and in the end had to recruit more from Queensland. Mr Sinclair says that he did not fill Mr McEwen position except by relief until about three weeks later. Mr Sinclair's evidence is that he did not say to Mr McEwen that he had abandoned his employment instead he advised Mr McEwen to speak to Mr Bickford and gave him his number. Mr Sinclair also says that he could not dismiss Mr McEwen as he was not the employer, albeit he was responsible for time and wages records of the employees.

30 I consider that it was more probable, given the evidence which I have outlined, that Mr Sinclair having advised Mr McEwen on the Monday that if he did not sign the workplace agreement he would be under the state award and allowing him to go and get further advice, did not simply terminate Mr McEwen's services the next morning. It is common evidence that Mr McEwen would be paid less under the state award. It is the case that Mr McEwen was not happy about the choice he had to make. It is also the case that there had been discussions over several weeks to come to this point. Mr McEwen was to get advice from his union and yet there is no suggestion that, on his evidence, that having been dismissed the union then contacted the employer to have the situation rectified. There was simply an application made to the Commission about two weeks later. In all the circumstances I consider it much more likely that Mr McEwen was offended by the approach adopted by his new employer

and simply left the premises and failed to contact his employer. I do not find that Mr Sinclair terminated the services of Mr McEwen on 5 February 2002 and hence I would dismiss the application.

2003 WAIRC 10412

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WEST AUSTRALIAN BRANCH, AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION, INDUSTRIAL UNION OF WORKERS, PERTH, APPLICANT
	v.
	JADESTAR ENTERPRISES PTY LTD , RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	WEDNESDAY, 31 DECEMBER 2003
FILE NO.	CR 40 OF 2002
CITATION NO.	2003 WAIRC 10412

Result	Application dismissed
Representation	
Applicant	Ms J Boots of Counsel
Respondent	Ms P Edward of Counsel

Order

HAVING heard Ms J Boots of Counsel on behalf of the applicant and Ms P Edward 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 10128

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SKILLED ENGINEERING PTY LTD & OTHERS, APPLICANTS
	v.
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 26 NOVEMBER 2003
FILE NO/S.	CR 229 OF 2003
CITATION NO.	2003 WAIRC 10128

Result	Order issued
Representation	
Applicants	Mr M Borlase as agent, and Mr D Butterworth on behalf of Weld Integrity Pty Ltd
Respondent	Mr J Ferguson
Intervenor	Mr A Lucev of counsel and with him Mr S Heathcote of counsel on behalf of Western Power

Order

HAVING heard Mr M Borlase as agent on behalf of the applicants, Mr D Butterworth on behalf of Weld Integrity Pty Ltd, Mr J Ferguson on behalf of the respondent and Mr A Lucev of counsel and with him Mr S Heathcote of counsel on behalf of the intervenor, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the Commission's order of 2 November 2003 be and is hereby revoked.
2. THAT the application be and is hereby discontinued by leave.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 10006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SKILLED ENGINEERING PTY LTD & OTHERS, APPLICANTS *v.* THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH , RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 10 NOVEMBER 2003
FILE NO/S.	C 229 OF 2003
CITATION NO.	2003 WAIRC 10006

Result	Order issued
Representation	
Applicants	Mr M Borlase as agent, and Mr L Connors on behalf of Project Painting Services
Respondent	Mr L Edmonds of counsel
Intervenor	Ms K Hasluck-Janes of counsel on behalf of Western Power Corporation Limited

Order

HAVING heard Mr M Borlase as agent on behalf of the applicants, Mr L Connors on behalf of Project Painting Services, Mr L Edmonds of counsel on behalf of the respondent and Ms K Hasluck-Janes of counsel on behalf of the intervenor, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT Project Painting Services be and is hereby struck out as a party to the herein application.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09910

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SKILLED ENGINEERING PTY LTD AND OTHERS, APPLICANTS *v.* THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH , RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	SUNDAY, 2 NOVEMBER 2003
FILE NO.	C 229 OF 2003
CITATION NO.	2003 WAIRC 09910

Result	Order issued
Representation	
Applicants	Mr M Borlase as agent and Mr D Butterworth on behalf of Weld Integrity
Respondent	No appearance
Intervenor	Ms K Hasluck-Janes of counsel on behalf of Western Power Corporation Limited

Order

WHEREAS on 30 October 2003 the applicant applied to the Commission for an urgent conference pursuant to s 44 of the Industrial Relations Act, 1979 ("the Act");

AND WHEREAS on 31 October 2003 and 2 November 2003 the Commission convened conferences between the parties pursuant to s 44 of the Industrial Relations Act, 1979;

AND WHEREAS at the conference on 31 October 2003 the Commission was informed by the applicant that it is contracted to provide supplementary labour to Western Power to perform maintenance works at the Western Power Corporation Naval Base Power Generation Facility, Leith Road, Naval Base ("the Site") and that commencing 30 October 2003, picket lines had been established in or about the Site by members and/or agents of the respondent in support of demands by the respondent on behalf of its members that they receive improvements in wages and conditions of employment;

AND WHEREAS the applicant informed the Commission that it had reached an agreement with the respondent prior to the commencement of the works as to rates of pay and conditions of employment which allegation was denied by the respondent;

AND WHEREAS the Commission was informed by the applicant and the intervenor that the picket line at the site was preventing access to or egress from the Site for the performance of the applicant's works for the intervenor and for the intervenor's maintenance employees also;

AND WHEREAS the respondent claimed that the employees of the applicant were not being adequately remunerated by the applicant for the work being performed at the Site;

AND WHEREAS the Commission, in an endeavour to assist the parties in resolving the industrial dispute, outlined a procedure by which the matters in dispute may be resolved and issued a recommendation accordingly;

AND WHEREAS the Commission has been informed by the applicants and the intervenor at the conference on 2 November 2003 that the recommendation of the Commission has not been complied with in that a picket line, protest line or the like was maintained on the Site on 1 November 2003 preventing access to and egress from the Site;

AND WHEREAS at the conference on 2 November 2003 Aim Maintenance Limited, Collex Pty Ltd, Project Painting Services and Weld Integrity were joined as parties to these proceedings;

AND WHEREAS the Commission was informed by the applicants and the intervenor at the conference on 2 November 2003 that they seriously apprehend that there will be a continuation of the industrial action and seek an order of the Commission that the industrial action cease in light in particular of the possible interruption of power supplies in the State as a consequence of the continuation of the industrial action;

NOW THEREFORE the Commission, having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of s 44 (6) the Act hereby orders—

(1) THAT each of the employees of the applicants members of or eligible to be members of the respondent engaged in work at the Site who are engaged in industrial action concerning matters the subject of these proceedings cease such industrial action immediately and thereafter work in accordance with their contracts of service and refrain from commencing or taking part in further industrial action of any kind in respect of this matter until this order is revoked.

(2) THAT the respondent and each of its officers, servants and agents must not participate in any picket line, protest line or the like at or near the Site.

(3) THAT the respondent and each of its officials, servants and agents shall take all necessary steps to ensure that industrial action ceases and normal work resumes by 7.00am, 3 November 2003 in accordance with the terms of this order including but without limiting the generality of this obligation to—

(a) advise the employees of the terms of this order; and

(b) counsel the employees to return to work in accordance with the terms of this order and to refrain from engaging in any further industrial action of any kind in respect of the matters the subject of these proceedings.

(4) THAT the applicants serve a copy of this order on the respondent and place a copy of it on the front gate of the Site and on the relevant noticeboards on the Site.

(5) THAT the applicants or the respondent may, on giving 24 hours notice to the other, apply to the Commission to vary, revoke or otherwise set aside the terms of this order.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 09905

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SKILLED ENGINEERING PTY LTD, APPLICANT *v.* THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH , RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 31 OCTOBER 2003
FILE NO.	C 229 OF 2003
CITATION NO.	2003 WAIRC 09905

Result	Recommendation issued
Representation	
Applicant	Mr M Borlase as agent
Respondent	Ms K Grove and Mr S McCartney on behalf of the AFMEPKIU
Intervenor	Mr T Lucev of counsel and with him Ms K Hasluck-Janes of counsel on behalf of Western Power Corporation Limited

Recommendation

WHEREAS on 30 October 2003 the applicant applied to the Commission for an urgent conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 31 October 2003 the Commission convened a conference between the parties pursuant to s 44 of the Act;

AND WHEREAS at the conference the Commission was informed by the applicant that it is contracted to perform shutdown maintenance works at the Western Power Corporation Naval Base Power Generation Facility, Leith Road, Naval Base ("the Site") and that commencing 30 October 2003, picket lines had been established in or about the Site by members and/or agents of the respondent in support of demands by the respondent on behalf of its members that they receive improvements in wages and conditions of employment;

AND WHEREAS the applicant informed the Commission that it had reached an agreement with the respondent prior to the commencement of the works as to rates of pay and conditions of employment which allegation was denied by the respondent;

AND WHEREAS the Commission was informed by the applicant and the intervenor that the picket line at the site was preventing access to or egress from the Site for the performance of the applicant's works for the intervenor and for the intervenor's maintenance employees also;

AND WHEREAS the respondent claimed that the employees of the applicant were not being adequately remunerated by the applicant for the work being performed at the Site;

AND WHEREAS the Commission, in an endeavour to assist the parties in resolving the industrial dispute, outlined a procedure by which the matters in dispute may be resolved and advised the parties it would issue a recommendation accordingly;

NOW THEREFORE the Commission, having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Act hereby recommends–

(1) THAT the issue of wages and conditions of employment in relation to employees of the applicant who are employed in the shutdown works at the Site presently be the subject forthwith of negotiations in good faith between the applicant and the respondent, involving the appropriate State level officials of the respondent and representatives of management.

(2) THAT the respondent reduces its claims against the applicant to writing and provides a copy of its claim to the applicant and the Commission by 4pm today.

(3) THAT by no later than 6.30pm today there be a full resumption of work by all employees, and thereafter all protest lines, picket lines and the like be removed on the basis that there be free and open access and egress from the Site, in order that all employees can access the Site freely to attend to the performance of their work duties.

(4) THAT the application be adjourned to a report back conference to be held on Monday 3 November 2003, at a time to be fixed by the Commission not earlier than 4.30pm.

(5) THAT the matters in dispute be the subject of further conciliation and/or arbitration by the Commission.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2003 WAIRC 10004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SKILLED ENGINEERING PTY LTD , APPLICANT *v.* THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH & OTHERS, RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 31 OCTOBER 2003
FILE NO/S.	C 229 OF 2003
CITATION NO.	2003 WAIRC 10004

Result	Order issued
Representation	
Applicant	Mr M Borlase as agent
Respondents	Ms K Grove on behalf of the AFMEPKIU, Mr W Game on behalf of the CEPU and Mr T Kucera on behalf of the CFMEU
Intervenor	Mr T Lucev and with him K Hasluck-Janes of counsel on behalf of Western Power Corporation Limited

Order

HAVING heard Mr M Borlase as agent on behalf of the applicant, Ms K Grove on behalf of the AFMEPKIU, Mr W Game on behalf of the CEPU, Mr T Kucera on behalf of the CFMEU and Mr T Lucev and with him Ms K Hasluck-Janes of counsel on behalf of the intervenor, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, Western Australian Branch and the Construction, Mining and Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch, named as respondents to this application in schedule 1 to the applicant's application filed in the Commission on 30 October 2003 be and are hereby struck out as parties.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

CORRECTIONS—

2003 WAIRC 10358

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

No. PSAA 1 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	MONDAY, 22 DECEMBER 2003
FILE NO.	P 16 OF 2003
CITATION NO.	2003 WAIRC 10358

Result Correcting Order Issued

Correcting Order

WHEREAS this was an application to vary the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990, PSAA 1 of 1989; and

WHEREAS on the 11th day of December 2003, a Correcting Order in this application was deposited in the office of the Registrar; and

WHEREAS the Correcting Order contained an error in the instruction for Item 2;

NOW THEREFORE the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the said order be corrected by substituting the instruction for Item 2 with the following—

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

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

[L.S.]

2003 WAIRC 10258

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSAA 3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ALBANY PORT AUTHORITY AND OTHERS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 10 DECEMBER 2003
FILE NO.	P 7 OF 2003
CITATION NO.	2003 WAIRC 10258

Result Correcting Order Issued

Correcting Order

WHEREAS this was an application to vary the Government Officers Salaries, Allowances and Conditions Award 1989, No. PSAA 3 of 1989; and

WHEREAS on the 5th day of November 2003, the Respondents filed an amended schedule to the application and the Applicant consented to such amendments to the application; and

WHEREAS this application was heard on the 7th day of November 2003, and at the conclusion of the hearing the Public Service Arbitrator issued Minutes of Proposed Order to the parties; and

WHEREAS on the 7th day of November 2003, the parties advised the Public Service Arbitrator that a Speaking to the Minutes in respect of this application was not required;

WHEREAS on the 7th day of November 2003, an Order in this application was deposited in the office of the Registrar; and

WHEREAS on the 8th day of December 2003, the Respondents advised the Public Service Arbitrator in writing that Item 2 of the schedule filed on the 5th day of November 2003 contained incorrect figures and that the Schedule to the Order issued on the 7th day of November 2003 therefore also contained incorrect figures; and

WHEREAS the Respondents requested that the Public Service Arbitrator issue an order to correct those errors at Item 2 of the Schedule; and

WHEREAS on the 9th day of December 2003, the Applicant agreed in writing to such an order being issued;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the Schedule attached to the Order dated 7 November 2003 with respect to Application P 7 of 2003 be amended by deleting Item 2 and inserting the following in lieu thereof—

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
	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	73.10
(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	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

(15)	Each Adult	21.40
(16)	Each Child	3.65

MIDDAY MEAL

(17)	Rate per meal	5.20
(18)	Maximum reimbursement per pay period.	26.00

[L.S.]

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

2003 WAIRC 10357

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	MONDAY, 22 DECEMBER 2003
FILE NO.	P 15 OF 2003
CITATION NO.	2003 WAIRC 10357

Result Correcting Order Issued

Correcting Order

WHEREAS this was an application to vary the Government Officers (Social Trainers) Award 1988, No. PSAA 20 of 1985; and

WHEREAS on the 11th day of December 2003, a Correcting Order in this application was deposited in the office of the Registrar; and

WHEREAS the Correcting Order contained an error in the instruction for Item 2;

NOW THEREFORE the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the said order be corrected by substituting the instruction for Item 2 with the following—

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

[L.S.]

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

2003 WAIRC 10356

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	MONDAY, 22 DECEMBER 2003
FILE NO.	P 14 OF 2003
CITATION NO.	2003 WAIRC 10356

Result Correcting Order Issued

Correcting Order

WHEREAS this was an application to vary the Graylands Selby-Lemnos and Special Care Health Service Award 1999, PSAA 1 of 1999; and

WHEREAS on the 11th day of December 2003, a Correcting Order in this application was deposited in the office of the Registrar; and

WHEREAS the Correcting Order contained an error in the instruction for Item 2;

NOW THEREFORE the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the said order be corrected by substituting the instruction for Item 2 with the following—

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

[L.S.]

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

PROCEDURAL DIRECTIONS AND ORDERS—

2003 WAIRC 10304

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN RAINSFORD PENN, APPLICANT
	v.
	BUDGET AIRCONDITIONING, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 12 DECEMBER 2003
FILE NO.	APPLICATION 566 OF 2003
CITATION NO.	2003 WAIRC 10304

Result	Direction and Orders Issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr W Yu of Counsel

Order

The Commission, having heard Mr K Trainer on behalf of the applicant and Mr W Yu 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 this day, the 12th day of December 2003, ordered and directed as follows:—

THAT the respondent provide to the applicant by close of business Monday, 15 December 2003 the following particulars in relation to the position described in the respondent's correspondence as a junior refrigeration mechanic (the Position)—

1. The date(s) the Position was advertised, including but not limited to when the Position was entered into Australian Job Search.
2. The terms of the advertisement including but not limited to the qualifications and experience required of applicants.

3. The date(s) of interviews for the Position.
4. The Duties of the Position.
5. The salary or wage and other conditions of employment offered to the successful applicant.
6. The date of the commencement of the successful applicant.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2003 WAIRC 10255

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KERRY MARIE LING, APPLICANT *v.* DOCTOR CHRIS BARKER DENTAL SURGEON, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	WEDNESDAY, 10 DECEMBER 2003
FILE NO/S.	APPLICATION 898 OF 2003
CITATION NO.	2003 WAIRC 10255

Result	Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mrs L Barker as agent

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the matter was listed for a preliminary hearing on 28 November 2003 to determine the issue of the naming of the respondent; and

WHEREAS both parties submit that the real identity of the employer is Richwill Nominees Pty Ltd as trustee for The Chris Barker Family Trust; and

WHEREAS I find that the applicant mistook the name of the respondent and consequently misdescribed the name of the respondent in her application; and

WHEREAS I find that the prejudice to the applicant would be severe if the respondent's name was not changed and outweighs any prejudice to the respondent; and

WHEREAS having regard to my obligations under s 26 of the Act;

NOW THEREFORE pursuant to section 27(1)(m) of the Industrial Relations Act 1979, I hereby order that the name of the respondent be amended from Doctor Chris Barker Dental Surgeon to **Richwill Nominees Pty Ltd as trustee for The Chris Barker Family Trust**.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2003 WAIRC 10377

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRONWYN KAY BROWN, APPLICANT *v.* SILVERBIRD NOMINEES PTY LTD T/AS THE C RESTAURANT (ACN 094 727 910), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 23 DECEMBER 2003
FILE NO.	APPLICATION 1282 OF 2003
CITATION NO.	2003 WAIRC 10377

Result	Further and better particulars and discovery granted in part

Order

WHEREAS on 9th December 2003 the Applicant in this matter applied for Further and Better Particulars and Discovery of Documents from the Respondent; and

WHEREAS on 22nd December 2003 the Commission convened a hearing and having heard from Counsel for the Applicant and there being no appearance by the Respondent; and

WHEREAS the Commission decided to grant from Schedule "A" of the application Particulars 1, 2 and 3 and Discovery 1, 2, 4, 5 and 7; and

WHEREAS the particulars and discovery order herein shall be provided by 13th January 2004.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

1. The Respondent provide full particulars in relation to paragraph 4 of the Notice of Answer and Counter Proposal, specifically—
   (a) identify each date when the Applicant was spoken to by her Manager regarding her inability to portray a welcoming and enthusiastic demeanour towards customers;
   (b) identify who the Manager is;
   (c) provide full particulars of each conversation referred to in paragraph 4 of the Notice of Answer and Counter Proposal.
2. The Respondent provide full particulars in relation to paragraph 5 of the Notice of Answer and Counter Proposal, specifically—
   (a) identify the date when the Applicant was advised that she needed to improve on her guest liaison skills;
   (b) identify who advised the Applicant that she needed to improve on her guest liaison skills on each relevant occasion;
   (c) provide full particulars in relation to the lack of improvement in the Applicant's work;
   (d) provide full particulars as to the decline in the luncheon trade referred to in paragraph 5 of the Notice of Answer and Counter Proposal.
3. The Respondent provide full particulars in relation to paragraph 7 of the Notice of Answer and Counter proposal regarding the Applicant's inability to meet the Respondent's needs in building a luncheon trade.
4. The Respondent provides discovery of all workplace agreements and contracts of employment relevant to the Applicant's contract of employment.
5. The Respondent provide discovery of the Applicant's personnel file.
6. The Respondent provide discovery of all notes and records relating to counselling sessions with respect to the Applicant's employment and work.
7. The Respondent provide discovery of all documents relating to the performance of the Applicant or work done by the Applicant during the course of her employment.
8. The Respondent provide discovery of all documents relating to the alleged decline in luncheon trade during the Applicant's employment referred to in paragraph 5 of the Notice of Answer and Counter Proposal.
9. The particulars and discovery order herein shall be provided by 13th January 2004.

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

2003 WAIRC 10408

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IUSTIN SORA, APPLICANT
	v.
	MERIDIN PTY LTD (PROJECT INDUSTRIES), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 30 DECEMBER 2003
FILE NO/S.	APPLICATION 1355 OF 2003
CITATION NO.	2003 WAIRC 10408

Result Order for Discovery granted

Order

WHEREAS on the 22nd October 2003 the Respondent made an informal request for Discovery from the Applicant; and

WHEREAS on the 24th December 2003 the Respondent in this matter applied for an Order for the a list of Discoverable Documents and copies thereof from the Applicant; and

WHEREAS on 30th December 2003 the Commission, *ex parte*, in consideration that the matter is listed for hearing on 9th February 2004 and to avoid any adjournment, decided to make an Order *ex parte*, for the Applicant to Discover his list of Documents and copies thereof to the Respondent; and

WHEREAS the list of Discoverable Documents and copies thereof shall be provided by 15th January 2004 to the Respondent by the Applicant.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

1. The Applicant provides to the Respondent his list of Discoverable Documents and copies thereof. by 15th January 2004.

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

2003 WAIRC 10381

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ANTHONY MOORE, APPELLANT
	v.
	THE COMMISSIONER OF POLICE, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	TUESDAY, 23 DECEMBER 2003
FILE NO/S.	APPLICATION 1728 OF 2003
CITATION NO.	2003 WAIRC 10381

Result	Order issued
Representation	
Appellant	Mr J Moore on his own behalf
Respondent	Mr D Matthews (of counsel) on behalf of the respondent

Order

HAVING HEARD Mr J Moore on his own behalf, and Mr D Matthews (of counsel) on behalf of the Respondent, pursuant to the powers conferred on it by Part IIB of the *Police Act 1892* and the *Industrial Relations Act 1979*, the Commission hereby orders—

1. That the Appellant file two copies in the office of the Registrar, and serve one copy of the Notice of Application of Appeal on the Respondent within seven (7) days of the date of this order.
2. Within twenty-eight (28) days of the date of this Order the Respondent shall file three copies of an answer in the office of the Registrar and serve one copy on the Appellant.
3. The Respondent's answer shall set out—
   (a) The Respondent's reasons for deciding to take removal action, together with a summary of facts or issues of law relied upon by the Respondent including any relevant matters set out in s 33Q(4) of the *Police Act*; and
   (b) any matters the Respondent wishes to raise in reply to the Appellant's case.
4. At the time of filing an answer, the Respondent shall file in the office of the Registrar and serve on the Appellant—
   (a) a list and copy of all materials that were examined and taken into account by the Respondent in making his decision to take removal action; and
   (b) a copy of the notices given by the Respondent under section 33L(1) and (3) of the Police Act 1892.
5. Within twenty one (21) days of filing an answer the parties shall file with the Registrar
   (a) a list and copy of any new evidence agreed to be adduced by consent of the parties; and
   (b) a list and copy of any other new evidence sought to be adduced and the grounds on which leave will be sought to tender that evidence.
6. Liberty to apply.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

NOTICES—Appointments—

FILE 64/2000

REGISTRAR

Pursuant to Section 95 of the Industrial Relations Act,1979 the designated Deputy Registrar shall be Mr John Rossi for the period 4 January-3 February 2004 inclusive.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

(Sgd.) J. SPURLING,
Registrar.

NOTICES—Cancellation of Awards/Agreements/ Respondents—Under Section 47—

GRAIN POOL OF W.A. ADMINISTRATIVE AND CLERICAL OFFICERS AWARD, 1978

No. 15 of 1978.

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—

Grain Pool of W.A. Administrative and Clerical Officers Award, 1978, No. 15 of 1978.

On the grounds that the Respondent named in the abovementioned award does not employee workers in the capacity as identified in Clause 3 – Area & 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 order.

Please quote 686/77/45 on all correspondence.

DATED THIS 17 December 2003.

JOHN SPURLING,
Registrar.

NOTICES—General matters—

NOTICE

The Registrar of the WAIRC wishes to advise its readers that as from January 2004, the format of the "Cumulative Digests" published at the back of the monthly Western Australian Industrial Gazette (WAIG) will change to incorporate "Catchwords Phrases" followed by the result of the Decision, Parties' Name, Application Number, Commissioner's Name, Date of Delivery and the page number where the Reasons for Decision is published.

Dated 7th day of December, 2003

(Sgd.) J SPURLING,
[L.S.] Registrar.

EXAMPLES

CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF THE INDUSTRIAL APPEAL COURT, INDUSTRIAL RELATIONS COMMISSION AND INDUSTRIAL MAGISTRATES COURT CONTAINED IN VOL. … PART …, SUB PARTS …..

NOTE: [1] Denotes Industrial Appeal Court Decision [3] Denotes Commission in Court Session Decision
[2] Denotes Full Bench Decision [4] Denotes Decision of President

[1]Practice and Procedure - Costs – Turns on own facts – Appeal discontinued and application for costs dismissed - Mr AG Matthews -v- Cool or Cosy Pty Ltd - IAC 5 of 2003 - Scott J, Parker J, Pullin J – 23/06/03 2749

[2]Unfair dismissal claim - Appeal to Full Bench - Summary dismissal not unfair – Misconduct Incompetence - Whether employer condoned misconduct – Dismissed - Mr RA James -v- Australian Integration Management Services Corporation Pty Ltd - FBA 55 of 2002 – Sharkey P, Coleman CC, Gregor C – 23/05/03 1387

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 - Mrs EV Jolley -v- Cecilia Wee, Director Sin-Aus - APPL 315 of 2003 - WOOD C - 31/10/03 559

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) - Ms S Lanza -v- Arrix Integrated - APPL 559 of 2003 – KENNER C – 31/07/03 4489

PUBLIC SERVICE APPEAL BOARD—

2003 WAIRC 10267

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH NORTHOVER, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF INDIGENOUS AFFAIRS, RESPONDENT
CORAM	SENIOR COMMISSIONER A.R. BEECH
	MR F. MARTIN - BOARD MEMBER
	MS J. BRIENNE - BOARD MEMBER
DATE	WEDNESDAY, 10 DECEMBER 2003
FILE NO.	PSAB 8 OF 2003
CITATION NO.	2003 WAIRC 10267

Result	Application for Discovery of Documents granted in part and for Further and Better Particulars dismissed.
Catchwords	Practice and procedure – Discovery, inspection and production of documents; Further and better particulars – Orders made – Industrial Relations Act 1979 (WA) ss 27(1)(o)
Representation	
Applicant	Mr J. Dasey
Respondent	Mr R. Andretich (of counsel)

Reasons for Decision- Application for Discovery of documents and further and better particulars

1 This is the unanimous decision of the Board: The substantive matter before the Public Service Appeal Board is an appeal by Mr Northover against the decision to terminate his employment made on 25 August 2003. The Notice of Appeal was filed on 27 August 2003. On 24 September 2003 the Civil Service Association of WA Inc on behalf of Mr Northover requested that the matter be referred to the Public Service Appeal Board for hearing and determination. On 28 October 2003 the appeal was listed for hearing for 22 and 23 December 2003.

2 On 25 November 2003 the union filed two applications. The first application is for the discovery, production and inspection of all documents in relation to the matter before the Public Service Appeal Board concerning the termination of Mr Northover (the discovery application). The second application seeks an order for the respondent to provide further and better particulars as detailed in a schedule attached to the application (the particulars application). The schedule states that the particulars shall be in relation to Mr Northover's Termination of Services effective 25 August 2003 in connection with unexplained substandard performance allegations, the complaint an alleged breach of the code of conduct and code of ethics. It then seeks the answers to 60 specific questions.

3 Both applications were opposed and accordingly the Board, reconstituted for the purpose, convened and gave both parties an opportunity to be heard. At the conclusion of the proceedings, the Board indicated that the discovery application would be granted in general terms and that the particulars application would be dismissed. This was the unanimous decision of the Board and what follows are the reasons of the Chairperson for reaching that decision.

4 On behalf of Mr Northover, the union submitted that the particulars application related to the letter terminating Mr Northover's employment. This letter, a copy of which was passed to the Board during the proceedings, is headed "Termination of Services". The union argued that it was therefore reasonable for the union to seek further and better particulars of the matters set out in that letter. It was submitted that the 60 points set out in the Notice of Application sought to address the three principal limbs of the grounds for the dismissal.

5 In relation to the discovery application, the union sought to have disclosed to it the documents relevant to the matters in the appeal. The union recognised there may be room for a difference of opinion regarding what is relevant to the appeal but the union believed it was entitled to seek discovery of the relevant documents held by the respondent. The union also stated that it is customary for discovery to be accompanied by an affidavit as to the completeness and accuracy of the documents provided.

6 For the respondent, Mr Andretich stated that the usual order for discovery was that documents in the power, custody or possession of the respondent relevant to the issue would be discovered. The respondent did not object to providing discovery on that basis. It is the respondent's decision what was or was not relevant to its decision to dismiss and if the union is not happy with the result of the informal discovery which it had offered (and which the union had refused) then further orders could be sought. Mr Andretich stated that there is supposed to be a question of trust between practitioners regarding such matters. He objected to the provision of documents upon affidavit unless there is sufficient reason for it to be done. No such reason has been identified by the union. Mr Andretich stated, by way of example, that one of the documents specified was Mr Northover's personal file. Mr Andretich stated that there may be many documents, for example leave applications, on a personal file which had no relevance to the decision to dismiss and which therefore ought not be encompassed within an order for discovery.

7 Mr Andretich submitted that the particulars application was oppressive. Much of what the union sought in its 60 points are matters of evidence. As such, they are matters which are to be the subject of evidence on the day.

8 Mr Dasey replied stating that discovery by affidavit was the normal and safe method of prescribing the production of documents and that an order imposes timeframes and gives enforceability. He also stated that the letter of dismissal is the core of the matter even if it is not yet in evidence before the Board.

9 The decision we have reached was based upon the following considerations. The principle that a party to proceedings is entitled to apply for an order the discovery of documents capable of being relevant to an issue in the case before the Commission is well established (*ALHMWU v Burswood Resort (Management) Limited and Others* (1995) 75 WAIG 1801 at 1805). Indeed, the respondent does not object to the provision of discovery and offered to do so on an informal basis.

10 On the application that is before the Board, the discovery, production and inspection of all documents in relation to the matter before the Public Service Appeal Board concerning the termination of Mr Northover is appropriate. An order in those terms will necessarily embrace the wording in the two dot points set out in the "orders sought" in the application. Accordingly, we would make that order and provide that the respondent discover and produce to the applicant all documents in relation to the

matter before the Public Service Appeal Board concerning the termination of Mr Northover within 7 days of the issuing of the order. The parties will have an opportunity to speak to the Minutes and address the Board on whether the 7 day period is appropriate.

11 On the submissions before the Board we would not order that the documents discovered be verified on affidavit. There is no suggestion that the respondent will do other than give full discovery. In a jurisdiction which is not bound by technicality or legal form we are not of the view that a party should routinely be ordered to provide discovery on affidavit.

12 The particulars application raises somewhat different issues. We have little difficulty concluding that Mr Northover would be entitled to ask for particulars of the letter which terminated his services if an allegation within it is too general or not intelligible. We are unable to see that the 60 specific questions posed in the particulars claim come within that entitlement.

13 Further, some of the questions may well be answered by the documents to be provided as part of the discovery process. In particular, the customer complaint referred to in the letter of termination is likely to be discovered, and therefore identified, as part of the discovery process.

14 For those reasons, we dismissed the particulars application. In the event that there remains a matter within the termination of employment letter which requires particularisation, this does not prevent the union from further applying for particulars on a more narrow basis.

15 The Minute of Proposed Order now issues.

2003 WAIRC 10280

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH NORTHOVER, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF INDIGENOUS AFFAIRS, RESPONDENT
CORAM	SENIOR COMMISSIONER A.R. BEECH
	MR F. MARTIN - BOARD MEMBER
	MS J. BRIENNE - BOARD MEMBER
DATE	THURSDAY, 11 DECEMBER 2003
FILE NO.	PSAB 8 OF 2003
CITATION NO.	2003 WAIRC 10280

Result	Application for Discovery of Documents granted in part and for Further and Better Particulars dismissed.
Representation	
Applicant	Mr J. Dasey
Respondent	Mr R. Andretich (of counsel)

Order

HAVING HEARD Mr J. Dasey on behalf of the applicant and Mr R. Andretich (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 within 7 days of the date hereof the respondent discover and produce to the applicant all documents in relation to the matter before the Public Service Appeal Board concerning the termination of Mr Northover.

(2) THAT the application for further and better particulars dated 25 November 2003 is hereby dismissed.

(Sgd.) A. R. BEECH,

[L.S.] Public Service Appeal Board.

NOTICES—Union matters—

NOTICE

FBM No. 001 of 2004

NOTICE is given of an application by the "Hospital Salaried Officers' Service Association of Western Australia (Union of Workers)" to the Full Bench of the Western Australian Industrial Relations Commission for an alteration to the Name rule,– Name of Union at Rule 1

The existing rule relating to the name is proposed to be altered name as set out below—

Delete Rule 1 – Name of Union which reads—

"**1 – NAME OF UNION**

The name of the Union shall be Hospital Salaried Officers Association of Western Australia (Union of Workers).";

and

insert in lieu thereof the following new Rule—

"1 – NAME OF UNION

The name of the Union shall be Health Services Union of Western Australia (Union of Workers)."

The matter has been listed before the Full Bench on 2nd day of March 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 January 2004