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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2004 WAIRC 13163

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BELL POTTER SECURITIES LIMITED
	APPELLANT
	-and-
	ROBERT GERALD CATENA
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 27 OCTOBER 2004
FILE NO/S	FBA 32 OF 2003
CITATION NO.	2004 WAIRC 13163

Decision	Appeal discontinued.
Appearances	
Appellant	No appearance
Respondent	Mr T J Carmody (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 27th day of October 2004, and there being no appearance on behalf of the appellant, and having heard Mr T J Carmody (of Counsel), by leave, on behalf of the respondent, and the appellant having filed a notice of discontinuance of the appeal, and the respondent not having objected to the discontinuance of such appeal and the parties having waived their rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 27th day of October 2004, ordered and declared:-

THAT there be leave granted and leave is hereby granted for appeal No FBA 32 of 2003 to be discontinued and the said appeal is declared to be discontinued.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2004 WAIRC 13052

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPELLANT** **-and-** BHP BILLITON IRON ORE PTY LTD **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 15 OCTOBER 2004
FILE NO	FBA 7 OF 2004
CITATION NO.	2004 WAIRC 13052

Catchwords	Industrial Law (WA) – Appeal against the decision of a single Commissioner – Matter not settled at conference and referred for hearing and determination – Unfair dismissal – Discretionary decision – Breach of Rules – Inattention and dangerous driving of locomotive – Contract of employment – Consistency in treatment of employees - *Industrial Relations Act* 1979 (as amended), s44, s49, s49(5)(c), s49(6a).
Decision	Appeal dismissed.
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr A Power (of Counsel), by leave, and Mr R Curry (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal by The Construction, Forestry, Mining and Energy Union of Workers (hereinafter referred to as "the CFMEU"), against the decision of the Commission, constituted by a single Commissioner, made on 3 February 2004 in application No CR 99 of 2003. The appeal is brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The decision is constituted by an order that the application made at first instance by the CFMEU be dismissed (see page 7 of the appeal book (hereinafter referred to as "AB")).

GROUNDS OF APPEAL

3 The CFMEU now appeals against that decision on the following grounds, which were twice amended:-

"1. In dismissing the application the Commission erred in the exercise of its discretion in that the Commission exercised it discretion on a wrong basis of fact, viz:

(a) that Hellmrich stopped his locomotive approximately 200 metres past the stop board when in fact the distance was less than 80 metres

(b) that Hellmrich offered no real explanation as to how the events occurred when, in fact, Hellmrich explained that he had deliberately proceeded through the stop board, believing, and reasonably though mistakenly so, that he had permission to do so.

(c) that Hellmrich had lost situational awareness of the position of his train when in fact he had not

(d) Hellmrich placed his train and the other train in grave jeopardy of a collision when in fact there was no risk of a collision

(e) that it was open for BHP to conclude in each of the situations dealt with in the Reasons for Decision that Mr Hellmrich had displayed a lack of situational awareness when, in fact, BHP did not consider that question nor make any conclusion about it

(f) that, in effect, Hellmrich only stopped the train as a result of the warning from Reaburn

2. The applicant and Mr Hellmrich were denied natural justice in that the Commission concluded, and decided the application on the basis, that Mr Hellmrich had lost "situational awareness" without that question being raised or argued in the proceedings.

3. In dismissing the application the Commission erred in the exercise of its discretion in that the Commission failed to take into account

(a) the bias of the respondent's supervisors in dealing with award workers of whom Hellmrich was one;

(b) the inequality of treatment of other employees in breach of the rules of the railroad as compared to the treatment of Mr Hellmrich

Relief sought:

An order quashing the order appealed from and an order in lieu that Mr Hellmrich be reinstated by the respondent without loss."

4 The appeal is against the whole of the decision.

5 The Commissioner at first instance heard two matters together, applications Nos CR 41 of 2003 and CR 99 of 2003. The reasons for decision encompass both matters. Both involved the parties to this appeal. They were referred under s44 of *the Act*.

6 However, appeals No FBA 7 of 2004 and FBA 8 of 2004 were heard, by consent, separately on appeal by the Full Bench.

BACKGROUND

7 The respondent is and has been engaged for many years in mining, transport and shipping of iron ore in the Pilbara region of this State.

8 The appellant represents engine drivers employed by the respondent and is an organisation of employees.

9 Much of the background to the industry and its rail operations and the regulation of those operations appear in *CFMEU v BHP Billiton Iron Ore Pty Ltd* (2004) 84 WAIG 1033 (FB).

Conference

10 The matter at first instance arose from a conference held on 17 June 2003 pursuant to s44 of *the Act*, which conference related to the dismissal on 24 March 2003 by the respondent of Mr Glenn Hellmrich, a locomotive driver employed by the respondent, on the grounds that he was unsuitable for continued employment because of alleged breaches of a number of railroad rules, regulations and procedures, in particular an allegation that he was involved in an incident on 22 March 2003 when he drove a train past a notice board displaying a stop aspect without authority.

11 The matter was not settled and was referred for hearing and determination. The memorandum of matters for hearing and determination under s44 of the schedule appears hereunder (see pages 9-10 (AB)):-

> "*1. The applicant's member, Mr Glenn Hellmrich, was dismissed by the respondent on 24 April 2003.*
>
> *2. The applicant says that the dismissal was on the grounds that Mr Hellmrich was said to be unsuitable for further employment by reason of, inter alia, an alleged breach by Mr Hellmrich of unspecified railroad rules, regulations and procedures, on 24 March 2003.*
>
> *3. The applicant says that in all of the circumstances, including Mr Hellmrich's length of service, the particular incident and Mr Hellmrich's person circumstances the dismissal was unfair.*
>
> *4. The applicant claims reinstatement of Mr Hellmrich and compensation for loss of earnings.*
>
> *5. The respondent says that Mr Hellmrich was involved in an incident on 22 March 2003, including the driving of a train past a notice board displaying a stop aspect without authority. It is alleged that Mr Hellmrich failed to comply with a number of railroad rules, regulations and procedures.*
>
> *6. The respondent says that after conducting an investigation into the incident and considering all the matters raised by Mr Hellmrich, it considered that Mr Hellmrich was, in all the circumstances, unsuitable for further employment.*
>
> *7. The respondent says it dismissed Mr Hellmrich with payment in lieu of notice and denies that it did so unfairly.*"

12 Before the Commissioner at first instance were a number of transcripts of radio conversations, a document showing train configurations and a number of other documents. In addition, there was tendered to the Commissioner the investigation reports relating to three separate incidents. There were witness statements and also viva voce evidence.

13 The matter was then arbitrated and the decision of the Commissioner made after the hearing to which I have referred above.

FACTS

14 In this case, and at all material times, the respondent has mined iron ore at Mt Whaleback near the town of Mt Newman, and also at Jimblebar and Yandi. They are all serviced by a railway track which begins in Port Hedland and ends at Newman, 427 kilometres from its point of origin. The track distances mentioned begin at Port Hedland for the Newman track and at Finucane Island for the Yarrie track. Iron ore is carted to the port at Port Hedland by trains which are pulled by one or more locomotives driven by one driver. Sometimes there are three or four locomotives, all controlled by the driver in one locomotive by a very sophisticated control system. They may pull one or two hundred iron ore cars carrying loads weighing thousands of tonnes. Control is exercised over the passage and activity of trains, locomotives and traffic on the railway lines by traffic controllers by radio from Port Hedland, with several controllers operating on each shift and responsible for various parts of the rail operations.

15 The respondent also mines ore at Yarrie and Nimingarra, and these mines are serviced by the Yarrie line which is the Yarrie-Boodarrie line. There are a number of junctions, of course, in the system. The closest to Newman is Jimblebar Junction (hereinafter called "JBJ"), the south end of which is located at the 401 kilometre mark. Yandi Junction is located at the 275 to 286 kilometre mark. Goldsworthy Junction between the Newman and the Yarrie line is at the 13-14 kilometre mark on the Newman line. The line from Newman then goes to the Port Hedland yard from which the ships are loaded. The Yarrie line ends at the Yarrie loading place, 203 kilometres from Finucane Island. On the track journey it passes through Rubin Junction where the Nimingarra track spur joins the main Yarrie line. The Yarrie line crosses the Newman line at the Goldsworthy Junction and then proceeds to the Boodarie rail depot and then to Finucane Island.

16 The trains are loaded in the Newman yard and then depart on a downgrade from Newman. They then proceed from Newman at 421 kilometres past Orebody 25 at 409 kilometres to JBJ at 401 kilometres. The JBJ also enables access from the spur to the Jimblebar mine. The Junction consists of two parallel roads, the entry road from Port Hedland through the JBN3 signal at 393 kilometres to 1A Road. There is a switch (51 switch) to 2A Road. There are stop boards on 1A Road at 397.267 kilometres and on 2A Road at 397.43 kilometres. There is 3700 metres of track in both 1A and 2A Roads. The roads are protected by stop boards which are red and which indicate in writing that no train can pass them without first obtaining authority to do so from a train controller. They are easily legible on the evidence. 2A Road becomes 2B Road from a stop board located close to switch 53 and 1A Road becomes 1B Road on the other side of the notice board near switch 54B. 2B Road is 3495 metres long and the adjoining road is 3400 kilometres. The spur from Jimblebar connects via switch 56 and a train entering from Jimblebar mine can be diverted through that switch to 2B Road. A train from Newman can enter 2B Road through switch 57. A switch used to be called "points".

17 At the time of this incident, the BHP Iron Ore – Pilbara District Railroad Rules and Regulations 3rd Edition ("the Rules") were in force. They have since been replaced. However, the Rules are required to be known and complied with by train controllers and locomotive drivers.

18 The railway system is controlled using CTC, which is a system of railroad operation, in which the movement of all railroad traffic through a designated section of track is directed by signals and switches that are controlled electronically from a central point. The track covered is known as CTC territory. On the Newman-Hedland rail CTC is maintained using a system of electronic signals and switch controls. On the Yarrie line the system of control ((ie) maintaining of separation between trains on the track) is by use of the train order system. The train order is a written authority issued by a traffic controller authorising the movement of railway vehicles in non CTC territory or in CTC territory when there is a system failure. S5 of the Rules relates to signals and their uses.

19 Under the CTC system, the operator of a vehicle on the railway must treat the absence of a fixed signal indication where one is normally located as a stop signal. Red is, of course, indicative of a requirement to stop. If a fixed signal is to be varied or supplemented, the train controller must make sure that it is varied or supplemented by an order in accordance with regulation 8.3.

20 On the Newman-Hedland line trains must obey the visual signals as they present, otherwise they must operate in accordance with the orders issued by CTC. Once it is issued, a CTC order cannot be amended and will remain in effect until fulfilled or cancelled. Radio is the main means by which traffic controllers transmit CTC orders, but other forms of communication may be used if required. The crews receiving the CTC orders are required to write them down and repeat the message to traffic controller to verify the content.

21 If a signal cannot be cleared because of equipment failure the traffic controller is to issue a CTC order authorising the driver to pass that or any other signal affected within the limits of the order and proceed.

22 When a train is stopped on the main line the driver may not dismount from the cabin until the CTC has advised directions for making the train safe from moving. This involves the application of handbrakes.

23 The General Appendix to the Iron Ore - Pilbara District Railroad Rules and Regulations provides information relating to the definitions and functions of equipment. Trains use an airbrake system which consists of a series of mechanisms and components necessary to formulate a pneumatic brake for retarding or stopping the locomotive and individual cars of a train. The system consists of air compressors, control valves, piping brake cylinders and brake rigging. The most drastic form of brake application is emergency braking. The next is a full service application.

24 BHP uses and used in this case, an investigation system and report system known as ICAM. The aim of this system is to provide a consistent framework for the investigation of accidents. The investigator is required to identify basic causes and contributing factors and to draw key learning experiences from those causes and factors. The investigation is to be conducted by a team and the process is required to be described in the report. There is to be a detailed description of the incident from the persons involved, including a description of the incident areas together with the sequence of events. The ICAM system was used in this case by BHP.

Facts and Considerations

25 Mr Hellmrich was a senior driver, a level 5 driver, with 33 years' experience.

26 It is, of course, the duty of an engine driver employed by the respondent to know and abide by the operating rules which are made under the authority of and approved under the Mines Regulations (see *CFMEU v BHP Billiton Iron Ore Pty Ltd* (FB)(op cit)).

27 At about 11.30pm on 21 March 2003, Mr Hellmrich sought authority to depart Newman for JBJ, driving a 15,000 tonne train on the Newman-Port Hedland line. He had loaded the train at the Newman loader. He was in the first of two locomotives pulling 99 cars. He was given that permission and given permission to proceed to the 2B Road at JBJ and it was clear for him to do so. That is, he was authorised to depart 1 Road Newman for JBJ and initially to 2B Road which was clear by the train controller, Mr Peter McShane, at Port Hedland. This, however, did not constitute an authority to pass the stop board. The order was acknowledged by Mr Hellmrich who departed Newman yard for JBJ at about 11.55 pm and was given no further instructions by Mr Trevor Emmitt, the controller who had come on duty.

28 The conversation with Mr McShane and Mr Hellmrich reads (see page 327 (AB)) reads:-

> "PM Roger Glen. Clear to depart 1 road Newman for JBJ. Initially it will be 2B clear road.
>
> GH Clear to depart 1 road Newman that was 2B was it, clear road.
>
> PH That's affirmative.
>
> GH Right call you on departure Peter."

29 Then immediately after Mr McShane spoke to another driver, Mr Derek Bourne, and said (see page 327 (AB)):-

> "PM 2339 Derek. Stop board only on 2A.
>
> DB OK Peter as far as the stop board only."

30 Later, at about midnight, Mr McShane seems to have been replaced by Mr Trevor Emmitt as the train controller. Mr Hellmrich admitted after the event that he thought he had the all clear to go through the first stop board at Jimblebar. Stop boards are red and have white writing on them. One is not allowed to go through a stop board and as the stop board read, one can only go through it with the permission of a train controller. From what Mr McShane had said to him, Mr Hellmrich thought, as he said, that he had that permission. He did not. After what he received what he thought was that permission from Mr McShane, he heard nothing from Mr Emmitt. Mr Tony Reaburn, the co-ordinator and an experienced engine driver himself, was also present at JBJ and also communicated by radio. The job of the JBJ coordinator is to tell the drivers what they are doing in the junction as well as to coordinate the train movements in the yard, but the Hedland train controller is still in control of movements in the junction.

31 When he left the mine for JBJ, Mr McShane told Mr Hellmrich that 2B Road at JBJ was "clear road". As I have said, he took that as permission to proceed through the stop board, he said. He did not obtain permission to go through or expressly ask for that permission.

32 There are three crossovers to allow movement between 1A and 2A, and 1B and 2B. The crossovers are designated as 52A, 52B, 54A, 54B, 55A and 55B.

33 At 00:21:23, in response to a request from Mr Hellmrich, Mr Emmitt told him "Clear from 2 road over to 1A road and 54 Crossover". At 00:29:20 Mr Emmitt gave Mr Tom Forrest, driving train 69, permission to go clear past the stop board on 2B Road to OB 25. This was the same road on which Mr Hellmrich was to travel. Those conversations occurred on radio channel 1.

34 When he advised at 00:10:47am his arrival at JBJ, his arrival being at 00:10 or 12.10am, that was merely acknowledged by Mr Emmitt as distinct from what was said to be "the usual practice of advising what point to proceed to". When Mr Hellmrich arrived at JBJ, he was to shunt and pick up a number of other iron ore cars to add to his train. When he arrived, he also advised his arrival on channel 39 of the radio. Mr Hellmrich had entered JBJ "many times".

35 About the same time as the authorisation was given, another train consisting of two locomotives on the front, two locomotives in the middle, and approximately 200 empty cars arrived in JBJ and came to stand at the 2A stop board before 52B switch. This train was facing Mr Hellmrich's train as it entered 2B Road. It was driven by Mr Thomas Forrest. All of these events occurred just before or after midnight.

36 JBJ is about 10 kilometres in length overall, running approximately north/south (see page 34 (AB)). The junction consists of two parallel rail tracks which are designated as 1A road and 2A road, north of the office, and 1B road and 2B road south of the office. 1A becomes 1B at about the office and 2A becomes 2B at that point as well.

37 At 00:19 he passed the stop board which was visible on 2B Road, as were the switches 500 metres away. A stop board under the rules is red, which is the stop colour for railway signs. It was common ground under the rules that a stop board cannot be passed by a train or rail vehicle without the controller's express permission. The stop board in this case was red and on it was written in clear white lettering what I have just said, that is, that one is required to stop at the stop board unless permission is given by a controller to go past it.

38 Mr Reaburn advised him of the details of the movement to be carried out. He assumed that he had permission, he said, because he thought he had been told by Mr McShane, but mainly by Mr Reaburn, together with Mr Emmitt's failure to say anything about where to go in the junction, that he was clear to go past the stop board. On the basis of all of that, Mr Hellmrich said that he believed that he had permission to proceed through the stop board and he maintained that position throughout the subsequent investigations by company managers, Mr Anthony Holland, Mr John Ireland and Mr Robert Jolly (see pages 31-35 (AB)). He was not cross-examined on this point at the hearing. He himself admitted in evidence that the usual practice for him was that he would advise train control that he had arrived at JBJ. Train control would then give him the arrival time and direct him to proceed to whatever point in the junction train control wanted him to go to. However, he said that Mr Emmitt gave him the arrival time only but he knew from Mr McShane that he was to go down 2B road.

39 The train or driver coordinator, Mr Reaburn, at Jimblebar, is not a train controller and does not have the overall powers of a train controller, but is a former locomotive driver himself. Mr Reaburn told Mr Hellmrich that the back of his train was sitting on 1B Road at the crossing, that he would be asked to move over the 52 crossover to the 1A Road from 2B and would be counted back for the setback to pick up the second half of the rake. That is, he was to back his train down the branch and connect up the other rail cars and take his train on. This meant that he would transfer, as I have observed, from 2B to 1A. This was because the train of 100 cars, with another locomotive which he was to pick up, was standing on 1A road on the other side of the crossover. He acknowledged the proposed shunt. By the time he arrived at JBJ, two trains were already occupying sections of the track. One was occupying 1B Road, another was occupying 2A Road. Thus, when Mr Hellmrich drove his train onto 2B Road he had a train on his right hand side and directly in front of him at the notice board on 2A Road was the other train, driven by Mr Forrest. The only authority he had at that time was to proceed up to the stop board. He saw the stop board. He did not and had not obtained permission from the train controller to pass it and, because he did not, he should have stopped.

40 It is important to locate the relevant stop board. It is and was before the 54 crossover on 2B road. As Mr Hellmrich was approaching the 52 crossover which is and was before the 54 crossover, and of course before the stop board which was before the 54 crossover, he was required to stop and the stop board if he did not have permission to pass it.

41 Mr Hellmrich also said that, as he was travelling along the track, he saw a green light ahead of him and the second switch too was set to go straight ahead. He did not deny that the switches were visible 500 metres away. He said that he therefore came up to the stop board in order to check the switch and went through the stop board. This was an explanation not offered until well after the event. At the time he said that he was travelling slowly and decelerating and that the train was on a straight track on level ground with good visibility.

42 Mr Hellmrich gave evidence that, as he entered JBJ, the train was travelling at 50 – 60 kph, but slowing down, and as he approached the crossover points 54A and 52B, the train was travelling at about 30 – 35 kph. He also noticed, he said, the lights on both points ahead of him were green which showed that the points were set for straight ahead. Otherwise, the second point should have been set at yellow. He went on to say in evidence that this did not seem right to him because, while 54A should have been green, 52B should have been orange to show that it was switched for a crossover. He could also see a train standing on the track on the other side of 52B, that is, straight ahead of him. He therefore brought the train to a stop, stopping only 200 to 100 odd metres from the other train, Mr Forrest's train.

43 Mr Hellmrich was given no permission to pass the stop board, and this meant that the train controller did not know that his train had proceeded past 54A switch stop board and into the 2A Road extension which is what occurred. The 52B switch was not set towards the turnout but straight ahead, and that meant that any movement past that switch would be directly towards the train which was already standing on 2A Road. At that time, Mr Reaburn, according to his statement, saw that Mr Hellmrich had proceeded past the 54A switch stop board and that the 52B switch was set straight ahead and yelled a warning to him on channel 39 shouting words to the effect "Hold it Glen, hold it! Look out!" There was some dispute about whether he cried that warning before or after Mr Hellmrich commenced to brake. That was said before he stopped or as he was stopping. This was about seven minutes after his last conversation with Mr Reaburn. It is to be noted that he did not apply his emergency brakes because, as he said, it was not necessary and indeed the train stopped short of collision without applying the emergency brakes.

44 Mr Hellmrich, however, applied a full service application of his brakes bringing his train to a standstill approximately 100 metres short of the other train, Mr Forrest's, and approximately 200 metres past the board. He then set his train back behind the switch by a rapid engagement of the throttle lever to notch 5 and without obtaining the permission of the controller, Mr Emmitt, although he was required by the Rules to do so. He did so, he said, because he had overshot the stop board. By "set back", it is meant "to reverse". He asserted in evidence that he knew that there was no train behind him and that therefore it was safe to push back over the 54 crossover. This, he said, was necessary to allow 52B to be set for crossover. In particular, he said, that there was no danger of any damage to BHP's plant and equipment. He then proceeded over to 1A Road, a fair distance away, bringing the whole train clear of the crossover, then he brought it to a stop. It was then that Mr Reaburn,

having been directed to do so, pulled up alongside Mr Hellmrich's cab and told him that he had to take Mr Hellmrich for a drug and alcohol test because "there had been an incident".

45 It is clear that almost immediately after he had come to a stop Mr Hellmrich set the train back beyond the 2B stop board, and did so without permission, and then asked for the line to be shut so that he could shunt and take on the cars which he was to take on. He explained that he had set back because he had overshot the stop board. Mr Reaburn informed the traffic controller that Mr Hellmrich had passed the stop board and that he had set back onto 2B Road; and, further, that he had not given Mr Hellmrich permission for the train to pass the stop board or for the train to set back.

46 In his witness statement in reply (see page 37 (AB)), Mr Hellmrich said that, when he passed through the stop board, the first signal at 54A was set at green, which was correct for the movement which he was to carry out. However, he said that the second signal at 52B was set green for straight ahead, whereas it should have been yellow to show that it was set to take the train to 1A. He said that, on seeing that the signal was set for green, he allowed the train to approach the switch so that he could see whether the switch was correctly set or not. He then ascertained that it was not correctly set and brought the train immediately to a halt, applying a full service application of the brakes. This explanation did not occur in his original hand written report given soon after the event. He did add that an emergency application was not operationally necessary and that his train was never seconds away from disaster. Indeed, he repeated that the train was perfectly safe at all times because he was vigilant in looking ahead and the train was travelling slowly and slowing down.

Investigations

47 An investigation of the incident then took place on 24 March 2003 (see page 305 (AB) et seq).

48 Mr Hellmrich wrote a report about the incident which was included in the investigation report (see page 319 (AB)). He said that he had finished loading the train at Newman and called Mr McShane on the radio and was given permission to depart "Newman for Jimblebar Junction 2B clear road". When he arrived at JBJ he called Mr Emmitt who gave him the arrival times. He then spoke to Mr Reaburn who said that he would count him back. Significantly, he gave no further instructions.

49 There was a report about the incident to Mr Gary Taylor from the train controller at Goldsworthy dated 22 March 2003 at 12.16am and reporting that Mr Hellmrich did not ask if he could give him permission to pass the stop board (see page 320 (AB)).

50 Mr Reaburn's written statement was to the effect that at 12.10am he told Mr Hellmrich that he was to go from 2B to 1A and that he would count him down. He also said that Mr Forrest was his 1700 T/L and Mr Forrest proceeded to walk to his train on 2A. He went into the office to prepare Mr Hellmrich's speed sheet with his train details. Then, according to Mr Reaburn's statement, he went outside and saw Mr Hellmrich's train approaching the high rise crossing on 2B. He then noticed, too, that number 52 switch was set against him and he called him on channel 39 to hold it there and called to Mr Forrest to look out. The train stopped and then set back. There were discussions between Mr Emmitt and Mr Reaburn and he then informed Mr Hellmrich that he was taking him from the locomotive for a drug and alcohol test.

51 There were reports and statements, including statements from Mr Reaburn and Mr Hellmrich. The complaints against Mr Hellmrich were as follows (see page 333 (AB)):-

- "Locomotive Driver Hellmrich failed to obtain permission from the Mainline Traffic Controller to proceed beyond the Stop Board. (Bulletin 53), (CT 8.22.1, 8.22.2), Regulations (4.5.5), (4.5.10) Rule (4.5.5)
- Locomotive Driver Hellmrich did not have Authority to pass the Stop Board on 2B road. (Bulletin 53), GA (CT 8.22.1, 8.22.2), Regulations (4.5.5), (4.5.10) Rule (4.5.5)
- Locomotive Driver Hellmrich applied the Automatic Brake to full service instead of emergency. Regulation (4.1.3) Rule (4.5.5)
- Locomotive Driver Hellmrich once stopped, set back into 2B road without permission. GA (CT 8.22.2)
- Locomotive Driver Hellmrich placed the throttle very quickly into notch 5 immediately after stopping, while the brakes were still releasing. Regulation (4.1.3)
- The misuse of the throttle caused unnecessary shocks and the potential to cause severe in-train forces resulting in possible drawgear failures. Regulation (4.1.3)."

52 On 23 March 2003 the employer held a disciplinary inquiry into the incident. Present were Mr Holland, Mr Hellmrich, Mr Warren Johncock as union representative, and Ms Cherie Daniel.

53 In answer to a question about whether Mr McShane gave him permission to depart Newman for JBJ 2B clear road, he said that as he approached the 52 crossover he noticed that the indicators were all green and not set for the crossover. Mr Hellmrich said that he immediately brought the train to a stop and pushed back clear of the 52B switches. He said that he was instructed by Mr McShane that he was "clear to depart Newman, clear road onto 2B".

54 Mr Hellmrich said that his understanding of what a stop board meant was that it meant that one stopped and got permission from the train controller to go past it. He said that you do not go past it without permission (see page 335 (AB)).

55 Significantly, Mr Hellmrich said that he thought he had permission to pass the stop board at JBJ on the night in question. This he said was because Mr McShane had given him permission clear to 2B. He said that Mr Emmitt had given him an arrival time and that when he did not say anything he thought that he, Mr Hellmrich, had a clear road. Thus, when he rang Mr Reaburn, Mr Reaburn said that he would count him down. He said also that he knew that the empty train was standing in the clear road. He explained that when he realised that he had exceeded his authority, he applied the brake and brought the train to a stop. He went on to say that his train was under control and he knew that it was at a stop and he was aware of the empty train. He also said that he had no permission to set back, and did so because he overshot. He said that he knew that he had a clear road behind him. He also said that he was unable to see the stop board on 2B Road, but would have been stopping as he went past it (see page 336 (AB)). He also said that he did not consider that by his actions, he placed at risk the safety of the driver on the empty train, himself or company property. Mr Hellmrich also said that because he had not received any other instruction, he thought that he had the road and was given the 52 crossover.

56 Mr Hellmrich went on to say that normally when you answer, they, the controllers, tell you the extent of the movement, and that he thought that he had permission. It is noteworthy that at the meeting of 1 April 2003, which constituted part of the disciplinary inquiry and at which were present Mr Holland, Mr Hellmrich, Mr Warren Johncock as union representative, and Ms Cherie Daniel, Mr Hellmrich admitted that when one came to a stop board, one is required to stop and get permission to go past it (see page 335 (AB)). He repeated that Mr McShane had given him permission. He also said that, because he had not received anything, he thought that he had the road and was given the 52 crossover. He added that when Mr Emmitt did not say

anything, he thought that he had permission. He agreed that it was a misunderstanding of a radio message. He said that next time he would call train control and get permission and, if he did not get the controller, he would bring the train to a stop at the stop board, or even before (see page 337 (AB)).

57 A further meeting took place on 10 April 2003, at which were present Mr Holland, Mr Hellmrich and two other persons.

58 On 17 April 2003 Mr Hellmrich wrote to Mr Michael Darby, the respondent's vice-president, railways, where he said that to dismiss him would be unfair, and, inter alia, said "I do not wish to downplay the seriousness of my actions …" (see page 341 (AB)). Mr Ireland's evidence was that, even though he may not have been involved in many incidents in 30 years, Mr Hellmrich had been involved in one major incident (the Good Friday derailment) and two minor incidents (the heavy shunt incident and the R18 collision) within the past year. He also added that, obeying signals and the limits of authority granted by the train controller is essential and basic driver competence. He said, too, that he did not consider it acceptable to miss issues like signals and limits of authority because of the central importance of signals and limits of authority to safe working on the railway (see page 99 (AB)).

59 On 24 April 2003 he was orally advised of his dismissal, and on 24 April 2003 Mr John Ireland, the manager of rail operations, signed a letter of that date to him which gave notice of dismissal, and which, formal parts omitted, reads as follows (see page 344 (AB)):-

> "I refer to the disciplinary investigation conducted on 1 April, 10 April and 16 April in relation to the events of 22 March 2003.
>
> That investigation found that you failed to comply with a number of railroad rules, regulations and procedures.
>
> Your failures in this regard seriously compromised the safety of yourself and others, and exposed the rail operations to the potential of substantial damage.
>
> In all the circumstances, including the written warning dated 1 May 2002, and having considered all the matters raised by you the Company considers that you are unsuitable for further employment and your employment is terminated in accordance with clause 9(3) of the Award with a payment in lieu of notice.
>
> Please contact HR Assist on 1800 247 772 to finalise the procedural aspects of the termination of your employment."

60 He said also that, at all times, he was alert and had the train under full control, and there was no risk of damage or injury, and that, at all times, he was vigilant as he was required to be.

61 He asserted that the train was never seconds away from disaster (see page 37 (AB)). He reiterated that he had, at all times, believed from the combination of instructions and discussions with the two train controllers and the yard co-ordinator that he had authority to pass the stop board.

62 It is quite clear that permission to proceed past the stop board can only be obtained from the train controller who is the only person who has authority to authorise traffic movements in JBJ.

63 There was evidence for the respondent from Mr Geoffrey Charles Jolly, supervisor, rail transport, and Mr John Charles Ireland, the then acting manager, rail operations. It was Mr Ireland who made the decision to recommend to Mr Darby that Mr Hellmrich be dismissed after Mr Holland recommended that Mr Hellmrich should be dismissed. He and Mr Holland made comments in evidence as experienced railway operators, as did Mr Jolly, about Mr Hellmrich's evidence that drivers can never assume that they have permission to pass a signal displaying a stop aspect. Mr Ireland said that it is a fundamental safe working requirement that drivers always obtain the requisite permission before proceeding past a signal displaying a stop aspect. Further, as a trained and experienced level 5 driver, Mr Hellmrich knew or should have known that the information which he had received from the co-ordinator was just a shunting strategy and that the driver co-ordinator had no authority to grant him permission to go past the board. He knew that he had no permission from the train controller to go past the board, and the directions on the board are clear, namely stop unless you have permission from the train controller. The fact that the train controller did not provide further instructions upon his arrival at JBJ did not excuse Mr Hellmrich's failure to obtain permission from the train controller before passing the board.

64 The train controller had not set the 52B switch for 1A Road, which is a good reason why he may not have given Mr Hellmrich further instructions, Mr Ireland said. Mr Hellmrich, he said, also should have been aware that the 52B switch was not set for 1A Road from the switch indicator beside that switch, which is visible at a distance of 500 metres. Mr Hellmrich's claim that the train controller was unclear was, Mr Ireland said, unjustified.

65 Mr Ireland went on to say that Mr Hellmrich's breaches of the rules were very serious because he had seriously compromised the train separation system relied on in JBJ, and, in doing so, had compromised his own safety and that of Mr Forrest, and exposed the rail operation to the potential of substantial damage. Further, the breaches of the rules committed by him were similar to the earlier incident, the Good Friday derailment, in which he had been involved, and it involved him also in exceeding the limit of his authority by failing to comply with clear instructions (a stop board and a train order) to stop; and it involved him in moving his train without permission from the train controller after having exceeded his authority. This meant that Mr Ireland did not trust him as a driver anymore. This is because it is essential to be able to trust a driver because failing to follow the procedures relating to the train separation system has one of the greatest potentials on the railway to have a catastrophic effect. This is because of the size and weight of the trains running, and because drivers, particularly level 5 drivers, work alone without direct supervision for a long time in remote locations, and are operating machinery worth millions of dollars. Mr Hellmrich was an unacceptable risk to himself and other personnel working on or about the railway.

Previous Incidents

66 Mr Hellmrich is a long term employee of the respondent. There was no record of incidents early in his employment, but on 6 January 2002 the first of three incidents occurred, which were investigated and findings significant to the conclusions which the Commission ought to draw were made.

67 On 6 January 2002 there was a collision between road vehicle R18 and ore cars at the ore car repair shop road. The accident was investigated and an investigation report was issued. Mr Hellmrich was working as a yardman and piloting a shunting movement of 21 ore cars into the ore car repair workshop. Three of the ore cars and the road vehicle collided. It was found that Mr Hellmrich, by his own admission, did not ensure that the vehicle was not obstructing the track before the shunting movement took place, nor did he stop the movement when he noticed that the vehicle was obstructing the track. There was extensive damage to the road vehicle.

68 As a result of the investigation on 10 January 2002, an email was issued to all rail transport drivers, technicians, shunters and track machine operators, drawing attention to their obligation to apply operating rules and signals and the relevant provisions of the General Appendix as it applies to shunting.

69 In March 2002 he was involved in an accident involving the derailment of an ore car at the West Hardie switch. After a detailed investigation, he was ordered to be retrained in the train order system, the ATP, the node system, the use of the radio and in ore car faults. He was also to retrain in management skills and the proper use of the brake system.

70 On 24 May 2002 there was another collision at the 9 Road north yard reception area where Mr Hellmrich was working as a yardman. The inquiry found that he did not stop movement when he saw damage to equipment or work was imminent, in breach of regulation 4.1.3. Nor did he ensure that his personal protection and safety equipment was working before the commencement of the tasks, and, further, he, along with others, did not report the incident to the yard controller. He was counselled and retrained.

71 The Commissioner at first instance concluded, having compared these incidents, that there was a breach of fundamental rules of the railway system by Mr Hellmrich for which he offered no reasonable explanation. There was a proper and detailed investigation of the incident. He had committed a serious breach of the rules in 2002 at Hardie for which he had been retrained. These deficiencies were repeated at JBJ on 23 March 2003. These were serious deficiencies in all of these incidents in a driver. He had been retrained, and, notwithstanding that, had committed this breach. He was not unfairly dismissed and the application should be dismissed.

ISSUES AND CONCLUSIONS

72 This was a matter where the Commissioner had a discretionary decision to make. It was a discretionary as defined in *Norbis v Norbis* [1986] 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194. Thus, it was for the CFMEU on behalf of its member, Mr Hellmrich, to establish that the Commission at first instance had erred in the exercise of its discretion and that the exercise of the discretion had miscarried, in accordance with the rules laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC)).

73 If that is not established, then the appellant provides no warrant to the Full Bench to interfere with the exercise of the discretion at first instance, and, in particular, to substitute the exercise of the Full Bench's discretion for that of the Commissioner at first instance.

74 In this case, the Commissioner at first instance also had the benefit of seeing the witnesses and determined the matter to some extent on credibility. The principles in such matters are clear and have recently been reinforced by the High Court of Australia in *Fox v Percy* (2003) 197 ALR 201 (HC). *Fox v Percy* (HC) (op cit) expressly approved what was said in *Devries v Australian National Railways Commission* [1993] 177 CLR 472 at 479, 482-483 and in other cases.

75 The Full Bench as an appeal court is required to show appellate respect for the advantages of Commissioners at first instance and especially where their decisions might be affected by their impression about the credibility of witnesses whom the Commissioner at first instance sees, but the appellate court does not (see *Fox v Percy* (HC) (op cit) at page 208). However, as the court also said, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another, does not, and cannot prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases, incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous even when they appear to be, or are stated to be, based on credibility findings (see *Fox v Percy* (HC) (op cit) at pages 208-209 per Gleeson, Gummow and Kirby JJ).

76 It was made clear to the Full Bench in submissions that, whilst his belief in the circumstances was mistaken, it was entirely understandable that he should hold such a belief and that was the case at first instance. The Commissioner at first instance, of course, found that he offered no real explanation as to the events and clearly found that he lost situational awareness which meant, as I understood it, on a fair reading, that he did not know where he was and what he was doing.

77 The Commissioner found that there was a grave danger of a collision on the track. That was against the background of what happened.

78 Mr Hellmrich also said that he was travelling along the track, he saw the stop board, it was suggested that the board was clearly legible and visible and not disputed, and it prevents a person going on without the consent of the train controller. He saw a green light and was not sure whether behind it was a yellow light or another green light and he came up to the stop board in order to check and went through it, he said. He did not think to get out at the stop board, stopping his train there. His evidence was that he was travelling slowly and decelerating, that the train was on the straight track on level ground and there was good visibility. He eventually stopped the train by the use of a full penalty application of the air brakes, but not an emergency application. He stopped at a distance of between 100 and 200 metres from and short of a stationary train driven by Mr Forrest, which was ahead of him. It was, of course, brought to a halt by the driver without having to make an emergency brake application, and stopped therefore clear of the other train ahead of him on the same track.

79 There is clear evidence that, at one point, Mr Reaburn shouted over the radio "Hold it Glen, hold it there", and there was a great deal of argument about whether that warning was shouted before Mr Hellmrich started to brake or whilst he was braking. Whatever the rights of it were, it is clear that, as an observer, Mr Reaburn was attempting to prevent a collision. The danger of collision arose of course because Mr Hellmrich went through the stop board without permission. It was submitted that loss of situational awareness was not a reason for his dismissal or holding that the dismissal was not unfair.

80 What Mr Hellmrich did immediately after the train stopped, either 100 or 200 metres from the stationary train dead ahead of him, was to back up, that is to reverse his train immediately back so that he was not intruding past the stop board. He did so without knowing whether there was anyone or anything behind him, but on the understanding that, as he had come up there, there was nothing there. None of that was denied.

81 He did so also contrary to the regulations because he was not entitled to reverse the train like that without the consent of the train controller and he had no such consent.

82 There was eventually an ICAM enquiry and he was dismissed because it was the view of his superiors that he had created a grave danger of a collision by going through the stop board.

83 There was some argument about what speed he was doing and that in fact it was faster than he said. There was reference to the radio transmissions which were produced in evidence. There was no evidence from Mr Forrest or Mr Reaburn who were eye witnesses to what occurred, the only evidence being from the managers who dealt with Mr Hellmrich's dismissal, Mr Jolly, Mr Ireland and Mr Holland, none of whom saw what occurred and all of whom were involved in the decision to dismiss him.

84 It was submitted that the real answer in this matter was that Mr Hellmrich made an error and the matter was caused by his error in believing that he had permission to go through the stop board from Mr McShane. It is to be noted, however, that the alleged permission given by Mr McShane, if it were given, which it was not, was given about 10 minutes before Mr Hellmrich went through the stop board.

85 It was also a large part of the CFMEU case that he was in fact vigilant, although against him was the evidence that said that he was not vigilant because he required a warning to stop from Mr Reaburn, that there were no radio communications to Mr Reaburn to explain what he was doing between the time that Mr Hellmrich confirmed the details of the proposed shunt at 10.47 hours and the warning from Mr Reaburn at 17.28 hours (see page 327 (AB)).

86 In addition, so the submission went, the fact that the 52B switch indicator can be seen from behind the board for up to another 500 metres as opposed to from after the board where Mr Hellmrich claims to have seen it and his continued progress towards Mr Forrest's train, SN2110, in front of him when the switch indicator was green, was said to be factors which made it clear, as Mr Holland said, that Mr Hellmrich could not have been vigilant during the incident.

87 As to the setting back without authority, Mr Hellmrich failed to offer any real explanation of his actions, even though he knew at the time that he required authority to set his train back. However, he did seek to justify his action in setting back without authority in his witness statement on the basis that he knew that there was no train behind him and it was necessary to allow the switch to be set to the crossover. It still does not explain why he thought he could set back without authority in breach of the rules.

88 Further, he did not say how he knew there was no train behind him. He failed to explain that he could not see the back of his rake of trucks at the time he set back. He failed to deal with the question of whether personnel on rail mounted traffic, etc, might have been behind him and his attempt at justification relies upon the assumption that all trains, personnel and other rail means of traffic remained static and did not move from the time that he entered JBJ. Thus, it was open to find that Mr Hellmrich offered no real explanation about why these events occurred.

89 There was evidence from Mr Hellmrich himself that he was vigilant and it was contained in his witness statement in this matter. In this case, it was clear that the momentum of his train would have carried him beyond the point where the brake was applied, that once he exceeded the limit of his authority, he was in an emergency situation and he should have made every physical attempt to stop as quickly as possible. Of course, he did not stop in time. Further, there is no real credible explanation as to why he rolled up to the switch to check it by going through the board. Next, his response in setting back quickly and without consent was indicative of an awareness that he had gone through the board and should not have. In relation to the switch, he could have checked that by stopping at the board and checking with the train controller or walking up to it. There was no evidence that the switch indicator was malfunctioning or that there was reason to suspect that it was.

Other Incidents and Conduct Submitted to be Comparable

90 A major part of the case for the appellant was that he had been treated unfairly as against the manner in which contemporaneously or in recent times, other drivers, Mr Gregory Brandis, Mr Dominic Yap, and Mr Dennis Robinson had been treated for breaches of company rules and discipline. Mr Yap, on 7 March 2002, deliberately overrode the safety mechanism of the ATP which cannot be done without the consent of a train controller. He continued to override it past seven nodes, during which time he breached five temporary speed restrictions and five switch nodes and did not inform the train controller that the system was not operating normally. He only stopped his train when the train controller, in response to a panel alert from within the train, directed him to stop at node 3. It was found that his actions compromised his safety and that of other drivers and he was suspended for three days. This incident lasted over some distance and for about an hour. Similarly, Mr Robinson's safety mechanism for the ATP was not working and, even when he found that it was not working, he continued to leave it in override for some distance.

91 Mr Robinson, as he admitted himself, was the driver of a train which went through a stop board towards an area where there was a lot of railway traffic because he was filling in his diary and setting his crib out on a ledge and not paying attention. He was not dismissed.

92 In September 2002 a train driven by Mr Robinson passed a stop at Goldsworthy Junction. Mr Robinson, although he was treated as if he had had a lapse of concentration, actually was distracted because he was arranging his crib when part of it fell on the floor and at the same time was filling in his diary. He did not recover until he saw signal GJ8 at red and was unable to stop the train until he had passed some 100 metres beyond the signal. He also was not dismissed because he was said to be open and honest and therefore he was suspended only. The submission was that Mr Hellmrich had been unfairly treated because he had mistaken the clearance which he had received.

93 There was no evidence of whether there had been any previous incidents in respect of which disciplinary measures were taken.

Previous Incidents involving Mr Hellmrich

94 There were three previous incidents attracting disciplinary measures in which Mr Hellmrich had been involved. In January 2002 it was found, on his own admission, that he did not ensure that a vehicle was not obstructing the track when he was shunting, nor did he stop the movement when he noticed that the vehicle was obstructing the track and there was extensive damage to the road vehicle with which his vehicle collided.

95 On 6 January 2002, he parked a motor vehicle so that it protruded onto a line and was struck by rolling stock. He was given a written warning and directed to attend counselling.

96 On 29 March 2002 he was involved in an accident involving the derailment of an ore car at the West Hardie switch and, again he was ordered to be retrained in the train order system, the ATP, the node system, the use of radio and in iron ore car faults. He was also to retain in management skills and the proper use of the brake system. He had been warned in writing by Mr Darby in relation to the West Hardie incident, the second, of Friday, 29 March 2002, as follows:-

> "Should you be involved in any conduct of a similar nature in the future, you will be subject to further disciplinary action up to and including termination of your contract of employment."

(See Mr Darby's letter to Mr Hellmrich of 1 May 2002 (page 198 (AB)) in which Mr Darby also notified him of his suspension for a period of three days.)

97 On 24 May 2002 there was another collision at the 9 Road north yard reception area where Mr Hellmrich worked as a yardman. The enquiry found that he did not stop movement when he saw damage to equipment and works was imminent in breach of regulation 4.1.3, and, further, that he did not ensure that his personal protection and safety equipment was working safely before the commencement of the tasks and, further, that he did not report the incident to the yard controller. He was counselled and retrained and not otherwise disciplined.

98 I will refer to these incidents in more detail hereinafter.

Conclusions

99 There was a great deal of evidence adduced in this matter, none of it by calling eye witnesses to the incidents to give evidence on behalf of the respondent. There was also a number of written statements and a great deal of documentary evidence. The factual mosaic was not a complex one.

Observations on the Facts

100 Mr Hellmrich said this in essence. He believed on reasonable grounds that he had authority to go through the stop board and that having done so it was necessary for him to set back and safe to do so because he knew from his journey in that there was no train behind him. What was submitted was that the appeal could not be successful unless each event in the series was adequately explained, and that the explanation for each event was reasonable and plausible. The case was that this was not a reasonable explanation because Mr Hellmrich was an experienced driver who had been into JBJ many times before and stopped behind the notice boards, and that he knew that the words on the notice board required him to stop unless he had permission from the train controller.

101 Mr Hellmrich understood what the requirement was of a stop board, the requirement to obtain a controller's permission to go past the stop board, so the submission for the respondent went. As an experienced driver, he should have been aware of the limit of his authority, and that the driver co-ordinator could not grant him permission to proceed past the board. He certainly understood that he was to go to the end of 2B Road rather than 1A Road where he intended to go. There was no authority given to him to proceed past 2B Road to 1A Road. There was nothing about the train controller's communication, that he had only granted Mr Hellmrich permission to proceed to 2B Road, which was misunderstandable.

102 There was no mention of 1A Road. Mr Hellmrich had received indications from the switch indicators which, together with the fact that SN2110 was directly in front of him, should have reinforced the fact that he did not have authority to pass the board. Of course, the switch indicators can be seen behind the board for up to another 500 metres away. Therefore, his explanation was inconsistent with his experience, his understanding of the rules and notice boards, his understanding of the system in place at JBJ, his understanding of the instructions which he had been given, and the indications that he had received from the switch indicators, and therefore his explanation was entirely implausible.

103 In addition, his explanation of his actions after he passed the stop board were inconsistent with his explanation that he thought that he had permission to pass the board and supported the learned Commissioner's view at first instance that Mr Hellmrich offered no real explanation about how the events occurred. In particular, he knew that he should have obtained authority to set back his train and failed to do so (see page 178 of the transcript at first instance (hereinafter referred to as "TFI")). He gave no explanation about this. He went through the first four notches very quickly and accepted in evidence that when performing a shunt he would have used a lower notch normally. It was therefore open to conclude that Mr Hellmrich was aware that his train was where it should not be, and that was the most likely explanation why he immediately instigated a high powered set back without authority. He also said that he rolled up to the switches to see if they were properly set, but his original handwritten statement said nothing about that. Similarly, he said nothing about that at the disciplinary hearing on 1 April 2003 (see pages 180-182 (TFI), and page 334 (AB)). He said clearly at page 319 (AB):-

> "As I was approaching the 52 crossover I noticed that the indicators were all green and not set for the crossover. I immediately brought the train to a stop."

104 Nothing was said about this while the investigation took place.

105 There was no suggestion by Mr Hellmrich that the switch indicator was malfunctioning or that there was any reason to suspect that the switch indicator was malfunctioning.

106 No reason was given why he could not have complied with the notice board requirements by walking to the switch to check or checking with the train controller. Thus, there was no plausible basis for Mr Hellmrich's assertion that he only rolled forward to check that the switches were, in fact, set as per the indication for the switch indicator. Part of his explanation was that his train was perfectly safe at all times because he was being vigilant in looking ahead and the train was travelling slowly and slowing down. Thus, his subsequent and immediate breach and response in setting back was indicative of an awareness that he was involved in some wrong doing and the lack of any plausible explanation why he did not roll up to the switch to check it. There was an attack on his failure to apply the emergency brake when he was in an emergency situation because the momentum of his train would have carried him past the point where the brake was applied and once he exceeded his limit he was in an emergency situation. Further, so the submission went, having exceeded the limit of his authority, he should have made every effort to stop as quickly as possible.

107 There is no evidence that he was vigilant, and, indeed, it is against the weight of the evidence, so the submission went, because there was a warning to stop from Mr Reaburn required.

108 There was no radio communication until then for about seven minutes, and the fact that the 52B switch indicator can be seen before the board and he continued towards SN2110 when the switch indicator was green, demonstrated that he was not paying attention.

109 As to the setting back, he had no real knowledge that nothing was behind him when he set his train back.

110 It was open to the Commissioner at first instance to find that Mr Hellmrich failed to offer any real or reasonable explanation about the events, the subject of these proceedings.

111 It should be observed that Mr Hellmrich, on his own admission, committed two breaches of rules, and these breaches resulted in his dismissal. Therefore, he was in breach of two rules and that warranted some action in this case. What he did was to exceed his authority and pass a stop board without the authority of a traffic controller. Whatever the explanation, he committed a breach of that rule. His explanation was that he thought that he had received permission from Mr McShane before he went to JBJ and some 15 minutes before he went through the stop board. Once he went through the stop board he braked and had to come to a stop 100 metres from a stationary train ahead of him. He set back immediately, that is reversed, so that he was not past the stop board, because, as he explained, he had overshot the board, which he had. He knew, and the board itself confirmed this, that one cannot pass a stop board without a train controller's permission to do so, and one could not pass this stop board without that permission. He clearly saw a stop board ten minutes after the alleged permission given to him and did not obey the sign. He did not expressly ask for that permission, and he did not have that permission. He also knew that one cannot set back without a train controller's permission. He obtained no such permission. His only explanation was that because of what he saw on his way towards the junction he was of opinion that there were no trains behind him. He did see the stationary train ahead of him on the same line, however.

The Concept of Dangerous Driving

112 The evidence of the witnesses for the respondent characterised his driving as dangerous.

113 Whilst this sort of driving is not to be characterised according to the definitions of driving at a speed or in a manner dangerous in the road traffic statutes, in this country, some assistance can be derived from the notion of dangerous driving in characterising his driving. Whether his driving is dangerous or not is an objective matter and is fixed in relation to his duty as an employee and his duty to other users of the railway (see *R v Coventry* [1938] 59 CLR 633).

114 It is not necessary that his driving was dangerous to constitute a breach of his duty as an employee. A breach of rules, which are valid commands to him as a locomotive driver, as these rules are, is sufficient. However, if danger is a criterion to be adjudged in judging the seriousness of the act, which it was in this case, then it is necessary to know what the concept means. The question of danger can be judged by whether there is a real or potential danger arising of a substantial injury to persons or damage to property who or which might be reasonably expected to come into the vicinity of the train. A further question also may arise which is whether, in all of the circumstances, the danger is real rather than a purely speculative danger to persons in the vicinity of the railway on which the driver was driving (see *Morton v Bevis* (1993) 19 MVR 181 (SC WA)).

115 It is dangerous if the act done is one which any reasonable person in the situation of the driver would recognise as dangerous in the sense that it involves the risk of injury to others which exceeds the ordinary risk of the road and amounts to a real danger to the public (see *McBride v R* [1966] 115 CLR 44).

116 It is well known that even momentary inattention can constitute dangerous driving. Similarly, in these circumstances, one would say that the same can occur in relation to driving a train.

Findings Open to be Made

117 I am of the opinion on the evidence, as I have outlined it above, that the following findings were open to be made and should have been made, either directly or by inference by the Commission at first instance. What on the evidence was clear and open to be found was this:-

(a) That Mr Hellmrich acted in breach of two important safety rules in the driving of his locomotive and in the control of the train being pulled by his locomotive and any other locomotives.

(b) That what he did constituted disobedience of rules approved under the Mining Regulations in the public interest and which he was bound to obey.

(c) That these were rules which he knew and was required to know as a locomotive driver and which he was required to comply with.

(d) That he failed to obtain permission from the traffic controller, as he was required to do, before passing a stop board.

(e) That he knew that this was what he was required to do.

(f) That he did pass the stop board, having seen it, without asking for permission to pass it, when it bore on it the clear requirement that one could not pass the board without the permission of the train controller.

(g) That he clearly said, at all relevant times, that he thought that he had such permission.

(h) That at no time was he given such permission by any traffic controller to go through the stop board, on a fair reading of the evidence and of the transcript of the radio transmissions, which I have reproduced above; nor could he reasonably have assumed that he had such permission from what was said to him. Even the fact that he was told that he had a clear road to 2B was not and could not be read as permission to go through the red stop board 15 minutes later. What was said was clear: there was a clear road to 2B.

(i) That when he was leaving Newman on the way to JBJ some 15 minutes elapsed after he was told by Mr McShane that it was a clear road to 2B. That alone would have been enough for him to be reminded that he should seek permission when he got to JBJ after 15 minutes, even if there was no other requirement, which there was. As he admitted himself, movements within the junction were within the control of the train controller.

(j) That it was open to the inference that Mr Hellmrich should have sought express permission to pass the board because the board required him to, the regulations required him to and because, even if he had been given permission by Mr McShane 15 minutes before, which he had not, to pass the board, it would be entirely wrong for him to assume that that permission existed for the next 15 minutes. In addition, it was entirely wrong for him to assume, if he did, that the line ahead of him and behind him would remain clear for that time or any time. In fact, the line ahead of him did not remain clear for that time.

(k) That he was not given any authority to go past the stop board or to go onto road 1A. (He did rely by analogy on direct leave being given to Mr Derek Bourne to travel up to a stop board). However, the rule is clear and the board itself is clear, and he should have complied with it and what was said to Mr Bourne was said to Mr Bourne. It did not constitute evidence that Mr Hellmrich was given leave to proceed or not given leave to proceed as the case may be.

(l) That he knew the rule and saw the board.

(m) That Mr Hellmrich's explanation that he stopped when he saw the green light followed by a green light was not credible, given that:-

i. He did not give such an explanation in his early report about the incident;

ii. It is not consistent with his earlier explanation of how the incident occurred;

iii. If he was serious about checking the lights or the switches, he would and should have stopped and done so and he did not.

(n) That, in this case, whatever else might have been said to Mr Hellmrich he was merely told that he was clear to depart Newman for JBJ.

(o) That he was told that "Initially it will be 2B clear road". He was only authorised to travel on 2B Road, not to pass any stop board within the junction. That authority was given at 23.38.32.

(p) That he arrived at the junction at 00.10.47am, which is about 30 minutes later.

(q) That at about 00:17:28am he was going past the stop board.

(r) That he received no permission to pass the stop board and that there was nothing which could be construed from the radio record as such. It could not be reasonably inferred by him that he had permission to pass the stop board.

(s) That, having regard to his knowledge of the rules and the junction and the procedure at the junction, it is not open to find that he reasonably should have believed that he had permission.

(t) That nothing that Mr Reaburn said, particularly since he was not a train controller and without the requisite authority, could properly be interpreted, particularly by an experienced driver like Mr Hellmrich, as authority to go past the stop board, given that he well knew that a controller's permission was required and the stop board reinforced that because of what it bore on it. Further, he himself admitted during the inquiry that he, Mr Hellmrich, was required to stop at a stop board and obtain permission to pass it and that that he would do so in the future. That evidence constituted an admission of what his duty was, irrespective of what he thought a train controller said 15 minutes before.

(u) That Mr Hellmrich drove through the stop board without permission even when he could see a stationary train on the track ahead of him; that was serious.

(v) That there was a risk of collision was clear from Mr Reaburn's urgent shout to him to "Hold it there Glen, hold it there. Look Out".

(w) That whether that warning was uttered before or after Mr Hellmrich started to brake is not of great consequence. It can be inferred that there was a risk of a collision in Mr Reaburn's mind because he found it necessary to shout that warning.

(x) That what is of great consequence is that Mr Reaburn saw it as necessary to shout a warning. Thus, it was inferable that he did so because he was afraid of a collision occurring.

(y) That Mr Hellmrich's train stopped 100 metres away from Mr Forrest's train and travelled past the stop board and was required to brake to stop, but it was required to brake more severely than normally.

(z) That the train was clearly under control to the extent that it did not require the application of an emergency brake either to stop or to stop in order to avoid a collision with Mr Forrest's train.

(aa) That a collision with Mr Forrest's train was avoided by the action which Mr Hellmrich took although the action was necessary because he passed the stop board without permission.

(bb) That Mr Hellmrich, as he expressed it, because he had overshot, immediately set the train back so that it was no longer protruding past the stop sign.

(cc) That Mr Hellmrich did so using more power than usual and without the permission of the train controller, whose permission he knew that he needed.

(dd) That Mr Hellmrich offered no explanation at all why he reversed or set back without permission.

(ee) That he did explain that there were no trains behind him and that is why he set back.

(ff) That that was not an explanation of why he did so without permission contrary to the rule, and, indeed, it is not at all clear how he could tell over the distance from his locomotive backwards past the rear of the train that the line was clear behind him in the junction so as to enable him to set back with safety. The manoeuvre which was done at unusually high throttle was therefore not only forbidden by the rules but risky.

(gg) That he did have sufficient control over his train so as to stop without having to apply the emergency brake.

(hh) That whatever speed he was travelling at, it was a speed which enabled him to pull up without using the emergency brake and without colliding with Mr Forrest's train.

(ii) That Mr Hellmrich knew, or ought to have known, that he was breaching rules by doing what he did.

(jj) That, alternatively, he did so know and his approach to the rules was exemplified by his setting back soon after, also without the leave of a controller.

(kk) That he gave no real or reasonable explanation therefore about why he failed to stop at the stop board or failed to obtain permission to pass it, and no explanation why he set back without permission.

(ll) That it was a fair inference from all of the facts and circumstances, having regard to the findings which it was open to make, that he was keeping no or no sufficient lookout and/or that the incident was caused by his lack of concentration, inattention and indeed lack of vigilance.

(mm) That, even if that be wrong, Mr Hellmrich had no reasonable basis on which to reach the understanding that he had permission from Mr McShane or anyone else to go through the stop board instead of stopping at it.

(nn) That he gave no reason at all for his breach of the rule requiring him not to set back without permission.

(oo) That Mr Hellmrich admitted to a degree of culpability in his letter to Mr Darby to which I have referred above.

(pp) That driving the train in this manner created a situation of danger, but not of grave danger, because he pulled up and was able to pull up 100 metres from another train, a stationary train, and going through a stop board immediately caused a risk of accident and collision. Stop boards are meant to reduce or avoid the danger of collision. Whilst the words grave danger is probably too harsh a criticism, there was potential danger and his driving was, on any reasonable objective assessment in accordance with the authority to which I have referred to above, dangerous.

(qq) That Mr Hellmrich committed two serious breaches of the Rules.

Previous Conduct of Mr Hellmrich

118 There is another consideration and that is Mr Hellmrich's previous conduct which contributed to the decision to dismiss him. (I have referred to Mr Ireland's evidence of this above.)

119 He has been employed for 33 years and only suspended once which is, on the face of it, without further examination, a good record.

120 These are the incidents.

121 On 6 January 2002 Mr Hellmrich parked a four wheel drive motor vehicle, not a railway vehicle, in such a way that it was foul of the car repair shop railway line at Nelson Point. It was damaged when the leading ore car of a train struck it. The investigation report of 7 January 2002 revealed that Mr Hellmrich did not ensure that the vehicle, called R18, was safe prior to his commencing a shunting movement. Further, he did not stop the movement of his train when he noticed that R18 was obstructing the track, and he was in no position to take action to halt the movement. He did not therefore stop the shunting prior to moving the vehicle. He was given a written warning and directed to attend counselling. The incident, according to the visible damage, was relatively minor and on its own could be of no great significance.

122 On 29 March 2002 Mr Hellmrich was involved in an incident when he ran though a switch at Hardie station on the Goldsworthy line ((ie) the line from Finucane Island to Yarrie mine) without authorisation and derailed an ore car (the Good Friday derailment). The inquiry found that he had committed a number of breaches of operating procedures, exceeding the authority of his train order in breach of regulations 11.7.1 and 12.3.9, not having a clear understanding of his train order in breach of regulations 12.4.7 and 12.5.1, and failing to ensure that the switches were correctly set. This incident resulted in costs and damages in an amount exceeding $415,000.00, which was not disputed in evidence before the Commissioner at first instance. In this case, inter alia, it was found that he was not absorbing the train controller's instructions, despite having been given a train order, and after having exceeded his authority he had moved his train without permission from the train controller. The respondent considered these breaches of the regulations were very serious, but decided that a written warning was appropriate, in all of the circumstances. Mr Hellmrich was suspended for three days without pay.

123 On 1 May 2002 (see page 198 (AB)) Mr Darby wrote to Mr Hellmrich to advise of the three day suspension and warn him of the prospect of disciplinary action for conduct of a similar nature, such disciplinary action included termination of his contract of employment.

124 On 24 May 2002 there was an incident involving a collision called a "Heavy Shunt Incident". Mr Hellmrich was working as a yardman and the rolling stock which he was in charge of was involved in a collision. He was counselled and retrained because he did not stop movement when he saw damage to equipment or work was imminent, did not ensure that his personal protection and safety equipment was working before commencing the task, and did not report the incident. He was not primarily responsible for the incident, but there was concern that he was not concentrating. Mr Hellmrich's evidence was that he had not been involved in any incidents whilst at BHP for which he had been held responsible, other than the derailment of the empty wagon in March 2002. His explanation was that this was a complicated shunting incident which he believed arose out of a misunderstanding of a train controller as a result of unclear instructions, he said. He did not refer to the other incidents.

125 The Commissioner at first instance found that he had displayed the shortcomings of failure to concentrate for some time arising from these incidents and was subjected to retraining, which, unfortunately, was involved in this incident. It was open to the Commissioner to so find, given particularly that the iron ore car derailment at Hardie involved also a misunderstanding of a controller and a setting back without permission, which is what occurred in this case. The Commissioner called it a lack of situational awareness, but the words of lack of concentration and of vigilance are probably more appropriate.

Alleged Comparable Incidents

126 Evidence was adduced, as I have said, on behalf of the CFMEU of three other incidents, which were said to be comparable, involving drivers employed by the respondent.

127 One involved a Mr Brandis who used the ATP override switch to override the ATP on 10 separate occasions without looking at the display to ascertain why it was sending an alarm. He was at the time driving a ballast train for about 100 kilometres from the 178 kilometre mark on the Yarrie line to Nelson Point. He went past a series of nodes until he passed node 3 which was set at stop and brought him to a stop. The driver was stood aside.

128 The next incident on 9 September 2002 involved a Mr Robinson who departed on a train order from Boodarrie at 6.55am. He noticed signal GJ7 at yellow and brought the speed of the train to below 35 kilometres per hour. However, after passing that signal, he had a lapse of concentration, so the inquiry found, when a can of drink, a part of his crib, fell off the front bench on the observer's side onto the floor. The driver was distracted and when he looked back saw that he was close to the signal at GJ8 which was red meaning stop. He applied a full emergency brake, but the momentum of the train took him 100 metres past the signal post. He was suspended and given a written warning. The Commissioner held that Mr Holland's finding that he was distracted when the soft drink can fell was wrong because Mr Robinson himself admitted that he was at the time preparing his lunch and writing in his diary. The Commissioner also found that this was an incident where the driver lost "situation awareness" and yet a view was taken by the employer contrary to the truth of what occurred and resulting in a finding that the distraction was minor caused by a can of drink falling. Thus, the employer had not even considered his own explanation, and thus, too, that driver was given a minor penalty.

129 The Commissioner at first instance failed to exercise his discretion correctly, because he failed to take into account the question of whether Mr Hellmrich's treatment was fair compared to the treatment of other drivers who committed similar breaches of the regulations.

130 That failure of the exercise of discretion enables the Full Bench to substitute its own discretion. The Commissioner noted in the context of Mr Cupak's case that Mr Holland had ignored the truth about Mr Robinson's incident. The Commissioner said that it was taken into account that Mr Robinson was open and honest, which he was. However, the Commissioner also noted that he was forgiven because of a very beneficial view of his conduct which it was open to find. That is a finding with which one could clearly agree. Mr Robinson failed to comply with a red signal entering a junction and applying his emergency brake. His failure to be vigilant and properly control his train was due to his engaging in an activity which he should not have engaged in, particularly in hazardous circumstances when approaching a red signal. His act was very dangerous.

131 Similarly, Mr Brandis who overrode the ATP until pulled up over 100 kilometres, 10 times, acted dangerously.

132 Both of these were comparable to Mr Hellmrich's act in their gravity, but Mr Brandis and Mr Robinson were treated leniently and unwarrantedly leniently.

133 Mr Yap's behaviour constituted a somewhat lesser breach of the rules from that of Mr Robinson and Mr Brandis and Mr Hellmrich.

134 In the case of all of these persons though there was no evidence of their work record. However, the only incident of a major nature involving Mr Hellmrich was the Good Friday incident. There was, however, evidence of two minor incidents involving lack of concentration. The Good Friday incident was, however, a serious incident which cost a lot of money and after which Mr Hellmrich was retrained in the train order system, the ATP, the node system, the use of the radio, ore car faults, management skills, and the proper use of the brake system.

135 In my opinion, he had been involved in two serious problems when the other employees had not, which involved two serious lapses of concentration. There were two minor lapses as well, and these were all in a short period of time. Thus, his long period of service without incident was negatived by four incidents requiring discipline in a brief period of time. The last incident involved two breaches of the rules, one of the same nature for the second time. Both breaches of the rules were also potentially dangerous. He had also received a final warning after the Good Friday incident and then committed a worse breach.

136 It was open to the Commissioner to find in this case at first instance that Mr Hellmrich had committed a breach of important rules for which he offered no reasonable explanation. He committed breaches of rules for which he had been retrained, and it was open to find that the errors were repeated and that the deficiencies in performance which had occurred previously were repeated.

137 The Commissioner found that it was open to conclude that in the West Hardie incident he had displayed a lack of situational awareness which, with respect, I would call a lack of concentration, which was quite severe. It was open to so find.

138 Thus, it was open to find that the serious incident at JBJ and the derailment at West Hardie can properly be attributed to lack of attention and confusion about what he was doing. The Commissioner correctly found that these were serious deficiencies for a driver and that Mr Hellmrich had "shown these flaws before". It was open to find, too, that his going through the stop board without permission and having to brake to avoid a collision with another train on the same track was dangerous. Similarly, his immediate setting back without permission and without evidence of a clear view behind him was also potentially dangerous. As a result, the Commissioner found that Mr Hellmrich's dismissal was not unfair. It is to be noted that, even though Mr Brandis acted dangerously, as did Mr Robinson, there was no evidence of previous events requiring a final warning or other discipline. Thus, on its own merits, the incident involving Mr Hellmrich justified dismissal both for its seriousness and of its evidence of a failure to concentrate and be vigilant. Again, I must observe that the treatment of Mr Brandis and Mr Robinson was unaccountably lenient, given the serious nature of their transgressions and which may have warranted dismissal. However, it was still open to find that Mr Hellmrich's behaviour, past and present, and the nature of the incidents in which he was involved, warranted dismissal and to dismiss him was not unfair, for the reasons which the Commissioner gave.

139 Further, it was fair because there was a failure to comply, in a dangerous manner, with two rules. However, even though the Commissioner erred in the exercise of his discretion by failing to take into account the treatment meted out to Mr Robinson and Mr Brandis which was a relevant factor, the treatment was not inconsistent within the meaning of *CFMEU v BHP Billiton Iron Ore Pty Ltd* (FB)(op cit) because their records of breaches were confined only to one breach and Mr Hellmrich had been guilty of two serious breaches.

140 I would therefore, for those reasons, observe that it is unnecessary for me to substitute my discretion for that of the Commissioner at first instance to find otherwise. I say that because, whilst the Commissioner erred in failing to take into account a relevant consideration, what the Full Bench should find is, in my opinion, for the reasons which I have expressed, what the Commissioner found, that the dismissal was not established to be unfair or was not unfair. I am not satisfied that the Commissioner erred in finding as he did for the reasons which I have expressed. There was no or no sufficient evidence to support ground 3.

FINALLY

141 I would also add in relation to the amended grounds of appeal that, whether the locomotive was stopped 80 to 200 metres in front of Mr Forrest's train, does not much aggravate or mitigate the seriousness of the breach. This is given the length of the trains and their weight. Further, I have already said that the explanation of the event which occurred was neither reasonable or adequate or credible and that Mr Hellmrich was inattentive, was not vigilant, and lack in concentration. He did place his train in some risk of collision, but not grave risk. However, the acts were dangerous.

142 In setting back the train without permission, as Mr Hellmrich had done once before, he deliberately acted in breach of the rules. He had no explanation for so doing. It is not to the point that the respondent may not have considered whether he had displayed a lack of situational awareness. The fact of the matter is that he had breached the rules and the Commissioner correctly made a finding as to the reason why. Again, too, whether he stopped the train as a result of the warning from Mr Reaburn or not is not clear, but it is clear that he was warned by Mr Reaburn whom, inferably, feared a collision.

143 Further, whether it was expressly raised as situational awareness in the proceedings at first instance or not, it is not to the point, for the reasons which I have advanced above. It seems to me that it was sufficiently raised and that, even if it were not, it would not be sufficient within the principles in *Stead v State Government Insurance Commission* [1986] 161 CLR 141 to say that any appealable error occurred.

144 For those reasons, I would find that the appeal should be dismissed, the dismissal not having been established to be unfair, according to the principles laid down in *Miles and Others t/a Undercliffe Nursing Home v FMWU* (1985) 65 WAIG 385 (IAC).

CHIEF COMMISSIONER W S COLEMAN AND SENIOR COMMISSIONER A R BEECH:

145 These are the joint reasons of Chief Commissioner Coleman and Senior Commissioner Beech.

146 The background facts to this matter have been set out in the Reasons for Decision of his Honour the President. Those reasons also express generally the reasons why, in our view, grounds 1 and 2 were not made out on the appeal. Although the use by the Commission at first instance of the words "situational awareness" was much criticised in the appeal, for the reasons set out by his Honour that criticism was not made out. The evidence that Mr Hellmrich proceeded past the stop board because he believed that he had permission to do so, that he was unaware that the crossover points had not been switched for crossover when that would have been apparent because the switch indicator is visible from the vicinity of the stop board, and his setting back the train without permission and doing so using a rapid engagement of the throttle lever to notch 5 contrary to the regulations are all consistent with a finding that Mr Hellmrich had showed a lack of attention to the task. Even if the words "situational awareness" had not been used during the course of the proceedings, their meaning does not appear to us to be inconsistent with these matters.

147 Further, although Mr Hellmrich was not dismissed for losing "situational awareness", he was dismissed for the consequences of doing so: passing the stop board without permission and setting the train back without permission. He did so because he was mistaken in believing he had permission to proceed past the stop board and he set back the train because he had overshot.

148 Different issues arise however in relation to ground 3. At first instance, the union argued before the Commission that the dismissals of both Mr Hellmrich and Mr Cupak were unfair when the penalties given to three other drivers, Mr Brandis, Mr Yap and Mr Robinson by BHPB for different, though similar, offences were taken into account. The Commission noted the circumstances of those three other penalties and decided the dismissal of Mr Cupak was unfair by reference to them. The investigation reports of the three incidents were put before the Commission and the Commissioner refers to them in paragraphs 51 to 57 (AB 17 - 18).

149 The Commission's decision was that in the case of Mr Cupak there was a breach of the rules involving passing a signal at red and that BHPB was entitled to treat the matter as a very serious incident. It acknowledged that BHPB's conclusions about the breaches it said occurred were correct and Mr Cupak was guilty of those breaches. Significantly, the Commission at first

instance then stated:

> "The issue to be considered though is whether the punishment which was applied to him, that is, the ultimate punishment an employer can impose which is termination of the contract of employment, was fair given the circumstances, not only of Mr Cupak's incident but how BHP applies the Rules generally when incidents of this nature occur on its track".
>
> (paragraph 72, AB 21)

150 The Commission then considered the dismissal of Mr Cupak against the circumstances of the penalties imposed upon Mr Brandis, Mr Yap and Mr Robinson. The Commissioner compared the circumstances and the penalty of Mr Cupak with the other circumstances and penalties reaching the conclusion that to dismiss Mr Cupak was "not a fair go all round given the whole of the way that BHP approaches driver discipline in its railway system" (paragraph 82, AB 23).

151 However, the Commissioner did not follow a similar approach in the case of Mr Hellmrich. His conclusions, (at paragraph 99, AB 26), do not refer at all to the penalties received by Mr Brandis, Mr Yap and Mr Robinson upon which the union relied. In the appeal, BHPB submitted that the analysis of the three penalties by the Commission in the Reasons for Decision as a whole was sufficient to show that the Commissioner took the incidents into account in relation to Mr Hellmrich. However, that submission cannot stand given the detail with which the three incidents were examined in relation to the dismissal of Mr Cupak. There would have been no need to have such a detailed examination if the earlier references had been sufficient for the Commission to reach a conclusion regarding the dismissal of Mr Cupak. It plainly was not sufficient as the detailed examination demonstrates. Ground 3 is therefore made out.

152 However, by s.49(6a) of the Act, the Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason. In the circumstances of this case, the comparison of the penalty of dismissal for Mr Hellmrich compared to the lesser penalties given to Mr Brandis, Mr Yap and Mr Robinson in their circumstances is able to be done by this Full Bench. This is because the evidence relating to Mr Brandis, Mr Yap and Mr Robinson, the conclusions of the Commission at first instance in relation to those three incidents as they relate to Mr Cupak and the circumstances of Mr Hellmrich's case were canvassed in considerable detail before the Commission at first instance and during the proceedings before this Full Bench. We therefore consider that the Full Bench is not unable to make its own decision on the merits of the case because of lack of evidence. We also do not consider there is any other good reason for the Full Bench not to make its own decision on the merits of the case.

153 In relation to Mr Hellmrich, the Commission at first instance noted this incident constituted a breach of fundamental rules of the railway system and that any explanation offered by Mr Hellmrich was not reasonable. It noted that there had been a serious breach of the rules in 2002 at West Hardie for which he had been re-trained but that the deficiencies for which he was re-trained were repeated in the errors he made in this incident. The Commission stated that the incidents arose due to a lack of attention to the task and confusion about what he was doing on the part of Mr Hellmrich. He concluded that these are serious deficiencies in a driver and created fundamental concerns for both his personal safety and that of other drivers and equipment on the track. These deficiencies had been displayed for some time. The Commission at first instance regarded the incident as being worse than the previous incidents.

154 The incidents involving Mr Brandis, Mr Yap and Mr Robinson with which the union sought a comparison of penalties occurred on the Yarrie line which has a different system of train control. However the evidence reveals that both Mr Brandis and Mr Robinson deliberately ignored the rules by, in the case of Mr Brandis, on 10 separate occasions during a journey overriding the safety system designed to protect the train from collision and in the case of Mr Robinson deliberately preferring to rearrange his crib and write up his diary for the day notwithstanding that the last signal he had passed was a yellow signal. In the latter case, if not the former as well, this was recognised as having "the potential for serious consequences" (FBA 8, AB 530). In the case of Mr Yap he overrode the ATP repeatedly without permission choosing to wilfully disregard the rules and regulations pertaining to the operation of the ATP. In all three cases, dismissal did not result. Rather, penalties of suspension and/or re-training occurred.

155 It is acknowledged that in Mr Hellmrich's case he disobeyed a primary method of train control, the red signal, whereas the three other incidents concerned breaching rules and regulations. That is, Mr Hellmrich proceeded to a part of the track for which he did not have permission whereas the three other incidents involved trains being on parts of the track for which they did possess a train control order. However, the overriding consideration, at least as it appears to us, is that in all four incidents, the safety systems designed to protect the train from collision were ignored or overridden.

156 Further, the point is well made by the union that in the case of Mr Hellmrich there was not deliberate overriding of the train protection systems whereas in the case of the other three incidents the actions of those drivers were in each case deliberate.

157 What is apparent from the evidence however is that notwithstanding Mr Hellmrich's 33 years' experience, since 2002 he has himself been involved in three incidents. One of these resulted in a written warning being given to him on 1 May 2002 (AB 198) which concluded:

> "Should you be involved in any conduct of a similar nature in the future you will be subject to further disciplinary action up to and including termination of your contract of employment."

158 The incident at Jimblebar Junction for which he was dismissed involved the lack of attention to detail inherent in an earlier incident and for which he had been re-trained. Retraining carries with it the implication that an incident of the same nature should not recur. The fact that it did is serious given the warning he had received.

159 Mr Hellmrich's length of service is a factor of relevance. He has been a driver for some 33 years with BHPB. Until 2002, at least on the information available to the Commission, Mr Hellmrich had an impeccable work record. However, this incident was a fourth incident in just over 2 years, an incident potentially more serious than the previous incidents but which represented a repeat of the lack of attention to detail for which Mr Hellmrich had already been re-trained. We do not consider that it has been shown that the dismissal was unfair by comparison with the other three incidents and accordingly would dismiss the appeal.

THE PRESIDENT:

160 For those reasons, the appeal is dismissed.

Order accordingly

2004 WAIRC 13051

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPELLANT
	-and-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 15 OCTOBER 2004
FILE NO	FBA 7 OF 2004
CITATION NO.	2004 WAIRC 13051

Decision	Appeal dismissed
Appearances	
Applicant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr A Power (of Counsel), by leave, and Mr R Curry (of Counsel),by leave

Order

This matter having come on for hearing before the Full Bench on the 24th day of May 2004, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant, and Mr A Power (of Counsel), by leave, and Mr R Curry (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision being delivered on the 15th day of October 2004 wherein it was found that the appeal should be dismissed, it is this day the 15th day of October 2004, ordered that appeal No. FBA 7 of 2004 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2004 WAIRC 13114

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	G & M PARTICINI TRADING AS BAYSWATER POWDER COATERS
	APPELLANT
	-and-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER P E SCOTT
DELIVERED	THURSDAY, 21 OCTOBER 2004
FILE NO.	FBA 22 OF 2004
CITATION NO.	2004 WAIRC 13114

Catchwords	Industrial Law (WA) – Appeal against decision of a single Commissioner – Contractual benefits – Driving a vehicle in the course of employment – Damages arising from an accident – Alleged miscarriage of the exercise of discretion at first instance – Adduce new or fresh evidence – Industrial Matter – Express or implied term of a contract – Implied indemnity term – Appeal dismissed – *Industrial Relations Act* 1979 (as amended), s7, s29(1)(b)(ii) – *Road Traffic Act* 1974, s62
Decision	Appeal dismissed.
Appearances	
Appellant	Mr C Fayle, as agent
Respondent	Mr T Pope, as agent

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal by the above-named appellant against the whole of the decision of the Commission, constituted by a single Commissioner, perfected on 27 May 2004 when it was deposited in the Registry in matter No CR 142 of 2003.

2 By that decision the Commissioner ordered the above-named appellant to pay to one Benedetto Coccaro the sum of $2,367.00 within 14 days of the date of the order, being a contractual benefit claimed.

3 The appellant now appeals against that decision on a number of grounds to which I will refer hereinafter.

4 The matter was originally the subject of the respondent organisation of employees' application on behalf of Mr Coccaro, who I assume is a member of the respondent organisation, and who was an employee of the appellant firm. As part of his duties he was required to drive a company vehicle on company business and deliveries.

5 On 16 January 2001 at about 5.30pm, Mr Giorgio Particini, a partner in the appellant firm, and Mr Coccaro loaded the firm's vehicle, a utility, with materials to be sandblasted. The materials were to be taken to premises about 400 metres away from the appellant's operations to be sandblasted and once sandblasted were loaded and returned to the appellant's premises. Mr Coccaro then re-loaded the utility with goods to be delivered to Louie's Flyscreens in Greenwood the next morning. However, he drove home with the load on and was to keep the loaded vehicle at home overnight, at Wanneroo where he resided, ready to effect delivery next morning.

6 He left the appellant's premises at approximately 8.10pm and at 8.20pm he was involved in a collision with a Laser motor vehicle on Malaga Drive, Noranda. What occurred was that, whilst driving on his normal route home, the utility being driven by Mr Coccaro ran into the back of a Ford Laser sedan which was broken down in the left lane of the dual carriageway on Malaga Drive. There was a third vehicle involved in the accident but it sustained no damage. Mr Coccaro was issued with a traffic infringement notice for careless driving under s62 of the *Road Traffic Act* 1974 as a result of the accident. The utility was owned by PGC Fabrications Pty Ltd, the previous owners of the appellant's business, but when the appellant took over PGC's operations Mr Particini was offered the utility as part of the business sale arrangements, and, even though PGC owned the utility, Mr Particini paid for the utility's licence and mechanical repairs.

7 It was not in issue that, on that evening, Mr Coccaro was travelling on his way from the appellant's premises to home and that his utility was loaded with the appellant's goods, powder coated screen doors and screen frames, for delivery to customers the next morning before Mr Coccaro came to work at the appellant's premises; nor, as the Commissioner at first instance found, that although it was about 8.00pm he was driving in the course of his employment. In any event, that he was driving in the course of his employment was not a ground of appeal.

8 The utility was damaged in the accident and had to be towed to Mr Coccaro's home. After the accident there were discussions between Mr Particini and Mr Coccaro about the damages arising from the accident. Mr Particini, according to Mr Coccaro, told him that, as the utility was not owned by the appellant it would not pay for any damage. After Mr Coccaro left the appellant's employment, the insurance company of the driver of the Laser, SGIO, contacted Mr Coccaro and said it had taken Mr Particini to court and was unsuccessful in obtaining money from him for the damage. The insurer therefore informed Mr Coccaro that he would have to pay for the damage since he was driving the utility. Mr Coccaro said that he did not contact Mr Particini at this time about this claim for payment as Mr Particini had previously told him on more than one occasion that the appellant would not be paying any money for the repairs to the Laser since Mr Particini believed that the utility's owner should have insured the utility and that would have covered the damage.

9 After he had received a letter of demand dated 15 October 2002, Mr Coccaro obtained legal advice and paid the total amount claimed and costs to the insurance company in the total sum of $3,156.00.

10 Mr Coccaro said that he was unaware of any local court action against him and Mr Particini by or on behalf of the Laser's owner. Part of the appellant's case was that, as Mr Particini had already paid approximately $4,400.00 to repair the vehicle driven by Mr Coccaro, that is the utility, then the appellant should not have to pay any more money arising out of Mr Coccaro's accident.

11 The appellant said that the driver of the Laser, which Mr Coccaro struck, should share some of the blame for the accident since it was illegally parked in the left lane of a dual carriageway and therefore the full amount of damage sustained to the Laser should not have been sought from Mr Coccaro.

12 The Commissioner at first instance held that the issue for determination in the case was whether or not the appellant should pay $3,156.00, being the amount that Mr Coccaro paid to SGIO for damages arising out of Mr Coccaro's accident with the Laser on 16 January 2001. There is no doubt that he was employed by the appellant at the material times and that he was driving the vehicle in the course of work related duties. There was no credible evidence to the contrary. The vehicle was not insured nor was it owned by the appellant, even though it was fully maintained by the appellant. However, it used the vehicle as if it were its own giving it to Mr Coccaro to use in the course of his employment as if it were his employer's vehicle.

13 The Commissioner decided that the dispute was an industrial matter and that Mr Coccaro had been allocated the utility for use under his contract of employment with the appellant.

14 Before the accident there was discussion about the utility's insurance coverage between Mr Coccaro and Mr Particini. The appellant was aware of the importance of insurance cover because Mr Particini confirmed that the vehicle was insured. Mr Particini paid $4,400.00 to fix the utility and therefore, according to the Commissioner, accepted that it was responsible for the utility. At all material times, the utility was not insured in respect of damage to it or damage caused to other vehicles by its driver.

15 The Commissioner found that the appellant had a responsibility to pay for the damages to the Laser arising from the accident on 16 January 2001 and should therefore be responsible for costs arising out of an accident involving the utility due to the utility not being comprehensively insured.

16 The Commissioner then went on to consider responsibility for the accident and found that 75% of the total cost paid by Mr Coccaro as result of the accident should be borne by the appellant, being an amount of $2,367.00 and ordered accordingly.

CLAIM

17 The claim by the respondent was that he was driving a motor vehicle provided to him by the appellant in the course of his employment and that it was a vehicle which he had been assured by the appellant was comprehensively insured. He was involved in an accident, causing damage to another vehicle in Malaga Drive, Noranda. That vehicle's insurance company pursued him, and, in response to its pursuit, he paid its claim in the sum of $3,156.00 for costs to the Laser vehicle with which the vehicle he was driving collided. He asked that the appellant pay him that money, but the appellant firm refused. As a result, he claimed the monies as monies payable to him by his employer pursuant to a contractual entitlement.

ISSUES AND CONCLUSIONS

18 Some grounds of appeal were directed to the alleged miscarriage of the exercise of the discretion at first instance. The decision at first instance was a discretionary decision as that term is defined in *Norbis v Norbis* [1986] 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194.

19 As to the discretionary decision, it is for the appellant to establish that the exercise of the discretion at first instance miscarried, applying the principles laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* (1992) 73WAIG 220 (IAC)). If it does not do so, there is no warrant for the Full Bench to interfere with the decision at first instance.

20 The Commissioner at first instance accepted the evidence of Mr Coccaro, and unless the appellant establishes that the Full Bench should interfere with that finding within the principles laid down in *Fox v Percy* (2003) 197 ALR 201 (HC), then the Full Bench cannot interfere with those findings.

Application to Adduce Fresh Evidence

21 There was an application on behalf of the appellant to adduce new or fresh evidence in the form of transcript of proceedings in the Commission before the Chief Commissioner in *Glasson and Bayswater Powdercoaters* (1999) 79 WAIG 270. The evidence was said to be evidence affecting and going to the credibility of Mr Coccaro. It was also submitted that it was not procurable by reasonable diligence before or at the hearing at first instance because credibility did not become an issue until after the evidence had been given. That argument holds no merit in that regard. The appellant knew or ought to have known that some matters of credit might arise. This matter might have been cross-examined upon, but was not. It might also have been adduced in evidence in chief through Mr Particini if necessary, but was not. The appellant sought to adduce transcript of evidence from that hearing in 1998. The evidence which was that Mr Coccaro may have had some interest in the appellant's business six years ago simply cannot be relevant to what he knew about whether a vehicle was insured three or four years later, when he did not have any such interest, nor was it suggested that he did.

22 In any event, Mr Particini, who gave evidence at first instance, knew or ought to have known what Mr Coccaro's position was for a period of four years and he gave no evidence about it all. Mr Coccaro was not asked any questions which might adduce such evidence in evidence in chief. There was no cross-examination of Mr Coccaro on the point, as I have said.

23 On all of the tests therefore laid down in *Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited* (1990) 70 WAIG 3040 (FB) and, more recently and very comprehensively, in *Hanssen Pty Ltd v CFMEU* (2004) 84 WAIG 694 (FB), the evidence was not adducible in the Full Bench and there was no merit in the application.

Was the Matter an Industrial Matter?

24 At first instance the Commissioner found that the matter was an industrial matter because it was decided on written submissions and not on sworn evidence that that was so. There was no necessity for such sworn evidence. The matter, on the "pleadings", did not require sworn evidence. It is quite simple. An employee drove his employer's vehicle and had an accident damaging another person's vehicle whilst the driver was driving in the course of his employment. He sought that his employer indemnify him in respect of the cost of repairs to the damaged vehicle for which he paid, claiming the same as a contractual benefit.

25 The claim is one which, within s7 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"), is clearly an industrial matter. That is because it demonstrably is a matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees in any industry or of any employer and employee therein, and, further, is a matter affecting or relating or pertaining to the relationship between an employer and an employee. The claim is also a claim for a contractual benefit brought pursuant to s29(1)(b)(ii) of *the Act* and is manifestly such a claim.

Implied Term

26 The crucial question in this matter is whether it was an express or implied term of the contract that Mr Coccaro be insured or indemnified against the claim made against him and which he paid. The Court of Appeal in New South Wales in *Rowell v Alexander Mackie College of Advanced Education* 25 IR 87 at 90 per Hope, Samuels and Mahoney JJA dealt with this question. Samuels JA in obiter, with whose reasons Hope JA agreed, said at page 90:-

> "Although I have some difficulty with the language in which other implications are formulated I would be much inclined to conclude that, as a matter of law arising out of the relationship of an employer and employee, a similar term is to be implied in every contract of employment under which a person is required to drive his employer's motor vehicle. It would be to the effect that the employer would maintain in force an insurance policy in standard form covering both the employer's and the employee's liability for damages for loss of or damage to property caused by the negligent driving of the insured motor vehicle by the employee in the course of his employment, and any damage so occasioned to the employer's own property; and to the further effect that the employer would exhaust its rights under the policy before seeking any recovery from the employee. This conclusion would be contrary to *Lister*. But I entirely agree with Wall DCJ that there is no ground for regarding that case as determinative of industrial conditions at the other end of the world thirty years after it was decided. I do not read the references to *Lister* in *McGrath v Fairfield Municipal Council* (1985) 156 CLR 672 as requiring any other course."

27 It is with respect a statement of the law which I would apply as a principle in this case.

28 In this case an employee was driving in the course of his employment, and, through his negligence, was involved in a collision. Mr Particini agreed that he had a discussion with Mr Coccaro about whether or not the utility was insured at some stage during Mr Coccaro's period of employment by the appellant insofar as that was material. In my opinion, he was denied the entitlement under the implied term of the contract to the contractual benefit of indemnity under a comprehensive insurance policy. The value of that indemnity was what he was denied. There is a further element in this matter which even strengthens

the case in that Mr Coccaro believed that he was driving a vehicle which was insured on the assurance of a representative of the appellant.

29 As a result, it matters not that the negligent driving of Mr Coccaro was an unlawful act or not, although I am not certain that it could be characterised as an unlawful act.

30 It was therefore established that he had been denied a contractual benefit which he claimed, namely payment by way of indemnity of the amount of monies which he had expended to meet the claim of the owner of the vehicle which he had damaged by his driving. The question of what apportionment of blame is not relevant. By the appellant's failure to indemnify him at the time, it lost the opportunity to deal with the question of apportionment. That was a matter determinable when the claim was made against Mr Coccaro. In my opinion, the amount of the claim should not have been reduced or negligence apportioned, but there is no cross appeal and therefore it does not fall to the Full Bench to determine that question.

31 As a result, the question of apportioning blame is entirely irrelevant and thus grounds 1, 2, 3, 4, 8 and 9 are entirely irrelevant and are not made out. Because of the nature of the implied term to which I have referred, ground 6 is not relevant to the determination of the matter and is not made out.

32 Since the evidence referred to in ground 7 was not admitted by the Full Bench, that ground falls away.

33 There was no other attack in the grounds of appeal on the findings of fact based on the Commissioner's view of the credibility of the witnesses and those findings whereby she accepted the evidence of Mr Coccaro therefore stand.

FINALLY

34 It was not established that the exercise of the discretion at first instance miscarried. No ground of appeal has been made out, for those reasons. For those reasons, too, I would dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN:

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

COMMISSIONER P E SCOTT:

36 I have had the benefit of reading the reasons for decision of His Honour, the President. I agree for the reasons he has expressed that the appeal be dismissed and have nothing further to add.

THE PRESIDENT:

37 For those reasons, the appeal is dismissed.

Order accordingly

2004 WAIRC 13107

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	G & M PARTICINI TRADING AS BAYSWATER POWDER COATERS **APPELLANT** **-and-** THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION OF WESTERN AUSTRALIA **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER P E SCOTT
DELIVERED	THURSDAY, 21 OCTOBER 2004
FILE NO/S	FBA 22 OF 2004
CITATION NO.	2004 WAIRC 13107

Decision	Appeal dismissed
Appearances	
Appellant	Mr C Fayle, as agent
Respondent	Mr T Pope, as agent

Order

This matter having come on for hearing before the Full Bench on the 6th day of August 2004, and having heard Mr C Fayle, as agent on behalf of the appellant, and Mr T Pope, as agent on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 21st day of October 2004 wherein it was found that the appeal should be dismissed, it is this day the 21st day of October 2004, ordered that appeal No. FBA 22 of 2004 be and is hereby dismissed.

By the Full Bench

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

FULL BENCH—Appeals against decision of Industrial Magistrate—

2004 WAIRC 13201

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL PENN
	APPELLANT
	-and-
	PATRICIA EDWARDS OF VERSCHUER EDWARD
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J H SMITH
DELIVERED	MONDAY, 1 NOVEMBER 2004
FILE NO/S	FBA 23 OF 2004
CITATION NO.	2004 WAIRC 13201

Catchwords	Industrial Law (WA) – Appeal against decision of Industrial Magistrate – Prejudgment interest – Unpaid leave wrongly deducted – Enforcement *MCE Act* 1993 – No penalty imposed at first instance – Payment of annual leave – Contract of employment – Caution imposed – Appeal upheld and decision at first instance varied – *Industrial Relations Act* 1979 (as amended), s32, s66, s83, s83B(5), s84 – *Industrial Magistrates' Courts (General Jurisdiction) Regulations* 2000, *Minimum Conditions of Employment Act* 1993, s7(c), s23(1)
Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr D Clarke, as agent
Respondent	Mr K Yin (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This was an appeal brought by the appellant against the decision of the Industrial Magistrate in the Industrial Court at Perth under s84 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The appeal is against Parts 1 and 2 of the order made on 18 June 2004 in Claim No M63 of 2004. Those orders read as follows (see page 21 of the appeal book (hereinafter called "AB")):-

> "1. The respondent shall pay to the claimant the amount of $211.15.
>
> 2. The claim is otherwise dismissed."

3 The appellant appeals against the decision on the following grounds, as amended:-

> "The Appellant submits that the Learned Magistrate erred in part of his decision whereby
>
> 1. The Learned Magistrate erred in accepting a document being Exhibit 8 which was compiled by the book keeper who admitted under cross examination that Exhibit 8 had mistakes made and sought to modify the Exhibit. The Learned Magistrate should have accepted the Claimant's document being Exhibit C under the weight of evidence submitted at the Hearing and no proper notice or weight should have been applied to the Respondent's Exhibit and the Appellant further submits that this Application by the Learned Magistrate was incorrect in applying the legal weight of the evidence submitted.
>
> 2. The Appellant submits that in the public interest this Appeal should be heard because the contractual entitlements due to the Appellant are still outstanding and the matter needs to be determined by the Full Bench.
>
> 3. The Appellant submits that the Learned Magistrate erred in not allowing the Appellant to submit and be heard on the matter of a penalty which was claimed by the Appellant at the commencement of proceedings in the Orders sought.
>
> 4. The Appellant submits that the Learned Magistrate erred in not allowing pre judgement interest to be heard by the Appellant.
>
> (Ground 4 was abandoned.)
>
> 5. The Appellant submits that the Learned Magistrate erred in not allowing the Appellant to be heard on costs in the matter and the Appellant further submits that the Respondent had no proper or logical defense (sic) to the claim before the Learned Industrial Magistrate and therefore the defense (sic) of the Respondent had no prospect of success and was of a frivolous and vexatious defense (sic) and the Learned Magistrate should have allowed the Appellant to be heard and costs should have been awarded to the Appellant.
>
> 6. The Appellant is seeking an Order from the Full Bench, to vary the Order of the Learned Industrial Magistrate in that $211.15 has been awarded and the balance of $2,557.97 be awarded to the Appellant.
>
> 7. The Appellant is seeking an Order from the Full Bench, to vary the Order of the Learned Industrial Magistrate and issue a penalty against the Respondent.
>
> 8. The Appellant is seeking an Order from the Full Bench, to vary the Order of the Learned Industrial Magistrate and award the Appellant pre judgement interest.

9. The Appellant is seeking an Order from the Full Bench, to vary the Order of the Learned Industrial Magistrate and award the Appellant costs."

4 By the claim filed in the Industrial Magistrates' Court under the *Industrial Magistrates' Courts (General Jurisdiction) Regulations* 2000 (hereinafter called "*the Regulations*"), the above-named appellant, as claimant, made application alleging that the respondent "failed to comply with an award agreement or order" and claiming the payment of $2,769.22 annual leave under the *Minimum Conditions of Employment Act* 1993 (hereinafter called "*the MCE Act*"), together with a penalty and pre-judgment interest. No penalty was imposed and no pre-judgment interest was ordered to be paid.

5 The claim for pre-judgment interest was abandoned by the appellant after the Full Bench had drawn her agent's attention to the decision of the Full Bench in *Foy v The Directors of Terraqua Pty Ltd* (2003) 83 WAIG 3319 (FB).

6 It should be observed that evidence that what the appellant says is the full amount of the appellant's contractual benefits were paid by the respondent by cheque on 9 August 2004 was relevant to the submission that the appeal was exhausted and was admitted. The sum of $211.15 was paid on 18 June 2004 in full satisfaction of the order of the Industrial Magistrate, together with the sum of $519.25 in payment of unpaid leave for Good Friday, Easter Monday and Anzac Day 2003, which had been wrongly deducted from the amount due to Ms Penn and payable for annual leave.

7 The cheques were not returned, nor was it suggested that they were returned; nor was it was suggested that they had not been received or accepted.

8 It is to be noted that no penalty was imposed at first instance. It is also to be noted that *the MCE Act* which was referred to in these proceedings, by s7(c), provides as follows:-

> "(c) where the condition is implied in a contract of employment, under section 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act."

9 S83B(5) of *the Act* reads as follows:-

> "(5) The industrial magistrate's court may, in addition to making an order under subsection (3)(a) or (4)(a) —
>
> (a) issue a caution or impose such penalty as the industrial magistrate's court thinks just but not exceeding $5 000;
>
> (b) in the case of an order under subsection (3)(a), order the employer to pay to the employee, in addition to any remuneration or amount ordered to be paid, the remuneration lost, or likely to have been lost, by the employee because of the contravention or failure to comply with the order under section 23A*;* and
>
> (c) make any ancillary or incidental order that the court thinks necessary for giving effect to any order made under this section."

10 It is the only penalty provision which applies to s83 applications and therefore applies by virtue of s7(c) of *the MCE Act* to proceedings in relation to *the MCE Act* in the Industrial Magistrate's Court.

BACKGROUND

11 The appellant commenced as an articled law clerk in the service of the respondent, a solicitor, from 26 June 2001 for a period of six months to 17 July 2002, and then until 17 July 2003, as an employee solicitor on a restricted practising certificate for one year. After that, there was some falling out. She claimed that she was not paid the annual leave to which she was entitled in April 2003. She was employed pursuant to several letters which were not made part of the appeal book in these proceedings.

12 By virtue of *the MCE Act*, minimum paid annual leave of four weeks for the number of hours which the employee is required ordinarily to work in a full week period up to 152 hours applies pursuant to s23(1) of *the MCE Act* as follows:-

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

13 There was no evidence to that effect, but it is conceded that an amount was owing under *the MCE Act*. It may have been, of course, that there was no clear claim under *the MCE Act* if there was a four week holiday entitlement per year under the contract of employment, but that matter was not argued.

14 There was evidence about leave owing, but it was not convincing, on a fair reading. Mr Clarke, on behalf of the appellant, attempted to make something of the fact that the respondent's bookkeeper, Ms Carol Anne Harrison, made errors in the quantum of annual leave by failing to pay separately from annual leave the public holiday entitlements which were due to the appellant, she having admitted these errors, but her evidence overall was not in some respects challenged and was accepted by His Worship.

15 The appellant's evidence was that she was currently employed as a solicitor at the time of hearing. She was shown a document in evidence which she said had been prepared by Mr Clarke, her agent, which was not included in the appeal book (exhibit B) and it gave evidence that a term of her contract was that she was entitled to four weeks' leave which she did not receive until after twelve months' continuous service (see page 4 of the transcript (hereinafter called "TR")). She was, it would appear, employed from July 2001 to July 2003 (see exhibit 8, page 62(AB)). She referred to a document, exhibit C (page 60(AB)), which was prepared by Mr Clarke called "Annual Leave by Carol Penn". She was also shown the holiday report (exhibit D, page 61(AB)) prepared by the respondent. She pointed out an error in it (see page 27(TR)).

16 The appellant also explained that the period 4 April to 25 April 2002 was when she completed Part B of her Articles Training Program which was actually from 4 April 2002 to 24 April 2002, because 25 April 2002 was a public holiday. This did not therefore form part of her annual leave entitlements.

17 The appellant attended a three day seminar in August 2002 but said that two days would have been taken in leave. She said that on 7 August 2002 she made work related telephone calls while she was in Melbourne attending the seminar and some internet connections (see pages 27-28 (AB)). She calculated that for the period 6 August to 19 August 2002 on exhibit C, she was owed three days' leave.

18 From 9 to 13 December 2002, the appellant took five days' leave.

19 The appellant did not go to work on 5 April 2003, but on Sunday, 6 April 2003, she worked with her daughter at the office, she said in evidence.

20 Three public holidays are to be deducted, she said, which reduces it to 12 days' leave.

21 On 28 May 2003, she received five days' pay in lieu of leave.

22 On 15 July 2003, she attended the admission of a friend as a legal practitioner and returned to work at 1.00pm, so her evidence went.

23 The appellant gave evidence that the total leave which she had taken during her period of employment was 24 days and the balance owing was 16 days, which, using her annual salary at the time of $45,000, amounted to $173.07 per day, totalling $2,769.12 in accrued holiday entitlements.

24 The appellant agreed with Ms Edwards that she resigned on 22 July 2003. Ms Penn said that she did not accept paragraph 3 of the Defence because there was no agreement, oral or in writing, that any amount would be offset against any annual leave entitlements owing to her. In cross-examination, Ms Penn said that her claim was based on an agreement for pay. Ms Penn said that the agreement was that she would continue to be paid wages, which would accrue as holiday entitlements in her contract of service.

25 The appellant continued in evidence saying that no contract was entered into for her restricted year which prescribed the amount of leave to be taken. The claim is the same as that in *the MCE Act*, she said. When Ms Penn became a restricted practitioner, she said, the respondent had deleted the requirement that she take annual leave 15 months from when it first started to accrue. There was no further written contract other than the contract for articles of clerkship between them.

26 The appellant was unable to say that she was a restricted practitioner at the time when she sent an email to Ms Harrison, the bookkeeper, asking about a requirement to take leave 15 months from when leave first started to accrue. She also said that she believed that, if you attended a work related seminar, you would be paid. It was not expressed in the contract that she be given paid leave to attend the Articles Training Program, but she said that it was implied.

27 The appellant said that she went to Melbourne to the seminar to obtain 10 points to continue to be eligible for re-registration as a migration agent. She took some phone calls about a person called Gifte Azari, who was a party in proceedings in a Migration Review Tribunal case.

28 There was evidence given for the respondent by the respondent herself, Ms Patricia May Verschuer Edwards, who gave evidence (see page 65 (TR) et seq).

29 A number of contracts of employment were tendered which were not included in the appeal book.

30 The respondent gave evidence that in proceedings on behalf of the appellant in the Commission that were discontinued, Mr Clarke admitted that the terms and conditions of employment during the restricted practice year were those of the contract of employment.

31 The respondent referred to her witness statement which had been used in the Commission. Again, that is not in the appeal book. She also gave evidence that, for the period of restricted practice, she and the appellant were going to operate on the same terms and conditions as the Articles of Clerkship contract, except where they were not relevant. She said that the appellant became a restricted practitioner on about 17 July 2002, when she was admitted to practice, having been employed since 26 or 28 June 2001.

32 The respondent also gave evidence that the appellant took 27 days' annual leave, 25 days for the Articles Training Program and two days to paint her house, although she later said that the extra two days was not for painting her house but might have been for something else. She said that she did not agree to paid leave for 2 and 3 April 2002. She said that she also told the appellant that there was no additional paid leave beyond what had been agreed and that she could have the whole of the Articles Training Program for leave. If she wanted additional leave, the appellant would have to notify the respondent or the bookkeeper and this was unpaid leave.

33 The contract merely said that the respondent would pay the cost only of the Articled Clerk Training Program and any other courses or seminars relevant to her practice with prior approval.

34 On 14 November 2002, the appellant sought leave for 22, 25, 26, 27, 28 and 29 November 2002 and 2, 3, 4 and 5 December 2002, and sent an email to Ms Carol Harrison to this effect. Ms Penn said that that would dispose of all leave entitlements which had accrued for the first year of employment. That email was not seen by the respondent until these proceedings. The email concerned was from Carol Penn to Carol Harrison dated 14 November 2002.

35 In evidence, the respondent emphasised that the appellant was a lady whom she trusted and whom she gave a power of attorney with Ms Harrison while she was away over Christmas that year to run the practice. The respondent had been ill during this time also. She said that she signed the leave application because she was going overseas. She said that she paid for all of the costs of the appellant getting qualified as a migration agent and costs related to her engaging in family law practice. She said that she regarded these costs as an investment in someone who was staying with her. She said that she was a bit hazy about the figures, but also said that the appellant did not work 50 hours per week.

36 On the appellant's resignation, the bookkeeper, Ms Harrison, paid the appellant in excess of $2,000. The respondent had paid for Ms Penn's practising certificate and for indemnity insurance. She said that the bookkeeper had worked out the termination pay.

37 When Mrs Edwards was cross-examined, the respondent said that when the appellant resigned, she, Ms Edwards, asked her to leave quietly and she did so. She said that Ms Harrison in good faith had paid monies into the appellant's bank account for leave to which she, Ms Penn, was not entitled and which were never refunded. There was therefore an amount owing to the respondent, she said.

38 The respondent could not give evidence about what amounts were due to Ms Penn. This was a matter, she said, for the bookkeeper's evidence. All of the time that the appellant was employed by the respondent, she was employed pursuant to the same contract of employment, the respondent said. Ms Edwards said that she gave no instructions to the bookkeeper about the requirements and expectations for annual leave. She said that she signed the cheques which the bookkeeper produced.

39 Ms Harrison gave evidence that she was the respondent's office administrator cum bookkeeper and had been so employed since 9 August 2001. She said that she, of course, knew the appellant. She referred to a document which she had prepared and said that there was 41.22 days leave due to the appellant and 65 days leave were taken by her which exceeded her entitlement. Ms Harrison said that the appellant had been paid for the period 4 April to 24 April 2002. She said that the appellant also sent her a memorandum for the period 1 August to 19 August 2002 and said that she would be attending a seminar on 2, 3 and 4 August 2002 in Melbourne. Ms Harrison calculated the appellant's leave from 1 to 19 August 2002. She wrote out a cheque for the seminar for the appellant in the sum of $695.00.

40 The conference program was from 2 to 4 April 2002. It was the basis on which Ms Harrison drew up the paid leave taken. Ms Harrison said that the appellant also claimed that she worked 11.15am to 1.15pm on both the Saturday and Sunday for work applying for visas.

41 The appellant also made a leave application for 9 to 13 December 2002, five working days approved by the respondent. Ms Harrison based the leave taken on that.

42 There was also a document which said that the appellant was on leave from 7 April 2003 to 25 April 2003 (see page 60 (AB)).

43 Ms Harrison entered these leave amounts in the computer records. She recorded paid leave taken by the appellant on the computer but not the Articles Training Program for the 10 days from 5 November to 16 November 2001 because she did not even know what "ATP" was. She said that, as at August 2003, the period of Ms Penn's absence was 15 days and there was 12 days unpaid leave. She recorded leave from 5 to 16 November 2001 for ATP as 10 days (see pages 138b and 139 (TR)). Leave was taken on 2 and 3 April 2002, and 4 to 24 April 2002, when the appellant took 15 days leave and the second part of the ATP, which is a total of 27 working days. Thus, there were 16 days taken in 2002, 12 days in August 2002 and leave in Melbourne which included one day of the seminar which fell on a Friday because she left on a Thursday. 9 to 13 December 2002 were five working days. 7 to 25 December 2002 were 15 working days. On 28 May 2003 there was a payment for five days' leave when the leave was not taken and one day's leave on 15 July 2003 which the appellant took for a friend's admission.

44 The appellant was paid $1,090.00 for 10 days. That, divided by 10, gives a figure of $109.01 for one day. All of this is set out in exhibit 8.

45 There is adjustment in figures for increases. Exhibit 17 is a record of the monies paid to the appellant. Ms Harrison said that she had no idea that 65 days' annual leave were taken before the appellant left the respondent's employment, because when the appellant asked for leave, Ms Harrison trusted her because of the close friendship between the appellant and the respondent. She did not go back and refer to the leave which the appellant had already taken. In May, the appellant asked for five days' worth of leave money because she was broke and needed the money, the appellant told Ms Harrison. Again, Ms Harrison repeated that because the appellant was friendly with the respondent, she did not think that she should query everything which the appellant asked her.

46 Ms Harrison said that she was not told that "ATP" was going to be included. She said that she had not taken off the three public holidays for the period 7 April 2003 to 25 April 2003, thus the number of days should be 12 and not 15, and she admitted that she had made an error. She said that she had supporting evidence to establish that 65 days had been taken in leave, and, indeed, there was no evidence convincingly to the contrary. She found supporting documents after the appellant left.

47 Ms Harrison said that, when the appellant went to Melbourne for the immigration seminar, they spoke about three days before she was going to the seminar. Ms Harrison said that she did not say that the appellant could have nine days off. She found out that the ATP was to be included as annual leave after the appellant left.

48 The appellant was recalled to give evidence and was unable to recall the authorship of the email, exhibit 7, dealing with leave on 2 and 3 April 2003. She then denied authorship and said that it was sent by Ms Harrison on Ms Edward's computer. She denied that she sent the email of 27 March 2002.

FINDINGS OF FACT

49 The findings of fact were as follows:-

(a) That the appellant produced a schedule (exhibit C) that stated that she had taken 24 days leave and was owed a further 16 days at $173.07 per day resulting in a failure to pay $2,679.12.

(b) That His Worship accepted that document.

(c) That His Worship concluded that the appellant did some work while she was on leave, but that did not affect the ultimate outcome.

(d) That it was quite correct, as His Worship found, that the respondent produced a document (exhibit 8) compiled from primary documents which showed that the appellant had 65 days' annual leave over a two year period when the most she would have been entitled to was 41.22 days.

e) That His Worship found implicitly, accepting the evidence of Ms Harrison, that the figures supported by primary documents were correct.

ISSUES AND CONCLUSIONS

50 On the authority of *Fox v Percy* (2003) 77 ALJR 989, the Full Bench should not interfere unless His Worship misused his advantage in seeing the witnesses. It was clear and it was open to find, on the evidence of Ms Harrison on the point which was neither challenged nor shaken, that the appellant would make leave applications to Ms Harrison, the bookkeeper, who did not, because there was a close friendship between the appellant and the respondent, query them. Indeed, at one time, the former held the latter's power of attorney.

51 His Worship also accepted, and correctly, that the appellant was not required to take annual leave when she went on an Articles Training Program for which she was paid but was told it was annual leave. However, he added that this need not be paid leave.

52 Thus, His Worship held that the amount of 65 days must be reduced by the 25 days taken in November 2001 and April 2002 for attendance at the Articles Training Program. This left the appellant with an entitlement to 1.22 days of accrued leave.

53 On all of the evidence, that is clearly what is the case. It was open to His Worship, having viewed the witnesses and read the documents, to have reached that conclusion and no error has been demonstrated in his so doing.

54 No other ground was pressed.

55 In my opinion, none of the grounds, for those reasons, is made out, save and except that which relates to a penalty, which I will come to later.

56 I would also add that it is arguable, too, that *the MCE Act* did not apply because it is not clear that the contract included a term which was not as beneficial as that implied by *the MCE Act* for annual leave. However, that point was not argued at first instance and I do not consider it.

57 The appeal did not encompass the order that the sum of $211.15 which had been ordered to be paid should be disturbed, save and except to increase it.

58 Part of the appeal was that no penalty had been imposed. S83B(5) of *the Act*, which I have quoted above, requires that a penalty be imposed. Because of the circumstances of this matter and the very small amount involved, that penalty should be a caution. That is the irreducible minimum penalty. I would vary the order to that extent. I would otherwise dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN:

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

COMMISSIONER J H SMITH:

60 I have had the benefit of reading the reasons to be published by the President. For the reasons His Honour gives, I agree the Appeal should be upheld to the extent of varying the order to insert as order 3 that the respondent be cautioned. I would otherwise dismiss the appeal and having nothing further to add.

THE PRESIDENT:

61 Fr those reasons, the appeal was upheld, the order at first instance varied, and the appeal otherwise dismissed.

2004 WAIRC 12702

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL PENN
	APPELLANT
	-and-
	PATRICIA EDWARDS OF VERSCHUER EDWARD
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 7 SEPTEMBER 2004
FILE NO/S	FBA 23 OF 2004
CITATION NO.	2004 WAIRC 12702

Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr D Clarke, as agent
Respondent	Mr K Yin (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 7th day of September 2004, and having heard Mr D Clarke, as agent, on behalf of the appellant and Mr K Yin (of Counsel), by leave, on behalf of the respondent, and the Full Bench having heard and determined the matter, and having determined that reasons for decision will issue at a future date, and the parties herein having waived their rights pursuant to s35 of the *Industrial Relations Act* 1979 (as amended), it is this 7th day of September 2004, ordered and declared as follows:-

(1) THAT appeal No FBA 23 of 2004 be and is hereby upheld.

(2) THAT the decision of the Industrial Magistrate in matter No M 63 of 2004 given on the 18th day of June 2004 be and is hereby varied by inserting as order 3 thereof the following:-

"THAT the above-named respondent be and is hereby cautioned."

(3) THAT the appeal herein be and is otherwise dismissed.

By the Full Bench

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

PRESIDENT—Matters dealt with

2004 WAIRC 13115

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CANON FOODS
	APPLICANT
	-and-
	HAYLEY MAREE MCCOLL
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 22 OCTOBER 2004
FILE NO	PRES 5 OF 2004
CITATION NO.	2004 WAIRC 13115

Catchwords	Industrial Law (WA) – Stay of operation of decision – General principles relating to stays – Order at first instance that the respondent pay the applicant a sum of money – Reinstatement of applicant impracticable – Requirements for the order of a stay not met – Application dismissed - *Industrial Relations Act* 1979 (as amended), s27(1)(d), s29, s29(1)(b)(i), s29(1)(b)(ii), s49(11)
Decision	Application dismissed.
Appearances	
Applicant	Mr D Clarke, as agent
Respondent	No appearance

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an application brought pursuant to s49(11) of *the Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"), by which the applicant sought a stay of operation of the whole of the order of the Commission, constituted by a single Commissioner, made at first instance in matter No. 1567 of 2001, which was made and deposited in the office of the Registrar on 29 September 2004.

2 At the hearing of the application, Mr D Clarke, Industrial Agent, appeared for the applicant and there was no appearance by or on behalf of the respondent to the application. However, I was satisfied that, by way of valid service of a copy of the application with directions as to the date and time of hearing and other procedural directions endorsed thereon, that Ms McColl was duly served with a notice of the proceedings as required by s27(1)(d) of *the Act*. I was therefore satisfied that the Commission, constituted by me, was entitled to hear and determine the matter in the absence of the respondent.

3 At first instance, an application was made by the abovenamed respondent, to whom I will refer to hereinafter as "Ms McColl". By that application, made under s29(1)(b)(i) of *the Act*, Ms McColl alleged that she was harshly, oppressively or unfairly dismissed by the abovenamed applicant, then the respondent, her employer Canon Foods (hereinafter referred to as "Canon"). She claimed compensation, as well as contractual benefits under s29(1)(b)(ii) of *the Act*. The application was opposed, was heard and determined, and the orders sought to be stayed in these proceedings made.

4 Those orders, formal parts omitted, are as follows:-

> "THAT the applicant, Hayley Maree McColl, was harshly, oppressively and unfairly dismissed by the respondent;
>
> THAT reinstatement of the applicant is impracticable;
>
> THAT the respondent pay to the applicant a sum equivalent to ten (10) weeks pay at the rate of $522.00 per week less the amount of $500.00 as compensation for her loss as a result of the unfairness of the dismissal;
>
> THAT the respondent pay to the applicant this amount within 14 days of the date of this order;
>
> THAT the applicant's claim for a denied contractual benefit in relation to overtime hours is dismissed;
>
> THAT the applicant's claim for a denied contractual benefit in the form of a motor vehicle allowance is dismissed."

5 It was not suggested that the order had been complied with.

6 Canon filed a Notice of Appeal in this Commission, being FBA 42 of 2004, on 13 October 2004 and the same, according to a Declaration of Service of Damian Clarke filed on 13 October 2004, was served on Ms McColl on the same date.

7 I am satisfied and find that the appeal has been validly instituted within the meaning of s49(11) of *the Act*, therefore.

8 I am also satisfied and find that the applicant had sufficient interest to make this application, since the applicant was, as the respondent, a party to the proceedings at first instance, and was required by the order to do certain things including pay compensation to Ms McColl.

THE APPLICATION

9 The application herein relied on a number of grounds, which I reproduce hereunder:-

> "1. The Appellant seeks a stay of the order because an appeal has been lodged before the Full Bench and there is an extremely serious issue to be heard by the Full Bench. The Appellant submits that the Learned Chief Commissioner erred in his decision concerning probation and warnings given in evidence. A stay is required in order to determine the appeal.

2. The Appellant seeks a stay in the order, not to frustrate or deny the Respondent the fruits of it's (sic) litigation but in an attempt to have the matter fully determined before the Full Bench and if the prospect of reinstatement is imminent then that course of action should be instituted in lieu of compensation.

3. The Appellant submits that the balance of convenience lies with the Appellant in this matter in that no inconvenience will occur to the Respondent at this stage until the appeal has been heard. There is no loss or inconvenience to the Respondent and the Appellant submits that the Respondent will not be inconvenienced by waiting for the appeal to be determined.

4. The outcome of the appeal with the evidence and the grounds of appeal are such that the Appellant believes that the probable success of the appeal will be upheld by the Full Bench and therefore the Respondent will not be inconvenienced or put in such a position as to reimburse any monies that have been awarded.

5. The Appellant believes there is a serious issue to be heard in that the Learned Chief Commissioner erred in the decision and that a stay of the order would be fair and equitable to the parties concerned until the matter has been fully determined."

10 This application was not opposed by Ms McColl. However, it is for the applicant to establish that I should exercise my discretion in its favour.

PRINCIPLES

11 The principles which are applicable in proceedings such as this are well settled and I quote them as they appear in *Barminco Pty Ltd v Holly* (2004) 84 WAIG 233:-

> "The principles which apply to applications for a stay are long settled and were most recently expressed by this Commission in *Millennium Inorganic Chemicals Limited v Trimble* (2003) 83 WAIG 3082 (FB) at pages 3083-3084 as follows:-
>
> "19 The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Bamboo Holdings Pty Ltd v Halligan* 82 WAIG 966 at 967-968, and are as follows:-
>
> ""The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Stanley and Others t/a Communique Communications v Bryant* 82 WAIG 785 at 787 and are as follows:-
>
> "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission (see *Commissioner of Police v CSA* 81 WAIG 2553 at 2554):-
>
> The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408:-
>
> I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-
>
> These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
>
> It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
>
> For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
>
> If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)
>
> The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Ex parte Pillar* [1991] 65 ALJR 683 at 685 (HC)).
>
> I would add the following further observations.
>
> Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).
>
> If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.
>
> An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).
>
> Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).
>
> The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).
>
> The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable,

is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (FC)).

Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 375) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223).""

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

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

21 Further, at page 91 His Honour said:-

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

BACKGROUND

12 Ms McColl had been employed for a period of some months as a salesperson by Canon. She was dismissed on 15 August 2001 and it was as a result of that dismissal that she took proceedings pursuant to s.29 of *the Act*.

Serious Issue to be Tried

13 This was a matter which was determined by the Chief Commissioner at first instance on the basis that there was no procedural unfairness afforded because, whilst she received a warning on 1 August 2001 about flaws in her performance, Ms McColl was not so warned on 15 August 2001 when she was in fact dismissed. There was some discussion then, according to the witnesses for Canon at first instance, Mr John Frederick Dickenson, National Sales Director and Ms Tracey Shaw, the Food Service and Food Market Manager of Canon.

14 There is a conflict, however, in evidence of how much of an opportunity Ms McColl was given to respond on this occasion and the Chief Commissioner found that she should have been given a chance to respond to any allegations made about shortcomings in her conduct, and was not, and went on to find the dismissal unfair. That is a matter of the Chief Commissioner's advantage in seeing the parties, in accordance with *Abalos v Australian Postal Commission* [1990] 171 CLR 167, and he preferred by implication the evidence of Ms McColl who gave evidence at first instance. Thus, it cannot be said that there is a strongly arguable case on a reading of the transcript at this time.

15 It has not, therefore, been established that there is a serious issue to be tried.

Balance of Convenience

16 It was submitted on behalf of Canon that a stay would not inconvenience Ms McColl. She herself did not appear to assert otherwise. However, it was not established and there is authority in this Commission to the contrary that it is not a matter where there is no inconvenience if a person has been deprived of the fruits of his or her litigation since, for example, in this case 2001, which is now over three years ago. It is, whether there is an appearance or not, the duty of the applicant to establish that the Commission should, on an application under s49(11) of *the Act*, stay the operation of an order, given that an applicant is entitled to the fruits of his or her litigation in a matter such as this if the applicant does not establish that a stay order should be made.

17 That has not been established in this case, for those reasons and, for those reasons, I dismiss the application. In addition, Canon has not established that it will suffer any inconvenience by having to pay the monies out, save by an assertion from the bar table that it is in some financial difficulty, which is not, on the face of it, an answer to a necessity to meet its liability under the order, even if in the circumstances of this case, I was disposed to attach weight to that evidence from the bar table.

18 Significantly, there was certainly no assertion on behalf of Canon that, if the monies are paid out to Ms McColl, they will not be recovered. I am not satisfied, too, given that three years or more have elapsed since the dismissal, that the balance of convenience favours Canon.

FINALLY

19 I am not therefore satisfied that there are exceptional circumstances to justify the making of the order sought. In particular, I am not satisfied that a stay is necessary to preserve the subject matter or integrity of the litigation.

20 For the reasons which I have expressed, it has not been established that the interests of Canon outweigh those of Ms McColl. For those reasons, too, I am not satisfied that the equity, good conscience and substantial merits of the case lie with the applicant. For those reasons, I dismissed the application.

2004 WAIRC 13093

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CANON FOODS
	APPLICANT
	-and-
	HAYLEY MAREE MCCOLL
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 20 OCTOBER 2004
FILE NO/S	PRES 5 OF 2004
CITATION NO.	2004 WAIRC 13093

Decision	Application dismissed
Appearances	
Applicant	Mr D Clarke, as agent
Respondent	No appearance

Order

This matter having come on for hearing before me on the 20th day of October 2004, and having heard Mr D Clarke, as agent, on behalf of the applicant and there being no appearance by or on behalf of the respondent, and having determined that the application herein should be dismissed, and having determined that reasons for decision will issue at a future date, it is this day, the 20th day of October 2004, ordered that application No PRES 5 of 2004 be and is hereby dismissed.

(Sgd.) P J SHARKEY,
President.

[L.S.]

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2004 WAIRC 13042

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 15 OCTOBER 2004
FILE NO	P 15 OF 2004
CITATION NO.	2004 WAIRC 13042

Result	Award varied

Order

HAVING heard Ms L Jacobson and with her Mr M Sims on behalf of the applicant and Mr R Heaperman on behalf of the respondent and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Officers (Social Trainers) Award 1988 (No. PSAA 20 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2004.

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

[L.S.]

SCHEDULE

1. Schedule B – Clause 22. – Overtime: Delete Part I – Out of Hours Contact of this schedule and insert the following in lieu thereof:

(Operative from the first pay period on or after 15th October 2004)

Standby	$6.51 per hour
On Call	$3.25 per hour
Availability	$1.63 per hour

2. Schedule G – Clause 28. – Shiftwork Allowances: Delete this schedule and insert the following in lieu thereof:

For each afternoon or night shift worked - $15.21.

The shiftwork allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 officer.

2004 WAIRC 13062

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** THE METROPOLITAN HEALTH SERVICE BOARD AND THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **RESPONDENTS**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	MONDAY, 18 OCTOBER 2004
FILE NO	P 17 OF 2004
CITATION NO.	2004 WAIRC 13062

Result Award varied

Order

HAVING heard Ms L Jacobson and with her Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr R Heaperman on behalf of the Metropolitan Health Services Board and there being no appearance on behalf of the Health Services Union of Western Australia (Union of Workers) respondent and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 (No. PSAA 1 of 1999) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2004.

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

SCHEDULE

1. Schedule H. – Overtime: Delete Part 1 – Out of Hours Contact of this schedule and insert the following in lieu thereof:

(Operative from the first pay period on or after 15th day of October 2004)

Standby	$6.51 per hour
On Call	$3.25 per hour
Availability	$1.63 per hour

2. Schedule K. – Diving, Flying and Seagoing Allowances: Delete this schedule and insert the following in lieu thereof:

(1) Diving - (Clause 33)

$5.33 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - $9.84 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $13.49 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - $18.65 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel - meals on board not prepared by a cook - $25.10 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $18.89 per day.

(iii) Non Government Vessel - $22.91 each overnight period.

(b) Hard Living Allowance - 52 cents per hour or part thereof.

The allowances prescribed in this schedule shall apply from the first pay period on or after the 15th day of October 2004, and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2004 WAIRC 12942

GOVERNMENT OFFICERS (STATE GOVERNMENT INSURANCE COMMISSION) AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INSURANCE COMMISSION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 7 OCTOBER 2004
FILE NO	P 24 OF 2004
CITATION NO.	2004 WAIRC 12942

Result Award Varied and Consolidated

Order

HAVING heard Ms E Ward on behalf of the Insurance Commission of Western Australia and Ms J van den Herik on behalf of the Civil Service Association of Western Australia, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Officers (State Government Insurance Commission) Award, 1987 (No. PSAA 21 of 1986) be varied and consolidated in accordance with the following Schedule and that such variation shall have effect on and from the 6th day of October 2004.

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

SCHEDULE

GOVERNMENT OFFICERS (STATE GOVERNMENT INSURANCE COMMISSION) AWARD, 1987

No. PSA A21 of 1986

1. - TITLE

This Award shall be known as the Government Officer (State Government Insurance Commission) Award, 1987.

1B. - MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $467.40 per week payable on and from 4 June 2004.

(3) The Minimum Adult Award Wage of $467.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $467.40 per week.

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(7) Subject to this clause the Minimum Adult Award Wage shall –

(a) apply to all work in ordinary hours.

(b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2004 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.

(9) Adult Apprentices

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

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

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

(d) Nothing in this sub-clause shall operate to reduce the rate of pay fixed by the Award for an adult apprentice in force immediately prior to 4 June 2004.

2. ARRANGEMENT

3. AREA OF OPERATION

This Award shall have effect throughout the State of Western Australia.

4. SCOPE

This Award shall apply to all Government Officers employed by the Employer and to the Employer employing such officers, except those officers whose salaries or salary ranges are determined or recommended pursuant to the *Salaries and Allowances Act 1975* and who do not occupy offices for which the remuneration is determined by an Act of Parliament to be a fixed rate, or is determined or to be determined by the Governor pursuant to the provisions of any Act of Parliament.

5. TERM OF AWARD

This term of this Award shall be for a period of one year from the date hereof.

6. DEFINITIONS

“De facto partner” means a relationship (other than a legal marriage) between two persons who live together in a ‘marriage-like’ relationship and includes same sex partners.

“Employee” means every employee appointed under the provisions of the *Insurance Commission of Western Australia Act 1986.*

"Employer" shall mean the Insurance Commission of Western Australia and shall include such senior employees as the Employer authorises from time to time to act on its behalf.

“Partner” means either spouse or de facto partner.

“Spouse” means a person who is lawfully married to that person.

“The Act” means – *The Industrial Relations Act 1979* as amended.

"The Association" means the Civil Service Association of Western Australia (Inc.).

7. CONTRACT OF SERVICE

(1) No employee shall leave the employ of the Employer until the expiration of one month's written notice of his/her intention to do so without the approval of the Employer.

(2) One month's written notice shall be given by the Employer to an employee whose services are no longer required. Provided that the Employer may pay the employee one month's salary in lieu of said notice.

(3) The Employer may summarily dismiss an employee deemed guilty of gross misconduct or neglect of duty and the employee shall not be entitled to any notice or payment in lieu of notice.

(4) An employee, having attained the age of 55 years shall be entitled to retire from the employ of the Employer.

8. CERTIFICATE OF SERVICE

(1) On request, the Employer shall issue a Certificate of Service containing full information as to the period of service, and nature of duties performed by the employee to the employee on redundancy, retirement, resignation or where contracts of service expire through the effluxion of time.

9. CONDITIONS OF EMPLOYMENT

The Employer and the Association shall ensure, as far as practicable, that employees covered by this Award shall be entitled to the same conditions of employment as permanent employees in the Western Australian State Public Service.

10. PART-TIME EMPLOYMENT

(1) Definitions

(a) Part-time employment is defined as regular and continuing employment of less than 37.5 hours per week.

(2) Part-Time Agreement

(a) Each part-time arrangement shall be confirmed in writing and shall include the agreed period of the arrangement, and the agreed hours of duty in accordance with subclause (3) of this clause.

(b) The conversion of a full-time employee to part-time employment can only implemented with the written consent or by written request of that employee. No employee may be converted to part-time employment without the employee’s prior agreement.

(3) The Hours of Duty will be in accordance with Clause 15. Hours of Duty of this award, including flexible working hours.

(a) The Employer shall specify in writing before a part-time employee commences duty, the prescribed weekly and daily hours of duty for the employee including starting and finishing times each day ("ordinary hours").

(b) The Employer shall give an employee one (1) month's notice of any proposed variation to that employee's starting and finishing times and/or particular days worked, provided that the Employer shall not vary the

employee's total weekly hours of duty without the employee's prior written consent, a copy of which shall be sent to the designated employee at the Association.

(c) All variations to an employee's working hours must be agreed to in writing by the part-time employee.

If agreement is reached to vary an employee's ordinary working hours pursuant to this subclause:

(i) Time worked to 7½ hours on any day is not to be regarded as overtime but an extension of the contract hours for that day and should be paid at the normal rate of pay.

(ii) Overtime shall not be payable unless the total time worked on any day exceeds 8 hours.

(iii) Additional days worked, up to a total of five days per week, are also regarded as an extension of the contract and should be paid at the normal rate. Days worked on a Saturday or Sunday are to be paid in accordance with subclause 3 (d) of Clause 36. Overtime of this Award.

(4) Salary and Annual Increments

(a) An employee who is employed on a part-time basis shall be paid a proportion of the appropriate full-time salary dependent upon time worked. The salary shall be calculated in the following manner: -

$$\frac{\text{Hours worked per fortnight}}{75} \times \frac{\text{Full-time fortnightly salary}}{1}$$

(b) A part-time employee shall be entitled to annual increments in accordance with Clause 13. Annual Performance Based Salary Increments of this Award, subject to meeting the usual performance criteria.

(a) A part-time employee shall be entitled to the same leave and conditions prescribed in this Award for full time employees.

(b) Payment to an employee proceeding on accrued annual leave and long service leave shall be calculated on a pro rata basis having regard for any variations to the employee's ordinary working hours during the accrual period.

(c) Sick leave and any other paid leave shall be paid at the current salary, but only for those hours or days that would normally have been worked had the employee not been on such leave.

(5) Public Holidays

A part-time employee shall be allowed the prescribed Public Holidays without deduction of pay in respect of each holiday, which is observed on a day ordinarily worked by the part-time employee.

(6) Right of Reversion of Employees

(a) Where a full-time employee is permitted to work part-time for a period no greater than 12 months the employee has a right (upon written application) to revert to full-time hours in the position previously occupied before becoming part time or a position of equal classification as soon as deemed practicable by the Employer, but no later than the expiry of the agreed period.

(b) The Employer will endeavour to place the employee in a position with similar duties as the full time position previously held by the employee. However, the parties recognise that this is not always possible.

(c) Where a full-time employee is permitted to work part-time for a period greater than 12 months that employee may apply to revert to full-time hours in the position previously occupied before becoming part time or a position of equal classification, but only as soon as is deemed practicable by the Employer. This should not prevent the transfer of the employee to another full-time position at a salary commensurable to his or her previous full-time position. The Employer will endeavour to place the employee in a position with similar duties as the full time position previously held by the employee. However, the parties recognise that this is not always possible.

(7) The number or proportion of part-time employees employed shall not exceed any number or proportion that may be agreed in writing between the Association and the Employer.

11. SALARIES

(1) Subject to Clause 14. Traineeships, the annual salaries of Employees covered by this Award shall be those contained at Schedule A.

(2) Payment of Salaries

(a) Salaries shall be paid fortnightly but, where the usual payday falls on a public holiday, payment shall be made on the previous working day.

(b) Dividing the annual salary by 313 and multiplying the result by 12 shall compute a fortnight's salary.

(c) The hourly rate shall be computed as one seventy-fifth of the fortnight's salary.

(d) Salaries shall be paid by direct funds transfer to the credit of an account nominated by the employee at a bank, building society or credit union approved by the Employer.

(e) Provided that where such form of payment is impracticable or where some exceptional circumstances exist, and by agreement between the Employer and the Association, payment by cheque may be made.

(3) Arbitrated Safety Net Adjustments

(a) The rates of pay in this Award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

(b) These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

(c) Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

12. EXPIRED GENERAL AGREEMENT SALARIES

(1) No-Disadvantage Test

(a) Expired General Agreement salary rates as amended from time to time are incorporated in this Award at Schedule D. These rates are not to be subject to arbitrated safety net adjustments and unless otherwise specified are only for the purpose of the no-disadvantage test as defined at s.97VS Industrial Relations Act 1979.

(b) Notwithstanding the above if the salary rates within the Award at Schedule A is higher than those expressed at Schedule D, the former rates shall be utilised for the purpose of the no-disadvantage test under the Industrial Relations Act 1979.

(2) Salary Based Allowances

All salary based allowances specified within this Award will be calculated on the salary rate as specified at Schedule D of this Award or the applicable Award salary rate as specified at Schedule A of this Award which ever is the higher.

13. ANNUAL PERFORMANCE BASED SALARY INCREMENTS

(1) An employee shall qualify for an annual increment in his/her salary, if one is available, subject to:

(a) The employee accumulating 12 months' of continuous service with the public sector since last receiving a salary increment; and

(b) A satisfactory report in respect of the employee's level of performance, efficiency, diligence and conduct.

(2) Before any increase in salary is paid, the employee's immediate supervisor shall, no later than 12 months since the employee's last increment, complete a report in respect of the employee's level of performance, based on the most recent Performance Management & Development System Review.

(3) Where the employer is satisfied with the assessment the increase in salary will be paid. The increment can be deferred or withheld if an employee's performance is considered substandard.

(4) Where the assessment is adverse to the employee:

(a) The assessment shall be brought to the notice of the employee and shall be signed and dated by him/her;

(b) If the employee desires to give an explanation for the assessment or give any reasons for disagreeing with the assessment, the employee shall put the explanation or reasons in writing;

(c) The Employer shall consider the assessment and the employee's submissions; and

(d) The Employer shall notify the employee of the decision within 28 calendar days of receipt of the assessment.

(5) Where the Employer decides not to pay an increase for a specific period, the Employer shall complete a further assessment before the expiry of that period and the provisions of subclauses 2, 3 and 4 (Annual Performance Based Salary Increments) shall apply.

(6) The non-payment of an increase will change the normal anniversary date of any further increase to 12 months after the last increase was paid.

(7) For the purposes of this clause, continuous service, except where an increment is payable due to age, shall not include:

(a) Any continuous period exceeding 14 calendar days during which the Employee is absent on leave without pay, in which case the entire period is to be excised;

(b) Any continuous period exceeding 6 months during which the Employee is absent on workers' compensation. Only the period which exceeds 6 months is to be excised; and

(c) Any continuous period exceeding 3 months during which the Employee is absent on sick leave without pay. Only the period, which exceeds 3 months, is to be excised.

14. TRAINEESHIPS

(1) Definitions

"Part time trainee" means a trainee who is employed for a minimum of 20 hours per week (except in the case of school based traineeships), and has regular and stable hours of work each week, to allow training to occur. Wages and entitlements accrue on a pro-rata basis.

"Traineeship" means a full time or part time structured employment based training arrangement approved by the Western Australian Department of Education and Training where the trainee gains work experience and has the opportunity to learn new skills in a work environment. On successful completion of the traineeship the trainee obtains a nationally recognised qualification.

"Traineeship Training Contract" means the agreement between the Employer and the trainee that provides details of the traineeship and obligations of the Employer and the trainee and is registered with the Western Australian Department of Education and Training.

"Training Plan" means the plan that outlines what training and assessment will be conducted off-the-job and what will be conducted on-the-job and how the Registered Training Organisation will assist in ensuring the integrity of both aspects of the training and assessment process.

(2) Traineeships

(a) Trainees are to be additional to the normal workforce of the Employers so that trainees shall not replace paid workers or volunteers or reduce the hours worked by existing employees.

(b) Training Conditions:

The arrangements between the Employer and the trainee in relation to the traineeship are as specified in the Traineeship Training Contract, as administered by the Department of Education and Training. The trainee will be trained in accordance with the agreed Training Plan.

(c) Employment Conditions:

(i) the initial period of employment for trainees is the nominal training period endorsed at the time the particular traineeship is established;

(ii) completion of the traineeship scheme will not guarantee the trainee future employment with the Insurance Commission of Western Australia, but the Employer will cooperate to assist the trainee to be placed in suitable alternative employment within the public sector, should a position arise;

(iii) trainees are permitted to be absent from work without loss of continuity of employment to attend off the job training in accordance with the Training Plan. However, except for absences provided for under this Award, failure to attend for work or training without an acceptable cause may result in loss of pay for the period of the absence;

(iv) trainees will receive a mix of supervised work experience, structured training on the job and off the job, and the opportunity to practice new skills in a work environment; and

(v) overtime and shift work shall not be worked by trainees except to enable the requirements of the training to be effected. When overtime and shift work are worked the relevant allowances and penalties of the Award, based on the training wage stated in subclause 2(d) will apply. No trainee shall work overtime or shift work unsupervised.

(d) Wages:

The salary applicable to trainees shall be as prescribed in the National Training Wage Award 2000 for employees up to and including 20 years of age. Adult trainees will be paid the rate prescribed under the *Minimum Conditions of Employment Act 1993* for the minimum weekly rate of pay for employees 21 or more years of age.

15. HOURS OF DUTY

(1) Subject to subclauses (3) and (4) hereof, the ordinary working hours, exclusive of meal intervals shall not exceed thirty seven and a half in any week nor seven and a half in any day. Such hours shall be worked on Monday to Friday between the hours of 7.30 am and 5.30 pm in a spread of not more than eight and a half hours.

(2) Each meal interval shall be taken between the hours of 12.00 noon and 2.00 pm for full time staff and shall not be less than one-half hour nor more than one hour in duration. An employee shall not be required to work more than five hours on any day without taking a break for a meal interval.

(3) By agreement between the Employer and the Association, the ordinary hours of work may be arranged to allow the employee to work flexitime and/or to accumulate time off without loss of pay up to one day each fortnight or on some other basis and such extension of daily hours shall not be paid as overtime to the extent of the agreed accumulation.

(4) Ordinary hours may be worked by way of shifts outside the hours specified in subclause (1) hereof where, pursuant to an agreement between the Employer and the Association, it is permitted.

16. ANNUAL LEAVE

(1) Definitions:

(a) Accrued leave - is the leave an employee is entitled to from a previous calendar year.

(b) Pro-rata leave - is the proportion of leave that an employee is entitled to in the current year, either from the date of commencement, or to the date of cessation.

(2) Entitlement

(a) Each employee is entitled to four weeks paid leave for each year of service. Annual leave shall be calculated on a calendar year basis commencing on January 1 in each year.

(b) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee. An employee employed on a fixed term contract or on a part time basis for a period less than 12 months, shall be credited with the same entitlement on a pro-rata basis for the period of the contract.

(c) On written application, an employee shall be paid salary in advance when proceeding on annual leave. However, such payment in advance will only be made for full pay periods which occur whilst the employee is on annual leave.

(3) Pro rata Annual Leave

(a) Entitlement

(i) An employee employed after January 1 is entitled to pro rata annual leave for that year, calculated in accordance with the following formula:

Completed Calendar Months of Service	Pro Rata Annual Leave (Working Days)
1	2
2	3
3	5
4	7
5	8
6	10
7	12
8	13
9	15
10	17
11	18

(ii) Provided that in the first and last months of an employees service the employee is entitled to pro rata annual leave of one working day for each two completed weeks of service.

(iii) For the purposes of this paragraph, an employee who commences on the first working day of a month and works for the remainder of the month and an employee who has worked throughout a month and

terminates on the last working day of a month shall be regarded as having completed that calendar month of service.

(b) An employee may take annual leave during the calendar year in which it accrues or anytime thereafter, but the time during which the leave may be taken is subject to the approval of the Employer.

(c) An employee who has been permitted to proceed on annual leave and who ceases duty before completing the required continuous service to accrue the leave, must refund the value of the unearned pro rata portion, calculated at the rate of salary as at the date the leave was taken, but no refund is required in the event of the death of an employee.

(4) Part-time entitlement

A part-time employee shall be granted annual leave in accordance with this clause, however payment to a part-time employee proceeding on annual leave shall be calculated having regard for any variations to the employee's ordinary working hours during the accrual period.

(5) Compaction of Annual Leave

An employee who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the employee's ordinary working hours at the time of commencement of annual leave, may elect to take a lesser period of annual leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of annual leave.

(6) Portability

Where an employee immediately prior to being employed by the Insurance Commission of Western Australia was in any Western Australian State body or statutory authority the Employer shall approve portability of accrued and pro rata annual leave entitlements held at the date the employee ceased that previous employment, provided that:

(i) the employee's employment with the Employer commenced no later than one week after ceasing the previous employment; and

(ii) the employee was not paid out all or part of the accrued and pro rata annual leave entitlements held at the time of ceasing that previous employment.

(7) The Managing Director may direct an employee to take accrued annual leave and may determine the date on which such leave shall commence. Should the employee not comply with the direction, disciplinary action may be taken against the employee.

(8) Leave Loading

(a) Subject to the provisions of paragraphs (b) and (f) of this subclause, a loading equivalent to 17.5% of normal salary is payable to employees proceeding on annual leave, including accumulated annual leave.

(b) Maximum Loading

(i) Subject to the provisions of paragraph (d) of this subclause the loading is paid on a maximum of four weeks annual leave. Payment of the loading is not made on additional leave granted for any other purpose.

(ii) Maximum payment shall not exceed the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences.

(c) Annual leave commencing in any year and extending without a break into the following year attracts the loading calculated on the salary applicable on the day the leave commenced.

(d) The loading payable on approved accumulated annual leave shall be at the rate applicable at the date the leave is commenced. Under these circumstances an employee can receive up to the maximum loading for the approved accumulated annual leave in addition to the loading for the current year's entitlement.

(e) A pro rata loading is payable on periods of approved annual leave less than four weeks.

(f) The loading is calculated on the rate of the normal fortnightly salary including any allowances, which are paid as a regular fortnightly or annual amount. Any allowance paid to an employee for undertaking additional or higher level duties is only included if the allowance is payable during that period of normal annual leave as provided in subclauses (6) and (7) of Clause 35. Higher Duties Allowance of this Award.

(g) Part-time employees shall be paid a proportion of the annual leave loading at the salary rate applicable, provided that the maximum loading payable shall be calculated in accordance with the following:

$$\frac{\text{Hours of work per fortnight}}{75} \times \frac{\text{Maximum loading in accordance with subparagraph b(ii) of this subclause}}{1}$$

(h) An employee who has been permitted to proceed on annual leave and who ceases duty other than by resignation before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion of Leave Loading but no refund is required in the event of the death of an employee.

(i) An employee who has been permitted to proceed on annual leave and who resigns must refund the value of the loading paid for leave other than accrued leave.

(9) Lump Sum Payments

(a) On application to the Employer, a lump sum payment for the money equivalent of any:

(i) accrued annual leave as prescribed by subclause (2) and (4) of this clause shall be made to an employee who resigns, retires, is retired or is dismissed unless the misconduct for which the employee has been dismissed occurred prior to the completion of the qualifying period, or in respect of an employee who dies; and

(ii) *pro rata* annual leave shall be made to an employee who resigns, retires, is retired or in respect of an employee who dies, but not an employee who is dismissed.

(b) In the case of a deceased employee, payment shall be made to the estate of the employee unless the employee is survived by a legal dependant, approved by the Employer, in which case payment shall be made to the legal dependant.

(c) Where payment in lieu of accrued or pro rata annual leave is made on the death, dismissal, resignation or retirement of an employee, a loading calculated in accordance with the terms of this Clause is to be paid. Provided that no loading shall be payable in respect of pro rata annual leave paid on resignation or where an employee is dismissed for misconduct.

17. - PUBLIC HOLIDAYS

(1) The following days shall be allowed as holidays with pay:

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Sovereign's Birthday, Foundation Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

(2) When any of the days mentioned in subclause (1) of this clause falls on a Saturday or on a Sunday, the holiday shall be observed on the next succeeding Monday.

When Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next succeeding Tuesday.

In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

18. LONG SERVICE LEAVE

(1) Each employee who has completed a period of 7 years of continuous service shall be entitled to 13 weeks of long service leave on full pay.

(2) Employees may by agreement with their Employer, clear any accrued entitlement to long service leave in one-week periods.

(3) Each employee is entitled to an additional 13 weeks of long service leave on full pay for each subsequent period of 7 years of continuous service.

(4) A part-time employee shall have the same entitlement to long service leave, as full time employees however payment made during such periods of long service leave shall be adjusted according to the hours worked by the employee during that accrual period.

(5) For the purpose of determining an employee's long service leave entitlement, the expression "continuous service" includes any period during which the employee is absent on full pay or part pay from duties, but does not include:

(a) any period exceeding two weeks during which the employee is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;

(b) any period during which an employee is taking long service leave entitlement or any portion thereof except in the case of subclause (10) when the period excised will equate to a full entitlement of 13 weeks;

(c) any service by an employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service has actually entitled the employee to the long service leave under this clause;

(d) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave.

(6) A long service leave entitlement, which fell due prior to March 16, 1988, amounted to three months. A long service leave entitlement, which falls due on or after that date, shall amount to thirteen weeks.

(7) Any Public Holiday or days in lieu of the repealed public service holidays occurring during an employees absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.

(8) The Managing Director may direct an employee to take accrued long service leave and may determine the date on which such leave shall commence. Should the employee not comply with the direction, disciplinary action may be taken against the employee.

(9) An employee who has elected to retire at or over the age of 55 years and who will complete not less than 12 months continuous service before the date of retirement may make application to the Employer to take pro rata long service leave before the date of retirement, based on continuous service of a lesser period than that prescribed by this clause for a long service entitlement.

(10) Compaction of leave

(a) An employee who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the employee's ordinary working hours at the time of commencement of long service leave, may elect to take a lesser period of long service leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of long service leave.

(b) Notwithstanding subclause (6) of this clause, an employee who has elected to compact an accrued entitlement to long service leave in accordance with paragraph (10)(a) of this clause, shall only take such leave in any period on full pay, and the period excised as "continuous service" shall be 13 weeks.

(11) Portability

(a) Where an employee was, immediately prior to being employed by the Insurance Commission of Western Australia was in the service of:

- The Commonwealth of Australia, or
- Any other State Government of Australia, or
- Any Western Australian State body or statutory

and the period between the date when the employee ceased previous employment and the date of commencing employment does not exceed one week, that employee shall be entitled to long service leave determined in the following manner:

(i) the pro rata portion of long service leave to which the employee would have been entitled up to the date of appointment shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled under this clause; and

(ii) the balance of the long service leave entitlement of the employee shall be calculated upon appointment by the Employer in accordance with the provisions of this clause.

(b) Nothing in this clause confers or shall be deemed to confer on any employee previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the employee's favour prior to the date on which the employee commenced employment.

(12) Half Pay

Subject to the Employer's convenience, an Employer may approve an employee's application to take long service leave on full pay or half pay. In the case of long service leave which falls due on or after March 16, 1988 portions in excess of four weeks shall be in multiples of one week's entitlement.

(13) Lump Sum Payments

(a) On application to the Employer, a lump sum payment for the money equivalent of any:

(i) long service leave entitlement for continuous service as prescribed by subclause (1) and (2) of this Clause shall be made to an employee who resigns, retires, is retired or is dismissed, or in respect of an employee who dies; and

(ii) pro rata long service leave based on continuous service of a lesser period than that prescribed by subclause (1) and (2) of this Clause for a long service leave entitlement shall be made:

(aa) to an employee who retires at or over the age of 55 years or who is retired on the grounds of ill health, if the employee has completed not less than 12 months continuous service before the date of retirement;

(bb) to an employee who, not having resigned, is retired by the employing authority for any other cause, if the employee has completed not less than 3 years continuous service before the date of retirement;

(cc) in respect of an employee who dies, if the employee has completed not less than 12 months continuous service before the date of death.

(b) In the case of a deceased employee, payment shall be made to the estate of the employee unless the employee is survived by a legal dependant, approved by the Employer, in which case payment shall be made to the legal dependant.

(c) The calculation of the amount due for long service leave accrued and for pro rata long service leave shall be made at the rate of salary of an employee at the date of retirement or resignation or death, whichever applies.

19. SICK LEAVE

(1) For the purposes of this clause "service" shall not include:

(a) any period exceeding 14 calendar days during which an employee is absent on leave without pay. In the case of leave without pay which exceeds 14 calendar days, the entire period of such leave without pay is excised in full;

(b) any period which exceeds six months in one continuous period during which an employee is absent on workers' compensation. Provided that only that portion of such continuous absence which exceeds six months shall not count as "service";

(c) any period which exceeds three months in one continuous period during which an employee is absent on sick leave without pay. Provided that only that portion of such continuous absence which exceeds three months shall not count as "service".

(2) Entitlement

(a) The Employer shall credit each permanent employee with the following sick leave credits, which shall be cumulative:

	Sick Leave on full pay	Sick Leave on half pay
On the day of initial appointment	37.5 hours	15 hours
On completion of 6 months continuous service	37.5 hours	22.5 hours
On the completion of 12 months continuous service	75 hours	37.5 hours
On the completion of each further period of 12 months continuous service	75 hours	37.5 hours

(b) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee. An employee employed on a fixed term contract for a period less than 12 months, shall be credited with the same entitlement on a pro rata basis for the period of the contract.

(c) A part-time employee shall be entitled to the same sick leave credits, on a pro rata basis according to the number of hours worked each fortnight. Payment for sick leave shall only be made for those hours that would normally have been worked had the employee not been on sick leave.

(d) The provisions of this clause do not apply to casual employees.

(3) Evidence

(a) An application for sick leave exceeding two consecutive working days shall be supported by evidence to satisfy a reasonable person.

(b) The amount of sick leave granted without the production of evidence to satisfy a reasonable person required in paragraph (a) of this subclause shall not exceed, in the aggregate, 5 working days in any one-credit year.

(4) Where the Employer has occasion for doubt as to the cause of the illness or the reason for the absence, the Employer may arrange for a registered medical practitioner to visit and examine the employee, or may direct the employee to attend the medical practitioner for examination. If the report of the medical practitioner does not confirm that the employee is ill, or if the employee is not available for examination at the time of the visit of the medical practitioner, or fails, without reasonable cause, to attend the medical practitioner when directed to do so, the fee payable for the examination, appointment or visit shall be paid by the employee.

(5) Where a application for sick leave is supported by the certificate of a registered medical practitioner, a further certificate from a registered medical practitioner nominated by the Employer maybe required and if that certificate does not confirm or substantially confirm the certificate of the medical practitioner, the employee making the application for sick leave shall pay the fee due to the nominated medical practitioner in respect of the certificate.

(6) (a) If the Employer has reason to believe that an employee is in such a state of health as to render him a danger to fellow employees or the public, the Employer may require the employee to obtain and furnish a report as to the employee's condition from a registered medical practitioner or may require the employee to submit him/herself for examination by a medical practitioner nominated by the Employer. The fee for any such examination shall be paid by the Employer.

(b) Upon receipt of the medical report, the Employer may direct the employee to be absent from duty for a specified period or, if already on leave of absence, direct the employee to continue on leave for a specified period. Such leave shall be regarded as sick leave.

(7) (a) Upon report by a registered medical practitioner that, by reason of contact with a person suffering from an infectious disease and through the operation of restrictions imposed by Commonwealth or State law in respect of that disease, an employee is unable to attend for duty, the employee concerned may be granted sick leave or, at the option of the employee, the whole or any portion of the leave may be deducted from accrued annual leave or long service leave.

(b) Leave granted under paragraph (a) of this subclause shall not be granted for any period beyond the earliest date at which it would be practicable for the employee to resume duty, having regard to the restrictions imposed by law.

(8) Where an employee is ill during the period of annual leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the Employer that as a result of the illness the employee was confined to their place of residence or a hospital for a period of at least seven consecutive calendar days, the Employer may grant sick leave for the period during which the employee was so confined and reinstate annual leave equivalent to the period of confinement.

(9) Where an employee is ill during the period of long service leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the Employer that as a result of illness the employee was confined to their place of residence or a hospital for a period of at least 14 consecutive calendar days, the Employer may grant sick leave for the period during which the employee was so confined and reinstate long service leave equivalent to the period of confinement.

(10) An employee who is absent on leave without pay is not eligible for sick leave during the currency of that leave without pay.

(11) No sick leave shall be granted with pay, if the illness has been caused by the misconduct of the employee or in any case of absence from duty without sufficient cause.

(12) Where an employee who has been retired from employment on medical grounds resumes duty therein, sick leave credits at the date of retirement shall be reinstated. This provision does not apply to an employee who has resigned from employment and is subsequently reappointed.

(13) Workers' Compensation

Where an employee suffers a disability within the meaning of section 5 of the *Workers' Compensation & Rehabilitation Act 1981*, which necessitates that employee being absent from duty, sick leave with pay shall be granted to the extent of sick leave credits. In accordance with section 80(2) of the *Workers' Compensation & Rehabilitation Act 1981* where the claim for workers' compensation is decided in favour of the employee, sick leave credit is to be reinstated and the period of absence shall be granted as sick leave without pay.

(14) War Caused Illnesses

(a) An employee who produces a certificate from the Department of Veterans' Affairs stating that the employee suffers from war caused illness may be granted special sick leave credits of 112 hours 30 minutes (15 standard hour days) per annum on full pay in respect of that war caused illness. These credits shall accumulate up to a maximum credit of 337 hours and 30 minutes (45 standard hour days), and shall be recorded separately to the employee's normal sick leave credit.

(b) Every application for sick leave for war caused illness shall be supported by a certificate from a registered medical practitioner as to the nature of the illness.

(15) Portability

(a) The Employer may credit an employee additional sick leave credits up to those held at the date that employee ceased previous employment provided:

(i) immediately prior to commencing employment with the Insurance Commission of Western Australia the employee was employed in the service of:

- The Commonwealth Government of Australia, or
- Any other State of Australia, or
- In a Western Australian State body or statutory; and

(ii) the employee's employment with the Insurance Commission of Western Australia commenced no later than one week after ceasing previous employment.

(b) The maximum break in employment permitted by subparagraph (a)(ii) of this subclause, may be varied by the approval of the Employer provided that where employment with the Insurance Commission of Western Australia commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the employee ceased with the previous Employer.

20. CARERS LEAVE

(1) An employee is entitled to use, each year, up to five (5) days of the employee's sick leave entitlement per year to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of immediate care and attention.

(2) Employees shall, wherever practical, give the Employer notice of the intention to take carers leave and the estimated length of absence. If it is not practicable to give prior notice of absence employees shall notify the Employer as soon as possible on the first day of absence.

(3) Employees shall provide, where required by the Employer, evidence to establish the requirement to take carers leave. An application for carers leave exceeding two (2) consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.

(4) The definition of family shall be a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee.

(5) Carers leave may be taken on an hourly basis or part thereof.

21. PARENTAL LEAVE

(1) Definition

"Employee" includes full time, part time, permanent and fixed term contract employees.

"Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The Employer may require confirmation of primary care giver status.

"Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.

"Partner" means a person who is a spouse or de facto partner.

(2) Entitlement to Parental and Partner Leave

(a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

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

(ii) adoption of a child who is not the child or the stepchild of the employee or the employee's partner; is under the age of five (5); and has not lived continuously with the employee for six (6) months or longer.

(b) An employee identified as the primary care giver of a child and who has completed twelve months continuous service in a public authority shall be entitled to six (6) weeks paid parental leave. Paid parental leave will form part of the 52-week entitlement provided in subclause (2) (a) of this clause.

(c) A pregnant employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.

(d) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed six (6) weeks.

(e) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.

(f) Parental leave may not be taken concurrently by an employee and his or her partner except under special circumstances and with the approval of the Employer.

(g) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.

(h) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

(i) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

(3) Partner Leave

An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.

(4) Birth of a child

(a) An employee shall provide the Employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner confirming the pregnancy and the estimated date of birth.

(b) If the pregnancy results in other than a live child or the child dies in the six weeks immediately after the birth, the entitlement to paid parental leave remains intact.

(5) Adoption of a child

(a) An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.

(b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

(6) Other leave entitlements

(a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.

(b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The Employer's approval is required for such an extension.

(c) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the Employer the total combined period of leave without pay following parental leave will not exceed two (2) years.

(d) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in subclause (6) (a) and (6) (e).

(e) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.

(f) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

(7) Notice and Variation

(a) The employee shall give not less than four (4) weeks notice in writing to the Employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.

(b) An employee seeking to adopt a child shall not be in breach of subclause (7) (a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

(8) Transfer to a Safe Job

Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the pregnant employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.

(9) Replacement Employee

Prior to engaging a replacement employee the Employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

(10) Return to Work

(a) An employee shall confirm the intention to return to work by notice in writing to the Employer not less than four (4) weeks prior to the expiration of parental leave.

(b) Where an Employer has made a definite decision to introduce major changes that are likely to have a significant effect on the employee's position the Employer shall notify the employee while they are on parental leave.

(c) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.

(d) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time provisions of the relevant award and agreement.

(e) Employees who return to work on a part time basis have access to the right of reversion provisions of Clause 10. Part-Time Employment.

(11) Effect of Parental Leave on the Contract of Employment

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(b) Paid parental leave will count as qualifying service for all purposes under the relevant award and agreement. Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose under the relevant award and agreement.

(c) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the relevant award and agreement.

(d) An Employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on parental leave but otherwise the rights of the Employer in respect of termination of employment are not affected.

22. LEAVE WITHOUT PAY

(1) Subject to the provisions of subclause (2) of this clause, the Employer may grant an employee leave without pay for any period and is responsible for that employee on their return.

(2) Every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

(a) The work of the Employer is not inconvenienced; and

(b) All other leave credits of the employee are exhausted.

(3) An employee on a fixed term contract may not be granted leave without pay for any period beyond that employee's approved period of engagement.

(4) Any period that exceeds two weeks during which an employee is on leave without pay shall not, for any purpose, be regarded as part of the period of service of that employee.

23. STUDY LEAVE

(1) Conditions for Granting Time Off

(a) An employee may be granted time off with pay for study purposes at the discretion of the Employer.

(b) Part-time employees are entitled to study leave on the same basis as full time employees. Employees on fixed term contracts also have the same access to study leave as all other employees.

(c) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.

(d) Employees who are obliged to attend educational institutions for compulsory block sessions, may be granted time off with pay including travelling time up to the maximum annual amount allowed in subclause (1) (c) of this clause.

(e) Employees shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.

(f) In every case the approval of time off to attend lectures and tutorials will be subject to:

(i) operational convenience;

(ii) the course being undertaken on a part-time basis;

(iii) employees undertaking an acceptable formal study load in their own time;

(iv) employees making satisfactory progress with their studies;

(v) the course being of value to the Insurance Commission of Western Australia; and

(vi) the Employer's discretion when the course is only relevant to the employee's career in the Insurance Commission of Western Australia and being of value to the State.

(g) A service agreement or bond will not be required for undergraduate courses.

(2) Payment of Fees and Other Costs

(a) Trainees

(i) The Insurance Commission of Western Australia will meet the payment of higher education administrative charges for trainees who, as a condition of their employment, are required to undertake studies at a University or College of Advanced Education. Employees who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.

(ii) This assistance does not include the cost of textbooks or Guild and Society fees.

(iii) An employee who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.

(b) All Employees

Notwithstanding paragraph (a), the Employer has the discretion to reimburse an employee for the full or part of any reasonable costs of enrolment fees, Higher Education Contribution Surcharge, compulsory textbooks, compulsory computer software, and other necessary study materials. Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of enrolment and costs incurred, and the remaining half shall be reimbursed following production of written evidence of successful completion of the subject for which reimbursement has been claimed. The Employer and employee may agree to alternative reimbursement arrangements.

(3) Approved Courses

(a) (i) First-degree or associate diploma courses at a University within the state of Western Australia.

(ii) First degree or associate diploma courses at a college of advanced education.

(iii) Diploma courses at Technical and Further Education (TAFE).

(iv) Two-year full time Certificate courses at TAFE.

(v) Courses recognised by the National Authority for the Accreditation of Translators and Interpreters (NAATI) in a language relevant to the needs of the Public Sector

(b) Except as outlined in subclause (3)(d) of this clause, employees are not eligible for study assistance if they already possess one of the qualifications specified in subclause (3)(a)(i) and 3(a)(ii) of this clause.

(c) An employee who has completed a Diploma through TAFE is eligible for study assistance to undertake a degree course at a University within the state of Western Australia or a College of Advanced Education. An employee who has completed a two year full time Certificate through TAFE is eligible for study assistance to undertake a Diploma course specified in subclause (3)(a)(iii) or a degree or associate diploma course specified in subclause (3)(a)(i) or (3)(a)(ii) of this clause.

(d) Assistance towards additional qualifications including second or higher degrees may be granted in special cases, at the discretion of the Employer.

(4) (a) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the employee's own time, except in special cases such as where the employee is in the final year of study and requires less time to complete the course, or the employee is undertaking the recommended part-time year or stage and this does not entail five hours formal study.

(b) A first degree or Associate Diploma course does not include the continuation of a degree or Associate Diploma towards a higher postgraduate qualification.

(c) In cases where employees are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.

(d) For employees with access to flexi-time, time spent attending or travelling to or from formal classes for approved courses between 8.15 am and 4.30 pm, less the usual lunch break, and for which "time off" would usually be granted, is to be counted as credit time for the purpose of calculating total hours worked per week.

(e) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the employee's normal place of work.

(f) An employee shall not be granted more than 5 hours time off with pay per week except in exceptional circumstances where the Employer may decide otherwise.

(g) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.

(5) Subject to the provisions of subclause (6) of this clause, the Employer may grant an employee full time study leave with pay to undertake:

(a) post graduate degree studies at Australian or overseas tertiary education institutions; or

(b) study tours involving observations and/or investigations; or

(c) a combination of postgraduate studies and study tour.

(6) Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:

(a) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclause (1) to (5) of this clause and the Leave Without Pay provisions of this Award.

(b) It must be a highly specialised course with direct relevance to the employee's profession.

(c) It must be highly relevant to the agency's corporate strategies and goals.

(d) The expertise or specialisation offered by the course of study should not already be available through other employees employed within the Insurance Commission.

(e) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an employee is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.

(f) A fixed term contract employee may not be granted study leave with pay for any period beyond that employee's approved period of engagement.

(7) Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.

(8) Where an outside award is granted and the studies to be undertaken are considered highly desirable by an Employer, financial assistance to the extent of the difference between the employee's normal salary and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of salary may be approved at the discretion of the Employer.

(9) The Employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.

(10) Where recipients are in receipt of a living allowance, this amount should be deducted from the employee's salary for that period.

(11) Where the Employer approves full time study leave with pay the actual salary contribution forms part of the agency's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.

(12) Where study leave with pay is approved and the Employer also supports the payment of transit costs and/or an accommodation allowance, the Employer will gain approval for the transit and accommodation costs as required.

(13) Where employees travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the Employer together with some local transit and accommodation expenses providing it meets the requirements of subclause (6) of this clause. Each case is to be considered on its merits.

(14) The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for employees under this Award.

24. SHORT LEAVE

(1) (a) An Employer may, upon sufficient cause being shown, grant an employee short leave on full pay not exceeding 15 consecutive working hours, but any leave granted under the provisions of this clause shall not exceed, in the aggregate, 22½ hours in any one calendar year.

(b) Part-time employees are eligible for short leave in accordance with this clause, on a pro rata basis calculated in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{75} \times \frac{22.5 \text{ hours}}{1}$$

(c) An employee employed on a fixed term contract of less than twelve months shall be eligible for pro rata short leave in accordance with this clause.

(2) Subject to the prior approval of the supervisor, employees located outside a radius of fifty (50) kilometres from the Perth City Railway Station shall be allowed Short Leave where pressing personal matters can only be dealt with within the required hours of duty.

25. BEREAVEMENT LEAVE

(1) Employees including casuals shall on the death of:

the spouse or de-facto partner of the employee;

the child or stepchild of the employee;

the parent or stepparent of the employee;

the brother, sister, step brother or step sister; or

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

be eligible for up to two (2) days paid bereavement leave, provided that at the request of an employee the Employer may exercise a discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

(2) The two (2) days need not be consecutive.

(3) Bereavement leave is not to be taken during any other period of leave.

(4) Payment of such leave may be subject to the employee providing evidence of the death or relationship to the deceased, satisfactory to the Employer.

(5) An employee requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

26. CULTURAL/CEREMONIAL LEAVE

(1) Cultural/ceremonial leave shall be available to all employees.

(2) Such leave shall include leave to meet the employee's customs, traditional law and to participate in cultural and ceremonial activities.

(3) Employees are entitled to time off without loss of pay for cultural /ceremonial purposes, subject to agreement between the Employer and employee and sufficient leave credits being available.

(4) The Employer will assess each application for ceremonial /cultural leave on its merits and give consideration to the personal circumstances of the employee seeking the leave.

(5) The Employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.

(6) Cultural /ceremonial leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from:

(a) the employee's annual leave entitlements;

(b) accrued days off or time in lieu; or

(c) short leave when entitlements under subclauses (a) and (b) have been fully exhausted.

(7) Time off without pay may be granted by arrangement between the Employer and the employee for cultural/ceremonial purposes.

27. BLOOD/PLASMA DONORS LEAVE

(1) Subject to operational requirements, employees shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:

(a) prior arrangements with the supervisor has been made and at least two (2) days' notice has been provided; or

(b) the employee is called upon by the Red Cross Blood Centre.

(2) The notification period shall be waived or reduced where the supervisor is satisfied that operations would not be unduly affected by the employee's absence.

(3) The employee shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.

(4) Employees shall be entitled to two (2) hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.

28. EMERGENCY SERVICE LEAVE

(1) Subject to operational requirements, paid leave of absence shall be granted by the Employer to an employee who is an active volunteer member of State Emergency Service Units, St John Ambulance Brigade, Volunteer Fire and Rescue Service Brigades, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or FESA Units, in order to allow for attendance at emergencies as declared by the recognised authority.

(2) The Employer shall be advised as soon as possible by the employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.

(3) The employee must complete a leave of absence form immediately upon return to work.

(4) The application form must be accompanied by a certificate from the emergency organisation certifying that the employee was required for the specified period.

(5) An employee, who during the course of an emergency, volunteers their services to an emergency organisation, shall comply with subclauses 2, 3 and 4.

29. UNION FACILITIES FOR UNION REPRESENTATIVES

(1) The Employer recognises the rights of the union to organise and represent its members. Union representatives in the Insurance Commission have a legitimate role and function in assisting the union in the tasks of recruitment, organising, communication and representing members' interests in the workplace, and union electorate.

(2) The Employer recognises that, under the union's rules, union representatives are members of an Electorate Delegates Committee representing members within a union electorate. A union electorate may cover other public sector agencies.

(3) The Employer will recognise union representatives in the agency and will allow them to carry out their role and functions.

(4) The union will advise the Employer in writing of the names of the union representatives in the Insurance Commission.

(5) The Employer shall recognise the authorisation of each union representative in the Insurance Commission and shall provide them with the following:

(a) Paid time off from normal duties to perform their functions as a union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the electorate delegates committee and to attend union business in accordance with Clause 30 - Leave to Attend Association Business of the Award.

(b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal agency protocols.

(c) A notice board for the display of union materials including broadcast email facilities.

(d) Paid access to periods of leave for the purpose of attending union training courses in accordance with Clause 31 - Trade Union Training Leave of the Award. Country representatives will be provided with appropriate travel time.

(e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of union membership with them.

(f) Access to awards, agreements, policies and procedures.

(g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.

(6) The Employer recognises that it is paramount that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.

30. LEAVE TO ATTEND ASSOCIATION BUSINESS

(1) The Employer shall grant paid leave at the ordinary rate of pay during normal working hours to an employee:

(a) who is required to attend or give evidence before any Industrial Tribunal;

(b) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;

(c) when prior arrangement has been made between the Union and the Employer for the employee to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and

(d) who as a Union-nominated representative is required to attend joint union/management consultative committees or working parties.

(2) The granting of leave is subject to convenience and shall only be approved:

(a) where reasonable notice is given for the application for leave;

(b) for the minimum period necessary to enable the union business to be conducted or evidence to be given; and

(c) for those employees whose attendance is essential.

(3) The Employer shall not be liable for any expenses associated with an employee attending to union business.

(4) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.

(5) An employee shall not be entitled to paid leave to attend to union business other than as prescribed by this Clause.

(6) The provisions of the Clause shall not apply to:

(a) special arrangements made with the union which provide for unpaid leave for employees to conduct union business;

(b) when an employee is absent from work without the approval of the Employer; and

(c) casual employees.

31. TRADE UNION TRAINING LEAVE

(1) Subject to organisational convenience and the provisions of this clause:

(a) The Employer shall grant paid leave of absence to employees who are nominated by the Association to attend short courses relevant to the public sector or the role of union workplace representative, conducted by the Civil Service Association.

(b) The Employer shall grant paid leave of absence to attend similar courses or seminars as from time to time approved by agreement between the Employer and the Association.

(2) An employee shall be granted up to a maximum of five (5) days paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five (5) days and up to ten (10) days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten (10) days.

(3) (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime.

(b) Where a Public Holiday or rostered day off falls during the duration of a course, a day off in lieu of that day will not be granted.

(c) Subject to paragraph (3)(a) of this clause, shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.

(d) Part-time employees shall receive the same entitlement as full time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.

(4) (a) Any application by an employee shall be submitted to the Employer for approval at least four weeks before the commencement of the course unless the Employer agrees otherwise.

(b) All applications for leave shall be accompanied by a statement from the union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the authority, which is conducting the course.

(5) A qualifying period of twelve months service shall be served before an employee is eligible to attend courses or seminars of more than a half-day duration. The Employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than twelve months service.

(6) (a) The Employer shall not be liable for any expenses associated with an employee's attendance at trade union training courses.

(b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

32. DEFENCE FORCE RESERVES LEAVE

(1) The Employer must grant leave of absence for the purpose of Defence service to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.

(2) Leave of absence may be paid or unpaid in accordance with the provisions of this clause.

(3) Application for leave of absence for Defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the employee shall provide a certificate of attendance to the Employer.

(4) Paid Leave

(a) An employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for Defence service, subject to the conditions set out hereunder.

(b) Part-time employees shall receive the same paid leave entitlement as full-time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.

(c) On written application, an employee shall be paid salary in advance when proceeding on such leave.

(d) Casual employees are not entitled to paid leave for the purpose of Defence service.

(e) An employee is entitled to paid leave for a period not exceeding 105 hours on full pay in any period of twelve months commencing on 1 July in each year.

(f) An employee is entitled to a further period of leave, not exceeding 16 calendar days, in any period of twelve months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the employee and the Defence Force payments to which the employee is entitled if such payments do not exceed normal salary. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered days off is to be excluded, and no account is to be taken of the value of any board or lodging provided for the employee.

(5) Unpaid Leave

(a) Any leave for the purpose of Defence service that exceeds the paid entitlement prescribed in subclause (4) of this clause shall be unpaid.

(b) Casual employees are entitled to unpaid leave for the purpose of Defence service.

(6) Use of Other Leave

(a) An employee may elect to use annual or long service leave credits for some or all of their absence on Defence service, in which case they will be treated in all respects as if on normal paid leave.

(b) An Employer cannot compel an employee to use annual leave or long service leave for the purpose of Defence service.

33. INTERNATIONAL SPORTING EVENTS LEAVE

(1) Special leave with pay may be granted by the Employer to an employee chosen to represent Australia as a competitor or official, at a sporting event, which meets the following criteria:

(a) it is a recognised international amateur sport of national significance; or

(b) it is a world or international regional competition; and

(c) no contribution is made by the sporting organisation towards the normal salary of the employee.

(2) The Employer shall make enquiries with the Department of Sport & Recreation:

(a) whether the application meets the above criteria;

(b) the period of leave to be granted.

34. WITNESS AND JURY SERVICE

WITNESS

(1) An employee subpoenaed or called as a witness to give evidence in any proceeding shall as soon as practicable notify the manager/supervisor who shall notify the Employer.

(2) Where an employee is subpoenaed or called as a witness to give evidence in an official capacity that employee shall be granted by the Employer leave of absence with pay, but only for such period as is required to enable the employee to carry out duties related to being a witness. If the employee is on any form of paid leave, the leave involved in being a witness will be reinstated, subject to the satisfaction of the Employer. The employee is not entitled to retain any witness fee but shall pay all fees received into the Insurance Commissions revenue account. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the Employer.

(3) An employee subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fees or travelling expenses as soon as practicable after the default, notify the Employer.

(4) An employee subpoenaed or called, as a witness on behalf of the Crown, not in an official capacity shall be granted leave with full pay entitlements. If the employee is on any form of paid leave, this leave shall not be reinstated as such witness service is deemed to be part of the employee's civic duty. The employee is not entitled to retain any witness fees but shall pay all fees received the Insurance Commissions revenue account

(5) An employee subpoenaed or called as a witness under any other circumstances other than specified in subclauses (2) and (4) of this clause shall be granted leave of absence without pay except when the employee makes an application to clear accrued leave in accordance with Award provisions.

JURY

(6) An employee required to serve on a jury shall as soon as practicable after being summoned to serve, notify the supervisor/manager who shall notify the Employer.

(7) An employee required to serve on a jury shall be granted by the Employer leave of absence on full pay, but only for such period as is required to enable the employee to carry out duties as a juror.

(8) An employee granted leave of absence on full pay as prescribed in subclause (6) of this clause is not entitled to retain any juror's fees but shall pay all fees received into the Insurance Commissions revenue account. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the Employer.

35. HIGHER DUTIES ALLOWANCE

(1) Where an Employee is directed by the Employer to act in a position which is classified higher than the Employee's own substantive position for 5 or more consecutive working days, that Employee will be entitled to a higher duties allowance.

(2) The allowance will be calculated by subtracting the Employee's salary from the salary he/she would receive if appointed to the acting position permanently.

(3) If an Employee does not perform all the duties and responsibilities of the position, or shares the duties with another Employee, the payment will be calculated on the proportion of duties performed by each Employee. Provided that the Employee is informed prior to the commencement of the acting of the duties to be carried out, the responsibilities to be accepted and the allowance to be paid.

(4) Subject to satisfactory performance, any increments will be paid as if the Employee was appointed to the acting position permanently. All previous acting at an equivalent level or higher during the preceding 18 months will aggregate as qualifying service for the purposes of achieving the increment.

(5) Where an Employee who has qualified for payment of a higher duties allowance is required to act in another position at a higher level than his/her own for periods of up to 5 working days without any break in acting service, the Employee shall be paid an allowance for such periods. The allowance would then be calculated based on the highest rate the Employee has been paid during the term of continuous acting, or at the rate applicable to the position in which the Employee is currently acting, whichever is the lesser.

(6) Where a higher duties allowance is being paid and the Employee proceeds on any period of normal annual leave, or any other approved leave of absence of not more than 4 weeks, the allowance continues to be paid during the period of such leave if the Employee:

(a) Has been receiving an allowance for a continuous period of 12 months or more; or

(b) Has not been receiving an allowance for 12 months and no other Employee acts in the position during his/her absence and he/she continues to act in the position on returning from leave.

(7) Where a higher duties allowance is being paid and an Employee proceeds on any period of annual leave in excess of the normal, the Employee shall only receive payment of the higher duties allowance for the period of normal annual leave.

(8) Where a higher duties allowance is being paid and the Employee proceeds on a period of any other approved leave of more than 4 weeks, the Employee shall not be entitled to receive payment of higher duties allowance for the whole or any part of the period of such leave.

(9) For the purposes of this clause the expression 'normal annual leave' shall mean the annual period of recreation leave as referred to in Clause 16 – Annual Leave of this Award and shall include any public holidays and leave in lieu accrued during the preceding twelve months taken in conjunction with such annual recreation leave.

36. OVERTIME ALLOWANCE

(1) For the purposes of this Clause, the following terms shall have the following meanings:

(a) "Overtime" means all work performed only at the direction of the Employer or a duly authorised employee outside the prescribed hours of duty.

(b) "Emergency Duty" means: duty by an employee required to return to duty, without prior notice, to meet an emergency at a time that the employee would not ordinarily have been on duty.

(c) "Prescribed hours of duty" means an employee's normal working hours as prescribed by the Employer in accordance with Clause 15. Hours of this Award.

(d) "Duly authorised employee" means an employee or employees appointed in writing by the Employer for the purpose of authorising overtime.

(e) "A day" shall mean from midnight to midnight.

(f) "Public Holiday" means the days prescribed as Public Holidays or in Clause 17. Public Holidays of this award.

(g) "Ordinary travelling time" means time that an employee would have ordinarily spent in travelling once daily from the employee's home to the employee's usual headquarters and home again, by either public transport, or where continuing approval has been given to use a vehicle for official business, by that vehicle.

(h) "Excess travelling time" means all time travelled on official business outside prescribed hours of duty and away from the employee's usual headquarters in accordance with subclause (8) of this Clause.

(i) "Fortnightly salary" means an employee's substantive salary exclusive of any allowances such as the district allowance, personal allowance, qualifications allowance, efficiency allowance, service allowance, special allowance, or higher duties allowance unless otherwise approved by the Employer. Provided that a special allowance or higher duties allowance shall be included in "fortnightly salary" when overtime is worked on duties for which these allowances are specifically paid.

(j) "Commuted overtime" means an agreed allowance negotiated between the Association and the Employer, paid in lieu of actual overtime worked for a group of employees occupying positions which require work to be performed consistently and regularly outside and in excess of the prescribed hours of duty.

(k) "Out of hours contact" shall include the following:

STANDBY - shall mean a written instruction or other authorised direction by the Employer or a duly authorised employee to an employee to remain at the employee's place of employment during any period outside the employee's normal hours of duty, and to perform certain designated tasks periodically or on an ad hoc basis. Such employee shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

Other than in extraordinary circumstances, employees shall not be required to perform more than two periods of standby in any rostered week.

This provision shall not replace normal overtime or shift work requirements.

ON CALL - shall mean a written instruction or other authorised direction by the Employer or a duly authorised employee to an employee rostered to remain at the employee's residence or to otherwise be immediately contactable by telephone or other means outside the employee's normal hours of duty in case of a call out requiring an immediate return to duty.

AVAILABILITY - shall mean a written instruction or other authorised direction by the Employer or a duly authorised employee to an employee to remain contactable, but not necessarily immediately contactable by telephone or other means, outside the employee's normal hours of duty and be available and in a fit state at all such times for recall to duty.

"Availability" will not include situations in which employees carry paging devices or make their telephone numbers available only in the event that they may be needed for casual contact or recall to work. Subject to subclause (4) of this Clause recall to work under such circumstances would constitute emergency duty in accordance with subclause (7) of this Clause.

(2) Reasonable Hours of Overtime

(a) An Employer may require an employee to work reasonable overtime at overtime rates as specified in this clause.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to employee health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

(iv) the notice, if any, given by the Employer of the overtime and by the employee of his or her intention to refuse it; and

(v) any other relevant matter.

(3) Overtime

(a) An employee who works overtime for a greater period than 30 minutes, shall be entitled to payment in accordance with paragraph (d) of this subclause, or time off in lieu of payment in accordance with paragraph (b) of this subclause, or any combination of payment or time off in lieu.

(b) Time off in lieu

(i) Where the employee or the Employer or the duly authorised employee, so elects in writing prior to overtime being worked, time off in lieu of payment for overtime worked may be taken in accordance with the time ratios in paragraph (d) of this subclause.

(ii) The employee shall be required to clear accumulated time off in lieu within two months of the overtime being performed, provided that by written agreement between the employee and the Employer, or duly authorised employee, time off in lieu of payment for overtime may be accumulated beyond two months from the time the overtime is performed so as to be taken in conjunction with periods of approved leave.

(iii) If the Employer is unable to release the employee to clear such leave within two months of the overtime being performed, and no further agreement prescribed in subparagraph (ii) of this paragraph is reached, then the employee shall be paid for the overtime worked.

(c) Commuted Allowance

Any commuted allowance and/or time off in lieu of overtime, other than that provided in paragraph (b) of this subclause, shall be negotiated between the Association and the Employer

(d) Payment for Overtime

Payment for overtime shall be calculated on an hourly basis in accordance with the following formula:

(i) Weekdays

For the first three hours worked outside the prescribed hours of duty on any one weekday at the rate of time and one half:

$$\text{i.e} \quad \frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

After the first three hours on any one week day at the rate of double time:

$$\text{i.e} \quad \frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

(ii) Saturdays

For the first three hours on any Saturday, before 12.00 noon, at the rate of time and one half:

$$\text{i.e} \quad \frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

After the first three hours or after 12.00 noon, whichever is the earlier, on any Saturday at the rate of double time:

$$\text{i.e} \quad \frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

(iii) Sundays

For all hours on any Sunday, at the rate of double time:

$$\text{i.e} \quad \frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

(iv) Public Holidays

For hours worked during prescribed hours of duty on any Public Holiday at the rate of time and one half (in addition to the normal pay for that day):

$$\text{i.e} \quad \frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

For hours worked outside of the prescribed hours of duty on any Public Holiday at the rate of double time and a half:

$$\text{i.e} \quad \frac{\text{Fortnightly Salary}}{75} \times \frac{5}{2}$$

(e) Annual Leave/Long Service Leave

An employee directed to return to duty during periods of annual or long service leave shall be deemed to be no longer on leave for the duration of that period of duty.

(i) If the employee is directed to return to duty during a period of leave during prescribed hours of duty, then that employee shall be recredited with that leave for the same number of hours of duty performed.

(ii) If the employee is directed to return to duty during a period of leave outside of prescribed hours of duty, then that employee shall be entitled to payment of overtime in accordance with subclause (3) of this clause.

(f) Time Worked Past Midnight

Where an employee is required to work a continuous period of overtime which extends past midnight into the succeeding day the time worked after midnight shall be included with that worked before midnight for the purpose of calculation of payment provided for in this subclause.

(g) Minimum Periods for Return to Duty

(i) An employee, having received prior notice, who is required to return to duty:

(aa) on a Saturday, Sunday or Public Holiday, otherwise than during prescribed hours of duty, shall be entitled to payment at the rate in accordance with paragraph (d) of this subclause for a minimum of three hours;

(bb) before or after the prescribed hours of duty on a weekday shall be entitled to payment at the rate in accordance with paragraph (d) of this subclause for a minimum period of one and one half hours;

(ii) For the purpose of this subclause, where an employee is required to return to duty more than once, each duty period shall stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.

(iii) The provisions of this subparagraph shall not apply in cases where it is customary for an employee to return to the place of employment to perform a specific job outside the prescribed hours of duty, or where the overtime is continuous (subject to a meal break) with the completion or commencement of prescribed hours of duty.

(h) Overtime at a Place Other than Usual Headquarters

(i) When an employee is directed to work overtime at a place other than usual headquarters, and provided that the place where the overtime is to be worked is situated in the area within a radius of fifty (50) kilometres from usual headquarters, and the time spent in travelling to and from that place is in excess of the time which an employee would ordinarily spend in travelling to and from usual headquarters, and provided such travel is undertaken on the same day as the overtime is worked, then such excess time shall be deemed to form part of the overtime worked.

(ii) Except as provided in paragraph (e) of subclause (6) and paragraph (b) of subclause (7) of this clause, when an employee is directed to work overtime at a place other than usual headquarters, and provided that the place where the overtime is to be worked is situated outside the area within a radius of fifty(50) kilometres from usual headquarters and the time spent in travelling to and from that place is in excess of the time which the employee would ordinarily spend in travelling to and from usual headquarters, then the employee shall be granted time off in lieu of such excess time spent in actual travel in accordance with subclause (8) Excess Travelling Time of this clause.

(i) Ten Hour Break

(i) When overtime is worked, a break of not less than ten (10) hours shall be taken between the completion of work on one day and the commencement of work on the next, without loss of salary for ordinary working time occurring during such absence.

(ii) Provided that where an employee is directed to return to or continue work without the break provided in subparagraph (i) of this paragraph then the employee shall be paid at double the ordinary rate until released from duty, or until the employee has had ten consecutive hours off duty without loss of salary for ordinary working time occurring during such absence.

(iii) The provisions of subparagraphs (i) and (ii) of this paragraph, shall not apply to employees included in subclause (6) of this clause.

(4) Cases where overtime provisions do not apply

(a) Except as provided in paragraph (b) of this subclause, payment for overtime, or the granting of time off in lieu of overtime, or travelling time, shall not be approved in the following cases:

(i) Employees whose maximum salary or maximum salary and allowance in the nature of salary exceeds that as determined for Level 5 as prescribed by Clause 11. Salaries of this Award.

(ii) Employees whose work is not subject to close supervision.

(b) (i) Where it appears just and reasonable, the Employer may approve the payment of overtime or grant time off in lieu to any employee referred to in paragraph (a) of this subclause.

(ii) When an employee who is not subject to close supervision is directed by the Employer to carry out specific duties involving the working of overtime, and provided such overtime can be reasonably determined by the employee's supervisor, then such employee shall be entitled to payment or time off in lieu of overtime worked in accordance with paragraphs (3)(d) or (3)(b) of this clause.

(5) Meal Allowances

(a) A break of 30 minutes shall be made for meals between 5.30 am and 7.30 am, between 12.00 noon and 2.00pm, and between 4.30 pm and 6.30 pm when overtime duty is being performed.

(b) Except in the case of emergency, an employee shall not be compelled to work more than five hours overtime duty without a meal break. At the conclusion of a meal break, the calculation of the five-hour limit recommences.

(c) An employee required to work overtime of not less than two hours, and who actually purchases a meal shall be reimbursed in accordance with Part 2 of Schedule C. - Overtime Allowance of this Award, in addition to any payment for overtime to which that employee is entitled.

(d) An employee working a continuous period of overtime who has already purchased one meal during a meal break, shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with Part 2 of Schedule C. – Overtime Allowance, of this Award until that employee has worked a further five hours overtime from the time of the last meal break.

(e) If an employee, having received prior notification of a requirement to work overtime, is no longer required to work overtime, then the employee shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.

(6) Out of Hours Contact

(a) Except as otherwise agreed between the Employer and the Association, an employee who is required by a duly authorised employee to be on "out of hours contact" during periods off duty shall be paid an allowance in accordance with the following formulae for each hour or part thereof the employee is on "out of hours contact".

Standby

$$\text{Level 2 (minimum) weekly rate} \times \frac{1}{37.5} \times \frac{37.5}{100}$$

On Call

$$\text{Level 2 (minimum) weekly rate} \times \frac{1}{37.5} \times \frac{18.75}{100}$$

Availability

$$\text{Level 2 (minimum) weekly rate} \times \frac{1}{37.5} \times \frac{18.75}{100} \times \frac{50}{100}$$

Such allowances are contained in Part 1 of Schedule C. - Overtime Allowance of this Award.

Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is made in accordance with the provisions of subclause (3) of this clause when the employee is recalled to work.

(b) When an employee is required to be "on call" or "availability" and the means of contact is to be by landline or satellite telephone fixed at the employees residence the Insurance Commission shall:

(i) Where the telephone is not already installed, pay the cost of such installation.

(ii) Where an employee pays or contributes towards the payment of the rental of such telephone, pay the employee 1/52nd of the annual rental paid by the employee for each seven days or part thereof on which an employee is rostered to be "on call" or "availability".

(iii) Provided that where as a usual feature of the duties an employee is regularly rostered to be on "on call" or "availability", pay the full amount of the telephone rental.

(iv) When an employee is required to “on call” or “available” and the means of contact is other than a landline/satellite telephone fixed at the employee’s residence, the Employer shall provide the employee with the means of contact free of charge for the purposes of work related activity.

(c) An employee shall be reimbursed the cost of all telephone calls made on behalf of the Employer as a result of being on out of hours contact.

(d) Where an employee rostered for "on call" or "availability" is recalled to duty during the period for which the employee is on "out of hours contact" then the employee shall receive payment for hours worked in accordance with subclause (3) of this clause.

(e) Where an employee rostered for "on call" or "availability" is recalled to duty, the time spent travelling to and from the place at which duty is to be performed, shall be included with actual duty for the purposes of overtime payment.

(f) Minimum payment provisions do not apply to an employee rostered for "out of hours contact" duty.

(g) An employee in receipt of an "out of hours contact" allowance and who is recalled to duty shall not be regarded as having performed emergency duty in accordance with subclause (7) of this clause.

(h) Employees subject to this clause shall, where practicable, be periodically relieved from any requirement to hold themselves on "standby", "on call" or "availability".

(i) No employee shall be on out of hours contact after the last working day preceding a period of annual leave or long service leave.

(7) Emergency Duty

(a) Where an employee is required to return to duty to meet an emergency at a time when he or she would not ordinarily have been on duty, and no notice of such call was given prior to completion of usual duty on the last day of work prior to the day on which called on duty, then if called to duty:

(i) on a Saturday, Sunday or Public Holiday, otherwise than during prescribed hours of duty he/she shall be entitled to payment at the rate in accordance with subclause (3) of this clause for a minimum period of three hours;

(ii) before or after the prescribed hours of duty on a weekday he/she shall be entitled to payment at the rate in accordance with subclause (3) of this clause for a minimum period of two and a half hours.

(b) Time spent in travelling to and from the place of duty where the employee is actually recalled to perform emergency duty shall be included with actual duty performed for the purpose of overtime payment.

(c) An employee recalled for emergency duty shall not be obliged to work for the minimum period if the work is completed in less time, provided that an employee called out more than once within any such minimum period shall not be entitled to any further payment for the time worked within that minimum period.

(d) Where an employee is required to work beyond the minimum period on the first or subsequent recall for emergency duty, the additional time worked at the conclusion of that minimum period shall be paid in accordance with the appropriate rate in subclause (3) of this clause.

(e) Where an employee is recalled for a second or subsequent period of emergency duty outside of the initial minimum period, the employee shall be entitled to payment for a new minimum period, and the provisions of this subclause shall be re-applied.

(f) For the purpose of this subclause, no claim for payment shall be allowed in respect of any emergency duty, including travelling time, which amounts to less than 30 minutes.

(8) Excess Travelling Time

An employee eligible for payment of overtime, who is required to travel on official business outside normal working hours and away from usual headquarters shall be granted time off in lieu of such actual time spent in travelling at equivalent or ordinary rates on weekdays and at time and one half rates on Saturdays, Sundays and Public Holidays, otherwise than during prescribed hours of duty, provided that:

(a) such travel is undertaken at the direction of the Employer;

(b) such travel shall not include:

(i) time spent in travelling by an employee on duty at a temporary headquarters to the employee's home for weekends for the employee's own convenience;

(ii) time spent in travelling by plane between the hours of 11.00 pm and 6.00 am;

(iii) time spent in travelling by train between the hours of 11.00 pm and 6.00 am;

(iv) time spent in travelling by ship when meals and accommodation are provided;

(v) time spent in travel resulting from the permanent transfer or promotion of an employee to a new location;

(vi) time of travelling in which an employee is required by the department to drive, outside ordinary hours of duty, a departmental vehicle or to drive the employee's own motor vehicle involving the payment of mileage allowance, but such time shall be deemed to be overtime and paid in accordance with subclause (3) of this clause. Passengers, however, are entitled to the provisions of this subclause (8) of this clause;

(vii) time spent in travelling to and from the place at which overtime or emergency duty is performed, when that travelling time is already included with actual duty time for the payment of overtime.

(c) Time off in lieu will not be granted for periods of less than 30 minutes.

(d) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty which is in excess of the employee's ordinary travelling time.

(e) Where the urgent need to travel compels an employee to travel during the employee's usual lunch interval such additional travelling time is not to be taken into account in computing the number of hours of travelling time due.

(f) In the case of an employee absent from usual headquarters, not involving an overnight stay, the time spent by the employee, outside the prescribed hours of duty, in waiting between the time of arrival at place of duty and the time of commencing duty, and between the time of ceasing duty and the time of departure by the first available transport shall be deemed to be excess travelling time.

(g) In the case of an employee absent from usual headquarters that does involve an overnight stay, the time spent by the employee, outside the prescribed hours of duty, in waiting between the time of ceasing duty on the last day and the time of departure by the first available transport shall be deemed to be excess travelling time.

(9) Special Conditions

Any group of employees whose duties necessarily entail special conditions of employment shall not be subject to the prescribed hours of duty as defined in Clause 15. Hours of this Award if the Managing Director so determines. Provided, however, that such a determination shall not abrogate the right of the Association to make a claim or claims on behalf of such a group.

37. MISCELLANEOUS ALLOWANCES & CONDITIONS

Subject to the other provisions of this Award, the following clauses within the Public Service Award 1992 (PSA A4 of 1989) and any amendments thereto including their replacement shall be deemed to have been made between the parties to this award and shall apply mutatis mutandis:

Clause 23 (6) - Additional Leave for the North West
Clause 23 (10) – Annual Leave Travel Concession
Clause 43. - District Allowance
Clause 44 - Disturbance Allowance
Clause 47 - Motor Vehicle Allowance
Clause 48 - Property Allowance
Clause 50 - Relieving Allowance
Clause 51 - Removal Allowance
Clause 53 -Transfer Allowance
Clause 54 -Travelling Allowance
Clause 55 -Weekend Absence for Residence

38. KEEPING OF AND ACCESS TO EMPLOYMENT RECORDS

(1) The Employer will ensure that the keeping of employment records and access to employment records of employees is in accordance with *Industrial Relations Act 1979 Part 11 Division 2F Keeping of and access to employment records.*

(2) If the Employer maintains a personal or other file on an employee subject to the Employer's convenience, the employee shall be entitled to examine all material maintained on that file.

39. RIGHT OF ENTRY AND INSPECTION BY AUTHORISED REPRESENTATIVES

(1) The parties to the award shall act consistently with the terms of the *Division 2 G – Right of Entry and Inspection by Authorised Representatives – of the Industrial Relations Act 1979.*

(2) An authorised representative shall on notification to the Employer have the right to enter any premises where relevant employees covered by this award work during working hours, including meal breaks, for the purpose of holding discussions at the premises with relevant employees covered by the award who wish to participate in those discussions, the legitimate business of the Association or for the purpose of investigating complaints concerning the application of this Award, but shall in no way unduly interfere with the work of employees.

40. COPIES OF AWARD

The Employer shall ensure that sufficient copies of this Award are available for every employee covered by this Award and every employee shall be entitled to have ready access to a copy of this Award.

41. ORGANISATIONAL CHANGE

(1) (a) Where the Employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the Employer shall notify the employees who may be affected by the proposed changes and the Association.

(b) For the purpose of this clause "significant effects" include termination of employment; major changes in the composition, operation or size of the Employer's workforce or in the skills required; elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs.

(2) (a) The Employer shall discuss with the employees affected and the Association, inter alia, the introduction of the changes referred to in subclause (1) hereof, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or the Association in relation to the changes.

(b) The discussion shall commence as early as practicable after a firm decision has been made by the Employer to make the changes referred to in subclause (1) hereof, unless by prior arrangement, the Association is represented on the body formulating recommendations for change to be considered by the Employer.

(c) For the purposes for such discussion, the Employer shall provide to the employees concerned and the Association all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and other matters likely to affect employees. Provided that the Employer shall not be required to disclose confidential information, the disclosure of which would be inimical to the Employer's interest.

42. PRESERVATION AND NON-REDUCTION

(1) No rights, privileges or entitlements presently granted to an employee, employed by the Employer at the date of this award, shall be withdrawn or ceased unless expressly agreed to by the Employer and the employee.

(2) Nothing herein contained shall enable the Employer to reduce the salary of any employee or conditions of work applied to any employee who at the date of this Award was being paid a higher rate of salary or wage than the minimum prescribed in this Award or was being accorded a benefit superior to any contained herein as a condition of work.

43. SPECIAL CONTRACTS

(1) Notwithstanding anything contained elsewhere in this Award to the contrary, the Employer and the Association may agree that a specific position, employee, group of positions or group of employees shall have their salary and conditions of employment regulated by a "special contract".

(2) An employee who is engaged on a "special contract" shall have such salary and conditions of employment as are agreed between the Employer and the employee and such contract shall prescribe an employment package which, when viewed overall, is not less than that prescribed by this award for the position concerned or similar positions.

In the event of a dispute, the matter shall be referred to the Western Australian Industrial Relations Commission for determination.

(3) The terms of any "special contract" shall be put in writing and forwarded to the Association for comment not less than seven (7) days after the contract is made with the employee or employees concerned.

(4) The provisions of this Clause shall be applicable only to employees or salaries in excess of Level 5.

44. ESTABLISHMENT OF CONSULTATIVE MECHANISMS

The parties to this award or agreement are required to establish a consultative mechanism/s and procedures appropriate to their size, structure and needs, for consultation and negotiation on matters affecting the efficiency and productivity of the Insurance Commission.

45. - SALARY PACKAGING ARRANGEMENT

(1) An employee may, by agreement with the Employer, enter into a salary packaging arrangement in accordance with this clause and Australian Taxation Office requirements.

(2) Salary packaging is an arrangement whereby the entitlements and benefits under this Award, contributing toward the Total Employment Cost (TEC) (as defined in subclause (3) of this clause) of an employee, can be reduced by and substituted with another or other benefits.

(3) The TEC for salary packaging purposes is calculated by adding the following entitlements and benefits:

(a) the base salary;

(b) other cash allowances;

(c) non cash benefits;

(d) any Fringe Benefit Tax liabilities currently paid; and

(e) any variable components.

(4) Where an employee enters into a salary packaging arrangement the employee will be required to enter into a separate written agreement with the Employer setting out the terms and conditions of the salary packaging arrangement.

(5) Notwithstanding any salary packaging arrangement, the salary rate as specified in this Award, is the basis for calculating salary related entitlements specified in the Award.

(6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory Employer contributions made to superannuation schemes established under the State Superannuation Act 2001 are calculated on the gross (pre packaged) salary amount regardless of whether an employee participates in a salary packaging arrangement with the Employer.

(7) A salary packaging arrangement cannot increase the costs to the Employer of employing an individual.

(8) A salary packaging arrangement is to provide that the amount of any taxes, penalties or other costs for which the Employer or employee is or may become liable for and are related to the salary packaging arrangement, shall be borne in full by the employee.

(9) In the event of any increase in taxes, penalties or costs relating to a salary packaging arrangement, the employee may vary or cancel that salary packaging arrangement.

46. SUPPORTED WAGE

(1) Workers Eligible for a Supported Wage

This clause defines the conditions that will apply to employees who, because of the effects of a disability, are eligible for a supported wage under the terms of this clause. In the context of this clause, the following definitions will apply:

"Supported Wage System" means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in "(Supported Wage System: Guidelines and Assessment Process)";

"Accredited Assessor ", means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessment of an individual's productive capacity within the Supported Wage System;

"Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme; and

"Assessment Instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(2) Eligibility Criteria

Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under the Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (This clause does not apply to any existing employee who has a claim against the Employer, which is subject to the provisions of workers' compensation legislation, or any provision of the Award relating to the rehabilitation of employees who are injured in the course of their current employment).

This clause also does not apply to Employers in respect of their facility, programme, undertaking, service or the like which receives funding under the Disability Services Act 1986 and fulfils the dual role of service provider and sheltered Employer to people with disabilities who are in receipt of or eligible for a Disability Support Pension, except with respect to an organisation which has received recognition under s10 or s12A of the Act, or if a part only has received recognition, that part.

(3) Supported Wage Rates

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by the Award for the class of work, which the person is performing according to the following schedule:

Assessed Capacity (clause 51.5)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than $60 per week).

*Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

(4) Assessment of Capacity

For the purpose of establishing the percentage of the Award rate to be paid to the employees, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

(a) the Employer and the union, in consultation with the employee, or if desired by any of these; or

(b) the Employer and an accredited Assessor from a panel agreed by the parties to the Award and the employee.

(5) Lodgement of Assessment Instruments

All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage rate to be paid to the employee, shall be lodged by the Employer with the Registrar of the Commission.

All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where the union is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

(6) Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

(7) Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of this clause will be entitled to the same terms and conditions of employment as all other employees covered by the Award paid on a pro rata basis.

(8) Workplace Adjustment

An Employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the area.

(9) Trial Period

In order for an adequate assessment of the employee's capacity to be made, an Employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.

During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

The minimum amount payable to the employee during the trial period shall be no less than $60 per week.

Work trials should include induction or training as appropriate to the job being trialled.

Where the Employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4).

47. PURCHASED LEAVE - 48/52 SALARY ARRANGEMENT

(1) The Employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to four weeks additional leave. The employee can agree to take a reduced salary spread over the 52 weeks of the year and receive the following amounts of additional leave:

Number of weeks' salary spread over 52 weeks	Number of weeks' additional leave purchased
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

(2) The additional purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the additional leave not taken. In the event that the employee is unable to take such leave, his/her salary will be adjusted on the last pay period in January to take account the fact that time worked during the year was not included in the salary.

(3) In the event that a part time employee's ordinary working hours are varied during the year, the salary paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the employee's ordinary working hours during the previous year.

(4) Access to this entitlement will be subject to the employee having satisfied the Employers accrued leave management policy.

(5) The Employer will assess each application for 48/52-salary arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.

48. PURCHASED LEAVE - DEFERRED SALARY ARRANGEMENT

(1) With the written agreement of the Employer, an Employee may elect to receive, over a four-year period, 80% of the salary they would otherwise be entitled to receive in accordance with this Award.

(2) The employer will assess each application for deferred salary on its merits and give consideration to the personal circumstances of the employee seeking the leave.

(3) On completion of the fourth year, an Employee will be entitled to 12 months leave and will receive an amount equal to 80% of the salary they were otherwise entitled to in the fourth year of deferment.

(4) Where an Employee completes 4 years of deferred salary service and is not required to attend duty in the following year, the period of nonattendance shall not constitute a break in service and shall count as service on a pro-rata basis for all purposes.

(5) An Employee may withdraw from this scheme prior to completing a 4-year period by written notice. The employee will receive a lump sum payment of salary forgone to that time but will not be entitled to equivalent absence from duty.

(6) The Employer will ensure that superannuation arrangements and taxation effects are fully explained to the employee by the relevant Authority. The Employer will put any necessary arrangements into place.

49. DISPUTE SETTLEMENT PROCEDURE

(1) Any questions, difficulties or disputes arising under this Award of employees bound by the award shall be dealt with in accordance with this clause.

(2) The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three (3) working days.

(3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's superior and an attempt made to find a satisfactory solution, within a further three (3) working days.

(4) If the dispute is still not resolved, it maybe referred by the employee/s or Association representative to the Employer or his/her nominee.

(5) Where the dispute cannot be resolved within five (5) working days of the Association representatives' referral of the dispute to the Employer or his/her nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.

(6) The period for resolving a dispute may be extended by agreement between the parties.

(7) At all stages of the procedure the employee may be accompanied by an Association representative.

50. CASUAL EMPLOYMENT

(1) Definition: "Casual Employee" means:

(a) an employee engaged by the hour for a period not exceeding one calendar month in any period of engagement, as determined by the Employer; or

(b) an employee engaged on an hourly rate of pay and by agreement between The Civil Service Association and the Managing Director.

Salary

(2) Casual Employee's shall be paid for each hour worked at the appropriate classification contained in Schedule 1- Salaries of this Agreement in accordance with the following formula:

$$\frac{\text{Fortnightly Salary}}{75}$$

with the addition of 20% in lieu of annual leave, sick leave, long service leave and payment for public holidays.

Conditions of Employment

(3) Conditions of employment, leave and allowances provided under the provisions of this Award shall not apply to a casual Employee.

However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of his/her duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Agreement.

(4) The employment of a casual employee may be terminated at any time by the casual employee or the Employer giving to the other, one hour's prior notice. In the event of the Employer or casual employee failing to give the required notice, one hour's salary shall be paid or forfeited.

(5) The provisions of the Overtime Allowance in this Agreement do not apply to Casual employee's who are paid by the hour for each hour worked.

(6) Additional hours are paid at the normal casual rate.

SCHEDULE A – SALARIES

(1) The annual salaries applicable to employees covered by this Award;

Level	**Salary Per Annum $**	**Arbitrated Safety Net Adjustments $**	**Total Salary Per Annum $**
Level 1			
Under 17 years	11355	2894	14249
17 years	13270	3383	16653
18 years	15480	3945	19425
19 years	17918	4567	22485
20 years	20122	5129	25251
1.1	22104	5634	27738
1.2	22756	5634	28390
1.3	23407	5634	29041
1.4	24054	5739	29793
1.5	24705	5739	30444
1.6	25356	5739	31095
1.7	26105	5635	31740
1.8	26623	5635	32258
1.9	27389	5635	33024
Level 2			
2.1	28306	5635	33941
2.2	29009	5635	34644
2.3	29748	5635	35383
2.4	30529	5635	36164
2.5	31346	5635	36981
Level 3			
3.1	32469	5635	38104
3.2	33344	5635	38979

3.3	34246	5530	39776
3.4	35172	5530	40702
Level 4			
4.1	36442	5530	41972
4.2	37437	5426	42863
4.3	38461	5426	43887
Level 5			
5.1	40433	5426	45859
5.2	41766	5426	47192
5.3	43151	5426	48577
5.4	44588	5426	50014
Level 6			
6.1	46899	5426	52325
6.2	48470	5426	53896
6.3	50096	5426	55522
6.4	51832	5426	57258
Level 7			
7.1	54494	5426	59920
7.2	56336	5426	61762
7.3	58340	5426	63766
Level 8			
8.1	61597	5426	67023
8.2	63930	5426	69356
8.3	66823	5426	72249
Level 9			
9.1	70436	5426	75862
9.2	72877	5426	78303
9.3	75661	5426	81087
Class 1	79871	5426	85297
Class 2	84081	5426	89507
Class 3	88289	5426	93715
Class 4	92499	5426	97925

(2) Salary increases resulting from State Wage Case Decisions are calculated for those employees under the age of 21 years employed at Level 1 by dividing the current junior annual salary by the current Level 1.1 annual salary and multiplying the result by the new Level 1.1 annual salary which includes the State Wage Case increase. The following formula is to be applied:

$$\frac{\text{Current junior rate}}{\text{Current Level 1.1 rate}} \times \text{New Level 1.1 rate} = \text{New junior rate}$$

SCHEDULE B - NAMED UNION PARTY

The Civil Service Association of Western Australia Incorporated.

SCHEDULE C – OVERTIME ALLOWANCE

PART I - OUT OF HOURS CONTACT

Standby	$6.89 per hour
On Call	$3.45 per hour
Availability	$1.72 per hour

PART II - MEALS

Breakfast	$8.05 per meal
Lunch	$9.90 per meal
Evening Meal	$11.90 per meal
Supper	$8.05 per meal

SCHEDULE D – EXPIRED GENERAL AGREEMENT SALARIES

Classification Level	**Annual Salary at 1-Jan-03 (Not to be subject to arbitrated safety net adjustments)**
Level 1	
Under 17 yrs	$14,284

17 yrs	$16,693
18 yrs	$19,472
19 yrs	$22,539
20 yrs	$25,311
1.1	$27,805
1.2	$28,661
1.3	$29,516
1.4	$30,366
1.5	$31,222
1.6	$32,077
1.7	$33,061
1.8	$33,741
1.9	$34,748
Level 2	
2.1	$35,952
2.2	$36,876
2.3	$37,847
2.4	$38,873
2.5	$39,946
Level 3	
3.1	$41,421
3.2	$42,571
3.3	$43,756
3.4	$44,972
Level 4	
4.1	$46,641
4.2	$47,948
4.3	$49,293
Level 5	
5.1	$51,884
5.2	$53,635
5.3	$55,454
5.4	$57,342
Level 6	
6.1	$60,378
6.2	$62,442
6.3	$64,578
6.4	$66,859
Level 7	
7.1	$70,356
7.2	$72,776
7.3	$75,408
Level 8	
8.1	$79,687
8.2	$82,752
8.3	$86,553
Level 9	
9.1	$91,299
9.2	$94,506
9.3	$98,163
CLASS 1	$103,694

CLASS 2	$109,225
CLASS 3	$114,753
CLASS 4	$120,284

AWARDS/AGREEMENTS—Variation of—

2004 WAIRC 13033

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANT

-v-

ARGYLE DIAMOND MINES PTY LIMITED ACN 008 912 418 & OTHERS

RESPONDENTS

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 14 OCTOBER 2004
FILE NO/S APPL 1072 OF 2004
CITATION NO. 2004 WAIRC 13033

Result Award varied. Order issued
Representation
Applicant Mr D McLane as agent
Respondents Ms E Athanasiou of counsel on behalf of Argyle Diamond Mines Pty Ltd

Order

HAVING heard Mr D McLane as agent on behalf of the applicant, Ms E Athanasiou of counsel on behalf of Argyle Diamond Mines Pty Ltd and there being no appearance on behalf of the other respondents the Commission, by consent, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders-

THAT the Argyle Diamonds Production Award 1996 No A7 of 1996 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date hereof.

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

SCHEDULE

1. Clause 9. – Hours of Work: Delete paragraph (f) of subclause (5) of this clause and insert in lieu thereof the following:

(f) A shift employee shall be paid a flat allowance of **$0.55** cents for each hour worked. This allowance shall compensate the employee for all disabilities associated with working shift work, particularly night shift. Increases to allowances in this clause shall be calculated by estimating the percentage change in the wage paid to the key classification for this award (Mechanical Trades Level 1) since this allowance was last changed and applying that percentage increase to the allowance paid previously.

2. Clause 20. – Allowances: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) (a) Day Employees:

Employees shall be paid a living away from home allowance of **$18.15** for each rostered period of duty at Argyle.

(b) Shift Employees:

Employees shall be paid a living away from home allowance of **$19.60** for each rostered shift at Argyle. The additional amount is in recognition of the requirement for shift employees to spend one additional night at Argyle.

3. Schedule A – Delete this Schedule and insert in lieu thereof the following:

SCHEDULE A – PARTIES TO THE AWARD

UNIONS

Australian Workers Union
West Australian Branch
Industrial Union of Workers
"Wellington Fair"
Cnr. Wellington & Lord Streets
EAST PERTH WA 6004

Communications, Electrical, Electronic, Energy, Information,
Postal, Plumbing and Allied Workers Union of Australia
Engineering and Electrical Division
WA Branch
U24/257 Balcatta Road
BALCATTA WA 6021

Automotive, Food, Metals, Engineering,
Printing & Kindred Industries Union,
121 Royal Street,
EAST PERTH WA 6004

COMPANY
Argyle Diamond Mines Pty Limited
2 Kings Park Road
WEST PERTH WA 6005

2004 WAIRC 12964

ARTWORKERS AWARD NO. A30 OF 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	TOWN OF NARROGIN , AVON VALLEY ARTS SOCIETY **RESPONDENT**
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 882 OF 2004
CITATION NO.	2004 WAIRC 12964

Result Award variation

Order

HAVING heard Ms L. Dowden for the Applicant and there being no appearance for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Artworkers Award No. A30 of 1987 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

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

(c) Construction Allowance $18.34

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

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

(1) Confined Space

An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 54 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(2) Toxic Substances

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

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

(c) An employee using toxic substances or materials of a like nature shall be paid 54 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 42 cents per hour extra.

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

(3) Wet Work

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 44 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(4) Dirty Work

An employee engaged on dirty work shall be paid 44 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(5) Spray Application - Painters

A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Labour and Industry, shall be paid 44 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Height Money

An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds fifteen metres in height shall be paid for all work above fifteen metres, 44 cents per hour or part thereof, with an additional 44 cents per hour or part thereof for work above each further fifteen metres in addition to the rates otherwise prescribed in this award.

(7) Swing Scaffold

(a) An employee employed -

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

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

shall be paid $3.19 for the first four hours or part thereof and 66 cents for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

2004 WAIRC 13031

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 14 OCTOBER 2004
FILE NO/S	APPL 1073 OF 2004
CITATION NO.	2004 WAIRC 13031

Result	Award varied. Order issued
Representation	
Applicant	Mr D McLane as agent
Respondents	Mr P Moss as agent on behalf of MacMahon Holdings and Mr R Gifford as agent on behalf of Ausdrill Limited

Order

HAVING heard Mr D McLane as agent on behalf of the applicant, Mr P Moss as agent on behalf of MacMahon Holdings, Mr R Gifford as agent on behalf of Ausdrill Limited and there being no appearance on behalf of the other respondents the Commission, by consent, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the AWU Gold (Mining and Processing) Award 1993 No A1 of 1992 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period following the date hereof.

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

SCHEDULE

1. Clause 7. – Shift Work: Delete subclause (2) of this clause and insert in lieu thereof the following:

(2) A shift employee, in addition to that employee's ordinary rate of pay, shall be paid an additional flat payment of **$10.90** per rostered afternoon or night shift.

2. Clause 9. – Rest Breaks and Recall to Work – All Employees: Delete subclause (4) of this clause and insert in lieu thereof the following:

(4) An employee who without notification on the prior day or shift is required to work overtime shall be supplied with a meal (or **$9.20** in lieu) when that employee works more than one hour beyond the rostered ordinary hours of the day or shift.

3. Clause 16. – Wage Rates: Delete subclauses (1), (2) and (4) of this clause and insert in lieu thereof the following:

(1)

Underground	**Total Weekly Minimum Rate (Includes Industry Allowance)**
	$
Group 1	531.00
Trucker	
Toolcarrier	
Salvage Person	
Pass Runner	
Group 2	544.80
Pipe Sampler	
Sampler	
Popper Machineperson	
Diamond Drillers Assistant	
Air Hoist Operator	
Ventilation Person	
Pump Attendant (as distinct from Pumpperson)	
Hydraulic Fill Operator	
Group 3	550.00
Platelayer	
Train Crew	
Mechanical Loader Operator	
Scraper Hauler Operator	
Braceperson	
Group 4	554.80
Scaler	
Pumpperson (engaged dewatering a mine)	
Group 5	562.80
Rock Drill Person in other places	
Rock Bolter	
Powder Monkey	
Percussion Drill Operator	
Sanitary Person	
Crusher Operator	
Group 6	571.60
Rock Drill Person in Rises	
Rock Drill Person in Winzes	
Raise Drill Operator	
In-The-Hole-Hammer Operator	
Diamond Driller up to 15kw	
Timberman	
Group 7	579.90
Rock Drill Person in Shaft	
Timberman in Shaft	
Diamond Driller over 15kw	
Group 8	588.00
Diesel Truck and Loader Operator	
Diesel Personnel Carrier Operator	
Group 9	600.70
Hydraulic Jumbo Drill Operator	

(2) (a)

Mining - Open Cut	**Total Weekly Minimum Rate (Includes Industry Allowance)**
	$
Mine Employee - Grade 1	531.90
Labourer	
Spotter	
Sampler	

Mine Employee - Grade 2	554.30
Blast Crew	
Trainee - Mobile Plant Operator	
Serviceperson	
Production	
Driller	
Mine Employee - Grade 3	596.50
Trained - Mobile Plant Operator	
Serviceperson	
Production	
Driller	
Mine Employee - Grade 4	606.10
Shot Firer	
Skilled - Mobile Plant Operator	
Serviceperson	
Production	
Driller	
Mine Employee - Grade 5	619.60
Multiskilled	

(b) **Ore Processing**

	Total Weekly Minimum Rate (Includes Industry Allowance)
	$
Process Operator - Grade 1	524.20
Process Operator - Grade 2	541.20
Process Operator - Grade 3	557.70
Process Operator - Grade 4	573.50
Process Operator - Grade 5	606.10
Laboratory	
Laboratory Employee - Grade 1	524.20
Laboratory Employee - Grade 2	541.20
Laboratory Employee - Grade 3	557.70
Laboratory Employee - Grade 4	573.50
Laboratory Employee - Grade 5	606.10

(c) **Mine Services Employees (MSE)**

	Total Weekly Minimum Rate (Including Industry Allowance)
	$
MSE - Grade 1	531.90
MSE - Grade 2	548.50
MSE - Grade 3	564.70

(4) **Leading Hands**

In addition to the highest relevant wage rates for his or her classification an employee appointed as a leading hand shall be paid per week, the following -

(a)	In charge of not less than three and not more than ten other employees	$19.50
(b)	In charge of more than ten and not more than twenty other employees	$29.40
(c)	In charge of more than twenty employees	$38.10

4. Clause 17. – Allowances: Delete subclauses (1), (2), (5) and (6) of this clause and insert in lieu thereof the following:

17. - ALLOWANCES

(1) Industry Allowance

(a) Each employee shall be paid the all purpose allowance of **$90.20** per week which is included in the total minimum wage of the Wage Schedule of Clause 16. - Wage Rates of this award. The make up of the total wage including the industry allowance is shown in Appendix 1.

(b) The allowance recognises, and is in payment for all aspects of work in the industry including the location and nature of individual operations within it.

(2) Height Money: An employee shall be paid an allowance of **$1.50** flat each day for work at a height of 15.5 metres or more above the nearest horizontal plane.

(5) First Aid

Any qualified person appointed by the employer to perform first aid duties shall be paid an additional flat allowance of **$2.10** per shift.

(6) Wet Places

An employee working in wet places shall be paid an allowance of **$1.80** per day or shift or part of a day or shift provided that:

(a) The allowance shall not be payable to employees working on natural surfaces made wet by rain.

(b) Where waterproof boots and clothing are provided by the employer, no claim shall be allowed under this provision for wet feet or clothing. The employee shall be paid the allowance where the employees clothing have become wet, notwithstanding the wearing of protective clothing and boots.

(c) Where an employee is compelled to work in water to thigh level the employee shall receive the allowance.

(d) A place shall be deemed to be wet when water other than rain is continually dropping from overhead so as to saturate the clothing of the employee if unprotected or when the water in the place where the employee is standing is over 2.5 centimetres deep and the employee has not been supplied with waterproof boots.

5. Appendix 1 – Make Up of Total Wage: Delete this appendix and insert in lieu thereof the following:

APPENDIX 1 – MAKE UP OF TOTAL WAGE

This appendix shows how the total wages in this award are made up detailing both base wage rates and safety net adjustments as well as the industry allowance and total rate published in Clause 16. - Wages.

Classification and wage per week.

(1) Underground	**se Rate**	**Industry Allowance**	**Arbitrated Safety Net Adjustment**	**Total Weekly Minimum Rate**
	$	$	$	$
Group 1	298.80	90.20	142.00	531.00
Trucker				
Toolcarrier				
Salvage Person				
Pass Runner				
Group 2	312.60	90.20	142.00	544.80
Pipe Sampler				
Sampler				
Popper Machineperson				
Diamond Drillers Assistant				
Air Hoist Operator				
Ventilation Person				
Pump Attendant (as distinct from Pumpperson)				
Hydraulic Fill Operator				
Group 3	317.80	90.20	142.00	550.00
Platelayer				
Train Crew				
Mechanical Loader Operator				
Scraper Hauler Operator				
Braceperson				
Group 4	322.60	90.20	142.00	554.80
Scaler				
Pumpman (engaged dewatering a mine)				
Group 5	330.60	90.20	142.00	562.80
Rock Drill Person in other places				
Rock Bolter				
Powder Monkey				
Percussion Drill Operator				
Sanitary Person				
Crusher Operator				
Group 6	339.40	90.20	142.00	571.60
Rock Drill Person in Rises				
Rock Drill Person in Winzes				
Raise Drill Operator				
In-The-Hole-Hammer Operator				
Diamond Driller up to 15kw				
Timberman				
Group 7	347.70	90.20	142.00	579.90
Rock Drill Person in Shaft				
Timberperson in Shaft				
Diamond driller over 15kw				

Group 8 Diesel Truck and Loader Operator Diesel Personnel Carrier Operator	353.80	90.20	144.00	588.00
Group 9 Hydraulic Jumbo Drill Operator	366.50	90.20	144.00	600.70

(2) (a) **Mining - Open Cut**	**Base Rate**	**Industry Allowance**	**Arbitrated Safety Net Adjustment**	**Total Weekly Minimum Rate**
	$	$	$	$
Mine Employee - Grade 1 Labourer Spotter Sampler	299.70	90.20	142.00	531.90
Mine Employee - Grade 2 Blast Crew Trainee - Mobile Plant Operator Serviceperson Production Driller	322.10	90.20	142.00	554.30
Mine Employee - Grade 3 Trained - Mobile Plant Operator Serviceperson Production Driller	362.30	90.20	144.00	596.50
Mine Employee - Grade 4 Shot Firer Skilled - Mobile Plant Operator Serviceperson Production Driller	371.90	90.20	144.00	606.10
Mine Employee - Grade 5 Multiskilled	385.40	90.20	144.00	619.60

(b) **Ore Processing**	**Base Rate**	**Industry Allowance**	**Arbitrated Safety Net Adjustment**	**Total Weekly Minimum Rate**
	$	$	$	$
Process Operator - Grade 1	292.00	90.20	142.00	524.20
Process Operator - Grade 2	309.00	90.20	142.00	541.20
Process Operator - Grade 3	325.50	90.20	142.00	557.70
Process Operator - Grade 4	341.30	90.20	142.00	573.50
Process Operator - Grade 5	371.90	90.20	144.00	606.10
Laboratory				
Laboratory Employee - Grade 1	292.00	90.20	142.00	524.20
Laboratory Employee - Grade 2	309.00	90.20	142.00	541.20
Laboratory Employee - Grade 3	325.50	90.20	142.00	557.70
Laboratory Employee - Grade 4	341.30	90.20	142.00	573.50
Laboratory Employee - Grade 5	371.90	90.20	144.00	606.10

(c) **Mine Services Employees (MSE)**	**Base Rate**	**Industry Allowance**	**Arbitrated Safety Net Adjustment**	**Total Weekly Minimum Rate**
	$	$	$	$
MSE - Grade 1	299.70	90.20	142.00	531.90
MSE - Grade 2	316.30	90.20	142.00	548.50
MSE - Grade 3	332.50	90.20	142.00	564.70

2004 WAIRC 12965

BUILDING TRADES AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	CRYSTAL SOFTDRINKS, FRESH FOOD INDUSTRIES, KAILIS BROS
	RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 873 OF 2004
CITATION NO.	2004 WAIRC 12965

Result Award varied

Order

HAVING heard Ms L. Dowden for the Applicant and Mr P. Moss for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades Award 1968, No. 31 of 1966 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

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

(5) Construction Allowance: (per week) $21.02. An employee shall not be entitled to this construction allowance except when required to work "on site" on any work in connection with the erection or demolition of a building or to carry out work which the employer and the union agree is construction work or in default of agreement, that is so declared by the Board of Reference.

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

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

		Per Week $
(a)	not more than one employee, other than an apprentice, shall be paid	13.49
(b)	more than one and not more than five other employees shall be paid	30.09
(c)	more than five and not more than ten other employees shall be paid	38.19
(d)	more than ten other employees shall be paid	50.86

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

3. Clause 13. – Special Rates and Provisions:

A. Delete subclauses (2) – (31) inclusive of this clause and insert in lieu the following:

(2) Insulation: An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof shall be paid $0.60 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(3) Hot Work:

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius shall be paid $0.47 per hour or part thereof in addition to the rates otherwise prescribed in this Award or in excess of 54 degrees Celsius shall be paid $0.60 per hour or part thereof in addition to the said rates.

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

(4) Cold Work:

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award.

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

(5) Confined Space: An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation shall be paid $0.60 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Toxic Substances:

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

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

(c) An employee using toxic substances or materials of a like nature shall be paid $0.60 per hour extra. Employees working in close proximity to employees so engaged shall be paid $0.48 per hour extra.

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

(7) Asbestos: Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) such employees shall be paid $0.60 per hour extra whilst so engaged.

(8) Dry Polishing or Cutting of Tiles: An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid $0.60 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(9) Bitumen Work: An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid $0.60 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(10) Roof Repairs: An employee engaged on repairs to roofs shall be paid $0.60 per hour or part thereof in addition to the rates otherwise provided in this award.

(11) Wet Work: An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(12) Dirty Work: An employee engaged on dirty work shall be paid $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(13) An employee engaged in repairs to sewers shall be paid at the rate of $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(14) An employee working in a dust-laden atmosphere in a joiners' shop where dust extractors are not provided or in such atmosphere caused by the use of materials for insulating, deafening or pugging work (as, for instance, pumice, charcoal, silicate of cotton or any other substitute), shall be paid at the rate of $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(15) Scaffolding Certificate Allowance: A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Occupational Health, Safety and Welfare and is required to act on that certificate whilst engaged on work requiring a certificated person shall be paid $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(16) Spray Application - Painters: A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Occupational Health, Safety and Welfare, shall be paid $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(17) Cleaning Down Brickwork: An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid $0.43 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(18) Bagging: An employee engaged upon bagging brick or concrete structures shall be paid $0.43 per hour thereof in addition to the rates otherwise prescribed in this award.

(19) Furnace Work: An employee engaged in the construction or alternation or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.28 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(20) Acid Work: An employee required to work on acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.28 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(21) Plasterers using flintcote shall be paid $0.32 per hour extra except where flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be $0.60 per hour extra.

(22) Chemical and Manure Works and Oil Refineries: Journeymen and builders' labourers working on chemical and manure works or oil refineries shall receive $0.21 per hour in addition to the prescribed rate.

(23) Height Money: An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds 15 metres in height shall be paid for all work above 15 metres, $0.48 per hour or part thereof, with an additional $0.48 per hour or part thereof for work above each further 15 metres in addition to the rates otherwise prescribed in this award.

(24) Swing Scaffold:

(a) An employee employed -

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

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

shall be paid $3.48 for the first four hours or part thereof and $0.70 for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

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

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

(25) Plumbing:

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

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

(ii) Morgues, shall be paid $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award.

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

(i) whilst under way; or

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

(iii) in a confined space; or

(iv) in a ship which has done one trip or more in a fume or dust-laden atmosphere, in bilges, or when cleaning blockages in soil pipes or waste pipes or repairing brine pipes; shall be paid $0.59 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(c) A plumber carrying out pipework in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.25 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(d) A plumber required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.47 for such examination and $0.89 per hour thereafter for fixing renewing or repairing such work.

(e) Permit Work: Any licenced plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $32.80 for that week, in addition to the rates otherwise prescribed in this award.

(f) Plumbers on Sewerage Work: Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up on house drains or wastepipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.59 per day in addition to the prescribed rate whilst so employed.

(26) Explosive Powered Tools: An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools is required to use an explosive powered tool shall be paid $1.13 for each day on which he uses such tool in addition to the rates otherwise prescribed in this award.

(27) Secondhand Timber: Where whilst working with secondhand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber, shall be entitled to an allowance of $1.88 per day on each day upon which his tools are so damaged provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(28) Computing Quantities: An employee, other than a leading hand, who is regularly required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.48 per day or part thereof in addition to the rates otherwise prescribed in this award.

(29) Setter Out: A setter out in a joiner's shop shall be paid $5.13 per day in addition to the rates otherwise prescribed by this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(30) Detail Worker: A detail worker shall be paid $5.13 per day in addition to the rates otherwise prescribed in this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(31) Spray Painting - Painters:

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

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

(c) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.43 per day.

2004 WAIRC 12959

BUILDING TRADES (CONSTRUCTION) AWARD 1987, NO. R14 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	ADSIGNS PTY LTD, LEIGHTON CONTRACTORS PTY LTD, PERTH CITY COUNCIL **RESPONDENTS**
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 871 OF 2004
CITATION NO.	2004 WAIRC 12959

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr K. Richardson and Mr P. Moss for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades (Construction) Award 1987, R14 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

1. Clause 8. - Rates of Pay:

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

(3) Industry Allowance

The industry allowance at the rate of $21.10 per week to be paid to each employee is to compensate for the following disabilities associated with construction work:-

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

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

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

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

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

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

B. Delete subclauses (8) to (14) inclusive of this clause and insert in lieu the following:

(8) Underground Allowance

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $10.32 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to an employee engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(b) Where an employee is required to work underground for no more than four days or shifts in any ordinary week he/she shall be paid an underground allowance in accordance with the provisions of paragraph (t) of subclause (1) of Clause 9. - Special Rates and Provisions in lieu of the allowance prescribed in paragraph (a) hereof.

(9) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $16.80 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 9. - Special Rates and Provisions whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 9. - Special Rates and Provisions.

(a) General Plumber

(i) Clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) Work in wet places;

(iii) Work requiring a swing scaffold, swing seat or rope;

(iv) Dirty or offensive work;

(v) Work in any confined space;

(vi) Work on a ladder exceeding eight metres in height.

(b) Mechanical Services Plumber

(i) Handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;

(ii) Work in a place where the temperature has been raised by artificial means to between 46 and 54 degrees celsius or exceeding 54 degrees celsius;

(iii) Work in a place where fumes of sulphur or other acid or other offensive fumes are present;

(iv) Dirty or offensive work;

(v) Work in any confined space;

(vi) Work on a ladder exceeding eight metres in height.

(c) Roof Plumber

(i) Work on the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;

(ii) Use of explosive powered tools;

(iii) Work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);

(iv) Dirty or offensive work;

(v) Work requiring a swing scaffold, swing seat or rope;

(vi) Work on a ladder exceeding eight metres in height.

(10) Leading Hands

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

		Weekly Base Only	Rate Per Hour
		$	$
(i)	In charge of not more than one person	17.70	0.48
(ii)	In charge of two and not more than five persons	29.70	0.81
(iii)	In charge of six and not more than ten persons	37.90	1.02
(iv)	In charge of more than ten persons	50.50	1.37

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

(11) Licensed Plumbers Accepting Responsibility

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any week - $32.79 for that week.

(12) Plumber Acting on Welding Certificate

A plumber who is requested by his/her employer to hold the relevant qualifications and has obtained a certificate of competency pursuant to procedures as set out by the Standards Association of Australia or other relevant recognised codes, or, who may have to carry out work which is subject to other special tests but not a normal trade test, and is required by his/her employer to act on such qualifications, shall be paid an additional 43 cents per hour for oxyacetylene welding and 43 cents per hour for electric welding for every hour of his/her employment whether or not he/she has in any hour performed work relevant to those qualifications held.

(13) Lead Work

A plumber engaged in leadburning or lead work in connection therewith shall be paid an additional $1.48 per hour.

(14) Ship's Plumbing

A plumber engaged on plumbing work in connection with ships shall be paid an additional $1.04 cents per hour.

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

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

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 59 cents per hour or part thereof.

(b) Hotwork

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius - 48 cents per hour or part thereof, exceeding 54 degrees celsius - 59 cents per hour or part thereof.

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

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 48 cents per hour.

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

(d) Confined Space

An employee required to work in a confined space shall be paid 59 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold -

(i) an employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours	Each Additional Hour
	$	$
0-15 storeys	3.45	0.71
16-30 storeys	4.45	0.92
31-45 storeys	5.25	1.07
46-60 storeys	8.61	1.77
Greater than 60 storeys	10.98	2.27

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 11 cents per hour.

(f) Explosive Powered Tools

An operator of explosive powered tools, as defined in this award, who is required to use an explosive powered tool, shall be paid $1.13 for each day on which he/she uses such a tool.

(g) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 48 cents per hour whilst so engaged.

(h) Dirty Work

An employee engaged on unusually dirty work shall be paid 48 cents per hour.

(i) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 48 cents per hour for all work above fifteen metres, and 48 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10. - Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(j) Toxic Substances

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

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 29. - Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 59 cents per hour. Employees working in close proximity to employees so engaged shall be paid 48 cents per hour.

(iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(k) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(l) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 59 cents per hour extra whilst so engaged.

(m) Furnace Work

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.26 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.26 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(o) Cleaning Down Brickwork

An employee required to clean down bricks using acids or other corrosive substances shall be paid 43 cents per hour. While so employed employees will be supplied with gloves by the employer.

(p) Bagging

Employees engaged upon bagging brick or concrete structures shall be paid 43 cents per hour.

(q) Bitumen Work

An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid 59 cents per hour.

(r) Roof Repairs

Employees engaged on repairs to roofs shall be paid 59 cents per hour.

(s) Computing Quantities

Employees who are regularly required to compute or estimate quantities of materials in respect to the work performed by other employees shall be paid $3.45 per day or part thereof.

Provided that this allowance shall not apply to an employee classified as a leading hand.

(t) Underground Allowance

(i) An employee required to work underground for no more than 4 days or shifts in an ordinary week shall be paid $2.06 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (8) of Clause 8. - Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than 6 metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(u) Plumbing

(i) A plumber doing sanitary plumbing work or repairs to sewer drainage or waste pipe services in any of the following places -

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

(bb) Morgues:

shall be paid 43 cents per hour or part thereof.

(ii) A plumber required to enter a well 9 metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith shall be paid $2.04 for such examination and 91 cents per hour thereafter for fixing, renewing or repairing such work.

(iii) A plumber or an apprentice to plumbing, other than one in his/her first or second year of apprenticeship, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose or on work involving the cleaning out of septic tanks or dry wells shall be paid a minimum of $2.54 per day.

(v) (a) An employee who:

(i) is appointed by his or her employer to be responsible for carrying out first aid duties as they may arise; and

(ii) holds a recognised first aid qualification (as set out hereunder) from the Australian Red Cross Society, St John Ambulance Association or similar body; and

(iii) is required by his or her employer to hold a qualification at that level; and

(iv) the qualification satisfies the relevant statutory requirement pertaining to the provision of first-aid services at the particular location where the employee is engaged;

(v) those duties are in addition to his or her normal duties, recognising what first aid duties encompass by definition;

shall be paid at the following additional rates to compensate that person for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications;

(A) an employee who holds the Basic First Aid certificate or equivalent qualification recognised under the Occupational Safety and Health Act 1984 - $2.03 per day; or

(B) an employee who holds at least a Senior First Aid certificate, Industrial First Aid certificate or equivalent, or higher qualification recognised under the Occupational Safety and Health Act 1984 - $3.19 per day.

(b) In payment of an allowance under this clause, a person shall be paid only for the level of qualification required to be held, and there shall be no double counting for employees who hold more than one qualification.

(c) An employer shall be under no obligation to provide paid training leave or other payment of any kind to employees to acquire or update first aid qualifications.

(w) Heavy Blocks

(i) Employees lifting other than standard bricks

An employee required to lift blocks (other than cindcrete blocks for plugging purposes) shall be paid the following additional rates:

Where the blocks weigh over 5.5 kg and under 9 kg - 48 cents per hour.

Where the blocks weigh 9 kg or over and up to 18 kg - 85 cents per hour.

Where the blocks weigh over 18 kg –$1.21 cents per hour.

An employee shall not be required to lift a building block in excess of 20 kg in weight unless such employee is provided with a mechanical aid or with an assisting employee; provided that an employee shall not be required to manually lift any building block in excess of 20 kg in weight to a height of more than 1.2 metres above the working platform.

Provided that this subclause shall not apply to employees being paid the extra rate for refractory work.

(ii) Stonemasonry Employees

The employer of stonemasonry employees shall provide mechanical means for the handling, lifting and placing of heavy blocks or pay in lieu thereof the rates and observe the conditions prescribed in paragraph (i) herein.

(x) Plaster or Composition Spray

An employee using a plaster or composition spray shall be paid an additional 48 cents per hour whilst so engaged.

(y) Slushing

An employee engaged at "Slushing" shall be paid 48 cents per hour.

(z) Dry Polishing of Tiles

Employees engaged on dry polishing of tiles (as defined) where machines are used shall be paid 59 cents per hour or part thereof.

(aa) Cutting Tiles

An employee engaged at cutting tiles by electric saw shall be paid 59 cents per hour whilst so engaged.

(bb) Second Hand Timber

Where, whilst working with second hand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber he/she shall be entitled to an allowance of $1.87 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this paragraph unless it is reported immediately to the employer's representative on the job in order that he/she may prove the claim.

(cc) Height Work - Painting Trades

An employee working on any structure at a height of more than 9 metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 43 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun's chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (i) of this subclause.

(dd) Brewery Cylinders - Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8. - Rates of Pay of this award.

(ee) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 48 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(ff) Spray Application - Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 48 cents per hour extra.

(gg) Bricklayer Operating Cutting Machine

One bricklayer on each site to operate the cutting machine and to be paid 59 cents per hour or part thereof whilst so engaged.

(hh) Spray Painting - Painters

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

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

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.36 per day.

(ii) Grindstone Allowance

Where a grindstone or wheel is not made available as required by Clause 32(5)(b) of the award, an allowance of $5.07 per week shall be paid in lieu of same to each Carpenter or Joiner.

3. Clause 10. – Multi-Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following:

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building - structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level - 38 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level - 47 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level - 71 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level - 91 cents per hour extra;

From Sixty-first Floor Level Onwards – $1.14 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix F – Asbestos Eradication: Delete clause 5 of this Appendix and insert in lieu the following:

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive $1.59 per hour worked in lieu of Special Rates prescribed in Clause 9(1) with the exception of subclauses (b), (c), (e), (x), (ab) and (af).

5. Appendix G – Laser Equipment: Delete clause 4 of this Appendix and insert in lieu the following:

Where an employee has been appointed by his employer to carry out the duties of a laser safety officer he shall be paid an allowance of $1.97 per day or part thereof whilst carrying out such duties. The allowance shall be paid as a flat amount without attracting any premium or penalty.

2004 WAIRC 12961

BUILDING TRADES (GOVERNMENT) AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	CONTRACT AND MANAGEMENT SERVICES, AGRICULTURE WESTERN AUSTRALIA, COMMISSIONER FOR MAIN ROADS **RESPONDENTS**
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 874 OF 2004
CITATION NO.	2004 WAIRC 12961

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr D. Spivey for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades (Government) Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

1. Clause 9. – Wages:

A. Delete subclauses (3) and (4) of this clause and insert in lieu the following:

(3) Allowance for Lost Time: Thirteen days' sick leave and follow the job (per week):

An employee whose employment is terminated through no fault of his/her own and who has not completed nine months' continuous service with his/her employer shall, for each week of continuous employment with that employer, immediately prior to his/her termination of employment be paid the lost time allowance prescribed hereunder less any payments made to him/her in respect of sick leave during that employment -

		$
(a)	Bricklayers, stoneworkers, carpenters, joiners, painters, glaziers, signwriters, plasterers, plumbers and stonemasons	47.84
(b)	Special Class Tradesperson (as defined)	50.24
(c)	Registered Plumbers	49.69
(d)	Builders Labourers	
	(i) Classifications (i) to (iii) inclusive	46.90
	(ii) Classifications (iv) to (ix)	44.09
	(iii) Classification (x)	42.62
	(iv) Classification (xi)	39.72

NOTE: In the event of any increase or decrease in the wages and other allowances prescribed in this clause, except the tool allowances, the amounts prescribed in this subclause shall be increased or decreased by an amount equal to 9.7% of that increase or decrease.

(4) Disabilities Allowance (Per Week): $20.91

(a) Subject to the provisions of paragraph (b), of this subclause an allowance of $20.91 shall be paid to all employees excepting employees who are employed for the major portion of any week in or about a permanent maintenance depot or who are usually employed in or about the employer's business when an employee coming within the exception is engaged on the erection or demolition of a building exceeding 250 square feet in floor area.

(b) Employees who are directed to work temporarily in or about a permanent maintenance depot and who immediately prior to being so directed were in receipt of the allowance for a period of not less than three months shall be paid two-thirds of the allowance prescribed herein.

B. Delete subclause (7) of this clause and insert in lieu the following:

(7) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $16.14 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 13. - Special Rates and Provisions of this award whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 13. - Special Rates and Provisions.

(a) General Plumber:

(i) clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) work in wet places;

(iii) work requiring a swing scaffold, swing seat or rope;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(b) Mechanical Services Plumber:

(i) handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;

(ii) work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius or exceeding 54° Celsius;

(iii) work in a place where fumes of sulphur or other acid or other offensive fumes are present;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

(c) Roof Plumber:

(i) work in the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;

(ii) use of explosive powered tools;

(iii) work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with, and shall use, all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);

(iv) dirty or offensive work;

(v) work requiring a swing scaffold, swing seat or rope;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

2. Clause 11. – Leading Hands: Delete subclause (1) of this clause and insert in lieu the following:

(1) Any employee referred to in Clause 9. - Wages of this award or a leading hand defined in paragraph (h) of subclause (3) of Clause 6. - Definitions of this award, who is placed in charge for not less than one day of -

(a) not less than three and not more than ten other employees referred to in Clause 9. - Wages shall be paid at the rate of $33.98 per week extra;

(b) more than ten and not more than twenty other employees referred to in Clause 9. - Wages shall be paid at the rate of $45.45 per week extra;

(c) more than twenty other employees referred to in Clause 9. - Wages shall be paid at the rate of $56.91 per week extra.

3. Clause 13. – Special Rates and Provisions: Delete this clause and insert in lieu the following:

(1) Conditions respecting Special Rates:

(a) The special rates prescribed in this award shall be paid irrespective of the times at which work is performed and shall not be subject to any premium or penalty conditions.

(b) Where more than one of the above rates provides payments for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(2) Swing Scaffold:

(a) An employee employed -

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

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height 6.1 metres or more above the nearest horizontal plane,

shall be paid $3.31 for the first four hours or part thereof: and 67 cents for each hour thereafter on any day in addition to the rates otherwise prescribed.

(b) A solid plasterer when working on a swing scaffold shall be paid an additional 13 cents per hour.

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

(d) Provided that no allowance shall be payable for working on such scaffolds when used under bridges or jetties unless the height of the scaffold above the water exceeds 0.9 metres.

(3) Insulation:

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof: shall be paid 55 cents per hour part thereof: in addition to the rates otherwise prescribed.

(4) Work in Dust Laden Atmosphere

Working in a dust laden atmosphere in a joiner's shop where dust extractors are not provided in or such atmosphere caused by the use of materials for insulating, deafening or plugging work (as, for instance, pumice, charcoal, silicate of cotton, or any other substitute) or from earthworks, 55 cents per hour extra.

(5) Confined Space:

An employee required to work in a confined space, being a place the dimension or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 55 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(6) Sewer Work:

An employee engaged in repairs to sewers shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(7) Sanitary Plumbing Work:

A plumber doing sanitary plumbing work on repairs to sewer drainage or waste pipe services in any of the following places -

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

(b) Morgues:

shall be paid 46 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(8) Ship Plumbing:

A plumber doing work on a ship of any class -

(a) Whilst under way; or

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

(c) In a confined space; or

(d) In a ship which has done one trip or more in a fume or dust laden atmosphere, in bilges, or when cleaning blockages in soil pipe or waste pipes or repairing brine pipes, shall be paid 66 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(e) A plumber carrying out pipe work in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.34 per hour or part thereof: in addition to the rates otherwise prescribed.

(9) Well Work:

A plumber or labourer required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.36 for such examination and 77 cents per hour extra thereafter for fixing, renewing or repairing such work.

(10) Permit Work:

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $14.21 for that week in addition to the rates otherwise prescribed.

(11) Plumbers on Sewerage Work:

Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.35 per day or part thereof: in addition to the prescribed rate.

(12) Height Money:

An employee required to work on a chimney stack, spire, tower, air shaft, cooling tower, water tower exceeding fifteen metres in height shall be paid for all work above fifteen metres, 46 cents per hour thereof: with an additional 46 cents per hour or part thereof: for work above each further fifteen metres in addition to the rates otherwise prescribed.

(13) Barge Work

A Main Roads Employee required to work on scaffolding which is mounted on a barge is to be paid an allowance of $4.23 per day, or majority thereof, or $2.10 per half day, or part thereof, for such work.

(14) Furnace Work:

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work or on underpinning shall be paid $1.21 per hour or part thereof: in addition to the rates otherwise prescribed.

(15) Hot Work:

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46° Celsius and 54° Celsius shall be paid 46 cents per hour or part thereof: in addition to the rates otherwise prescribed, or in excess of 54° Celsius shall be paid 55 cents per hour or part thereof: in addition to the said rates.

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

(16) Cold Work:

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than 0° Celsius shall be paid 46 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

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

(17) Swanbourne and Graylands: Employees required to work at the Swanbourne and Graylands Hospitals controlled by the Mental Health Service shall be paid at the rate of 46 cents per hour in addition to the prescribed rate.

(18) Flintcote: Plasterers using flintcote shall be paid 46 cents per hour or part thereof: except when flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be 79 cents per hour extra in addition to the prescribed rate.

(19) Dirty Work:

(a) An employee employed on excessively dirty work which is more likely to render the employee or his/her clothes dirtier than the normal run of work, shall be paid 46 cents per hour extra in addition to the prescribed rate (with a minimum payment of four hours when employed on such work).

(b) This shall not apply to an employee in receipt of the allowance prescribed in subclause (4) of Clause 9. - Wages of this award nor to a worker in receipt of the allowance prescribed in subclause (27) hereof.

(20) Stonemason on Wall:

A stonemason working on the wall (cottage work and foundation work in coastal stone excepted) shall be paid 46 cents per hour thereof: in addition to the rates otherwise prescribed.

(21) Setter Out:

A setter out (other than a leading hand) in a joiner's shop shall be paid $4.43 per day in addition to the rates otherwise prescribed.

(22) Detail Employee:

A detail employee (other than a leading hand) shall be paid $4.43 in addition to the rates otherwise prescribed.

(23) Spray Painting - Painter:

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

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

(c) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substance used by an employee in spray painting, the employee shall be paid a special allowance of $1.21 per day.

(24) Lead Paint Surfaces:

(a) No surface painted with lead paint shall be rubbed down or scraped by a dry process.

(b) Width of Brushes: All brushes shall not exceed 127 millimetres in width and no kalsomine brush shall be more than 177.8 millimetres in width.

(c) Meals not to be taken in paint shop. No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(25) Spray Application - Painters:

A painter engaged on all applications carried out in other than a properly constructed booth approved by the Department of Labour and Industry shall be paid 46 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(26) An employee who is a qualified first aid person and is appointed by his/her employer to carry out first aid duties in addition to his/her usual duties shall be paid an additional rate of $1.56 per day.

(27) Toxic Substances:

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

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

(c) An employee using toxic substances or materials of a like nature shall be paid 55 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 42 cents per hour extra.

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

(28) Abattoirs:

An employee, other than a plumber in receipt of the plumbing trade allowance, employed in an abattoir shall be paid such rate as is agreed upon between the parties, or, in default of agreement, the rate determined by the Board of Reference.

(29) Fumes:

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer.

(30) Asbestos:

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (ie. combination overalls and breathing equipment or similar apparatus) such employees shall be paid 55 cents per hour whilst so engaged.

(31) Explosive Powered Tools:

An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools, who is required to use an explosive powered tool shall be paid $1.07 for each day on which he/she used a tool in addition to the rates otherwise prescribed.

(32) Wet Work:

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 46 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(33) Cleaning Down Brickwork:

An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(34) Bagging:

An employee engaged upon bagging brick or concrete structures shall be paid 42 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(35) Bitumen Work:

An employee handling hot bitumen or asphalt or dripping materials in creosote shall be paid 55 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(36) Scaffolding Certificate Allowance:

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Labour and Industry and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid 46 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(37) Dry Polishing or Cutting of Tiles:

An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid 55 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(38) Secondhand Timber:

Where, whilst working with second-hand timber, an employees tools are damaged by nails, dumps or other foreign matter on the timber, he/she shall be entitled to an allowance of $1.56 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(39) Roof Repairs:

An employee engaged on repairs to roofs shall be paid 50 cents per hour or part thereof: in addition to the rates otherwise provided in this award.

(40) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.33 per day or part thereof: in addition to the rates otherwise prescribed in this award.

(41) Loads:

Where bricks are being used the employee shall not be required to carry:

(a) More than 40 bricks each load in a wheelbarrow (or a scaffold) to a height of 4.6 metres from the ground.

(b) More than 36 bricks each load in a wheelbarrow over a height of 4.6 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the union.

(42) Grinding Facilities:

The employer shall provide adequate facilities for the employees to grind tools either at the job or at the employer's premises and the employees shall be allowed time to use the same whenever reasonably necessary.

(43) First Aid Outfit:

On each job the employer shall provide sufficient supply of bandages and antiseptic dressings for use in case of accidents.

(44) Water and Soap:

Water and soap shall be provided in each shop or on each job by the employer.

(45) (a) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Construction Safety Act, 1972, an employee is required to wear such helmet.

(b) Any helmet so supplied shall remain the property of the employer and during that time it is on issue the employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(46) Provision of Boiling Water:

The employer shall, where practicable provide boiling water for the use of his/her employees on each job at lunch time.

(47) Sanitary Arrangements:

The employer shall comply with the provisions of section 102 of the Health Act, 1911.

(48) Attendants on Ladders:

No employees shall work on a ladder at a height of over 6.1 metres from the ground when such ladder is standing in any street, way or lane where traffic is passing to and fro, without an assistant on the ground.

(49) Electrical Sanding Machines:

The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions:

(a) The weight of each such machine shall not exceed 5.9 kilograms.

(b) Every employer operating any such machine shall endeavour to ensure that each such machine, together with all electrical leads and associated equipment, is kept in a safe condition and shall if requested so to do by any employee but not more often than once in any four weeks cause the same to be inspected under the provisions of the Electricity Act and the regulations made thereunder.

(c) Employers shall provide and supply respirators of a suitable type, to each employee and shall maintain same in an effective and clean state at all times.

Where respirators are used by more than one employee, each such respirator shall be sterilised or a new pad inserted after use by each such employee.

(d) Employers shall also provide and supply goggles of suitable type provided that the goggles with celluloid lenses shall not be regarded as suitable.

(e) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(50) Dam Walls:

Adequate precautions shall be taken by all employers for the safety of workers employed on the retaining walls of dams. Any dispute as to the adequacy of precautions taken shall be referred to the Board of Reference.

(51) The Secretary or any authorised officer of the union shall have the right to visit any job for the purpose of ascertaining whether work is being performed in accordance with the provisions of the Construction Safety Act, 1972, and any regulations made thereunder. Should he/she be of the opinion that the work being carried out is not in accordance with those provisions the Secretary or any authorised officer of the union shall inform the employer and the employees concerned accordingly and may report any alleged breach of Act or the regulations to the Chief Inspector of Construction Safety.

(52) Where the employer provides transport to and from the job the conveyance used for such transport shall be provided with suitable seating and weatherproof covering.

(53) An employee engaged on work at Fremantle Prison shall be paid 46 cents per hour extra.

(54) Any dispute which may arise between the parties in relation to the application of any of the foregoing special rates and provisions may be determined by the Board of Reference.

(55) Building tradespersons engaged solely on outside work at Homeswest shall be given one winter jacket per year to be replaced on a fair wear and tear basis.

4. Schedule C – Hospital Environment Allowance: Delete this schedule and insert in lieu the following:

Notwithstanding the provisions of Clause 13. - Special Rates and Provisions of this Award, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:-

1. (a) For work performed in a hospital environment - $12.26 per week.

(b) For disabilities associated with work performed in -
Difficult access areas;
Tunnel complexes;
Areas with great temperature variation: - $4.27 per week.
Princess Margaret Hospital
King Edward Memorial Hospital
Sir Charles Gairdner Hospital
Royal Perth Hospital
Fremantle Hospital

2. For work performed in a hospital environment - $8.25 per week.
Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

3. For work performed in a hospital environment - $5.84 per week.
Bentley Hospital
Derby Hospital
Narrogin Hospital
Port Hedland Hospital
Rockingham Hospital
Sunset Hospital
Armadale Hospital
Broome Hospital
Busselton Hospital
Carnarvon Hospital
Collie Hospital
Esperance Hospital
Katanning Hospital
Merredin Hospital
Murray Hospital
Warren Hospital
Wyndham Hospital

4. The monetary amounts prescribed in this Schedule shall be adjusted in accordance with any decision of the Commission in Court Session which alters wage rates generally following movements in the Consumer Price Index and which is subsequently reflected by amendment to the allowances contained in Clause 13. - Special Rates and Provisions of the Building Trades (Government) Award No. 31A of 1966.

5. Appendix D – Award Restructuring: Delete clause (8)(b) this appendix and insert in lieu the following:

(b) (i) In addition to the rates contained in paragraph (a) of this subclause, employees designated in classification levels to 7 inclusive shall receive an all purpose industry allowance of $13.01.

(ii) This allowance shall be paid in two instalments as follows:

(aa) $6.57 of the allowance shall be paid after the first twelve months of government service; and

(bb) the remaining $6.43 shall be paid on 24 months of government service.

2004 WAIRC 12969

EARTH MOVING AND CONSTRUCTION AWARD NO. 10 OF 1963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	GOLDFIELDS CONTRACTORS PTY LTD, HOT MIX LTD, LEIGHTON CONTRACTORS PTY LTD **RESPONDENTS**
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 880 OF 2004
CITATION NO.	2004 WAIRC 12969

Result Award varied

Order

HAVING heard Ms L. Dowden for the Applicant and Mr P. Moss for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Earthmoving and Construction Award No. 10 of 1963 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

1. Clause 24. – Allowances and Special Provisions: Delete this clause and insert in lieu the following:

(1) Dirt Money -

A dirt allowance of $0.49 per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(2) Confined Space -

Workers working in confined space shall be paid an allowance of $0.59 per hour. "Confined space" means one of which the dimensions are such that the workman must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him.

(3) Wet Work -

(a) Any worker working in water or "wet places" shall be paid an extra allowance of $3.84 per day or part of a day.

(b) "Wet places" shall mean places where, in the performance of the work the splashing of water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to men working on surfaces made wet by rain.

(c) In exceptional cases where the work is excessively wet and which are not covered by paragraph (b) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(d) Subject to paragraph (c), the engineer in charge or the foreman shall decide whether any allowance is payable under this clause.

(e) Workers called upon to work overtime in water or in wet places shall receive an extra $3.84 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(4) A multi-storey allowance shall be paid to all employees to whom this award applies engaged on site in the construction of a multi-storey building as defined in accordance with the following:-

From commencement of building to 15th floor level - $0.37 per hour extra.

From 16th floor level to 30th floor level - $0.47 per hour extra.

From 31st floor level to 45th floor level - $0.71 per hour extra.

From 46th floor level to 60th floor level - $0.91 per hour extra.

From 61st floor level onwards - $1.16 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

2. Appendix I:

A. Delete clause 5 of this Appendix and insert in lieu the following:

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $20.85 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

B. Delete clause 8 of this Appendix and insert in lieu the following:

(8) Allowances and Special Provisions

(a) Dirt Money

A dirt allowance of $0.49 per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(b) Confined Space

Workers working in confined space shall be paid an allowance of $0.59 per hour. "Confined space" means one of which the dimensions are such that the workperson must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him/her.

(c) Wet Work

(i) Any worker working in water or "wet places" shall be paid an extra allowance of $3.84 per day or part of a day.

(ii) "Wet places" shall mean places where, in the performance of the work the splashing of water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his/her clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to workers working on wet surfaces made wet by rain.

(iii) In exceptional cases where the work is excessively wet and which are not covered by paragraph (ii) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(iv) Subject to paragraph (iii), the engineer in charge or the foreperson shall decide whether any allowance is payable under this clause.

(v) Workers called upon to work overtime in water or in wet places shall receive an extra $3.84 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(d) A multi-storey allowance shall be paid to all employees to whom this Appendix applies engaged on site in the construction of a multi-storey building as defined in accordance with the following:-

From commencement of building to 15th floor level - 37 cents per hour extra.

From 16th floor level to 30th floor level - 47 cents per hour extra.

From 31st floor level to 45th floor level - 71 cents per hour extra.

From 46th floor level to 60th floor level - 91 cents per hour extra.

From 61st floor level onwards - $1.16 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

2004 WAIRC 12960

ENGINE DRIVERS' (BUILDING AND STEEL CONSTRUCTION) AWARD NO. 20 OF 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** MASTER BUILDERS ASSOCIATION OF WA, FRANKIPILE AUSTRALIA PTY LTD, CIVIL AND CIVIC PTY LTD (NOW NAMED BOVIS LEND LEASE PTY LTD) **RESPONDENTS**
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 872 OF 2004
CITATION NO.	2004 WAIRC 12960

Result	Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr K. Richardson and Mr P. Moss for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

1. Clause 24. – Allowances and Special Provisions: Delete this clause and insert in lieu the following:

(1) An employee required to work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius shall be paid $0.48 per hour or part thereof in addition to the rates otherwise prescribed in this award, or in excess of 54° Celsius shall be paid $0.58 per hour or part thereof in addition to the said rates.

(2) Dirt Money: a dirt allowance of $0.48 per hour or part thereof shall be payable in connection with work deemed to be unusually dirty; cases of dispute to be settled by a Board of Reference.

(3) Height Allowance:

(a) Tower crane drivers shall be paid a height allowance in accordance with the following schedule, the height to be measured from ground level, i.e. street level to floor of crane cabin:

From ground level up to and including 30 metres - $0.37 per hour.

Over 30 metres and up to 45 metres - $0.46 per hour.

Over 45 metres and up to 60 metres - $0.78 per hour.

Over 60 metres - $0.37 per hour additional for each 15 metres over 60 metres.

(b) Mobile crane drivers, when employed for any day or part thereof on a building site where a multi storey building is being or is to be constructed shall be paid a multi-storey allowance in accordance with the following table:-

From commencement of building to 15th floor level - $0.37 per hour extra.

From 16th floor level to 30th floor level - $0.46 per hour extra.

From 31st floor level to 45th floor level - $0.69 per hour extra.

From 46th floor level to 60th floor level - $0.89 per hour extra.

From 61st floor level onwards - $1.14 per hour extra.

2. Clause 27. – Wages: Delete subclause (5) of this clause and insert in lieu the following:

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $20.57 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

3. 4th Schedule - Special Site Provisions: Delete in Part 1 of this Schedule and insert in lieu the following:

	SITE	ALLOWANCE
1.	S.E.C. Kwinana	$0.98 per hour for each hour worked and 5 cents per hour footwear allowance for each hour worked.

2004 WAIRC 12962

ENGINE DRIVERS (GOVERNMENT) AWARD 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

BOARD OF MANAGEMENT, FREMANTLE HOSPITAL, BOARD OF MANAGEMENT, ROYAL PERTH HOSPITAL, BOARD OF MANAGEMENT, PRINCESS MARGARET HOSPITAL

RESPONDENTS

CORAM COMMISSIONER J F GREGOR
DATE FRIDAY, 8 OCTOBER 2004
FILE NO APPLICATION 876 OF 2004
CITATION NO. 2004 WAIRC 12962

Result Award varied

Order

HAVING heard Ms L. Dowden on behalf of the Applicant and Mr D. Spivey for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Engine Drivers' (Government) Award 1983 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

Clause 24. – Wages: Delete subclauses (2) and (3) inclusive of this clause and insert in lieu the following:

(2) Hospital Plant Operator

(a) The weekly rates of wages payable to employees defined as such shall be -

	Base Rate $	ASNA $	Total Rate $	%
Hospital Plant Operator - Level 1 (C12a)	380.80	142.00	522.80	91.55
Hospital Plant Operator - Level 2 (C11a)	399.20	142.00	541.20	95.77
Hospital Plant Operator - Level 3 (C10)	417.20	144.00	561.20	100.00
Hospital Plant Operator - Level 4 (C9a)	449.40	144.00	593.40	107.33

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chamber shall be paid $1.09 per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction work allowance prescribed in subclause (1) of Clause 19. - Special Provisions of this Award.

(3) Additions to Wage Rates

		Per Week $
(a)	A classified employee engaged as hereinafter specified shall have his/her wage rate increased as follows:	
(i)	Attending to refrigerator and/or air compressor or compressors	23.69
(ii)	Attending to an electric generator or dynamo exceeding 10 watt capacity	23.69
(iii)	Attending to a switchboard where the generating capacity is 350kw or more	7.62
(iv)	In charge of plant as defined	23.70
(v)	Leading Fireperson, where two or more Firepersons are employed on one shift (per shift)	0.52

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chambers shall be paid $1.14 per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction allowance prescribed in subclause (1) of Clause 19. - Special Provisions of this Award.

2004 WAIRC 12968

INDUSTRIAL SPRAYPAINTING AND SANDBLASTING AWARD 1991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	ABRASIVE BLASTING SERVICES PTY LTD, ZINCO PTY LTD, TOTAL CORROSION CONTROL PTY LTD **RESPONDENTS**
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 879 OF 2004
CITATION NO.	2004 WAIRC 12968

Result Award varied

Order

HAVING heard Ms L. Dowden for the Applicant and Mr P. Moss for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Industrial Spraypainting and Sandblasting Award 1991 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

1. Clause 8. - Rates of Pay: Delete subclauses (4) and (5) of this clause and insert in lieu the following:

(4) Underground Allowance

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $10.17 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the allowance shall commence from the surface.

(b) Where an employee is required to work underground for no more than four days or shifts in any ordinary week he/she shall be paid an underground allowance in accordance with the provisions of paragraph (n) of subclause (1) of Clause 9. - Special Rates and Provisions in lieu of the allowance prescribed in paragraph (a) hereof.

(5) Leading Hands

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

		Weekly Base Only $	Rate Per Hour $
(i)	In charge of not more than one person	13.10	0.36
(ii)	In charge of two and not more than five persons	29.20	0.80
(iii)	In charge of six and not more than ten persons	37.30	1.01
(iv)	In charge of more than ten persons	49.50	1.34

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

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

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

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 58 cents per hour or part thereof.

(b) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius - 47 cents per hour or part thereof, exceeding 54 degrees Celsius - 58 cents per hour or part thereof.

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

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 47 cents per hour.

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

(d) Confined Space

An employee required to work in a confined space shall be paid 58 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold

(i) An employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours	Each Additional Hour
0-15 storeys	3.40	0.70
16-30 storeys	4.35	0.92

31-45 storeys	5.13	1.05
46-60 storeys	8.44	1.75
Greater than 60 storeys	10.74	2.22

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 15 cents per hour.

(ii) Payments contained in this subclause are in recognition of the disabilities associated with the use of swing scaffolds.

(iii) For the purpose of Clause 9(1)(e)(i) hereof:

"Completed" means the building is fully functioning and all work which was part of the principle contract is complete.

"Storeys" shall be given the same meaning as the storey level in Clause 10(2) of this Award.

(f) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 47 cents per hour whilst so engaged.

(g) Dirty Work

An employee engaged on unusually dirty work shall be paid 47 cents per hour.

(h) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 47 cents per hour for all work above fifteen metres, and 47 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10. - Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(i) Toxic Substances

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

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 27. - Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 58 cents per hour. Employees working in close proximity to employees so engaged shall be paid 47 cents per hour.

(iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(j) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(k) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 58 cents per hour extra whilst so engaged.

(l) Furnace Work

An employee required to work on the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.26 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(m) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.26 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Roof Repairs

Employees engaged on repairs to roofs shall be paid 58 cents per hour.

(o) Underground Allowance

(i) An employee required to work underground for no more than four days or shifts in an ordinary week shall be paid $2.02 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (3) of Clause 8. - Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(p) First Aid

An employee who is qualified to provide first aid and who is appointed by his/her employer to carry out first aid duties shall be paid $2.00 per day.

(q) Fireproofing Spray: An employee using a fireproof or composition spray shall be paid an additional 47 cents per hour whilst so engaged.

(r) Height Work: An employee working on any structure at a height of more than nine metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 44 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun's chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (h) of this subclause.

(s) Brewery Cylinders - Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8. - Rates of Pay of this award.

(t) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 47 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(u) Spray Application - Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 47 cents per hour extra.

(v) Spray Painting:

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

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

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.32 per day.

3. Clause 10. - Multi-Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following:

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building - structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level - 36 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level - 46 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level – 70 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level - 90 cents per hour extra;

From Sixty-first Floor Level Onwards – $1.11 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix B - Asbestos Eradication : Delete clause 5 of this Appendix and insert in lieu the following:

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive $1.54 per hour worked in lieu of Special Rates prescribed in Clause 9(1) of this award with the exception of subclauses (b), (c) and (e).

2004 WAIRC 13261

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; THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANTS
	-v-
	UNITED KG ENGINEERING & CONSTRUCTION, ABB ENGINEERING CONSTRUCTION PTY LTD, TOTAL CORROSION CONTROL PTY LTD
	RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 10 NOVEMBER 2004
FILE NO	APPL 1318 OF 2004
CITATION NO.	2004 WAIRC 13261

Result Vary Order

Order

HAVING heard Mr J. Murie for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and Ms K. Scoble (of Counsel) for The Construction, Forestry, Mining and Energy Union of Workers and Mr B. Matthews for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Metal, Electrical and Building Trades (Pinjarra and Kwinana Alumina Refineries and the Huntley, Del Park and Jarrahdale Mine Sites) Construction Order; and replaces Order No. 944 of 2003, be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 5th November 2004.

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

SCHEDULE

1. – TITLE

This Order shall be known as the Metal, Electrical and Building Trades (Pinjarra and Kwinana Alumina Refineries and the Huntley, Del Park and Jarrahdale Mine Sites) Construction Order No. 1318 of 2004 and, subject to its terms, shall supplement the Metal Trades (General) Award No. 13 of 1965, the Electrical Contracting Industry Award No. R 22 of 1978, the Building Trades (Construction) Award No. R 14 of 1978 and the Engine drivers' (Building and Steel construction) Award No. 20 of 1973 and shall replace Order No. 944 of 2003.

2. – ARRANGEMENT

3. – AREA AND SCOPE

This order shall apply to those employees who, except for the terms of this Order, would be bound by either the Metal Trades (General) Award No. 13 of 1965, the Electrical Contracting Industry Award No. R22 of 1978 or the Building Trades (Construction) Award No. R14 of 1978 and the Engine Drivers' (Building and Steel Construction) Award No. R20 of 1973 and who are employed by any of the employers named in the Schedule attached to this Order on construction work at the Pinjarra and Kwinana Alumina Refineries and the Huntley, Del Park and Jarrahdale Mines Sites, operated by Alcoa of Australia Ltd.

4. - GENERAL CONDITIONS OF EMPLOYMENT

Except as provided in Clause 5. - Travelling Allowance, Clause 6. - Site Allowance and Clause 7. - Job Stewards of this Order, the terms and conditions of each employee covered by this Order shall be as prescribed in the Award by which the employee would be bound if not for this Order.

5. - TRAVELLING ALLOWANCE

(1) Each employee who is not provided with transport by the employer to travel to and from the job shall be paid as follows:

		Per Day $
(a)	Employees residing in the Pinjarra township shall be paid as provided in the award	13.75

(2) Employees other than those provided for in paragraph (1) and who travel from a point -

Up to 32 km radius from the job site	27.60
32 km-50km radius from the job site	37.10
50km-68km radius from the job site	45.55

(3) Notwithstanding the foregoing, an employee not provided with transport by their employer and who is required to travel, by the shortest possible route, a distance of more than 60kms from home to the job, shall be paid an allowance of not less than **$45.55** per day and such an employee who is required to travel, by the shortest possible route, a distance of more than 80kms from their home to the job, shall be paid an allowance of **$64.00** per day.

(4) (a) An employee shall not be entitled to the allowance prescribed in paragraph (3) hereof unless and until they submit a written statement to the employer setting out their place of residence and the number of kilometres the employee is required to travel from home to the job by the shortest possible route.

(b) An employee who wilfully sets out an incorrect distance to their written statement shall be deemed guilty of wilful misconduct.

(5) Employees engaged on the Kwinana Alumina Refinery or the Jarrahdale Mine Site shall not be subject to the provisions of this clause, but shall be entitled to the provisions of Clause 6. - Allowance for Travelling and Employment in Construction Work of Part II - Construction Work of the Metal Trades (General) Award No. 13 of 1965 or Clause 20. - Allowance for Travelling and Employment in Construction Work of the Electrical Contracting Industry Award No. R22 of 1978 or Clause 12A. - Fares and Travelling (Except Plumbers) of the Building Trades (Construction) Award No. R14 of 1978 or Clause 22. - Allowances For Travelling and Employment in Construction work of the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973.

6. - SITE ALLOWANCE

(1) An additional allowance of **$2.48** per hour shall be paid for each hour worked on the Alcoa Kwinana Alumina Refinery.

(2) An additional allowance of **$2.17** per hour shall be paid for work on the Alcoa Pinjarra Alumina Refinery and the Huntley, Del Park and Jarrahdale Mine Sites.

(3) Such allowance is specifically prescribed to cover all disabilities associated with construction work at the Pinjarra and Kwinana Alumina Refineries or the Huntley, Del Park and Jarrahdale Mine Sites.

7. - JOB STEWARDS

(1) Prior to the termination or transfer of a job steward, two days' notice shall be given by the employer to the union for the purpose of discussing the reasons for such termination or transfer.

(2) In the event of a dispute arising in relation to such termination or transfer, the matter shall be referred within seven (7) days to a Board of Reference.

8. - DATE OF OPERATION

This Order shall operate from the commencement of the first pay period beginning on or after 5th November 2004.

9. – DISPUTE SETTLEMENT PROCEDURE

In the event that a question, dispute or difficulty arises under this Order, the dispute settlement procedures contained in the Award specified at Clause 3. – Area and Scope of this Order, which otherwise applies to the employee or employees in question, shall be followed.

10. – NO FURTHER CLAIMS – SITE ALLOWANCE

The rates for site allowance prescribed at Clause 6. – Site Allowances of this Order shall remain unchanged until expiration of Certified Agreements existing at the date of this Order made between the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers and the employers named in the Schedule attached to the Order.

SCHEDULE OF RESPONDENTS

ABB Engineering Construction Pty. Ltd.
AMEC Services Pty. Ltd.
Bains Harding Industries Pty. Ltd.
Barclay Mowlem Construction Ltd.
Downer RML Pty. Ltd.
G. & S. Industries Pty. Ltd.
Jadsco Pty. Ltd.
O'Donnell Griffin Pty. Ltd.
Total Corrosion Control Pty. Ltd.
United Construction Pty. Ltd.
Western Construction Co.
Electrical Contractors Association of Western Australia (Union of Employees)

2004 WAIRC 13262

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH; THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANTS
	-v-
	UNITED KG ENGINEERING & CONSTRUCTION, ABB ENGINEERING CONSTRUCTION PTY LTD, TOTAL CORROSION CONTROL PTY LTD
	RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 10 NOVEMBER 2004
FILE NO	APPL 1319 OF 2004
CITATION NO.	2004 WAIRC 13262

Result Vary Order

Order

HAVING heard Mr J. Murie for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and Ms K. Scoble (of Counsel) for The Construction, Forestry, Mining and Energy Union of Workers and Mr B. Matthews for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Metal, Electrical and Building Trades (Wagerup Alumina Refinery and Willowdale Mine Site) Construction Order; and replaces Order No. 945 of 2003, be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 5th November 2004.

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

SCHEDULE

1. - TITLE

This Order shall be known as the Metal, Electrical and Building Trades (Wagerup Alumina Refinery and Willowdale Mine Site) Construction Order No. 945 of 2003 and, subject to its terms, shall supplement the Metal Trades (General) Award No. 13 of 1965, the Electrical Contracting Industry Award No. 22 of 1978, the Building Trades (Construction) Award 1987 (No. R 14 of 1978) and the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 and shall replace Order No. 945 of 2003.

2. - ARRANGEMENT

3. - AREA AND SCOPE

This Order shall apply to those employees who, except of the terms of this Order, would be bound by either the Metal Trades (General) Award No. 13 of 1965, the Electrical Contracting Industry Award No. 22 of 1978, the Building Trades (Construction) Award 1987 (No. R 14 of 1978) and the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 and who are employed by any of the employers named in the schedule attached to this Order on construction work at the Wagerup Alumina Refinery and the Willowdale Mine Site, operated by Alcoa of Australia Limited.

4. - GENERAL CONDITIONS OF EMPLOYMENT

Except as provided in Clause 5. - Travelling Allowance, Clause 6. - Site Allowance and Clause 7. - Job Stewards of this Order, the terms and conditions of each employee covered by this Order shall be as prescribed in the award by which the employee would be bound if not for this Order.

5. - TRAVELLING ALLOWANCE

Each employee who is not provided with transport by their employer to travel to and from the job shall be paid as follows:

Per Day
$

(1)	Employees residing in the Waroona township (including a caravan park)		13.75
(2)	Employees other than those provided for in paragraph (1) and who travel from a point -		
	(a)	Up to 32km radius from the job site	27.60
	(b)	32km-50km radius from the job site	37.10
	(c)	50km-68km radius from the job site	45.55
	(d)	Over 68km radius from the job site	64.00

(3) Notwithstanding the foregoing, an employee who is not provided with transport by their employer and who is required to travel, by the shortest possible route, a distance of more than 60km from the employee's home to the job, shall be paid an allowance of not less than **$45.55** per day and such an employee who is required to travel, by the shortest possible route, a distance of more than 80km from their home to the job, shall be paid an allowance of **$64.00** per day.

(4) (a) An employee shall not be entitled to the allowance prescribed in (3) hereof unless and until they submit a written statement to their employer setting out their place of residence and the number of kilometres the employee is required to travel from home to the job by the shortest possible route.

(b) An employee who wilfully sets out an incorrect distance to their written statement shall be deemed guilty of wilful misconduct.

6. - SITE ALLOWANCE

(1) An additional allowance of **$2.17** per hour shall be paid for each hour worked.

(2) Such allowance is specifically prescribed to cover all disabilities associated with construction work at the Wagerup Alumina Refinery and the Willowdale Mine Site.

7. - JOB STEWARDS

Prior to the termination or transfer of a job steward, two days' notice shall be given by the employer to the Union for the purpose of discussing the reasons for such termination or transfer.

In the event of a dispute arising in relation to such termination or transfer, the matter shall be referred within seven (7) days to a Board of Reference.

8. - DATE OF OPERATION

This Order shall operate from the beginning of the first pay period commencing on or after 5th November 2004.

SCHEDULE OF RESPONDENTS

ABB Service Pty Ltd
Bains Harding Industries Pty Ltd
Barclay Mowlem Construction Ltd
Downer RML Pty Ltd
G & S Industries Pty Ltd
Jadsco Pty Ltd
O'Donnell Griffin Pty Ltd
Total Corrosion Control Pty Ltd
United Construction Pty Ltd
United KG Engineering & Construction Pty Ltd
Western Construction Co.
The Electrical Contractors Association of Western Australia (Union of Employers)

2004 WAIRC 12970

PLASTER, PLASTERGLASS AND CEMENT WORKERS' AWARD NO. A29 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	BELMONT CONCRETE CO, EDU CONCRETE CO, WELSHPOOL CONCRETE PRODUCTS **RESPONDENTS**
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 OCTOBER 2004
FILE NO	APPLICATION 881 OF 2004
CITATION NO.	2004 WAIRC 12970

Result Award varied

Order

HAVING heard Ms L. Dowden for the Applicant and Mr P. Moss for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Plaster, Plasterglass and Cement Workers Award No. A29 of 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 7th October 2004.

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

SCHEDULE

1. Clause 7. - Adult Trainee Casters: Delete subclause (4) of this clause and insert in lieu the following:

(4) A caster responsible for the training of a trainee under this clause shall be paid $2.90 per week extra whilst so engaged

2. Clause 14. – Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following:

(1) Leading Hands: An employee placed in charge for not less than one day of –

		$ Per Week
(a)	Not less than three (3) and not more than ten (10) other tradesperson	13.89
(b)	More than ten (10)and not more than twenty (20)other tradesperson	21.95
(c)	More than twenty (20) other tradesperson	29.35
(d)	The rates herein prescribed shall be deemed to form part of the ordinary rate of wage of the employees concerned for all purposes of this Award	

Where the leading hand works under the supervision of a foreperson or of the employer for the major portion of the day, the extra rates set out in this subclause shall be halved.

2004 WAIRC 13232

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPLICANT

-v-

MYER STORES LIMITED AND OTHERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE FRIDAY, 5 NOVEMBER 2004
FILE NO/S APPL 853 OF 2004
CITATION NO. 2004 WAIRC 13232

Result Award varied

Order

Having heard Mr T Pope on behalf of the Applicant and Ms N Thomson as agent on behalf of some 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 Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (No R32 of 1976) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 5 November 2004.

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

SCHEDULE

1. Clause 7A. – Nightfill Duty: Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) (a) A full-time, part-time or casual worker employed in a "General Retail Shop" or "Special Retail Shop" pursuant to this clause shall be paid an additional loading as prescribed hereunder:

(i) Monday to Saturday prior to 7.00 am

(aa) Full-time and Part-time Workers

- a loading of $2.62 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(bb) Casual Workers

- a loading of $2.62 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(ii) Saturday between 5.00 pm and Midnight

(aa) Full-time and Part-time Workers

- a loading of $3.72 per hour in addition to the ordinary hourly rate of a full-time worker as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(bb) Part-time Workers

- a loading of $8.09 per hour in addition to the ordinary hourly rate of a full-time shop assistant as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(cc) Casual Workers

- a loading of $9.69 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(b) Junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.

(c) The loadings referred to in (i) and (ii) above shall be paid for the purpose of superannuation calculations.

2. Clause 12. – Meal Money: Delete this clause and insert the following in lieu thereof:

(1) When a worker is required to continue working after the usual finishing time for more than one hour he/she shall be paid $9.30 for the purchase of any meal required.

(2) Late Night Trading Meal Allowance:

A worker who commences work at or prior to 1.00pm on the day of late night trading and is required to work beyond 7.00pm on that day shall be paid a meal allowance of $9.30.

(3) Meal money may be paid prior to the meal period on the day upon which the overtime is to be worked or as part of the normal weekly or fortnightly wage as appropriate.

3. Clause 28 – Wages: Delete Part III of this clause and insert the following in lieu thereof:

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable:

(1) (a) A worker required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his duties shall be paid an additional 56 cents per hour whilst so engaged.

(b) A worker required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his duties shall be paid an additional 63 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade 1" or a "Storeman Operator Grade 2".

(2) Any workers, whether a junior or adult, employed as a canvasser and/or collector shall be paid the adult male wage.

(3) Where a canvasser provides his own bicycle he shall be paid an allowance of $1.20 per week.

(4) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following:

In a cold chamber in which the temperature is:

(i) Below 0° Celsius to -20° Celsius - 68 cents per hour

(ii) Below -20° Celsius to -25° Celsius - 80 cents per hour

(iii) Below -25° Celsius - 91 cents per hour.

(b) Workers required to work in temperatures less than -18.9° Celsius shall be medically examined at the employer's expense.

(5) (a) A worker (full time, part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. Monday to Friday inclusive in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

For casual workers such loading shall be paid in addition to the rates prescribed in Clause 7 (4) of this award.

(b) A worker (part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. on Saturday in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

(i) A casual worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A part time worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part Time Workers.

(6) (a) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight Monday to Friday inclusive shall be paid a loading of 20% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(b) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight on Saturday shall be paid a loading of 20% for each hour worked after 6.00pm.

(i) A casual employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A full or part-time employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part-Time Workers.

(c) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours before 7.00am on any day Monday to Saturday inclusive shall be paid a loading of 30% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(7) An automotive spare parts or accessories salesman qualified (i.e. one who has passed the appropriate course of technical training) shall be paid the sum of $21.20 per week in addition to the rates prescribed herein.

4. Clause 28A. – Structural Efficiency Agreement – Cold Storage Industry: Delete this clause and insert the following in lieu thereof:

P. & O. Cold Stores and Clelands Cold Stores shall pay $20.55 per week in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 November 1989 and $3.40 in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 December 1989 on account of agreement reached for a structural efficiency package which the parties anticipate will result in the creation of a Cold Storage Award being negotiated in accordance with the objectives and content of the Structural Efficiency Principle.

5. Clause 46. – First Aid Allowance: Delete this clause and insert the following in lieu thereof:

A worker holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $8.20 per week in addition to the worker's ordinary rate.

6. Clause 48. – Additional Loading for Late Night Trading Establishments: Delete this clause and insert the following in lieu thereof:

(1) A full-time or part-time worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid a loading of $3.28 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(2) A casual worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid the amount of $3.28 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(3) Provided that junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.

(4) The loading referred to in subclauses (1), (2) and (3) above shall be paid for the purpose of superannuation calculations.

2004 WAIRC 12564

TIN AND ASSOCIATED MINERALS MINING AND PROCESSING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	GREENBUSHES TIN LTD & OTHER
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 9 AUGUST 2004
FILE NO/S	APPL 1153A OF 2002
CITATION NO.	2004 WAIRC 12564

Result	Award varied. Order issued.
Representation	
Applicant	Mr D McLane as agent
Respondents	Mr R Gifford as agent

Order

HAVING heard Mr D McLane as agent on behalf of the applicant, and Mr R Gifford as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent hereby orders –

1. THAT the applicant's claim in relation to the proposed variation to the district allowance clause be and is hereby divided as application 1153B of 2002.

2. THAT otherwise the Tin and Associated Minerals Mining and Processing Industry Award No. A 14 of 1971 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date of this order.

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

SCHEDULE

Delete all clauses and insert in lieu thereof the following:

1. AWARD STRUCTURE

1.1 – TITLE

This Award shall be known as the Tin and Associated Minerals Mining and Processing Industry Award No. 14 of 1971.

1.2 - ARRANGEMENT

1.3 – AREA

This Award shall have effect throughout the State of Western Australia.

1.4 – SCOPE

This Award shall apply:

(1) To the industry involving the mining and processing of tin, tantalum, lithium and kaolin and other associated minerals, as conducted by the respondent company or any associated company engaged in the mining and processing of such minerals.

(2) To employees eligible for membership of the Union party to this Award.

1.5 – TERM

The term of this Award shall be for a period of three years from the beginning of the first pay period commencing on or after the date hereof. (This Award was delivered on the 28th April, 1972).

1.6 – DEFINITIONS

(1) Primary Metallurgical Plants means -

Those processing plants involved in the producing of mineral concentrates from primary ores, tailings or low grade concentrates.

(2) Secondary Metallurgical Plants means -

Those processing plants involved in the producing of mineral and metal products from mineral concentrates, and they include smelting and chemical solvent extraction processes.

(3) Plant Operator Grade (1) means -

(a) An employee who is certified by his or her employer as being competent to efficiently operate all sections of the processing plant at the site of his or her employment with a minimum of supervision.

(b) Is required by his or her employer to operate any section of the plant.

(c) Is appointed as such.

(4) Plant Operator Grade (2) means -

An employee other than a trainee processing plant operator who is certified by his or her employer as being competent to efficiently operate at least one section of the processing plant at the site of his or her employment with a minimum of supervision.

(5) Plant Operator Grade (3) means -

A trainee processing plant operator with less than three month's experience in the processing plant of his or her employment.

(6) Laboratory Assistant Grade (1) means -

(a) An employee who is certified by his or her employer as being competent to efficiently operate in all areas of laboratory analytical processing with a minimum of supervision.

(b) Is required by his or her employer to operate any area of laboratory analytical processing.

(c) Is appointed as such.

(7) Laboratory Assistant Grade (2) means -

An employee other than a trainee laboratory assistant who is certified by his or her employer as being competent to efficiently operate at least one area of laboratory analytical processing with a minimum of supervision.

(8) Laboratory Assistant Grade (3) means -

A trainee laboratory assistant with less than three months experience in laboratory analytical processing.

(9) Rehabilitation Hand Grade (1) means -

(a) An employee who is certified by his or her employer as being competent to efficiently carry out all aspects of rehabilitation work with the minimum amount of supervision.

(b) Is required by his or her employer to carry out any aspect of rehabilitation work.

(c) Is appointed as such.

(10) Rehabilitation Hand Grade (2) means -

An employee other than a trainee rehabilitation hand who is certified by his or her employer as being competent to efficiently carry out at least one aspect of rehabilitation work with a minimum of supervision.

(11) Rehabilitation Hand Grade (3) means -

A trainee rehabilitation hand with less than three month's experience in rehabilitation work.

2. CONTRACT OF EMPLOYMENT

2.1 – CONTRACT OF SERVICE

(1) Termination of Employment

(a) Full time and Part time employees

(i) Should an employer wish to terminate a full time or part time employee, the following period of notice shall be provided:

Period of Continuous Service	**Period of Notice**
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks

More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

(ii) Employees over 45 years of age with two or more years' continuous service at the time of termination shall receive an additional week's notice.

(iii) Where the relevant notice is not provided, the employee shall be entitled to payment in lieu. Provided that employment may be terminated by part of the period of notice and part payment in lieu.

(iv) Payment in lieu of notice shall be calculated using the employee's weekly ordinary time earnings.

(v) The period of notice in this clause shall not apply in the case of dismissal for serious misconduct, that is, misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.

(vi) Notice of termination by employee. Except in the first three months of service, one week's notice shall be necessary for an employee to terminate his or her engagement or the forfeiture or payment of one week's pay by the employee to the employer in lieu of notice.

(vii) Probation. An employee engaged under the terms of this award may be engaged under probation for an agreed period not exceeding three months. Notwithstanding subclause (1)(a)(i) above, should an employer wish to terminate an employee still on probation, one day's notice shall be given by either party, or one day's pay in lieu shall be paid or forfeited.

(b) Casual Employees

The employment of a casual employee may be terminated by the giving or receiving of one hour's notice.

(2) The employer shall be under no obligation to pay for any day not worked upon which the employee is required to present himself or herself for duty, except where such absence from work is due to paid leave to which the employee is entitled under the provisions of this award.

(3) The employer shall be entitled to deduct payment for any day or portion of a day upon which the employee cannot be usefully employed because of any strike or through the breakdown of the employer's machinery or any stoppage of work by any cause which the employer cannot reasonably prevent.

(4) (a) Prior to engagement, an employee shall be notified by the employer or by the employer's representative whether the duration of his or her employment is expected to exceed one month, and if the employee is hired as a casual employee, he or she shall be advised accordingly.

(b) An employee shall, for the purposes of this award, be deemed to be a casual employee –

(i) If the expected duration of the employment is less than one month; or

(ii) If the notification referred to in paragraph (a) of this subclause is not given and the employee is dismissed through no fault of his or her own within one month of commencing employment.

2.2 - REDUNDANCY

(1) Discussions Before Terminations

(a) Where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the employees directly affected and with the union.

(b) The discussions shall take place as soon as is practicable after the employer has made a definite decision that would invoke the provisions of subclause (1) paragraph (a) hereof and shall cover, among other things, any reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to mitigate any adverse affect of any terminations on the employees concerned.

(c) For the purpose of the discussion the employer shall, as soon as practicable, provide in writing to the employees concerned and the union, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected and the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that any employer shall not be required to disclose confidential information the disclosure of which would be unfavourable to the employer's interests.

(2) Transfer to Lower Paid Duties

Where an employee is transferred to lower paid duties for reasons set out in subclause (1) hereof, the employee shall be entitled to the same period of notice of transfer as he or she would have been entitled to if his or her employment had been terminated, and the employer may at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former ordinary time rate of pay and the new lower ordinary time rates for the number of weeks of notice still owing.

(3) Severance Pay

In addition to the period of notice prescribed for ordinary termination in Clause 2.1 - Contract of Service, subclause (2) paragraph (a), and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in subclause (1) paragraph (a) hereof, shall be entitled to the following amount of severance pay in respect of a continuous period of service.

Period of Continuous Service	Severance Pay
1 year or less	Nil
1 year and up to the completion of 2 years	4 weeks
2 year and up to the completion of 3 years	6 weeks

3 year and up to the completion of 4 years	7 weeks
4 years and over	8 weeks

"Week's Pay" means the ordinary time rate of pay for the employee concerned. Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(4) Employee Leaving During Notice

An employee whose employment is terminated for reasons set out in subclause (1) paragraph (a) hereof, may terminate his or her employment during the period of notice and, if so, shall be entitled to the same benefits and payments under this clause had he or she remained with the employer until the expiry of such notice.

Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice.

(5) Alternative Employment

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee.

(6) Time Off During Notice Period

(a) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or he or she shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

(7) Notice to CentreLink

Where a decision has been made to terminate employees in the circumstances outlined in subclause (1) paragraph (a) hereof, the employer shall notify the CentreLink thereof as soon as possible giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.

(8) Superannuation Benefit

Subject to an order of the Commission, where an employee who is terminated receives a benefit from a superannuation scheme, he or shall only receive under subclause (3) hereof, the difference between the severance pay specified in that subclause and the amount of the superannuation benefit he or she receives, that is attributable to employer contributions only.

If the superannuation benefit is equal to, or greater than the amount due under subclause (3) hereof, then he or she shall receive no payment under that subclause.

(9) Transmission of Business

(a) Where, before or after the date of this award, a business is transmitted from an employer (in this subclause called "the transmittor") to another employer (in this subclause called "(the transmittee"), an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee:

(i) The continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission; and

(ii) The period of employment which the employee has had with the transmittor or any prior transmittor shall be deemed to be service of the employee with the transmittee.

(b) In this subclause "business" includes trade, process, business or occupation and includes part of any such business and "transmission" includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

(10) Employees With Less Than One Year's Service

This clause shall not apply to employees with less than one year's continuous service and the general obligation on employers should be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity, and to take such steps as may be reasonable to facilitate the obtaining by the employees of suitable alterative employment.

(11) Employees Exempted

This clause shall not apply where employment is terminated as a consequence of serious misconduct justifying instant dismissal, or in the case of casual employees, apprentices, or employees engaged for a specific period of time or for a specified task or tasks.

(12) Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, this clause shall not apply to employers who employ less than 15 employees.

(13) Incapacity to Pay

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

3. HOURS OF WORK

3.1 – HOURS

(1) Day Employees

(a) Subject to the provision of this subclause, the ordinary working hours of day employees shall be thirty-eight per week, to be worked over 7.6 hours per day between 7.00 a.m. and 5.00 p.m. Monday to Friday inclusive.

(b) Starting or finishing times other than those prescribed in paragraph (a) of this subclause may, in any particular case, be fixed by agreement between the employer concerned and the union.

(c) The ordinary working hours shall be consecutive except for a meal interval which shall not be more than one hour, nor less than thirty minutes.

(2) Shift Employees.

(a) The ordinary working hours of shift employees shall be -

(i) In the case of continuous or seven day shift employees - seventy-six hours per fortnight to be worked in shifts of 7.6 hours; and

(ii) In other cases - thirty-eight hours per week to be worked in shifts of 7.6 hours.

For the purposes of this paragraph a fortnight means the two-weekly pay period or, where wages are paid weekly, any two consecutive weekly pay periods.

(b) (i) Subject to the provisions of this paragraph each shift employee shall be allowed time for crib in each shift as nearly as practicable to the middle of the shift but dependent upon the plant requirements from day to day.

(ii) On a three shift system, but not otherwise, the crib time shall be counted as time worked and shall be twenty minutes. In other cases, the crib time shall be not less than thirty minutes, nor more than one hour.

(iii) The crib time shall commence no later than five and one half hours after the commencement of the shift.

(c) Where a three shift system is not being worked the ordinary hours shall be consecutive except for crib time.

(d) A tea break of seven minutes shall be allowed to employees during the first half of each shift.

3.2 - DISTANT WORK

(1) Where an employee living in the area of his or her employment is required to proceed to another place of employment from which the employee cannot return to his or her home each night, the employee shall be provided with free board and lodging.

(2) All time involved in travelling up to a maximum of eight hours in any day to such distant place shall be paid for at ordinary rates.

3.2 - OVERTIME

(1) Day Employees.

(a) Subject to the provisions of subclause (3) of this clause, all time worked outside or in excess of the ordinary working hours on any day Monday to Friday inclusive shall be paid for at the rate of time and one-half for the first two hours and double time thereafter.

(b) Where a day employee is required for duty during his or her usual meal time and the meal time is thereby postponed for more than one hour, the employee shall be paid at overtime rates until the employee gets a meal break of the customary period.

(2) Shift Employees.

(a) Subject to the provisions of paragraph (c) of this subclause all time worked by a continuous shift employee in excess of the ordinary hours as prescribed or on a shift other than a rostered shift shall be paid for at the rate of double time, except where such an employee is called upon to work a regularly rostered overtime shift in not more than one week in any four weeks, when the employee shall be paid for such shift at time and one-half for the first two hours and double time thereafter.

(b) All time worked by a shift employee other than a continuous shift employee in excess of the ordinary hours as prescribed shall be paid at the rate of time and one-half for the first two hours and double time thereafter.

(c) Time worked in excess of the ordinary working hours shall be paid for at ordinary rates -

(i) If it is due to private arrangements between the employees themselves;

(ii) If it does not exceed two hours and is due to a relief person not coming on duty at the proper time; or

(iii) If it is for the purpose of effecting the customary rotation of shifts.

(3) All Employees:

(a) (i) When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that employees have at least ten consecutive hours off duty between the work of successive days.

(ii) An employee (other than a casual employee) who works so much overtime between the termination of his or her ordinary work on one day and the commencement of his or her ordinary work on the next day that the employee has not at least ten consecutive hours off duty between those times shall, subject to this paragraph, be released after completion of such overtime until the employee has ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(iii) If, on the instructions of the employer, such an employee resumes or continues work without having had such ten consecutive hours off duty, the employee shall be paid at double rates until the employee is released from duty for such period and he or she shall then be entitled to be absent until the employee has had ten hours off duty without loss of pay for ordinary working time occurring during such absence.

(iv) Where an employee (other than a casual employee or an employee engaged on continuous shift work), is called into work on a Sunday or public holiday preceding an ordinary working day, the employee shall, wherever reasonably practicable, be given ten consecutive hours off duty before his

or her usual starting time on the next day. If this is not practicable, then the provisions of sub-paragraphs (ii) and (iii) of this paragraph shall apply the necessary changed having been made.

(v) The provisions of this clause shall apply in the case of shift employees who rotate from one shift to another, as if eight hours were substituted for ten hours when overtime is worked -

(aa) For the purpose of changing shift rosters; or

(bb) Where a shift employee does not report for duty; or

(cc) Where a shift is worked by arrangement between the employees themselves.

(b) (i) When an employee is recalled to work overtime after leaving the job (whether notified before or after leaving the premises) -

(aa) The employee shall be paid for at least three hours at the appropriate rate for each such occasion but not more than once in respect of any period of time;

(bb) Except in the case of unforeseen circumstances arising, the employee shall not be required to work the full three hours if the job he or she was to perform is completed within a shorter period.

Provided that sub-paragraphs **(aa)** and **(bb)** shall not apply in cases where it is customary for an employee to return to the employer's premises to perform a specific job outside his or her ordinary working hours or where the overtime is continuous (subject to a reasonable meal break), with the completion or commencement of ordinary working time.

(ii) Overtime worked in the circumstances specified in sub-paragraph (i) of this paragraph shall not be regarded as overtime for the purposes of paragraph **(aa)** of this subclause where the actual time worked is less than three hours on such recall or on each such recalls.

(c) Subject to the provisions of paragraph (d) 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 **$6.50** 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 **$4.60** for each meal so required.

(d) The provisions of paragraph (c) of this subclause do not apply -

(i) In respect of any period of overtime for which the employee has been notified on the previous day or earlier that he or she will be required; or

(ii) To any employee who lives in the locality in which the place of work is situated in respect of any meal for which he or she can reasonably go home.

(e) Where an employee, as a consequence of receiving the notice referred to in paragraph (d)(i) of this subclause, has provided himself or herself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified the employee shall be paid for each meal provided, and not required, the appropriate amount prescribed in paragraph (c) of this subclause.

(f) An employee shall not be compelled to work for more than five and one-half hours without a break for a meal.

(g) In computing overtime each day shall stand alone but when an employee works overtime which continues beyond midnight on any day, the time worked after midnight shall be deemed to be part of the previous day's work for the purpose of this subclause.

(h) (i) An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement;

(4) Overtime on shift work shall be based on the rate payable for shift work.

3.4 - SATURDAY WORK

(1) Day Employees: All time worked by employees other than shift employees on Saturday shall be paid for at the rate of time and one-half for the first two hours and double time thereafter. Provided that all work performed after twelve noon shall be paid for at the rate of double time.

(2) Shift Employees:

(a) All time worked by shift employees during ordinary hours on Saturdays shall be paid for at the rate of time and one-half. This rate shall be in lieu of the shift allowance prescribed in subclause (2) of Clause 5.1 – Shift Work of this award.

(b) All time worked by shift employees other than continuous shift employees outside ordinary hours on Saturdays shall be paid for at the rates prescribed in subclause (1) of this clause.

(c) All time worked by continuous shift employees outside ordinary hours on Saturday shall be paid for at the rate of double time.

3.5 - SUNDAY AND HOLIDAY WORK

(1) Day Employees and Shift Employees (Other than Continuous Shift Employees):

(a) All time worked on Sundays shall be paid for at the rate of double time.

(b) All time worked on any day prescribed as a holiday under this award shall be paid for at the rate of double time and a half (2.5).

(2) Continuous Shift Employees:

(a) All time worked by continuous shift employees during ordinary hours on Sundays shall be paid for at the rate of time and three-quarters. This rate shall be in lieu of the shift allowances prescribed in subclause (2) of Clause 5.1 – Shift Work of this award.

(b) All time worked by continuous shift employees outside the ordinary hours on Sundays shall be paid for at the rate of double time.

(c) All time worked by continuous shift employees during ordinary hours on any of the holidays prescribed in Clause 6.3 – Public Holidays of this award shall be paid for at the rate of double time. This rate shall be paid for in lieu of the shift allowances prescribed in subclause (2) of Clause 5.1 – Shift Work of this award.

(d) All time worked by continuous shift employees outside ordinary hours on any of the holidays prescribed in Clause 6.3 – Public Holidays of this award shall be paid for at the rate of double time and a half (2.5).

(e) A continuous shift employee rostered off on any of the holidays prescribed in Clause 6.3 – Public Holidays of this award, shall be paid eight hours pay at ordinary rates.

4. RATES OF PAY

4.1 - MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $467.40 per week payable on and from 4th June 2004.

(3) The Minimum Adult Award Wage of $467.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

(5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the Minimum Adult Award Wage of $467.40 per week.

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

(7) Subject to this clause the Minimum Adult Award Wage shall -

(a) Apply to all work in ordinary hours.

(b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2004 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.

(9) Adult Apprentices

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

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

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

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

4.2 - WAGE RATES

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

The following shall be the minimum rates of wages per week payable to employees covered by this award -

			Total Wage Per Week
(1)	(a)	**Surface Section**:	$
		Pit Controllers	579.90
		General Hand	514.40
		Plant Operators - Primary Metallurgical Plants	
		Grade (1)	545.20
		Grade (2)	536.60
		Grade (3)	528.40
		Plant Operators - Secondary Metallurgical Plants	
		Grade (1)	554.00

Grade (2)	545.20
Grade (3)	536.60
Laboratory Assistants	
Grade (1)	554.00
Grade (2)	545.20
Grade (3)	536.60
Field Operators	
Grade (1) Operators of Equipment in excess of 375kw	574.20
Grade (2)	
(i) Operators of Equipment 225-275 kw	568.50
(ii) Operators of Semi-trailer Ore Truck	
(iii) Grader Operators	
Grade (3)	
(i) Operators of equipment 95-225 kw	561.20
(ii) Motor Truck Drivers	
(iii) Water Truck Drivers	
Grade (4) Operators of Equipment 50-95 kw	547.90
Grade (5) Operators of Mechanical Drilling Rig	536.60
Grade (6)	
Drillers Assistant	526.80
Field and Survey Hand	
Storeperson	

Note: The classification of Operators of Equipment includes Front End Loader Driver, Bulldozer Driver and similar types of mobile plant

Rehabilitation Hands	
Grade (1)	545.20
Grade (2)	536.60
Grade (3)	528.40

(b) Underground Section

Trucker	518.70
Tool Carrier	518.70
Shoveller	518.70
Diamond Drillers Assistant	531.20
Pipe Assembler	531.20
Sampler	531.20
Hydraulic Drill Operator	531.20
Popper Machine Person	531.20
Air Hoist Operator	531.20
Electric Hoist Operator	519.40
Pump Attendant	519.40
Ventilation Person	519.40
Platelayer	524.80
Train Crew	524.80
Mechanical Loader Operator	524.80
Scraper Hauler Operator	524.80
Braceperson	524.80
Platperson	524.80
Skipperson	524.80
Scalers	524.80
Rock Drillperson in all other places	531.30
Rock Drillperson in all other places including open-cut	541.20
Sanitary Person	541.60
Timberperson - Other	547.60
Rock Drillperson in rises	552.60
Rock Drillperson in winzes	552.60
Diamond Driller -	
(a) Up to 20 h.p.	552.60
(b) Over 20 h.p.	552.60
Timberperson – Shaft	565.00
Rock Drillperson in Shaft	565.00
Hauler Operator	572.80
Hydraulic Twin and Treble Boom - Jumbo Operator	582.50

(2) Mess Personnel

(a) The minimum rate of wages per week payable to mess personnel shall be as follows:-

	Total Wage Per Week
	$
Head Cook	602.90
Cook	561.20
Mess Attendant	525.80

(b) All time worked by employees in the mess outside the daily spread of 12 hours or in excess of 40 hours in any one week shall be deemed overtime and be paid for at the rate of time and one half. Provided that overtime in excess of four hours in any one week shall be paid for at the rate of double time.

(c) All time worked during ordinary hours on a Saturday shall be paid for at the rate of time and one half, on a Sunday at the rate of time and three quarters and on a holiday at the rate of double time.

(d) The provisions of clauses -

3.1 Hours

3.3 Overtime

5.1 Shift Work

3.4 Saturday Work

3.5 Sunday and Holiday Work

shall not apply to mess personnel.

(3) Leading Hands: employees appointed by the employer as leading hands shall be paid the following amounts in addition to the ordinary rates of pay:

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	**20.70**
(b)	If placed in charge of more than 10 and not more than 20 other employees	**31.50**
(c)	If placed in charge of more than 20 other employees	**41.20**

(4) Industry Allowance: in addition to the rates of wages specified in subclauses (1) and (2) of this clause, employees shall receive as compensation for all the disabilities associated with the industry an amount of **$9.70** per week for forty hours.

(5) Junior Employees: (percentage of General Hand rate)

	%
Under 17 years of age	55
At 17 years of age	65
At 18 years of age	80
At 19 years of age	Appropriate Adult Rate

(6) Casual Employees: a casual employee shall be paid 20 percent in addition to the ordinary rate for their class of work.

4.3 - ACCIDENT PAY

In the event of an employee meeting with an accident during the shift, or being required to attend to one who has met with an accident, the employee shall be deemed to have rendered duty during the whole of the shift and be paid accordingly.

4.4 - PAYMENT OF WAGES

(1) Wages shall be paid weekly or fortnightly at the option of the employer.

(2) Any employee, on lawful termination of his or her employment, shall be paid the full amount due to him or her within one hour of ceasing work, or within one hour of the opening of the pay office if such office was closed at the time of the employee ceasing work.

(3) On or before payment of wages the employee shall be issued with a slip showing the gross amount of wages and allowances, if any, due to him or her and any other deductions therefrom, the total number of hours worked including the number of overtime hours, and the rate at which such overtime is paid.

(4) Wages shall be paid into an account nominated by the employee, except where by agreement between the employee and employer, payment is made by cash or cheque.

4.5 - HIGHER DUTIES

(1) An employee engaged on duties carrying a higher rate than his or her ordinary classification shall be paid the higher rate for the period he or she is so engaged, but if the employee is so engaged for more than two hours of one day or shift the employee shall be paid the higher rate for the whole day or shift.

(2) Any employee regularly engaged in relieving work shall be paid the highest rate applicable to the class of work upon which the employee is so employed during any day or shift.

5. ALLOWANCES AND FACILITIES

5.1 - SHIFT WORK

(1) The provisions of this clause apply to shift work whether continuous or otherwise.

(2) A shift employee shall, in addition to his or her ordinary rate, be paid per shift of eight hours, at the rate of **$9.55** when on afternoon or night shift.

(3) (a) An employee who does not work at least one week on day shift out of each consecutive three weeks shall be paid for each shift other than day shift at the rate of time and one quarter. Provided that if the employee is required to work for more than one week consecutively on afternoon shift, or for more than one week consecutively on night shift, such an employee shall be paid at the rate of time and one-quarter for each shift other than day shift in the consecutive second and subsequent weeks of afternoon shift or of night shift.

(b) This subclause shall not apply to employees employed on what is known as the Great Boulder Roster or accepted variations thereof, nor to employees to whom this subclause would only otherwise apply because of a change of shift due to a private arrangement with another employee, nor to employees (known as "rostered relief employees"), regularly employed on continuous process work who are required to work shifts to enable other employees engaged on such work to change shifts weekly and to have their days off, if such rostered relief employee is not required to work more night shifts or more afternoon shifts than the number of day shifts worked by him or her.

(4) (a) Where any particular process is carried out on shifts other than day shifts, and less than five consecutive afternoon or five consecutive night shifts are worked on that process, then employees employed on such afternoon or night shifts shall be paid at overtime rates.

(b) The sequence of work shall not be deemed to be broken under the preceding paragraph by reason of the fact that work on the process is not carried out on a Saturday or Sunday or on any public holiday.

(5) (a) An employee who replaces a regular shift employee who is absent for any reason beyond the control of the employer, on afternoon or night shift, shall be paid at the rate of time and one-quarter if the employee does not work for five consecutive shifts (other than day shift) and the appropriate shift work rate if the employee works five or more of such shifts consecutively.

(b) An employee who replaces on afternoon or night shift a regular shift employee who is absent by reason of a direction of the employer, shall be paid at overtime rates unless the employee works the number of consecutive shifts prescribed in the next preceding paragraph.

(c) The sequence of consecutive shifts shall not be deemed to be broken under paragraph (a) by reason of rostered days off in respect to employees employed on continuous process work or by a Saturday or Sunday in respect to other employees or by any public holiday or any other reason beyond the control of the employer.

5.2 - SPECIAL PROVISIONS

(1) (a) The employer shall have available a sufficient supply of protective equipment (for example, helmets, hand screens, goggles, (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, waterproof clothing or other efficient substitutes thereof), for use by his or her employees when engaged on work for which some protective equipment is reasonably necessary. This equipment shall be as required under the Mines Safety and Inspection Act 1994 as amended from time to time. It shall be a defence by an employer charged with a breach of this subclause if he or she proves that he or she was unable to obtain either the item of equipment the subject of the charge, or a suitable substitute.

(b) Every employee shall sign an acknowledgement on receipt of any article of protective equipment and shall return same to the employer when he or she has finished using it or on leaving the employment.

(c) No employee shall lend another employee any such article of protective equipment issued to such first mentioned employee, and if the same is lent, both the lender and the borrower shall be held responsible.

(d) Before helmets, goggles or gloves which have been used by an employee are re-issued by the employer to another employee, they shall be effectively sterilised.

(e) During the time any article of protective equipment or hand tool is on issue to the employee, he or she shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(f) Use of Acids and Solvents.

(i) Employees in this industry who are exposed to acids and solvents of such concentration and nature as are likely to cause ill health unless specific safety precautions are taken shall be informed by the employer of the known hazard involved and shall be instructed in their correct use and the necessary safeguards to be observed.

(ii) These employees shall be provided with, and shall wear protective clothing when required, including acid resistant boots, gloves, face shields, full rubber suits and face masks. This equipment shall be as required under the Mines Safety and Inspection Act 1994 as amended from time to time.

(iii) In addition to the wages prescribed in Clause 4.2 – Wages Rates of this award employees using the protective clothing and exercising the safeguards referred to in (i) and (ii) hereof, shall be paid **$0.39** per hour for each hour or part of an hour whilst so engaged.

(2) Where it is reasonably convenient, and where there is no undue interference with normal work, the employer will permit employees during the first half of the day shift to take a morning tea break of seven minutes without loss of pay.

(3) The morning tea break shall not entitle the employee to return to the crib room, but shall be taken "on the job" if so required by the employer.

5.3 – DISTRICT ALLOWANCE

(1) Subject to the provisions of subclause (3) of this clause in addition to the wages prescribed in this award, an allowance shall be paid at the rate set out below, to each employee employed in the following area:-

	Allowance per week $
Within that area of the State situated between lat. 24° and a line running east from Carnot Bay to the Northern Territory Border	6.00

(2) The above allowance covers a week, whether of five, six or seven days. For periods of less than five days, one seventh of the above shall be payable for each day or part thereof; Provided however, that an employee who has worked at least one half of a week shall be given the benefit of Sunday in the calculation of district allowances.

(3) An employee living in a mess or camp provided by the employer free of charge to the employee shall be paid half the rates prescribed in subclause (1) of this clause.

5.4 - CLOTHING ALLOWANCE AND SAFETY BOOTS

(1) (a) Each employee shall be paid an allowance of **$1.70** per week for the purpose of purchasing overalls.

or

(b) Each employee may buy one set of appropriate work clothing each six months and be reimbursed to a maximum amount of **$42.90** for each set, upon production of the necessary receipts.

(2) The wearing of safety footwear is compulsory and any employee reporting for work without safety footwear may be refused work and shall not be entitled to payment for that day or shift.

(3) The employer shall supply to each employee upon commencement of employment with the employer one pair of steel capped safety boots at no cost to the employee.

A replacement pair of steel capped safety boots shall be supplied by the employer to any employee at no cost to that employee, who satisfies the employer that the initial issue of such boots or the pair the employee presently possesses needs replacing through wear and tear arising out of or in the course of the employee's employment with the employer.

All safety boots issued pursuant to the provisions of this subclause shall remain the property of the employer.

5.5 - SERVICE PAYMENTS

(1) In addition to the wages provided in Clause 4.2 – Wage Rates each adult employee shall be paid a service allowance as hereunder:

	Per Week $
Upon completion of 12 months continuous service	3.20
Upon completion of 24 months continuous service	7.80
Upon completion of 36 months continuous service	12.30
Upon completion of 60 months continuous service	15.50

(2) All service prior to the date of operation of this clause shall count as service for the purpose of assessing an employee's entitlement under this clause.

(3) Payment shall be made for each completed week of service including all paid leave.

(4) Payment shall be deducted for any day upon which an employee is required to attend work and fails to attend.

5.6 - TRAVELLING ALLOWANCE

(1) If transport to and from the job is not provided by the employer, a travelling allowance of **$1.80** per day shall be paid when an employee's home is more than eight kilometres from the job by the shortest practical route.

(2) The allowance specified in subclause (1) of this clause shall be paid to an employee to compensate for excess travelling expenses from the employee's home and his or her place of work and return.

5.7 - FIRST AID

(1) The employer shall at each main place of employment, provide a suitable first aid outfit. This shall be an outfit deemed suitable under the Mine Safety and Inspection Act 1996 WA (as amended from time to time).

5.8 - FARES AND TRAVELLING TIME

(1) The provisions of this clause apply only in respect to employment north of south latitude 26°.

(2) Subject to the provisions of this clause the fare of an employee from the place of engagement to any place of employment shall be paid by the employer and the employee shall be paid at ordinary rates for not more than eight hours in any day for time spent in travelling to the place of employment including time occupied in waiting for transport connections, but if the employee uses a mode of travel not approved by the employer travelling time in excess of eight hours shall not be allowed unless the Board of Reference otherwise determines.

(3) The amount of the fare paid by an employer pursuant to subclause (2) of this clause may be deducted from the subsequent earnings of the employee concerned in such manner as is agreed in writing between the employee and the employer.

(4) If an employee completes six months' continuous service with an employer or is dismissed before that time through no fault of their own, any amount deducted by that employer from the employee's wages pursuant to subclause (3) of this clause shall be refunded to the employee.

(5) The employer shall pay the fare of the worker from the place of employment to the place of engagement if the employment terminates and -

(a) The employee has completed six months continuous service with that employer; or

(b) The employee has completed six months continuous service with that employer and is dismissed through no fault of their own.

(6) Where an employee has completed six months continuous service and leaves for a reason deemed reasonable by their employer they shall be paid one-sixth of the fare referred to in subclause (5) of this clause for each month of service in excess of six months.

6. LEAVE

6.1 - ANNUAL LEAVE

(1) (a) Except as hereinafter provided a period of four consecutive weeks' leave with payment as prescribed in paragraph (b) hereof, shall be allowed annually to an employee by the employer accrued on a weekly basis. Provided that employees employed North of South latitude 26° shall be allowed one additional weeks' leave.

(b) (i) An employee before going on leave shall be paid the wages the employee would have received in respect of the ordinary time the employee would have worked had he or she not been on leave during the relevant period.

(ii) Subject to paragraph (c) hereof an employee shall, where applicable, have the amount of wages to be received for annual leave, calculated by including the following where applicable -

(aa) The rate applicable to him or her as prescribed by Clause 4.2 - Wage Rates;

(bb) Subject to paragraph (c)(ii) hereof the rate prescribed for work in ordinary time by Clause 5.1 - Shift Work, Clause 3.4 - Saturday Work and Clause 3.5 - Sunday and Holiday Work of the award according to the employee's roster or projected roster including Saturday and Sunday shifts;

(cc) The rate payable pursuant to Clause 4.5 - Higher Duties calculated on a daily basis which the employee would have received for ordinary time during the relevant period whether on a shift roster or otherwise;

(dd) Any other rate to which the employee is entitled to in accordance with his or her contract of employment for ordinary hours of work; Provided that this provision shall not operate so as to include any payment which is of a similar nature to or is paid for the same reasons as or is paid in lieu of those payments prescribed by Clause 3.3 - Overtime, of this award, nor any payment which might have become payable to the employee as reimbursement for expenses incurred.

(c) During a period of annual leave an employee shall receive a loading calculated on the rate of wage prescribed by paragraph (b)(ii)(aa) hereof. The loading shall be as follows:

(i) Day Employees - An employee who would have worked on day work had he or she not been on leave - a loading of 17.5 per cent.

(ii) Shift Employees - An employee who would have worked on shift work had he or she not been on leave - a loading of 17.5 per cent.

Provided that where the employee would have received shift loadings prescribed by Clause 5.1 - Shift Work, Clause 3.4 - Saturday Work, and Clause 3.5 - Sunday and Holiday Work had the employee not been on leave during the relevant period and such loadings would have entitled him or her to a greater amount than the loading of 17.5 per cent, then the shift loadings shall be added to the rate of wage prescribed by paragraph (b)(ii)(aa) hereof in lieu of the 17.5 per cent loading.

Provided further, that if the shift loadings would have entitled the employee to a lesser amount than the loading of 17.5 per cent, then such loading of 17.5 per cent, shall be added to the rate of wage prescribed by paragraph (b)(ii)(aa) hereof in lieu of the shift loadings.

The loading prescribed by this subclause shall not apply to proportionate leave on termination.

(2) After one week's continuous service an employee whose employment terminates shall be paid in the proportion that the number of shifts worked by him or her at the rate prescribed in paragraph (b) of subclause (1) of this clause in that qualifying period bears to the full number of such shifts worked.

(3) (a) Continuous shift employees, that is shift employees engaged in a continuous process who are rostered to work regularly on Sundays and holidays shall be allowed one week's leave in addition to the leave prescribed in subclause (1) hereof.

(b) Where an employee is engaged for part of his or her employment as a continuous shift employee, he or she shall be entitled to have the period of annual leave which the employee is otherwise entitled under this clause increased by that proportion of the additional week as the number of shifts worked by him or her at ordinary rates bears to the full number of such shifts worked.

(4) The amounts to be paid hereunder shall be calculated at the rate prevailing at the time the payment is made.

(5) Where an employee is justifiably dismissed for serious misconduct during any qualifying twelve monthly period, the provisions of subclause (2) do not apply.

(6) If any of the holidays prescribed in Clause 6.3 – Public Holidays of this award fall during the employee's period of annual leave and are observed on a day which in the case of that employee would have been an ordinary working day the employee shall have one extra day added to the period of annual leave.

(7) An employer may close down the operation or section or sections thereof for the purpose of allowing annual leave to all or the majority of the employees employed generally or in any such section or sections and in the event of an employee being employed for portion only of a year he or she shall only be entitled to such leave on full pay as is proportionate to his or her length of service during that period with such employer and if such leave is not equal to the leave given to the other employees he or she shall not be entitled to work or pay whilst the other employees of such employer are on leave on full pay.

(8) (a) An employee who, at the commencement of his or her annual leave, has an entitlement to payment for non-attendance on the ground of personal ill health for not less than 40 hours under the provisions of Clause 6.2 – Sick Leave of this award and who, within 14 days of resuming work, produces to the employer evidence that would satisfy a reasonable person that during annual leave the employee was confined to his or her home or to a hospital for a period of at least seven consecutive days for a reason which, if he or she had not been on annual leave, would have entitled him or her to payment under the provisions of the said Clause 6.2 – Sick Leave shall be deemed to be on sick leave for so much of that period as the employee would otherwise have been entitled to payment under that clause.

(b) An employee to whom paragraph (a) applies shall take the period deemed to be absence through sickness as annual leave at a time convenient to the employer but on ordinary pay, without the loading prescribed in paragraph (c) of subclause (1).

(9) This clause shall not apply to casual employees.

(10) In special circumstances, and by mutual consent of the employer, the employee and the union, annual leave may be taken in not more than two periods but neither period shall be less than one week.

(11) (a) Where an employer and an employee have not agreed when the employee is to take his or her annual leave, subject to subclause (1), the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time.

(b) The employee is to give the employer at least two weeks notice of the period during which the employee intends to take his or her leave.

6.2 – SICK LEAVE

(1) Subject as hereinafter provided a full-time employee shall be entitled to payment for non-attendance on the ground of personal ill health or injury for up to 10 working days or 80 hours, whichever is the lesser, each year accrued on a weekly basis. Part-time employees who are paid a proportion of a full-time employee's pay or paid according to the number of hours worked shall be entitled to the proportion of the number of hours worked each week that the average number of hours worked each week bears to 40, up to 80 hours each year. This clause shall not apply where the employee is entitled to compensation under the Workers' Compensation and Rehabilitation Act 1981.

(2) An employee shall not be entitled to receive wages from the employer for any time lost through an illness or injury caused by the employee's own serious and wilful misconduct or gross and wilful neglect.

(3) An employee, who claims to be entitled to paid leave under this clause, is to provide the employer with evidence that would satisfy a reasonable person of the entitlement.

(4) Sick leave shall accumulate from year to year so that any balance of the period specified in subclause (1) of this clause which has in any year not been allowed to any employee by the employer as paid sick leave may be claimed by the employee and subject to the conditions hereinbefore prescribed, shall be allowed by the employer in any subsequent year without diminution of the sick leave prescribed in respect of that year.

(5) An employee who is absent through sickness shall as far as is practicable within twenty-four hours of the commencement of such absence, advise the employer of his or her inability to attend for work and the estimated duration of the absence.

(6) The provisions of this clause do not apply to casual employees.

6.3 – PUBLIC HOLIDAYS

(1) (a) The following days or the days observed in lieu shall, subject to Clauses 3.3 - Overtime and 5.1 – Shift Work hereof, be allowed as holidays without deduction of pay namely: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that north of south latitude 26° the following days shall be allowed as holidays without deduction of pay namely: New Year's Day, Good Friday, Anzac Day, Labour Day and Christmas Day. Provided further that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.

(b) Where any of the holidays mentioned in paragraph (a) falls on a Saturday or a Sunday such holiday shall be observed on the next succeeding Monday and where Boxing Day falls on a Sunday or on a Monday such holiday shall be observed on the next succeeding Tuesday; in each case the substituted day shall be deemed a holiday without deduction of pay in lieu of the day for which it is substituted.

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

(3) This clause does not apply to casual employees.

6.4 - BEREAVEMENT LEAVE

(1) An employee on the death of:

(a) Spouse or de facto partner

(b) Child or step child

(c) Parent, step parent or parent-in-law

(d) Sibling or sibling-in-law

(e) Grandparent

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

is entitled to paid bereavement leave of up to three days, which do not have to be consecutive.

(2) If requested, evidence of the death and relationship of the employee to the deceased person that would satisfy a reasonable person is to be furnished to the employer.

(3) Bereavement leave is not to be taken during any other type of leave.

6.5 - PARENTAL LEAVE

(1) Basic Entitlements

(a) An employee, other than a casual employee, and their spouse are entitled to unpaid parental leave totalling 52 weeks in respect of:

(i) The birth of a child; or

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

(b) To obtain parental leave, an employee must satisfy the following basic requirements:

(i) The employee has, before the expected date of birth or placement, completed at least 12 months continuous service with the employer;

(ii) The employee has given the employer at least ten weeks written notice of their intention to take the leave, unless due to circumstances it is impractical or unreasonable to do so;

(iii) Complied with paragraph (c) of this subclause.

(c) Except for a period of one week at the time of the birth or placement, an employee and his or her spouse must take parental leave at different times.

(d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's spouse in relation to the same child, except for the period of one week's leave referred to in paragraph (c) of this subclause.

(e) An employee may take other leave (for example, annual leave) in conjunction with parental leave, but this will reduce the amount of parental leave they may take in accordance with subclause (6) of this clause.

(f) An employee who takes parental leave is, in most circumstances, entitled to return to the position which they held before the leave was taken.

(g) The absence of an employee on parental leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose in terms of this award.

(2) Definitions

''Adoption'' in relation to a child, is a reference to a child who:

(a) Is not the natural child or the step-child of the employee or the employee's spouse;

(b) Is less than 5 years of age;

(c) Has not lived continuously with the employee for six months or longer.

''Employee'' includes a part-time employee, but not a casual or seasonal employee;

''Continuous service'' means service (otherwise than as a casual or seasonal employee) under an unbroken contract of employment, and includes a period of leave, or a period of absence, authorised:

(a) By the employer; or

(b) By an award or order of a court or tribunal or a workplace agreement certified by such a body; or

(c) By a contract of employment.

''Expected date of birth'' means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's spouse, as the case may be, to give birth to a child.

''Medical certificate'' means a certificate signed by a registered medical practitioner.

''Placement'' means the placement, by an adoption agency, of a child with an employee for adoption.

''Spouse'' includes a de facto spouse.

(3) Notice Requirements

The written notice required in placitum (ii) of paragraph (b) of subclause (1) shall include:

(a) A specification of the first and last days of the period of leave, provided that a female employee who has given notice of her intention to take parental leave, other than for adoption, is to start the leave six weeks before the expected date of birth unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work;

(b) In the case where parental leave is taken for the birth of a child, the employee must give to the employer:

(i) A medical certificate that states that the employee or the employee's spouse is pregnant and specifies the estimated date of birth;

(ii) A statutory declaration that:

(aa) Supports the particulars notified;

(bb) The employee will be the child's primary care-giver throughout the period of parental leave; and

(cc) That the employee will not engage in any conduct inconsistent with their contract of employment while on parental leave

(c) In the case where parental leave is taken for the adoption of a child, the employee must give to the employer:

(i) A statement from the adoption agency of the proposed date of placement of the child; and

(ii) A statutory declaration that:

(aa) The child will be at the proposed date of the placement, or was, at the date of the placement, as the case requires, under the age of 5 years; and

(bb) Is not a child or step-child of the employee or the employee's spouse; and

(cc) Will not have, at the proposed date of the placement, or had not, at the date of the placement, as the case requires, previously lived with the employee for a continuous period of 6 months or more.

(dd) The employee will be the child's primary care-giver throughout the period of parental leave.

(ee) Will not engage in any conduct inconsistent with the employee's contract of employment while on adoption leave.

(d) An employee who has given notice of their intention to take parental leave is to notify the employer, in the form of a statutory declaration, of particulars of any period of parental leave taken or to be taken by the employee's spouse in relation to the same child.

(e) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to start or finish the leave.

(f) The starting and finishing dates of a period of parental leave is, subject to this subclause, to be agreed between the employer and employee.

(4) Transfer to Safe Job

(a) Where, in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of the parental leave.

(b) Where the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a registered medical practitioner. Such leave shall be treated as parental leave for purposes of this section.

(5) Variation to Period of Parental Leave

(a) Provided the maximum period of parental leave does not exceed the period to which the employee is entitled under subclause (7) hereof:

(i) The period of parental leave may be lengthened once only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;

(ii) The period may be further lengthened by agreement between the employee and the employer.

(b) The period of maternity leave may, with the consent of the employer, be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.

(6) Special Parental Leave

(a) Where an employee is not yet on parental leave and her pregnancy terminates after 28 weeks other than by the birth of a living child, the employee shall be entitled to:

(i) Such period of unpaid leave as a registered medical practitioner certifies as necessary before her return to work; and/or

(ii) For illness other than the normal consequences of confinement, paid sick leave to which she is entitled and which a registered medical practitioner certifies as necessary for her return to work.

(b) The aggregate of parental leave, special parental leave and sick leave shall not exceed the period of leave granted under subclause (7) of this clause.

(7) Period of Entitlement

An employee who qualifies for parental leave under this subclause, is entitled to a period of 52 weeks unpaid leave, less the total of:

(a) Each period of unpaid leave, or paid sick leave, other than parental leave, that the employer has already granted to the employee in respect of the same pregnancy; and

(b) Each period of annual leave, or long service leave, that the employee has applied for instead of, or in conjunction with, parental leave in respect of the pregnancy; and

(c) Each period of special parental leave; and

(d) Each period of parental leave taken by the employee's spouse and specified in paragraph (d) of subclause (3) of this clause.

(8) Effect on Parental Leave of Failure to Complete 12 months Continuous Service

If parental leave has been granted on the basis that it is reasonable to expect that the employee will complete a period of at least 12 months continuous service with the employer on a particular day, the employer may cancel the leave if the employee does not complete such a period on that day.

(9) Effect on Parental Leave in Certain Circumstances

(a) This subclause applies if an employer has granted parental leave to an employee and:

(i) The pregnancy terminates otherwise than by the birth of a living child; or

(ii) The employee gives birth to a living child but the child later dies; or

(iii) The adoption of a child does not take place; or

(iv) The adoption of a child takes place but does not continue.

(b) The employer may cancel the parental leave at any time before it begins.

(c) If the parental leave has begun, the employee may notify the employer in writing that he or she wishes to return to work.

(d) If he or she does so, the employer must notify him or her in writing of the day on which he or she is to return to work. That day must be within four weeks after the employer received the notice under subclause (3) of this clause.

(e) If the parental leave has begun, the employer may notify the employee in writing that he or she must return to work on a specified day that is not less than four weeks after the notice is given.

(f) If the employee returns to work, the employer must cancel the rest of the parental leave.

(10) Effect on Parental Leave if Employee Ceases to be Primary Caretaker of Child

(a) This subclause applies if:

(i) For a substantial period beginning on or after the beginning of an employee's parental leave, the employee is not the child's primary care-giver; and

(ii) Having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.

(b) The employer may notify the employee in writing that he or she must return to work on a specified day that is not less than four weeks after the notice is given.

(c) If the employee returns to work, the employer must cancel the rest of the leave.

(11) Return to Work After Parental Leave

(a) This subclause applies when an employee returns to work after a period of parental leave.

(b) The employer must employ the employee in the position he or she held immediately before starting parental leave, provided that in the case of a female employee:

(i) If she was transferred to a safe job because of her pregnancy, the position shall be the one immediately before the transfer; or

(ii) If she began working part-time because of the pregnancy, the position shall be the one immediately before she so began.

(c) If that position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, the employee shall be entitled to a position as nearly comparable in status and pay to that of their former position.

(12) Replacement Employee

An employer must not employ a person:

(a) To replace an employee while he or she is on parental leave; or

(b) To replace an employee who, while another employee is on parental leave, is to perform the duties of the position held by the other employee;

Unless the employer has informed the person:

(c) That his or her employment is only temporary; and

(d) About the rights of the employee who is on parental leave.

(13) Termination of Employment

(a) An employee on parental leave may terminate his/her employment at any time during the period of leave by notice given in accordance with this award.

(b) An employer shall not terminate the employment of an employee on the ground of her pregnancy or of their absence on parental leave, but otherwise the rights of the employer in relation to termination of employment are not hereby affected.

(14) Part-time Work

(a) This subclause only applies where the employer and employee have reached agreement that an employee may work part-time under the circumstances and according to the conditions contained in this subclause.

(b) With the agreement of the employer:

(i) An employee may work part-time in one or more periods at any time from the date of birth of his/her child until its second birthday or, in relation to adoption, from the date of placement of the child until the second anniversary of the placement.

(ii) A female employee may work part-time in one or more periods while she is pregnant where part-time work is, because of the pregnancy, necessary or desirable.

(c) An employee, who has had at least 12 months continuous employment with an employer immediately before commencing part-time work under this subclause, has at the expiration of the period of such part-time employment the right to return to his or her former position.

(d) Subject to the provisions of this subclause part-time employment shall be in accordance with the provisions of this award which shall apply pro-rata.

(e) Before commencing a period of part-time employment under this subclause the employee and the employer shall agree:

(i) That the employee may work part-time;

(ii) Upon the hours to be worked by the employee, the days upon which they will be worked and commencing times for the work;

(iii) Upon the classification applying to the work to be performed; and

(iv) Upon the period of part-time employment.

(f) The terms of the agreement may be varied by consent.

(g) The terms of this agreement or any variation to it shall be reduced to writing and retained by the employer. A copy of the agreement and any variation to it shall be provided to the employee by the employer.

(h) (i) The employment of a part-time employee under this subclause, may be terminated in accordance with the provisions of this award but may not be terminated by the employer because the employee has exercised or proposes to exercise any rights arising under this subclause or has enjoyed or proposes to enjoy any benefits arising under this subclause.

(ii) Any termination entitlements payable to an employee whose employment is terminated while working part-time under this subclause, or while working full-time after transferring from part-time

work under this subclause, shall be calculated by reference to the full-time rate of pay at the time of termination and by regarding all service as a full-time employee as qualifying for a termination entitlement based on the period of full-time employment and all service as a part-time employment on a pro rata basis.

(i) An employer may request, but not require, an employee working part-time under this subclause to work outside or in excess of the employee's ordinary hours of duty provided for in accordance with paragraph (e) of this subclause.

(j) The work to be performed part-time need not be the work performed by the employee in his or her former position but shall be worked otherwise performed under this award.

6.6 - CARER'S LEAVE

(1) Use of Sick Leave

(a) An employee with responsibilities in relation to either members of their immediate family or members of their household who need their care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement for absences to provide care and support for such persons when they are ill or injured. Such leave shall not exceed five (5) days in any calendar year and is not cumulative.

(b) The employee shall, if required, provide a written statement as to the fact of illness or injury of the person for whom the care and support is required.

(c) The entitlement to use sick leave is subject to:

(i) The employee being responsible for the care of the person concerned; and

(ii) The person concerned being either a member of the employee's family or a member of the employee's household.

(iii) The term "member of the employee's family" means any of the following persons:

(aa) The employee's spouse or de facto spouse;

(bb) A child for whom the employee has parental responsibility as defined by the Family Court Act 1997;

(cc) An adult child of the employee;

(dd) A parent, sibling or grandparent of the employee.

(d) The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

(2) Use of Unpaid Leave

An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill or injured.

6.7 - LONG SERVICE LEAVE

Except for the substituted subclauses and paragraphs, i.e. paragraph (1) of subclause 2 – Long Service and subclause 3 – Period of Leave, employees covered by this Award will be entitled to Long Service Leave in accordance with the Long Service Leave General Order published in Part 1 of the January volume of the Western Australian Industrial Gazette.

2. - Long Service

(1) The long service which shall entitle an employee to such leave shall, subject as herein provided, be continuous service with one and the same employer, in the Tin Mining industry.

3. - Period of Leave

(1) The leave to which an employee 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 an employee has completed at least 10 years service, the amount of leave shall be -

(a) In respect of 10 years service so completed - 13 weeks;

(b) In respect of each 10 years service completed after the first 10 years - 13 weeks;

(c) In respect of each seven years service after the first 20 years - 13 weeks;

(c) On the termination of the employee's employment-

(i) By his or her death; or

(ii) In any circumstances otherwise than by his or her employer for serious misconduct;

in respect of the number of years service with the employer completed since he or she last became entitled to an amount of long service leave, a proportionate amount on the basis of 13 weeks for 10 years service or as the case may be on the basis of 13 weeks leave for seven years service.

(3) Subject to the provisions of paragraph (6) of this subclause, where an employee has completed at least three years service, but less than 10 years service since its commencement and his or her employment is terminated-

(i) By his or her death; or

(ii) By the employer for any reason other than serious misconduct; or

(iii) By the employee on account of sickness or injury to the employee or domestic or other pressing necessity where such sickness or injury or necessity is of such a nature as to justify or in the event of a dispute is, in the opinion of the Special Board of Reference, of such a nature as to justify such termination;

the amount of the leave shall be such proportion of 13 weeks leave as the number of completed years of such service bears to 10 years.

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

(5) An employee whose service with an employer commenced before 1st June 1980 and whose service would entitle him or her 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 1st June 1980, an amount of leave calculated on the basis of 13 weeks leave for 15 years; and

(b) For each completed year of service commencing on or after 1st June 1980, an amount of leave calculated on the basis of 13 weeks' leave for 10 years' service or the basis of 13 weeks leave for seven years service as the case may be.

Provided that such employee shall not be entitled to long service leave until his or her completed years of service entitle him or her to 13 weeks leave.

(6) An employee to whom paragraphs (2)(d) and (3) of this subclause apply whose service with an employer commenced before 1st June 1980, shall be entitled to an amount of long service leave calculated on the following basis:-

(a) For each completed year of service commencing before 1st June 1980, an amount of leave calculated on the basis of 13 weeks leave for 15 years service; and

(b) For each completed year of service commencing on or after 1st June 1980, an amount of leave calculated on the basis of 13 weeks leave for 10 years service or 13 weeks leave for seven years service as the case may be.

6.8 - JURY SERVICE

Any employee required for Jury Service shall be paid a daily amount equal to the difference between the amount received for such service and what that employee would have received during ordinary hours had he or she been at work.

7. REGISTERED ORGANISATION MATTERS

7.1 – RIGHT OF ENTRY & REPRESENTATIVE INTERVIEWING EMPLOYEES

(1) An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of investigating any suspected breach of the Industrial Relations Act 1979, the Long Service Leave Act 1958, the Minimum Conditions of Employment Act 1993, the Occupational Safety and Health Act 1984, the Mines Safety and Inspection Act 1994 or an award, order, industrial agreement or employer-employee agreement that applies to any such employee.

(2) An authorized representative of an organization may enter, during working hours, any premises where relevant employees work, for the purpose of holding discussions at the premises with any relevant employees who wish to participate in those discussions.

(3) An 'authorised representative' means a person who holds an authority in force under Division 2G of the Industrial Relations Act 1979 (as amended).

(4) A ‘relevant employee’ means an employee who is a member of an organization of who is eligible to become a member of the organization.

(5) An authorised representative is not entitled to require the production of employment records or other documents unless, before exercising the power, the authorised representative has given the employer concerned:

(a) If the records or other documents are kept on the employers premises, at least 24 hours written notice; or

(b) If the records or other documents are kept elsewhere, at least 48 hours written notice.

7.2 - POSTING OF NOTICES

The employer shall keep a copy of this award at a convenient place and shall also provide a notice board for the posting of union notices. All notices shall be submitted to the employer for approval before being posted.

8. KEEPING OF RECORDS

8.1 – EMPLOYMENT RECORD

(1) Each employer shall keep employment records containing:

(a) The employee's name, and if the employee is under 21 years of age, his or her date of birth.

(b) Any Industrial Instrument that applies.

(c) The date on which the employee commenced employment with the employer.

(d) All leave taken by the employee, whether paid, partly paid or unpaid.

(e) The information necessary for the calculation of the entitlement to, and payment for long service leave under the Long Service Leave Act 1958, the Construction Industry Portable Long Service Leave Act 1985 or the industrial instrument.

(2) Industrial instrument means:

(a) This Award.

(b) An Order of the Western Australian Industrial Relations Commission.

(c) An Industrial Agreement.

(3) The employer shall keep and maintain a time and wages record showing:

(a) The name of each employee.

(b) For each day -

(i) The time at which the employee started and finished work.

(ii) The period or periods for which the employee was paid.

(iii) Details of work breaks, including meal breaks.

(a) For each pay period -

(i) The employee's designation.

(ii) The total number of hours worked each week.

(iii) The allowances paid.

(iv) The wages paid.

(v) The gross and net amounts paid to the employee under the Industrial Instrument.

(vi) All deductions and reasons for them.

(4) The employer shall on the written request by a relevant person:

(a) Produce to the person the employment records (including the time and wages record) relating to the employee.

(b) Let the person inspect the employment records (including the time and wages record).

(c) Let the relevant person enter the premises of the employer for the purpose of inspecting the records.

(d) Let the relevant person take copies of or extracts from the records.

(5) A "relevant person" means:

(a) The employee concerned.

(b) If the employee is a represented person, his or her representative.

(c) A person authorised in writing by the employee.

(d) An Officer referred to in section 93 of the Industrial Relations Act 1979 (as amended) authorised in writing by the Registrar.

(6) An employer shall comply with a written request not later than:

(a) At the end of the next pay period after the request is received; or

(b) The seventh day after the day on which the request was made to the employer.

9. APPENDICES

Appendix 1 – Make Up of Total Wage

This appendix shows how the total wages paid to employees under this award are made up. It details both base wage rates and safety net adjustments as well as the total rate.

			Base Rate	**Arbitrated Safety Net Adjustment**	**Total Wage Per Week**
(1)	(a)	**Surface Section**:	$	$	$
		Pit Controllers	435.90	144.00	579.90
		General Hand	372.40	142.00	514.40
		Plant Operators - Primary Metallurgical Plants			
		Grade (1)	403.20	142.00	545.20
		Grade (2)	394.60	142.00	536.60
		Grade (3)	386.40	142.00	528.40
		Plant Operators - Secondary Metallurgical Plants			
		Grade (1)	412.00	142.00	554.00
		Grade (2)	403.20	142.00	545.20
		Grade (3)	394.60	142.00	536.60
		Laboratory Assistants			
		Grade (1)	412.00	142.00	554.00
		Grade (2)	403.20	142.00	545.20
		Grade (3)	394.60	142.00	536.60
		Field Operators			
		Grade (1) Operators of Equipment in excess of 375kw	430.20	144.00	574.20
		Grade (2)			
		(i) Operators of Equipment 225-275 kw	424.50	144.00	568.50
		(ii) Operators of Semi-trailer Ore Truck			
		(iii) Grader Operators			
		Grade (3)			
		(i) Operators of equipment 95-225 kw	417.20	144.00	561.20
		(ii) Motor Truck Drivers			
		(iii) Water Truck Drivers			
		Grade (4) Operators of Equipment 50-95 kw	405.90	142.00	547.90
		Grade (5) Operators of Mechanical Drilling Rig	394.60	142.00	536.60
		Grade (6)			
		Drillers Assistant	384.80	142.00	526.80
		Field and Survey Hand			
		Storeperson			

Note: The classification of Operators of Equipment includes Front End Loader Driver, Bulldozer Driver and similar types of mobile plant

Rehabilitation Hands			
Grade (1)	403.20	142.00	545.20
Grade (2)	394.60	142.00	536.60
Grade (3)	386.40	142.00	528.40

(b) Underground Section

Trucker	376.70	142.00	518.70
Tool Carrier	376.70	142.00	518.70
Shoveller	376.70	142.00	518.70
Diamond Drillers Assistant	389.20	142.00	531.20
Pipe Assembler	389.20	142.00	531.20
Sampler	389.20	142.00	531.20
Hydraulic Drill Operator	389.20	142.00	531.20
Popper Machine Person	389.20	142.00	531.20
Air Hoist Operator	389.20	142.00	531.20
Electric Hoist Operator	377.40	142.00	519.40
Pump Attendant	377.40	142.00	519.40
Ventilation Person	377.40	142.00	519.40
Platelayer	382.80	142.00	524.80
Train Crew	382.80	142.00	524.80
Mechanical Loader Operator	382.80	142.00	524.80
Scraper Hauler Operator	382.80	142.00	524.80
Braceperson	382.80	142.00	524.80
Platperson	382.80	142.00	524.80
Skipperson	382.80	142.00	524.80
Scalers	382.80	142.00	524.80
Rock Drillperson in all other places	389.30	142.00	531.30
Rock Drillperson in all other places including open-cut	399.20	142.00	541.20
Sanitary Person	399.60	142.00	541.60
Timberperson - Other	405.60	142.00	547.60
Rock Drillperson in rises	410.60	142.00	552.60
Rock Drillperson in winzes	410.60	142.00	552.60
Diamond Driller -			
(a) Up to 20 h.p.	410.60	142.00	552.60
(b) Over 20 h.p.	410.60	142.00	552.60
Timberperson – Shaft	421.00	144.00	565.00
Rock Drillperson in Shaft	421.00	144.00	565.00
Hauler Operator	428.80	144.00	572.80
Hydraulic Twin and Treble Boom - Jumbo Operator	438.50	144.00	582.50

(2) Mess Personnel

(a) The minimum rate of wages per week payable to mess personnel shall be as follows:-

	Base Rate	**Arbitrated Safety Net Adjustment**	**Total Wage Per Week**
	$	$	$
Head Cook	458.90	144.00	602.90
Cook	417.20	144.00	561.20
Mess Attendant	383.80	142.00	525.80

9.2 – LEAVE RESERVED

Leave shall be reserved to the respondent, to apply to the Commission to vary this award, pursuant to their counter proposal filed on 19 September 2003, in relation to:

Clause 4.2 – Wage Rates : with respect to the classification structure application to Service, Underground and Mess Employees.

10. RESPONDENTS

10.1 – RESPONDENTS TO THE AWARD

Greenbushes Tin Ltd

16 Parliament Place

WEST PERTH 6005

11. NAMED PARTIES

11.1 – PARTIES TO THE AWARD

UNION

The Australian Workers' Union
West Australian Branch
Industrial Union of Workers
Cnr Wellington & Lord Streets
EAST PERTH WA 6004

2004 WAIRC 12416

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	GREENBUSHES TIN LTD & OTHER
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 19 AUGUST 2004
FILE NO/S	APPL 1153B OF 2002
CITATION NO.	2004 WAIRC 12416

Catchwords	Industrial law – Award – Award variation – Variation to district allowance clause – Whether "furnishing trades formula" applicable – Award varied – Order issued – *Industrial Relations Act 1979* (WA)
Result	Award varied. Order issued
Representation	
Applicant	Mr D McLane as agent
Respondents	Mr R Gifford as agent

Reasons for Decision

1 By minute of proposed order dated 9 August 2004, the Commission proposes to vary the Tin and Association Minerals Mining and Processing Industry Award No A14 of 1971 ("the Award") by consent of the parties. One matter not agreed by the parties, which was divided from the matters dealt with by the Commission by consent, is the applicant's claim in relation to its proposed variation to clause 28 - District Allowance.

2 The existing district allowance clause, prescribing a rate of $6.00 per week, remains unchanged from when the Award was first made by the Commission in 1968: (1968) 48 WAIG 537. The applicant in the amended schedule to the present application claimed an adjustment to the allowance by the application of the "furnishing trades formula" prescribed under Principle 5 of the Commission's Wage Fixing Principles. Principle 5 provides that where the Commission has determined it appropriate to adjust existing allowances relating to work or conditions which have not changed, to reflect safety net adjustments, the formula set out is to be applied. Applying that formula to the present allowance, given that it has not been adjusted since its inception in 1968, leads to a percentage increase in the order of 300 per cent and a revised weekly rate of $24.10 rounded to the nearest 10 cents.

3 The employer respondents, on whose behalf Mr Gifford appeared, argued that the "furnishing trades formula" was not appropriate to apply in this case. The respondents submitted however, the appropriate approach to this matter would be to only calculate any increase from the introduction of the Commission's Wage Fixing Principles, from November 1983, which was the first time, within the then Principle 9, that various allowances were able to be adjusted taking account of a range of factors: (1983) 63 WAIG 2207. Mr Gifford further submitted that the adjustment of the district allowance, should take into account, by reason of the nature of the allowance, similar principles as those applying to the adjustment of location allowances in awards generally. That is, by adopting the prices component of the CPI by way of a percentage increase in the period December 1983 to April 2004, leading to an increase in the prices component of the CPI of 112.8%, resulting in an adjustment to the allowance to $12.80.

4 In his submissions, Mr McLane, on behalf of the applicant, agreed because of the nature of district allowance payments, that the furnishing trades formula may not necessarily be an appropriate method of adjustment. To his credit, Mr McLane acknowledged the intrinsic logic of the submissions of the respondent on this issue.

5 I have considered the submissions of the parties. In my opinion, whilst the method of adjustment may not lead to as significant an increase in the allowance as the applicant would wish, the respondent's submissions have considerable attraction. Firstly, it is appropriate for the Commission to approach this matter on the basis of a datum point, from which allowances generally were able to be adjusted under the Wage Fixing Principles. Secondly, given the nature of district allowances, being similar in kind to location allowances, that is, to attract labour to and compensating to some extent, for prices of goods and services in locations outside of the metropolitan area, adopting an approach similar to criteria used for the adjustment of location allowances seems to me to be good sense. Furthermore, and equally as importantly, the Commission's decision in this matter can then be used as an appropriate basis for further adjustments to the allowance under consideration, for the future.

6 The Award will therefore be varied to prescribe a district allowance payment of $12.80 per week. I order accordingly.

2004 WAIRC 12574

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANT

-v-

GREENBUSHES TIN LTD & OTHER

RESPONDENTS

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 19 AUGUST 2004
FILE NO/S APPL 1153B OF 2002
CITATION NO. 2004 WAIRC 12574

Result Award varied. Order issued
Representation
Applicant Mr D McLane as agent
Respondents Mr R Gifford as agent

Order

HAVING heard Mr D McLane as agent on behalf of the applicant, and Mr R Gifford as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Tin and Associated Minerals Mining and Processing Industry Award No. A 14 of 1971 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date of this order.

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

SCHEDULE

1. Clause 5.3 – District Allowance:

Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) Subject to the provisions of subclause (3) of this clause in addition to the wages prescribed in this award, an allowance shall be paid at the rate set out below, to each employee employed in the following area:-

	Allowance per week $
Within that area of the State situated between lat. 24° and a line running east from Carnot Bay to the Northern Territory Border	12.80

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

2004 WAIRC 13026

BUILDING MATERIALS MANUFACTURE (CSR LIMITED- WELSHPOOLWORKS) AWARD, 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

CSR LIMITED

RESPONDENT

CORAM CHIEF COMMISSIONER W S COLEMAN
DATE WEDNESDAY, 13 OCTOBER 2004
FILE NO APPL 1008 OF 2002
CITATION NO. 2004 WAIRC 13026

Result Application Discontinued
Representation
Applicant No appearance
Respondent No appearance

Order

WHEREAS on 6 June 2002 the applicant lodged a claim in the Western Australian Industrial Relations Commission to vary the Building Materials Manufacture (CSR Limited Welshpool Works) Award 1982;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 30 September 2004:

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent, hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) W S COLEMAN,
Chief Commissioner.

[L.S.]

2004 WAIRC 13024

PUBLIC SERVICE ALLOWANCES (MORTUARY STAFF) AWARD 1985

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** THE WESTERN AUSTRALIAN CENTRE FOR PATHOLOGY AND MEDICAL RESEARCH **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	WEDNESDAY, 13 OCTOBER 2004
FILE NO	P 16 OF 2004
CITATION NO.	2004 WAIRC 13024

Result	Application Discontinued

Order

WHEREAS this is an application to vary the Public Service Allowances (Mortuary Staff) Award 1985: and

WHEREAS on the 8th day of October 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 application be, and is hereby discontinued.

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

[L.S.]

AWARDS/AGREEMENTS—Interpretation of—

2004 WAIRC 12956

THE PRINTING (NEWSPAPER) AWARD 1979

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** WEST AUSTRALIAN NEWSPAPERS PTY LTD and SUNDAY TIMES (TRADING AS PERTH PRINT PTY LTD) **RESPONDENTS**
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 12 OCTOBER 2004
FILE NO.	APPL 745 OF 2004
CITATION NO.	2004 WAIRC 12956

CatchWords	Declare true interpretation of Clause 18 – Annual Leave – The Printing (Newspaper) Award 1979 – Calculation of rate of pay – *Industrial Relations Act 1979* (WA) s 46; *Minimum Conditions of Employment Act 1993* (WA) ss 5, 18 and 23.
Result	Declaration made
Representation	
Applicant	Mr L Edmonds
Respondents	Mr D Cronin (of counsel) and Mr J Hetman on behalf of West Australian Newspapers Pty Ltd No appearance on behalf of Sunday Times (trading as Perth Print Pty Ltd)

Reasons for Decision

1 This is an application made under s 46 of the *Industrial Relations Act 1979* ("the Act") to declare the true interpretation of clause 18 – Annual Leave of The Printing (Newspaper) Award 1979 ('the award"). Clause 18(1), (2) and (7) provide as follows:

> "(1) Subject to the provisions of this clause each worker shall be allowed six weeks and two days leave on full pay each year in respect of each twelve months of continuous service.
>
> (2) Annual leave rights accrue on the 31st December of each year and in the case of any worker who joins the employer's service during the year annual leave shall be adjusted to that date.
>
> (7) For the purposes of this clause, "full pay", with respect to any worker, means -
>
> (a) the rate prescribed in this award for his regular classification;
>
> (b) any personal margin ordinarily paid to him;
>
> (c) where, during the period in which his annual leave is accrued, he has been employed for more than twenty shifts on a higher award or House classification - an additional amount proportionate to the number of such shifts;
>
> (d) where, during the period in which his annual leave accrued, he was employed on night or intermediate shifts - night or intermediate work loading proportionate to the number of such shifts; and
>
> (e) where, during the period in which his annual leave accrued he was entitled to weekend penalties, an additional amount proportionate to such penalties.
>
> (f) a loading of twenty per cent of the amount arrived at by the application of the preceding paragraphs of this subclause."

2 Pursuant a direction given by the Commission the parties filed a Statement of Agreed Facts on 26 August 2004. The Statement of Agreed Facts states as follows:

> "1. The Applicant is entitled to represent the interests of employees currently engaged by the Respondent who are members or eligible to be members of the Applicant ("relevant employees").
>
> 2. The terms and conditions of employment of relevant employees currently engaged by the Respondent are governed by the Printing (Newspaper) Award 1979 No R23 of 1979 ("the Award") and the West Australian Newspapers Production Employers [sic] (Enterprise Bargaining) Agreement 2003 – AG 216 of 2003 ("the Agreement").
>
> 3. Clause 18 of the Award concerns Annual Leave entitlements and relevantly provides as follows:
>
> (1) Subject to the provisions of this clause each worker shall be allowed six weeks and two days leave on full pay each year in respect of each twelve months of continuous service.
>
> (2) Annual leave rights accrue on the 31st December of each year and in the case of any worker who joins the employer's service during the year annual leave shall be adjusted to that date.
>
> (7) For the purposes of this clause, "full pay", with respect to any worker means –
>
> (a) the rate prescribed in this ward [sic] for his regular classification;
>
> (b) any personal margin regularly paid to him;
>
> (c) where, during the period in which his annual leave is accrued, he has been employed for more than twenty shifts on a higher award or House classification – an additional amount proportionate to the number of such shifts;
>
> (d) where, during the period in which his annual leave accrued, he was employed on night or intermediate shifts – night or intermediate work loading proportionate to the number of such shifts; and
>
> (e) where, during the period in which his annual leave accrued he was entitled to weekend penalties an additional amount proportionate to such penalties.
>
> (f) a loading of twenty per cent of the amount arrived at by the application of the preceding paragraphs of this subclause.
>
> 4. The Respondent has always calculated annual leave entitlements, for employees who take annual leave that accrued in the previous 12 month period, at the average of payments made during the period the annual leave accrued in respect of relief margins, shift loading and weekend penalty payments.
>
> 5. Annual leave payments, in respect of relief margins, shift loading and weekend penalty payments, have been calculated in the same manner since the award was made.
>
> 6. The Applicant contends that the Respondent's current method of calculating annual leave payments in respect of relief margins, shift loading and weekend penalty payments is incorrect and that the correct rate is that current at the time the annual leave is taken."

3 There is no dispute that West Australian Newspapers Pty Ltd ("the West Australian") pays its employees the rate prescribed in the award for the employee's regular classification at the rate the employee receives at the time the leave is taken. However, the West Australian calculates the amount set out in clause 18(7)(b) to (e) as the amount that was payable at 31 December of the year the leave accrued. There is no dispute that the West Australian has made the annual leave payments in this way since the award was made in 1979. Further, the West Australian says that it has calculated these payments in this way since the predecessor of clause 18 came into effect in 1963 (see clause 17 of the Newspaper Award No 1 of 1963).

4 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch ("the Union") says there has been no dispute about the way in which the payments made under clause 18(7)(b) to (e) have been calculated in the past because there has been no awareness by the Union's members until recently that this is the way the clause has been interpreted by the West Australian. The Union says that in the past the rates payable from one year to the next for relief margins (over-award payments), shift loading and weekend penalties have been fairly marginal. However, since the parties entered into an enterprise bargaining agreement in 2003, which was registered as an industrial agreement by the Commission as the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003 AG 216 of

2003 on 25 September 2003, the difference in rates from year to year has been raised from approximately $5 to $10 per week to approximately $100 per week.

The Applicant's submissions

5 The Union contends that the payments in clause 18(7)(b) to (e) should be paid at the same rate as prescribed for clause 18(7)(a) payments. The Union says this is the plain meaning of clause 18(7).

6 The Union says their construction is reinforced by s 18(1) of the *Minimum Conditions of Employment Act 1993* ("the MCE Act") which pursuant to s 5 of the MCE Act is implied into clause 18. Section 18(1) and (3) of the MCE Act provides:

> "(1) Where leave is paid leave, payment is to be made at the rate the employee would have received as his or her payment at the time the leave is taken under the employer-employee agreement, award or contract of employment.
>
> (3) Payment for overtime, penalty rates or any kind of allowance is not required to be taken into account in determining any rate of payment for the purposes of this section."

7 The Union says s 18 of the MCE Act makes it clear that when an employee takes leave they are to be paid for that leave in respect of the items specified in clause 18(7) of the award at the rate they would have received at the time they take the leave rather than being paid at the rate which applied at 31 December in the accruing year. By inference their argument is supported by s 23(2) of the MCE Act which provides that an entitlement to annual leave accrues pro rata on a weekly basis.

8 The Union says that s 18(3) of the MCE Act does not deal with relief margins, shift loading or weekend penalties. Section 18(3) of the MCE Act provides that payment for overtime, penalty rates or any kind of allowance is not required to be taken into account in determining any rate of payment for the purposes of s 18. The Union contends that the purpose of s 18(3) is to deal with the situation where overtime, penalty rates and other allowances do not ordinarily form part of the calculation of payments for annual leave. Further, they say that s 18(3) has no application to clause 18(7) of the award because the award is more favourable than s 18 of the MCE Act, in that clause 18(7) provides for the calculation of overtime, penalty rates and other allowances to be incorporated into the annual leave payment. In support of their argument they say that pursuant to s 5(2) of the MCE Act it is only a provision in an award that is less favourable to an employee than a MCE Act provision that has no effect. Consequently, it follows that a provision in an award which is more favourable than a minimum condition provided for in the MCE Act does have effect.

The West Australian's submissions

9 Counsel on behalf of the West Australian points out that the principles for interpretation of awards are well settled. The principles which are to be applied by the Commission were enunciated by the Industrial Appeal Court in *Norwest Beef Industries Ltd & Anor v West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers* (1984) 64 WAIG 2124 ("the Norwest Beef Case"). At 2127 Brinsden J set out those principles as follows:

> "The principles applied in interpreting awards are the same principles as are applied in the Courts of law for the constructions of deeds, instruments and statutes: *Tramways Union v Commissioner of Railways* (1928) 7 WAIG 155; *AWU v Lake View and Star* (1934) 14 WAIG 279 at 289 and *AWU v Co-operative Bulk Handling* (1946) 26 WAIG 353 at 354. Applying those principles the argument goes, the meaning of a provision in an award is to be obtained by considering the terms of the award as a whole. If the terms are clear and unambiguous, it is not permissible to look to extrinsic material to qualify that meaning. A number of cases were quoted in support of that proposition and it is only necessary to mention a few: *Amalgamated Society of Engineers v Adelaide Steamship Co* 28 CLR 129 at 161-2; *Life Insurance Co of Australia Ltd v Phillips* 36 CLR 60 at 70; *Jones v Walton* (1966) WAR 139 at 142. As clause 12 is unambiguous and clear in meaning, earlier awards, the progenitors of these awards, and the reasons for the making of the earlier awards, and the behaviour of the parties over the years in acting pursuant to the awards, are therefore irrelevant."

10 Counsel for the Respondent also referred to the decision in *Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board* (2001) 81 WAIG 665 in which I observed at paragraph [48]:

> "In interpreting industrial instruments tribunals usually do not apply a literal approach, as awards and enterprise agreements may have been drafted by industrial rather than skilled draftsmen (*Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union* per Kennedy J at 1100). This approach to interpretation was explained by Street J in *Geo A Bond and Co Ltd (in liq) v McKenzie* (1929) 28 AR 499 at 503-504:
>
> > 'Now, speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relation as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.' "

11 The West Australian points out that there is nothing in the whole of the award which assists in the interpretation of clause 18 so that its meaning must be found within clause 18 itself. It says that when the words of clause 18(7) are given their ordinary commonsense meaning, they are not ambiguous and it is clear from the words used in clause 18(7)(c) to (e) that the words provide for a different approach to calculating payments than clause 18(7)(a) and (b). In particular, clause 18(7)(c), (d) and (e) all provide as preconditions to the rate of payment the words "where, during the period in which his annual leave is accrued", whereas these words are not contained in paragraphs (a) and (b).

12 The West Australian contends that the plain meaning of the words "where, during the period in which his annual leave is accrued" is a plain reference to the date on which the annual leave rates accrue, that is, on 31 December of each year as provided for in clause 18(2). Further, that the words in each of paragraphs (c), (d) and (e) "an additional amount proportionate to the number of such …" shifts or penalties, are clearly a reference to the shifts or penalties which occurred in the previous year, when the annual leave rights accrued. Accordingly, the West Australian says there is no ambiguity in the way in which the West Australian has always interpreted the requirements of clause 18(7).

13 Alternatively, the West Australian says that if the Commission comes to the view that there is ambiguity in the words used in clause 18 then the Commission should, as suggested by Justice Brinsden in the Norwest Beef Case, look at earlier awards

involving the same parties. In support of its argument the West Australian provided to the Commission copies of relevant decisions and transcript in respect of a number of predecessor awards. The decisions to make the awards including the current award are reported as follows:

Newspaper Award No 13 of 1957 (1958) 38 WAIG 654 and 659;

Newspaper Award No 1 of 1963 (1963) 43 WAIG 85;

The Printing (Newspaper) Award 1972 No 19 of 1972 (1972) 52 WAIG 1204;

The Printing (Newspaper) Award 1979 (1979) 60 WAIG 193 (the current award).

14 The West Australian says that these decisions show the following:

(a) The 1957 award provided for averaging of payments for piece workers when they took annual leave. Such a provision was not provided for other classes of employees. There was also a provision for payment to be made to casual employees (who were granted four weeks' annual leave), to be averaged over the period in respect of which the leave had accrued. Clause 17 of the 1957 award provided that holiday rights for workers would accrue on 31 December of each year. There was no provision for payments of any additional amounts to be added to payments for annual leave at that time.

(b) Clause 17 of the 1963 award also provided that holiday rights for workers would accrue on 31 December of each year. For the first time the following provision was provided for in clause 17, "A worker shall receive holiday pay at the rate applicable to the weekly day rate wage on the classification he is employed and in addition such night work loading proportionate to the shifts he was employed on night work during the period in which his holidays accrued."

The West Australian tendered into evidence copy of the transcript of the proceedings before the Court of Arbitration of Western Australia when the 1963 award was made. The transcript shows proceedings occurred before the Commission on 18 February 1963. The West Australian's representative, who at that time represented both the West Australian Newspapers Limited and Western Press Limited, stated at page 2 of the transcript, "As Mr Hearle has pointed out we have altered one of the clauses under 17 "Holidays" to provide for the night payment to the boys going on holidays. Previously they were paid in accordance with what they would have received if they had been at work, but as holidays now are adjusted to the 31st December of each year we are taking the proportion of the night shifts that they have worked during the previous year and they will receive that proportion of the night loading in their holiday pay. Both parties feel that it is a most equitable way of dealing with the night allowance for the staff going on holidays." (*Exhibit 2*)

(c) Clause 18(7) of the 1972 award contains a provision which is almost identical in terms to clause 18(7) of the current award. The 1972 award was made by Commissioner Kelly on 12 December 1972. Clause 18 of the 1972 award was made by consent. The only difference between the current clause 18 and clause 18 of the 1972 award is that there was no provision for payment of weekend penalties.

(d) The weekend penalty clause, which is contained in clause 18(7)(e) of the current award was inserted into the 1979 award by Commissioner Halliwell on 7 December 1979. After the award was made by Commissioner Halliwell the West Australian says a dispute arose between the parties as to when the weekend penalty rates would accrue from. This dispute was "referred to" in the transcript of proceedings before Commissioner Halliwell on 21 November 1979 when Mr Weeks on behalf of the West Australian, stated that the penalty rates would accrue from 1 January 1980 so that the entitlement would become due as at 31 December 1980. It appears from correspondence tendered by the West Australian that the dispute was settled in April 1980 whereby it was agreed by the West Australian that payments would be made to workers terminating their services during 1980 because of "special circumstances".

15 In relation to the MCE Act the West Australian says that s 18(1) only applies to base rates of pay and that s 18(3) makes it clear that the payments for penalty rates and allowances covered by paragraphs (c), (d) and (e) of clause 18(7) of the award are excluded. In the alternative, the West Australian says that clause 18(7) of the award is more favourable than the MCE Act so that the provisions of ss 18 and 23 of the MCE Act have no effect.

Conclusion

16 Pursuant to s 5(2) of the MCE Act a provision in or a condition of a contract of employment that is less favourable than a condition of employment has no effect. However, a more favourable provision does have effect (*J & R Sacca Poultry v Carl Pearson* (1998) 78 WAIG 2588 at 2589).

17 Whilst the history of the award and the predecessor provisions in the relevant newspaper awards set out a history the West Australian relies upon in contending that it has always correctly calculated annual leave entitlements at the average of payments during the period the annual leave accrued in respect of relief margins, shift loading and weekend penalty payments, in my view that history does not assist in the resolution of this matter as clause 18 of the award and its predecessors were made prior to the enactment of the MCE Act.

18 It is plain that when s 18(1) and (3) of the MCE Act are read together that it is only the ordinary rate of pay that is required to paid under s 18(1) at the time the leave is taken. Clearly, s 18(3) excludes payments for overtime penalty rates or any kind of allowance. It is apparent that shift loading and weekend penalty rates are "excluded payments" within the meaning of s 18(3) of the MCE Act. However, in my view this does not apply to personal margins within the meaning of clause 18(7)(b), as those payments do not come within the exclusion in s 18(3) of the MCE Act. In my view the rate of pay to be calculated in respect of payment of personal margins under clause 18(7)(b) has to be made on the basis that the personal margin is to be calculated as at the date the employee takes their leave, rather than as at 31 December of the year in which the leave accrued.

19 I agree with the submission made on behalf of the Respondent that the words in clause 18(c), (d) and (e) are clear and unambiguous. The payment of shift allowance and weekend penalties has to be calculated on the basis of an amount proportionate to the number of shifts or penalties during the period in which the annual leave accrued. Clause 18(2) makes clear the date on which the annual leave rights accrue is 31 December of each year.

20 In my view this interpretation is not disturbed by the operation of s 23(1) and (2) of the MCE Act, which provide:

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

(2) An entitlement under subsection (1) accrues pro rata on a weekly basis."

21 Section 23 provides for an entitlement of up to 152 hours of annual leave a year. Clause 18 provides for six weeks and two days annual leave. Whilst it would appear that the entitlement to at least four weeks of that period of leave accrues pro rata on a weekly basis rather than as at 31 December of each year, clause 18(2) of the award insofar as it relates to the accrual of "annual leave rights" relates to more than accrual of hours of leave. In my view it relates to both hours and pay. To accept the Union's approach to the interpretation of clause 18 would not give meaning to the words in clause 18(7)(c), (d) and (e) which state "where, during the period in which his annual leave is accrued" nor to the words which refer to "an additional amount proportionate to the number of such" shifts or penalties. Further, the consequence of the Union's argument is that clause 18(2) of the award which provides that annual leave "rights" accrue on 31 December of each year would be rendered entirely inoperative.

22 In my view ss 18 and 23 of the MCE Act must be read together. There is no inconsistency between these sections of the MCE Act. Clause 18(2) and (7) together with s 18(1) and (3) of the MCE Act preserve the accrual date for 31 December of each year in respect of payments to be made pursuant to clause 18(7)(c), (d) and (e) of the award in that the calculation date for those payments is 31 December of each year prior to when the leave is taken. As set out above it is my view that this does not apply in respect of ordinary rate of pay or personal margins which are payments made pursuant to clause 18(7)(a) and (b). In my view s 18(1) of the MCE Act applies to personal margins.

23 In light of these reasons I will make a declaration that the rate paid to employees for their regular classification and any personal margin is to be paid to an employee at the rate the employee would have received at the time the annual leave is taken. I will also make a declaration that the rate of pay for the payments specified in clause 18(7)(c), (d) and (e) of the award is to be made at the rate that applied on 31 December each year the annual leave accrues.

2004 WAIRC 13047

THE PRINTING (NEWSPAPER) AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** WEST AUSTRALIAN NEWSPAPERS PTY LTD and SUNDAY TIMES (TRADING AS PERTH PRINT PTY LTD) **RESPONDENTS**
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 15 OCTOBER 2004
FILE NO.	APPL 745 OF 2004
CITATION NO.	2004 WAIRC 13047

Result	Declaration made
Representation	
Applicant	Mr L Edmonds
Respondents	Mr D Cronin (of counsel) and Mr J Hetman on behalf of West Australian Newspapers Pty Ltd No appearance on behalf of Perth Print Pty Ltd

Declaration

HAVING heard Mr L Edmonds on behalf of the Applicant and Mr D Cronin (of counsel) and Mr J Hetman on behalf of West Australian Newspapers Pty Ltd the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby declares that:

(1) The rate paid to employees for their regular classification and any personal margin in clause 18(7)(a) and (b) of The Printing (Newspaper) Award 1979 ("the award") is to be paid to an employee at the rate the employee would have received at the time the annual leave is taken; and

(2) The rate of pay for the payments specified in clause 18(7)(c), (d) and (e) of the award is to be made at the rate that applied on 31 December each year the annual leave accrues.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. APPL 1296 OF 2004

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"MISCELLANEOUS GOVERNMENT CONDITIONS AND ALLOWANCES AWARD NO 4 OF 1992"

NOTICE is given that an application has been made to the Commission by Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder: -

1. Clause 3. – Area and Scope – Delete this clause and insert in lieu –

3.– AREA AND SCOPE

This Award shall apply throughout the State of Western Australia to all employees employed in all Public Authorities (as defined in the Industrial Relations Act, 1979 as amended) or by the Respondents as listed in Schedule B who are eligible to be members of the Liquor Hospitality and Miscellaneous Union, Western Australian Branch, but shall be limited by and shall be read in conjunction with the Area and Scope Clauses of the Awards and Agreements listed in Schedule C hereof.

Provided that any businesses operating as contractors who are bound by any of the awards or agreements listed in Schedule C hereof, shall not be bound by Clause 7. – Leave Without Pay, Clause 9. – Study Leave, Clause 19. Employees Living North of 26 degrees South Latitude and Clause 23. – Witness and Jury Service of this Award.

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd) J.A. SPURLING,
REGISTRAR.

11 October 2004

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2004 WAIRC 13189

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE HON MINISTER FOR EDUCATION AND DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 29 OCTOBER 2004
FILE NO.	PSAC 28 OF 2003
CITATION NO.	2004 WAIRC 13189

Result Recommendation issued.

Recommendation

WHEREAS this is an application pursuant to s44 of the Industrial Relations Act 1979; and

WHEREAS on 28 October 2004 the Public Service Arbitrator ("the Arbitrator") convened a further report back conference regarding discussions in relation to the issues in dispute; and

WHEREAS at the conference the Arbitrator was informed that discussions between the parties on the issues in dispute had not eventuated in any agreement being reached between the parties; and

WHEREAS the Arbitrator decided that the issues in dispute would be referred for hearing and determination given the lengthy timeframe over which unsuccessful discussions had taken place; and

WHEREAS the Arbitrator decided that it was appropriate to issue a recommendation with a view to assisting the parties to have further discussions prior to the hearing in an endeavour to resolve the issues in dispute;

NOW THEREFORE, the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby recommends:

THAT both parties meet on a regular basis, commencing in the week following this recommendation issuing, to reach agreement on the issues in dispute in relation to this application.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] Public Service Arbitrator.

2004 WAIRC 13055

DENIAL OF LEAVE ENTITLEMENTS TO A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT**
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF INDIGENOUS AFFAIRS **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	MONDAY, 18 OCTOBER 2004
FILE NO	PSACR 11 OF 2004
CITATION NO.	2004 WAIRC 13055

Catchwords	Public Service Arbitrator - Whether employer acted unfairly, inequitably or in an oppressive manner towards employee - Employee on number of absences from work - Whether permission ought to have been given to convert sick leave without pay to other forms of paid leave - Leave ought be converted for those days that the employee met the criteria of the employer's policy for conversion of sick leave
Result	Claim regarding converting sick leave to other form of leave granted in part
Representation	
Applicant	Mr M Amati
Respondent	Mr S Narula

Reasons for Decision

1 The matter referred for hearing and determination is as follows:

"1. The Civil Service Association of Western Australia (Incorporated) ("the Applicant"), on behalf of its member, Ms Yvette Alger, says that:

(a) The Department of Indigenous Affairs ("the Respondent") has acted in an unfair, inequitable and oppressive manner towards Ms Alger by:

(i) retrospectively cancelling the approvals for Ms Alger's applications for leave for the periods 22-24 and 29-31 December 2003;

(ii) unreasonably withholding Ms Alger's salary for the fortnight of 2-15 January 2004, notwithstanding that Ms Alger worked on some of those days; and

(iii) disregarding its own procedures and guidelines relating to sick leave;

(b) The effect of the Respondent's actions is that Ms Alger has not been paid for 13 days, i.e. 22-26, 29 and 31 December 2003 and 5-9 and 12 January 2004, a salary loss of $3,759.11.

2. The Applicant seeks the following Orders:

(a) That the Respondent's decisions to withdraw the previously granted permission for paid leave, thereby deeming Ms Alger on sick leave without pay for 22-26, 29 and 31 December 2003 and 5-9 and 12 January 2004, be quashed;

(b) That the Respondent allow Ms Alger to access her accrued paid leave entitlements for 5-9 and 12 January 2004; and

(c) That the Respondent pay Ms Alger the outstanding salary of $3,759.11.

3. The Respondent rejects the Applicant's claims, says that there is no case to answer and further says that:

(a) The actions undertaken are in accordance with departmental policies and procedures and at no time has there been a diminution of award entitlements available to Ms Alger;

(b) Ms Alger has not been paid for those days for which she was not at work or not on approved leave and therefore was not entitled to be paid for those days;

(c) Ms Alger was advised on 15 December 2003 that her leave request for the period 22 December 2003 to 2 January 2004 had not been approved;

(d) On 2 January 2004, Ms Alger applied again for leave for the period 22 to 31 December 2003, having already taken this leave. This leave application was initially approved by the Assistant Director on 5 January 2004, but subsequently reversed by the Director on 7 January 2004;

(e) On 8 January 2004, Ms Alger was advised by telephone by the Director that the leave was not approved and that Ms Alger would be on sick leave without pay for the time she had been absent since 22 December 2003 and would continue to be on sick leave without pay whilst she remained absent from the workplace; and

(f) On 15 January 2004, Ms Alger was not paid any salary as she had been on sick leave without pay and had already been overpaid 6 days salary from the pay of 1 January 2004.

4. The Respondent denies that the Applicant is entitled to the relief sought or any relief at all."

2 At the commencement of the hearing of this matter, the parties submitted a Statement of Agreed Facts however, during the course of clarifying those facts it became apparent that not all were agreed. However, the parties have agreed as follows:

"1) The Director General of the Department of Indigenous Affairs is an "employing authority" within the meaning of section 80C of the Industrial Relations Act, 1979, and has employed Ms Yvette Alger as a Manager, Level 7 – since February 1997.

2) Ms Yvette Alger is a public service officer employed under Part 3, Division 3 of the Public Sector Management Act, 1994 and, therefore, is also a government officer within the meaning of sections 80C and 80E of the *Industrial Relations Act, 1979*.

3) Ms Alger's terms of employment are subject to the provisions of the Public Service Award, 1992, Public Service General Agreement 2002, the Public Sector Management Act, 1994 and the various Regulations made under that Act; as well as the relevant "Approved Procedures" made under that Act and other public service Regulations; including the internal policies and procedures of the Respondent.

4) Ms Alger attended work on both Tuesday, 30 December 2003 and Friday, 2 January 2004.

5) On the 30 December 2003, Ms Alger applied for paid leave and submitted a full memorandum explanation to the Supervisor for the 22, 23, 24, 29 December 2003 which was approved by Ms Alger's supervisor on behalf of the Respondent on the 2nd or 5th January 2004.

6) Such approvals for paid leave on 22, 23, 24, 29 December 2003 & 2nd January 2004 were then subsequently withdrawn by the Respondent.

7) (Not agreed)

8) On 23rd December 2003, Ms Alger sent an email to the members of her Branch of her absence for that day as she was sick.

9) On 31st December, Ms Alger's daughter spoke directly to her Supervisor as the representative of the Respondent advising of her mother's – Ms Alger – illness and absence from work.

10) (Not agreed)

11) (Not agreed)

12) (Not agreed)

13) (Not agreed)

14) (Not agreed)

15) (Not agreed)

16) On the 13th January 2004, Ms Alger returned to work and spoke to her supervisor about her illness and related absence.

17) On the 29 January 2004, the Respondent wrote to Ms Alger claiming an overpayment of salary of a further 3 days – equating to $867.

18) (Not agreed)

19) Ms Alger's claims that the outstanding salary amounts to $3759.11; it being the salary for the 22, 23, 24, 25, 26, 29, 31 December 2003 and the 5, 6, 7, 8, 9, 12 January 2004. The Respondent contends that no monies are payable to Ms Alger."

3 Ms Alger has given evidence that she has been employed by the respondent for approximately 6 years and held several management positions. At the time of the hearing she was the Manager of Land Transfer within the Land Branch, at Level 7.

4 The history of Ms Alger's sick leave includes that in November 2002, she wrote to the respondent seeking clarification of some issues. Her letter is not before the Arbitrator, however, the respondent's Manager, Human Resources, Natalie Boult, responded to her in the following terms, formal parts omitted:

"Dear Yvette

I refer to your electronic mail dated 8 November 2002 regarding your absence from the workplace since 22 October 2002.

Please find below responses to your queries:

1. In accordance with sub-clause 22 (8) of the *Public Service Award 1992 'no sick leave shall be granted with pay, if the illness has been caused by the misconduct of the officer or* ***in any case of absence from duty without sufficient cause'***. As a general rule, sick leave should not be substituted for leave, however where sufficient cause can be demonstrated then a manager has the discretion to substitute other leave in lieu of sick leave no pay.

   In accordance with Ms Thorley's letter dated 8 November 2002 could you please provide specific details of your illness that is work-related. It is imperative that the Department establish information about your condition and its prognosis to enable DIA to determine 'sufficient cause'. The Department will then be better able to discuss and manage workload and stress related issues that may be impacting upon your attendance at work.

2 Approval to take leave is at the discretion of your Manager, subject to departmental convenience. At this stage one weeks (sic) long service leave for the period 11 November 2002 to 15 November 2002 has been approved by the A/Director, Regional Operations. You will need to advise the Department in advance of any future leave requests (additional leave forms attached), which will be considered in the context of operational requirements and the branch leave roster.

3 Please find attached Workers Compensation Form 2B, Witness Statement Form 5A and the Department's policy on Workers Compensation. If you decide to lodge a workers compensation claim please complete Forms 2B and 5A and return them to Anna Gillespie, Human Resources Officer, as soon as possible for lodgement with the Department's insurer, Riskcover for assessment.

4 You are welcome to access your personal file and copy the contents at any time during office hours, however, these files cannot be removed from the HR area. If you wish to view your personal file please contact Anna Gillespie, Human Resources Officer on 9235 8015 to arrange a convenient time.

5 The final matter you raised regarding 'acting opportunities', in your last paragraph, should be directed through Ms Thorley, A/Director, Regional Operations, as acting opportunities are a management prerogative. As you did not lodge an 'Expression of Interest' for the Assistant Director, Land position, the Office of Public Sector Standards Commission have advised that, should you wish to lodge a review in accordance with the Public Sector Management (Examination and Review Procedures) Regulations 2001 you would need to demonstrate that you have been directly and adversely affected by the appointment of the temporary deployment. An outline of the breach of standard review process and claim from are attached for your information.

6 I have received your sick leave form for the period 22 October 2002 to 8 November 2002 (13 days) but only have a medical certificate for 23 October 2002 (1 day). It would be appreciated if you could forward the outstanding medical certificates (as indicated on your leave form) to the Department as soon as possible so we can process your leave. If medical certificates are not received by close of business 15 November 2002 the leave will be processed as leave without pay. I also wish to advise that you currently have no sick leave entitlements remaining (effective from 11 November 2002) and your next entitlement for sick leave is due on 2 July 2003.

If you have any questions in relation to these matters or require further assistance, please don't hesitate to contact me on 9235 8025."

(Exhibit R1)

5 Ms Alger says that in December 2003, she was experiencing stress on account of some allegations of breaches that she had notified to the Department against her Supervisor. She says that on Thursday, 4 and Friday, 5 December 2003 she was absent from work. Her doctor was unavailable on 4 December and she attended on Monday 8 December 2003. The doctor gave her a medical certificate and suggested that she take two weeks off work. A medical certificate was provided for the period 8 to 19 December 2003.

6 Ms Alger says that on Monday, 8 December 2003, she went to the office and prepared a full memorandum, setting out the situation and requesting leave. She had also intended to put in a request for leave for the Christmas period in any event and did so in the memorandum, and she tidied up a few things on her desk so that they would not be left for 2 weeks. She wrote the following memo to Mr Cottier, her Director:

"**TO:** Chris Cottier

FROM: Manager, Land Transfer, Zone Two

DATE: 8/12/2003

FILE: Personal File

SUBJECT: Request for Long Service Leave in lieu of Sick Leave.

Chris

Please be advised that I attended my doctor this morning and she advised that I take 2 weeks leave commencing immediately. (See attached Medical Certificate)

As I have no "Sick Leave" available to me, I am requesting that you support my application for Long Service Leave to avoid any financial hardship that would be caused if my salary were debited for this period.

My Leave Entitlements currently are as follows:

Leave Type	Calculation Date	Next Accrual Date	Actual Balance	Pro-rata Balance	Unit
Annual Leave	31-DEC-2003	31-DEC-2004	59	47.624	Hours
Long Service Leave	31-DEC-2003	13-OCT-2008	342.2	496.408	Hours
Public Service Holiday in Lieu	31-DEC-2003	01-JAN-2004	0	0	Days
Short Leave	31-DEC-2003	01-JAN-2004	1.607	1.607	Days
Sick Leave Full Pay	31-DEC-2003	02-JUL-2004	-32.251	-32.233	Hours
Sick Leave Half Pay	31-DEC-2003	01-JAN-2005	73.005	73	Hours

If this were agreeable to you, I would submit an application for the periods:

- Thursday 4/12/03 to Wednesday 24/12/03 for Long Service Leave
- Monday 29/12/03 to Wednesday 31/12/03 for Annual Leave.
- Friday 2/01/04 for Public Service Holiday in Lieu.
- Return to work on Monday 5 January 2004.

Further, as this application for leave is at short notice, I am requesting that I retain my laptop for the next few days only so that I may clear any outstanding emails or file actions to assist the continuity within my work area while I am absent.

Finally, I wish to advise that I would like the investigation into my grievances continued if possible and will call Mr Shakespeare to explain the situation and make myself available at any time that he may require to meet.

Yvette Alger"

7 Attached to the memorandum was a medical certificate in the following terms:

"DERBARL YERRIGAN HEALTH SERVICE INC
Unit 14, 22 Chesterfield Road, Mirrabooka W.A. 6061
Phone: (08) 9344 0444 Fax: (08) 9344 0499

THIS IS TO CERTIFY THAT Yvette Alger of
Address 2/323 Stirling St. …… is/was unfit for
work/school from 8/12/03 to 19/12/03 for medical reasons.
Doctor *Mariane Wood* Qualifications MBLLB BA DPH
Date: 8/12/03"

(Exhibit A1)

8 Ms Alger says that she was aware that staff had been asked to put in leave requests in anticipation of the Christmas, Boxing Day and New Year holidays so that consideration could be given to the appropriate staffing levels. Ms Alger says that as it was approximately a month before Christmas, she took the opportunity to also request annual leave over that period and set this all out. (I pause to note here that while Ms Alger said it was approximately a month before Christmas, it was, in fact, 2 weeks and 3 days until Christmas.) She extracted from the respondent's "Web Kiosk" pay and leave records system the record of her current leave entitlements. She said that she knew that this was incorrect but it was the best available information. Ms Alger says that she acknowledged that the records showed that she was in deficit by 32 hours sick leave with full pay and she had already queried that with Human Resources and sought that an audit be conducted. She says her annual leave records were also incorrect as they showed 40 hours annual leave and she believed that there were approximately 57 or 59 hours of annual leave available to her.

9 Ms Alger says that the electronic Web Kiosk leave application system was new to the department. An employee electronically applied for leave, the request would automatically go to the employee's supervisor who would have the authority to approve the leave. Should the leave be approved, the system would generate an email to the employee advising of the approval. The employee would then be able to access records within the system to indicate the leave taken to date. She says, though, that somewhere within the relevant period some leave already approved and taken had not shown up.

10 Ms Alger says that when she completed the memorandum to Mr Cottier, she gave it to his personal assistant with the medical certificate.

11 Ms Alger took her lap top computer home, as she had requested, and checked for any advice on the email system. By the next day she had received no indication through that system that her absence and request were noted and approved. She says "so nobody actually knew that I was not at work so that I did not think that it was appropriate because it is important that reception and the Land Branch people know where we are" (transcript page 18).

12 Ms Alger says that by the Wednesday, 10 December 2003, she still had not heard anything and she rang through to Mr Cottier's office and his personal assistant answered. Ms Alger says that she indicated that she was a bit anxious about whether her leave had been approved because she needed to plan her finances.

13 Later that day, Wednesday, 10 December 2003, Mr Sunil Narula, the respondent's Acting Human Resources Manager, rang Ms Alger and asked for her approval to speak to her doctor. She denied that approval to Mr Narula but said the Director, Mr Cottier, could speak to the doctor because the information was quite personal. It appeared to her that Mr Cottier had attempted to ring her doctor but as the doctor was not aware that she had given her permission to speak to Mr Cottier, the doctor had declined to provide any information. Accordingly, Mr Cottier rang Ms Alger and asked her to call her doctor to give that approval, which it appears she did.

14 Ms Alger says that it turned out that it was Friday, 12 December 2003 before Mr Cottier managed to speak to her doctor due to the doctor's unavailability. Mr Cottier then rang Ms Alger about 4:30 that afternoon and advised that he had decided to approve the leave, and her doctor had confirmed that she was on stress leave. He told Ms Alger that two weeks' long service leave entitlement converted to sick leave had been approved. Although her application covered a period greater than that, she says she was pleased because she would have money over the Christmas period. Ms Alger said to Mr Cottier that she had an application in for leave from 22 December 2003. He advised her that that was not approved and that she was expected back at work on 22 December. He indicated to her that she was to come in on that day and make her application for leave. She says that she told Mr Cottier that he had two weeks to consider that application and it would help her if she knew that there was an opportunity for her to plan her travel around the Christmas period as she wished to travel to Geraldton, spend Christmas with her family and needed to know before 22 December. Mr Cottier advised her again to come in on 22 December and if there were enough resources then she would be able to have that leave. If there was not then she would not be able to have the leave. She says that she indicated to him that she did not think that it was fair, that there were two weeks before that period that he could decide whether there were going to be resources or not to which he responded, "You have been told to be back on the 22nd and that's it". Although Ms Alger says there were 2 weeks in which Mr Cottier could have considered her application for leave on 22 Decembers 2003, in fact there was only 1 week as she spoke to him at around 4.30pm on Friday, 12 December 2003.

15 Mr Cottier then sent Ms Alger an email to confirm his advice and instructions including acknowledging that a medical certificate had been provided for the period 8 to 18 December 2003 (Exhibit A2).

16 Ms Alger says that the period that she was looking for leave from 22 December 2003 through to 2 January 2004 would have been a quiet time in the Land Branch. There were no meetings scheduled and this would have enabled her to utilise her leave at the least disruptive time. Therefore, she was surprised at Mr Cottier's requirement that she attend on 22 December and he would consider availability of resources at that point. She thought it was unfair as she could have put in her application for leave electronically from home and yet she was required to attend for her to make that application for leave at that time.

17 Ms Alger says that on the morning of Monday 22 December 2003, she was still feeling very depressed. However, she got up intending to go to work that day even though she had woken up with severe diarrhoea. Her doctor had previously prescribed medication which, when she went to the chemist on the preceding Sunday to have the prescription filled, the chemist had advised her of an alternative medication which he said was exactly the same as her prescribed medication. However, she believed she had an adverse reaction to the alternative medication. She says she did not attempt to visit her doctor but called her and the doctor insisted that the medication could not have been the cause of her being unwell as it was the same as she had prescribed. Ms Alger says she replied that it could not have been the same because it had a different brand name and that she had an adverse effect as a consequence. The doctor had said that it was probably caused by a virus, to which she responded that it was impossible and she clearly saw this as more than a coincidence with changing the brand of medication. The doctor

told her that if she felt strongly about it that she should insist on the other version of the medication. Ms Alger says she went back to the chemist and asked her to change the medication.

18 Ms Alger did not go to work that day. She says after she rang the doctor, she rang the office. She says she rang Mr Cottier's direct line and was diverted to reception. She informed the receptionist that she would not be in.

19 Ms Alger says that every time she calls reception when she is ill, she makes a point of noting that the receptionist acknowledge that she had rung directly through to speak to Mr Cottier and that the telephone had been diverted. She says that on some occasions, the receptionist acknowledged that Mr Cottier was not in but sometimes the call simply goes directly through to reception.

20 Ms Alger presented a copy of an email from the receptionist to staff of the Land Branch at 9:07am noting that she had called in sick and would not be in that day, Monday 22 December 2003. Ms Alger also provided a copy of an email of a similar nature in respect of another officer who had called in and the message had been taken by the receptionist as to that person's absence that day.

21 Ms Alger says that on Tuesday, 23 December 2003 she was still unwell and so she again rang to speak to Mr Cottier. She says his telephone did not answer and so she sent an email to Trevor Carlton, the Assistant Director, copied to Mr Cottier, explaining what had occurred, in the following terms:

> "Trevor
>
> Please note that I am still suffering from the effects of the medication prescribed by my doctor but incorrectly supplied by the Pharmacist – The effects are a gastric condition which I initially thought was a virus – I have since changed back to my correct medication, however, it takes some time to "kick" in, thus I am still unfit to attend work.
>
> I will submit the appropriate leave applications in the Web Self-serviced for your consideration.
>
> From the emails provided – I appreciate that my absence may cause some disruption due to the number of Land Branch staff that will be on leave during this period, however, I respectfully request that you recognise that my request is unavoidable.
>
> Wishing you and your family a safe and prosperous Xmas.
>
> Cheers
>
> Yvette"

(Exhibit A3)

22 Ms Alger says that by this time she had concluded that she had a virus because she had stopped taking the medication and still had a severe gastric condition.

23 Ms Alger says that about 9.30am that morning, having sent the email around 8.30am, she noticed that the email system showed there was no advice to anyone that she was going to be absent that day so she emailed directly through to reception and the other Land Branch staff advising that she was still unwell and unlikely to be in the office until Monday, 29 December 2003.

24 Ms Alger did not provide a medical certificate for 22 and 23 December 2003 because, she said, she rang her doctor and her doctor was busy and had just said to her take the medication, that it was not the medication that was making her unwell and it was probably a virus and that there was no point in going to see her.

25 In cross examination, Ms Alger says that in respect of the period 22, 23 and 24 December 2003 she did not attend a doctor and the doctor would not give her a certificate unless she attended a doctor. She did not attempt to attend a doctor although she says that she called her doctor. When asked "therefore, on that basis do you consider it reasonable for an employer to determine sufficient cause where they are unable to verify the illness or otherwise of an applicant?" She replied "No" (transcript page 57). She says, though, that somebody should have some faith in the person's word where they have worked for the department for a period of 6 years and been a senior manager. She says that if you say you are sick then you are sick. She acknowledges that the award requires that for periods in excess of two days a certificate is required. She also acknowledges for that period in excess of two days a medical certificate was required in accordance with the award.

26 So, by this point, Ms Alger had advised that she would not be in on 22 December 2003. On 23 December 2003, she advised that she would not be in and that it was unlikely that she would be in on Wednesday 24 December 2003. Both advices had involved messages left with either the receptionist or via email. Having been unable to speak to Mr Cottier on 23 December, 2003, Ms Alger made no effort to speak to Mr Carlton but emailed him instead.

27 Ms Alger says that she travelled to Geraldton on Christmas morning to see her sister and stayed there over the weekend. On the Sunday night, 28 December 2003, Ms Alger decided that she and her niece would leave early Monday morning and get back to Perth in time for work. She says they left Geraldton at approximately 4.00am on Monday expecting to arrive "in town" around 8.00am and be at work by 9.00am, as she had done several times before. However, the vehicle broke down between Eneabba and Badgingarra and they were stuck there for some time until someone came through. Ms Alger says there was no mobile phone access, so they would have to wait for the RAC. However, her sister came down from Geraldton and got the car going. There is no evidence as to how Ms Alger was able to contact her sister or the RAC for mechanical assistance yet not to contact the respondent. She says that by the time she got to town (which I take to mean Perth) it was around midday on Monday, 29 December 2003. She did not go into work that day, nor did she attempt to contact the respondent.

28 Ms Alger says that on Tuesday, 30 December 2003, she went to work. When she arrived, she prepared a memorandum to her Supervisor, Mr Carlton, in which she explained the whole situation. This memorandum reads as follows formal parts omitted:

> "**SUBJECT: Request for leave**
>
> Trevor
>
> You will have received a number of Leave applications from me through the Web Self Service.
>
> These requests have not included the Long Service Leave granted for the period 08 Dec. to 19 Dec. as I note that this had already been recorded on my pay advice slip. I will confirm with HR whether this documentation is still required, in case a formal application duplicates some process that has already occurred.
>
> In the instance of the 26th November, my leave request was rejected by you due to a query on whether I had a doctor's appointment that day? – I wish to confirm that I had indeed tried to make an appointment however; my Doctor was unavailable to see me as she was called away to an emergency. I am therefore applying for Annual Leave in lieu of sick leave as per my **Reason** "*Personal Illness*" and **Comments** "I am applying for Annual Leave as I have no sick leave

available" provided on the original Web Self Serve application. Please advise if you require any further detail to consider my application.

In the instance of my Annual Leave application rejected for 27th November, I note that my follow up application for PSHL instead of AL must have been approved as it appears on my pay advice statement. Thank you.

For dates of the 4th – 5th December, I was absent due to illness and for these dates, while I was unable to attend my Doctors until Monday 8th (when she provided me with my medical note to verify my absence due to illness from that day til the 19th December). I have therefore submitted an application of Annual Leave in Lieu of no Sick Leave available. As you are aware, this is at Management's discretion and should you not approve, I will adjust my timesheet (attached) accordingly to read – *Absent*. The situation is the same for the period, 22nd to 24th December when I spoke to my Doctor on the telephone but was unable to attend a personal visit due to her heavy schedule during the festive season. I have therefore submitted the appropriate Annual Leave applications to apply in lieu of sickness during those 3 days, for your consideration.

Another application I submitted was for consideration of granting "short leave" for Monday (yesterday) as I was returning to Perth from Geraldton early Monday morning (29th December) when my vehicle broke down. It took most of the day to acquire mechanical assistance and during his time, I was predominately out of telephone range between towns – I therefore respectfully request that you accept my apology for the non-notification of my absence based on the extenuating circumstances and consider my application accordingly.

The final applications I have submitted are for PSHL for tomorrow and Friday 2nd January however, it would appear that I am only eligible for this category of leave on Friday – so I respectfully withdraw my application for PSHL for tomorrow.

I trust this clarifies the administrative requirements for my absence from the workplace during the months of November and December.

Yvette Alger

cc. Director Policy & Coordination, Chris Cottier"

(Exhibit A4)

29 Ms Alger says that when she went into work on 30 December 2003, she put together the memorandum and, in checking the electronic records, noticed that she did not actually have an entitlement to a public service holiday in lieu for 31 December 2003 which had shown up previously. Ms Alger says that on 30 December 2003, she realised that she did not have a public service holiday in lieu so she sought to "respectively withdraw" her application for public service holiday for 31 December 2003 and intended to come to work.

30 Ms Alger did not attend for work on 31 December 2003 as she says that although she did feel better over Christmas, she woke up that morning feeling sick. Her daughter told her that she could not go to work in that condition so her daughter rang her Supervisor, Mr Carlton, to say that she would not be attending work for that day.

31 On Friday, 2 January 2004, Ms Alger looked up the email system and discovered that her leave had not been approved and there was no response to her memorandum so she got up and went to work.

32 On 5 January 2004, Ms Alger says she had an appointment with a psychiatrist, Dr Manners, which she had been waiting for since she originally went to see her doctor, presumably associated with the depression she was suffering in December 2003. However, she felt physically unwell again and when she went to move she couldn't. She rang her daughter from the phone next to the bed. She said that she was experiencing "really weird, dizzy spells".

33 Ms Alger attended Dr Manners. However, Dr Manners said that in the circumstances she should see a general practitioner as what she described to him did not appear to be related to the purpose of her visit.

34 Ms Alger says that her daughter took her to the nearest doctor, Dr Brooke Sheldon, rather than her regular doctor because she, Ms Alger, was very upset because she did not know what was going on. Ms Alger says that every time she went around the corner in the car she felt like she was going to throw up. She had not seen Dr Sheldon before. Dr Sheldon did some tests and diagnosed her with vertigo. Dr Sheldon told her that there was no medication for her condition, that it was not uncommon and that it would probably not happen again. According to Ms Alger she told Dr Sheldon that she was already on medication for depression and asked if it could be related to her then current condition, that she had not been having the best time at work lately and had to go back to work for a day. She asked Dr Sheldon if it could have triggered the situation. Dr Sheldon explained that there was no reaction to that situation and that it was not related to the medication that she was taking or to any other condition. Dr Sheldon gave her a medical certificate and said that the condition might last two days or two weeks. Ms Alger says she went home and lay down all day. She is not sure if she contacted the office that day, and suggests that her daughter may have done so. Dr Sheldon gave her a medical certificate for that day and the next, being Tuesday, 6 January 2004.

35 Ms Alger says that on Wednesday, 7 January 2004, she woke up and felt exactly the same as she had the day before. She says she rang Dr Sheldon but Dr Sheldon was not available and was not back in the surgery until Friday so Ms Alger asked to speak to another doctor in the same clinic as they had her file. She made an appointment for the next day with a Dr Denz.

36 Ms Alger says on Thursday, 8 January 2004, when she woke up she did not feel so bad and was moving and walking so she called Mr Carlton, her supervisor. She explained the situation to him and said that she was feeling a bit better that day and that she was on her way into the office. Her daughter had come over to pick her up and was going to drive her because she was on strict instructions not to drive. However, Ms Alger says that she started feeling nauseous and was vomiting. Her daughter told her that she could not go to work in those circumstances. However, she attended the appointment with Dr Denz. He did a series of tests and gave her some medication for the nausea notwithstanding the advice she had previously received from Dr Sheldon that there was no medication for her condition. He told her not to go to work until the following Monday, 12 January 2004.

37 Ms Alger says that she would have rung her employer, she does not know if she did, as the day was quite a blur. She suggests in her evidence that her daughter probably called the office but she had an appointment already for that morning so she is sure that she would have let the department know that she was going to be late.

38 Ms Alger says that when she returned home on 8 January 2004, she received a telephone call from Mr Cottier who asked whether she was returning to work. She said that she advised him that she had intended to return to work but that when she actually got up, she experienced vertigo, she had just returned from attending a doctor who had advised her to stay away until Monday (which would have been 12 January 2004). According to Ms Alger, Mr Cottier said to her that he wanted her to

attend an independent doctor for a second opinion. Ms Alger said that she agreed with this because her condition had caused her concern and she had already had two doctors' opinions. She says that she also told Mr Cottier that she wanted him to note that she had not been to her regular doctor who Mr Cottier had questioned previously but she said that her condition had nothing to do with her previous condition. She says that he said to her "well, while you remain on leave, I am going to put you on leave without pay". She responded that it was his prerogative but that he already knew that she had not been well for a while and that there was nothing she could do as she was sick. She told him that if she could be in the office, she would be there and that if he did not believe her doctor then to get another doctor to examine her. Mr Cottier replied to her that she would remain on leave without pay. Ms Alger says Mr Cottier did not mention which dates the leave without pay would apply to. She believed it to be prospective rather than relating to the period she had already been absent.

39 On Tuesday, 13 January 2004, Ms Alger returned to work. On her return, she checked the electronic leave system which showed that a number of her leave applications had been approved, and a number rejected. Those which were approved included 5 single whole day absences all approved on Monday, 5 January 2004. Each day approved or rejected had an identification number but there was no way of knowing to which particular day the approval related.

40 Ms Alger says that the leave would have been approved through the Web Kiosk process by Trevor Carlton. Because there is no way of matching up the ID number for each of the leave requests referred to in the electronic system with leave requests that she had made, Ms Alger said that she had to make the assumption that 5 whole day leave applications which came through on 5 January 2004 related to the 5 applications that she had put in on 30 December 2003.

41 On 13 January 2004, Ms Alger sent an email to Julie Inns, in Human Resources, following a telephone discussion, seeking advice in relation to which approvals applied to which applications for leave, confirmation that her current leave balances shown on the Web Kiosk service electronic system were accurate and seeking confirmation of her available balance of leave. Ms Inns responded on 14 January 2004 clarifying that:

> "The only way to confirm which leave applications have been approved and which are still pending are to go to the "Pending Transactions" options in Web Kiosk. If the applications are still in this area, they have not yet been approved by your Manager. Once they have been approved you can view them by clicking on "Leave Booking Enquiry" which will show your history of all leave which has been approved.
>
> At present, I cannot guarantee the accuracy of the leave balances on the Web Kiosk system. I am currently undertaking a full audit on your sick and annual leave, and you will be advised of the outcome early next week."

42 Ms Alger was not paid any salary for the pay period 2 – 15 January 2004. She says that she did not find out that she was not going to get any pay for the pay period until she got to work on 13 January 2004. She said that she had a medical certificate with her and she went into Web Kiosk to make an enquiry. She says she spoke to someone in Human Resources or emailed them advising that there was already an application for her on leave and that she is at work and how could the system do that. Whoever she spoke to advised her that her supervisor could do it and "we can do - - it can be done". She says that she was at work on 13 January 2004 and going to be at work on 14 and 15 January 2004 and these had not occurred yet she was already in the system as being on sick leave without pay. Ms Alger says that she wanted to go into the system to put in an application but she could not override the system. She checked her salary because it ought to have been available but the system showed it as zero. She says she was very upset at discovering that she was getting no pay for that pay period because she had to pay child support and had loans and other obligations.

43 Ms Alger says that she then received an email from Mr Cottier requesting that they meet on 15 January 2004 so she called the union to discuss the matter. She met with Mr Cottier on 15 January 2004, however, she gave no evidence of what occurred in that meeting.

44 Following the meeting, she received the following memorandum by email:

> "Dear Ms Alger,
>
> In response to our meeting on the 15 January 2004 and your subsequent emails.
>
> We recently met to discuss a number of issues relating to your leave during the December and January periods.
>
> In this meeting, I explained that you were deemed as on sick leave without pay due to your not communicating directly with your supervisor or director your leave intentions. During this period, messages were left with reception on a daily basis that you would not be attending work due to illness. This was also exacerbated as your absence from the office was in excess of two weeks without a satisfactory explanation from yourself.
>
> Following our conversation on Friday 12 December 2003, I advised you that approval had been granted to convert long service leave to sick leave for the period 8 – 10 December 2003. You were advised that that you were expected back to work on the 22 December 2003. This was also confirmed in an email 15 December 2003.
>
> I telephoned yourself on the 8 January 2004 to determine if you intended to return to work, you advised that you had a medical certificate that ceased on the 23 January 2004 but you might come into work. I advised yourself that the Department would now consider you on sick leave without pay. The decision to place you on sick leave without pay was based on the following:
>
> - Not communicating to the Department your expected leave duration;
> - At the time of the telephone conversation, you had indicated that you had no sick leave credit.
>
> It is my understanding that you attended work only on 30 December 2003 and 2 January 2004 from the period commencing 22 December 2003 up until your return to work on 13 January 2004.
>
> I advised Human Resources and the Assistant Director Land on the 8 January 2003 to advise yourself that you were considered on sick leave without pay. This also included withdrawing previous leave approvals actioned by the Assistant Director Land based on the fact that you were expected back at work on the 22 December 03. In the conversation with yourself I also advised that I intended to refer you to an independent medical practitioner to determine your fitness for work, Human Resources were also advised on the 8 January 2004 to start arrangements for the referral. Due to your return to work on the 13 January this has negated the need for an independent referral.
>
> The Employee Performance Agreement (EPA) is required to be completed and I would like to start this process next week on the 6 February at 3:00pm. Please confirm that you and your union representative will be available to participate. As previously advised, Trevor Carlton will undertake the process which is a two way process and I will mediate. Also be aware that this is the second time that I have attempted to have your EPA completed.

Mr Ian Shakespeare also needs to meet with you to discuss his findings to date and to provide feedback to yourself. Mr Shakespeare would like to schedule this meeting for the 4th February at 3 pm in his office. As part of that process I have attached for your information Trevor Carleton (sic) and Jacqui Brienne's responses to your grievance.

I confirm that the Department has received medical certificates from yourself for the following periods:

5 – 6 January 2004

7 – 9 January 2004

16 January 2004

Medical certificates have not been received for the period 4 – 22 December 2003 when approval was granted to convert long service leave to sick leave.

As advised in our meeting on the 15 January 2004, the Human Resources section are currently undertaking an audit of your leave entitlements to assist you in this process. I understand that this information is to be provided shortly.

In conclusion, you have made a number of statements about the racist policies of the Department and how only Indigenous people are targeted; these statements are strongly refuted by the department and myself as the director for the policy and coordination section."

(Exhibit A8)

45 Mr Cottier's email says that medical certificates had not been received for the period 4 to 22 December 2003 when approval was granted to convert long service leave to sick leave. However, in his evidence Mr Cottier said that this advice was an error.

46 Ms Alger says that she did not receive advice until that email from Mr Cottier that previous approvals were going to be withdrawn. She drafted a memorandum to him asking him to explore the process and format for withdrawing her pay without notifying her. Ms Alger says that during the course of discussion with Mr Cottier on 15 January 2004 she said to him that she had no pay and asked what had happened. She says that he advised her that she had no other pay available and that she owed the department other amounts. She queried this and he said that it related to the period to 22 December 2003 that she was absent to which she responded that she had already had approval for those days to be converted and he advised her that he had since withdrawn that approval on 15 January 2004. Mr Cottier said that she had not provided medical certificates to which she responded that she had them there in her hand and that she was on sick leave.

47 Ms Alger says that the policy and process of the respondent is that the employee brings the certificate to work on the day that they return to work and that they are put in with an application for leave.

48 In response to that part of Mr Cottier's email which referred to the reasons for the situation as including that she did not communicate to the department her expected leave duration Ms Alger says that she did not communicate the leave duration because she did not know it. She said that every day that she would wake up she would hope that her condition had gone away but she could not say how long she was going to be away. All she could say was that she had certificate for two days, being the days that she was absent.

49 As the second reason given by Mr Cottier in his memorandum of 15 January 2004 for putting her on sick leave without pay as being that:

"At the time with the telephone conversation, you had indicated that you had a sick leave credit,"

50 Ms Alger says that she had asked for an audit to be done on her leave because it was not correct and it did not make sense.

51 Ms Alger says that on 15 January 2004, after her meeting with Mr Cottier, Mr Sunil Narula, the Acting Human Resources Manager, came into her office to confirm that she had attended work only on 30 December 2003 during that period. She says she replied "and 2 January". He queried that and said that he would need to go and check that, and he left her office. Ms Alger then received an email asking her to confirm dates.

52 As far as Ms Alger was aware, there was no leave audit undertaken. Ms Alger says that her daughter rang the supervisor, Mr Carlton on 30 or 31 December but refused to ring him back because he was rude to her.

53 Ms Alger says that at the time she had several weeks long service leave available to her and that even if the specific record of hours was not correct there was an entitlement and there is annual leave that she had not utilised.

54 Ms Alger says that the effect of this whole situation was that she did not have any money for a fortnight and was not able to plan for that situation as she was not given any indication it would occur. She had commitments which she was required to meet.

55 Ms Alger says that approximately 14 days after her salary had been withheld, she received a letter from Mr Narula dated 29 January 2004, as follows:

"Ms Yvette Alger

Department of Indigenous Affairs

Dear Yvette

OVERPAYMENT OF SALARY

A recent audit of your payroll records has revealed an overpayment of salary due to absences from the workplace.

For the pay of 1 January 2004, that relates to the period 19 December 2003 to 1 January 2004, you were paid for the entire 10 days, however, it is recorded that you only attended work for 2 days (19 and 30 December 2003) in this particular pay period. Given a public holiday on 1 January 2004, which is considered authorised leave, will be paid, you have been overpaid 7 days salary for the pay of 1 January 2004.

For the pay of 15 January 2004, that relates to the period 2 January 2004 to 15 January 2004, and following discussions between yourself and Mr Cottier, you were advised that your pay would be processed as Sick Leave No Pay whilst you remained absent from the workplace. You attended work for 4 days during his period (2, 13, 14 and 15 January 2004). Accordingly, you have been underpaid 4 days salary for the pay of 15 January 2004.

In summary, the net effect of the above is that you have been overpaid 3 days salary, totalling a gross amount of $867.31.

Outstanding monies are required to be repaid in accordance with the Department's policies and procedures. Please advise me how you wish to make such repayments by Monday 2 February 2004.

Should you have any queries regarding this matter, please do not hesitate to contact Julie Imms, A/Human Resources Officer on 9235 8023.

Yours sincerely

SUNIL NARULA

A/HUMAN RESOURCES MANAGER

29 January 2004"

(Exhibit A10)

56 Ms Alger says that she understood that audit related to sick leave only. Ms Alger says that she was upset and thought that she had no real option but to approve or authorise the withdrawal of further monies from her entitlements and she did so by email on 4 February 2004.

57 Ms Alger says that it is unfair not to allow her to convert long service leave to sick leave on the basis of the respondent's policies and procedures for sick leave. That policy provides under the subheading of:

"**Conversion of Sick Leave to Other Forms of Leave**

Where an officer is suffering a prolonged illness and exhausts all sick leave credits, the officer may convert sick leave (with a medical certificate) to other forms of paid leave, on compassionate grounds, with the approval of their manager.

Where an officer has utilised 5 days sick leave without medical certificate in any one credit year, and indicate that they are sick for a short period, and do not furnish a medical certificate, any request to convert sick leave to paid leave (ie annual leave) should be declined. Officers are only able to have approved sick leave without medical certificate of 5 days in any one credit year."

(Exhibit A11)

58 Ms Alger says that the respondent did not deal with her compassionately.

59 Ms Alger says that she did not, at any time, attempt to contact her manager via his mobile phone because it is never turned on. She says though that she made a real effort to contact her manager directly. She insists that on the days she was absent she was unwell and although she was able to check her email system from time to time from home via the laptop she was not sufficiently well to be at work.

60 Ms Alger submitted into evidence 3 undated medical certificates, one from Dr Sheldon stating that Ms Alger was unwell and not fit for work from 5 to 6 January 2004, one from Dr Denz for 7 to 9 January 2004, and one from Dr Sheldon for 12 January 2004. Ms Alger says that Dr Sheldon gave her the medical certificate in respect of 5 and 6 January 2004 on 5 January 2004. The first two such documents contain the handwritten notation "5.1.04" and "8.1.04" respectively. The certificate for 12 January 2004 has no handwritten notation. According to the respondent the handwriting is that of Anna Gillespie, the respondent's Acting Senior Human Resources Consultant.

61 Ms Alger says that she may have submitted her medical certificates on 16 January 2004. She did not submit them on 13 and 14 January 2004, because she was waiting for the meeting with Mr Cottier on 15 January 2004, and there were no leave applications for her to submit them with to which they would be relevant. She says that she submitted them in an internal yellow envelope through the mail system. When asked by Mr Narula for the respondent whether it could have been 27 January 2004 that she submitted the medical certificates she said that she had no idea, she had them in her hand the whole time and was waiting to find out where and when she was to give them and in what situation. It may be that they were submitted around 20 January 2004.

62 For the period of 5 January 2004 to 12 January 2004, the period where Ms Alger claims that she was ill, she says that she had not submitted a request to convert sick leave to any other form of leave because the electronic system would not allow her to do this. She says that she attempted to make a manual request when she discussed the matter with Mr Cottier on the telephone on 8 January 2004 and again on 15 January 2004.

63 The respondent called evidence from Christopher Gregory Cottier, the Director of Policy and Coordination for the respondent. The Land Branch in which Ms Alger is employed sits within his area of responsibility.

64 Mr Cottier says that he spoke to Ms Alger's doctor, Dr Marion Woods on Friday, 12 December 2003, in respect of her absence in the first part of December and the medical certificate provided then and he made a file note in the following terms, formal parts omitted:

"**Date:** 15/12/2003

Following up from my previous file note 11 December 2003, regarding permission to speak to Ms Yvette Algers (sic) doctor in relation to her sick leave.

I spoke to Doctor Marion Woods at 3:40pm Friday afternoon, to discuss the nature of Ms Algers (sic) medical certificate. Ms Woods confirmed that the (sic) Ms Alger was suffering from depression.

Ms Woods further advised that it is possible that work is a factor and that Ms Alger requires time off from work.

This matter was discussed between Acting Human Resource Manager Sunil Narula and Assistant Director Land Trevor Carlton and it was agreed that Ms Alger be approved to utilise Long Service Leave for the period of her medical certificate.

I spoke to Ms Alger later Friday afternoon and advised that her application to utilise long service leave had been approved and that she was expected back in the office on the 22 of December 2003.

Ms Alger queried if her request for annual leave had been approved and I advised that we had only approved her request in line with the medical certificate. I advised that she needed to return to work and talk to her supervisor and that issues such as work loads and other staff leave already approved over the Christmas break needed to be taken into consideration.

Signed

Chris Cottier"

(Exhibit R4)

65 Mr Cottier also gave evidence that he received a memorandum from Mr Carlton, the Assistant Director, Land, dated 7 January 2004 regarding Ms Alger's absences. This memorandum, formal parts omitted, said:

"**SUBJECT: ABSENCES – YVETTE ALGER**

Chris

Yvette Alger's absence from the workplace continues.

You will recall advising Yvette by e-mail on 15 December 2004 that she was expected back at work on Monday, 22 December.

Yvette's attendance/absences since that date are as follows.

Monday, 22 December	-	absent without medical certificate
Tuesday, 23 December	-	absent without medical certificate
Wednesday, 24 December	-	absent without medical certificate
Monday, 29 December	-	absent without notification [1]
Tuesday, 30 December	-	at work[2]
Wednesday, 31 December	-	absent without medical certificate
Friday, 2 January	-	absent without medical certificate
Monday, 5 January	-	absent without medical certificate
Tuesday, 6 January	-	absent without medical certificate
Wednesday, 7 January	-	absent without medical certificate

Although I have processed Ms Alger's leave applications pursuant to her written request dated 30 December 2003, the Human Resources Manager will reverse her requests in light of the fact that you expected Yvette to return to work on 22 December and that no further medical certificates have been forthcoming. It is agreed that Yvette cannot substitute sick leave with other forms of leave.

Yvette's application for short leave on Monday, 29 December is problematic – particularly as there was not prior notice of leave. The fact that Yvette was returning from Geraldton that day seems to indicate she had no intention of being in Perth and at work at the due starting time. I will rely on advice from Human Resources on this.

I understand you will telephone Yvette tomorrow to alert her to the fact that she is on sick leave without pay for the days indicated above (where no medical certificate is provided).

Signed

Trevor Carleton

[1] Claims to have returned from Geraldton that day and car broke down – no notification of absence? Recovered from previous illness?

[2] Worked on "Request for leave" application most of the day. Apparently recovered from illness."

(Exhibit R5)

66 Mr Cottier says that on 8 January 2004, he telephoned Ms Alger at approximately 4.30pm. He says that his file note written on the following Monday, 12 January 2004 is an accurate record of the conversation. It notes as follows:

"I telephoned Yvette Alger at 4:30pm on Thursday 8 January 2004, to seek clarification on when she was returning from leave.

I spoke to Ms Alger on her work mobile.

I advised Ms Alger that due to her continued absenteeism she is now on leave without pay as she has not provided medical certificates to substantiate her sick leave. I also advised her that she has not spoken to her immediate supervisor Mr Trevor Carlton or if he is not available myself as the Director of Policy and Coordination. I further advised that it is not acceptable to leave a message with reception when not intending to attend work.

Additionally, I advised that I intended to refer her to independent medical advice to determine the exact nature of her illness, as she had not provided this information to the department and this would also determine her fitness for duty.

Ms Alger advised that she had already sought a second medical opinion on her illness and the second medical advice confirmed the original advice. In a previous minute 15 December 2003, Ms Algers (sic) doctor confirmed that Ms Alger was suffering from depression.

Ms Alger stated that she "welcomed the referral to an independent medical practitioner" as it would confirm her illness to the department. I advised that I would write to her to confirm my advice to her. She also said that she would welcome written advice from the department.

Ms Alger then queried if the Department scrutinised all sick leave applications and made referrals for other staff members for independent medical advice. I advised that she has not provided any advice to the department in terms of medical certificates to provide proof of her condition. I acknowledged that she has provided a memo seeking to justify her sick leave and seeking conversion of annual leave to sick leave and additional leave for Friday 2 January 2004, however; medical certificates were not attached. I further advised that the department has referred a number of people in the past months for independent medical advice.

Ms Alger then talked about how the department treats indigenous people with its racists policies. I advised her that her statement was incorrect.

Ms Alger then politely terminated the conversation.

Signed

Chris Cottier"

(Exhibit R6)

67 Mr Cottier met with Ms Alger on 15 January 2004.

68 On 28 January 2004, Mr Cottier wrote an email to Ms Alger in response to their meeting of 15 January and her explanation for previous absences, which is set out earlier in these Reasons. In respect of that paragraph which says that medical certificates had not been received for the period 4 to 22 December 2003, in his evidence Mr Cottier agrees that this was in error as a medical certificate had been received and enquires made with Dr Woods.

69 In respect of his requirement that Ms Alger deal with Mr Carlton, her supervisor and manager even though there was some acrimony between them and Ms Alger had lodged a grievance against Mr Carlton, Mr Cottier says that it was not unreasonable to expect them to continue to communicate.

70 Mr Cottier says there was not a satisfactory explanation for the period of leave from 22 December to 31 December 2003 and the manner in which Ms Alger had notified the department of that period of leave was unsatisfactory. He says leaving messages with reception was not acceptable and she was expected to return to work to negotiate her leave with Mr Carlton, her supervisor. She had not informed the department in the proper way as to why she was not at work. The difficulty was that from day to day she was not attending for work, would leave messages and would not indicate when she expected to return to work. He says that he would have expected her to have advised prospectively, not on a day to day basis and to do so directly with her supervisor. Further, Ms Alger did not have any sick leave available, and there was uncertainty as to whether she was going to attend for work. Mr Cottier says that he could not answer the question of whether or not she was sick at that point. He did not know the answer to that. She was expected to return to work on 22 December 2003, did not do so and did not provide a satisfactory explanation.

71 As to the email from reception recording that another person had also contacted reception to advise of his absence, Mr Cottier was unable to comment as he did not know the circumstances.

72 Mr Cottier says he instructed Mr Carlton to overturn the leave previously granted for 22 December 2003 to early January 2004. Mr Cottier advised Ms Alger on 8 January 2004, at 4.30pm that she was "now on leave without pay". He appears not to have specifically advised her that her pay would be stopped for the fortnight for the pay period.

73 The reason for the decision to place her on sick leave without pay was based on her not communicating to the department her expected leave duration and that at the time of the telephone conversation she had indicated to him that she had no sick leave credits, and he did not know whether or not she was sick. At this point, Mr Cottier had not had her sick leave audited and therefore did not know for himself what her leave entitlement was.

74 Anna Gillespie, the respondent's acting Senior Human Resources Consultant, who has worked within the human resources branch of the respondent for 5 years, gave evidence about the respondent's policy regarding sick leave and the conversion of sick leave to other forms of leave, and the application of that policy. She says that in respect of sick leave applications there must be sufficient cause which can be demonstrated by a medical certificate from the doctor or dentist verifying illness. Conversion of sick leave to other forms of leave could be utilised only when all other leave credits were exhausted, medical certificates are provided to verify the illness, the illness is for a prolonged period and the department considers it on companionate grounds. She says that all four criteria need to be met. She says that where someone has been on sick leave for two weeks that that period could be considered to be prolonged.

Conclusions

75 This is not a matter of the enforcement of entitlements. It is a matter relating to whether the employer has treated Ms Alger fairly in the application of its policy and of her entitlements. Fairness is to be considered in light of all of the circumstances, and not viewed only on the basis of the interests of one party, or on the strict application of entitlements.

76 It is clear from Ms Boult's letter to Ms Alger of 11 November 2002, that prior to December 2003, issues relating to Ms Alger's use of sick leave had arisen and she was informed by her employer that sick leave would not be granted in the case of absence from duty "without sufficient cause". She was also advised of the requirement to demonstrate sufficient cause. In respect of other leave, she was informed of the need for it to meet operational requirements and for future requests to be made in advance. In the case of a particular absence of 13 days from 22 October 2002 to 8 November 2002, for which a medical certificate had been provided in respect of one day only, Ms Alger was informed of the need to provide medical certificates within 4 days of the date of Ms Boult's letter, and 7 days from the last date of absence, or the leave would be processed as leave without pay.

77 According to that letter, Ms Alger had no sick leave available to her until 2 July 2003.

78 Prior to Ms Alger taking leave in December 2003, according to her memorandum to Mr Carlton of 30 December 2003, she took a day's leave on 26 November 2003 without a medical certificate and sought a day's Public Service Holiday leave for 27 November 2003.

79 Ms Alger was then absent on 4 and 5 December 2003 without a medical certificate. She was absent from 8 to 19 December 2003. She sought conversion of sick leave to other leave for this latter period, and it was granted. She sought other leave from 22 December 2003 to 3 January 2004. This application was rejected and she was directed to attend for work to negotiate further leave with her supervisor. She objected to this direction, claiming it was unfair.

80 For the period 22 to 24 December 2003 for which Ms Alger was not paid, she had clearly run out of sick leave. For her to have been entitled to have that leave converted to another form of leave, Ms Alger would have needed to meet the requirements of the respondent's policy. That policy included that all sick leave was exhausted, the leave would be in relation to a prolonged illness and with a medical certificate. According to Ms Alger these absences were not part of any prolonged illness but related to a short term gastric condition. Further, Ms Alger had no medical certificates to substantiate her claim in respect of that period.

81 Given that Ms Alger had protested the unfairness of being required to attend for work on 22 December 2003 to negotiate further leave, and she did not attend, nor did she have a medical certificate, some scepticism on the respondent's part was to be expected. Further, Ms Alger's advices to her employer for those days were made up of messages left with reception and emails. She made no real efforts to speak with her supervisor by asking that he call her. This absence does not meet the requirements of policy for conversion to other leave. The respondent's rejection of it is not unfair.

82 In respect of 29 December 2003, clearly Ms Alger was not suffering from any illness, nor does she claim to have been. Her claim is that her motor vehicle broke down on the return journey from Geraldton. She was clearly absent without leave and without notifying her employer. Given that she says in her evidence that she had arrived back in town (which I take to mean Perth) by around midday for her to not to have attended work or to have contacted her employer provides no explanation or justification for her to be granted any leave with pay in that regard. It is noteworthy too that her evidence as to her time of arrival in Perth conflicts with what she told Mr Carlton in her memorandum of 30 December 2003, in which she said that "it took most of the day to acquire mechanical assistance and during this time I was predominantly out of telephone range,

between towns." (Exhibit 4) In certain circumstances such an absence might warrant some consideration of disciplinary action.

83 On 31 December 2003, Ms Alger says she woke up feeling unwell, she did not attend a doctor nor does the evidence indicate that she attempted to see one. Her daughter spoke to Mr Carlton advising of her absence. Once again, Ms Alger avoided speaking with her employer to discuss her absence. This absence was also without a medical certificate, there is no evidence of it relating to the absence before Christmas, and it was not part of an absence due to her suffering a prolonged illness. This absence does not meet the requirements for payment for sick leave for conversion of sick leave to other forms of leave. Given all of the circumstances, there was no unfairness in it not being allowed.

84 In respect of 5 and 6, 7 to 9 and 12 January 2004, Ms Alger was absent with medical certificates. She has given evidence of the circumstances of the absences for 5 and 6, and 7 to 9 January 2004. Ms Alger gave no evidence regarding her absence on Monday, 12 January 2004. Interestingly, when she saw Dr Denz on Thursday 8 January 2004, he reportedly told her not to attend work until Monday 12 January 2004. Yet, she has submitted a medical certificate, undated, from Dr Sheldon for Monday, 12 January 2004. Further, Ms Alger says in evidence that when she spoke to Mr Cottier on 8 January 2004, she mentioned she had 2 medical certificates. Clearly, no issue is taken by the respondent as to the absence on Monday 12 January 2004 being any different from the absences the week before.

85 Although in cross examination, Ms Alger says that she submitted medical certificates regarding her absences on 5 and 6 and 7 to 9, and 12 January 2004, after the meeting on 15 January 2004 with Mr Cottier and left the impression that it was immediately after that meeting that she submitted those through the office mail system, in cross examination she indicated that she was not sure when she submitted them, and it would appear that they were received by the respondent by 28 January 2004, perhaps on 20 January 2004. This was at least 5 days after her meeting with Mr Cottier and 8 days after the last day of absence.

86 I make no finding that, in general, a period of 6 days constitutes a "prolonged illness" for the purposes of the respondent's policy on Conversion of Sick Leave to Other Forms of Leave. However, in the context that Ms Gillespie gave evidence that a 2 weeks illness may constitute a prolonged illness, it may be said that this period was prolonged in that it was for a period of 8 consecutive days; six of those days were working days. Therefore, Ms Alger's absence appeared to meet the criteria of the employer's policy in that she was suffering from what in those circumstances might be said to be prolonged illness, she had exhausted all sick leave credits and she had medical certificates. It is clear that she would have been without pay for that period and, on compassionate grounds, it may have been appropriate for the respondent to have granted that leave to be converted. Having said that, given her previous approach and the lack of provision of medical certificates for some time after her return, her employer's scepticism was not surprising. However, in the final wash up, she meets the tests and ought to be given approval to convert that period of sick leave to other leave.

87 As to Mr Cottier's evidence in respect of Ms Alger leaving messages from day to day, not providing direct contact with her supervisor, and not providing prospective advice as to her absences, I make the following comment. I accept Ms Alger's evidence that she attempted, on some occasions, to contact her supervisor directly but was unable to do so. She left messages about her absences but made no effort to speak to him when the situation was likely to give rise to some scepticism on the respondent's part. For their part, neither Mr Cottier nor Mr Carlton made any efforts to contact Ms Alger until they sought to clarify the situation well into the series of absences. Clearly they were not satisfied with the information she provided but, further, there seems to have been a lack of faith in Ms Alger because of her conduct over a period of time in respect of her leave. I find that her absence on 29 December 2003 and her lack of contact with the respondent indicated a lackadaisical attitude towards her absence. For a senior manager of some 6 years' service with the respondent, who expected her word to be accepted that she was sick without other supporting evidence, this attitude was irresponsible. Further, there were grounds for confusion when on Thursday, 8 January 2004, she indicated to Mr Carlton her intention to be at work but says that later she became ill and did not attend for work. It was not until Mr Cottier telephoned her later that day that she informed her employer of her absence. In respect of the applicant's suggestion that Ms Alger should not have been required to make contact with her supervisor Mr Carlton due to her complaint against him, the evidence does not demonstrate any vindictiveness on his part in his treatment of Ms Alger where her leave application was concerned. In fact, Mr Carlton treated Ms Alger with consideration as it was he who approved her conversion of leave for late December which was later overturned by Mr Cottier.

88 Ms Alger was aware that if she was unable to speak to her supervisor, she should speak to her manager. If that person was not available, she should speak to a management support officer. She says she made every attempt to speak to her supervisor, yet it is clear that on some days no attempt was made, and on other days her daughter might or might not have called. On other days, she simply sent an email rather than attempt to speak to someone. One can understand the significance of being required to make direct contact in these circumstances.

89 Further, whilst Ms Alger met with Mr Cottier on 15 January 2004, at which there was clearly concern as to her absenteeism, the evidence indicates that she put medical certificates for the periods 5 and 6, 7 to 9 and 12 January 2004 in the internal mail system but is not sure when, possibly on 20 January 2004, and it would appear that they may not have arrived or been drawn to Mr Cottier's attention until possibly 27 January 2004.

90 Given the circumstances, it is not surprising that there was at least some lack of clarity if not suspicion as to what was occurring in respect of Ms Alger's absences. By her own actions, Ms Alger did not assist her own cause. Nonetheless the respondent, and in particular Mr Cottier, appears to have formed views which were incorrect. For example, in respect of his letter of 28 January 2004, Mr Cottier erroneously noted that medical certificates had not been received for the period 4 to 22 December 2003 when approval was granted to convert long service leave to sick leave.

91 In respect of the retrospective cancelling of approvals of Ms Alger's applications for leave for 22 to 24 and 29 to 31 December 2003, some of that leave was approved retrospectively by Mr Carlton without consulting Mr Cottier. Those days, as noted were not the subject of medical certificates, and one was simply a day of unauthorised absence. It was appropriate for Mr Cottier to reverse that approval. However, there was clearly a communication breakdown which caused Ms Alger to not realise that she would be without pay. She believed, having seen the approvals on 13 January 2004, that she would be paid. What she did not realise was that Mr Cottier had already reversed the approvals by that time, but the computer records had not noted the reversal. The evidence of Ms Alger and Mr Cottier conflicts as to what Ms Alger was informed of by Mr Cottier in the telephone conversation of 8 January 2004 as to whether the leave she had already taken from 22 December 2003 was to be without pay or whether prospectively she would be without pay. The evidence demonstrates that on 7 January 2004 Mr Carlton wrote to Mr Cottier indicating that the Human Resources Manager would reverse the previously approved request in light of Ms Alger's failure to return on 22 December 2003 and that no further medical certificates had been forthcoming. He also wrote:

"I understand you will telephone Yvette tomorrow to alert her to the fact that she is on sick leave without pay for the days indicated above (where no medical certificate is provided). The days indicated above include those days Monday 22nd, Tuesday 23rd, Wednesday 24th, Monday 29th and Wednesday 31 December 2003."

92 That communication was copied to the Manager, Human Resources. Therefore, on 7 January 2004, Human Resources were alerted to the requirement to reverse that leave. Further, Mr Cottier, on 8 January 2004, telephoned Ms Alger at her home and informed her that due to her failure to comply with the requirements for being on sick leave, the failure to provide medical certificates and the failure to properly notify her employer, that she was considered on leave without pay. I am satisfied that his intention was to advise her that the leave that she had previously taken was not approved. It is quite possible that she did not understand that to be the case and it is clear from her evidence that when she returned to work and discovered that she was not paid for the period that she became upset about that.

93 In all of the circumstances, while there was room for some greater clarity being provided by Mr Cottier about that situation, I am not satisfied that there was such unfairness in the circumstances as to warrant the payment being made to Ms Alger when otherwise the payment was not warranted. It is unfortunate that the approval was initially given by Mr Carlton for such payment and that that information was contained in the respondent's information systems which were checked by Ms Alger and she was misled into believing that leave had been approved. As I have said, though, the circumstances of the taking of the leave and of her conduct in regard to the leave are not overridden by the communication break-down in that regard. In those circumstances, it is not appropriate that Ms Alger be paid for that leave simply because of a communication problem. In saying that I do not in any way seek to down play the significance or the impact on Ms Alger of discovering later that she received no pay for that pay period and in fact there is clearly some error, in any event, in the days for which she was not paid. The whole situation is unsatisfactory on both sides.

94 While it might have been appropriate for Ms Alger to not be paid for any periods of sick leave where she did not meet the policy and criteria, withholding her salary for the period 2 to 15 January 2004, when she was not absent for all of the days in that period and the bulk of it being with medical certificates, might have been unfair. However, given her role in the situation, her lackadaisical approach to notifying her employer, her unauthorised absence on 29 December 2003, her failure to provide medical certificates in a timely fashion and her apparent avoidance of making direct contact with Mr Carlton or Mr Cottier, I am unable to conclude that the respondent acted unfairly.

95 All in all, the situation was entirely unsatisfactory on both sides. Ms Alger tended to treat her absenteeism irresponsibly. While she might have had good reason and a genuine sickness on certain days, she has also failed to comply with her obligations to her employer. Her employer has failed to fully consider the situation, and the circumstances degenerated as time progressed.

96 In all of the circumstances, the fair outcome would be for the respondent to pay Ms Alger for the period 5 to 12 January 2004 by converting those absences to another form of leave, as Ms Alger met the requirements of the respondent's policy for conversion of the sick leave to other forms of leave with the benefit of the evidence provided at a subsequent time by way of medical certificates even though they were not provided in a timely fashion.

97 The parties are to confer in respect of the actual amount due to Ms Alger in light of these Reasons for Decision and advise the Commission within 7 days.

2004 WAIRC 13197

DENIAL OF LEAVE ENTITLEMENTS TO A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED) **APPLICANT** **-v-** DIRECTOR GENERAL, DEPARTMENT OF INDIGENOUS AFFAIRS **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	MONDAY, 1 NOVEMBER 2004
FILE NO	PSACR 11 OF 2004
CITATION NO.	2004 WAIRC 13197

Result Claim regarding converting sick leave to other form of leave granted in part

Order

HAVING heard Mr M Amati on behalf of the applicant and Mr S Narula and with him Ms A Gillespie on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby:

1. DECLARES that Ms Yvette Alger met the requirements for conversion of sick leave to other forms of leave for the period 5 January 2004 to 12 January 2004.
2. ORDERS that the respondent shall:
   (a) convert Ms Yvette Alger's leave for the period 5 January 2004 to 12 January 2004 from sick leave without pay to another form of leave;
   (b) pay Ms Yvette Alger the amount of $1734.62 in accordance with the conversion referred to in order 2(a) above.
3. ORDERS that the amount referred to in Order 2 above shall be paid within 14 days of the date of this Order.

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

INDUSTRIAL MAGISTRATE—Complaints before—

2004 WAIRC 13193

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT
PARTIES	ELIZABETH SINCLAIR
	CLAIMANT
	-v-
	STARTUNE HOLDINGS PTY LTD
	RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 15 SEPTEMBER 2004
CLAIM NO	M 24 OF 2004
CITATION NO.	2004 WAIRC 13193

Representation	
Claimant	Mr N Irvine of *Workplace Negotiations (WA)* appeared as agent for the Claimant.
Respondent	Mr T Caspersz (of Counsel) and with him Ms R Taseff (of Counsel) instructed by *Blake Dawson Waldron Lawyers* appeared for the Respondent.

Reasons for Decision

Introduction

1 The Claimant is and was at all material times a medical practitioner practising in Western Australia.

2 Between 1988 and 6 August 1998 she worked with the Barkhouse Trust Medical Practice situated at Adelaide Terrace, Perth. Dr David Barkhouse and Mrs Jennifer Barkhouse owned that practice as trustees for the Barkhouse Family Trust (the Barkhouse Trust). Her engagement from 1988 to 1991 was on a part-time basis and thereafter on a full-time basis. The Claimant contends that she was during those periods an employee of the Barkhouse Trust.

3 In about June or July of 1998 Dr Barkhouse informed the Claimant that he was negotiating to sell the Barkhouse Practice to Westpoint Pty Ltd in exchange for an agreement that Westpoint provide all administration services to Dr Barkhouse's practice which he intended to amalgamate with the medical practices of Dr Bateman and Dr Linfoot. It was proposed that the amalgamated practices should operate from a new centre that Westpoint proposed to open located at 160 St Georges Terrace, Perth in the hub of the central business district. It was envisaged that it would attract lucrative corporate medical work. In addition the new centre would provide other healthcare services such as physiotherapy, thereby making the centre more attractive to patients. Dr Barkhouse's negotiations with Westpoint were conducted through Martyn Harris, a business broker specialising in the sale of medical practices. The Claimant was involved in the process. Indeed she discussed with Mr Harris certain implications of the proposal directly impacting upon her. The negotiations eventually culminated in the sale of the Barkhouse business to the Respondent, which was at that stage a subsidiary of Westpoint. The Agreement was formally concluded on 6 August 1998.

4 On or about 6 August 1998 the Claimant discussed with Dr Barkhouse the implications of the sale of his practice and in particular whether the Service Agreement which she had been asked to sign by the Respondent would result in changes once the Respondent had taken over. The Claimant says that Dr Barkhouse informed her that *"nothing would change".* She took that to mean that she would remain an employee. Dr Barkhouse told her that she should sign the Service Agreement, which she duly did.

5 Dr Barkhouse concedes that he may have told the Claimant that nothing would change but said that if he did so it was said in the context of the medical work remaining the same and the level of percentage taken out of Dr Sinclair's gross billing remaining the same. That is, under the Services Agreement Dr Sinclair would pay 50% of her gross billings for the Respondent's administration services as she was already then paying to the Barkhouse Trust for similar administration services.

6 The Services Agreement executed on 6 August 1998 (Attachment ES 14 to the supplementary affidavit of the Claimant sworn 12 July 2004), had been made available to the Claimant some time prior to its execution. Indeed she was given ample opportunity to read and consider the same and, if necessary, to obtain legal advice about it. It seems that the Claimant did not seek legal advice concerning the document. The agreement entitled "*Services Agreement (Adelaide Terrace Medical & Dental Centre)*" contained various recitals under the heading "*Introduction*". It also contained the operative clauses of the agreement. The recitals state inter alia:

> *A. The Practitioner has, for some years, conducted a medical practice in the Central Business District of Perth.*
>
> *B.* …
>
> *C. The Practitioner wishes to concentrate on the provision of her medical services and previously has procured the provision of premises, facilities from which to conduct her medical practice and also the provision of a broad range of administrative services from the Current Manager.*
>
> D. *Under the Sale & Purchase Agreement the Current Manager is selling and the Manager is purchasing the medical administration business of the Current Manager including the exclusive right to provide medical administration services to the Practitioner.*
>
> …

7 Notwithstanding that in executing the agreement, the Claimant has accepted those recitals; she now resiles from the same. In her supplementary affidavit sworn on 12 July 2004 she denies that she had for some years conducted a medical practice in the Central Business District of Perth, and further, that she had procured the provision of premises and facilities from which she conducted her medical practice or that she had procured a broad range of administrative services from the Barkhouse Trust.

Further, the Claimant denies that the Barkhouse Trust had hitherto the exclusive right to provide medical administration services to the Claimant as it did not have any such agreement with her and as such had no right to sell the same to the Respondent.

8 The Services Agreement purports to create a relationship of independent contractor and specifically disavows any other relationship between the parties and, in particular, partnerships, joint ventures and employment relationships (see Clause 7.10). The Services Agreement expired on 13 December 2001.

9 On or about 5 February 2002 the Claimant was informed that due to changes in management that her current position at the St Georges Terrace Centre Practice would cease with effect on 22 February 2002. Dr Flett, as agent for the Respondent, instructed her that she would not be entitled to copy or retain any patient files or inform patients that she was leaving.

10 On 18 March 2002 the Claimant commenced practice at the Mill Street Medical Practice. Many of her pre-existing patients followed her to that practice. In June of this year she commenced work in Beechboro, as there was insufficient work in Perth.

Issues

11 The pivotal issue in this matter is whether at the material times the Claimant was an employee or, alternatively, an independent contractor. The Claimant avers that at all material times she was an employee of the Respondent and not an independent contractor. She says that the fact that she was an employee is reflected inter alia by aspects of the agreement, when considered in the light of her actual circumstances in the performance of her duties including the mode of remuneration and method of termination.

12 The Claimant says that the document entitled "*Services Agreement*" purporting to create a relationship of principal and independent contractor is no more than a "*sham, a ruse that's (sic) sole purpose was to disguise a true relationship of employer and employee*" (see item 66 of the Claimant's affidavit sworn 29 June 2004). Further, the Claimant maintains that notwithstanding the terms of the written agreement between the parties that they nevertheless throughout the course of their relationship acted in the way that an employer and employee would as is evidenced by the following:

- The Claimant did not operate her own business.
- The Claimant did not have any business structure.
- The Claimant did not invoice the Respondent for any work done.
- The Respondent did not pay any GST to the Claimant on amounts earned.
- The Claimant was paid as per a fixed amount per annum, adjusted every three months.
- The Respondent handled all administration – appointments, billing, supply of materials/medicines.
- Control of the business lay totally in the hands of the Respondent.
- The Claimant was paid for labour only.
- The Claimant did not supply any materials.
- The Claimant had little or no opportunity to pursue any genuine business enterprise.
- The Claimant was not paid for any business expenses i.e. phone, travel.
- The Claimant worked regular hours.
- The efforts of the Claimant comprised the very essence of the public manifestation of the Respondent's business.
- The Respondent set the hours of work and the Claimant could only work hours she was directed.
- The Claimant had no time to work for anyone else.
- The Claimant worked exclusively for the Respondent.
- The Claimant was at work irrespective of whether or not there were patients to see.
- The Respondent varied the hours of work unilaterally.
- The Respondent unilaterally changed the Claimant's place of work.
- The Respondent determined the Claimant's rosters.
- The Claimant worked as an integral part of the Respondent's organisation.
- The Respondent unilaterally increased the Claimant's fixed annual salary.
- The Claimant was unable to delegate shifts to others.
- The Claimant could not employ another medical practitioner to fill in for her.
- When her employment was terminated, the Claimant was not permitted to contact any of her clients following termination.
- The Claimant was not permitted to take any of her patient's medical files with her.
- The Claimant was not permitted to copy the patient's medical files.

13 The Claimant's claim made under the provisions of the ***Minimum Conditions of Employment Act 1993*** for unpaid accumulated annual leave entitlements together with her claim made pursuant to section 170CM of the ***Workplace Relations Act 1996 (Commonwealth)*** for the alleged failure to give adequate notice of termination are contingent upon her being able to establish, on the balance of probabilities, that she was, at all material times, an employee.

14 The Respondent denies the Claimant's claim in its entirety. It says that it is in the business of providing medical support services such as administration services and accounting services to medical practitioners. The Respondent provides such services at a number of medical centres, including that at 160 St Georges Terrace, Perth. The Respondent says that the Claimant was not, during the material times, an employee and, therefore, is not entitled to payment for annual leave pursuant to the provisions of the ***Minimum Conditions of Employment Act 1993*** or to notice pursuant to section 170CM of the ***Workplace Relations Act 1996***.

15 The Respondent contends that the agreement with the Respondent was one to provide various services to the Claimant to assist her to carry out her medical practice, which is evidenced inter alia by the following:

- The Respondent provided premises, facilities and administrative services such as scheduling patients, maintaining records and collecting professional fees for which the Claimant paid to the Respondent a fee based on a percentage of revenue generated.
- The Claimant had the sole and unfettered conduct of her medical practice and was not subject to any direction. She had complete control over the nature and length of consultations as well as the amount charged for the consultations.
- The Respondent had no effective control over the hours the Claimant chose to work and when she chose not to attend the medical centre.
- The Claimant was responsible for her own insurance and was liable for the conduct of her medical practice.
- The Claimant had the ability to assign her rights and obligations with the consent of the Respondent.
- The Claimant received tax invoices from the Respondent.
- The Claimant conducted her affairs as a business as is reflected in her obtaining an Australian Business Number (ABN) and is also reflected in the material income tax returns filed by the Claimant (see exhibit 4) which indicate that she was at the material times conducting her own business.

16 In short the Respondent contends that the terms and conditions of the Services Agreement, when considered in the light of the Claimant's work conditions, method of remuneration and the degree of control she exercised in carrying out her duties, demonstrate that she was an independent contractor.

Evidence

Claimant's Case

Dr Elizabeth Sinclair

17 The Claimant's evidence in support of her claims is found in two affidavits sworn by her on 29 June 2004 and 12 July 2004. Prior to the commencement of the hearing the parties agreed that certain portions of her affidavit ought to be struck out and, accordingly, I have received into evidence those affidavits with the offending portions struck out.

18 In her first affidavit the Claimant recited a history of events leading up to her signing the Services Agreement. She also addressed the nature of her engagement by the Barkhouse Trust and contends that she was an employee of the Barkhouse Trust because she:

- Worked regular rosters;
- Was provided with weekly pay slips;
- Was paid superannuation;
- Had income tax withheld; and
- Received an annual group certificate.

19 Further the Claimant swore that she worked as the Respondent's employee throughout the material period as is evidenced by the following:

- Working Conditions

  The reception staff over which the Claimant had no control booked in patients. The Claimant was unable to give direction in that regard. Further, the Respondent directed her as to where she should work off-site in the performance of health checks on corporate staff, visiting patients in nursing homes, conducting home visits, giving immunisation injections and other services. Furthermore the Claimant worked exclusively for the Respondent. She did not supply materials and was paid for her labour only.

- Rosters

  The Claimant worked a regular roster every week. The Respondent as evidenced by its unilateral decision to cancel Saturday work controlled the rosters. The Claimant's hours of work were set by the Respondent and she worked those hours as directed.

- Remuneration

  The Claimant was in the main paid a percentage of her patients' fees except for a short period in March 2000 when she agreed to work at the Respondent's Mill Street Clinic. Whilst working at that place she was paid at the rate of $60.00 per hour.

  The Claimant was also paid a portion of the total Practice Incentive Payment (PIP) that the practice received from the Federal Government, paid each quarter based on her percentage of the total practice billings for the quarter.

  All fees and charges were set at a practice level following discussion between the doctors at the practice and the Respondent's representative held each October.

- Guaranteed Income

  The provision in the Services Agreement for the payment of a guaranteed income was reflective of the payment of a minimum salary regardless of the amount of patients seen. Notwithstanding that facility, the Claimant's income always exceeded the minimum guaranteed amount in any event.

- Lack of Goodwill

  The Claimant says that she did not derive, and was unable to derive, any goodwill from the practice, being demonstrative of her employment situation. The fact that the practice was that of the Respondent rather than the Claimant is gleaned by the following, inter alia:

  - She was not at the conclusion of the agreement permitted to take any of her patient medical files with her.
  - She was not permitted to copy patient medical files.
  - She could not employ another practitioner to fill in for her.
  - Her patients were contacted after she left the practice reminding them to attend the practice. The reminder letter purported to issue from the Claimant purporting that she was still at the practice despite that she had departed the same.

- Termination

  The circumstances of termination including the refusal to permit the Claimant to copy or retain patients files together with the direction given to her that she should not inform her patients that she was leaving the practice are demonstrative of her employee status.

Dr David Barkhouse

20 The affidavit of Dr Barkhouse sworn on 24 August 2004 was received into evidence by consent and tendered by the Claimant in support of her claim.

21 In his affidavit Dr Barkhouse addressed the nature of the relationship with the Claimant, the circumstances leading up to the creation of the relationship with the Respondent and his own Services Agreement with the Respondent. He also addressed certain matters raised in the affidavit of the Claimant.

22 Dr Barkhouse's evidence concerning his Service Agreement found at pages 4 and 5 of his affidavit is as follows:

> ***"My services Agreement***
>
> *30. At the same time I executed the Sale Agreement, I also entered into my Services Agreement.*
>
> *31. The percentages charged by the respondent for its services which are set out in the Schedule to my Services Agreement were generally accepted by me as representing the 'going rate'. They were similar to what other corporate entities had been offering to me in the past. In my experience, overheads generally represent 50% of the takings of a medical practice. The percentage charges vary depending on the level of services which the respondent provides, for example, the respondent charges 25% for services rendered for home visits. This difference in fee was included to reflect the lower level of services provided by the respondent to me if and when I perform home visits.*
>
> *32. I understand that Dr Sinclair entered into a services agreement, similar to the one that was offered to me, albeit for a shorter term.*
>
> *33. Following the Settlement Date, I have continued to conduct my medical practice, and have accepted the respondent's administrative services in accordance with my Services Agreement to enable me to do so. I do not report to anyone in the conduct of my medical practice.*
>
> *34. I have total control over what I do, and the way in which I do it. There is no review (formal or otherwise) of the decisions I make in my work by other doctors at the Centre, or by management of the respondent or Endeavour.*
>
> *35. I have no productivity budgets or profitability budgets. My earnings are dependent on the number of patients I see, and what I charge.*
>
> *36. There are guidelines for charges for particular services. The charges for corporate medical services are usually negotiated between Endeavour and the particular corporate client, and then advised to me. The travel medicine charges are similarly advised to me. I charge those fees for those services as set fees as they are in my interest to do so.*
>
> *37. As concerns charges for individual, non-corporate patients (such as general practice patients), I have and exercised discretion in what to charge them - e.g. to bulk bill, or to charge a private consultation fee.*
>
> *38. I can take, and have taken, sick leave or annual leave when I wish, and do not get paid when I do. I do not need to apply for leave although I usually give the respondent one month's notice of my intention to take leave so as to ensure the smooth running of the Centre. It is in my interests to do so as any impact on the efficiency of the Centre could undermine its appeal to patients and, consequently, the profitability of my medical practice conducted from it.*
>
> *39. I arrange and maintain my own professional indemnity insurance. I am responsible for my own taxation.*
>
> *40. Under the terms of the services agreement I have the right to issue reasonable directions to the administrative staff engaged at the Centre, such as receptionists. Directions are issued to them every day as part of the ordinary course of running my medical practice. Staff are directed to fetch files, bill patients, take messages, enter certain appointments, block out time in a diary, order supplies, and so on.*
>
> *41. Immediately following Settlement Date, the respondent took possession of, and control over, the patient files of the Barkhouse business. I don't personally now have any patient files. The respondent controls all patient files."*

23 I do not intend to review Dr Barkhouse's evidence concerning the pre Services Agreement arrangement with Dr Sinclair except to say that his evidence in that regard is consistent with that of the Claimant.

Kerry Furler

24 The Claimant called Kerry Furler. The Claimant in support of her claim tendered Ms Furler's affidavit sworn 29 June 2004 with certain sections struck out as agreed.

25 The Respondent employed Ms Furler as a registered nurse from November 1999 until February 2000 and then as a full-time practice manager until October 2001. She worked at 160 St Georges Terrace, Perth. Her function was to oversee the operation of the practice and report back to head office.

26 Her evidence is that reception staff scheduled all appointments for the doctors under her supervision. Further that the administrative and nursing staff together with doctors and head office staff held regular meetings concerning the operation of the practice and that head office staff were called in regularly to attempt to resolve disputes between doctors including those relating to doctors taking other's patients.

27 Ms Furler said that doctors worked regular rosters each week and were not permitted by the Respondent to change their roster. She said that in 2000 she was instructed by head office to cease operating on Saturdays. Dr Sinclair was advised of that decision only following the decision having been made. She testified that Dr Sinclair was directed to perform certain tasks off-site such as conducting flu vaccinations and performing nursing home visits.

28 Ms Furler said that doctors were paid a guaranteed minimum per quarter even if they did not work. In that regard she recalled Dr Bateman having taken six week's leave and still being paid the guaranteed minimum for the whole quarter.

29 When cross-examined Ms Furler conceded that she did not regard herself to be in a position to discipline doctors. She conceded also that she could not force doctors to do anything or indeed force them to work their rostered hours. In that regard she admitted that doctors would cause certain times to be blocked out of their appointment schedules and that they would

make themselves unavailable during those times. They would instruct receptionists in that regard. Receptionists could not countermand the doctor's instruction.

Respondent

30 The Respondent called two witnesses. They were Amanda Jayne Piercy and Trevor Green each employed by Endeavour Health Care Limited (Endeavour) of which the Respondent is a wholly owned subsidiary.

Amanda Piercy

31 Amanda Piercy is Endeavour's "*Operations Manager Primary Care – Western Australia (Southern Clinics)*". She was, from about 5 September 2001, responsible for overseeing the practice manager at the medical centre at 160 St Georges Terrace, Perth.

32 In her affidavit sworn on 2 August 2004 filed in response to the claim she said that patients who attended the medical practice were treated as private patients. However it was not uncommon for a private patient attending the medical practice, to over time, see more than one doctor. Such would often occur if his or her doctor was unavailable. In such circumstances in order to avoid waiting the patient would see another doctor. It was not uncommon for private patients to see more than one doctor over a period of a number of consultations. All the various doctors who saw the patient would use the same patient file for reference to notes of previous consultations, and would use that same file to record notes themselves of that particular consultation. Accordingly the patient files became shared files. The situation was similar in the case of corporate patients. Consequently the medical centre regarded itself as obliged to hold the file. As a result the patient file did not leave the centre without the patient's written permission.

33 With respect to billing Ms Piercy said that the doctor had complete discretion as to what to charge private clients. The Respondent had no control over whether the doctor bulk-billed or charged a private fee. The individual doctor always determined that. As to corporate clients the Respondent on behalf of the doctors as a service to the doctors negotiated a fee.

34 Ms Piercy testified that doctors could take leave at any time. There was no requirement to apply for leave. Although the Respondent requested that doctors notify it of their planned leave before taking the same for reasons associated with rostering and staff levels, there was no obligation to do so and no disciplinary action was taken or could be taken when that was not done.

35 If any complaints were received about doctors, the complaints would be passed on directly to the doctor. The Respondent did not have the ability to, nor did it try to discipline or otherwise manage the conduct of the doctor. The Respondent did not direct doctors to engage in continuing medical education or training. It did not pay for the same. That was left up to the individual doctor's sole discretion.

36 With respect to rosters and work hours Ms Piercy said that whilst doctors had their rosters formulated in accordance with their Services Agreements, the Respondent could not discipline or otherwise take action against a doctor who did not work strictly in accordance with the hours set in their agreements. Indeed doctors did not always make themselves available for all of the hours set out in their rosters. If a doctor wanted to take time off they simply did so. They did not need to obtain authority to do so.

37 Furthermore the rostered hours could only be varied with the consent of the individual doctor. A doctor could not unilaterally have his or her hours varied by the Respondent.

Trevor Green

38 The affidavit of Mr Green, sworn 30 July 2004, was tendered in evidence.

39 Mr Green, in his affidavit, addressed the nature of Endeavour's business and its connection with the Respondent. He also gave an historical overview of the corporatisation of the practice of medicine both in Australia and overseas and addressed current trends in that regard.

40 Mr Green, within his affidavit, also went on to interpret various aspects of the Services Agreement. That, in my view, was unhelpful as the agreement speaks for itself.

41 With respect to the issue of the Respondent's control over doctors, Mr Green said the following at pages 7 to 9 of his affidavit:

> *"32. GPs such as Dr Sinclair who conduct their practices under services agreement such as the Services Agreement are not subject to any supervision, and are not responsible to anyone within the services company. Neither I, nor any employees of the services company, can discipline such a GP, or counsel them on the manner in which they conduct their practice.*
>
> *33. There is no such thing as performance management by the services company of an underperforming doctor - e.g. one who is not earning sufficient fees. There are no productivity (gross billings) or profitability budgets set for GPs.*
>
> *34. The earnings of GPs are entirely dependent on the ambition and energy of the doctors to make money. GPs' billings can vary from day to day, and month to month. Billings depend on things like the season, the hours worked and the patient mix (eg, older patients take longer to see than younger patients). The number of patients a GP sees in any given hour will vary from GP to GP, with some GPs having a higher workload in terms of patients seen per hour, but less lucrative practice, and other GPs having a lower workload but higher billings.*
>
> *35. The services company has no ability to direct GPs to see certain patients, to direct GPs to bulk bill or privately bill, or to see a set number of patients within a given hour or time frame. At the extreme, there is nothing to stop a GP from seeing one patient a day should he or she so desire.*
>
> *36. Services agreements are usually for a set term. Short of material breach by a GP of their services agreement, the services company has no right to terminate the services agreement (although I have known the situation where individual GPs have walked away from services agreements, leaving services companies with very little, practical remedies for such breach).*
>
> *37. If an individual patient complains to a Practice Manager or to me about the medical treatment provided by a GP, the response given to that patient is that it is a matter they must pursue with the GP. If a patient complains in writing to me, my practice is to write back to the patient and inform them that they must take the matter up with the GP directly. I copy the GP in on the correspondence. There is no ability on my part, or anyone else within the organisation to resolve the complaint. If the patient remains dissatisfied then they are referred to the Medical Board of Western Australia.*

(v) Directions to Staff clause

38. Clause 4.2 of the Services Agreement provides that the GP can give reasonable directions. On a daily basis, GPs issue numerous instructions to staff, including the collection of patient files and instructions on how much to bill a patient. Receptionists and other staff, including Practice Managers (who are the managers of centres), respond to instructions, directions and requests from GPs as far as practically possible.

39. Patients, if they are new patients, are asked by reception staff to whom they first speak, whether they have a preference for any particular GP, or a male or female GP. They are then allocated to a GP by the reception staff to suit their stated preference, depending upon availability at the time, and any specific instructions from a particular GP (e.g. some GPs might only want to do 2 PAP smears a day and, so, if the patient requires a PAP smear, they will not be allocated to that GP if they already have 2 PAP smears to do on the day).

40. If such a patient subsequently wants another consultation, then the reception staff will offer them the GP they first saw, subject to availability, unless the patient requests a different GP for reasons of their own. If the GP is unavailable, then the patient is given the choice of waiting for that GP, or consulting another one.

41. Reception staff cannot, and do not, tell patients to consult a particular GP. It is left to the patient to choose which GP to consult, within the parameters referred to above.

(vi) Liability and Insurance clause

42. GPs are always responsible for securing and maintaining their own professional indemnity insurance. The services company plays no part in this."

42 When subjected to cross-examination on various issues Mr Green was less than forthcoming. I gained the view that he was a hesitant witness concerned with protecting the interests of the Respondent.

43 During the course of cross-examination he conceded that doctors the subject of the Services Agreement including the Claimant brought no more than "*labour*" to their relationship. He also somewhat reluctantly agreed there was nothing in the Services Agreement governing who had control and authority over patient files. He maintained that the reason behind the Claimant being instructed to desist from photocopying of patient files related to one of cost only. Further he could not explain why the Claimant was prohibited from copying her own patient files in her own time at her own cost. Mr Green's evidence concerning patient files was, in my view, less than satisfactory and aimed at justifying the Respondent's conduct, which on the face could not be supported by the Services Agreement.

Determination

44 The Claimant submits that the totality of the relationship between the parties following the execution of the Services Agreement can only be characterised as an employment relationship having regard to the indicia of what constitutes such a relationship as set out by the Full Bench of the Western Australian Industrial Relations Commission in ***The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v RB Exclusive Pools Pty Ltd trading as Florida Exclusive Pools 77 WAIG 4*** and as applied in ***Peters v James Turner Roofing Pty Ltd 81 WAIG 3093***. That is particularly so if this Court has regard to the nature of the relationship existing between the Barkhouse Trust and the Claimant prior to the Services Agreement and also to the representations made to the Claimant by Dr Barkhouse concerning what was to occur following the sale of his practice to the Respondent.

45 In my view the status of the Barkhouse Trust's relationship with the Claimant is irrelevant to my considerations in this matter. It is self evident that the Claimant knew that she would be entering into a new agreement with the Respondent and that the terms of the agreement were to be contained within the written Services Agreement. Indeed the Claimant negotiated her position in that regard with Mr Harris, the business broker engaged to conclude the transaction between the Barkhouse Trust and the Respondent. Furthermore, to the extent that it could be said that on the evidence it would be possible to find that the Claimant's relationship with the Barkhouse Trust was an employment relationship and that Dr Barkhouse represented to the Claimant that the circumstances would not change under the Respondent, it cannot, in any event, be established that Dr Barkhouse's representations were made on behalf of the Respondent. I agree generally with the submissions made by Mr Caspersz on point in concluding that the pre-existing relationship between the Barkhouse Trust and the Claimant is almost entirely irrelevant in my considerations of whether the relationship between the Claimant and the Respondent was one of employment or otherwise.

46 In reality, the Claimant knew immediately prior to executing the Services Agreement that her relationship with the Barkhouse Trust was to end and she was being asked to enter into a new and written agreement with the Respondent. She was given a copy of the agreement to read and consider. If necessary she could have obtained legal advice about it. The Services Agreement is not a complicated document. Indeed it is easy to read and is written in plain language. Given the Claimant's level of education she would have had no difficulty in understanding its terms. Indeed she did understand its terms. The Claimant executed the agreement quite willingly. It was open to her at the time to reject its terms but she chose not to do so. She accepted the terms of the agreement, which expressly describes the nature of the relationship to be one for the provision of services. It expressly disavows an employment relationship.

47 The Claimant says however that notwithstanding the terms of the agreement, the reality was that the agreement was "*a sham*" or "*a ruse*" because its actual operation was not consistent with its terms. Indeed the Claimant suggests that when the evidence relating to work practices and other aspects of the relationship are considered that the inevitable and inescapable conclusion that must be reached, notwithstanding the terms of the Services Agreement, is that at all material times the Claimant was an employee of the Respondent. That is so notwithstanding the Respondent's attempt at trying to label the relationship differently to that which it was. The Claimant submits that the Court should have regard for what Lord Denning MR said in ***Massey v Crown Life Insurance Co [1978] 2 All ER 576 at 579*** where he said;

> *" … if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it."*

48 In ***Federal Commissioner of Taxation v Krakos Investments Pty Ltd 133 ALR 545*** the Full Court of the Federal Court of Australia held per Hill J (Von Doussa and O'Loughlin JJ concurring) that:

> "The parties cannot determine the proper characterisation of a relationship by the label which they choose to attach to it. However, where a transaction is not a sham, and it is not suggested that the label used is not a genuine statement of the parties' intention, that label will be given its proper weight."

Australian Mutual Provident Society v Allen (1978) 18 ALR 385;52 ALJR 407; Narich Pty Ltd v Commissioner of Pay-Roll tax [1983] 2 NSWLR 597, applied.

49 The weight to be given to the Services Agreement is to be determined only after consideration of whether or not the same was a sham. In ***Sharrment Pty Ltd and Others v Official Trustee in Bankruptcy (1988) 18 FCR 449 at 454*** His Honour Lockhart J said:

> *"A 'sham' is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive."*

50 Can it be said that the Services Agreement is a sham? The answer is clearly, no. I say that because the Claimant was aware of the terms of the agreement. She is a well-educated, sophisticated woman not unfamiliar with business matters as is reflected in her taxation returns (exhibit 4). She had the opportunity to read and did read the Services Agreement. The Services Agreement is uncomplicated. It is quite readable and easily understood. The Claimant reflected upon its terms prior to signing it. She understood how the agreement would operate. In those circumstances it could not be maintained that the agreement was a ruse or a sham. The Services Agreement constitutes the agreement between the parties. The recital within the Services Agreement reflected the pre-existing situation. In my view the Claimant is now estopped from resiling from the recitals forming part of the agreement, which she freely entered into. The Services Agreement was not a sham or a ruse and accordingly should be given its full weight.

51 Having arrived at that conclusion, the matter does not end there because I need to consider whether the conduct of the parties in pursuance of the Service Agreement, notwithstanding its terms, was one which characterised a provision of services by the Claimant to the Respondent or whether, in reality, it constituted an employment relationship. The question of whether a worker is an employee or, alternatively, an independent contractor may be, having regard to the nature of the relationship, difficult to resolve. It can only be resolved by having regard to the type of approach taken by the Full Bench in ***Florida Exclusive Pools*** (supra). Accordingly a consideration of various indicia is necessarily required notwithstanding what the parties may have designated the relationship to be. It is the duty of this Court to determine the nature of the relationship. (see ***R v Foster and Others; Ex Parte The Commonwealth Life (Amalgamated) Assurances Limited (1951-1952) 85 CLR 138***).

52 The indicia to be considered, without being an exhaustive list, in determining the issue include the following:

- Control
- Hours worked
- Start and finish times
- Obligation to work
- Mode of remuneration
- Taxation and other deductions
- Business arrangements of the worker
- Provision of equipment
- Organisational arrangements; and
- Contractual arrangements

53 Quite often the indicia within any given relationship may be conflicting with some suggestive of an employment relationship and others of an independent contractor relationship. In ***Hollis v Vabu Pty Ltd (2001) 207 CLR 21*** the High Court of Australia considered the competing indicia.

54 At first instance the trial judge found that the bicycle couriers who worked for Vabu were not its servants or agents but were independent contractors with the result that Vabu was not liable for their negligent acts. That decision was confirmed on appeal. The majority of the High Court comprised of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ found that the Court of Appeal fell into error in classifying bicycle couriers as independent contractors in making too much of the circumstance that bicycle couriers owned their own bicycle, paid the expenses of running them and supplied many of their own accessories. Viewed as a practical matter bicycle couriers were not running their own business or enterprise nor did they have independence in the conduct of their operation. A consideration of the nature of their engagement, as evidenced by documentary evidence and the work practices imposed by Vabu, indicated that they were employees.

55 The Court found, inter alia, that a courier had little control over the manner of performing their work. They were required to be at work by 9.00 am and were assigned work in a roster. They were not able to refuse work. It was most unlikely that they could have delegated their work to others or worked for another courier company on the same day. Further the nature of Vabu's requirements was such as to leave the couriers with limited scope for the pursuit of any real business enterprise on their own account. Additionally, the fact that couriers were responsible for their own bicycles reflects only that they were in a situation of employment more favourable than not to the employer; it did not indicate the existence of a relationship of independent contractor and principal. Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude. Vabu's fleet controller allocated their work. They were to deliver goods in the manner in which Vabu directed. In this way Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business.

56 The Court also held that even considerations respecting economic independence and freedom of contract are not of themselves determinative of the legal character of the relationship.

57 That approach, it seems, was taken in the matter of ***G. Bibic v First Interstate Security (unreported, Full Bench of the Australian Industrial Relations Commission, Polites SDP, Watson, SDP and Smith C, delivered on 22 June 2000, Print S7290)***. In that matter there were a number of indicia that supported the contention that the relationship was not one of employment. They were:

- The applicant was required to establish a business entity before he could commence with the respondent.
- The applicant established a company specifically for the purpose.
- The company invoiced the respondent on the basis of hours worked.
- The respondent paid the company by cheque as a lump sum.
- The applicant was responsible for his own income tax, annual leave and sick leave.
- The applicant was responsible for the provision of his uniform.

- The respondent did not require exclusive use of the applicant's services.

58 Notwithstanding that, the Full Bench concluded that the substantive nature of the relationship, when examined, was that of employer and employee. It arrived at that conclusion because:

- There was evidence that a supervisor was on site during most of the time that the applicant was employed and that the supervisor directed the applicant as to any work to be performed that was out of the ordinary.
- When the applicant was engaged a representative of the respondent showed him around the site.
- The applicant was under an obligation to work on behalf of the respondent.
- The applicant was provided with a uniform.
- The applicant was unable to delegate shifts to others.
- The respondent determined the rosters.
- The respondent did not pay Holiday leave but it did pay work cover and superannuation.

59 It will be noted from the authorities referred to above that whether or not there is the existence of control is significant. However, whilst it is significant, it is not the sole criteria by which to gauge whether a relationship is one of employment. The approach that must necessarily be taken is to regard control as only one of a number of indicia that must be considered in the determination of the question. Mason J said in ***Stevens v Brodribb Sawmilling Co Pty Ltd [1985-1986] 160 CLR 16 at 24:***

"Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

60 In the present matter the Claimant argues that the Respondent's control over her was such that it is indicative of an employment relationship. The following manifested control, which is not an exhaustive list:

- Head office having control of the hours worked as indicated by the Respondent unilaterally ceasing Saturday work without consultation. (Evidence of the Claimant as corroborated by Ms Furler).
- Head office refusing to change the hours of Drs Bradford and Linfoot.
- The requirement that the Claimant attend certain off-site duties arranged without direct consultation with her.
- The direction that she work at the Mill Street Practice.
- The nature of the roster designating set days and times of work.
- Being directed to acquire an ABN.
- Seeing patients allocated by the Respondent.
- Being directed not to copy patients' records or remove them from the premises.
- Being instructed not to disclose to patients the fact that she was leaving or where she was going.

61 In determining whether the Respondent exercised control over the Claimant in the performance of her work it is readily apparent that the provision of rosters and set work times was not a manifestation of control. I say that because it is self evident that the ability of the Respondent to provide the services it contracted to provide could only be delivered if there was knowledge on the part of the Respondent of the hours that doctors would work. It was the commercial reality that there had to be some certainty in the designated hours in order to facilitate the provision of nursing and administrative services. In any event the evidence of Ms Piercy and Ms Furler establishes that doctors were able to unilaterally choose whether or not they worked on any given day. Further their evidence dictates that they were not subject to disciplinary action for failing to meet the rostered allocations. The refusal of the Respondent to change the agreed rostered hours of Doctors Bradford and Linfoot must be considered in light of the necessity to have certainty and continuity. Indeed the continued provision of reasonable hours was also necessary to ensure the Respondent's own viability. I recognise, however, that the unilateral cessation of Saturday work is indicative of control. However had the Claimant insisted, she could have demanded the continuation of Saturday morning work, in which case, the Respondent was bound to facilitate the same. In that way it will be seen that the Claimant always retained the upper hand and was in fact in control.

62 The contention that the direction to the Claimant that she was to work off-site in the provision of services was indicative of control is, in my view, not sustainable. I say that because it is quite obvious that, given concessions made by the Claimant, she worked off-site by agreement and with her concurrence. There is no suggestion that she was forced to work off-site or that she did so unwillingly or under protest.

63 The allocation of patients was not an indication of control but rather a necessary function of the Respondent in providing its services to the Claimant and the other doctors. Further I accept that the Claimant was not directed to obtain an ABN but rather was advised to do so in the light of the implementation of GST. In any event the provision of the ABN was a necessary requirement for the facilitation of her business activities as noted in the Claimant's tax returns.

64 Finally, dealing with the issue of control with respect to the copying and the removal of files, I accept that the Respondent had, as custodian of the records, a legitimate role to play in ensuring that the records were maintained. Additionally, its duty to other doctors, given the composite nature of the medical files required it to ensure that the files were not copied without consent. Furthermore, given the impact of a doctor's departure and the consequent potential loss of custom, one can well understand why the Respondent took the stance that it did in seeking to prevent disclosure by the Claimant of the fact that she was leaving and where she was going to. Whether the Respondent could legally do so is in doubt, but in any event the Claimant had present the ability to ignore such request and was not bound to follow the directive.

65 For those reasons and others such as the ability of the Claimant to choose not to work, take leave when she wanted, charge patients how she wanted and the amount she wanted is demonstrative of lack of control. I accept the evidence of Ms Piercy on such issues. Indeed if the Claimant chose not to work there was little the Respondent could do. She could not be disciplined.

66 Other indicia such as the mode of remuneration, the arrangement concerning tax, the failure to seek annual leave and sick leave and, importantly, the Claimant's failure to demand the same at the material times are all indicative of the fact that the Claimant ran her own business. She controlled the amount of income received, subject to deduction for administration, by deciding the method of charging and quantum of charging. In that regard she was in full control. Indeed the Respondent was very much subject to the Claimant's decision making in that regard. She had latitude and complete independence in that regard and the way she dealt with the patients. The facilitation of a minimum payment is, of itself, not indicative of

employment but rather a commercial carrot to encourage the Claimant to enter into the agreement. Given the relocation that occurred, that safety net provision had real commercial application, albeit that the Claimant was never caused to rely upon it. The Claimant's conduct in paying for her own professional indemnity insurance as well as her own disability insurance is also indicative of the fact that she was running her own business. She could not, in the circumstances, be said to be part of the Respondent's business. Indeed the reverse is probably more accurate. The fact that the Respondent provided the Claimant with equipment is in keeping with the contract for the provision of services and is not demonstrative of an employment relationship.

67 One of the main thrusts of the Claimant's argument is that if the arrangement were considered to be a true contract for services, it would result in the Claimant leaving the arrangement with nothing to show for it. That is, there is no goodwill. She would leave with nothing, however, that is not so. Indeed the Claimant left with her goodwill established in the relationship formed with her patients. Exhibit 5 reflects that many of her clients followed her to the new practice at Mill Street following her departure from St Georges Terrace. That is demonstrative of goodwill.

68 Finally, regard must be had to the Services Agreement itself. It clearly states the intention of the parties. The conduct of the Claimant does not vitiate it but rather reinforces it, particularly having regard to her taxation arrangements and her failure at the material times to demand the provision of the benefits, which she now seeks.

69 I am satisfied on the balance of probabilities that at all material times the Claimant was an independent contractor for whom the Respondent provided services. There was no employment relationship.

70 In view of the above finding the Claimant's claim does not succeed and she is not entitled to the sums claimed.

G Cicchini
Industrial Magistrate

BOARDS OF REFERENCE—Decisions of—

2004 WAIRC 13172

IN THE MATTER OF THE LONG SERVICE LEAVE GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN SCOTT LA ROSA
	APPLICANT
	-v-
	MCPBD PTY LTD TRADING AS MODERN JOINERY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 28 OCTOBER 2004
FILE NO.	BOR 2 OF 2004
CITATION NO.	2004 WAIRC 13172

Catchwords	Board of Reference – whether service continuous within the meaning of the Long Service Leave General Order
Result	Declaration made – Applicant's service continuous from 30 July 1991 until 19 June 2003
Representation	
Applicant	Ms M La Rosa (as agent)
Respondent	Mr C Basso

Determination

1 This is a determination made under s 48 of the *Industrial Relations Act 1979,* whereby the Commission constituted as a Board of Reference is to determine whether Steven Scott La Rosa ("the Applicant") can be said to have been employed "continuously" for a period of at least ten years by MCPBD Pty Ltd trading as Modern Joinery ("the Respondent") so as to be entitled to payment of pro rata long service leave under the provisions of the Long Service Leave General Order 58 WAIG 116 (see (2004) 84 WAIG 1).

2 The only issue in dispute between the parties is whether the Applicant had a break in service for a period longer than two months in 1993. The Applicant testified that he commenced employment with the Respondent in July 1992 and his employment ceased on 19 June 2003, or at the end of June 2003.

3 Clause 6(g) of the Long Service Leave General Order provides that service is continuous where an employee's employment is terminated by the employer on any ground other than slackness of trade if the worker is re-employed by the same employer within a period not exceeding two months from the date of such termination.

4 The Applicant says that he had a break in service which was shorter than two months in 1993 or 1994 and the Respondent says that there was a material break in service in 1993 for a period longer than two months. If the Commission finds that a break in service did not exceed two months at anytime during the periods the Applicant was employed from 1992 until 2003, the Applicant is entitled to be paid pro rata long service leave by the Respondent.

5 The Applicant says in his application, he commenced work for the Respondent in July 1991 and ceased on 30 June 2003, and that all the breaks in service he had in that period were for less than two months. However, in his evidence, the Applicant testified that his employment commenced in July 1992.

6 The Respondent concedes in his Notice of Answer that the Applicant commenced work in approximately July 1991 but says the Applicant resigned his full-time position in mid 1993 and went to the eastern states. The Respondent contends that

approximately six months later, he was re-employed until his employment was terminated in approximately June 1994 for three weeks. The Applicant was subsequently re-employed on 11 July 1994 until his resignation on 19 December 2002. He was re-employed again shortly after in January 2003 and then was continuously employed until 19 June 2003.

7 The Applicant testified that he was born on 11 February 1974. Consequently, in July 1992, he was aged 18. He was initially employed as a joiner and became a wood machinist in 1996. It was common ground at all material times that the Applicant was paid above the rates specified by the Furnishing Trades Industry Award. It is also common ground that the Applicant received yearly pay increases. The Applicant says that he received pay increases on his birthday, whereas the Respondent says that he received pay increases at various times. It is common ground that the Applicant was a valued and skilled employee. The Applicant says that he initially worked a 38 hour week but from sometime in 1994, when the Respondent moved into a new factory, he started working a 43 hour week. The Respondent agrees that overtime was worked every week from 1994, when a 43 hour week was implemented throughout the factory but says that overtime was worked sporadically by the Applicant prior to 1994.

8 The Applicant tendered into evidence group certificates for the following financial years which show the total gross amounts paid from July 1992 to June 1996 were as follows:

(a)	July 1992 to June 1993	$16,988.95
(b)	July 1993 to June 1994	$18,192.95
(c)	July 1994 to June 1995	$23,430.35
(d)	July 1995 to June 1996	$25,542.00

9 There are only two group certificates which state that the Applicant was not employed for a full year. The certificate for July 1993 to June 1994 states that the Applicant was employed from 1 July 1993 until 8 June 1994 and the group certificate for July 1994 to June 1995 states the Applicant was employed from 11 July 1994 until 30 June 1995. There is no other break in service shown in the group certificates.

10 The Applicant testified that in June 1993, he had a break in service which was brought about by a dispute with his employer about access to a joint bank account. In 1993, he entered into an arrangement with Mr Carl Basso, the owner of the Respondent, to open a joint account. The Applicant could not withdraw money from the account without the joint signature of Mr Carl Basso. The purpose of the account was for the Applicant to save money towards a deposit on a house. The Applicant needed $350 to $400 to fix the front end of his car. He asked Mr Carl Basso to access the account on more than one occasion and Mr Carl Basso refused. They had a heated argument and the Applicant told Mr Carl Basso that he would resign and he was going to Melbourne. The Applicant resigned and accessed his money. He says that he was re-employed by the Respondent 4.7 weeks later and his group certificates show that he had a break in service of 4.7 weeks when he resigned to obtain funds from his joint account.

11 The Applicant does not dispute that he had another short break in service in December 2002 and agrees this break in service was less than two months.

12 Mr Carl Basso testified on behalf of the Respondent that he has owned the Respondent's business since 1990. When the Applicant was first employed, he worked a 38 hour week, with occasional overtime and in 1994 the whole factory began to work a 43 hour week. Mr Carl Basso says that it is his recollection that the Applicant resigned sometime late in 1993, was off work for a few months and re-employed before Christmas 1993. He says that the Applicant received pay increases as an incentive to keep him employed and the timing of the pay increases were not linked to when the Applicant's birthday occurred each year.

13 Mr Carl Basso contends that when regard is had to the total amount of wages paid (as set out in the group certificates), a conclusion must be drawn that there was a break in service longer than two months in 1993 because the Applicant's wages increased substantially in the financial year that ran from July 1994 to June 1995. Further, Mr Carl Basso contends that there is a mistake in the group certificates, in that the break in service in late 1993, is not reflected in the group certificates. The group certificates were not prepared by Mr Carl Basso but by the accounts clerk. The accounts clerk did not give evidence in this matter.

14 Ms La Rosa, on behalf of the Applicant, contends that the break in service to obtain funds from the joint account occurred from 8 June 1994 until 11 July 1994 and not in 1993. She says the Applicant was mistaken in his evidence and that the group certificates should be accepted as evidence of service. Consequently, it is argued that a determination should be made by this Board of Reference that the Applicant's service was continuous within the meaning of clause 6 of the Long Service Leave General Order from July 1991 until the end of June 2003.

Conclusions

15 The most reliable evidence before the Board of Reference is the group certificates. The evidence given by the Applicant and Mr Carl Basso as to breaks in service in my view is too vague to be relied upon without regard to those certificates. Where their evidence is corroborated by the group certificates, I have accepted their evidence. However, in relation to matters where there is no dispute between the Applicant and Mr Carl Basso, I accept their evidence and contentions.

16 The group certificates show that in the 1992/1993 financial year (when the Applicant was 18 years old), he earned an amount of $16,988.95. It is uncontradicted that during this financial year the Applicant only worked occasional overtime. The next financial year (1993/1994) the Applicant turned 19 years old and earned $18,193.95. The evidence is not clear as to when the regular ongoing overtime commenced. It could have been in that financial year or it may have been in the first part of the next financial year when the Applicant turned 20 years old. If so overtime payment would have been greater in 1994/1995 than in 1993/1994. In 1994/1995, the Applicant earned an amount of $23,430.35. In any event, it is clear that in the previous financial year the Applicant would not have worked ongoing overtime each week for the entire financial year, as the previous financial year ran from 1 July 1993 to 30 June 1994. However, it is open for this Board of Reference to draw an inference that a substantial part of the increase in wages in the 1994/1995 group certificate can be attributed to regular and continuous overtime payments, as at least from the end of 1994 through to June 1995, overtime was worked each week.

17 I do not accept the Mr Carl Basso's evidence and contention that the Applicant had a break in service of about six months in late 1993. If it was the case that the Applicant had a break in service at the end of 1993, for a period of about six months, then it is likely that he would have earned less in the 1993/1994 financial year than the 1992/1993 financial year. Accordingly, I reject the Respondent's contention that the Applicant's break in service was for a period of six months. In any event, Mr Carl Basso, in his evidence, only testified that the break was for a "few months". He was unable to be specific about the period of time the Applicant had a break in service. In all the circumstances, where the group certificates show that there was only a break in service in June 1994 and July 1994, and where the group certificates show an increase in wages from year to year, I am satisfied that the Applicant has proved that his breaks in service were for periods of less than two months. In particular, I

am satisfied that the break in service to access the joint account was in June 1994 and not 1993, as the group certificates do not show that in 1993 there was a loss of wages of significance.

18 In all the circumstances, I will make a declaration that the Applicant's employment was continuous from 30 July 1991 until 19 June 2003. I will also make an order that the name of the Respondent be amended from Modern Joinery to MCPBD Pty Ltd trading as Modern Joinery. Further, I direct the parties to confer, in light of the declaration, as to the quantum of payment for long service leave.

2004 WAIRC 13228

IN THE MATTER OF THE LONG SERVICE LEAVE GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN SCOTT LA ROSA
	APPLICANT
	-v-
	MODERN JOINERY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 4 NOVEMBER 2004
FILE NO.	BOR 2 OF 2004
CITATION NO.	2004 WAIRC 13228

Result	Order made to change Respondent's name
Representation	
Applicant	Ms M La Rosa (as agent)
Respondent	Mr C Basso

Order

HAVING heard Ms M La Rosa, as agent, for the Applicant and Mr C Basso, on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

ORDERS that the name of the Respondent be deleted and that be substituted therefor the name, MCPBD Pty Ltd trading as Modern Joinery.

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

2004 WAIRC 13229

IN THE MATTER OF THE LONG SERVICE LEAVE GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN SCOTT LA ROSA
	APPLICANT
	-v-
	MCPBD PTY LTD TRADING AS MODERN JOINERY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 4 NOVMEBER 2004
FILE NO.	BOR 2 OF 2004
CITATION NO.	2004 WAIRC 13229

Result	Declaration made
Representation	
Applicant	Ms M La Rosa (as agent)
Respondent	Mr C Basso

Declaration

HAVING heard Ms M La Rosa, as agent, for the Applicant and Mr C Basso, on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

DECLARES that the Applicant's employment by Modern Joinery was continuous from 30 July 1991 until 19 June 2003 within the meaning of clause 6 of the Long Service General Order.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2004 WAIRC 13170

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MICHAEL CHARLES BOWLAY

APPLICANT

-v-

ALBERTS CAR STEREO

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 27 OCTOBER 2004
FILE NO. APPL 434 OF 2002
CITATION NO. 2004 WAIRC 13170

CatchWords Termination of employment – Harsh, oppressive and unfair dismissal – Show cause hearing – No appearance by applicant – Want of prosecution

Result Application dismissed for want of prosecution

Representation
Applicant No appearance
Respondent Mr J Brits of Counsel

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) of the Western Australian *Industrial Relations Act 1979* ("the Act"). The matter was listed for a show cause hearing on Friday, 22 October 2004 at which time the applicant did not attend and was not represented. Mr Brits on behalf of the respondent submitted that the matter should be dismissed. I required no fuller submission from Mr Brits as the applicant did not attend, the notice of listing clearly required the applicant's attendance and stated that the matter may be dismissed for want of prosecution if he did not attend, and the file displayed a history of a lack of progress with the application. I indicated that I would issue an order dismissing the application for want of prosecution pursuant to my powers under section 27(1) of the *Act*. It is the responsibility of the applicant to pursue his application without undue delay and to advise the Commission of any change in detail or status of the application, including any change of address.

2 The agent for the applicant advised the Commission by letter dated 21 October 2004 that they had no known address for their client, no instructions and hence would not attend at hearing. They also advised that they did not consider that the applicant would attend at hearing as he did not have a notice of hearing. The notice was sent on 7 October 2004 to the applicant care of their agent, Workclaims Australia. It would seem that the agent no longer acts for Mr Bowlay.

3 The brief history of the application is this. The application was lodged in the Commission on 12 March 2002. The matter came on for show cause hearing as the applicant, through his agent on record, had not responded to letters from the Commission on 30 August and 20 September 2004 asking for advice on progress with the matter. The application was previously listed for hearing on 3 and 4 June 2004 and was adjourned at the request of the applicant, with no objection from the respondent. A criminal matter was said to be pending and the applicant did not wish to be potentially prejudiced by having to conduct his case in this jurisdiction in advance of the criminal prosecution.

4 The agent for the applicant had earlier asked that the matter be deferred until sometime after 2 December 2003 as the applicant's criminal case had been deferred until that date. This was in response to an earlier letter from the Commission of 20 October 2003 asking for progress on the matter. Prior to that time the agent for the applicant had written to the Commission on 25 June 2003 indicating that their client had "finally contacted us and his criminal case has been adjourned until 13th and 14th October, 2003. We would be pleased if this application can be deferred until sometime after that date". The criminal matter had seemingly been originally due to be heard on 12 May 2003. The applicant's letter was in response to a letter from the Commission of 10 June 2003 indicating that the matter would be listed for show cause if the applicant did not advise the Commission what he intended to do with the application. The application was originally set down for hearing on 23 and 24 September 2002 and was adjourned at the applicant's request as the Commission was advised that "Mr Bowlay has been summonsed by the Police Service to the Court of Petty Sessions on matters relevant to his application." The original conference was on 10 May 2002.

5 In my view the applicant has not pursued this application with any diligence and has had to be prompted frequently by the Commission as to whether the matter could or should proceed. I then have no hesitation in finding that the applicant has not properly pursued his application and hence would dismiss the application pursuant to my powers under section 27(1) of the *Act*.

2004 WAIRC 13171

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MICHAEL CHARLES BOWLAY

APPLICANT

-v-

ALBERTS CAR STEREO

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 27 OCTOBER 2004
FILE NO APPL 434 OF 2002
CITATION NO. 2004 WAIRC 13171

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	Mr J Brits of Counsel

Order

THERE being no appearance on behalf of the applicant and having heard Mr J Brits of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed for want of prosecution.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2004 WAIRC 12747

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA ELIZABETH DOWNS-STONEY
	APPLICANT
	-v-
	VANESSA DAVIES, CEO DERBARL YERRIGAN HEALTH SERVICE, AND WALTER MCGUIRE PRESIDENT OF THE BOARD OF DERBARL YERRIGAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 10 SEPTEMBER 2004
FILE NO	APPLICATION 12 OF 2004
CITATION NO.	2004 WAIRC 12747

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Outstanding contractual entitlements - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) & (ii) – Summary termination – Credibility of witnesses – Procedural fairness – Jurisdiction of the Commission – s 29AA prescribed amount – Definition of salary for purposes of s 29AA – Authority to make contract – Whether contract valid - Whether fair go all round afforded – Contractual entitlements claim awarded
Result	Contractual entitlements claim awarded for time worked and notice
Representation	
Applicant	Mr P L Fraser of Counsel
Respondent	Mr G Stubbs of Counsel

Reasons for Decision

1 This is an application made on 7 January 2004 pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* ("the Act"). I note that the applicant has named two persons as the respondent. The naming of the respondent was not raised or challenged at any time. The parties have progressed the matter as if the respondent is truly named as Derbarl Yerrigan Health Service. This is a matter for a correcting order; if required.

2 The applicant Ms Diana Downs-Stoney was employed by the respondent as Director, Client Services in January 2002. She was dismissed from her employment on 13 December 2002. Ms Downs-Stoney then made application to the Commission, application 37 of 2003, and I convened conciliation conferences in relation to that dismissal. The matter could not be settled in conciliation and was referred to hearing. Commissioner Smith heard that matter and issued decisions on 8 April 2004 and 23 July 2004, 84 WAIG 2612 and 84 WAIG 2623 respectively.

3 In relation to application 37 of 2003, Ms Downs-Stoney was offered reinstatement to her position. This letter of offer is dated 17 September 2003 and is [Exhibit A1] in these proceedings. It reads as follows:

> "Dear Diana,
>
> Please be advised that the Executive Committee of Derbarl Yerrigan has resolved to offer you reinstatement to your position at Derbarl Yerrigan. I am authorised to negotiate your return with you.
>
> Our offer is that you return at the same salary conditions with no loss of your leave or other entitlements. You will be repaid the gap between the workers compensation and other funds you have received and your salary entitlements for the period you were away.
>
> You will also be reimbursed for any overtime approved before your departure from Derbarl Yerrigan.
>
> Salary and other repayments will be made on receipt of your acceptance of this offer.
>
> You have also requested coverage of your legal fees. Please provide Derbarl Yerrigan with receipts or invoices for unpaid accounts so that we may consider this. We agree to pay an amount up to $10,000.
>
> I understand you are keen to return to Derbarl Yerrigan. The Executive Committee and I welcome you back and look forward to working with you again. We hope to put this sorry business behind us and apologise to you for what has

happened. You return, of course, with our acknowledgement that you had no case to answer with respect to your termination. This will be made clear to staff of Derbarl Yerrigan and other relevant parties, following consultation with you.

To accept this offer, please sign below as indicated.

Yours sincerely,

Robin Yarran

CHAIRMAN

DERBARL YERRIGAN HEALTH SERVICES

17/9/2003"

(Page 21 of the applicant's book of documents)

"Dear Diana,

Please be advised that the Board of Derbarl Yerrigan Health Service has resolved to offer you reinstatement to your position at Derbarl Yerrigan. I am authorised to negotiate your return with you.

Our offer is that you return at the same salary conditions with no loss of your leave and other entitlements. You will be repaid a sum of money equal to the gap between the salary to which you would have been entitled during your absence, and the salary monies received from Worker's Compensation and other insurers.

You will also be reimbursed for any overtime worked for which approval was given prior to your departure from Derbarl Yerrigan Health Service. These payments will be made immediately upon your acceptance of this offer.

You have also requested payment of your legal fees. Please provide Derbarl Yerrigan Health Service with receipts or invoices for unpaid accounts. So that these may be paid or reimbursed. We understand that you estimate these costs to be circa $10,000.00, agree to pay your legal costs up to this amount.

I understand that you are keen to return to work at Derbarl Yerrigan. The Executive Committee and I welcome you back and look forward to working with you again. We hope to put all this sorry business behind us and apologise to you for what has happened.

Your return of course is with our acknowledgement that you had no case to answer with respect to the allegations made and the subsequent termination of your employment. This will be made clear to staff of Derbarl Yerrigan Health Service and other relevant parties, following consultation with you.

To accept this offer, please sign below as indicated.

Yours sincerely,

Robin Yarran

President

Derbarl Yerrigan Health Services

On behalf of the Board

17/09/2003"

(page 22 and 23 of the Applicant's book of documents).

I incorporate both the letters as they differ somewhat in text. Both were signed on the same day. The applicant wrote some changes by hand on the first letter and signed the letter. These changes plus others were made to the second letter; it was returned to the applicant and also signed.

4 The applicant resumed working for the respondent on 24 September 2003. She was then dismissed again on 4 December 2003 for serious and wilful misconduct. I will later cover the issue of whether the applicant worked during this period. The letter of termination is [Exhibit A3] and reads as follows:

"Dear Ms Downs-Stoney

Employment

We consider you are guilty of serious and wilful misconduct by breaching the Derbarl Yerrigan Health Service Code of Conduct as specified in your contract of employment.

We therefore consider you to be in breach of your contract of employment.

Accordingly, you are hereby summarily dismissed from your position as Director of Client Services, effective immediately.

We are aware of the existence of a purported contract of employment dated 23rd of September 2003. We deny that purported contract of employment is your contract of employment, or that Derbarl Yerrigan Health Service is a party to any such contract.

Without prejudice to the position of Derbarl Yerrigan Health Service as outlined in the preceding paragraph to the extent to which you believe that such a contract exists, that Derbarl Yerrigan Health Service is a party to such a contract and that you are employed pursuant to such a contract, Derbarl Yerrigan Health Service hereby rescinds any such purported contract.

Yours sincerely,

Vanessa Davies

Acting Chief Executive Officer"

5 As is evident from the above letter of dismissal, key issues in this matter concern the contract which was signed by Ms Downs-Stoney and Mr Robin Yarran, the then President of the respondent, on 23 September 2003 at the premises of the respondent, in the company of several Board members. Much of this contract is in terms similar to the applicant's original workplace agreement [Exhibit R1] but there are importantly terms in the new contract which are significantly more beneficial to the applicant (see for example clauses 7 and 15(f)). This contract is [Exhibit A2] and reads as follows:

"TERMS AND CONDITIONS OF CONTRACT

TERMS AND CONDITIONS OF CONTRACT

1. Parties:

This agreement shall be between Derbarl Yerrigan Health Service Inc, 156 Wittenoom Street East Perth WA 6004 ("the employer') and Diana Downs-Stoney ("the employee") who are signatories to this document as named in Clause 29 — Signatories.

2. Position:

Your position with the Derbarl Yerrigan Health Service will be as the **Director Client Services**. The position description and title may at times need to be altered by the Derbarl Yerrigan Health Service as a consequence of operational requirements of the Derbarl Yerrigan Health Service and such an altered position description will then become your duties. This position reports directly to the Chief Executive Officer of the Derbarl Yerrigan Health Service.

3. Key Responsibility:

To be responsible for the efficient and effective management of all service delivery units and the programs provided by the Derbarl Yerrigan Health Service. This will require a close working relationship with other members of Senior Management under the general direction Of the Chief Executive Officer.

4. Term:

The term of your contract of employment shall be five years. Your commencement date is the beginning of ordinary business hours on the 24th September 2003 while your contract of employment will cease at the close of ordinary business hours on nearest business day to the 24th September 2008.

6. Contract of Employment:

Your contract of employment with the Derbarl Yerrigan Health Service consists of the terms and conditions contained within this offer plus any of the Derbarl Yerrigan Health Service policies that may exist from time to time. This contract is separate from and excludes any and all awards and enactments, or provisions of them, unless they are expressly contained in this contract. This contract replaces any previous written or verbal offers, understandings, or contracts, and stands as a contract of reinstatement to the position from which you were unfairly dismissed.

6. Dispute Settlement Procedures:

a) The following procedure shall apply for the purpose of dealing with any question or dispute that arises between the employee and the employer about the meaning and effect of this Agreement, including any provisions implied in the Agreement by the Minimum Conditions of Employment Act 1993 which cannot be resolved by discussion between the parties.

b) The principle of conciliation and direct negotiation shall be adopted for the purpose of prevention and settlement of any industrial dispute that may arise.

c) The parties shall take an early and active part in discussions and negotiations aimed at preventing or settling disputes. Where a question or dispute arises the question or dispute is to be processed according to the following stages:

I. The matter shall first be discussed between the employer and the employee and resolved if possible within 3 working days;

II. If unresolved by (I.) above, the employee should give the employer a written statement of the matter in question or dispute and the employer should then give the employee a written response.

III. If the question or dispute is not resolved by (II.) above, either party may refer the matter to an agreed third party mediator for the purpose of mediation of the question or dispute.

IV. If the question or dispute is not resolved by (III;) above, either party may refer all or any of the matters to arbitration. The arbitrator will be a person nominated by the Chief Commissioner of the WA Industrial Relations Commission.

d) The employer shall meet cost of arbitration.

e) The decision of the arbitrator will be final.

7. Salary:

a) Your taxable salary on commencement shall be $71,967 per annum. Your salary will be paid fortnightly in arrears, by direct deposit into a bank account nominated by you.

b) After 12 months service both parties to enter into negotiations for a review of salary and conditions. Any increase will be subject to a satisfactory annual performance appraisal, and will be benchmarked on the median point of the AIM scale for Director positions for similar organizations, but at minimum of CPI, and thereafter each 12 months.

8. Copies:

The employee bound by this Agreement shall be given a copy of this Agreement.

9. Keeping Records:

a) The employer shall keep records showing;

I. The name of the employee

II. The date on which the employee commenced employment with the employer

III. The nature of work performed

IV. The salary, allowances and overtime paid to the employee

V. All leave taken by the employee

VI. All deductions and reasons for them

b) Each entry subject to subclause (a) above will be retained for not less than 7 years after it is made, even if the employee leaves employment with Derbarl Yerrigan Health Service or is no longer a party to this Agreement.

c) The employer will, in addition to the records referred to in subclause (a) above, maintain a copy of this Agreement.

10. Salary Packaging:

a) You will be entitled to package an amount of $15 450.00 ($30 000.00 grossed up) per annum, to be spent on items of personal expenditure, as agreed. Changes to agreed terms can only be made effective each quarter ie. July, Oct, Jan and April. This amount will not attract Income Taxation but will appear on your Group Certificate grossed up as a fringe benefit. No funds allocated for packaging can be taken in cash.

11. Superannuation:

The Derbarl Yerrigan Health Service shall contribute on your behalf an amount equal to the prevailing Statutory requirement, (currently nine per cent) of your salary package into a superannuation fund nominated by you. Derbarl Yerrigan Health Service policy, the Superannuation Guarantee Act and the rules of the fund will determine the conditions applying to superannuation.

12. Parking:

You will be allocated a dedicated parking bay at the Derbarl Yerrigan Health Service premises. This will be shown as an additional fringe benefit on your Group Certificate. The value is $1 040.00 grossed up. It is recognized that you are in possession of an ACCROD sticker as a result of your mobility disability.

13. Hours of Work:

a) As a minimum your ordinary hours of work shall be thirty-seven point five per week, Monday to Friday, 8.30 am to 5.00 pm, or as otherwise agreed.

b) Not withstanding the normal hours in Clause 13(a), some flexibility can be negotiated with your immediate Manager. It is acknowledged that you may wish to negotiate same variation to take account of your disability.

c) It would be expected as a Senior Manager, that hours worked in excess of 37.5 hours per week would be without the payment of overtime.

d) In exceptional circumstances, where significant longer hours have been worked, Time Off in Lieu (TOIL) can be negotiated with your immediate Manager.

e) If TOIL has been agreed in writing then any unused TOIL will be paid out on termination.

14. Other Duties:

You may be required by the Derbarl Yerrigan Health Service to perform duties in addition to or in place of those stated in your job description at and for any time period. You will be paid a Higher Duties allowance where you are required to occupy a more Senior position, or to add the additional duties of another position.

15. Termination:

Your contract of employment may be terminated before its expiry date as follows:

a) Termination By Notice from the Derbarl Yerrigan Health Service.

The Derbarl Yerrigan Health Service may terminate your employment by giving two weeks notice of the termination. The Derbarl Yerrigan Health Service may choose to pay out this notice period rather than have you work out the notice.

b) Termination By Notice From You.

You may terminate your employment by giving two weeks notice of the termination. Normally you would be required to work during this notice period by the Derbarl Yerrigan Health Service may agree to an earlier release of your duties.

c) Summary Dismissal/Serious Misconduct

The Derbarl Yerrigan Health Service may terminate your employment without notice, or payment in lieu of notice because of serious misconduct including but not limited to conduct which is fraudulent, criminal or dishonest, or breach of Clause 18, Code of Conduct, in this contract, on your part. dishonest, or breach of Clause 24, Code of Conduct, in this contract, on your part.

d) Unsatisfactory Performance or Behaviour

The Derbarl Yerrigan Health Service may terminate your employment with notice because of any; unsatisfactory work performance or behaviour, provided always that:

I. Derbarl Yerrigan Health Service has first provided a written statement of its specifics complaints or concerns relating to your behaviour or performance, and the changes which it requires to remedy these.

II. Derbarl Yerrigan Health Service has provided a period of not less than 30 days for you to remedy your behaviour or performance.

III.Derbarl Yerrigan has provided a written statement of continuing performance issues and appropriate counseling, training and support over a further period of 30 days.

IV. You have failed to remedy your behaviour or performance as specified in the statement/s of d I. and/or d) III. as above as determined by an independent arbitrator.

e) End Of Contract.

No notice is required and no compensation will be payable if your contract runs the full term specified in Clause 3.

f) Termination Payment.

If Derbarl Yerrigan Health Service terminates the employment for any reason other than serious misconduct in accordance with Clause 15 c) above, then Derbarl Yerrigan Health Service will (in addition to all accrued entitlements) pay a final payment equivalent to the pay of the otherwise unexpired period of your contract within 14 days of the date of such termination..

16. Vehicle:

a) Provision and Use:- The use of your own private vehicle for business purposes under the terms of the organisation's vehicle use policy, and with kilometerage paid at the prevailing Commonwealth Government rate or alternatively,

b) A Derbarl Yenigan Health Service pool vehicle appropriate to your position and mobility disability to be made available for you for your full private use.

c) You will be provided with a mobile phone for use in accordance with the policy.

d) You must retain, for the duration of your employment with the Derbarl Yerrigan Health Service, a valid Western Australian driver's licence.

17. Annual Leave:

a) Entitlement

Your entitlement to annual leave is four weeks for each year of completed service. Payment for your period of leave is at your ordinary rate plus a loading of 17.5 per cent on four weeks of leave.

In applying for the taking of Annual Leave, you shall give the Derbarl Yerrigan Health Service at least two (2) weeks' notice. In any dispute as to the time that you may take Annual leave, the Derbarl Yerrigan Health Service shall not refuse to allow you taking, at a time suitable to you, any period of Annual Leave accrued for more than twelve (12) months before that time.

Annual Leave may be taken on a pro rate basis provided that only the leave actually accrued is eligible to be taken.

b) Time of Taking Leave

You must request annual leave and have your request approved by the Derbarl Yerrigan Health Service before you go on leave. Where possible the Derbarl Yerrigan Health Service will try to grant annual leave for the time requested. However all annual leave will be grated at the discretion of the Derbarl Yerrigan Health Service and according to its operational requirements.

c) Payment On Termination

On the termination of your employment your accrued and pro rats annual leave, plus leave loading, and any approved TOIL entitlement will be paid out.

18. Sick Leave

a) Entitlement.

You are entitled to 12 days of paid sick leave per year. Your sick leave entitlement in one year accrues to the next year. These days are to cater for instances of genuine personal illness. However up to five days of this entitlement may be taken by you to enable you to be responsible for the care and support of a member of your family and/or household who is genuinely ill. Sick leave entitlements shall not be paid out if not taken. The Derbarl Yerrigan Health Service may agree, at is absolute discretion, to extend unpaid sick leave for any incapacity to attend for work due to illness that exceeds your sick leave entitlements.

b) Notification of Absence.

You are required to advise the Derbarl Yerrigan Health Service as soon as practicable if you are not able to attend work for reasons for which you are claiming sick leave.

c) Proof of Reasons for Absence.

You may be required to produce a medical certificate, in relation to absences of 2 or more consecutive days, or other proof of your inability to attend for work, because of that illness or to enable you to be responsible for the care and support of a member of your family and/or household that is genuinely ill.

19. Bereavement Leave:

You shall, on the death of a person where a close family relationship can be demonstrated, be entitled to five (5) days paid Bereavement Leave, including the day of the funeral of such relation, provided that you shall provide to the Derbarl Yerrigan Health Service, if so requested, evidence that would satisfy a reasonable person as to:

I. The death that is subject of the leave sought; and

II. The relationship of the employee to the deceased person.

The five (5) days need not be taken consecutively.

Bereavement Leave shall not be taken during a period of any other kind of leave.

Additional leave may be granted at the Derbarl Yerrigan Health Service's absolute discretion, on an unpaid basis by agreement.

20. Public Holidays:

You shall be entitled to paid leave for any Public Holiday listed below:

New Year's Day

Australia Day

Labour Day

Good Friday

Easter Monday

Anzac day

Foundation Day (the day appointed by proclamation published in the Gazette under the Public and Bank Holidays Act 1972)

Queen's Birthday (the day appointed by proclamation published in the Gazette under the Public and Bank Holidays Act 1972)

Christmas Day

Boxing Day

National Aboriginal Day (determined by NAIDOC Committee in the lst week of July)

Such leave shall be paid at the normal rate of pay.

21. Parental Leave:

The employee after more than 12 months continuous service, is entitled to up to 52 weeks unpaid parental leave following the birth or adoption of a child.

When returning to work the employee will return to the position held prior to the leave.

22. Other Leave:

You may request leave for purpose other than those that have been detailed elsewhere in this contract. The Derbarl Yerrigan Health.Service on their merits will consider requests of this type. Absolute discretion rests with the Derbarl Yerrigan Health Service to grant or not to grant other leave and if granted to allow paid or unpaid leave.

23. Long Service Leave:

Three months long service leave will be payable after each seven years of service.

24. Code of Conduct:

The Derbarl Yerrigan Health Service expects you to conduct yourself in certain ways at work. Specifically this means:

a) Always taking due care with the Derbarl Yerrigan Health Service property.

b) Avoiding and disclosing any potential or actual conflicts of interest that may or do effect the Derbarl Yerrigan Health Service.

c) Always behaving in a manner that does not prove of detriment or cause offence to, or bring disrepute on the Derbarl Yerrigan Health Service.

d) Obeying any rules and guidelines the Derbarl Yerrigan Health Service may make.

e) Always being honest in your employment and dealings with Derbarl Yerrigan Health Service.

f) Not engaging in any form of harassment, or victimisation, sexual or otherwise, towards any employee, contractee, client or Board Member of the Derbarl Yerrigan Health Service.

g) The maintenance of absolute confidentiality in relation to medical records.

25. Occupational Health and Safety:

You are responsible for the implementation and maintenance of all reasonable measures to manage the Derbarl Yerrigan Health Service occupational health and safety obligations and ensure the Derbarl Yerrigan Health Service complies with all relevant legislation.

26. Performance Management and Training:

You are required to maintain a performance management system for all Service Delivery Unit staff designed to ensure quality in the provision of services to the Derbarl Yerrigan Health Service clients. This system must include training identification for all staff that will provide for the maintenance of professional standards.

27. The Derbarl Yerrigan Health Service Property:

All property, including documents, of the Derbarl Yerrigan Health Service shall remain the property of the Derbarl Yerrigan Health Service, even though it may be retained in your possession during your employment as a consequence of your employment duties. You must not borrow, lend or possess any Derbarl Yerrigan Health Service property unless authorized by the Derbarl Yerrigan Health Service to do so. On the termination of your employment any and all Derbarl Yerrigan Health Service property in your possession is to be returned immediately to the Derbarl Yerrigan Health Service in good working order.

28. Reporting:

The Derbarl Yerrigan Health Service may require you to make a written or verbal report to the Derbarl Yerrigan Health Service regarding the performance of your duties, the Derbarl Yerrigan Health Service activities or any other such matter that it requires. The Derbarl Yerrigan Health Service may request that you make these reports: as described in your position description, on a periodic or ad hoc basis, or as it sees fit. You shall comply with all requests from the Derbarl Yerrigan Health Service for the making of a report and make such reports within any time frames that are set by the Derbarl Yerrigan Health Service.

29. Signatories:

'My organisation understands its rights and obligations under this Agreement, has freely entered into it and wishes to have this Agreement registered.'

Signature on behalf of:	Robin Yarran	23/09/2003
	Name	Date

Derbarl Yerrigan Health Service

156 Wittenoom Street

EAST PERTH WA 6004

Phone: 9421 3888

'I Diana Downs-Stoney understand my rights and obligations under this Agreement, have freely entered into it and wish to have this Agreement registered.'

Signature	Diana Downs-Stoney	23/09/2003
	Name of Employee	Date

Moonstone Farm

I Coast Road

WEST SWAN WA 6055

Phone: 9250 4518

Phone: 0402 160 452"

(pages 24 to 35 of the applicant's book of documents)

6 The claim of the applicant is that she was harshly, oppressively and unfairly dismissed on 4 December 2003 and in her application she states:

"I feel that I was unfairly dismissed as I was not afforded substantive or procedural fairness in the conduct of the termination of my employment.

My employer did not provided details of the allegations made, take note of the information provided in response, nor allow an appropriate time for a response to be prepared, nor allow access to documents required for a response to be prepared.

The employer has relied upon allegations which are not proven or which have been rebutted."

The claim for denied contractual benefits as specified in paragraph 24 is as follows:

"To be advised, but in terms of the contract which states that if termination is for any reason other than serious and gross misconduct, then the cash and non-cash benefits for the remainder of the five year contract are payable. Since no salary payments have ever been made the total being claimed is circa $500,000.00

Higher duties amount underpaid, overtime/time of in lieu and payment of sick leave and annual leave."

7 I will not go to the evidence about the manner of dismissal. It is the case that the matter turns on the circumstances surrounding the signing of the contract and thereafter, and whether the employer could have formed a reasonable view that the grounds they allege in the letter of termination are in fact correct. I must say from the outset that there is very limited evidence led on behalf of the respondent as to how the decision maker came to the view that Ms Downs-Stoney was guilty as charged, so to speak, or evidence of any actual investigation undertaken by the respondent to so form a view. There is no evidence that the matters as alleged were put to Ms Downs-Stoney prior to her dismissal. In this sense, at least procedurally, the dismissal of the applicant, if she were employed, was patently unfair. It is the case however that matters arising post termination can be taken in account in justifying a termination. This is more a case of whether the Commission can come to an independent view that it is probable that the applicant did act as alleged in the making of the "purported contract" (the respondent's term).

8 The remedy the applicant seeks is the payment of the contract for the full term. The applicant says the contract is a five year contract and provides that on termination except for serious or wilful misconduct the balance of the contract should be paid out (see clause 15(f)). The applicant denies that she was guilty of such misconduct and hence her claim, as outlined in the applicant's further and better particulars filed on 19 May 2004, and at paragraph 14 and 90 of the applicant's closing submissions, is as follows:

"14. Prior to her dismissal from her employment, the Applicant was receiving an annual remuneration package made up of approximately $72,000.00 in salary, together with further contractual benefits of approximately $30,000.00 comprising a vehicle, mobile phone and superannuation.

90. Under the Employment Contract the benefit to which the Applicant is entitled per annum is:

(a) Salary	$71,967.00
(b) Salary Sacrifice	$15,450.00
(c) Annual leave loading (17.5%)	$968.78
Subtotal	$88,385.78
Non cash benefits comprising:	
(a) Motor vehicle	$14,000.00
(b) Parking	$ 1,040.00
Subtotal	$15,040.00
Subtotal	$103,425.78
Plus superannuation at 9%	$ 9,308.32
Total	**$112,734.10**"

9 Mr Fraser for the applicant amended these claims in oral closing submission and submitted that the vehicle, mobile phone and superannuation were not part of the $30,000. Similarly he submitted that the total claim as per paragraph 90 (amended) should be:

(a) Salary	$71,967.00
(b) Salary Sacrifice	$15,450.00
(c) Annual leave loading (17.5%)	$ 968.78
(d) Superannuation 9% of $71,967.00)	$ 6,477.03
Total	$94,862.81
Multiplied by the 5 year period of the contact	
To give a total claim of	$474,314.05

10 The respondent sought by letter dated 31 March 2004 further and better particulars from the applicant. The applicant's counsel replied by filing these particulars on 19 May 2004. Item 13(b) in that document relating to a claim for higher duties was deleted by the applicant at hearing on 20 May 2004.

11 It is common ground that Ms Downs-Stoney was never paid for her period of "employment", being 24 September to 4 December 2003. The respondent denies that she was ever employed and that a contract was formed. The applicant characterises the claim as outlined as a claim for loss arising from the unfair dismissal. At least this is what I understand the submissions to be. Alternatively, it is a claim for denied contractual benefit, arising from the terms of the contract and the unfair termination of that contract, as per *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307. It is not said to be a claim for damages. Counsel for the applicant says that the amount of $474,314.05 is the loss suffered and is subject to deduction as determined by the Commission due to the applicant's duty to mitigate. It is the applicant's submission that the applicant was incapacitated, at least from the time of her dismissal and resulting from the dismissal, and has been unable to work since and will continue to be unable to work at least until the end of 2004. The unchallenged evidence of Dr Burvill supports this submission.

12 The respondent filed an amended notice of answer and counterproposal on 6 April 2004. I recite all of the notice of answer and counterproposal as it importantly covers the numerous contentions raised by the respondent. It states as follows:

"The Particulars of the Answer and Counter Proposal are:

1. The Respondent denies that the Applicant was employed pursuant to a contract of employment dated 23 September 2003.
2. The Respondent does not admit that Robin Yarran had authority to enter into agreements on behalf of the Respondent.
3. If, (which is not admitted), Mr Yarran had authority to enter into agreements on behalf of the Respondent then by a letter dated 17 September 2003 from the Respondent to the Applicant an offer was made to reinstate the Applicant ("Letter of Reinstatement").
4. The Respondent's Board did not ratify Mr Yarran's actions in relation to the Letter of Reinstatement.
5. If, (which is not admitted) Robin Yarran had authority to enter into an agreement with the Applicant regarding her reinstatement with the Respondent, it is an implied term of the agreement that the reinstatement was conditional upon the consent and agreement of the Funds Administrator and Steering Committee. Otherwise the terms of the agreement are contained wholly in writing and contained in the Letter of Reinstatement and the terms and conditions contained in the written employment contract between the Applicant and the Respondent dated 11 January 2002 and signed by the Applicant and Respondent ("WPA").
6. The Respondent admits paragraphs 1 to 10 of the Particulars of Claim ("Particulars").
7. The Respondent denies paragraphs 11 - 15 of the Particulars.
8. The Respondent denies paragraph 16 of the Particulars and says that pursuant to Clause 13(c) and (d) of the WPA the Applicant was to work 37.5 hours per week and it was expected that any hours she worked in excess of 37.5 hours per week would be without the payment of overtime.
9. The Respondent denies paragraph 17 of the Particulars and says that the Applicant's salary was to be $63,253.00 per annum, to be paid fortnightly in arrears pursuant to Clause 7 of the WPA.
10. The Respondent admits paragraphs 18 and 19 of the Particulars.

11. If, (which is not admitted), the Applicant was in fact employed by the Respondent then the Respondent denies paragraph 20 of the Particulars and says the Applicant was summarily dismissed for serious and wilful misconduct by a letter from the Respondent to the Applicant, dated 4 December 2003.

Particulars of Misconduct

(a) On or about 17 September 2003, the Applicant agreed to the terms contained in the Letter of Reinstatement.

(b) On or about 23 September 2003 the Applicant presented to Robin Yarran, an officer of the Respondent, the New Contract which she represented as being a contract of employment which incorporated the terms contained in the Letter of Reinstatement ("Representations").

(c) Mr Yarran is semi-literate and this was known to the Applicant.

(d) Mr Yarran signed the New Contract on the basis of the Applicant's Representations.

(e) The Applicant's Representations were untrue and the New Contract in fact differed materially from the terms contained in the Letter of Reinstatement and these material differences operated to the advantage of the Applicant and the disadvantage of the Respondent.

12. The Applicant grossly breached her duty of good faith and honesty in making the Representations, which Representations constitute serious and wilful misconduct pursuant to Clauses 15(c) and 21(d) and (e) of the WPA.

13. Serious misconduct is grounds for summary dismissal pursuant to Clause 15(c) of the WPA.

14. The making of the Representations was a breach of the Derbarl Yerrigan Health Service Policy/Procedures ("Code of Conduct").

15. A breach of Code of Conduct is grounds for summary dismissal pursuant to Clause 15(c) of the WPA.

16. The Respondent denies that the Applicant was employed pursuant to the New Contract and states that if, (which is not admitted) the Applicant was employed by the Respondent, then it was pursuant to the terms contained in the WPA.

17. The Respondent does not admit that Mr Yarran had authority to enter into the New Contract on behalf of the Respondent.

18. The Respondent's Board has not ratify Mr Yarran's actions in relation to the New Contract.

19. If, (which is denied), Mr Yarran had authority to enter into the New Contract with the Applicant, it is an implied term of the New Contract that the New Contract was conditional upon the consent and agreement of the Funds Administrator and Steering Committee.

20. Mr Yarran was in a position of disadvantage when dealing with the Applicant because he was semi-literate and unable to read and comprehend the New Contract.

21. The Applicant took advantage of Mr Yarran as the Applicant knew that Mr Yarran did not have the capacity to read and understand the New Contract.

22. The Applicant's conduct as pleaded in paragraphs 20 and 21 above was unconscionable.

23. Mr Yarran did not know what he was signing when he signed the New Contract because he was semi-literate.

24. The Applicant used her position to pressure and influence Mr Yarran to sign the New Contract and the Applicant exerted undue influence on Mr Yarran.

25. The Respondent does not plead to paragraph 21 of the Particulars.

26. The Respondent denies paragraph 22 of the Particulars save that the Respondent admits that this is the second unfair dismissal claim lodged by the Applicant against the Respondent.

27. The Respondent denies paragraph 23 of the Particulars and says the Applicant is not entitled to the remedy she seeks or punitive damages or any remedy or damages at all.

28. If. (which is denied). Mr Yarran had authority to enter into the New Contract with the Applicant it was an express or implied term or condition precedent of the New Contract that the Applicant be fit to carry out her duties under the New Contract and that the applicant satisfy the Funds Administrator and Funding Bodies as to the Applicants fitness to perform the duties under the New Contract.

29. The Applicant did not satisfy the Funds Administrator and Funding Bodies as to the applicant's fitness to perform the duties under the New Contract.

30. The Applicant has lodged a workers' compensation claim against the Respondent claiming that she is totally incapacitated for work with effect from on or about 4 December 2003 and has suffered from a disability from on or about the 1st October 2003.

31. As a result of the Applicant suffering a disability and unfitness for work the Applicant has was not fit to carry out her duties under the New contract

32. Further and in the alternative, the Applicant's unfitness for work has frustrated the New Contract.

33. Further and in the alternative the applicant misrepresented to the respondent that the applicant was fit to carry out the duties under the contract.

34. Further and in the alternative, the Applicant is only entitled to a payment of sick leave pursuant to Clause 18 of the New Contract as accrued under the New Contract up to a maximum of 12 days paid sick leave per year.

35. Further and in the alternative, the unwillingness of the Funds Administrator and Funding Bodies to agree to the Applicant's employment and to pay the Applicant pursuant to the terms of the New Contract frustrated the New Contract.

36. If, (which is not admitted), the New Contract was enforceable between the parties then the Applicant by choosing to continue performance under the New Contract without payment has waived her rights to payment under the New Contract.

37. The Applicant's salary exceeds the jurisdictional limits of the Commission and the Commission has no jurisdiction to deal with this matter."

13 The matter of jurisdiction concerns the salary cap and is a matter that on the submission of the respondent was to be dealt with in closing submission after evidence. An issue arose during the course of the hearing regarding a document faxed to the respondent on 13 April 2004 and copied to the Commission on 14 April 2004 and marked without prejudice. I ruled this document could not be used at hearing because it arose in the context of the conciliation whereby I asked the applicant to put forward what she claimed in settlement in conciliation. The document is rightly marked without prejudice and in my view could not be used in hearing. The respondent following this ruling sought an adjournment on the basis that in Mr Stubbs' submission he had approached the case on the basis that it was a three year contract and not a five year contract. However, the claim of the applicant was made plain in the application and in the opening submission of Mr Fraser for the applicant.

THE EVIDENCE

14 The matter was heard over a number of days 19, 20, 21, 28 May 2004 and 9, 10 August 2004 with the parties' closing submissions heard on 6 September 2004. Evidence was given on behalf of the applicant by Dr Dennis Tannenbaum, Dr Peter Burvill, Ms Abigail Harry, Mr Robin Yarran, Mrs Patricia Yarran and Ms Diana Elizabeth Downs-Stoney. The respondent called evidence from Mr Michael O'Kane, Mr Alan Philp, Ms Margot Tobin, Dr Richard Yin, Mr Neville Collard, Ms Sandra Harben, Mr Terry Murphy, Mr Hadyn Lowe and Mr Shane Devitt.

15 It is the evidence of the applicant that she first commenced employment with the respondent on 7 January 2002 in the position of Director Client Services (see Exhibit R1, Workplace Agreement, pages 62 to 72 of applicant's book of documents). She received a salary of approximately $63,185 and also a salary sacrifice component of $15,450. In addition she received use of a vehicle, mobile telephone, laptop and a parking spot. Her duties were to institute policies and procedures for medical services to meet the quality and productivity requirements of the respondent. The organisation at that time had discovered a deficit in excess of 3 million dollars and part of her duties was to ensure accountability of the organisation. About the time of her appointment the CEO and the manager of clinical services left and so Ms Downs-Stoney was made acting CEO for six months.

16 In April 2002 the applicant's working life became very difficult. There was considerable industrial action and a 3 day stop work meeting. Ms Downs-Stoney says that at that time she was physically and verbally abused. She says she was blamed by some for the departure of Mr Wilkes and she was bullied by some staff and committee members. At that time she says the organisation had no management skills. There were no policies or protocols for good corporate covenance and the service provision was not good. The organisation had considerable corruption and nepotism. Ms Downs-Stoney says she worked long hours and was subject to abuse. Her health was affected. She sought medical attention and was diagnosed with high blood pressure and depression. She also suffered from sleep disorder. Then on 13 December 2002 she was dismissed amidst a series of allegations against her. I do not go to the allegations.

17 Ms Downs-Stoney says that she had no contact with Board members from that time until approximately April/May 2003. Some Board members approached her because they wanted to know why she was not still working for the respondent. The Board members were Betty Dan, Robin Yarran, Pat Yarran and Abigail Harry. Other persons involved were Sandra Harben, Ollie Rundle and Dulcie. Ms Downs-Stoney gave them a copy of the allegations made against her. She had denied any wrongdoing. The Board members indicated that the allegations should be investigated and Mr Neville Collard approached a person he knew, a Mr Haydn Lowe, to do the investigation. The Board members also asked the applicant to advise them about the President and the then CEO, Ms Marian Kickett. The applicant advised the Board members that they should seek legal advice and assisted them by directing them to some legal advisers. The Board members asked Ms Downs-Stoney if she could return to work for the respondent. The applicant agreed to do so on the basis there was a public apology made to her and her contract was changed to ensure that she was more secure if the same thing happened again.

18 Ms Downs-Stoney says that she had several discussions with the Board members. Apart from the ones mentioned previously, Mr Clarrie Isaacs was also involved as was Ms Lorraine Bellotti. In about July 2003 Mr Robin Yarran became the President of the Board, Mr Isaacs was the Secretary, Ms Harry was Treasurer and Mr Neville Collard was Vice President. She met with Board members at her home on Sundays. Ms Downs-Stoney waited for Mr Lowe to complete his investigation report and later Ms Downs-Stoney received a letter advising her that the Board wanted to reinstate her and repay her benefits [Exhibit A10]. Ms Downs-Stoney says she advised the Board members that the contract would have to be done by a professional person. She was asked to provide her contractual requirements to the lawyer and she did that. The Board agreed on these and the contract was sent to a typist. The typed contract was then faxed by the applicant to Mr Isaacs on Friday, 19 September 2003. Prior to this Ms Downs-Stoney received a telephone call on 17 September 2003 saying that the Board wanted to give her a letter offering her reinstatement. Ms Harry, Patricia and Robin Yarran and Clarrie Isaacs came to her home with the letter and it was signed by the applicant. The letter is Exhibit A1. The letter includes handwriting by the applicant and initials by Pat Yarran. Following this Ms Downs-Stoney attended at the respondent's premises in the room behind the reception and signed the contract [Exhibit A2] in the presence of Mr Isaacs, Mr Robin Yarran, Mrs Pat Yarran, Ms Harry and perhaps Ms Bellotti.

19 The applicant says that these were all current Board members at that time. She says that previously she had discussed with the Board the term of three years in the contract. However, she was advised that the Commonwealth Government, which is the funder, wanted continuity of management and hence five years was suggested. The Board wanted the applicant to provide a medical certificate indicating that she was fit for work. She obtained this from her general practitioner. She also attended a psychiatrist to obtain a fitness for work report. This report from Dr Tannenbaum is Exhibit A6. There were no other queries regarding her health. Ms Downs-Stoney says that her health at the time was excellent and she was relieved to have been publicly vindicated. She felt at the time that she had a Board who would support the changes that she believed were necessary to make. She resumed her employment on 24 September 2003. At that time the position of Director Client Services was filled by another person and Ms Downs-Stoney says that she was asked to act as the Deputy CEO. This decision was then ratified by the Board at the next Board meeting that night or the next day. Ms Downs-Stoney says she then acted in the position of CEO when Ms Harben was terminated on 16 October 2003. She was asked to act as the CEO until a new CEO, Ms Vanessa Davies commenced. She did this and until the time of her termination on 4 December 2003 was acting as the deputy CEO.

20 Ms Downs-Stoney gave a copy of her contract to Ms Sandra Harben who sent the contract to Ms Tobin who created a pay record for the applicant. However, the applicant was not paid as there was a dispute regarding the provision of funds. The Funds Administrator, Mr Shane Devitt had said that the applicant was not authorised by the funding body to be paid. The respondent was under funds administration at that time. Then in late October the funding body agreed that Ms Downs-Stoney could be paid out of Medicare income over which the funding body had no control. The applicant says that the funds administrator could control funds for the respondent but the day to day management was up to the CEO and Board.

21 Ms Downs-Stoney says that the Board sought advice from Mr Stubbs and Mr Lowe. Mr Lowe attended the steering committee meetings. Mr Stubbs wrote a letter to the Commonwealth indicating that they could not refuse to pay her salary. The Commonwealth refused to pay her salary as they believed she had a disability and was a workers compensation risk; hence

they could not risk public money and the insurance premiums would go up for the organisation. Ms Downs-Stoney says the Commonwealth and the State then agreed that she could be paid from the Medicare funds which were not controlled by them. The Board advised her of this and gave her a copy of the letter.

22 She says that when she returned to the organisation it was in crisis. Her duties involved developing an inventory of medical equipment, some of which had gone missing. There was no control over the key to the poisons cabinet. She investigated risk management approaches to the organisation. She also had to attend a lot of meetings both in the office, at Royal Perth Hospital and interstate.

23 On 4 December 2003 Ms Downs-Stoney says she attended a funeral and went to lunch. At 2:15pm she returned to her office, she was advised she had to meet with Ms Davies and Margot Tobin at 3:00pm. At that meeting she was given a letter of termination. It indicated that she was summarily dismissed for breaching her contract and misconduct. She asked what the letter meant and Ms Davies was not sure. She returned the goods signed documents and was given a lift home. Exhibit A3 is the letter of dismissal.

24 Ms Downs-Stoney says that Ms Davies and Ms Tobin said that they did not know why she was dismissed but it had to do with the signing of her contract. They indicated someone would get in touch with her and explain it to her. Ms Downs-Stoney spoke to Mr Lowe. He indicated to her that it was said that she had tricked the Board into signing the contract, namely that she had forced them to sign something that they did not understand and did not want. The applicant said that she was very upset as she had gone to great lengths to make sure she knew what the Board wanted.

25 The applicant says that she had a performance appraisal and her performance was good. She said that at the Annual General Meeting of the organisation in November the people who supported her stood for re-election. On her dismissal Ms Downs-Stoney says her health was not good. She says from the time of the new Board there were machinations in the organisation and she was not clear what was required and Ms Davies became distant. She was not given information that she needed. She consulted Ms Davies and was told not to worry as the organisation would not do it to her again, meaning dismiss her. She found this period stressful and hard and found it hard to focus. She reported her concerns to Ms Davies. She did not get any feedback on her duties.

26 The applicant says her return to work was well publicised [Exhibit A4]. Following her dismissal her health was not good and she saw a psychiatrist and has been taking medication for depression. This started in January 2004. At present she cannot work due to her ill health.

27 Under cross examination Ms Downs-Stoney said that she had originally signed a contract on 11 January 2002 [Exhibit R1]. Prior to joining the respondent she worked for the Commonwealth Health department and was involved with the funding body responsible for the respondent. As such she was aware of funding contracts and aware that a funds administrator could be appointed. This ability to appoint is represented in clause 9 of the funding contract; which has now been amended to clause 10. The funding administrator is there to prevent an organisation spending money that they do not have or spending money for reasons not in accordance with the contract. She says the funds administrator cannot impose restrictions on what, when and how to expend funds. She says if the Commonwealth approves a budget for an organisation; the new organisation is responsible for expending monies as per the contract. So long as the expenditure is within budget and in accordance with contract then it is okay. Ms Downs-Stoney was involved in the steering committee which assisted the respondent when she worked for the Commonwealth. At that time the organisation was under funds administration. The funds administrator was involved with the steering committee and took direction from the steering committee. The funds administrator is responsible for signing cheques. The funds administrator in January 2002 and then later in September 2003 was Shane Devitt. There was also another funds administrator.

28 Ms Downs-Stoney says that in 2002 she attended meetings of the steering committee. She says the funds administrator had authorised expenditure of funds but not all funds. At that time the respondent had 150 employees and a turnover of about 10 million dollars of which 8 to 9 million dollars came from Commonwealth and State funding.

29 The applicant says that she settled her workers compensation claim with the respondent's insurer for about $45,000. Ms Downs-Stoney says that prior to joining the respondent she knew Robin Yarran but she was not familiar with Pat Yarran or Abigail Harry. She had known Lorraine Bellotti for about five years. She did not form a friendship with either Pat or Robin Yarran or Abigail Harry. At the time of her first dismissal the applicant says the respondent was not under funds administration. She was contacted in April 2003 by Sandra Harben. The Board members had contacted her regarding concerns about the then CEO, Marion Kickett and President, Robert Isaacs. The applicant agreed to meet some Board members and agreed to assist them. She met at her home with Betty Dan, Abigail Harry, Ollie Rundle, Pat and Robin Yarran and perhaps Clarrie Isaacs. At that time Ms Downs-Stoney was ill and at that meeting the Board members had minutes of Board meetings and several letters from the Board to Mr Isaacs, from Ms Kickett to Mr Isaacs and from Ms Kickett to the Board. There was also a copy of an apprehended violence order on behalf of Ms Kickett against some Board members. Board members asked the applicant what they should do. The respondent was not under funds administration at that time. Ms Downs-Stoney says that Mr Robert Isaacs resigned from the Board in about late June or early July. In the following period the applicant says that she had about six or seven informal meetings with the Board members. This led to her receiving the letter of 17 September 2003 offering to reinstate her [Exhibit A1]. She says she attended a Board meeting prior to that time. Ms Downs-Stoney says that she became aware that the respondent had been placed under funds administration. Robin Yarran became President, Abigail Harry was the Treasurer and Betty Dan was the Secretary of the Board. Mr Robert Isaacs had asked that the funds administrator be appointed to get some control over the Board. He thought that the Board was out of control. Ms Downs-Stoney encouraged the Board members to seek a lawyer and arranged for them to meet a lawyer which was Mr Stubbs. At that time the Board members were denied access to facilities of the respondent.

30 Ms Abigail Harry gave evidence that she sat on the board of the respondent from 2001 to 2003. In May 2003 Mr Haydn Lowe was appointed to investigate the circumstances behind Ms Downs-Stoney's initial termination. A report was prepared and tabled at a board meeting around 11 August 2003. Ms Harry along with Mr and Mrs Yarran and Ms Harben spoke to the applicant in August about her coming back to help the organisation. There were about three discussions which occurred at the applicant's home. A meeting occurred on 11 September where it was resolved by the board to offer employment to the applicant. Ms Harry says that she discussed with the applicant about returning to work and the applicant advised her that she would come back, but only if, she had a secure contract (Transcript p.240-241). She says that they discussed negotiating a new contract and changing the contract to secure the applicant's position with the respondent:

> "Well, they talked about 3 years at first but we wanted a 5-years contract to bring the stability of the organisation" (Transcript p.241).

31 During these discussions present also were Mr Isaacs and Mr Yarran. She says that they also offered the applicant a greater amount of remuneration. She says that the contract was signed on 23 September 2003 in the presence of Mr Isaacs, Mr Yarran, herself and the applicant; and Ms Bellotti who was coming in and out. She agrees that she saw a contract with a three year term and says that on the day of signing there was discussions around a five year term as there had been discussions at board level. Prior to 23 September 2003 she had seen the contract and there had been discussions at board level about it. Money for the organisation came from the State and Commonwealth and she thought that the applicant would be paid out of the Medicare monies. She had discussions with the Funds Administrator, Shane Devitt who had no difficulty with the applicant being paid. The applicant was not paid during her second stint of employment. The board wanted to pay her but the funds administrator did not. She says she spoke to Mr Devitt, and she went to Bankwest to arrange for the Medicare monies to be transferred into a new account and the applicant would be paid out of that. She says that she believes she went to the bank towards the back end of the applicant's second stint of employment. She says that the State or Commonwealth wanted the applicant to present a medical certificate to confirm she was fit for work

32 Under cross examination Ms Harry says that she had some difficulty returning from the Torres Strait in March. She contacted Ms Downs-Stoney by telephone to assist with her son's schooling arrangements. During this discussion Ms Downs-Stoney advised her that she had been terminated from the respondent. She was picked up that evening at the airport by Ms Downs-Stoney and they had a discussion about Ms Downs-Stoney's termination (Transcript p. 254-255). She next saw the applicant when she went to her home in May, present with her were Sandra Harben, Ollie Rundle, Robin and Patricia Yarran. She agreed after some questioning that the applicant had written letters on their behalf to obtain legal advice (Transcript p.258). There was no discussion with the applicant at this time about her returning to work, however they wanted her to come back and wanted to hire an investigator to examine the first termination. She says that she did not speak to the applicant about returning to work until the investigation was completed, she then says:

> "No. Just hold on. Okay. So the situation is that you're saying that you did not speak with her about bringing her back prior to - - or in May of 2003. Is that right? Let's clearly understand your evidence. You did not speak with her about that. Is that right?---In May?
>
> Mm?---I spoke about it.
>
> With her?---I said that to have the stability back and for the organisation to go ahead it would be best if we look at the investigation and then having Diana Downs-Stoney back, not at this stage. Diana said she would not come back" (Transcript p.260).

33 When the funds administrator returned the second time Ms Harry remained the treasurer; she says, in name only, and she understood that the administrator had control of the funds and approval of any expenditure. She agrees that there were further meetings with the applicant at her home following the meeting in May during these meetings present were Mr Yarran, Mrs Yarran, Ms Harben and Mr C Isaacs. She says the only discussions that occurred were those at the applicant's house, except for the offices at Dwyer Durack.

34 She says it was Mr Collard's idea for an investigation to occur and this was about May 2003. She had no contact with the applicant while this was occurring.

> "Not with her. Okay. So there was no meetings while Haydn was investigating. Were you talking to Diana over the phone?---No. I only phoned her that night or - - one of the meetings over the contract. That was all" (Transcript p.265).

35 She agrees that after Mr Lowe's report a number of meetings occurred at the applicant's home.

> "Okay. Now, that report, if you look at it, is dated the 4th of August 2003, the last page. So what you're saying is that the meetings that took place at Diana's house after that initial one in May occurred some time between the 4th of August 2003 and the 23rd of September 2003. Is that correct?---Mm" (Transcript p.266-267).

36 She says that there were three to four meetings. She agrees that at these meetings there were discussions about the applicant's return to work. She further agrees that there was discussion generally about what was occurring at the workplace. She says that there was no discussion about the funds administrator (Transcript p. 268). She agrees that at a board meeting on 18 August 2003 a resolution was passed to do nothing in relation to the applicant and leave it to the new board. She says she discussed with the applicant what had occurred during the board meeting. She denies discussing options considered by the board or the resolution passed. She says that she told the applicant she was thinking of resigning and that she was not happy with the decision of the board (Transcript p.276). She had no discussion with the applicant following the 4 August 2003 board meeting. She denies attending a steering committee meeting on 4 September 2003; she says that she was not aware they were still involved.

37 Ms Harry says that there was discussion prior to the applicant returning as to the use of Medicare monies. She agrees that a resolution was passed at a board meeting on 11 September 2003. Ms Harry seemed reluctant to answer directly questions in relation to any board meetings occurring between 11 and 23 September (Transcript p. 282 and 286). She agrees that the board passed a resolution to offer the applicant a 5 year contract; she does not know where that resolution is, she says that the resolution occurred in a meeting in September.

38 She agrees that Mr Yarran advised her that the funding bodies would not accept the applicant's return. She further agrees that they did not obtain any legal advice prior to signing the contract with the applicant. "We just went ahead, as always. We make the decision as a board to sign any contract" (Transcript p.288-289).

39 She discussed the issue of Ms Kickett, and how to terminate her, with the applicant, but not in great detail. She says that she sought assistance from the applicant to obtain a lawyer. She denies she had discussions with her about the funds administrator:

> "Yeah. And you discussed other issues with her, about the funds administrator, didn't you? Before she came back you discussed those issues with her?---No, not the funds administrator" (Transcript p.291).

40 Later at page 294 there is the following

> "MR STUBBS: Okay. And did you tell her about the fact that the funds administrator was controlling things at Derbarl Yerrigan before the contract was signed?---But we discussed that prior to her coming".

41 She agrees that the reason for being denied access to facilities was as a result of the funds administrator restricting access (Transcript p.293). Prior to the contract being signed on the morning of 23 September 2003 Ms Harry had seen the document as Mr Yarran had the document at the workplace. She agrees there were discussions prior to the applicant arriving. She says that the term in that contract was for five years, she does not know if she saw a contract with 3 years in it but says that there probably was one. She says that document was not sent to the lawyers and Mr Lowe was not present. There was discussion about the contract with the applicant on that morning:

"You did. Okay. So she arrived and you discussed the contract with her?---Yes, because we made the decision at the board we were looking at 3 to 5 years.

Mm. Okay. And when you were discussing it with her did you tell her that the board had decided on 3 years?---No. We decided on 5 years

Right. When you say "decided on 5 years", is what happened - - well, did the people who were at that meeting with Ms Downs-Stoney simply then decide it was going to be 5 years?---No. We discussed that before prior to the - - if it's not entered in any of those other minutes you have got it should have, because we discussed it because that was the outcome from both state and Commonwealth, that that organisation would take 4 to 5 years to have it". (Transcript p.298).

42 She says that at the morning meeting on 23 September 2003 the applicant read out the contract and said that it was for 5 years. As to whether she understood the impact of a five year term in the contract, Ms Harry's evidence is:

"No. But if the funding for her position was cut that you couldn't lay Ms Downs-Stoney off without having to pay out the full 5 years of her contract. Did you understand it?---Yes. We understand it because we discuss it.

…….

And you decided that if funding for her position was cut that it was acceptable that Derbarl Yerrigan would have to pay out the balance of a 5-year contract. Is that what you - -?---No. We didn't discuss that, no.

…….

Right. So what you're saying is you didn't understand that if the funding was cut Derbarl Yerrigan would still have to pay her out 5 years. The Commonwealth comes along and says, "No more funding for that position." It doesn't matter. Diana Downs-Stoney gets paid out for 5 years. You didn't understand that?---I understand that because if they was to terminate her prior to the 5 years because of any mis - - gross misconduct they'd still have to pay her out. That's why we secured that. We wanted her to stay on to bring the stability back" (Transcript p.302).

43 She says that she believed it would not occur, a payout of the contract, as the respondent could seek to work the applicant harder this time. She says that she did not know that Ms Fulton was in the applicant's position at first.

44 Mr Robin Yarran gave evidence that he was a Board member of the respondent from October 2001 to October 2003. From about April 2003 he was the acting President when Mr Robert Isaacs resigned. About August 2003 he became the President. He was not aware, for a while, that Ms Downs-Stoney had been dismissed the first time. The Board asked Mr Lowe to look into the matter. He received a letter from Mr Lowe on 4 August 2003 [Exhibit A9]. Given Mr Lowe's report the Board decided to reinstate the applicant; she had done nothing wrong. Following that Mr Yarran gave Ms Downs-Stoney a letter dated 8 September 2003 [Exhibit A10].

45 Mr Yarran says that the Board on 11 September 2003 authorised him to negotiate Ms Downs-Stoney's reinstatement with her. He says the applicant was a 'bit scared' of returning in case she got dismissed again. He delivered a letter to her on 17 September 2003. In attendance were Mrs Yarran, Ms Harry and Ms Betty Dan. The Board wanted Ms Downs-Stoney to help settle the staff. They discussed a 3 and 5 year contract and decided on 5 years as it would give the applicant a better chance of getting the organisation on course.

46 Mr Yarran signed and initialled the applicant's employment contract on 23 September 2003 as he was the President. He says that all the respondent's documents require the President's signature. He says he saw the contract a week or so later and got the contract through the applicant, and "the lawyers done it" (transcript p.325). He then gave it to the Board and went through it. He says that clause 15(c) was put in the contract as:

"I was thinking in - -in front of myself, what happens if - - you know, okay, Diana's been here for 3 or 4 or 2 years, or even 6 months, and all of a sudden she goes. This covers her. Being the president, you got the rights to do that." (transcript p.326)

47 When the contract was signed Mr Yarran says they met at Ms Donaldson's office at the respondent's premises. In attendance were Ms Harry, Mr Clarrie Isaacs, Mrs Yarran, Ms Dan, Ms Lorraine Bellotti and himself. There were two contracts in the room; one for 3 years and one for 5 years. The two contracts got mixed up, but the Board wanted a 5 year contract so he pushed the 3 year contract to one side. He thinks either Mr Isaacs or Ms Donaldson brought the 3 year contract to the meeting. The Board, however, wanted a 5 year contract with Ms Downs-Stoney. He is not clear what happened to the contracts after they were signed.

48 Mr Yarran says that when he told Ms Downs-Stoney that the Board wanted her back he also told her that she needed to get a medical certificate to say she was fit for work. She provided the certificate. When Ms Downs-Stoney returned she was appointed as Director, Client Services but they offered her the Deputy CEO position as the Board was having problems with Ms Sandra Harben. Mr Yarran says he had a lot of trouble getting a computer and swipe card for the applicant. He experienced difficulty with Mr Michael O'Kane, Mr Terry Murphy, Mr Alan Philp and Mr Shane Devitt. It was decided to pay Ms Downs-Stoney out of Medicare money. The respondent was under funds administration at the time. He started an account with Bankwest for this purpose.

49 Ms Downs-Stoney was never paid. When the applicant returned she did her job well. He says he told the 'little guy', which I presume from his evidence is Mr Shane Devitt, to pay the applicant, but it never happened.

50 Under cross-examination Mr Yarran says that late in 2003 he stood for re-election to the Board but was not successful. He cannot recall whether Ms Downs-Stoney was acting CEO in 2002. He says he thinks he spoke to the applicant in April 2003 and probably discussed her coming back to the respondent. He believes the respondent was under funds administration at that time. Mr Isaacs got the funds administrator in after he resigned. The funds administrator was Mr Shane Devitt. He remained as funds administrator until late 2003 when Mr Yarran left the Board after the elections.

51 Under the funds administration there was a steering committee. Mr Yarran sat on the steering committee, as did other Board members at times. Federal health department officials also sat on the steering committee. Mr Philp was the Federal representative and Mr Murphy was the State representative. Every two weeks or so the funds administrator would attend. Ms Downs-Stoney knew the respondent was under funds administration when Mr Yarran discussed her reinstatement with her. On 18 August 2003 the Board resolved to do nothing in relation to Ms Downs-Stoney and leave it to the next Board.

52 In terms of whether the funds administrator had to sign off to everything Mr Yarran says, "most of it. Some of it" (transcript p.341). In relation to the appointment of staff, there was the following exchange:

"the steering committee, the funding body, would not accept appointment of people unless they'd agreed to it beforehand. You knew that, didn't you?---No, because there would have been about 6 people being employed at Derbarl Yerrigan, not only Sandra Harben. But those guys didn't interfere - - they didn't interfere with the daily running of Derbarl Yerrigan." (transcript p.344)

53 He says he attended meetings of the steering committee and the committee would have to approve expenditure (transcript p.346). On 4 September 2003 he reported to the steering committee that the Board was going to do nothing about Ms Downs-Stoney's employment. He attended a steering committee meeting on 18 September 2003. They discussed the fact that Ms Downs-Stoney had been offered reinstatement and Mr Yarran was advised that the respondent would potentially be in breach of its obligations under the funding contracts. Mr Yarran then had the following exchange:

"Yeah, I said to Mr Philps, Alan Philps - - I said, "Alan, I'm sorry, you'll give us the money but you're not going to tell us who to employ and who not to employ because if you look over the last 2, 3 or 4 weeks or 5 weeks, how many employees that we signed up at Derbarl Yerrigan - -"

Mm?---"- - that you didn't complain to them and all of a sudden you're - - you're complaining about Diana Stoney-Downs? - -"

Right?---"- - because all of a sudden you are worried about the insurance premium - -" which is all a lie, "going to go - - record? up to 100 per cent - - 100 per cent what it was" and that was a lie anyway. So Alan was just trying to stand over us and, I said, "Alan, you're not going to stand over us and tell us who - - who to hire and not - - not to hire."

Okay. Okay. After that meeting with the steering committee which occurred on the 18th of September, did you discuss what had occurred in the steering committee meeting about Diana's contract with Diana?---Did I tell her that Alan - -

No, did you tell Diana about what the steering committee's attitude was to her contract?---We had - - me - - myself and Haydn had a talk about it and Neville because we told Alan to stay out of Aboriginal politics.

Did you tell Diana about what had happened at the - - the steering committee meeting?---I don't know if I did or not. (Transcript p.359)

54 Mr Yarran denies that the Board did not specifically authorise him to sign a five year contract with Ms Downs-Stoney. He says he signed and initialled two contracts on 23 September 2003. He understood that the terms of the contract were scrutinised by the applicant's lawyer. It was not put before the respondent's lawyers before being signed and was not discussed with Mr Lowe.

55 Ms Patricia Yarran gave evidence that she was a member of the respondent's Board from September 2002 to October 2003. She was on the Board when the applicant was first dismissed. She was not told of the dismissal until after the event. She then wanted to know the reason for the termination. Mr Lowe looked into the matter for the Board. Following Mr Lowe's report to the Board they decided to reinstate her. Mrs Yarran agreed with this decision. Her husband Mr Yarran, the President at the time, was left to negotiate with Ms Downs-Stoney her reinstatement.

56 Mrs Yarran says she was not present when the applicant signed her contract [Exhibit A2]. She saw the contract before that time when the Board discussed whether the terms of the contract would be 3 or 5 years. The Board decided on 5 years. The applicant was to be funded from Medicare.

57 Under cross-examination Mrs Yarran says in September 2002 Ms Downs-Stoney was the Director of Client Services for the respondent. Mrs Yarran does not think that the respondent was under administration when she was there. Ms Marion Kickett was the Chief Executive Officer. She thinks the applicant's services were terminated in February 2003. The funds administrator took control of the respondent's funds in May 2003. Mrs Yarran says that she went to the see the applicant at her house after the funds administrator was appointed. During June to August 2003 she visited Ms Downs-Stoney 2 to 3 times, but her husband conducted the discussion. Ms Harry was also present. She does not remember any discussion about the respondent at those meetings.

58 After the Board received Mr Lowe's report they originally decided to do nothing. That meeting occurred on 18 August 2003. She cannot recall going to see the applicant after that meeting. On 11 September 2003 the Board resolved that the chairman (Mr Yarran), deputy chairman (Mr Collard) and Mr Lowe would talk to Ms Downs-Stoney about returning to work. Mrs Yarran says she did not attend those discussions. She says that she went to the applicant's house with her husband on 17 September 2003. She did not see the letter dated 17 September 2003 [Exhibit A1]. She agreed the letter represented accurately the Board's intentions.

59 The next Board meeting was 23 September 2003. Mr Lowe and the applicant were present. Mrs Yarran did not see the signed contract for a 5 year term until the Commission hearing. She did see a 5 year contract (unsigned) at the previous Board meeting when they discussed a 3 or 5 year term (transcript p.395-396). She did not discuss anything with the applicant between 17 and 23 September 2003. Her recall of the meetings and discussions is not good. She does recall that the funds administrator would not pay Ms Downs-Stoney. Mrs Yarran says that often the papers of the Board were missing and had been taken. She does recall that the Board resolved to give Ms Downs-Stoney a five year contract.

60 Dr Peter Burvill gave evidence that he is a psychiatrist and first saw the applicant on 20 February 2004. He says that he has seen the applicant on a further eight occasions. She was referred to him by Dr Yin at very short notice as he believed she was severely depressed, suicidal and required hospitalisation. His diagnosis of the applicant was that she had a severe major depressive disorder. He says that on the history available to him it was a result of workplace stress and a dismissal in December from the workplace. Dr Burvill gave evidence that the applicant gave him a history of the workplace, that she had a workers compensation claim accepted for reason of stress in 2002/2003, left her position, was reinstated or reapplied for the position in September, had a tremendous amount of work, had friction as a result of the new board not wanting her there, she was not paid, and there were allegations of undue influence on board members. He says that as a result of the termination her depression became much more severe, on the available history. He says that the stress in the second instance was a rehash in a different form of the first stress. He did not treat her in relation to the first instance.

61 When he first saw her she was on 600 milligrams a day of Effexor XR which is a very high dosage. She was very agitated, very depressed and actively suicidal. He says that he added a second antidepressant. He did not feel it necessary to hospitalise her but it was "a bit iffy", he contacted the applicant's daughter arranged to see her to discuss the situation the following day and from then on he has seen her at fairly regular intervals. At the time he was seeing her and currently she has no capacity to work, he does not see her returning to the workforce, depending on the work, until the end of the year. He says that the applicant struck him as being fairly resilient and tough in a psychological sense.

62 Under cross examination he says that on the available history the applicant is much more severely depressed on this occasion than on the first occasion. In relation to the first instance there had been a number of false allegations against the applicant, that she had stolen some goods and was charged, which was later withdrawn and was advised that it was used as a device to pressure her. He says that he did not go into a blow by blow. He does not recall or have notes of a number of allegations raised by Mr Stubbs (transcript p.229-231) although he does have notes in relation to allegations of tape recording of conversations, unauthorised use of credit cards and a significant breakdown in the working relationship. He says that the applicant advised him that in May 2003 she had settled her workers compensation claim, but he did not discuss figures with her. If he had been in the position at the time the applicant returned to work in September he would have liked to ask her quite extensively why she was returning, did she feel well enough to do it and had the situation changed considerably so that there would be no recurrence.

63 Dr Dennis Tannenbaum gave evidence that he has been a psychiatrist for 20 years. He saw the applicant on one occasion for the purposes of an assessment of her capacity to return to work. He says that Exhibit A6 is a truthful and accurate statement based upon his examination of the applicant.

64 Under cross examination he says that he saw the applicant on 9 October and that he only had the referral from Dr Beech. He disagrees that without Dr Beech's notes it would be difficult to undertake an assessment. He says that the applicant advised him that she occupied three jobs, was the only manager, on the day she commenced the CEO was terminated, there were legal problems, she worked long hours and took no breaks or holidays. A new CEO was appointed, the applicant was asked to look the other way and refused and was ultimately dismissed. At the time of her assessment she was back working with the respondent but he did not have a specific description of her work. She indicated to him that she was doing satisfactorily, although she had not been paid or offered any benefits of the workplace. He agrees that this is a significant stressor. He agrees that it is possible that it could result in a further psychiatric injury but that it was in a different league of issue. He says that she was not suffering stress at that stage.

65 He says that stress is normal in most workplaces but agrees that not being paid is abnormal. In relation to whether she would be fit for work under these circumstances he says that it would depend upon how long and whether she would have been paid in the future. He says that he did not seek any further information from the applicant at that stage. He says that he certified her fit to return to a normal workplace, but if it was an abnormal workplace nobody could be declared fit to return unless they were a psychopathic or grossly abnormal themselves. He says that he would not certify the applicant fit to return to an abnormal workplace. He says that the workplace, on the information of the applicant when she first left, was grossly abnormal. He says that he inquired of the applicant about this but does not have notes to that effect. He says that the applicant was of the belief that the workplace had the potential after investigation to return to normal, he says otherwise he would have advised her not to return to such an abnormal workplace.

66 Mr Michael O'Kane, the State Manager for the Commonwealth Department of Health and Ageing, gave evidence that he met with Mr Yarran on 2 or 3 occasions and received a series of emails from Mr Yarran. He formed an impression that Mr Yarran lacked a sufficient comprehension of the matters they discussed and in particular of written documentation. Mr O'Kane chaired the Steering Committee on one occasion when Mr Philp was on leave. At that meeting the Steering Committee endorsed payment of Mr Lowe, as a consultant, subject he thinks to the provision of a business plan. He says that he did not want to frustrate the wishes of the respondent's Board to any great extent. The Steering Committee also discussed the employment of the applicant. They declined to employ her and he says that he never accepted that Ms Downs-Stoney was employed by the respondent.

67 Mr O'Kane under cross-examination, and in relation to a letter he sent to Mr Yarran of 31 October 2003 [Exhibit A13], says that he was not concerned about what the respondent did with funds that were not under his control. If the respondent chose to pay Ms Downs-Stoney with funds, other than under his control, then they would and could employ her.

68 Mr Alan Philp, Assistant State Manager, Commonwealth Department of Health and Ageing, gave evidence that under the funding contracts which he administered the Commonwealth can appoint a funds administrator to oversee all financial transactions and expenditures. The respondent was under funds administration twice to his knowledge. The second time commenced 3 June 2003 and lasted to October 2003 and was monthly thereafter. The funds administrator was hired as they, along with the then President of the respondent, Mr Robert Isaacs, had considerable concerns about the way the organisation was being run.

69 Ms Margot Tobin, the Senior Manager, People Services, gave evidence that she commenced work with the respondent in July 2003 as Manager, Human Resources. Ms Harben was the acting CEO at that time and the organisation was under Funds Administration. Ms Tobin was advised by her Director, Mr John Murray, that any correspondence or query relating to Ms Downs-Stoney should be directed to him. Ms Tobin assisted Mr Lowe in his investigation by supplying documents.

70 Ms Tobin says that she was under strict instructions from the funds administrator not to put anyone on the payroll without his approval. At one point that required his written consent. She was not involved at all in the applicant's return to the respondent and she says that she would typically be involved, would conduct the recruitment process, do the necessary documentation and contract and she would advise the CEO and the board on appointments. Ms Tobin was asked by the funds administrator to check with the respondent's insurer as to whether, if Ms Downs-Stoney returned to work, she would be covered by their workers' compensation insurance. She knew that Ms Downs-Stoney had returned as she saw her in the tea room on about 24 September 2003 with members of the board. She is not aware of what duties Ms Downs-Stoney performed on her return. Ms Tobin did not see a contract for Ms Downs-Stoney until November 2003 when Ms Davies was appointed as CEO. At that time Ms Davies was instructed by the board to sort out Ms Downs-Stoney's employment and she instructed Ms Tobin to get all relevant documents from Ms Downs-Stoney. Ms Downs-Stoney gave her a bundle of documents and they both kept copies. A lot of the documents related to the matter before Commissioner Smith. The documents also included a contract for 5 years. Ms Tobin did not see a three year contract until it appeared in the matter before Commissioner Smith.

71 Ms Tobin says that the contract which was given to her by Ms Downs-Stoney had a number of unusual provisions in that it required a pay out of the entire contract if the employee's services were terminated. The contract also contained reference to a pay rise geared to the AIM survey (clause 7(b)). These provisions were very favourable to the employee. Ms Tobin says that she was put under considerable pressure from board members to put Ms Downs-Stoney on the payroll and she did not due to the funds administrator's direction. She says that Ms Downs-Stoney used a vehicle intermittently even though the funds administrator removed the keys from her at one point. Ms Downs-Stoney was never paid when she returned to the respondent. At the time of Ms Downs-Stoney's return Mr Murray was the Director, Corporate Services and Ms Liddy-Anne Fulton was on a fixed term contract as the Director, Client Services.

72 Ms Tobin in conjunction with Ms Davies terminated the services of Ms Downs-Stoney on 4 December 2003. They gave her a letter of dismissal and Ms Tobin says that Ms Downs-Stoney sighed and said that it was only a matter of time as the new board was due to commence. In February 2004 the applicant lodged a workers compensation claim for stress which is being dealt with by lawyers for the respondent's insurer. At one time Ms Tobin was interviewed by a representative of AMP who said that Ms Downs-Stoney received a monthly payment for a percentage of her salary.

73 Dr Richard Yin gave evidence that he first saw the applicant professionally on 8 January 2004. He took over from Dr Beech who had treated Ms Downs-Stoney and he had access to her medical record. The previous day had been Dr Beech's funeral and Ms Downs-Stoney was clearly upset and was suicidal. He sought to get her seen by a psychiatric registrar at Swan Districts hospital. This did not eventuate. He next saw her on 22 January 2004 when he tried to get her seen by a private psychiatrist. He took a full history from her on 24 February 2004 and on the basis of that examination and the medical notes he issued a workers compensation certificate concerning stress related symptoms from 1 October 2003. The applicant had a history of medication for depression, chronic pain and arthritis. Dr Yin agrees with the medical opinion expressed in Exhibit A6.

74 Mr Neville Collard gave evidence that Mr Clarrie Isaacs and he were approached about April 2003 by members of the respondent's board to join the board. Mr Collard joined the board for the period April to November 2003. He had earlier had considerable involvement with the respondent as a board member and employee. He says that the organisation is dear to his heart and that this time last year the organisation was in a bad state. Mr Collard suggested that the board get Mr Lowe to investigate the applicant's first dismissal and suggest what action the board may take. The board met twice to consider Mr Lowe's report. The first time they could not reach a decision. The second time they deputised Mr Yarran, Mr Collard and Mr Lowe to negotiate with Ms Downs-Stoney her return to the respondent. The minutes of the board meeting showed a brief outline of what the contract was to contain. He says that Ms Downs-Stoney was to be given a job for six months to see how that went and then further employment if that proved successful. He does not recall the board approving a 5 year contract. Mr Collard then missed a meeting of the board. He was advised that an employment contract for Ms Downs-Stoney had been written up and signed by Mr Yarran. He was surprised at this as it was not how the board had earlier decided to progress the matter. He was surprised that he had not been involved. He did not know where the contract came from.

75 Mr Collard says that Ms Harry pushed the board very hard to make a decision to re-instate Ms Downs-Stoney. She on one occasion said that she would resign from the board if they did not make a decision. Mr Collard was advised by Mr Issacs that Ms Harry and Ms Downs-Stoney had a close personal friendship and that Ms Downs-Stoney had provided financial support to Ms Harry. As a board member he was concerned about this and telephoned both Ms Downs-Stoney and Ms Harry. He says that he did not get a reply and the telephone went dead. He says that as a board member he had ready access to legal advice and would not move without such advice.

76 With regard to the contract, Mr Collard says:

> "Okay. Now, at any stage did the board authorise you or Robin, to your knowledge, to get Miss Downs-Stoney back to Derbarl Yerrigan on the basis of a 5 year contract?---No. I'll - - I'll tell you what happened. What happened was we would just have a meeting weekly and one of the meetings, I believe,
>
> after that - - we'd been seconded, that little group, to actually deal with the issue of the contract. I couldn't get to another meeting because I had a meeting with another organisation and I couldn't get there and, sort of, by the end of that week - I thought it was only about seven or 8 days - that I found - - I was advised that - - that a contract had been written up, signed and approved by Robin Yarran. Myself and Haydn Lowe had never had anything to do with the drawing up of the contract or even the signing of - - of what we were asked to do by the - - by the executive committee. It came out of the blue and I was very surprised because it had taken a long time for me and for other Aboriginal people talking to Robin and the committee and then coming on board and dealing with this issue, become - - I got a shock that it was - - I hadn't been advised, I hadn't been consulted and the contract had just been signed out of the blue. It had come - - we didn't know where it'd come from."

77 Ms Sandra Harben gave evidence that from July 2003 she was the acting CEO of the respondent organisation. The organisation was under funds administration. The Steering Committee approved her employment as a consultant, not an employee. She recalls that Ms Harry pursued vigorously Ms Downs-Stoney's reinstatement. She says that Ms Harry and Ms Downs-Stoney had a very close relationship and she complains that it was a conflict of interest for Ms Harry as a board member. Ms Harben assisted Mr Lowe's investigation by supplying information to him. She later discovered, after Mr Lowe had delivered his report, a box of information which she believed he needed to assess. She says that he was not interested and did not change his mind given the material. She says that she does not believe he could have done a proper investigation on a complex issue in such a short period of time. She spoke to Mr Yarran about her concerns with Mr Lowe's report.

78 Ms Harben says that the funds administrator directed that the respondent was not to employ any new employees. She says that Mr Yarran was aware of this. Ms Harben finished her employment in October 2003. Ms Harben found out that Ms Downs-Stoney was back at work about two weeks before she left. She saw Ms Downs-Stoney in the tearoom with Mr Yarran. Ms Harben was advised that Ms Downs-Stoney had been employed and had started that day. Ms Harben says that she had no idea of Ms Downs-Stoney's role and duties. She was told that Ms Downs-Stoney worked for the board. She says that Ms Downs-Stoney indicated that she was on probation for 6 months and was to do special duties. Ms Harben says that the respondent had no authority to employ any new employees and that she did not see a contract for Ms Downs-Stoney. At the time Ms Liddy-Anne Fulton was employed as the Director, Client Services. Ms Downs-Stoney got access to a vehicle, a security card, a computer and mobile telephone.

79 Ms Harben says that she worked under extreme duress as did other senior staff. She received opposite instructions about Ms Downs-Stoney's employment from the steering committee and from Mr Yarran. She felt intimidated by the applicant and Mr Yarran. The funds administrator removed equipment from Ms Downs-Stoney. There was industrial conflict as a result of Ms Downs-Stoney's return. Ms Harben says that the applicant was instrumental in having her dismissed. In Ms Harben's view Ms Downs-Stoney was manipulative and had lied.

80 Mr Shane Devitt, a chartered accountant with PriceWaterhouseCooper (PWC), gave evidence that he was appointed Funds Administrator for the respondent organisation on about 3 June 2003 and continued to perform that role until 30 June 2004. The funds administration arises from a contract between PWC and the Commonwealth Department of Health and Ageing, the Western Australian Department of Health and the Office of Aboriginal Health. He was appointed to an earlier period of funds administration on 3 December 2001 to 30 September 2002. He was appointed "to take financial management control of the organisation and to ensure the funds expended from that point on were consistent with the provisions of the various contracts that the organisation had contracted to provide those services" (Transcript p.413).

81 Mr Devitt met the applicant during his first period of funds administration as she was the Director, Client Services with the respondent, and acted as the CEO. He was even to control payroll expenditure as it is more than 50% of the budget. He approved the fortnightly payroll before it was transferred to employee accounts. New staff appointments required approval by the Steering Committee. The applicant would have been aware of this because at times she attended the Steering Committee.

82 In September 2003 the respondent was put on monthly funding, by the Commonwealth department. This affected the making of long term commitments by the Funds Administrator and there was sensitivity to any new employees over and above budgeted positions. If a matter was not budgeted for it went to the Steering Committee for approval. He advised the Director of Corporate Services and the payroll officer for the respondent that he needed to be made aware of any new appointments and get the approval for that person (Transcript p.424-425).

83 He says Ms Downs-Stoney's appointment would have been outside budget and the Steering Committee were concerned as to a potential workers compensation risk. On 26 August 2003 at a meeting of the Steering Committee Mr Philp instructed the respondent not to fill any vacant positions until they were approved by the Steering Committee.

84 At the meeting of 4 September 2003 of the Steering Committee he recalls Mr Yarran saying that the respondent would not make an offer of employment to the applicant. At the meeting of 18 September 2003 Mr Yarran presented a letter which offered the applicant reinstatement to her position [Exhibit A10]. He says the Steering Committee was taken aback as they understood the respondent was not going to offer the applicant her position back. The applicant returned physically to the respondent and Mr Yarran directed staff to give her various services. Mr Devitt says he sent emails to staff to advise not to put Ms Downs-Stoney on the payroll and he spoke to the applicant. They were not to act until the Steering Committee has approved her return. He went with the CEO and the manager of Assets to see the applicant and asked her for her car keys and her key to the premises of the respondent. She handed over the keys. Mr Yarran then sought to have them returned to the applicant. At no stage did he authorise any payments to be made to the applicant except for expenses of one conference which the applicant attended in November 2003.

85 He says the Medicare funds fell within the funds he administered. In mid-September 2003 the Steering Committee decided to place the net Medicare funds in the direct control of the respondent (Transcript p.436). He was instructed to open another account for this purpose. The Medicare income was about $40,000 to $50,000 per month. The net Medicare figure was in deficit during the time Mr Devitt was the Funds Administrator (Transcript p.437).

86 Mr Devitt's evidence is:

> "Okay. I might come back to that. Now, I think it would be fair to say that there was quite some disagreement between Derbarl Yerrigan and the steering committee in relation to the status of Diana Downs-Stoney in late 2003 when she was purportedly? reemployed?; would that be correct?---Yes.
>
> Okay. And during that time I think you indicated that she was not placed on the payroll?---Yes.
>
> But there was an ongoing dispute between, I suppose, the steering committee and Robin Yarran in relation to her status?---Yes.
>
> Okay. And I think you said that you were aware that she was attending each day?---At the offices, yes.
>
> Yes. And what was your understanding in relation to the role that she was fulfilling at that point in time?---I didn't really have an understanding of what the role was other than that the acting CEO at the time was basically saying that she was -- Ms Downs-Stoney was in the office and was basically giving certain directions, and so forth, to staff members."

87 Mr Devitt says that the respondent would have had to restructure the budget to employ and pay the applicant.

88 Mr Terry Murphy a public servant with the WA Department of Health and Director of the office of Aboriginal Health (OAC) gave evidence of the contractual relationship between itself and organisations including the respondent, and the ability to appoint a funds administrator. Ms Kickett and Mr Issacs contacted the OAC with concerns over the respondent and a funds administrator was appointed, being Mr Devitt of PWC. A Steering Committee was set up with representatives from the respondent, the funds administrator, the federal body (OTISA) and the OAC. There were regular meetings and the funds administrator and the Steering Committee oversaw the financial affairs of the respondent. He says that in practice commonsense was used and matters of a substantial nature had to be approved by the committee. This would include employment of staff, capital expenditure and legal fees (Transcript p.450). He says they were concerned over positions filled, how they were filled, whether the appointments were appropriate and whether they posed any risks. He says that the Steering Committee expressed dissatisfaction over the dismissal of the CEO and did not agree for Ms Harben to be placed on the payroll. She invoiced the organisation on a fortnightly basis. He says that the Steering Committee made it clear that no new staff were to be appointed without authority of the Steering Committee. He recalls Mr Lowe attending a steering committee meeting in August and raising the issue of Ms Downs-Stoney being re-employed. He said that Mr Philp and he were shocked. He was aware of a previous workers compensation claim. He says that concern was expressed but that it was not analysed further as it was not believed that it would occur (Transcript p.454-455).

89 At a Steering Committee meeting on 4 September 2003 the commonwealth funding body presented the new funding agreement with special conditions reinforcing funds administration. Mr Philp read out the special conditions to the representatives of the respondent, including Mr Yarran, and this was put on a take it or leave it basis. He says that following the first meeting at which Mr Lowe presented the idea of Ms Downs-Stoney's re-employment the matter was raised at subsequent meetings until she was re-employed. He says that in mid to late September they were advised that Ms Downs-Stoney had been re-employed. He does not recall any correspondence tabled but says that Mr Yarran advised that the committee had already written to Ms Downs-Stoney and the employment was in place. He says that they made it clear they would not endorse the employment or support her being placed on the payroll.

90 Under cross examination he says that the opinion of the doctor did not alleviate their concerns about risks to Ms Downs-Stoney and the organisation. He says that he received advice from the insurer that if there were further workers compensation claims there would be an effect on premiums. He says that the Steering Committee accepted that they could not determine the usage of the Medicare monies and control of those was assumed by the respondent. He says that the issue of Ms Downs-Stoney was of fundamental importance.

91 Mr Haydn Lowe gave evidence that he was engaged by the board to do three tasks, including investigating the dismissal of Ms Downs-Stoney. He was approached initially in July 2003. The approach was made by Mr Yarran, Mr Collard, Mrs Yarran, Ms Harry, Ms Harben and one or two others. He says there was a strong factional row at the time within the respondent organisation. He had known the applicant for many years. He knew that the board had spoken to Ms Downs-Stoney prior to that time. He was aware that she had provided secretarial support to the board and had given personal support to Ms Harry.

The applicant was aware that the respondent was under funds administration as this was discussed regularly. Mr Lowe reported to the board on 4 August 2003 about the applicant's initial termination.

92 Mr Lowe's evidence as to the first dismissal and the view of the respondent is:

> "Is that right? Okay. Now, at that stage, you know, what was the executive committee looking at doing with regard to Ms Downs-Stoney?---Their view had been that they thought she had been wrongfully dismissed. They thought that she had been of benefit to the agency, despite the fact that she wasn't particularly popular, and they attributed that to her trying to bring about change, and that wasn't really popular.
>
> They had said that should she be exonerated by any report, if you want to put it like that, they would wish to re-employ her. So, I provided a report that said that I could find nothing in the - - in the stated reasons for dismissal that warranted dismissal, and that if that was the - - if that's what the board had wanted the report for, then the - - then, logically, they should reinstate her." (Transcript 495)

93 He says the board of the respondent met on 18 August 2003 to consider his report and decided to leave the issue of whether Ms Downs-Stoney should be reinstated to the next board. Elections were to be conducted in the foreseeable future. He goes on to say:

> "Okay. And was that - - did you become aware of the fact that the steering committee had to approve payment to you before the board made any decision to re-employ Ms Downs-Stoney?---Yes. We were told - - they'd been told previously. Robin Yarran had been told some - - a couple of months earlier than my commencement that the commonwealth would not condone Diana's reappointment, and they were told again at a board meeting that I was at that that was their view, and several times thereafter" (Transcript p.498).

94 Mr Lowe attended a board meeting in September 2003 when the board decided to ask the applicant to return on the same conditions that she had previously been employed on. They would also compensate her for other matters. Mr Yarran, Mr Collard and Mr Lowe were given authority to negotiate with the applicant "provided we did not move far from that point". Ms Downs-Stoney was presented with the letter which is Exhibit A1. He says, "So the discussion, basically, was that this - - this is the contract" (Transcript p.499). There was also some discussion about that time, Mr Lowe cannot remember whether it was before or after 17 September 2003, about the need for Ms Downs-Stoney to provide a certificate of medical fitness for work as the Commonwealth was concerned about a potential workers compensation risk. Mr Lowe says that the applicant knew that she could not be paid until such time as she complied with this request (Transcript p.501). Mr Lowe says:

> "Okay. Now, subsequent to that letter being provided, and roughly speaking the 23rd of September 2003, did you have any further discussions with Ms Downs-Stoney about her employment, that you can recall?---We had quite a few discussions about the relationship between her and the commonwealth. I thought the commonwealth had been unreasonable. The workers compensation issue was originally that she would be a problem, and it subsequently - - the provision of the medical certificate, it then became she would be a problem to other people and that they would go on workers compensation, and we were quoted evidence that, you know, while she had been employed there before workers compensation had increased through the roof. In fact, I provided them with information to the extent that that wasn't - - that the reverse was the case. So we discussed all of those sorts of issues, and the commonwealth's view as to, you know, whether she ought to work there or not. We discussed those things.
>
> If you are intending to lead up to the issue of a separate contract, we didn't discuss earlier on - very early on - the notion of a separate contract. It was raised casually some time thereafter, or raised in conversation some time thereafter, when I made my views pretty clear what I thought about that, and then - - so we had those sorts of conversation, which are in - - during the next month or two.
>
> When you say that it was raised, who was raising it?---Well, Diana raised the issue of - - of security, of, you know - - and I - - I don't blame anybody for raising an issue like that, given the fragility of the board, but she raised those - - those sort of issues.
>
> MR STUBBS: Okay. Now, did you - - when did you become aware of any formal 3 or 5 year contract between Derbarl Yerrigan and Ms Downs-Stoney?---I can't remember the exact time, but it was later in my time at Derbarl Yerrigan, so it was some time after the - - her return to work when I discovered that there was a - - a workplace agreement and a different form of contract that was for 5 years, and subsequent to that there was another one for 3 years, but I didn't know about that until a long time after. The 5 year one, I suppose - - I'd say between the 18th of August and - - it was probably about a month later or 6 weeks later. It was a fair time, anyway.
>
> Okay. Now, have you spoken to Mr Yarran and Ms Downs-Stoney about the issue of the 3 or 5 year contracts subsequent to becoming aware of them?---I spoke to both of them, actually. One - - one was - - Robin Yarran, when I first discussed it with him, claimed ignorance of the content of the contract, and that was fairly typical of Robin. Deliberately or accidentally, that's the sort of response you might have got from him. I also spoke to Diana and told her that I was - - I thought, for starters, the contract was a silly one to enter into because it would create more resentment than it was worth with the other staff.
>
> Secondly, I thought it was - - to be blatantly honest, I thought it was somewhat underhanded and - - and organised by herself, and it - - the - - it would have been her, in my view, that had got the board to do it, in contravention of the board - - or Robin himself to do it, in contravention to - - of - - of the original arrangement. That board was, to say the least, naive." (Transcript pp.501,502)

95 Mr Lowe says that Mr Yarran's comprehension of what he reads is very poor. He says he discussed with Ms Downs-Stoney a number of times how malleable the board was. Mr Lowe then says:

> "MR STUBBS: Okay. Now, during the - - the time that the board was negotiating with Ms Downs-Stoney, were there meetings where the board was present with Ms Downs-Stoney before she - - before this contract was entered into in late-September? The 3 or 5 year contract I'm talking about?---I wasn't privy to any of them, no, and nobody on the board mentioned it to me if there had been.
>
> Mm hm?---I wasn't aware of a meeting that established a 5 year contract, and nor was I aware of any meeting where that was changed to a 3 year contract. In fact, I wasn't aware of any meeting that discussed it at all. (Transcript p.503-504)

96 Mr Lowe says that the applicant was aware that the Commonwealth would not pay her if she was re-employed as they discussed this. As to Ms Downs-Stoney's knowledge of the capacity of the board, Mr Lowe's evidence is:

> "Okay. And did she ever express a view to you as to the capacity of the board to carry out its functions?---Yes. "They couldn't do it by themselves" was sort of a fairly refrain. "They wouldn't be able to write a letter like this. They - -" I

mean, essentially we both understood them to be a group of people who were largely well-meaning good people but very naive in the way of anything like governance and not well educated and - - and those sorts of things. So, yes, they did need to have support." (Transcript p.505)

97 Under cross examination Mr Lowe says that he concluded that the applicant was not guilty of the alleged actions which led to her initial dismissal. He says that the board had access to legal advice and industrial advice if they wanted it.

98 As to the resolution of Ms Downs-Stoney's employment, Mr Lowe's evidence is:

"Okay. Now, where you had these - - these conversations with Diana about going to see a psychiatrist or a doctor, I take it that was shortly before the report was actually obtained. That was a bit of a, "Let's move quickly on this one"?---That's right. We had a - - we had a report - - Diana had a report from her GP, which I think was made available prior to the psychiatrist report. In the event, both reports were available prior to the commonwealth agreeing to provide any funds, and even when they did it was not funds from the normal grant but funds that they allowed the organisation to use from Medibank, or Medicare refunds - -

So - - ?--- - - which - - which were not, in fact, sufficient to pay anything.

Okay. But the Medicare occurred quite some time later after the medical report?---It did.

And - - ?---But the only reason they agreed to pay her at all was after the commonwealth officer in charge, the state director, had rung up and said, "Look, this mess has gone too far. Can we have a yarn?". He came around to my place, and - - I guess they were - - felt hoisted on a spit. They weren't prepared to back down, so they were looking for a way of - - of letting Diana stay.

MR FRASER: Sorry, who was this conversation with?---Oh, the - - the - - the state director of the department of - -

That was Michael O'Kane?---Yes, that's correct.

Okay. So you had a conversation with Michael O'Kane?---Very late in the piece.

And he was, basically, saying, "Look, enough's enough", I take it, "We need to sort something out"?---Yeah, basically.

And he was looking to, I suppose, engineer some way where they could get access to funds to pay - -?---Well, no, he was - -

- - Ms Downs-Stoney?--- - - trying to engineer a way that - - that Diana could, in a sense, be re-employed without them being in any way responsible.

Okay. So - -?---He probably had the belief that Diana was likely to cause all sorts of grief for them, because that was what his sidekick had been leading him to believe.

Oh, okay. So, when you say to be re-employed "without them being responsible", by "them" do you mean the steering committee, or the commonwealth or - - ?---The commonwealth.

The commonwealth?---The commonwealth steering committee. Yeah.

Okay?---Well, the commonwealth were - - the commonwealth and state were the steering committee. The fact that Derbarl Yerrigan had somebody on it was - - you know, they were the people who were being pushed around, rather than the people contributing to the decision making.

Okay. So, employment wasn't particularly an issue; it was just whether or not the steering committee was responsible or not? Is that your understanding?---Well, no, employment was the issue. They - - they certainly did not want to employ Diana, and they had made it very, very clear for a very long time, but one thing that was clear was that eventually Derbarl Yerrigan would have to come out of funds administration, or they would have to take it over or do something. It was one of those options.

Okay?---And they couldn't leave this thing hanging around without - - without sorting it out, but they - - they still refused to pay her. They never made their funds available; they only released those funds that were already - -

Okay?--- - - should have been released to Derbarl Yerrigan.

And they were to be used to pay her?---Well, if Derbarl Yerrigan wanted to pay Diana with those funds, they could, was the - - the way it was put.

Yeah. Okay. And obviously said that eventually Derbarl Yerrigan would come out of funds administration?---Then they could employ, assumedly, whoever they wanted." (Transcript pp.509 -511)

99 The evidence of the applicant must in my view be treated with caution. I was not convinced at hearing that her evidence was complete and unembellished. She denies that she formed a firm friendship with Mr and Mrs Yarran or Ms Harry (Transcript p.47). She says that she did not become quite friendly with the respondent board and gives a reason for her personal assistance to Ms Harry (Transcript p.55-56). This evidence is at odds with the evidence of Mr Collard and Ms Harben at least as it pertains to the relationship between Ms Harry and the applicant. I prefer the evidence of Mr Collard to that of the applicant. Clearly, Ms Downs-Stoney supported Ms Harry personally in a number of ways.

100 The applicant refers to meetings of the board on 16 and 19 September 2004, but there were no minutes or documents to support this. The applicant says in her evidence in chief that she received a letter on 8 September 2003 about her return to work, and at a subsequent meeting, which must be 17 September 2003, she was asked to write down what changes she wanted to her contract. She was asked to provide these to a lawyer. The lawyer provided a form of words "to give those intentions legal import" (transcript p.18) and these words were read back to the members of the board who accepted them and they were sent off to a typing company. A Rosa typed them, of some address and the applicant had to go to the Moora show so the applicant faxed the contract to the board on 18 or 19 September 2003. This timing is of course all possible, but on hearing the applicant I did not consider it to be credible evidence. Alternatively, if the timing is all correct then I consider the applicant, given the nature of the change made to the contract, must have given considerable aforethought to the changes prior to 17 September 2003 when the offer was made to return her to the same terms and conditions. She gives evidence that she discussed whether the contract should be 3 or 5 years. This contradicts Mr Lowe's evidence as he says such discussion was not until after the contract was made.

101 Mr Yarran's evidence must be discounted as under cross-examination he was not prepared to answer directly many of the questions. He repeated many times that he did not have the papers he needed as they had been shredded. He could not recall dates accurately. That is not of concern to me. However, he did not say what documents he was referring to and was not

willing to address directly the documents which were put to him. His evidence instead descended into opinion as a distraction. His lack of direct response was clearly not, in my view, due to a lack of understanding of the questions asked. He displayed a real reluctance to direct himself properly to the questions. Mrs Yarran's evidence is more reliable in my view. She responded directly to questions. However, her recall of events was reasonably limited, and as she put she did not have a lot of involvement in many of the discussions.

102 The evidence of Ms Harry is inconsistent, unconvincing and partisan in my view and cannot be adopted without considerable reservation. The evidence of Ms Harben must be considered in the light of her obvious dislike of the applicant. The evidence of the other witnesses I would accept without reservation.

JURISDICTIONAL ISSUE – SALARY CAP

103 In the decision of *Patrick Joseph O'Sullivan v Cooks Construction* 83 WAIG 2860 I expressed my reasoning as to what components of Mr Sullivan's remuneration package were salary for the purposes of assessing the prescribed amount under s.29AA of the Act.

104 Section 29AA is a new provision inserted into the *Act* by amendment in 2002. Subsections (3) and (5) apply to this matter. They state :

"(3) The Commission must not determine a claim of harsh, oppressive or unfair dismissal from employment if —

(a) an industrial instrument does not apply to the employment of the employee; and

(b) the employee's contract of employment provides for a salary exceeding the prescribed amount."

"(5) In this section —

"industrial instrument" means —

(a) an award;

(b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section;

(c) an industrial agreement;

(d) an employer-employee agreement; or

(e) a workplace agreement;

"prescribed amount" means —

(a) $90 000 per annum; or

(b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section."

105 For the period in question in this matter, i.e. September to December 2003, the prescribed amount as calculated by reference to the formula in the regulations was $94,300. This is also the submission of the applicant. I found that the components of Mr O'Sullivan's package which related to a car allowance and superannuation did not form part of "salary" for the purposes of s.29AA. There was no question as to a "salary sacrifice" component in that matter.

106 The relevant clauses in the applicant's contract are as follows:

7. Salary:

a) Your taxable salary on commencement shall be $71,967 per annum. Your salary will be paid fortnightly in arrears, by direct deposit into a bank account nominated by you.

b) After 12 months service both parties to enter into negotiations for a review of salary and conditions. Any increase will be subject to a satisfactory annual performance appraisal, and will be benchmarked on the median point of the AIM scale for Director positions for similar organizations, but at minimum of CPI, and thereafter each 12 months.

10. Salary Packaging:

a) You will be entitled to package an amount of $15 450.00 ($30 000.00 grossed up) per annum, to be spent on items of personal expenditure, as agreed. Changes to agreed terms can only be made effective each quarter ie. July, Oct, Jan and April. This amount will not attract Income Taxation but will appear on your Group Certificate grossed up as a fringe benefit. No funds allocated for packaging can be taken in cash.

107 In short, the respondent submits that they do not accept Exhibit A2 as the contract. However, if that be the contract then the grossed up figure of $30,000 referred to in clause 10 should be added to the salary figure in clause 7 and together they represent the salary of the applicant. This amount of $101,967 exceeds the prescribed amount and hence the applicant's claim is outside of the Commission's jurisdiction. The applicant submits that only the salary figure of $71,967 applies for the purpose of s.29AA as remuneration has a wider meaning than salary or wages (see *Patrick Joseph O'Sullivan v Cooks Construction*, *Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8 @ 10).

108 If salary packaging can be considered to be part of salary for the purpose of s.29AA I accept the submission of the respondent that the gross figure should be adopted. That would be consistent with how salary is treated under the Act. The gross figure is made explicit in the contract and is $30,000. The question is whether salary packaging can be said to be part of salary for this purpose. The applicant is not employed subject to an industrial instrument as defined in the Act.

109 It is important that I note Exhibit A5 (at page 9 of the applicant's book of documents). This is an exchange of emails between Ms Tobin and Ms Downs-Stoney whereby the applicant asks for a calculation of her pay. Ms Tobin's reply deducts the salary sacrifice figure from the salary figure to derive the taxable income for the fortnightly pay period. I would normally assume the calculation might be done in this way. No further evidence was led on this exhibit. The evidence of the applicant in relation to the salary sacrifice is as at Transcript p.12 where she states in relation to her contract for her original employment:

"Okay, and what was your base salary?---My base salary was sixty-three thousand something, maybe one eight five, and the salary sacrifice component was $15,450, I believe, and then there were some non-cash benefits as well - vehicle, phone, that type of - - those sorts of things."

110 It is the case that at all times the applicant has presented her remuneration package in her claim as salary plus salary sacrifice and other benefits (see also Transcript pp.89-90); not as the salary incorporating the salary sacrifice component. In other words the figures claimed are $71,967 plus $15,450, and not a lesser figure whereby $15,450 is incorporated in the salary of $71,967 but receives a favourable tax treatment and hence the net result is beneficial. I can also find no more detailed reference to the salary sacrifice component in the matter before Commissioner Smith as it related to the earlier contract.

111 Since my decision in *O'Sullivan v Cooks Construction* I have had the benefit of reading the decisions of my colleagues in *John Paul Volkofsky v Clough Engineering Limited* 83 WAIG 4120 and *Adrian Ciccotosto v TPS Firepower Pty Ltd* 84 WAIG 2607. Commissioner Harrison in *Volkofsky* found that superannuation and a substantial proportion of the mining operations allowance fell outside the definition of salary. In the *Ciccotosto* case the Chief Commissioner considered the issue of "salary sacrifice" in the context of a novated lease for a motor vehicle. He excluded from salary any allowance paid as a reimbursement of an expense. He then went on to quote the following:

> "14. More relevantly for the purposes of ascertaining the meaning of the word "salary" Anderson J (with whom Kennedy J and Scott J agreed) in *The Totaliser Agency Board v Edith Fisher* (1997) 77 WAIG 1889 ("the TAB case") sets out the approach to be taken.
>
> > "In my opinion although it can be helpful to see how words have been defined in other cases, the starting point is the ordinary meaning of words. As Lord Haldane LC said in *Vacher & Sons v London Society of Compositors* [1913] AC 107 at 113, "…I think that the only safe course is to read the language of the statute in what seems to be its natural sense." We were referred to several dictionaries. There is not much difference between them as to what salary in its ordinary sense means. In the Macquarie Dictionary the following meaning is given:
> >
> > > "A fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical or menial kind."
> >
> > In the New Shorter Oxford English Dictionary the following meaning is give:
> >
> > > "Fixed regular payments made by an employer to an employee in return for work"."
>
> (*op cit*)
>
> 15. Each of the judgements in the *TAB case* (op cit) identify that for the ordinary meaning of "salary", the concept of a fixed payment made periodically is central to the definition. In the circumstances in that case the issue was whether commission, which was computed on the basis of an opening fee for the agent, a percentage on net investments and a specified percentage based on weekly turnover, was salary for the purposes of the Government Officers Award. Two members of the Court cited the judgement of Fry LJ in *Re Shine; Ex parte Shine* [1892] QB 522 as giving an indication of the criteria that may be looked at in determining whether or not a particular payment is "salary". Fry LJ said at 531:
>
> > "Whenever a sum of money has four characteristics – first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; third, that it is computed by time; and fourthly, that it is payable at a fixed time – I am inclined to think that it is salary, and not the less so because it is liable to determination at the will of the payer, or that it is liable to deductions."
>
> 16. In the present matter the "sum of money" to be considered in the first instance must take into account the components of "basic salary" and payments made on the applicants account in accordance with the "salary sacrificing" arrangement. "Basic salary" satisfies the criteria set out by Fry LJ above. The money which would otherwise be paid to the employee (indeed as it was before the motor vehicle novated lease was entered into) became available solely on the basis of services rendered to the respondent under the contract of employment. Payments were made on a monthly basis being computed in accordance with the terms of the lease and running costs but were paid as deductions in conjunction with the applicant's salary on the 15th day of each month."

112 Hence in that matter the component for salary sacrifice was included as salary as it had the characteristics of a regular payment for services rendered, computed by time and payable at a fixed time.

113 I should note that I cannot use fully the formula contained in the regulations, namely:

> "(c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim – the amount worked out using the formula –
>
> $$\frac{\text{Remuneration received x 365}}{\text{Days employed}}$$

as Ms Downs-Stoney did not receive any remuneration for the time in question.

114 I consider that these four tests referred to above must be applied to Ms Downs-Stoney's salary packaging component to ascertain whether it forms part of salary. In general, I would be minded to incorporate a salary sacrifice component as part of salary as, in my view, it is typically salary arranged otherwise to attract a favourable taxation benefit for an employee.

115 There is very little evidence that would assist me to understand the salary packaging component of the contract. I simply go to the wording of the contract in clause 10. The clause permits the expenditure of $30,000 gross on items of "personal expenditure, as applied". Clearly the sum is paid for services rendered and is paid under the contract. The question is whether it is computed by time and payable at a fixed time. The clause refers to the figure as a per annum figure. Hence seemingly it has the characteristic of being computed by time. It is not a one-off or irregular payment. The salary is also per annum, but relevantly paid fortnightly in arrears. Clause 10 then states, "Changes to agreed terms can only be made effective each quarter ie. July, Oct, Jan and April, and the funds allocated cannot be taken in cash". The clause in my mind gives a sense that the items for which payment will be made are agreed. This list of items and the payment for them are the "agreed terms" and can be adjusted each quarter. It connotes in my mind a reconciliation of items and payments. In that sense, albeit the payment is not for example a fortnightly payment, it is in my mind payable at a fixed time. For the reasons expressed I find that the salary packaging component is part of salary for the purposes of s.29AA and hence the applicant's salary is above the prescribed amount and outside the jurisdiction of the Commission. This is of course if the contract was made as the applicant submitted, was the actual contract and included salary plus salary sacrifice.

116 The applicant is bound by her case. If I were to accept the applicant's case in its entirety then for the reasons expressed I would dismiss the application for want of jurisdiction. This is not my conclusion.

ISSUES AND CONCLUSIONS

117 Given the nature of this case, and the manner in which it was argued, I will cover all relevant aspects of the evidence and submissions. It is important that this matter also be seen in its full context. The matter before me involves the applicant's second period of employment with the respondent after she was re-instated to her position following an earlier termination on 13 December 2002. The earlier matter originally came before me in conference and was ultimately heard by Commissioner Smith.

118 The matter before Commissioner Smith involved principally the agreement to reinstate the applicant and associated terms reached between the parties on 17 September 2003 [Exhibit A1]. The issue was whether the Commission could make orders in terms of the compromise. The applicant having sought to reactivate the original application following the second dismissal on 4 December 2003 on the basis that the terms of the compromise had not been satisfied. The Commissioner, in my respectful opinion, found correctly that the Commission has power to make orders in terms of a compromise agreement.

119 The question of the authority of Mr Yarran to enter into the compromise was an issue in that matter. The contention of the respondent was:

> "If, (which is not admitted) the President of Derbarl Yerrigan, Mr Robin Yarran had authority to enter into a compromise with the Applicant, it is an implied term of the compromise that the compromise was conditional upon the consent and agreement of the Funds Administrator and Steering Committee. Otherwise the terms of the compromise are contained wholly in writing and contained in a letter from Mr Robin Yarran on behalf of the Respondent to the Applicant, dated 17 September 2003 ('Letter')."

Commissioner Smith, in outlining the evidence before her, notes a letter of 22 September 2003 from Mr O'Kane to Mr Yarran concerning a meeting held on 19 September 2003, and quotes:

> "Last Friday, following a request from DYHS, I met with you in your capacity as President of DYHS, the Vice President, Mr Neville Collard, the A/CEO, Ms Sandra Harben and Mr Haydn Lowe to discuss a number of matters of which you had concern. This letter confirms the agreed upon outcomes of these discussions.
>
> Firstly, I advised Departmental funds would not be made available for the purposes of employment of Ms Diana Downs-Stoney until it was established that such an appointment would not have any adverse effect on the organisation's workers' compensation insurance premiums. It was agreed that you would investigate this issue and provide the Department though the Steering Committee with any relevant information."

120 This was not specifically in evidence before me, but formed part of the earlier decision. Exhibit A13 is a letter of 31 October 2003 from Mr O'Kane to Mr Yarran covering similar ground as follows:

> "1. Payment to the Deputy Chief Executive Officer. The Department remains of the view that there are significant financial risk implications for the organisation in undertaking to employ a person previously subject to a workers compensation claim and subsequent settlement, and it is not satisfied that all necessary steps have been taken by the organisation to mitigate the level of potential risk and is not prepared to expose its funds to that risk. However, it may be that the Department's response to the other two conditions you seek to impose will render this condition unnecessary."

121 Commissioner Smith notes at paragraph 21that:

> "Mr Yarran then strongly made the point that he did not agree that the Steering Committee could tell the Board how to spend its money and he told the Board that he did not agree they (the Steering Committee) could do so. He said that the Steering Committee could determine to give the Respondent funds but not to determine how it was to be spent."

122 This is similarly the view expressed by Mr Yarran in this application. Commissioner Smith dealt with the question of the authority of the Board, based on the evidence before her. She stated:

> "55. In this matter the Respondent says it should not be bound by the compromise agreement entered into on 17 September 2003 as the Board did not have the authority to enter into the agreement with the Applicant because it did not obtain the approval of the Funds Administrator or the Steering Committee. The Respondent led no evidence on this issue and relied upon the evidence given in the Applicant's case.
>
> 56. Having considered that evidence I am not satisfied the Respondent can make out a case that a substantial question or dispute is raised in relation to this issue that should be tried in a separate case. In my view a substantial question or dispute must be one that has merit. There is no reliable evidence before this Commission that the Board of the Respondent was required to seek approval of the Steering Committee or the Funds Administrator prior to offering to compromise the Applicant's claim. Ms Harry gave uncontradicted evidence that at the time of the Applicant's appointment as Director, Client Services in January 2002, the Respondent was under funds administration and the Respondent did not have to obtain approval for the Applicant's appointment from the Funds Administrator or the Steering Committee. Further, Ms Harry confirmed that the Board was able to employ other persons without obtaining approval of the Funds Administrator and that the Funds Administrator had not refused to pay any other employee of the Respondent. The only document produced in these proceedings that relates to this issue is a copy of the letter from Mr O'Kane from the Department of Health and Ageing. Whether he was on the Steering Committee is not clear from his letter or the evidence given in these proceedings. All the letter says is that funds would not be made available for the Applicant's employment until certain information was provided. It is apparent from the evidence that the required information was provided and after a period of time following the Applicant's reinstatement funds were approved to her for the work carried out by her after 23 September 2003 and she was paid her salary.
>
> 57. As to the Respondent's contentions set out in paragraph 37 of these reasons, the Applicant did not give evidence in chief about this matter and nor were these contentions raised with her in cross-examination. As to the Respondent's contention that it should be implied in the compromise agreement that the Board required the approval of the Funds Administrator or the Steering Committee to enter into the compromise agreement, I do not agree that such a condition should be implied at law. A term will not be implied if it is not reasonable to do so. At the highest if it accepted that the letter written by Mr O'Kane, dated 22 September 2003, is a letter setting out the requirements of the Steering Committee, it follows that the Steering Committee simply imposed conditions (namely the requirement to produce evidence of the Applicant's fitness to work and the likelihood of re-injury) on the agreement to reinstate. At law these conditions can be said to be conditions subsequent on the performance of the agreement to compromise which was accepted by both parties. In such a case it cannot be said that it is necessary for the reasonable or effective operation of the contract to imply the term sought by the Respondent. Further the term sought to be implied is inconsistent with the conditions subsequent."

123 The point of Commissioner Smith's decision is that the compromise was made, the applicant was reinstated and the respondent was bound to pay. I agree with her reasoning. The question is whether any subsequent contract was validly made which bound the employment relationship. Exhibit A1 important states:

> "Please be advised that the Executive Committee of Derbarl Yerrigan has resolved to offer you reinstatement to your position at Derbarl Yerrigan. I am authorised to negotiate your return with you.
>
> Our offer is that you return at the same salary conditions with no loss of your leave or other entitlements.
>
> …
>
> To accept this offer, please sign below as indicated."

124 There is now evidence before me that Ms Downs-Stoney was in fact not paid. Put simply the contention of the respondent in the earlier matter and this matter is that Mr Yarran could not make the compromise on the contract as the Funds Administrator and the Steering Committee held the purse strings. This contention is diminished in a number of ways. The Funds Administrator never signed contracts; he authorised funds. He took to the Steering Committee for approval items outside of budget. The normal items within budget were treated on a day to day basis by the respondent organisation. I do not wish to cover whether Ms Downs-Stoney's appointment was within or outside of budget as it is clear Mr Devitt required all new appointments to be put to the Steering Committee. However, if it is a point of relevance then the applicant assumed the duties of the Deputy CEO and I would have thought was therefore within a budgeted position. The Funds Administrator never acted to terminate the contract or suggested he had power to do so. He seemed to act simply as if a contract had not been made as he did not provide funds. Yet the Steering Committee directed that the Medicare funds which were under his control were to be provided. The problem being that it was not until late October or November 2003 and Mr Devitt says the net Medicare funds were in deficit.

125 There can be little doubt, in my view, that Mr Robin Yarran as President of the Board was able to sign documents such as the contract [Exhibit A2] on behalf of the respondent. The applicant's original contract [Exhibit R1] was signed by the then President of the Board, Mr Robert Isaacs. The constitution and rules of the respondent [Exhibit R8] do not assist specifically in this regard except that the powers provided in clause 5 are broad and may be exercised by the Association, hence seemingly as the Board directs. The Board approved on 11 September 2003 a resolution that Mr Yarran, Mr Collard and Mr Lowe negotiate the terms of Ms Downs-Stoney's reinstatement. Hence the applicant was presented with the letter of 17 September 2003. This was after some debate concerning the report tendered to the Board by Mr Lowe. Exhibit A8, (p.20 of the applicant's documents) states in the minutes of that board meeting of 11 September 2003:

> "Board resolution: Diana Downs-Stoney is offered return to employment, subject to satisfactory negotiations by chairman/deputy chairman and H. Lowe. As a guide, annual and L.S.L. for period off work, and gap between compensation and salary. Negotiation team allowed some flexibility. These negotiations will commence after consideration of any "pay out" Ms D.Downs Stoney has received as to whether these were paid at a result of Ms Downs-Stoney inability to work further at Derbarl Yerrigan. Chair, deputy chair and H Lowe to proceed if satisfied all in order."

126 I have addressed the issue of the Medicare money which Ms Tobin says formed about 10% of the respondent's income (this is consistent with evidence given by Ms Downs-Stoney) and which Mr Devitt says did not amount to a sum of money to be deposited in a bank account and would have required the respondent to restructure its budget. The only other funds available to the respondent were those provided by State and Commonwealth authorities, which were controlled at the relevant time by the Funds Administrator on instruction from the Steering Committee. Mr O'Kane says that he was only interested in the Government funds and not any other source of funds. A bank account was established to deposit the Medicare funds. There is no evidence that such funds were deposited. The applicant was not paid from those funds, and not paid at all. It is Ms Tobin's evidence that the Funds Administrator advised the respondent that no staff should be employed without his express consent. What is presented then is a struggle between Mr Yarran and the Steering Committee/Funds Administrator as to whether the Steering Committee, and consequently the Funds Administrator, could tell the respondent's board what to do. This is against a backdrop whereby the respondent had no access to funds other than through the Funds Administrator, even though it was agreed that the Board could access Medicare funds. Ms Downs-Stoney says she continued in employment as she expected to be paid from these funds, or at least expected the financial stand-off to be resolved.

127 Whereas I have the benefit of considerable additional evidence on behalf of the respondent than that before Commissioner Smith, there is nothing in that evidence to suggest that the Funds Administrator and the Steering Committee controlled any thing other than the funds provided to the respondent, and what those funds might be expended upon. Clearly this is a significant control. It is not however in the nature of the control exercised by an administrator or receiver in a corporate law sense. It is a means of protecting the funds allocated and ensuring that they are spent on the purpose for which they were allocated. If the organisation does not do as required then further funding may be in jeopardy.

128 It would seem that whilst the Steering Committee would not allow payment for Ms Downs-Stoney, the condition and rationale they used was connected to whether she presented an insurance risk to them. Seemingly the applicant satisfied that condition by providing Dr Tannenbaum's report which certified her fit for full duties [Exhibit A6]. There is no evidence before me that suggests that the Steering Committee was dissatisfied with this report and sought additional medical assessment. This matter simply remained unresolved and it would seem largely unattended to. Albeit Mr Lowe in his evidence says he had a discussion with Mr O'Kane wherein he attempted to discuss how the matter might be resolved.

129 What also remained unresolved and unattended to was the actual contract of employment of Ms Downs-Stoney. Mr Lowe and Mr Collard at least were aware of the contract not long after it was signed. There is some issue about whether it was the 3 year or 5 year contract. It is my view that Ms Harben was also aware of the contract shortly after it was signed. Ms Tobin was aware of it sometime later. Mr Murphy says he was aware that the applicant had been re-employed in September. I conclude that the Steering Committee must also have known about the contract given that Ms Downs-Stoney was working at the respondent's premises. Clearly Mr Lowe was actively engaged in discussions with an array of people to attempt to settle some of the respondent's issues, including matters relating to the applicant. Mr Yarran took steps to have Ms Downs-Stoney paid. Ms Tobin was instructed not to by Mr Devitt. Ms Downs-Stoney continued to work for the respondent. The evidence is clear that Ms Downs-Stoney had access to a vehicle, a security card, some facilities and was paid expenses for her attendance at some conference. Mr Devitt sought to remove her access to facilities but this did not work. Ms Downs-Stoney says she undertook certain work. The applicant's evidence, whilst I treat it with some caution, was not contradicted on this point. Ms Harben and Ms Tobin say the applicant was at the respondent's premises but they are not sure what she did. Mr Lowe says he saw the applicant undertake her duties during the relevant period. Exhibit A4 is a communication to all staff from Ms Harben on 26 September 2003 advising them of the applicant's return to employment, though it does not specify her duties and states that a contract "is being negotiated". I find that the applicant did perform work for the respondent during the period 24 September to 4 December 2003.

130 All of this begs the question that if the Funds Administrator, and the Steering Committee, believed that Ms Downs-Stoney was not an employee and was not allowed to work at the respondent's premises, then why did they not direct that she be removed from the premises. Instead all that occurred was much debate and some correspondence, and Mr Devitt tried unsuccessfully to deny Ms Downs-Stoney access to facilities of the respondent. They simply denied that she was employed as they were not prepared to pay her. Then Ms Downs-Stoney by letter dated 4 December 2003 was told that she was in breach of her contract of employment and was summarily dismissed from that contract. The letter goes on to refer to the "purported contract" of 23 September 2003 and states that the "purported contract" is rescinded. Her breach of the Code of Conduct of the respondent, to which of course Ms Downs-Stoney could not be held accountable if in fact she was not an employee, seemingly related to her activities surrounding the making of the "purported contract". Clearly, Ms Downs-Stoney was not an employee prior to 17 September 2003, and on the applicant's claim not until 24 September 2003. The later date arguably being the correct date as that is the date she started work.

131 As I have alluded to earlier, I do not have evidence as to how the respondent came to form the view expressed in the letter of 4 December 2003. I only have evidence as to the brief exchange that ensued when the letter was delivered and that Ms Downs-Stoney was not surprised. The evidence is in effect that she expected to be terminated as things had been difficult under the new board. I must say that this was a poor way to treat the applicant. Notwithstanding the tensions that may have existed between Mr Yarran including perhaps some of the board, and the Steering Committee. It would have been better to have had the situation clarified for Ms Downs-Stoney either by way of payment, termination, or if the need demanded and suspicions were aroused, then by investigation. There may have been doubt about the contract of 23 September 2003 but the letter of 17 September 2003 was clear and the applicant accepted the invitation to return to employment and this was announced generally to staff on 26 September 2003. Ms Downs-Stoney started back with the respondent on 24 September 2003. Yet the matter or any doubts the Steering Committee or Funds Administrator remained unresolved by concrete action until 4 December 2004, on the evidence before me. The applicant was instructed to perform the role of the Deputy CEO [Exhibit A11], a very senior position in the organisation. The Funds Administrator had access to legal advice. If he thought that no contract had been made, that he had authority over employment, and that Mr Yarran had no authority, then he could have taken more definite steps to exclude Ms Downs-Stoney from the premises. He attempted to do so, or at least to take the keys to her vehicle, but was aware his attempts had been reversed. The difficulty was of course that he was not the employer; the board was and the board had made a contract with the applicant.

132 I have quoted at some length the evidence of Mr Lowe and Mr Collard, which I accept. Both of these men, together with Mr Yarran, were deputised by the respondent's board to negotiate with the applicant a return to her employment. The terms of her reinstatement are at Exhibit A1. Their evidence then makes it plain that they had no involvement with the applicant or the respondent board, of which Mr Collard was a member, between 17 September and 23 September 2003 concerning the applicant's contract [Exhibit A2]. They were surprised to find that the contract was signed by Mr Yarran and do not know why he signed it. Mr Lowe's opinion is that Ms Downs-Stoney acted in a "some what underhanded" manner. That is an opinion and there is no more concrete evidence than that. There is no evidence as to any investigation or queries addressed to Mr Yarran or Ms Downs-Stoney or others as to how it transpired that the contract came to be signed. The evidence, which I accept, is that Ms Harry had a personal relationship with Ms Downs-Stoney and pushed hard for the reinstatement of the applicant. The evidence is that the Board wanted the applicant to have a five year contract.

133 The only evidence I have of minutes of board meetings, and it would seem that meetings were always minuted, are Exhibits A7, A8 and A12. The evidence of Mr Yarran was that there are other documents which were effectively lost or destroyed. This evidence is at best unsatisfactory. The board meeting on 23 September 2003 dealt with this issue in the following way:

> "Haydon Lowe; Provided a report; Diana. Down-St – Return & workers compensation
>
> Return – Dianne must produce a medical certificate that states she is fit to return to work and the return will not cause a relaps of past problems and that there is no evidence that DDS is not a risk to other workers and that areas of concern have been addressed or Diana Down – Stoney should sign a document to release DYHS from responsibility"

134 I can see no endorsement of the contract of 23 September 2003. If the contract had been read out to the board and endorsed, given the significance of the issue, I would have expected some brief mention of it at least. I am not convinced therefore that the contract was ever formally approved by the board and that the only endorsement of a contractual arrangement, to be negotiated, occurred at the board meeting on 11 September 2003. This decision was then executed in the form of Exhibit A1. That document, in my view, given the terms of Exhibit A1, is sufficiently complete in its terms to form the contract of employment. The only point missing is Ms Downs-Stoney's actual date of return to work. This is not however the case of the applicant.

135 The applicant says the contract was made on 23 September 2003 and is Exhibit A2. This was of course signed subsequent to Exhibit A1 and is different, more complete and expressed in the typical form of an employment contract. The applicant says that she brought to the meeting documents which showed a 3 year and a 5 year term. She signed both and the board wanted a 5 year term. She is indifferent as to whether the contract was for 3 years to 5 years. She says Mr Lowe advised her that it should be 3 years as the funding body would be more amenable. I have a difficulty with this evidence, but it was not specifically put to Mr Lowe, and the manner of cross-examination suggests that there may have been some discussion of term between these two witnesses (Transcript p.125-126). I do not know when this may have occurred. In answer to a question from the Commission the applicant says directly that she thought she had signed up to a 3 year contract. Mr Yarran says that the board wanted a 5 year contract. As I have stated, there are no minutes of a board meeting which establishes this, but Mr Yarran was emphatic on this point and it is supported by Ms Harry and Mrs Yarran. Mr Yarran, had authority to sign such contracts. It was perhaps not a wise move given the issue of funding had not been resolved. However, the condition expressed by Mr O'Kane on 22 September 2003 concerning the applicant's employment, related only to fitness for work. The applicant says she was in good health and spirits at that time and her medical reports confirm she was fit for work.

136 There is an issue as to whether the contract had to be specifically authorised or endorsed by the board, given especially the decision of the board on 11 September 2003, followed by the letter of 17 September 2003 and the fact that the contract is importantly not consistent with that decision and that document. I consider that the conduct of the respondent coupled with the Constitution and Rules of the respondent means that board authorisation was required for this contract. This did not occur. The evidence on behalf of the applicant is that the board did endorse the contract; but papers were lost or destroyed. I doubt this evidence.

137 Mr Yarran expressly states that he was authorised by the board. No such authorisation existed for the second and subsequent contract on 23 September 2003. He did not have the authority as there is no record and no reliable evidence to suggest that the board, or those properly termed the "Executive Committee" passed a resolution in respect of the contract of 23 September 2003. Such matters were matters for the board as evidenced by the discussion and resolution arising from the meetings of 4 August and 11 September 2003.

138 Whilst I do not understand that this is a matter that has not been the thrust of the respondent's arguments, it is raised in items 4 and 18 of the respondent's notice of answer and counterproposal (NA&C). The Commission is also not a court of pleadings, and the evidence is squarely before the Commission. I do not support the view that Mr Yarran had no authority as the Funds Administrator had to approve the employment (Item 5 and 20 of NA&C). This matter was decided by Commissioner Smith as it relates to the offer of 17 September 2003. I agree with her reasoning.

139 Mr Fraser for the applicant says that the applicant is entitled to rely on the actions of the respondent. This is not however a usual situation. Ms Downs-Stoney had helped the board for several months and knew all the procedures and requirements of the organisation.

140 The respondent also maintains that the contract was somehow flawed as Mr Yarran was semi-literate and did not understand what he was doing; the applicant took advantage of him and exerted undue influence. It is abundantly clear to me from the hearing that Mr Yarran did not have a proper grasp of the contract [Exhibit A2]. He clearly did not know that it meant that if the applicant was terminated for other than serious misconduct then the full contract would have to be paid out. These important provisions were put into a document, by or on behalf of the applicant between 17 September and 18 or 19 September 2003.

141 The applicant had previously assisted the board members in a number of ways; including assisting them to get legal advice. Mr Lowe was engaged by the board to assist them with the applicant's reinstatement. Mr Lowe had known the applicant for some time and was on cordial terms with her. Yet he was left out of the events between 17 and 23 September 2003 as they relate to the contract. This naturally raises suspicions that a hurriedly concocted and inappropriate deal was made. I do not have evidence to form a view that Ms Downs-Stoney exerted undue influence on Mr Yarran, and I would say the other board members. That is a serious charge in my view. The respondent also clearly did not have such evidence when they dismissed the applicant, otherwise it would have been put before me. Mr Fraser says that the board could have resorted to outside (including legal) advice, as indeed they could have. Ms Harry would appear to have been a prime mover in seeking to have Ms Downs-Stoney's employment settled. In my view, I can however conclude that it is more probable than not that Ms Downs-Stoney was opportunistic in having such advantageous clauses inserted into the contract to improve her position, in such a short period of time, particularly after having just signed Exhibit A1. The evidence on behalf of the applicant would have me believe that there was much more discussion and debate about the contract in that short period of time than I consider possible. Her actions may seem to be understandable given the ill-treatment she received when first employed, and her subsequent ill-health. She needed to protect herself. It begs the question why she wanted to return to the respondent's employment in any event. But that is not an area I need or choose to explore further.

142 If I am wrong, and Mr Yarran did in fact have the authority of the board to sign the contract of 23 September 2003, then having regard to my obligations under s26 of the Act, and given the circumstances of the matter and the reasons expressed, I would in any event set aside the contract.

143 As stated, there is an argument that the applicant was entitled to rely on the conduct of the respondent in any event. I am not convinced of the merits of this argument in this case as the applicant, unlike an employee who is to be engaged by an employer, had full knowledge of the workings of the respondent organisation and the funds administration. The board had in fact asked her for help as they were floundering and needed assistance. The respondent, in my view, rightly argues that there has been a mutual mistake as to the terms of the contract; hence the genuine consent required to form the contract was not present. Clause 15(f) of the contract is clearly a crucial provision for the applicant of which, in my view, the respondent had no knowledge of and no understanding. It is one matter for Mr Yarran to want the applicant to have a contract for 5 years; it is an entirely different matter to say that the board or he wanted her to be paid out for that time if terminated. He gave some evidence that she was entitled to be protected. I am not convinced that he knew what this meant in contractual terms or had previously addressed his mind to the issue.

144 In Macken, O'Grady, Sappideen and Warburton's Law of Employment, Fifth edition @ p.77 they outline circumstances whereby a mistake may vitiate a contract:

> "A mistake may arise because one of the contracting parties enters into the contract under a serious mistake about its contents in relation to a fundamental term. If the other party is aware of this and deliberately sets out to ensure that the first party does not become aware of the mistake, a court of equity will set aside the contract. A mistake may arise because one of the parties, without any intention to deceive, fails to disclose all the facts he or she may be obliged to disclose to the other party. However, there is no general duty of disclosure on contracting parties to contracts of service and a party may "observe silence even in regard to facts which he believes would be operative on the mind of the other", although he or she cannot positively mislead, say by giving a false answer to a material question asked by the other party."

145 Mr Stubbs for the respondent submits as follows:

> "4. If one party intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, then there is no consensus ad idem and therefore, there is no contract unless one of the parties conducts themselves in such a way that a reasonable person would believe that they were assenting to the terms proposed by the other party.
>
> *Smith v Hughes* (1871) LR 6 QB 597 at 607,
>
> *Babsari Pty Ltd v Wong* (2000) 2 Qd R 576 at 584,
>
> *Dickonson v Dodds* (1876) 2 Ch D 463 at 473
>
> *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* (1983) 1 AC 854 at 916-917
>
> 5. There is no contract unless there is a true meeting of minds of the contracting parties so that each intended to contract on the same terms.
>
> *Babsari Pty Ltd v Wong* (2000) 2 Qd R 576 at 584
>
> *Dickonson v Dodds* (1876) 2 Ch D 463 at 473"

146 I agree with this submission.

147 The issue is whether the contract is void for uncertainty and whether the offending term is severable (*Whitlock v Brew* (1968) 118 CLR 445). It is the case that clause 15(f) would radically alter the contract in the mind of the applicant. The better and correct course in my view is that the contract must fail in its entirety.

148 This does not leave the parties without a contractual obligation. For the reasons expressed the contract was formed on 17 September 2003. That in my view is the contract which applied to Ms Downs-Stoney's period of employment between 24 September and 4 December 2003. The contract is under the prescribed amount and within jurisdiction. The applicant worked during this period and should have been paid accordingly. She has thus been denied a contractual benefit which is due and payable. That benefit is for a salary of $63,253 per annum and 9% superannuation. The benefits which relate to motor vehicle and mobile phone are a work related benefit and not claimable. I do not consider that the salary sacrifice component is in fact an additional component and hence do not factor that component in as an additional component. If the parties can produce a payslip as to the precise payment which the applicant was paid under her initial contract, and this presents an amount different to my calculations, I would award that amount. However, on the evidence before me Ms Downs-Stoney worked for 10.2 weeks and hence is entitled to a sum of $63,253 by 10.2 divide by 52; this is a total gross figure of $12,407.32 less any taxation payable to the Commissioner for Taxation. I would award this amount. The superannuation due, using the same approach, is $1,116.66. I would award this amount.

149 I turn then to the question of the alleged unfair dismissal. I have stated that procedurally Ms Downs-Stoney was not treated fairly. It is also the case that the respondent did not, and has not established grounds for a summary dismissal. Ms Downs-Stoney may have sought to protect herself in the making of the contract, but that is conduct one might expect a prospective employee to engage in. She had not commenced work at that time. The circumstances of this matter are however not usual, and the circumstances leading to the making of the contract are not usual. I cannot on the evidence before me form the view that somehow the applicant pressured Mr Yarran and others into signing the contract. Her actions though were not actions that should be condoned in my view. Ms Downs-Stoney had acted as the CEO of that organisation. She knew how the organisation was run, she on her own evidence was concerned about the mis-management of the organisation, and she knew the types of employment contracts that were entertained. Ms Tobin's evidence is that this contract was unusual as indeed one might expect that to be so. The applicant knew that she stood to gain substantially if the new board came in and dismissed her. She knew there were factional tensions. She had experienced them before. Ms Tobin's evidence about the applicant's comments on 4 December 2004 also supports this view. For all of these reasons I do not believe that the requisite trust required of the employment relationship could have been present or maintained. For that reason I consider that the employment relationship should have been terminated and terminated on notice (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). The contract [Exhibit R1] includes a provision at clause 15(a) for two weeks notice and that is the notice that should have been paid. That is a sum of $2,432.80, and a superannuation payment of $218.95. I would award these amounts also as a denied contractual benefit.

150 I note that the applicant was not fit for work after her termination. There is some contention about the date. However, she did work until 4 December 2003, on the evidence before me. Whether the applicant can sustain a claim for workers' compensation is not a matter for me.

2004 WAIRC 13149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA ELIZABETH DOWNS-STONEY
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 26 OCTOBER 2004
FILE NO	APPLICATION 12 OF 2004
CITATION NO.	2004 WAIRC 13149

Result	Contractual entitlements claim awarded for time worked and notice
Representation	
Applicant	Mr P Fraser of Counsel
Respondent	Mr G Stubbs of Counsel

Order

HAVING heard Mr P Fraser of counsel on behalf of the applicant and Mr G Stubbs of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

(1) ORDERS that the said respondent do hereby pay within 7 days of this order, as and by way of wages and notice the amount of $14,840.12 to Diana Elizabeth Downs-Stoney, less any taxation that may be payable to the Commissioner of Taxation.

(2) ORDERS that the said respondent do hereby pay within 7 days of this order, as and by way of superannuation the amount of $1,335.61 to a superannuation fund nominated by Diana Elizabeth Downs-Stoney.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2004 WAIRC 12915

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUNE ANNE GARDNER
	APPLICANT
	-v-
	AESTHETICS DENTAL GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 5 OCTOBER 2004
FILE NO.	APPL 185 OF 2004
CITATION NO.	2004 WAIRC 12915

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Lack of procedural and substantive fairness – Applicant unfairly terminated – Compensation for loss and injury ordered – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) and (ii).
Result	Declaration made that the Applicant was unfairly dismissed. Order made that the Respondent pay the Applicant $2,568.00.
Representation	
Applicant	Mr A G McDonald (as agent)
Respondent	Dr A S Furlan (in person)

Decision

1 June Anne Gardner ("the Applicant") claims she was harshly, oppressively and unfairly dismissed on 19 September 2003, by Aesthetics Dental Group Pty Ltd ("the Respondent"). The Applicant makes a claim under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The Applicant also makes a claim under s.29(1)(b)(ii) of the Act that she has been denied contractual benefits not being a benefit under an award or industrial agreement, namely pay for the two last weeks she worked for the Respondent.

2 The Applicant was employed by the Respondent as a dental therapist. The Respondent was a management company and provided the management services to Dr Furlan, the owner of the Respondent. Dr Furlan traded as Image 21 Dental Centre. The Applicant commenced her employment with the Respondent on 24 March 2003. At all material times the Applicant was employed as a dental therapist two days' a week for another dentist. The Applicant says that she applied for the position with the Respondent because it was part-time which fitted in with her other job.

3 There is no dispute that the Applicant was paid $35.00 per hour for each hour she worked for the Respondent. The Applicant was not paid sick leave or holiday pay while she was employed by the Respondent. The Applicant said that she was engaged by the Respondent as a part-time employee and the Respondent says that the Applicant was engaged as a casual employee.

4 The Applicant's employment was terminated on 19 September 2003, when she received a telephone call from the Respondent's office manager, Ms Kate Burnett, who informed the Applicant, "Don't come in on Monday, Dr Furlan has fallen down in a heap again. Don't come in on Monday. There is no work". At the time the Applicant received the telephone call, she was working at her other place of employment. The Applicant says that termination of her employment was effected in a manner that was procedurally and substantially unfair. The Applicant says that at the time she was dismissed, there was work for her to do at the Respondent's business because clients were booked to see her.

5 The Respondent says that the Applicant's termination was not unfair. The Respondent says that at the time the Applicant's employment was terminated, the business was unprofitable. Dr Furlan had left the running of the business to Ms Burnett because at the time Dr Furlan was unable to run the practice because of her ill health. She says that the Respondent had no choice but to terminate the Applicant's employment. The Respondent also says there were some "performance issues" with the Applicant. However, it was common ground that none of these issues were raised with the Applicant whilst she was employed by the Respondent.

The Applicant's Evidence

6 The Applicant has extensive experience as a dental therapist. Her curriculum vitae reveals that she qualified as a dental therapist in the early 1970s and has worked as a dental therapist since that time in a number of senior positions. The Applicant responded to an advertisement in the newspaper for the dental therapist's position at Image 21 Dental Centre and made an appointment with Dr Furlan for an interview. At the interview, she explained to Dr Furlan that she was working part-time for another dentist and wished to maintain that position. She advised Dr Furlan that she would be able to work for the Respondent all day on Mondays and on Wednesday mornings. The Applicant says that Dr Furlan informed her that she had not previously employed a dental therapist. The Applicant explained the procedures she would carry out would be scaling, cleaning, perio, radiographs and impressions. The Applicant says that she informed Dr Furlan that she was looking for "something permanent" and Dr Furlan told her that she was looking for something similar as she (Dr Furlan) wanted a reliable therapist to be employed on a long term basis. It was agreed at the interview that the Applicant was to be paid $35.00 per hour.

7 The Applicant said that after she commenced work for the Respondent, she worked on a regular basis on Mondays and Wednesdays and attended meetings on Fridays. Occasionally, she would see a patient on a Friday. She said they were trying "to get a team together" for Dr Furlan's business.

8 The Applicant tended into evidence two doctor certificates, which show that she was ill on Monday 14 July, Monday 8 September and Tuesday 9 September 2003. The Applicant says that she was not paid for those days. The Applicant also tended into evidence her timesheets for each week she worked and payslips she received while she was employed by the Respondent.

9 The Applicant's timesheets show she worked the following hours: –

Week	Thursday	Friday	Monday	Wednesday
1.			6.5 hours	
2.			8.25 hours	
3.		3 hours		
4			7.5 hours	
5.		3.25 hours		
6.			7 hours	
7.		Anzac Day	7 hours	4.5 hours
8.		5.25 hours	3.25 hours	
9.		4 hours	7.25 hours	4 hours
10.		3.5 hours	7 hours	4.5 hours
11.		3 hours		
12.				3 hours
13.		2.5 hours	8.75 hours	4.75 hours
14.			Public Holiday	3 hours
15.		2.5 hours	7 hours	4.25 hours
16.			8.25 hours	2.75 hours
17.			5 hours	3 hours
18.		3 hours	9 hours	5 hours
19.	3.5 hours		4.25 hours	
20.	1 hour			
21.	Sick		6.5 hours	
22.	5.5 hours		7.5 hours	
23.	3.5 hours		8.75 hours	
24.	5.25 hours		8.5 hours	
25.	2 hours		5.25 hours	1 hour
26.			9.5 hours	
27.			8.5 hours	5 hours (estimated) went home unwell 3 September 2003

10 There were no records tendered for work carried out by the Applicant after Wednesday, 3 September 2003.

11 The Applicant testified that she had set days to work and when not fully booked, she had the task of ringing clients to encourage them to book further appointments. She denied that she was engaged on the basis to only work when patients were booked to see her. She conceded throughout the currency of her employment that she never made a claim for paid sick leave or payment for public holidays. She said that she provided the medical certificates so her employer knew she would be absent and her patients would be looked after.

12 The Applicant maintained that whilst she was employed she got on well with the staff and that no performance issues were ever raised with her. When cross-examined the Applicant agreed that Dr Furlan spoke to her about some electric toothbrushes, which had not been paid for by patients. The Applicant said this conversation occurred about three weeks before she was terminated. Apparently a number of electric toothbrushes had not been accounted for. The Applicant agreed to try and recall the names of patients she suggested should purchase electric toothbrushes. She said there was no agreement to go though patient's records because she has a very good memory. She obtained an exercise book for the task but did not carry out the task prior to her employment termination. The Respondent put to the Applicant in cross- examination that she was responsible for noting the electric toothbrush item number on the patient's records, to ensure that the toothbrushes would be charged to the patients. The Applicant denied this was her responsibility. She testified that it was her practice to advise patients to purchase an electric toothbrush and to ask the receptionist about purchasing an electric toothbrush.

13 It is clear from the evidence given in these proceedings that the dispute about electric toothbrushes was not an issue which led to the termination of the Applicant's employment.

14 The Applicant testified that when she was informed by Ms Burnett that her employment was terminated, she was very concerned because to leave one's patients without an explanation was inappropriate. She said she felt "absolutely blown away, really quite shocked" and thought that "if I've done something wrong it would be very nice if I was consulted". She said she could see no reason why she had been dismissed. The Applicant said that it unusual that Dr Furlan was absent and she did not accept Ms Burnett's explanation that there was not enough work when there were plenty of other persons working in the practice, including Dr Furlan's brother and a dentist friend of Dr Furlan's brother. She said that she (the Applicant) had bookings to see clients after 19 September 2003. The Applicant says that after being advised by Ms Bennett employment was terminated, she attempted to contact Dr Furlan and was told Dr Furlan was unavailable.

15 On 25 September 2003, the Applicant faxed a letter to the Respondent's accountant Ms Angela McGuinness. In that letter she stated: –

> "I refer to phoned advise (sic) to me from Kate (Senior/Office Manager last Friday 19th September to the effect that my services as a Dental Therapist at Image 21 were no longer required.
>
> Could you please advise by return fax today my remuneration entitlements due and pay accordingly to my account.
>
> I am disappointed Aesthetics Dental Group can no longer retain my services. However, I have very much enjoyed working with all of you and look forward to staying in touch for the future."

16 On 17 October 2003, the Applicant sent a facsimile to Dr Furlan, in which she stated:

"Let me clarify a number of issues: –

"1. I understand as of today my last time sheet has no 'finish' time marked. Your surgery could not locate it today. If this is the case please fax it to me and I will fax it back complete.

2. From the beginning of my employment you made it clear my position was permanent partime [sic]. I made it clear I was requiring fixed on certain days partime [sic] employment. Not casual.

3. If your [sic] in any doubt I have arranged for DOCEP to fax you a copy (see attached) of the description of casual + partime [sic].

4. At no time have I given stock away to clients. What happens at the front desk after any advice from me is beyond my control. I am disappointed you have seen fit to stoop to such a level.

5. I have made representation to the W.A. Ind. Commission today (see attached). If you decide not to honour your obligations to pay me in full for wages and all other intitlements [sic] by 4.00 pm Monday 22nd Oct I will have no alternative but to proceed on Tuesday with the Form 1 as shown. I recommend you contact them on Monday Ph 9222 7700 if you are in any doubt.

I am a soft kind person Camelia and I worked diligently for you. What you have done since terminating my employ [sic], which I understand, is dirty and cheap and not worthy."

17 Dr Furlan responded the next day with a facsimile to the Applicant. In the facsimile she stated:

"It is with great sadness that I have to reply to your 'threat' under the conditions in which I find myself right now.

As you are aware, I have not been able to be available to manage and control what has been happening in the practice on a full time basis due to maternal responsibilities. I have chosen though, to employ people such as yourself, and others such as Kate Burnett (in management) and Angela McGuinness (in accounting and bookkeeping) that had expressed an attitude towards excellence in their field and demanded (like yourself) high wages for their services. I accepted, and in return expected professionalism and trusted that everyone employed under these conditions will look after the practice's best interests. However, as you may have experienced, it is difficult to get good service let alone excellent, even if one (myself the employer) is paying dearly for it in good trust.

I am very disappointed that Angela has not attended to your situation and has not attempted to contract you to resolve this issue more persistently. For that, I sincerely appologise [sic]. But as you know, there are always two sides to a story. I am writing this to express the view from where I stand.

I have been aware of your previous letter, and had instructed Angela to work out your remaining payments. At the same time, I asked her to hold on to your wages until such time as you return to the practice to honour the agreement we had.

If you will remember on a few occasions well before your termination, I have mentioned to you my concern that costly hygiene products such as electric toothbrushes were 'missing' from the stock room and that there were no invoices raised. You have told me that you will take care of this by going through patient records and identifying from your notes the names of the patients that you have offered products to, that way we can invoice the patients foe the products, and the practice has the opportunity to recover the costs. To this date, as far as I know, this has not been done.

As I've mentioned before I have employed you believing that you are a highly experienced and knowledgeable professional. Your comment in your facsimile message dated 17/10/03 point four 'what happens at the front desk after any advice from me is beyond my control' is a statement of a blaming and irresponsible person that is certainly not acting in the best interest of the employer and of the practice that has employed you. As the professional you are required to supervise, guide and check on the non-professional personnel that are there to help. It is your responsibility to make sure that at the end of the day, all is well and the practice is making (and not loosing) money. That is why you are the professional.

And about your comment 'I am disappointed you have seen fit to stoop to such a level'. Well, I absolutely mean and expect you to honour your promise.

The reason I asked Angela to hold on to your wages, was to ensure that you will return to the practice to complete this assignment (and by the way, I do not expect to be charged for it). As I see, it the practice can't afford to pay you if you are not productive, and do not charge for products and services adequately.

Even worse, the practice can charge you for neglect, and ask you to reimburse immediately the costs of missing unaccounted stock that were under your care. And until this is done, I do have the right to protect my interest by withholding your wages as a safety net, until such time that this is resolved.

Believe me June, I do not think that your outstanding wages will come even close to covering the losses I have suffered whilst you were at the practice. I would have much preferred it that rather than threatening, you would have chosen to seek a win-win solution.

In reference to point one on you facsimile, let me clarify that it is the employee's responsibility to fill in the time sheet, not the employer's If you do not fill it in, you can't expect to get paid. According to Angela, she has tried to contact you over the phone during her working hours at Image 21 several times, so that she can ask you about the missing details. Angela is not here at your disposition, June. And you have no right to harass and call her at home. Also, faxing you the timesheet will happen when I am available during working hours, and not when you demand and threaten. The sheet is, and has been available on the practice premises all the time. As the practice has now been sold, please ask permission first from the new owner.

In reference to your employment details, our understanding was that you will not have set regular hours until such time that the practice can afford it and has the bookings necessary to commit to this. You were employed just for that reason, to help get the appointment book busy, so that it does generate income. You agreed, that whilst there were no patients, you would not need to come in, so your employment was on a 'as need' basis, and you were paid only for the hours that you were productive, not on regular set hours.

You had no problem with this agreement and had no complaints about the wages so far.

Your performance was to be reassessed, after you had the chance to familiarise yourself with the practice and after you had the opportunity to prove yourself as an asset. These were the conditions under which I have employed you.

To me 'as needed' basis is not permanent; it is casually, as required, on the days that you can. If your performance was such that patients did not want to book or re-book, your appointment book would not fill and therefore, there would be no need for you to come in. If however, your performance was excellent, and you could book yourself solidly, then you would have been needed regularly.

We have treated your employment as such, 'casual'. You were only coming in if you were needed, and you only got paid for the time you had work to do. For this you did not get paid just 20% above the award, but 90% more than the award.

As for your termination, June it is not personal. If a business is losing money and the productivity is not there, then it simply can't afford to keep paying staff and wages. I do not feel that I have done anything to you that is dirty and cheap.

In view of the above, I want to let you know that I will not be able to make your deadline for various reasons, including your incomplete time sheet and Angela's availability.

It is a shame that this is turning out so ugly, when it could have been easily resolved by working together to help each other out.

You are putting me in a very uncomfortable situation, and I would prefer now that we resolve some of these issues via an arbitrator at the industrial relations commission, and some via a court of law."

18 The Applicant made a claim for payment pursuant to the "Dental Therapist's Award". As a result of that demand, Dr Furlan purportedly recalculated her pay in accordance with the award rate and provided the Applicant with new payslips covering her entire period of employment, which showed that she was paid an hourly rate of $18.37 with the balance of the $35.00 per hour as a bonus. In that letter, Dr Furlan calculated that the Applicant was owed 32 hours' of annual leave at the rate of $18.37 being a total of $587.84. That letter and the new payslips were sent to the Applicant on 18 October 2003.

19 The Applicant was sent an account from Dr Furlan on 11 December 2003, for an amount of $524.54 for 18 items the Respondent claims was stock missing from the premises. This account was rejected by the Applicant. The Applicant maintained that the amount of $524.54 was equivalent to the amount she was owed as outstanding wages. However, the Applicant, at the time of hearing, was unable to state whether such an amount was still owing to her and no further light was shed on the subject by any other witness.

20 In cross-examination the Respondent put a list of patient's names to the Applicant, who the Respondent allegedly says did not want to come back to the practice if they were going to be treated by the Applicant. The Applicant testified that she did not recognise any of the patient's names on the list and said that she would have to see the patient's cards to see if she had treated them. The patient's cards were not produced to the Commission by the Respondent.

21 Ms Angela McGuinness gave evidence on behalf of the Applicant. She testified that she was employed by the Respondent from January 2003 until 20 October 2003. She was initially employed as a bookkeeper but her work also encompassed payroll and accounts reporting. Ms McGuinness prepared the payroll for the Applicant as well as for the Respondent's other employees and maintained the personnel files for each of the Respondent's employees. Ms McGuinness paid the Applicant $35.00 per hour for each hour worked. The payments were made with regard to the Applicant's timesheets. Ms McGuinness said that Dr Furlan told her that employees were paid on an hourly basis but there were going to be some provision "for more permanent form of employment". Ms McGuinness prepared the Applicant's payslips which showed an hourly rate of $35.00 per hour but she did not prepare the payslips, which showed a pay rate of $18.35 per hour. She said that Dr Furlan asked her on 14 October 2003, to rearrange the pay rates and issue new payslips. Ms McGuinness says she refused to do so because she had already prepared the groups certificates for the end of the 2002/03 financial year and the Applicant had already been paid $35.00 per hour.

22 Ms McGuinness testified her activity book notes recorded that on 26 September 2003, she was asked to prepare termination wages for the Applicant. Ms McGuinness says she could not do so, as she was waiting for the Applicant to telephone and verify how many hours she worked in the last period of her employment.

23 The last day Ms McGuinness worked for the Respondent was on 14 October 2003. On that day, Dr Furlan asked Ms McGuinness to contact the Applicant to "sort something out" about accounting for the toothbrushes the Applicant had supposedly given to customers as she was going to deduct the cost of the missing toothbrushes from the Applicant's pay. Ms McGuinness did not do so, as it was her last day at work and she had to attend to other matters.

24 Ms McGuinness said that the Applicant was very happy, a lovely person to work with and Dr Furlan never conveyed to her that she was unhappy with quality of the Applicant's work. Further, Ms McGuinness also testified there was nothing unfavourable recorded about the Applicant's performance on the Applicant's personnel file.

25 When asked why the Applicant was not paid for sick leave, Ms McGuinness was unable to say why, other than to say that she had a baby on 10 July 2003. Consequently, she was not at work when the Applicant was sick on 14 July 2003. When asked why she did not pay the Applicant for public holidays, she said there was a lot of contention as to whether the Respondent's employees were entitled to be paid for public holidays. She said because the Applicant changed the days she worked, there was never a decision about whether she should be paid for public holidays.

26 Ms McGuinness testified that her employment came to an end on 14 October 2003, when Dr Furlan's brother Katlin, took over the business.

27 Ms Kate Emery testified on behalf of the Applicant that she was employed by the Respondent from early 2003 until about a month after the Applicant's employment was terminated. Ms Emery was initially employed by the Respondent as a dental nurse and later did "odd jobs". Ms Emery worked on Mondays, Thursdays and Fridays. She sometimes worked at the reception desk and sometimes as a dental nurse. She testified that no one had absolute responsibility for stock control. She said there was no official system for stock take or stock control although she said that she counted and rearranged the stock with another dental nurse when she first commenced work.

28 Her evidence was that no patient came to her while she was working at the reception desk and asked to purchase an electric toothbrush. Ms Emery worked on occasions as a dental nurse with the Applicant whilst the Applicant was conducting her dental therapist duties. When cross-examined Ms Emery agreed that the dentist or the dental therapist provided instructions to her as to what item numbers were to be charged to a patient. She agreed that sometimes this information was inputted into the computer by the dentist or the dental therapist and on some occasions it was inputted by the dental nurse.

Respondent's evidence

29 Dr Alexandria Camelia Furlan testified that she is a dentist. She says that until October 2003 she was the sole trader of Image 21 Dental Centre. She is also a director and owner of the Respondent. Her trading name was Image 21 Dental Centre and the

Respondent provided the management company which ran the business of the dental practise. This is because dentists cannot be incorporated. Dr Furlan said that her practice employed five to six people, including two part-time dentists, one therapist or hygienist, a receptionist and one nurse or sometimes two part-time nurses.

30 Dr Furlan testified that when she interviewed the Applicant, she informed her that she was looking for someone to build up the practice. Her practice was new and not fully established. She said that she did not have a lot of work to enable her to offer the Applicant a permanent position. Dr Furlan said she reached an agreement with the Applicant that they would try to build the business. Further, it was agreed that if the Applicant did not have any patients she would not be paid because she (Dr Furlan) could not afford to pay her $35.00 per hour unless she was "producing". Dr Furlan said $35.00 per hour was a very high rate of pay and she chose to employ the Applicant because she was a very experienced therapist. Dr Furlan said she agreed to be flexible about the days the Applicant could work but the Applicant's availability did restrict the days patients could visit the business to obtain the services of the Applicant.

31 Dr Furlan said that after the Applicant commenced work she (Dr Furlan) was not in "a very good state" to manage the business and delegated her responsibilities to manage the practice to Ms Burnett. Ms Burnett was engaged as a management consultant so she (Dr Furlan) could stay at home with her baby and not worry about any business related problems.

32 After the Applicant commenced work, some patients complained to her (Dr Furlan) that the Applicant was "quite harsh in their mouth". Yet they said that she is a "really lovely person", they liked her but they would rather attend another practise than come back to be treated by the Applicant. As a result of these complaints, Dr Furlan says she asked Ms Burnett to address the issue and to assist the Applicant with finding alternative products which were easier on the patients' mouths. Dr Furlan said they tried everything to keep the Applicant employed, including making arrangements for the Applicant to telephone patients from the business to make appointments to increase bookings.

33 As for the electric toothbrushes, Dr Furlan said that she was extremely concerned the practice was loosing a lot of money and no one was really responsible for "anything", and that when she was checking the billing there were some notes in patient's records that they had been given an electric toothbrush which apparently they were not billed. She said she raised this with the Applicant prior to the Applicant's employment being terminated and informed her, "June, I can't afford to lose money. You know those cost $100 to buy. We really have to charge the patients". She said the Applicant told her at that time that she wanted to help by going through the patients' cards, and bill the patients that received electric toothbrushes. Dr Furlan said she was pleased with the Applicant's response as it took the pressure off her because she thought the money could be retrieved.

34 In about September 2003, Dr Furlan said that her relationship with Ms Burnett became very "unhealthy" as she had no power in running her own practice and there was a little gang of staff, which were against her (Dr Furlan). This gang did not include the Applicant.

35 Dr Furlan testified she did not know the Applicant had been terminated until she spoke about it to Ms Burnett. Ms Burnett telephoned her and said, "Oh, by the way, I've dealt with June Gardner now and told her (Dr Furlan) not to worry about it".

36 On 23 September 2003, Dr Furlan spoke to her doctor and informed him that she could not continue to practise. He advised her to take some time off. So she made the decision to relinquish her practice to her brother Katlin. She said he was looking at purchasing a practice, so she gave the practice to him. She testified she did not want anything to do with the practice anymore because it was causing her so much heartache. In the meantime, the Applicant had left messages for her but she did not wish to deal with the Applicant because she (Dr Furlan) was in a "very unhealthy state" at that time. Dr Furlan says she relinquished her practice on 1 October 2003. She sold her brother the plant and equipment officially on 30 December 2003 and he has a different company running the business.

37 After the Applicant's employment was terminated, Dr Furlan became aware that the Applicant was seeking to be paid outstanding wages. Dr Furlan asked Ms McGuinness to finalise the Applicant's pay. Ms McGuinness informed her (Dr Furlan) that she did not have the Applicant's last timesheet, therefore, she was unable to do so. Dr Furlan was aware that the Applicant was becoming quite angry about not being paid her outstanding wages. She said it got really ugly after they exchanged facsimiles dated 17 and 18 October 2003. At that time, Dr Furlan came to the view she now had to work out the award rates of pay and this was why she created the second set of payslips. On 17 October 2003, Dr Furlan left a message on the Applicant's home telephone, advising her that she was calling about the facsimile, again reiterating that she wished to resolve the electric toothbrushes issue and wanted the Applicant to come in to check the patient's records which would assist her (Dr Furlan) to recover the cost of those electric toothbrushes. She said in the telephone message that if this was done she would be happy to "work out" the Applicant's wages. When cross-examined about the telephone call, she said in the message she was trying to inform the Applicant about the impact of not recovering the cost of the electric toothbrushes. She says she was desperate for the Applicant to understand and really wanted the Applicant to help her recover those costs.

Legal Principals Unfair Dismissal

38 The question to be determined by the Commission, is whether the Respondent exercised its legal right to dismiss the Applicant in such a way that the right has been exercised harshly or oppressively against the employee as to the amount of abuse of that right (see *Mills and Ors trading as Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous (WA) Branch* (1985) 65 WAIG 385 at 368).

39 The onus is on the Applicant to prove that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove in a case of summary dismissal that the dismissal is justified. (*Newmont Australia Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679). In this matter it cannot be disputed that the Applicant was summarily dismissed.

Legal Principal – Casual Employment

40 The term "casual employee" has no fixed meaning. The true nature of any employment relationship will depend upon the facts and circumstances of each case (*Doyle v Sydney Steel Company Limited* (1936) 56 CLR 545 at 551, 565). In the Australian Industrial Relations Commission it has been accepted that the status of "casual employment" is not necessarily inconsistent with the concept of an ongoing contract of employment (*Ryde–Eastwood Leagues Club v Taylor* (1994) 56 IR 385). The nature of casual engagement has been set out in a number of decisions of this Commission. In *Serco (Australia) Pty Limited v Moreno* (1996) 76 WAIG 937 at 939, Sharkey P observed:

> " 'The concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration.'

(See *Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World* (op cit) at page 1835 per Fielding C and *Stewart v Port Noarlunga Hotel Ltd* (1980) 47 SAIR 406 at 420).

The parties, of course, cannot by use of a label render the nature of a contractual relationship something different to what it is (see *Stewart v Port Noarlunga Hotel Ltd* (op cit) per Haese DPP at pages 5-6)."

41 In my view the concept of casual employment is usually work of an informal, irregular and uncertain nature. In most cases such engagement is not likely to continue for any length of time. However, the duration of engagement may vary according to the circumstances of a particular case. It is also inherent in the concept of casual employment that an employer can elect to offer employment on a particular day and when offered, the employee can elect whether or not to accept work on that day.

Credibility

42 Having heard the evidence in this case it is apparent little is in dispute between the Applicant and the Respondent as to relevant factual circumstances in respect of the reasons for termination, except as to whether the facts establish whether the Applicant was engaged on casual or part-time basis. The resolution of that issue turns on a question of the law. Notwithstanding that is the case, where the evidence departs I prefer the evidence given by the Applicant than the evidence given by the Respondent. It is clear from the Respondent's evidence that she had little to do with the day to day running of the business from June 2004. Ms McGuinness' evidence does not conflict with either party. She gave evidence in a forthright way and her evidence was supported by her contemporaneous notes. Whilst there is some conflict between the evidence of the Applicant and Ms Emery, at the end of the day, Ms Emery's evidence is immaterial as the issues relating to the sale of "electric toothbrushes" did not lead to the Applicant being dismissed.

Conclusion

43 The Applicant was summarily dismissed by the Respondent. I accept the Applicant's uncontradicted evidence that at the time of her dismissal patients were booked to see her. I do not accept that the Respondent had a valid reason for dismissing the Applicant. It is common ground that no performance issues were ever raised with the Applicant, nor was that said to be a reason for her dismissal. The reason put forth by the Respondent is simply that the business could no longer afford to continue her employment, yet the Respondent put forth no evidence to support this contention. Further, her own evidence contradicts this contention. She took no part in the termination of the Applicant. The decision was made by Ms Burnett for reasons that have not been adequately explained. The Respondent concedes that the "missing" electric toothbrushes had nothing to do with the termination of the Applicant's employment.

44 Clearly the dismissal was effected in a very callous way by Ms Burnett telephoning the Applicant at her other place of employment. Further, the Respondent was unreasonable to withhold the Applicant's final pay. I note, however, there is no claim by the Applicant for outstanding wages. Accordingly, I find the Applicant was unfairly dismissed.

45 I am of the view that the nature of the Applicant's engagement can be characterised as casual rather than permanent part-time. It is clear from the circumstances of this case that the days the Applicant reported for work were flexible. Her timesheets show she did not work the same days nor the same number of hours each week. Whilst it is apparent she was engaged on a continuing and ongoing basis, I am of the view that her employment was of a "casual nature" and she was only entitled to be paid for each hour she worked. Even if I am wrong in relation to this issue, it is also my view that the Applicant's employment can additionally be characterised as that of a part-time employee. Consequently I am of the view that this does not affect the Applicant's quantum of compensation, as the Applicant's uncontradicted evidence is that she had an ongoing expectation of work. However, it is my view that her employment would have come to an end on 20 October 2003, as this was the date Ms McGuinness' employment ceased due to Dr Furlan's brother taking over the business. There is no reliable evidence before the Commission to support an assumption that she would have been employed by the Respondent beyond that date.

Compensation

46 I am satisfied that an order for reinstatement should not be made. The Respondent no longer carries on a business. Further, the Applicant does not seek reinstatement. Since April 2004, she has been engaged as a full-time employee with another employer.

47 In assessing the Applicant's loss caused by the unfair dismissal I have taken into account that she was denied ongoing employment from 19 September 2003 until the 20 October 2003. The Applicant says her average remuneration was $267 per week. Consequently, I will make an order that the Respondent pay the Applicant an amount of $1,068 as compensation for the loss of four weeks' pay. I am satisfied that the Applicant has made out a case that she has suffered an injury within the meaning of s 23(A)(6) of the Act. The Respondent's conduct in dismissing the Applicant by telephone, during the course of her other employment was callous, oppressive and humiliating. I am satisfied the Applicant suffered shock as a result. I will make an award of compensation of $1,500 for the injury caused by the dismissal.

48 In light of these findings I will make an order that the Respondent pay the Applicant the sum of $2,568.

Contractual Benefit Claim

49 I am not satisfied the Applicant has proved her case to the standard required, that is, to the balance of probability that she was denied contractual benefit, namely pay for the last two weeks she worked. There is no evidence before the Commission of the hours worked by the Applicant after 3 September 2003. Further, the Applicant was unable to bring reliable evidence before the Commission that establishes that prior to the hearing of this matter she was not paid all the hours she worked. Accordingly, I will dismiss the Applicant's claim under s.29(1)(b)(ii) of the Act.

2004 WAIRC 13029

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUNE ANNE GARDNER
	APPLICANT
	-v-
	AESTHETICS DENTAL GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 13 OCTOBER 2004
FILE NO	APPL 185 OF 2004
CITATION NO.	2004 WAIRC 13029

Result	Declaration made that the Applicant was unfairly dismissed. Order made that the Respondent pay the Applicant $2,568.00.
Representation	
Applicant	Mr A G McDonald (as agent)
Respondent	Dr A C Furlan (in person)

Order

HAVING heard Mr A G McDonald on behalf of the Applicant and Dr A C Furlan on her own behalf the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby:

(1) DECLARES that the Applicant was unfairly dismissed by the Respondent; and

(2) ORDERS that the Respondent pay the Applicant $2,568 within seven days of the date of this Order.

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

2004 WAIRC 13077

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAG GILL
	APPLICANT
	-v-
	COMMISSIONER OF HEALTH
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 19 OCTOBER 2004
FILE NO	APPLICATION 1325 OF 2003
CITATION NO.	2004 WAIRC 13077

Catchwords	Outstanding contractual entitlements - Whether the on-call allowance in the Workplace Agreement retrospectively incorporated into the contract of employment - Findings made as to the terms of the contract of employment - Application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	Application seeking denied contractual benefit of on-call allowance dismissed
Representation	
Applicant	Ms C Crawford of counsel
Respondent	Mr R Andretich of counsel

Reasons for Decision

1 The applicant was employed by the respondent from 3 February 1992 until 30 June 2001. From November 1998, he was the Director of the Communicable Disease Control Branch.

2 The applicant claims that according to the terms of his contract of employment, he is entitled to the benefits of the on-call allowance provisions of the AMA Medical Practitioners Collective Workplace Agreement 1998 ("the Workplace Agreement"). While the applicant does not seek to enforce the Workplace Agreement per se, which he has done in the Industrial Magistrate's Court (M26 of 2002, 83 WAIG 532) for the period 2 November 1998 until 30 April 2001 when he was formally covered by the Workplace Agreement he seeks payment of the on-call allowance prescribed by the Workplace Agreement for the period 23 September 1996 to November 1998 because he says that agreement became part of his contract of employment by it being retrospectively applied pursuant to an agreement between himself and the respondent.

3 The Industrial Magistrate Cicchini in M 26 of 2002 made a number of findings of fact and law regarding the matter before him. They relate to the same circumstances as those before the Commission except that the Commission is to determine the issue of the entitlement or otherwise to the on-call allowance in respect of the period when the Workplace Agreement was made retrospective by the agreement of the parties, prior to its formal application. The Industrial Magistrate found as follows:

> "1 Dr Jag Gill was at all material times a medical practitioner employed by the Respondent in the position of either acting or substantive Director, Disease Control within the Health Department of Western Australia. Dr Gill had worked for the Respondent in its various guises since 1976. During the period of his employment with the Respondent, Dr Gill worked in the public health field with special emphasis and training in communicable diseases, their control, as well as tropical medicine. He also acquired extensive training and experience in management and administration. Dr Gill ceased to be employed by the Respondent on 29 June 2001. His employment ceased upon his acceptance of a redundancy offer made to employees of the Respondent.
>
> 2 The terms and conditions of Dr Gill's employment was, until 1998, governed by various oral and written agreements, the ***Public Service Award 1992*** and the ***Public Sector Management Act of 1994***. In the latter part of 1998, Dr Gill agreed to be added as a party to the AMA Medical Practitioners Collective Workplace Agreement (the 1998 Workplace Agreement), which expired in 1999. That agreement was followed by another Workplace Agreement also entitled the ***AMA Medical Practitioners Collective Workplace Agreement*** (the 1999 Workplace Agreement).
>
> …

84 The Respondent at all material times employed Dr Gill as Director of Disease Control. His terms and conditions of employment from 1976 to 1998 had been governed by various oral and written agreements, the ***Public Service Award 1997*** and the ***Public Sector Management Act 1994***. I find that commencing on 2 November 1998 Dr Gill's employment became subject to two successive Workplace Agreements registered pursuant to the provisions of the ***Workplace Agreements Act 1993***. I find from the documentary evidence before me that the first Workplace Agreement came into force on 2 November 1998. A perusal of exhibits 10, 11 and 12 clearly establishes that. Indeed Dr Gill's contention that the first Workplace Agreement came into force on 23 September 1998 is unsupported by the evidence. I find that the 1998 Workplace Agreement came into force only when Ms Ford, on behalf of the Respondent, wrote to Dr Gill accepting the terms of Dr Gill's proposals. It was her letter that concluded the negotiations and constituted the agreement between the parties. As to the 1999 Workplace Agreement, I find that the same came into effect on 9 September 1999 when Mr Rowan Davidson, on behalf of the Respondent, agreed that Dr Gill was to be added as a party. Exhibit 26 clearly demonstrates that to be so. The 1999 Workplace Agreement thereafter continued to govern Dr Gill's employment until he ceased work on 29 June 2001. I reject Dr Gill's contention that the 1999 Workplace Agreement was operative from 1 July 1999.

…

On Call

85 It is uncontroverted that Dr Gill was given a directive that he was to remain contactable outside of normal work hours and to be available in a fit state, at such times, for recall to duty. I accept that Dr Peter Brennan, the then Acting Commissioner of Health, on or about 5 February 1992 gave him such an oral directive. Mr Andrew Penman, the General Manager of Public Health, by memorandum dated 10 December 1993 reaffirmed that directive.

86 I find that the direction given to Dr Gill by Dr Brennan and Mr Penman constituted a direction that Dr Gill was to remain "on call". The "on call" directive remained binding and operational until varied by the formulation of the written roster in May of 2001. The fact that Dr Gill was required to remain contactable outside of normal hours of duty and be available, in a fit state at such times, for recall to duty was well known to officers of the Respondent. A perusal of exhibit 10 reflects that. Indeed the Respondent sought because of that to compensate Dr Gill by the payment of $8,800.00 per annum as a supplementary payment outside the terms of the Workplace Agreements.

87 It is self evident from what I have said earlier that I find that Dr Gill complied with the directive given to him and that he remained "on call" for the entire period of his employment, save for periods that he was absent from the State or unable to do so because of medical unfitness. The fact that Dr Gill was contactable outside of normal hours of duty and was available, in a fit state, for recall to duty is simply undeniable given the state of the evidence. I accept that Dr Gill was on call 130.5 hours per week. I accept Dr Gill's evidence concerning the nature of after-hour's contacts and duties carried out.

Is Dr Gill entitled to "On Call" Allowance?

88 The pivotal issue to be decided in this matter is whether the directions given by the Respondent to Dr Gill satisfied clauses 3.7 and 30 of the 1998 and 1999 Workplace Agreements respectively.

89 The Respondent contends that the directions given to Dr Gill were not ones that satisfied the relevant clauses of the Workplace Agreements. The Respondent says that because Dr Gill was not rostered by the relevant authorised officer in accordance with clinical need, he cannot fall within the relevant provisions. On the Respondent's view, rostering in accordance with the provisions of the 1998 Workplace Agreement is a necessary and fundamental pre-requisite to any entitlement.

90 I reject the Respondent's argument in that regard. The terms and provisions of the relevant clauses of the Workplace Agreements are clear and do not admit ambiguity. Clauses 3.7(1)(b) of the 1998 Workplace Agreement and 30.1.c(ii) of the 1999 Workplace Agreement apply so long as the medical practitioner fulfils the definitions found in clauses 3.7(1)(c) and 30.1.a respectively. It is obvious that Dr Gill fulfilled those definitions. Those provisions are not in any way subject to the rostering provisions.

…

95 In this case there was a single unwritten roster and Dr Gill was the sole person on that roster until the rostering changed in May 2001. In any event, irrespective of whether there were one or more persons on the roster, the Respondent's liability was the same. It had to pay for "on call" services provided whether it be by one or more persons. In this case Dr Gill alone provided the service. His services were provided in accordance with the instructions given to him, which remained operative during the terms of the Workplace Agreements. Having complied with the direction and thereby having met the relevant definitions within those agreements, he became entitled to the "on call" allowance provided by those Workplace Agreements. In so far as the Respondent represented to the Claimant that there was no provision in the Workplace Agreements covering his "on call" responsibilities, the Respondent mislead him and caused him to acquiesce to the receipt of payments made outside the terms of the Workplace Agreements.

96 The evidence establishes that the Respondent gave Dr Gill a direction and that such direction satisfied clauses 3.7 and 30 of the 1998 and 1999 Workplace Agreements respectively. Dr Gill, to the extent that he complied with the direction, is entitled to recover pursuant to the terms of the Workplace Agreements."

4 The applicant submits that the parties are bound by the findings of fact or law by the Industrial Magistrate where those same matters are relevant. During the course of the hearing of this matter I indicated to the parties that it was not my intention to hear evidence of what the applicant actually did for the period of his claim in terms of his being available or on-call unless it could be demonstrated that the Industrial Magistrate did not have before him all of the evidence as it related to the period of this claim.

5 I also concluded that the Industrial Magistrate had made findings that what the applicant did constituted being "on-call" only in respect of the period of operation of the Workplace Agreement. Whether he did something other than being on-call for the period prior to the operation of the Workplace Agreements, I found, was open to the Commission to consider.

6 With the benefit of having heard the arguments and evidence of the parties, and having had the opportunity to consider the law in respect of estoppel, I now conclude that in circumstances of this case it would be entirely inappropriate for the Commission to in effect provide the parties with a second chance to argue the same matters of fact and law. Accordingly, I accept all of those findings of the Industrial Magistrate set out above (Dixon J in *Blair v Curran* 1939 52 CLR 464 at 531 and ***Patras v The***

Commonwealth (1966) 9 FLR 152 at 155). This includes the learned Industrial Magistrate's finding that what the applicant did for the whole period, including the period covered by this claim, met the requirements to be on-call pursuant to the Workplace Agreement. That being so, and there being no distinction between what he did in the period the subject of the matter before the Industrial Magistrate and the period covered by this claim, I conclude that the applicant met those requirements to be on-call pursuant to the Workplace Agreement for the period of this claim.

7 This is an application pursuant to s.29(1)(b)(ii) of the Industrial Relations Act 1979, which provides as follows:

"(1) An industrial matter may be referred to the Commission —

(a) …

(b) in the case of a claim by an employee —

(i) …

(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."

8 The considerations applicable to such a claim are set out in *Perth Finishing College Pty Ltd and Susan Watt* (1989) 69 WAIG 2307. In particular, the Full Bench noted:

"It is, in our opinion, clear also that s.29(b)(ii) expands the definition of industrial matter so that an industrial matter may be referred (i.e. because there is a claim under s.29(b)(ii)). That is, the claim renders it an "industrial matter" even if it were not. Further authority for the assertion that jurisdiction exists in this case is contained in A.M.W.S.U. v. Bell Bros. Pty Ltd 1983 AILR 431 (Full Bench W.A.).

We now address the second aspect. It might be argued that the words "to which he is entitled" couched in the present tense means that the contract must be extant for jurisdiction to be exercised. That is not so; the employee must be entitled "under" a contract (i.e. by virtue of or even pursuant to). "Pursuant to" means "in accordance with and consequent and conformable to" (see Garbin v. Wild [1965] WAR 72 at 75 (FC)).

However, more cogently, "under" can have the meaning "by virtue of" (see R v. Clyne ex part Harrop [1941] VR 200 per O'Bryan J. at page 201)."

…

BENEFIT

However, what must be determined is whether this is a claim for a benefit to which the respondent is entitled under her contract of service. As Fielding C. said in Bartlett v. Indian Pacific Ltd 68 WAIG 2508 at 2519:-

> "By its very nature that requires that the Commission ascertain what benefits are embodied in the particular contract. Since a contract is a legal phenomenon its meaning and scope can only sensibly be determined having regard to legal concepts and particularly the laws of contract."

In that sense "benefit" cannot be restricted to failure to pay holiday pay, for example, during the currency of the contract of service, because that is not what the section says, and in addition, it would reduce the ambit of the plain unequivocal definition of "industrial matter".

The jurisdiction under s.29(b)(ii) can also be seen as the Full Bench saw it in Simons v. Business Computers International Pty Ltd 65 WAIG 2039, Edwards A.P. said:-

> "The jurisdiction of the Commission which is founded by proceedings brought under s.29(b)(ii) of the Act is judicial. It is not arbitral or legislative. The Commission's jurisdiction is thus limited to the ascertainment of existing rights by a determination of whether or not an employee has been denied a benefit, not being a benefit under an award or order, to which the employee is entitled under a contract of service."

The meaning of the word "benefit" is vital. If what is claimed is a "benefit" and the respondent was denied it (and the other requirements are established), then an order can be made subject to s.26(1) and (2).

We agree that benefit should be interpreted as widely as possible. We also agree that "benefits" can be best seen as referring to the contractual rights of the respondent. We adopt what Kennedy J. said in Pepler's Case (op. cit.) at page 17, where he clearly differentiating between s.29(b)(i) and (ii):-

> "This is not a conclusion which sits easily with s.29(b) of the Act, for it would mean that under paragraph (i) the Commission's jurisdiction to order compensation is at large, whereas, under paragraph (ii), it is strictly limited to allowing an entitlement arising out of the employee's contract of service. <u>The preferable view appears to me to be that the jurisdiction under paragraph (i) is limited to ordering re-employment whilst the remedy under paragraph (ii) is restricted to the employee's contractual rights</u>." (Our underlining)

A benefit is therefore what is the employee's right under a contract.

…

"Entitled" in the context of the section must mean entitled as a matter of legal right, because it refers to benefits under the contract. In Leontiades v. F.T. Manfield Pty Ltd (1980) 43 FLR 193, Keely J. interpreted the expression "entitled to mean the existence of an enforceable legal right", and therefore Ms Watts had an enforceable legal right, it was submitted. That authority was applied in Industrial Relations Bureau v. Hassan (1982) 2 IR 151 and Poulos v. Waltons Stores (Interstate) Ltd (1986) 10 FCR 429. We agree, applying Leontiades' Case (op. cit.) that the word "entitled" must mean "legally entitled".

Thus, those authorities support the view of Kennedy J. that s.29(b)(ii) relates to rights under the contract of service (see also Bartlett v. Indian Pacific Ltd (op. cit.), per Fielding C. "Benefit" in s.29(b)(ii), we think, was rightly defined by Johnson C. in Balfour v. Travelstrength Ltd (1980) 60 WAIG 1015. He said:-

> "Benefit ought to be wide enough to allow an employee to bring to the Commission a matter in which the employee believes that he/she has been deprived of an advantage, entitlement, right, superiority, favour, good or perquisite by the action of an employer <u>in contravention of a provision of the contract of service</u>." (My underlining)"

9 The Commission's obligation is to ascertain the terms of the contract of employment, and if a benefit has not been provided, to enforce that benefit, or contractual right. (see also *Simon v Business Computers International Pty Ltd* 65 WAIG 2039).

10 The essential questions before the Commission are what was the benefit to which the applicant was entitled under his contract of employment, and, for the period which the parties agreed to the Workplace Agreement being given retrospective effect, did this constitute a part of the contract of employment? If so, did the parties agree that in lieu of the terms of the provisions of the Workplace Agreement in respect of the on-call allowance, that the availability allowance of $8,800 per annum would continue to apply?

11 Having noted the findings of the Industrial Magistrate and adopted them, I note the following matters.

12 Mark Fitzpatrick, an Industrial Relations Officer with the Health Workforce Reform section of the Health Department of Western Australia wrote to the applicant on 22 September 1997 in the following terms, formal parts omitted:

> "**AMA COLLECTIVE WORKPLACE AGREEMENT VERSION 4**
>
> Dear Dr Gill
>
> Further to our conversation on 19 September 1997, I have enquired into the issue of how signing the AMA Collective Workplace Agreements impacts on your Senior Executive Service (SES) membership.
>
> The workplace agreement specifically states that the agreement does not apply to medical practitioners who are members of the SES. Therefore, to be a party to the agreement, you must forgo that membership. To do this a process, as outlined below, must be followed.
>
> - provide to the Commissioner of Health a declaration stating you wish to be removed from the SES.
> - obtain the Commissioner's approval of the application.
> - apply to the Public Sector Management Office (PSMO) for the removal of the position from the SES. In turn, they will need to approve this (this office can do this on your behalf).
> - PSMO will then need to Gazette the removal of the position from the SES. This will be subject to any regulations and processes as outlined by the PSMO. Consequently, this may involve a request from PSMO to return your EVS vehicle.
>
> **Until these, and any further requirements are fulfilled, you are not eligible to become a party to the workplace agreement.**
>
> It should be noted that this process is not one which the Health Department has developed. It is a requirement of PSMO. The Health Department, like all other Public Sector Agencies, must abide by it.
>
> Once the relevant processes have been completed, and the Department notified of any subsequent changes, you may apply to become a party to the agreement. If this occurs, the terms and conditions of the agreement will be backdated to the date which was agreed previously.
>
> Yours sincerely,"

(Exhibit 1 – document 20)

13 Following negotiations between the applicant and Prudence Ford, General Manager, Public Health, agreement was reached in the terms set out in correspondence between them. By letter to the applicant, dated 17 August 1998, Ms Ford set out the terms of the agreement as follows, formal parts omitted:

> "RE: AMA WORKPLACE AGREEMENT
>
> Following our earlier informal discussions, I am writing to clarify a number of matters in relation to your transfer to the AMA Medical Practitioners Collective Workplace Agreement 1998.
>
> As you are aware the Department's offer to hold open the opportunity for senior medical practitioners to join the Workplace Agreement (SPA) with backdating to 23 September 1996 further discussions (sic) lapsed on 31 May 1997. However you were provided with advice, in error, in September 1997 to the effect that the offer was still open. In the light of that and as an act of good faith, the Department has agreed to backdate the provisions of the WPA to 23 September 1996. Recognition of your qualifications and years of experience result in your translation to Level 22 of the Agreement.
>
> In order to access the AMA WPA, you were required to relinquish your SES position. This has now been done and the position of Director; Disease Control (Position No HE 500457) was removed from the SES with effect from 20 May 1998. As a consequence you are no longer entitled to a privately plated vehicle under the Executive Vehicle Scheme. In view of the requirement to be on call and that you indicated to me that you were recalled almost every weekend, I am prepared to offer you the use of a government-plated vehicle for official business and for journeys between the office and your place of residence and home garaging. The vehicle would not be available for private mileage. This change could occur either by changing the plates on the vehicle you currently use or providing you with another government plated vehicle and returning your existing vehicle to the pool. Please advice Beren Clarke (9222 4329) of your decision so that he can assist with arrangements.
>
> We also discussed the availability allowance which you are currently receiving which recognises the requirement for you to remain contactable outside normal hours of duty and be available, in a fit state, at such times for recall to duty. The allowance is $8,880 per annum. The AMA WPA does not make express provision for such an allowance. However it does provide flexibility for other arrangements to be mutually agreed. I therefore suggest that we agree to an arrangement whereby the Department continues to pay an availability allowance of $ 8,880 per annum under the same conditions as currently apply.
>
> Please let me know if you have any other questions concerning your move to the AMA WPA. If not please advise me that you agree to these arrangements and I will ask Human Resources to take the necessary action."

(Exhibit 1 – document 24)

14 The applicant responded to Ms Ford on 19 August, 1989, in the following terms:

> "**AMA WORKPLACE AGREEMENT**
>
> Thank you for your memorandum of 17 August 1998 clarifying arrangements for me to transfer to the AMA Medical Practitioners Collective Workplace Agreement 1998.

I appreciate that the Department has agreed to backdate the provisions of the WPA to 23 September 1996 as an act of good faith. I am prepared to accept all the conditions that you have specified, on the understanding that the translation of my salary to Level 22 of the agreement refers to Arrangement A pay rates, Schedule C2, which at 1 January 1997 is $129,878.

If you can confirm in writing that my understanding of our conversation regarding the salary level is correct, I will proceed with arrangements to have my private plated vehicle changed over to Government plates, and to use the vehicle only for official business, for journeys between the office and place of residence and home garaging."

(Exhibit 1 – document 25)

15 Ms Ford further confirmed the agreement to the applicant in the following terms:

"**RE AMA COLLECTIVE WORKPLACE AGREEMENT**

I refer to your memorandum dated 19 August 1998 regarding the agreed arrangements for your transfer to the AMA Medical Practitioners Collective Workplace Agreement 1998 and wish to confirm the following in settlement of all issues to enable your transfer to the above Agreement.

- It is agreed that on translation to the AMA Workplace Agreement you will be paid Arrangement A rates expressed under Schedule C2 of the Agreement at Level 22. I confirm that the current rate for Level 22 is the rate at 1 January 1997 of $129,878. This is granted on the understanding that you are employed as a specialist, have a NSQAC specialist recognised qualification and that you are providing a predominantly clinical service in that specialty. Any future change in these criteria may affect the arrangement to which you are entitled.
- As you are to be remunerated under Arrangement A I wish to point out that pursuant to the provisions of clause 3.5(1)(j) of the Agreement you are required to pay to the Health Department of WA all remuneration received from the rights to private practice which are granted under that Arrangement.
- As advised in my memorandum of 17 August, the Department is prepared to continue the current arrangement in relation to the payment of an availability allowance whereby you are paid an allowance of $8,880 per annum, provided you remain contactable outside normal hours of duty and are available, in a fit state, for recall to duty during those hours.
- As agreed please proceed to have your private plated vehicle changed over to Government plates and to use the vehicle only for official business and for journeys between the office and your place of residence and home garaging. The vehicle will not be available for private mileage. The vehicle is provided on the basis of the conditions put forward in my memorandum dated 17 August. That is, the requirement to be on call and your indication that you are recalled to attend work almost every weekend."

(Exhibit 1 – document 26)

16 I note a number of aspects of this correspondence:

1. It is clear that the whole process of the applicant withdrawing from the SES, being joined as a party to the Workplace Agreement and its retrospective application were part of the same agreement.
2. Both parties described the retrospective application of the Workplace Agreement to 23 September 1996 "as an act of good faith" on the part of the respondent.
3. Whether Ms Ford was in error regarding the application of the on-call provision of the Workplace Agreement and misled the applicant, both parties agreed to the continuation of the availability allowance.

The only inference which can be drawn from the agreement of the parties is that the availability allowance of $8,800 per annum was in lieu of, not in addition to, any similar provision in the Workplace Agreement. For it to have been in addition would have been double counting.

17 Having heard the evidence of both the applicant and Ms Ford, I have no reason to believe that Ms Ford deliberately misled the applicant. Bearing in mind the wording of the on-call provisions within the Workplace Agreement and the context taken in contrast with the applicant's circumstances it is understandable why Ms Ford might have come to the conclusion which she did, that the on-call provisions of the Workplace Agreement did not apply. That Ms Ford's "advice" to the applicant "misled him and caused him to acquiesce to the receipt of a payment made outside the terms of the Workplace Agreements, as found by the learned Industrial Magistrate is not to the point in a case such as this. This is not a case of the applicant seeking damages for misrepresentation, but of his seeking to enforce the terms of his contract of employment. (*See Chitty on Contracts – General Principles*). Due to the applicant's conduct, Ms Ford was entitled to assume that the applicant was aware of the provisions of the Workplace Agreement. However, for the purposes of this matter, it is the actual agreement which was reached which is of significance.

18 I find that what the parties agreed by reference to their correspondence, and they both believed, was that the Workplace Agreement provided no equivalent arrangement to the availability allowance which was already a condition of the applicant's employment. Whether the applicant believed this by reference to Ms Ford's "advice" or he also understood this to be the case by virtue of his own examination of the situation and general advice he received other than from Ms Ford, what they agreed to was the application of the Workplace Agreement for all purposes except in respect in his availability out of hours. In that case, the parties agreed to the availability allowance of $8,880.00 per annum.

19 I find that the parties amended the applicant's contract of employment to remove him from the Senior Executive Service and join him to the Workplace Agreement, to change his motor vehicle arrangements and to continue his availability allowance. As part of the arrangement, the terms of the Workplace Agreement were to be made retrospective. Given that the documents between Ms Ford and the applicant refer to the continuation of the existing availability allowance, I conclude that it was not the intention of the parties to give retrospective effect to any provision of the Workplace Agreement which related to similar arrangements.

20 Accordingly, I find that as a term of his contract of employment, the applicant had a benefit of an availability allowance of $8,800. This was in lieu of any similar provision or benefit arising under the term of the Workplace Agreement.

21 Accordingly, the applicant did not have as a term of his contract of employment, a benefit of the on-call allowance set out in the Workplace Agreement for the period of the retrospective application of the Workplace Agreement which is covered by this claim.

22 Therefore, the application will be dismissed.

2004 WAIRC 13080

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAG GILL
	APPLICANT
	-v-
	COMMISSIONER OF HEALTH
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 19 OCTOBER 2004
FILE NO	APPL 1325 OF 2003
CITATION NO.	2004 WAIRC 13080

Result	Application seeking denied contractual benefit of on-call allowance dismissed

Order

HAVING heard Ms C Crawford of counsel on behalf of the applicant and Mr R Andretich 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.

[L.S.]

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

2004 WAIRC 12971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLEY AVRIL GOLDING
	APPLICANT
	-v-
	P.I.H.A. PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	MONDAY, 11 OCTOBER 2004
FILE NO/S	APPLICATION 1712 OF 2003
CITATION NO.	2004 WAIRC 12971

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissals – Whether applicant terminated due to redundancy – Termination found to be due to redundancy – Applicant unlawfully terminated – Failure to meet all requirements of s 41 of the Minimum Conditions of Employment Act 1993 and requirement to afford procedural fairness – Applicant unfairly dismissed – Reinstatement/Re-employment impracticable – Determination of quantum of compensation – No loss demonstrated – Compensation for injury ordered – Industrial Relations Act 1979 (WA) ss 26 and 29(1)(b)(i) Minimum Conditions of Employment Act 1993 (WA) ss 41 and 43
Result	Application alleging unfair dismissal upheld. No compensation ordered. Compensation for injury awarded.
Representation	
Applicant	Ms B Golding on her own behalf
Respondent	Mr R Woodrow

Reasons for Decision

1 This is an application by Beverley Golding ("the applicant") pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). The applicant alleges that she was unfairly terminated from her employment with PIHA Pty Ltd ("the respondent") on 12 November 2003. The respondent denies that the applicant was unfairly terminated and maintains that the applicant was terminated due to a genuine redundancy situation.

Background

2 It was not in dispute that the applicant was employed by the respondent as an internal sales consultant between 14 October 2002 and 12 November 2003 and the applicant's terms and conditions of employment were outlined in a written contract of employment (Exhibit A2). The parties also agreed that the terms and conditions of the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (No R32 of 1976) ("the Award") formed part of the applicant's contract of employment. The applicant's duties were as follows:

"1. RESPOND TO FAX, PHONE & EMAIL REQUESTS FOR QUOTATION FOR GOODS & SERVICES.

2. FOLLOW UP AND REPORT ON CUSTOMER QUOTATIONS.

3. PROCESS ALL REQUIRED PAPERWORK ON RECEIPT OF CUSTOMER PURCHASE ORDERS.

4. LIASE (SIC) WITH WORKSHOP AND DESPATCH STAFF ON A DAILY BASIS TO ENSURE CUSTOMER ORDERS ARE COMPLETED WITHIN THE REQUIRED TIME FRAME.
5. PROVIDE TECHNICAL INFORMATION TO CUSTOMERS AS REQUIRED.
6. GENERATE SYSTEM BASED INTERNAL SALES REPORTS AS REQUIRED.
7. PROMOTE PIHA FITTINGS AND INSTALLATION SERVICES TO NEW AND EXISTING CUSTOMERS.
8. PROVIDE INFORMATION AND SUPPORT TO ALL ACCOUNT, PROJECTS AND PURCHASING STAFF AS REQUIRED.
9. OTHER DUTIES AS REQUIRED."

(Extract from Exhibit A2)

3 The applicant gave uncontradicted evidence that no performance issues were raised with her by the respondent throughout her employment.

4 During her employment the applicant had substantial periods of leave due to non-work related illnesses. Between March 2003 and October 2003 the applicant took approximately 66 hours of paid sick leave and 42 hours of unpaid leave as she had no sick leave entitlements left throughout the period July 2003 through to the end of August 2003. When the applicant was terminated she was paid four weeks' pay in lieu of notice plus four weeks' pay as a redundancy entitlement (Exhibit R1).

5 On 17 November 2003 Mr Scott Parker was employed by the respondent as a Project Sales and Business Coordinator. Mr Parker's job description is as follows:

"1. Respond to Fax, Phone, Email & Personal requests for quotation for goods & services predominantly in the Project/Large Scale supply & manufacture arena.
2. Comprehend & Analyse detailed engineering drawings & plans highlighting relevant components using Trade background skills.
3. Understand Tender documentation including Legal requirements & complex Terms & Conditions utilising Project Management skills & systems.
4. Build customer realationships (sic) by face to face meetings, by providing accurate data regarding products & services, by following up quotations & tenders and by using own well developed skills to understand the wide scope of requirements from various companies & industries.
5. Produce detailed production & shipping schedules for project requirements.
6. Attract and recruit new customers using previous industry knowledge & contacts.
7. Assist customers in rationalising their project requirements by advising & offering improved solutions using cutting edge methods & technologies and from prior experience.
8. Promote PIHA as a "Whole Solution" organisation for all project requirements within the Mining, oil, Gas Water & Industrial market place."

(Extract from Exhibit R4)

Applicant's Evidence

6 The applicant relied on a detailed statement that she lodged with her application outlining background relevant to her termination. In April 2003 the applicant had a hysterectomy and was advised by her doctor to take up to eight weeks off work. As the applicant was concerned about taking so much leave she raised the issue with the respondent's General Manager Mr Bozenko Gavranich who reassured her that the amount of leave required to be taken was acceptable to the respondent. However, as the applicant had only recently commenced employment with the respondent she only took three weeks' sick leave after the operation before returning to work.

7 In mid June 2003 the applicant had a car accident during her lunch break and severely injured her hand. Even though the applicant was upset and incapacitated by the incident she continued to work as normal. The applicant had to attend a number of specialist appointments as part of her rehabilitation programme and as the appointments were at a public hospital she had no control over the dates of these appointments.

8 The applicant gave evidence that she was required to attend an appointment with a plastic surgeon on 14 July 2003 which conflicted with her work colleague Mr Andrew Bayly wanting time off that day to attend to a personal commitment. This conflict led to an argument with Mr Bayly and subsequently a meeting was convened between Mr Gavranich and the applicant and at the meeting Mr Gavranich assured the applicant that "I shouldn't have any worries, I've just got to get myself well and return back to work." (Transcript page 9).

9 The applicant stated that on or about 30 October 2003 she had a brief meeting with Mr Gavranich and he advised her that Mr Parker had been employed by the respondent and at the same time Mr Gavranich advised her that she may hear rumours but that she need not be concerned about her job.

10 As she was concerned about her ongoing employment the applicant initiated a meeting with Mr Gavranich which took place on 4 November 2003. The applicant stated that at this meeting Mr Gavranich reassured her that her job was safe, that Mr Bayly would be moved out of the internal sales area and both the applicant and Mr Parker would remain in sales. The applicant stated that work continued as normal after this meeting until late in the afternoon on 12 November 2003 when the applicant was asked to attend a meeting with the respondent's Workshop Manager Mr Jim Carton and the respondent's Human Resource Manager Ms Rachel Woodrow. At this meeting the applicant was advised that her job had been made redundant as her sales had not been progressing due to the time she had off with the hand injury. The applicant stated that she was shocked and upset by these comments and subsequently became angry. The applicant then signed a document acknowledging that she had been made redundant and accepting receipt of notice and redundancy payments (Exhibit R1). The applicant stated that she was insulted when she was required to immediately pack up her personal effects and was watched whilst doing so. The applicant stated that prior to this meeting she was given no indication that she was to be made redundant or that the respondent had concerns about her performance.

11 As the applicant is a single parent with three dependent children she immediately looked for another position. The applicant gave evidence that she was very worried at this time as she had to have another operation on her hand. The applicant subsequently found alternative employment commencing on 1 December 2003 earning the same rate of remuneration as she

was paid by the respondent. The applicant stated that subsequent to her termination she had Bell's palsy as a result of suffering stress in the period after her termination. The applicant submitted a number of references in support of her good employment history (Exhibit A3) and a letter from her medical practitioner and medical reports (Exhibits A4 and A5) confirming the applicant's medical issues throughout 2003 and 2004.

12 Under cross-examination the applicant agreed that the respondent granted her time off to attend medical appointments and advanced her annual leave entitlements as her sick leave accruals had run out. When asked why she did not work additional hours to make up some of the time she took off the applicant stated that she was unable to drive due to the severity of the hand injury and as she had to rely on getting lifts to and from work this did not allow her to be flexible with her start and finish times. The applicant stated that notwithstanding these restrictions she was able to commence employment at 7.00 am on some occasions.

13 The applicant stated that she only became aware that Mr Parker had been recruited by an employment agency after being told this by the respondent prior to the hearing. The applicant maintained that Mr Parker was a friend of Mr Bayly as she shared an office with Mr Bayly and their conversations reflected this friendship.

Respondent's Evidence

14 Mr Gavranich is the respondent's General Manager and has been employed by the respondent since September 1993. Mr Gavranich stated that the applicant was employed to assist Mr Bayly in inventory and equipment control and that her main role was to sell off-the-shelf fittings. Mr Gavranich stated that as sales of off-the-shelf fittings reduced in 2003 it was uneconomic to continue to employ the applicant. Mr Gavranich gave evidence that an increasing number of the respondent's clients were requiring goods to be manufactured from drawings and the respondent needed someone with expertise and background in this area of sales. As the majority of the respondent's future work would require an awareness of technical skills necessary for the fabrication of special components compared with selling off-the-shelf stock the respondent decided to make the applicant's position redundant as she was not qualified to undertake the new position. Mr Gavranich stated that the respondent's sales had substantially improved since the change to selling purpose made products.

15 Mr Gavranich confirmed that he did not discuss the respondent's decision to make the applicant's position redundant with the applicant prior to her termination.

16 Mr Gavranich informed the applicant in late October 2003 that the respondent had decided to employ Mr Parker. Mr Gavranich maintained that he did not assure the applicant that her employment with the respondent was secure at any stage.

17 It was put to Mr Gavranich under cross-examination that the applicant could have fulfilled the requirements of Mr Parker's position if given sufficient training. Mr Gavranich stated that it was his view that the applicant could not undertake this role given her background and given the necessity for relevant trade qualifications to undertake this role. When asked about whether or not he had assured the applicant in April 2003 that she could take as much time off as necessary Mr Gavranich stated that he could not recall stating this to the applicant. Mr Gavranich stated that he did not tell the applicant at a meeting held in July 2003 not to worry about anything and that her job was safe. Mr Gavranich confirmed that when he advised the applicant that Mr Parker would be commencing employment with the respondent he told her that he would talk to the applicant about his appointment but this meeting did not take place. Mr Gavranich could not recall meeting the applicant on 4 November 2003.

Submissions

18 The applicant maintains that she was unfairly terminated as she was not advised that her job was at risk, she maintains that she should have been given the opportunity to continue being employed by the respondent and that Mr Parker's position is the same position she had been undertaking.

19 The respondent maintains that as the applicant was not qualified to undertake the new role required in the internal sales section, which was different to that of the applicant's existing position, and as there were no other positions suitable for the applicant with the respondent it was appropriate to make the applicant's position redundant. The respondent argued that because the applicant was given eight weeks' pay at termination she was treated more than generously.

20 When asked about the respondent's notice of answer and counter proposal that referred to the applicant being considered for redundancy because of her poor performance the respondent was unable to specify the basis upon which this claim was made nor was the respondent able to clarify why the notice of answer and counter proposal referred to the respondent making a decision in June 2003 to make the applicant redundant.

Findings and Conclusions

Credibility

21 I listened carefully to the evidence given by the applicant. In my view she gave her evidence clearly, honestly and to the best of her recollection and her evidence was not broken down during cross-examination. I therefore accept the evidence given by the applicant. Even though Mr Gavranich was forthright when giving his evidence he did not answer some questions directly. I also conclude that Mr Gavranich was not convincing when giving evidence about his discussions with the applicant at the end of October 2003 and early November 2003. On this basis where the evidence given by the applicant and Mr Gavranich is inconsistent I prefer the evidence given by the applicant.

22 I turn now to the principles in relation to these matters and my findings and conclusions.

23 Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and Other v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). If a decision is made to make an employee redundant based on the operational requirements of the company that can be a valid reason for the dismissal.

24 I have concerns about the varying reasons given by the respondent to terminate the applicant. Mr Gavranich stated at the hearing that the reason for the applicant's termination was that the respondent decided to change its sales direction however, this was different to the reasons outlined in the respondent's notice of answer and counter proposal which claimed that the respondent decided in June 2003 to make the applicant's position redundant due to the applicant's poor sales record. Furthermore, having accepted the applicant as being a credible witness I find that on 12 November 2003 the applicant was told that she was being terminated due to poor sales and excessive time off work and not due to a decision to restructure the respondent's sales section. Notwithstanding these discrepancies however, I am of the view that the respondent has

demonstrated that the applicant was terminated for a valid reason. Having reviewed the duty statements of the applicant and Mr Parker I accept Mr Gavranich's evidence that the respondent restructured its internal sales section due to a requirement to cater for selling custom made goods as opposed to goods sold off-the-shelf and as a result of this change Mr Parker was employed, effectively displacing the applicant's position. I also accept Mr Gavranich's uncontested evidence that this change boosted the respondent's sales. I therefore find that the respondent re-organised its sales section in October 2003 which eventuated in the applicant's position ceasing due to a redundancy situation.

25 Having said that it is appropriate to consider any unfairness in relation to the process used in effecting a redundancy, as well as all of the circumstances surrounding the termination of the employment having regard to s26 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).

26 The provisions of Part 5 of the Minimum Conditions of Employment Act 1993 ("the MCE Act") are implied into the applicant's contract of employment and a failure to comply with the mandatory requirements under s41 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; *WA Access Pty Ltd v Vaughan* (2000) 81 WAIG 373 at 378 and cases cited therein).

27 Section 41 of the MCE Act provides:

> **"41. Employee to be informed**
>
> (1) Where an employer has decided to —
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are —
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires."

28 Section 43 of the MCE Act provides:

> "43. **Paid leave for job interviews, entitlement to (sic)**
>
> (1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.
>
> (2) The 8 hours need not be consecutive.
>
> (3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.
>
> (4) Payment for leave under subsection (1) is to be made in accordance with section 18."

29 Section 41 provides that where an employer has decided to make an employee redundant the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made of the redundancy and discussions are to be held with the employee about the likely effects of the redundancy and measures that may be taken to avoid or minimise its effect. In this case these requirements were not met. It is clear on the evidence that discussions did not take place with the applicant about the effect of the redundancy on the applicant and alternatives to termination were not canvassed soon after the respondent decided to restructure her position. In fact, the opposite occurred. I accept the applicant's evidence that on at least three occasions she was assured that her employment with the respondent was secure. For this reason, in my view, I consider that to the extent the applicant was not consulted in relation to her dismissal and discussions were not held about measures to minimise the impact of the termination on her, the applicant's termination was unfair. It is also clear on the evidence that s43 of the MCE Act was not complied with as the applicant was deprived of any ability to avail herself of paid leave to attend job interviews and in my view this leave should have been made available to the applicant prior to her termination.

30 In my view the applicant was denied procedural fairness given the manner of her termination. The applicant was terminated without any notice and her termination was clearly sudden and unexpected. Further, the applicant was not given an opportunity to argue for being placed in the restructured position. It is also my view that the respondent was dishonest in its dealings with the applicant when it told the applicant that she was being terminated because of her poor sales record due to taking excessive time off.

31 In all of the circumstances I find that the applicant was unfairly terminated as she was not given a fair go all round.

Compensation

32 I am satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for re-instatement or re-employment would be impracticable. The applicant is not claiming re-instatement and in my view given the particulars of this case re-instatement or re-employment is impracticable.

33 I am required to assess whether or not in all of the circumstances compensation is due to the applicant. In a recent Full Bench matter *Budget Airconditioning v Steven Rainsford Penn* (2004) 84 WAIG 2171 at 2177 Smith, C reviewed the relevant authorities when determining compensation in a case of this nature.

> "In *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 Heenan J (with whom Parker J agreed) at [85] observed:
>
> > "…. Leaving aside cases where an order for reinstatement might be made, which are likely to be rare where there has been dismissal for genuine redundancy, issues of the claimant's entitlement to the payment of any moneys

> due under his contract of employment, or to compensation for the loss or injury caused by the dismissal are discretionary under s 23A of the Act. There can be little doubt that the discretion should be exercised in favour of the claimant where actual loss or damage can be proved, but where no loss or damage is proved, or where any entitlement to damages or compensation is adequately covered by payments made by the employer to the employee at the time of termination, whether as wages in lieu of notice and/or for other accrued benefits, will always be a matter for investigation. If no loss or damage, nor entitlement to compensation for the former employee is established beyond payments which have been made by the employer then there would be no entitlement to redress because the powers conferred under s 23A are intended to compensate the employee who has been harshly, oppressively or unfairly dismissed in respect of losses so caused and no more. They are not a means for punishing the employer or for conferring any windfall gain upon the claimant. This does not mean that the compensation which the Commission may order under s 23A(1)(ba) of the *Industrial Relations Act* (sic) is restricted to the damages which might be recovered at law for wrongful dismissal, but it does mean that payments ordered under s 23A must be in respect of a lawful entitlement and/or as compensation for a demonstrated loss or injury caused by the harsh, oppressive or unfair dismissal."

In relation to Mr Garbett at [101] Heenan J held:

> " In my view, this decision will require a finding to be made about whether the failure of the respondent to observe its contractual obligation to inform Mr Garbett of the action on the redundancy and to discuss the matters required by the term of the contract imported by s 41(2) of the *MCEA* resulted in any identifiable loss or damage for the appellant, such as the loss of a real opportunity to take up some alternative position with the respondent, or to apply for, or obtain, another employment opportunity elsewhere. It also seems to require a finding to be made whether the likely effects of the redundancy might have been avoided or minimised by any discussion which the employer should have initiated but, in breach of its contract, failed to do."

In Hooker *v The Owners of Strata Plan 5679 Kashmir* (2003) 83 WAIG 3948 ("Hooker's case") Mr Hooker was employed by the Respondent as a caretaker. The reason for termination was that his employer no longer had funds to employ him. There was a finding that the employer made no attempt to comply with the requirements of s 41(2) of the *Minimum Conditions of Employment Act* (sic). The Application and the Notice of Answer referred to some residual cleaning duties continuing at $75.00 per week. However, no evidence was given by either party that that was the case. It was argued on behalf of the (sic) Mr Hooker that he was entitled to claim a loss of an opportunity to obtain alternative employment with the Respondent and compensation should have been assessed on that basis. The Commission at first instance found that the Appellant would not have undertaken the residual cleaning duties if they were offered to him. The President, with whom Coleman C.C. and Gregor C agreed, held at paragraph [54] that the onus is on the Appellant to establish he had suffered a loss caused by the unfair dismissal, in this case a loss of an opportunity to obtain alternative employment from his employer or to obtain other employment elsewhere. Mr Hooker's evidence was that he might have taken a position if it was a "Strata Act" position. At [59] the President held, "... it was not established by Mr Hooker that an opportunity existed on the balance of probabilities which he had lost by the breach of the implied s 41 term of the contract by the employer and by the unfairness of the dismissal occasioned by that breach." Accordingly the appeal was dismissed.

In Hooker's case the Appellant was unable to prove that he suffered a loss as a result of the employer's failure to comply with s 41(2) of the MCE Act. In facts (sic) of this matter are, however, are different (sic). Mr Penn was deprived of continuing employment with the Appellant, that is, as a refrigeration mechanic at a salary of $36,000 per annum. His position of service manager/refrigeration mechanic at a salary of $44,000 was made redundant. It is clear that he could not have continued in that position. The consequence of these findings is that Mr Penn's loss, caused by the unfair dismissal, was the loss of the opportunity to take up the position as refrigeration mechanic at a salary of $36,000 per annum and his loss should not be assessed on the basis of $44,000 per annum. Accordingly, I am of the view that Ground 4 of the Grounds of Appeal is made out."

34 Even though I have found that the applicant was unfairly terminated it is my view that when taking into account the relevant authorities, the applicant is not entitled to any compensation as she has failed to demonstrate that she has suffered any direct loss as a result of being made redundant. The applicant has not demonstrated that another employee should have been made redundant instead of her, I accept that the applicant was not qualified nor sufficiently trained to undertake Mr Parker's position and she has not demonstrated that she has suffered any loss as a result of the lack of opportunity to have discussions about the effects of the redundancy on her and measures that may have been taken to avoid or minimise the effect on her of the termination. I therefore conclude that compensation is not due to the applicant.

Injury

35 The notion of injury must be treated with some caution (*AWI Administration Services Pty Ltd v Andrew Birnie* (2001) 81 WAIG 2849). In *AWI Administration Services Pty Ltd v Birnie* (op cit) at 2862 Coleman CC and Smith C observed:

> "It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299)."

36 Further, there will be a degree of distress in most dismissal cases (see *Nicholas Richard Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986).

37 Given the way the respondent handled the applicant's termination in this instance I find that the applicant suffered injury over and above that which is normally associated with a dismissal. I accept that the applicant was shocked and humiliated when she was terminated given that her termination was summary and unexpected and given the way in which she was supervised when she was required to pack up and leave the respondent's premises straight after her termination. I also take into account that the applicant was upset when she was told that she was terminated due to poor performance and excessive time off when this issue had not previously been raised with her. I consider that the respondent's treatment of the applicant was callous and in the circumstances warrants an award of $500.00 for injury being made to the applicant.

38 A Minute of Proposed Order will now issue.

2004 WAIRC 13054

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLEY AVRIL GOLDING
	APPLICANT
	-v-
	P.I.H.A. PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	MONDAY, 18 OCTOBER 2004
FILE NO/S	APPLICATION 1712 OF 2003
CITATION NO.	2004 WAIRC 13054

Result	Application alleging unfair dismissal upheld. No compensation ordered. Compensation for injury awarded.

Order

HAVING HEARD Ms B Golding on her own behalf and Ms R Woodrow on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1 DECLARES THAT the dismissal of Beverley Avril Golding by the respondent was unfair and that reinstatement is impracticable.

2 ORDERS that the respondent shall pay to Beverley Avril Golding the amount of $500.00 as compensation for injury within seven (7) days of the date of this order.

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

2004 WAIRC 13103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOANNA ELIZABETH GROVER
	APPLICANT
	-v-
	CONTAINER HANDLING SYSTEMS PTY LIMITED T/AS HANNAN CONTAINERISED FURNITURE REMOVALS
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 21 OCTOBER 2004
FILE NO.	APPL 366 OF 2004
CITATION NO.	2004 WAIRC 13103

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Lack of procedural and substantive fairness. *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Declaration made that the Applicant was unfairly dismissed. Order made that the Respondent pay the Applicant $2,450.50 (gross) and $1,000.00 (net)
Representation	
Applicant	Mr C Fayle (as agent)
Respondent	Mr D Southam

Reasons for Decision

1 Joanne Elizabeth Grover ("the Applicant") claims that she was harshly, oppressively and unfairly dismissed on 8 March 2004 by Container Handling Systems Pty Limited t/as Hannan Containerised Furniture Removals ("the Respondent"). The Applicant makes the claim under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act").

Background

2 The Applicant was employed by the Respondent as an "office all-rounder" to assist Mr David Southam, the Respondent's transport manager. The Respondent is a national company whose business is to arrange furniture removals. It employs approximately ten people in Western Australia. Usually only the Applicant and Mr Southam worked in the office. The other employees carried out the transport work. The Applicant's role was to answer the telephone, book jobs, write up labels and stickers and carry out other office duties. She also was required to pack houses a couple of days each week. The Respondent has two phone lines to the office.

3 The Applicant commenced employment on 27 October 2003. It is common ground that she was initially employed on three months' probation and that she successfully passed the probationary period at the end of January 2004. At all material times the Applicant was paid $490.10 (gross) per week.

4 The Applicant was dismissed on Monday, 8 March 2004. The Applicant was not at work the previous week. She had a serious car accident on Sunday, 29 February 2004, when a motor cyclist hit the back of her car. The Applicant's car was extensively damaged and the motor cyclist and his passenger were seriously injured. The Applicant says that she was in shock as a result of the accident and was advised to attend a doctor by the police. She was also informed by the police that she had to attend the Cannington Police Station. The following day was a public holiday so the Applicant attended the police station and the doctor on Tuesday, 2 March 2004. It is common ground that she notified her employer on Monday, 1 March 2004, that she would be unable to attend work on Tuesday. The Applicant did not attend work for the remainder of the week because she had previously arranged to take Wednesday, Thursday and Friday as annual leave. On Monday, 8 March 2003, she arrived at work and Mr Southam informed her that she no longer had a job.

5 The Respondent says that Mr Southam only agreed to the Applicant taking annual leave on Wednesday, 3 March 2004 to Friday, 5 March 2004 on the basis that the Applicant would work on Tuesday, 2 March 2004. The Respondent says that the Applicant did not inform him on Monday, 1 March 2004, that anyone was hurt in the accident. Further, it says the Applicant should have attended work on the Tuesday. Mr Southam says he told the Applicant that she could be released from work for sufficient time to attend the police station on Tuesday or she could have attended the police station after she had finished work that day. The Respondent says that in all the circumstances the Applicant's failure to attend work on Tuesday was an abandonment of her employment and Mr Southam's decision to dismiss her was justified.

Applicant's Evidence

6 The Applicant applied for the job as office all-rounder in October 2003 after she saw an advertisement in the paper. She posted her resumé to Mr David Southam and a few days later she was interviewed by Mr Southam. She later received a telephone call and was advised she had obtained the position. She said that at first the job was "good" but later she did not enjoy the job because Mr Southam was not very respectful and he was abusive towards her. Despite this in January 2004, Mr Southam told her that she had passed her probationary period and congratulated her. About this time she asked Mr Southam if she could take three days off from 3 March to 5 March 2004, and he told her to ask him closer to the time of her proposed leave. Shortly prior to the Applicant taking leave Mr Southam was in Darwin so she telephoned the Respondent's Payroll Officer, Maureen, in Queensland and asked her whether she could take the days off and Maureen informed her that it should be okay but to speak to Mr Southam about it. She then asked Craig Tierney, who was second-in-charge to Mr Southam. He also informed her that it should be okay but she should speak to Mr Southam about it. When Mr Southam returned from Darwin she did so and Mr Southam agreed to her taking the three days off as annual leave. The reason why she wanted to take the three days off work was because her sister was coming back from Germany and she wanted to spend some time with her.

7 On Sunday, 29 February 2004, the Applicant was driving down a street in her motor vehicle. She pulled the vehicle over on to the left-hand side of the road and stopped her vehicle off the road. She then indicated right and turned the vehicle back on to the road, moved to the centre of the road, stopped and indicated to turn right into a park. She was then hit from behind by a motorbike. Her car was pushed across the road, over the kerb and on to the grass. The motor bike rider and the passenger were seriously injured and rushed to hospital by ambulance. Immediately after the accident the rider was conscious and screaming. Prior to the motor cyclist and his passenger being conveyed to hospital the police attended. She says the police "made her" approach the motor cycle rider, who swore at her. The police officers told her to go to the police station on the next working day to make a formal statement and to see the doctor "to get checked out". The next day was a public holiday so the earliest working day was Tuesday, 2 March 2004.

8 On Monday, 1 March 2004, at 5:34 pm the Applicant telephoned Mr Southam on his mobile telephone. The Applicant said that she was still in shock when she spoke to Mr Southam. She explained to him what had happened and told him that she would "not be able to make it to work on Tuesday, she had to go to the police station and to the doctor's" (*Transcript page 10*). She said his reaction was, "Are you okay?" In her examination-in-chief she testified that she told him that she was in serious shock and had a very sore neck (*Transcript page 11*). However, when cross-examined she agreed that when Mr Southam asked the question, "Are you okay? Is anyone hurt?" she told him, "No." It is common ground that she did not tell Mr Southam that a motor cyclist and his passenger had been hurt. She explained to Mr Southam that her car was damaged and she had no way to get into work. He told her to find someone to drop her off at work. She told him she could not do so. He then swore at her and told her, "Well, just catch a f…g bus in then." The Applicant said that she then "hung up" in Mr Southam's ear because she was still in shock and she did not think she had to listen when he started swearing at her. When cross-examined she conceded that she may have sworn at Mr Southam during the telephone conversation.

9 On Tuesday, 2 March 2004, the Applicant visited her doctor at Forrestfield in the morning. She then went to the police station at Cannington. Her boyfriend took her to the doctor, then dropped her off at the police station and later picked her up. She filled out an accident report form at the police station and completed it at 11:50am. She then had to wait quite a long time to see a police officer. After she was interviewed by a police officer she left the police station at 3:30pm. The next day the Applicant returned to see her doctor at Forrestfield and obtained a medical certificate stating she was unfit to attend work. The Applicant produced to the Commission an original of a medical certificate signed by Dr Enzo Almonte, stating the Applicant was unfit for work on 2 and 3 March 2004.

10 The Applicant said that for the rest of the week she was "quite a mess" and on the following Monday when she attended work on 8 March 2004 she was still in shock, could not stop thinking about the accident and was suffering from flashbacks.

11 On 8 March 2004, the Applicant went to work at the normal time. As she walked towards her desk she said good morning to Mr Southam. Mr Southam said, "What the f… are you doing here, Jo?" She replied, "I work here, why else would I be here?" and he said, "No you don't, I don't need you anymore. You didn't bother to call me on Tuesday. You didn't bother to show up or anything." She said, "No, I called you on Monday and told you that I wouldn't be coming in for Tuesday." Mr Southam then said, "I don't need you here any longer." The Applicant then said, "Am I fired?" He said, "Yes." Then she said, "You can't fire me like that. I haven't had any warnings. I haven't been doing anything incorrect or anything." He replied, "I don't have to give you any f…g warnings" and she said, "ring up Col Hannan (the owner of the business) and find out if you can sack me like that." He then said, "I don't need to call anyone. I can do and say what I want." When cross-examined about this conversation the Applicant testified that Mr Southam swore at her when he first spoke to her that morning. She, however, denied that she swore at him in response.

12 The Applicant says Mr Southam told her to leave the premises and she told him she was not leaving until she had finished work and she sat down for about five minutes. He told her if she did not leave he would get someone to evict her. After about another five minutes she rang her father. When the Applicant's father arrived he went into Mr Southam's office and shook his hand. It was put to the Applicant in cross-examination that the Applicant said to her father "Don't shake that f…g a……'s hand. He is not worth it." The Applicant denied that she had said this. However, she agreed that there was a very heated exchange between her father and Mr Southam. The Applicant then left the premises.

13 After she was dismissed she was angry, upset and depressed because she had no money, no car and no job. She lost a lot of weight and was distraught. The Applicant, however, concedes that part of her symptoms of depression and stress were caused by the accident. A friend of the motor cyclist who was hurt in the accident, rang and harassed her on a couple of occasions. She said she had the police "on her back" as they were still making enquiries in an attempt to resolve who was at fault. The Applicant testified that at the time of the hearing in this matter the police had yet to determine who was at fault in relation to the car accident. As a result she was "under a lot of pressure". Despite this the Applicant made numerous applications for jobs and commenced work in April 2004. She said she was unemployed for a period of six weeks.

14 The day after the Applicant's employment was terminated she was due to be paid her weekly pay. She said she did not receive her pay until approximately one week later after she telephoned the Respondent's payroll officer in Queensland. A week after she was dismissed she received her wages for time worked, one week's pay in lieu of notice and payment for accrued annual leave.

15 The Applicant says that she was never given any warnings during her employment that her performance was unsatisfactory. She said that the only time that she was spoken to about making any mistakes was a few weeks prior to being dismissed for double booking a job. The Applicant says that Mr Southam also booked the job so the mistake was not entirely her fault. At no time was she ever informed by the Respondent that her employment was in jeopardy.

16 When the Applicant was employed with the Respondent her girlfriends used to come into the office at lunch time. It was common ground that the Applicant had asked and obtained permission from Mr Southam for her friends to do so. She agreed when cross-examined that the arrangement was that they could do so as long as they did not interfere with her work. She denied that Mr Southam later called her into his office and told her that her friends were interfering with her work and they were not to come into the office anymore. She conceded, however, that after a period of time they stopped coming in to the office. She says she is not sure why they stopped coming in. After they stopped coming in, one of her friends started ringing the office constantly. She told her not to do so but her friend did not stop ringing.

17 The Applicant agreed that whilst she was employed by the Respondent she did not attend work on one or two days because she was sick. She denied that her boyfriend had telephoned Mr Southam on each occasion to inform Mr Southam she was sick and could not attend work.

18 The Applicant was cross-examined about the identity of the Respondent's clients. She was unable to say who the Respondent's major client was.

19 The Applicant is seeking compensation for loss of income for the period she was unemployed and compensation for injury she sustained as a result of being dismissed.

Respondent's evidence

20 Mr David Southam testified that he has been employed by the Respondent as a transport manager for nine and a half years.

21 Mr Southam says that when he interviewed the Applicant he told her about the requirements of the job and made it plain to her that he was a bit of a "rough diamond". He says he told her that the environment in which she was going to work in was "pretty rough" and asked her whether she would be offended by bad language or by "boys' talk" in the depot. He said the Applicant told him that she would not be bothered by such conduct. As a result he employed her.

22 Mr Southam testified that at completion of the Applicant's probationary period he asked her to come into the office and he reiterated the tasks that she was to carry out. He said that this was the only time after the initial interview that he had a conversation with her about her job and what was expected of her. He spoke to her about the importance of the work they do and the problems he had with her work that needed rectification. He told her at that meeting that her friends could no longer come into the office. At the end of the meeting he told her, "Congratulations, you are in the workforce", meaning she was no longer a probationary employee. After that meeting, one of the Applicant's friends rang the office continuously and tied up one of the lines until Mr Southam "abusively" spoke to the friend and told her to stop calling the office.

23 Mr Southam testified that there were "little things" during the course of the Applicant's employment that built up which led to her dismissal. He said what annoyed him was when she took one or two days off sick her boyfriend rang him to say she was not coming into work. He had no objection to her taking a day off sick. However, he was annoyed that she did not personally telephone him. He said there were a number of mistakes she made in her work but philosophically he accepted her mistakes on the basis that "none of us is perfect".

24 Mr Southam was irritated about the Applicant taking three days annual leave after the long weekend. He said when she first asked him about taking leave she only mentioned taking one day off but whilst he was in Darwin she arranged to have three days off. Despite going behind his back he decided to be compassionate and allow her to take the three days off but he was counting on her being at working on Tuesday, 2 March 2004, because they were extremely busy and had numerous jobs to deal with for the Department of Defence. When he received the phone call from the Applicant on Monday, 1 March 2004, advising him that she was not coming to work the next day, his intuition told him her excuse was a blatant attempt to "scam" a day off. He testified that having been a young employee, he was aware of all the tricks and scams as he had probably used them all himself. He asked the Applicant on Monday, 1 March 2004, if anyone was hurt and that she said, "No." He says she made no mention to him that she had been told to go to the doctor. She only told him that she had to go to the police station. He says he told her that he would get her to the police station during the day or she could go to the police station after she had finished work. He told her to get on a bus or a taxi and find her way to work. Mr Southam says that the Applicant abused him by saying, "Don't f…g worry about it" and hung up in his ear. He conceded, however, that he was the first person to use bad language in that conversation. In particular, he conceded that he may have said, "Get a f…g bus" because he thought she was trying to avoid coming into work when she was not hurt. He said he had previously explained to the Applicant when she first commenced employment that this was the way he talked. However, he maintained in his evidence that he will not allow employees talk to him in that manner. The conversation on 1 March 2004, in his view, was the final straw. He made up his mind on that Monday evening to dismiss the Applicant if she did not come to work the next day.

25 On Tuesday, 2 March 2004, he arranged for Dianne Lampogh to come into work to fill in as the office all rounder, on a casual basis for the rest of the week. She was familiar with the Respondent's office procedures having worked in the office on a casual basis some five or six times previously. Mr Southam had no further contact with the Applicant until the following Monday. He said he was discussing with Ms Lampogh the work that had to be carried out that day when the Applicant arrived in the office on Monday, 8 March 2004. He said the Applicant waltzed in as if nothing had occurred. He said to her, "Hello, what are you doing here today?" She replied, "Get f…d you can't sack me. You haven't given me three warnings." He said the Applicant ranted and raved and refused to leave. He told her that if she did not leave he would get someone to evict her. Her father came in to pick her up. When her father shook Mr Southam's hand the Applicant abused Mr Southam again. The

Applicant's father, Mr Grover, then tried to intimidate him by invading his personal space. When cross-examined Mr Southam agreed that he is a much larger man than Mr Grover and that he (Mr Southam) is an aggressive character. Mr Southam says he "bit his tongue" and asked them politely to leave the premises and told them if they did not leave he would get someone to evict them. He says that after a further barrage of abuse they left. Mr Southam says he then telephoned the Respondent's payroll officer in Queensland and arranged for the Applicant to be paid one week's pay in lieu of notice and all accrued entitlements. To the best of his knowledge the Applicant was paid this amount the following day. The Applicant's pay records, which were tendered into evidence on behalf of the Applicant, indicate that a payment was made on the following day.

26 Mr Southam says that during the week the Applicant was not at work he ascertained that numerous jobs had not been booked in by the Applicant. He made arrangements to fix those errors and did not raise the matter with the Applicant. He agreed when cross-examined that he made the decision to dismiss the Applicant on Tuesday, 2 March 2004 but did not carry out that decision until the following Monday, 8 March 2004. Mr Southam says that during that week the Applicant had ample opportunity to ring and apologise to him for hanging up and to tell him she had gone to the doctor or drop into the office and provide him with her medical certificate but she failed to do so.

Legal Principles

27 The question to be determined by the Commission is whether the Respondent exercised its legal right to dismiss the Applicant in such a way that the right has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (see *Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

28 In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at 229-230 the Full Bench of the Industrial Commission of South Australia (approved by the majority of the Full Bench of this Commission in *Western Mining v Australian Workers' Union* (1997) 77 WAIG 1079 at 1084) held:

> "An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.
>
> 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 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.
>
> If a fact or facts come to light subsequent to the dismissal which cast a different light on the Commission of the alleged misconduct, such fact or facts will not necessarily or automatically render the dismissal harsh, unjust or unreasonable. In our view in such circumstances what will need to be considered is whether the employer, if it had acted reasonably and with all due diligence, could have ascertained those facts before the dismissal occurred.
>
> The Commission is required to objectively assess the subjective actions and beliefs of the employer as at the time of dismissal and not at some subsequent time: see *Gregory v Philip Morris* (1998) 24 IR 397 at 413; 80 ALR 455 at 471; see also *Stearnes v Myer SA Stores* Print No 9A/1973 at 5.
>
> Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations."

29 Whilst it is the case that the gravity of the alleged offence dictates the nature and extent of an inquiry which the employer must conduct and that the charge of this particular nature should not be found proved lightly by an employer, employers are not required to have the skills of police investigators or lawyers (*Schaale v Hoechst Australia Limited* (1993) 47 IR 249 per Heerey J at 252 and *Amin v Burswood Resort Casino* (1998) 78 WAIG 2441 per Fielding SC at 2442).

30 The general principles of the valid exercise of the remedy of summary dismissal were considered by Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 where he observed at 287 and 289:

> "… since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service … I … think … that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and … therefore … the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions."

31 In *The Shop, Distributive and Allied Employees' Association of Western Australia v David MacGuire t/a Handy Dans Discount Hardware and Hire* (1992) 73 WAIG 195 Salmon C observed in relation to the use of bad language in a workplace:

> "In *Wilson v Racher* (Court of Appeal) [1974] ICR 428, the use of bad language by an employee towards his employer was the central issue in the matter under consideration. Edmund Davies LJ made the following observation, which is of a general kind, at p.430:
>
> > 'What would today be regarded as almost an attitude of Czar-serf, which is to be found in some of the older cases where a dismissed employee failed to recover damages, would, I venture to think, be decided differently today. *We have by now come to realise that a contract of service imposes upon the parties a duty of mutual respect.*'
>
> *Wilson v Racher* was a wrongful dismissal case; however, the fact does not, in my opinion, alter the force of His Lordship's statement of principle which I have underlined. Notwithstanding the context, he was referring to duty of universal application in employment relationships.

The point is that even if an employee uses bad language towards an employer that would ordinarily be considered grounds for summary dismissal, it will not be grounds for such a dismissal where the conduct of the employer is fairly judged to have provoked the employee into using bad language in the first place. If there was provocation then the degree of respect due to the employee was missing; and the employer cannot complain that the degree of respect due to him was not forthcoming."

Credibility and Findings

32 Having heard the evidence given by the Applicant and the Respondent I found in some aspects that the Applicant's evidence was vague and in part lacked credibility. It became clear in cross-examination of the Applicant that she in fact had used abusive language to the Respondent when she spoke to him on the telephone on 1 March 2004. I do not accept that she informed the Respondent that she was going to go to the doctor on the Tuesday. Although it is quite clear for the reasons that follow that the Respondent failed to comply with its duty to provide the employee with (mutual) respect through the actions of Mr Southam, I found Mr Southam to be a reliable witness. He was extremely forthright in his evidence and did not attempt to colour his evidence in any way whatsoever. He bluntly disclosed his conduct. Consequently I find that where the evidence of the Applicant is not consistent with the evidence given by Mr Southam I prefer the evidence given by Mr Southam. However, that does not mean that I accept the contention made by Mr Southam that the Applicant was not unfairly dismissed.

33 Plainly the Applicant was summarily dismissed by Mr Southam. The onus is on the Applicant to prove that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove in a case of summary dismissal that the dismissal was justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

34 The Applicant was unfairly dismissed. The Applicant was denied both substantive and procedural fairness. The Applicant was not given an opportunity to explain prior to her dismissal why she had taken the Tuesday off work. If Mr Southam had given the Applicant an opportunity to produce her medical certificate on Monday, 8 March 2004, and listened to her explanation that she had been at the doctor on Tuesday morning and had later spent most of the afternoon at Cannington Police Station he would not have had reasonable grounds for dismissing the Applicant. Whilst I accept that the Applicant swore at Mr Southam on both Monday, 1 March and Monday, 8 March 2004, in the circumstances, where Mr Southam had a habit of swearing at the Applicant, I do not accept that her conduct in swearing at him and hanging up the phone justified her dismissal. Clearly she was provoked by Mr Southam. In all the circumstances it is plain that she was unfairly dismissed.

Compensation

35 I am satisfied that reinstatement is not practicable. Accordingly I will not make an order that the Applicant be reinstated. The Applicant was paid one week's pay in lieu of notice and was unemployed for a total period of six weeks. I will make an award that the Applicant be paid an amount equivalent to five weeks' pay which is an amount of $2,450.50 (gross).

36 I am also satisfied that the circumstances of the termination were such that the Applicant has suffered an injury. Quite plainly Mr Southam's conduct in using abusive language towards the Applicant when he dismissed her, ordering her to leave the premises and telling her that if she did not leave he would have her removed was, in my view, callous, oppressive and humiliating. I am satisfied the Applicant suffered shock as a result. I will, however, in making an award of compensation for injury, discount the shock and distress the Applicant was suffering at the time of her dismissal because of the motor vehicle accident. I will make an award of $1,000.00 for the injury caused by the dismissal.

37 In light of these findings I will make an Order that the Respondent pay the Applicant the sum of $2,450.50 (gross) and $1,000.00 (net).

2004 WAIRC 13173

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOANNA ELIZABETH GROVER
	APPLICANT
	-v-
	CONTAINER HANDLING SYSTEMS PTY LIMITED T/AS HANNAN CONTAINERISED FURNITURE REMOVALS
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 28 OCTOBER 2004
FILE NO.	APPL 366 OF 2004
CITATION NO.	2004 WAIRC 13173

Result	Order issued
Representation	
Applicant	Mr C Fayle (as agent)
Respondent	Mr D Southam

Order

HAVING heard Mr C Fayle as agent on behalf of the Applicant and Mr D Southam 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 was unfairly dismissed;

(2) ORDERS that the Respondent pay to the Applicant within fourteen (14) days of the date of this Order the sum of $2,450.50 (gross) and $1,000.00 (net).

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

2004 WAIRC 13266

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JIE YEW HONG
	APPLICANT
	-v-
	METRO FRESH
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 10 NOVEMBER 2004
FILE NO.	APPL 1316 OF 2004
CITATION NO.	2004 WAIRC 13266

Result	Claim of unfair dismissal out of time dismissed
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 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) s29(1)(b)(i),(2)&(3)
Representation	
Applicant	Mr J.Y. Hong
Respondent	Mr H. Lam

Reasons for Decision

1 On 8 October 2004 Mr Hong referred to the Commission a claim that he was unfairly dismissed by Metro Fresh on 6 September 2004, five days after his employment commenced. By s.29(2) of the *Industrial Relations Act 1979* Mr Hong's claim needed to be lodged within 28 days of the day his employment terminated; that is by 4 October 2004. His Notice of Application to the Commission was therefore four days out of time.

2 By s.29(3) of the Act the Commission may accept a referral that is out of time if the Commission considers it would be unfair not to do so. Accordingly, the Commission listed the claim for that purpose on 9 November 2004 and gave Mr Hong and the proprietor of Metro Fresh Mr Lam an opportunity to give evidence and address the Commission on the matters the Commission should take into account in deciding whether it would be unfair not to accept the claim.

3 The facts of the matter are relatively straightforward. Metro Fresh is a fruit and vegetable shop and Mr Lam employed Mr Hong to work in the shop. Although there is some dispute whether or not Mr Hong's employment was casual or full-time, it is agreed that he was to work five days of the week other than Thursdays and Sundays. It is also agreed that Monday is usually payday, although Mr Lam's evidence is that if he is not present in the shop on the Monday, payday will be the next day or the day after.

4 The evidence is that Mr Hong commenced working on Thursday 2 September 2004. He worked that day, Friday and Saturday. He did not work on the Sunday as he was not required to work on that day. Mr Hong attended for work the following Monday and at approximately 1:00pm, in the absence of Mr Lam, asked Mr Lam's brother whether he was going to get paid. Mr Hong's evidence is that he understood Monday was payday and that the other employees had been paid. Mr Hong's evidence is that Mr Lam's brother told him that Mr Hong would not be paid for approximately two weeks. Mr Hong said this was not what had been agreed and that everyone else had been paid. Mr Hong's father was waiting to collect Mr Hong and Mr Hong spoke to his father about the issue. Mr Hong's father then approached Mr Lam's brother saying words to the effect, "This is Australia, you cannot do this". Mr Hong's father's evidence is that Mr Lam's brother stated that he had been just joking and that he did not know when Mr Hong would be paid.

5 Mr Hong's evidence is that he did say that he wanted to be paid and as a result Mr Lam's brother made a telephone call, Mr Hong believes it was to Mr Lam, and he then returned to Mr Hong, gave him a pay envelope with cash in it and stated that Mr Hong was not to come again. Mr Hong stated that he told Mr Lam's brother he would take the matter up legally and he then left.

6 Mr Hong stated that although he contacted the Commission within a few days of his dismissal, and obtained the appropriate Notice of Application, he experienced some delay in finding out the full name of his employer and also he had difficulty finding the $50 filing fee. Mr Hong stated that he had brought the forms into the Commission only to be told that more detail was needed. Ultimately, he had to borrow the $50 from his family to pay the filing fee. He understood that the application had to be in within the 28 days. Also, he was working in a new job which he had found within 10 or 14 days of his departure from Metro Fresh.

7 Mr Hong was cross-examined by Mr Lam and I note that Mr Hong agreed that Mr Lam had been very nice to him and that generally Mr Lam had said that he was happy with Mr Hong's work. Mr Hong also admitted that he had not yet returned to

Mr Lam a completed Employee Taxation Declaration form with his tax file number. Mr Hong also denied any suggestion that he was swearing or shouting at Mr Lam's brother when he realised he was not going to be paid on the Monday.

8 Mr Hong called evidence from his father. Mr Hong's father gave evidence of his role in speaking to Mr Lam's brother. He had told his son to "calm down" and when he spoke to Mr Lam's brother, the brother had replied that he had merely been joking about Mr Hong not being paid. Mr Hong's father confirmed that Mr Lam's brother had said that Mr Hong had been troublesome, that he would be paid but that he was finished.

9 Mr Lam gave evidence on behalf of Metro Fresh. His evidence is that he is the proprietor and that his brother has no managerial role. Mr Lam's evidence is that his brother is merely another employee. He confirmed that payday was Monday, unless he was absent, but that he had not intended to pay Mr Hong on that Monday because it had only been three days since he had started work and Mr Hong had not yet returned the Employee Taxation Declaration form to him. His involvement on the Monday consisted of receiving a telephone call from his brother who informed him that Mr Hong had wanted to quit and be paid then and there. He was told that Mr Hong was in the shop and being very loud. Mr Lam therefore told his brother to pay Mr Hong in order to get him out of the shop. His evidence is that his brother has no power to dismiss anybody and that when Mr Lam is absent from the shop he is always to be contacted by telephone if a management issue arises. Mr Lam stated that Mr Hong should have spoken to him about his pay and not Mr Lam's brother. Mr Lam cannot answer for his brother and what his brother may or may have not said.

10 Mr Lam was cross-examined on his evidence. Essentially, Mr Lam disagreed with any suggestion put to him that his brother acted with authority or on his behalf while he was not there. He confirmed that he had not told Mr Hong that he would not get paid until receiving the Employee Taxation Declaration form. He had no intention of dismissing Mr Hong because, amongst other things, he had two employees absent and Mr Hong's sudden departure left him short staffed.

11 That is the evidence before the Commission.

12 The law to be applied in circumstances such as these is now well established following the decision of the Industrial Appeal Court in *Malik v. Paul Albert, Director General Department of Education* [2004] WASCA 51; (2004) 84 WAIG 683. That decision makes it clear that the principles or considerations to be taken into account in deciding whether it would be unfair not to accept a claim out of time are not exhaustive and each case will turn upon its own individual facts and circumstances. In the end, the Commission must be positively satisfied that the prescribed period should be extended because the time limit in the *Industrial Relations Act 1979* should be complied with unless there is an acceptable explanation for the delay which makes it equitable to extend the time.

13 In considering the evidence before me, I have not found persuasive Mr Hong's reasons for lodging the application late. He stated that he was aware of the 28 day limitation. However, it is not entirely clear from his evidence, with all due respect to him, why it took him as long as it did for him to refer the application to the Commission. While I accept that the $50 filing fee may be a difficulty, the point made by Mr Lam that Mr Hong had been paid $320 for his work for Metro Fresh, and that he therefore had at least that sum of money, is not without substance and was unexplained. Further, it is not entirely clear from the lack of detail in Mr Hong's evidence what other steps he had to take to find out the correct name of his employer and precisely when he took them. In this regard, the task faced by Mr Hong to find out his former employer's name is routinely faced by persons representing themselves who believe they have been unfairly dismissed and wish to refer a claim to the Commission. Most do so easily within the 28 day period. I did not find Mr Hong's evidence persuaded me that his explanation for the delay was acceptable. It is not irrelevant to consider fairness between Mr Hong and the circumstances of others who have referred their applications promptly to the Commission: the 28 day time limit is indeed there to be observed and although the delay in this case, four days, is not excessive, the 28 day period is to be complied with.

14 Further, the merits of the case were extensively debated in the evidence before me. It is not the task of the Commission on this occasion to judge whether Mr Hong was dismissed or whether if he was it was unfair. It is sufficient to note that if Mr Hong's application is accepted, his claim that he was dismissed by Metro Fresh is not without significant complications. While I accept that the evidence is likely to establish that Mr Lam's brother said, and acted, as both Mr Hong and his father have related in evidence, it is also quite clear that the evidence will also be that Mr Lam's brother had no managerial role and no authority to dismiss anybody. The point made by Mr Lam that Mr Hong should have spoken to Mr Lam and not his brother is perfectly valid. There may well have been a misunderstanding by Mr Hong of Mr Lam's brother's position and by Mr Lam of precisely what had happened to Mr Hong's employment. This is a clear case where a simple telephone call from either Mr Hong to Mr Lam, or vice versa, in the days following the alleged dismissal might well have allowed the issue to be resolved. I am therefore not persuaded that Mr Hong's case ultimately is a strong case.

15 The Commission is also to consider the prejudice to Metro Fresh if the application is accepted, including the prejudice caused by the delay. Although Mr Lam did not give direct evidence of the prejudice to be caused by him, I consider that is as much because his first language is not English as for any other reason. On the evidence before me, it is clear that the first Mr Lam knew of the claim of unfair dismissal was when it was served on him shortly after 19 October 2004 some six weeks after the Monday incident. There is no evidence before the Commission which could show that Mr Lam was aware prior to that time of Mr Hong's intention to "legally" challenge in the Commission what occurred. Had there been, the significance of the additional four days out of time would have been less.

16 Further, not only would Mr Lam be obliged to give evidence in any proceedings, so too would Mr Lam's brother and apparently at least two other employees who witnessed the incident on the Monday. I consider that is a prejudice to Metro Fresh, given the nature of its business, which is significant enough for the Commission to take into account. The Commission should only put Metro Fresh to that task if the case to be brought by Mr Hong had a reasonable chance of success. However, for the reasons I have given it cannot safely be said that it has that chance. Nor is there anything to positively satisfy the Commission that it would be unfair not to accept Mr Hong's application out of time.

17 While it is in my opinion quite correct to say that an employee cannot be fairly dismissed merely for requesting to be paid for three days worked, I am not persuaded that if Mr Hong's application is accepted, he will be able to show that that is what occurred in the face of the evidence to be brought by Mr Lam that he did not dismiss Mr Hong. Accordingly, this application is hereby dismissed.

2004 WAIRC 13267

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JIE YEW HONG
	APPLICANT
	-v-
	METRO FRESH
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 10 NOVEMBER 2004
FILE NO/S	APPL 1316 OF 2004
CITATION NO.	2004 WAIRC 13267

Result	Claim of unfair dismissal out of time dismissed
Representation	
Applicant	Mr J.Y. Hong
Respondent	Mr H. Lam

Order

HAVING HEARD Mr J.Y. Hong on his own behalf as the applicant and Mr H. Lam on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders -

THAT the application be hereby dismissed.

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

2004 WAIRC 13280

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY THOMAS JAMES
	APPLICANT
	-v-
	KALUMBURRU ABORIGINAL COMMUNITY
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 9 NOVEMBER 2004
FILE NO.	APPL 69 OF 2004
CITATION NO.	2004 WAIRC 13280

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Employment contract terminated by frustration – No dismissal at the initiative of the employer – Commission lacks jurisdiction – Application dismissed – *Industrial Relations Act 1979* (WA) s 23 & s 29(1)(b)(i) Termination of employment - Jurisdiction of the Commission - Whether application referred outside of 28 day time limit considered - *Industrial Relations Act 1979* (WA) s 23 & s 29(3) Termination of employment – Contractual benefits claim – Entitlements under contract of employment - Principles applied – Application dismissed – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	Application dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr S T Baldwin

Reasons For Decision

1 The applicant claims that he was harshly, oppressively and unfairly dismissed by the respondent. He says that reinstatement is not practicable and he seeks compensation of approximately 8 weeks pay being the period before he was able to access Centrelink benefits. He also claims a denied contract benefit of accrued annual leave for the last year of his employment.

2 The Commission has heard evidence from the applicant and from Stephen Terry Baldwin, who operates the Community and Administrative Support Company which provides offsite accounting and payroll services for Aboriginal communities including the respondent.

3 The applicant was engaged by the respondent in 1989 and has worked for a number of years on its Community Development Employment Projects ("CDEP"). The applicant says that he worked on that programme for approximately 20 hours per week on various jobs. In addition he performed work for contractors through arrangements with the respondent for additional hours on some weeks totalling as many as 40 hours.

4 The applicant says that his dismissal left him without income to support his wife and children in the period leading up to Christmas and in particular denied him the opportunity to buy Christmas presents for his children which he had always previously done.

5 The applicant says that his dismissal occurred on around 14 or 16 December 2003 when he was removed from the Community by the police due to what he described as a domestic issue which arose when he became intoxicated. The police took him to Wyndham and then to Kununurra where he remained in custody for some days awaiting a court appearance. After the court appearance he was released. However, the police told him that he could not go back to the Community because he was a menace. It was not until July 2004 that he obtained advice from the Department of Justice that he could return to the Community. He did so, but not on a permanent basis and appears to have not sought to stay there or to be given work.

6 The applicant says that no one from the Community told him that he was dismissed however, he says that his wife, Anna, told him that she was told that he was terminated.

7 Mr Baldwin has given evidence that for a period of 10 weeks from 1 April 2002, he was the Acting Chief Executive Officer for the respondent and since that time, the respondent has had 3 Chief Executive Officers. He was able to present evidence of the payment arrangements for the applicant and other employees on CDEP. That evidence includes that the respondent was incorporated in 1982 for the purpose of providing services to members of the Community. It takes a charitable approach and provides support for members of the Community in respect of drug and alcohol related matters, and employment to them through the CDEP funding arrangements. CDEP funding is provided to the Community via grants from the Commonwealth government which have quite substantial terms and conditions attached to them. Although Mr Baldwin was not able to provide to the Commission a copy of the particular terms and conditions which bind the respondent in respect of the grants for CDEP funding, he was able to provide a considerable amount of information in respect of how those funding arrangements work in practice and how they are administered. Those arrangements include that the recipient of the funding, in this case the respondent, needs to agree in writing to certain conditions. Those conditions include that the funding is provided as a replacement for unemployment benefits to allow the members of the Community to move from Centrelink benefits to paid employment pursuant to master and servant relationships. Approximately $2,000 per participant, being the employee or member of the Community, is paid to the respondent to cover on-costs which include the administrative support. The participant must be eligible for Centrelink benefits otherwise he or she is not eligible to participate in the CDEP programme.

8 The hourly rate of pay for each participant is fixed by the respondent at $10.85 for 20 hours work per week which is the standard number of hours of work per week provided to the participants. This hourly rate is derived from the funding being an average of $217.00 per participant. A participant may earn approximately $5,615.00 per quarter or $20,000.00 per annum through the normal minimum 20 hours per week worked. He or she is also eligible to top up his or her income by an equivalent amount through additional work undertaken and paid for by other funding or by the funding made available through other participants not performing work on a given day or week. This enables a participant to receive up to double the unemployment benefits. There are approximately 70 participants in the respondent's CDEP. When one participant does not perform work, funding is available for additional work to be performed by others. There is a no work no pay policy, to which the applicant agrees. Other work may be available due to funds received from other sources.

9 Mr Baldwin says that notwithstanding the requirement for each participant to perform work to receive pay, certain services are provided by the Community which need to be funded. These include the maintenance of housing, rent, electricity and amenities. For the purpose of providing for these services, the respondent pays each participant in the programme, whether they work or not, a minimum of 3.2 hours per week which equates to $34.72. This covers the $35.00 per week which the respondent deducts from each participant's pay to cover $10.00 for rent, $15.00 for electricity and $10.00 for amenities. Therefore, even if a participant does not work, he or she is recorded within the respondent's pay records as having worked 3.2 hours to enable him or her to be paid the amount to meet those obligations.

10 One of the requirements of the funding is that within 48 hours of a participant leaving one community or project, the community is required to provide a "CDEP Action Advice Form (ROA 12)" to Centrelink and the Aboriginal and Torres Strait Islander Services (ATSIS). The respondent would prefer to keep the person on the books for as long as possible because it is only through he or she being recorded as a participant that the respondent is able to have the funding available to reallocate to additional work or services by other participants beyond their 20 hours per week.

11 The respondent submitted into evidence a copy of the Centrelink CDEP Action Advice provided by the respondent to Centrelink which indicates that the last day of the applicant's participation pursuant to the CDEP programme was 27 November 2003. The Employment Separation Certificate also records the last day of work as being 27 November 2003. The "CDEP Manager" document, which records the applicant's employment history, also indicates that his end date of employment was 27 November 2003. Minutes of a meeting of the respondent's council on 17 December 2003 record that:

> "Geoffrey James situation – Ian (Burgman, the respondent's chief executive officer) advised that all had been done as requested. Geoffrey James is on New Start Family Payment. A hardship payment has been made – Andrew to follow up."

12 Mr Baldwin says that the inference to be drawn from that is that the respondent provided assistance to the applicant to establish his Centrelink payments.

13 There was also evidence that there are two forms of leave provided within the respondent's arrangements for the participants in the CDEP programme. They are funeral leave and medical leave. Funeral leave is without pay, however there is an allowance paid out of the amenities fund accumulated from the pay deduction of $10.00 per week. Medical leave of approximately 20 hours pay per week is available.

14 Mr Baldwin gave evidence that some CDEP programmes provide for annual leave to accrue which is by the accumulation of an amount deducted from the $217.00 per person each week. However, he says that the respondent has no such arrangements for annual leave as participants are paid out the full amount in wages and accrue no additional benefits. There is no other provision for annual leave.

15 The respondent says, and the applicant agrees in his evidence, that it has been the policy of the respondent that there is no work for the period of 4 weeks around Christmas corresponding with the school holidays. The respondent continues to pay those participants who are on the schedule of participants in the programme for a period of 4 weeks. Mr Baldwin says that the applicant left a number of weeks before Christmas, therefore, he was not on the schedule of participants at the time the leave was taken and therefore was not entitled to be paid during that period. He says that there is no accrual of annual leave.

Conclusions

16 The applicant's and Mr Baldwin's evidence demonstrates and I find that the applicant worked approximately 37 hours per week for at least the period of 5 months prior to the end of his employment. I accept Mr Baldwin's evidence that, and according to the respondent's records, the applicant's employment with the respondent terminated on the last day on which he performed work being Thursday, 27 November 2003, when he was removed from the Community by the police. From that time, for a period of one week, he was allocated 3.2 hours to cover his rent, electricity and amenities fees although no hours of work were performed by him.

17 I find that the evidence does not demonstrate that the respondent terminated the applicant's employment. Rather it indicates that the contract was frustrated by the applicant's removal from the Community by the police, his incarceration and the direction from the police that he not return to the Community, and essentially by his inability to return to the Community. (See *Macken, McCarry and Sappideen's Law of Employment, Fourth Edition, pp 232 – 234.*) In this case, the applicant's inability to return to the Community where he performed his work made the performance of his contract of employment with the respondent impossible. There is no evidence before me to indicate whether that instruction given by the police was in accordance with any decision by the respondent to terminate the applicant's employment. Accordingly, I find that there is no dismissal by the respondent but rather frustration of the contract.

18 Even if there were a dismissal, that dismissal occurred not on 14 or 16 December 2003 but on 27 November 2003. As the application was not lodged with the Registrar until 19 January 2004, the application is out of time and there is no application for the application to be received beyond the time limit imposed by the Industrial Relations Act 1979 ("the Act").

19 Where there is no dismissal, there can be no application pursuant to s.29(1)(b)(i) of the Act. Accordingly, the claim of harsh, oppressive or unfair dismissal will be dismissed.

20 As to the issue of the claim for accrued annual leave, this arises pursuant to s.29(1)(b)(ii) of the Act which provides:

> "b) in the case of a claim by an employee —
>
> (i) …
>
> (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."

21 The Commission must first ascertain the terms of the contract. (See *Perth Finishing College Pty Ltd v Susan Watt* (1989) 69 WAIG 2307 and *Simons v Business Computers International Pty Ltd* 65 WAIG 2039.)

22 It is clear from what Mr Baldwin says and from the applicant's corroborating evidence, and I find, that the applicant worked continuously for the respondent for a considerable period of time. There is no suggestion that he took unauthorised leave for any period in the preceding year. He worked a minimum of 20 hours per week and for approximately the last 5 months of his employment, worked a minimum of 37 per week and up to 40. His rate of pay for 20 hours per week was provided from the CDEP funding. No amount was deducted to take account of payment for annual leave, although pay is received for a period of 4 weeks for which no work is performed over the Christmas period for those on the schedule of participants at that time. There is no evidence that the applicant had an entitlement to payment of accrued or pro rata annual leave pursuant to his contract of employment.

23 It must be remembered, too, that CDEP work and income is an arrangement in lieu of unemployment benefits. The reason why the applicant was unable to obtain unemployment benefits from the end of his employment is not before me. His employment ended on 27 November 2003, at least 3 weeks prior to the holiday period. He was removed from the respondent's schedule of participants prior to that period when no work would have been required and therefore he would not have been entitled to payment according to his contract of employment.

24 Neither party was able to address the Commission on the issue of the Minimum Conditions of Employment Act 1993 and its implications, and the applicant does not seek to enforce the conditions which might be imported into his contract by that legislation.

25 Accordingly, I find that there is no entitlement to accrued or pro rata leave annual leave pursuant to the contract of employment.

26 The application will be dismissed.

2004 WAIRC 13279

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY JAMES
	APPLICANT
	-v-
	KALUMBURRU ABORIGINAL COMMUNITY
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 NOVEMBER 2004
FILE NO	APPL 69 OF 2004
CITATION NO.	2004 WAIRC 13279

Result	Application dismissed Application dismissed

Order

HAVING heard the applicant on his own behalf and Mr S T Baldwin 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.

2004 WAIRC 12976

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	GAVIN EDWARD MAVERICK-PHILLIPS
	APPLICANT
	-v-
	BIBLOS NOMINEES PTY LTD ATFT PALMA UNIT TRUST T/AS ARTIFEX AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J HARRISON
DATE	MONDAY, 11 OCTOBER 2004
FILE NO.	APPL 1019 OF 2004
CITATION NO.	2004 WAIRC 12976

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 to be applied – Commission satisfied applying principles that discretion should be exercised – Acceptance referral out of time granted – Industrial Relations Act 1979 (WA) s 29(1)(b)(i),(2)&(3)
Result	Application to accept applicant's claim which was lodged out of time granted
Representation	
Applicant	Mr G Maverick-Phillips on his own behalf
Respondent	Mr J Bright and with him Mr N Moniodis

Reasons for Decision

1 On 9 August 2004 Gavin Edward Maverick-Phillips ("the applicant") referred a claim to the Commission pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that he was harshly, oppressively and unfairly dismissed on 24 May 2004 by Artifex Australia ("the respondent").

2 At the commencement of the proceedings it became clear that the respondent had been incorrectly named. Given the Commission's powers under s27(1)(m) of the Act, and having formed the view that it was appropriate in the circumstances to grant the amendment, I propose to issue an order that Artifex Australia be deleted as the named respondent in this application and be substituted with Biblos Nominees Pty Ltd as trustee for the Palma Unit Trust trading as Artifex Australia.

3 Section 29(2) of the Act requires that applications pursuant to s29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 9 August 2004 it is 52 days out of the required timeframe for lodging a claim of this nature.

4 The matter was listed for hearing to allow the parties to put submissions and to give evidence as to whether or not this application should be accepted under s29(3) of the Act. Section 29(3) of the Act reads as follows:

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

5 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision of *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, which are as follows:

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

6 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

Background

7 It was not in issue that the applicant commenced employment with the respondent as a French Polisher on 28 January 2003, he was terminated by the respondent on 24 May 2004 and it was not in dispute that the applicant's contract of employment was governed by the terms and conditions of the Furniture Trades Industry Award (No A6 of 1984) ("the Award"). The respondent designs and manufactures upholstered and timber furniture and the applicant was one of two full time employees who undertook French polishing duties for the respondent. The applicant was terminated at the same time as the respondent's other French Polisher Mr Anthony Blunsdon after the respondent requested on Friday 21 May 2004 that the applicant and Mr Blunsdon take annual leave commencing the following Monday. Subsequent to this request both the applicant and Mr Blunsdon were terminated on 24 May 2004. After the applicant made a complaint to the Department of Consumer and Employment Protection (DOCEP) about his termination inspectors liaised with the respondent in order to reach agreement on the payment of redundancy entitlements to the applicant. In the event no agreement was reached and at the conclusion of DOCEP's investigations a letter was sent to the applicant advising him that its investigations had been concluded. This letter, dated 29 July 2004, was attached to the applicant's application and is as follows (formal parts omitted):

> "**FORMAL ENQUIRY NO. 483/2004**
>
> I am writing to (sic) in regard to the Formal Complaint lodged by (sic) against your former employer Artifex Australia.
>
> This claim has been allocated to me in my role as an Industrial Inspector so that I can evaluate your claim and determine if there is a case for the employer to answer. I have now completed this review and advise that this office will be taking no further action for the following reasons.
>
> I have enclosed for you a copy of Clause 20A of the Furniture Trades Industry Award that refers to Redundancy. If an "employer makes a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and that this is not due to the ordinary and customary turnover of labour", then Redundancy may apply. If however the decision to terminate an employee is because of a "shortage of work", the termination may be a valid decision due to the "operational requirements of the business". In this instance the employer has not made a decision that the job will not be done by anyone else and has in fact employed another employee to perform the duties of French Polisher. This indicates that the job still needs to be done and I therefore do not feel that a genuine Redundancy exists.
>
> The employer has complied with the provisions of both the Award and the Federal Workplace Relations Act by paying you two weeks (sic) pay in lieu of the required notice period along with payment for hours worked and outstanding accrued Annual Leave.
>
> Based on the rates of pay that you were receiving at the time of your termination I have determined that no underpayment of entitlement (sic) has occurred and accordingly I can take no further action and will close the file."
>
> (Letter attached to Form 1)

Applicant's Evidence

8 The applicant gave evidence that two weeks before he was terminated he was told by the respondent's Factory Manager Mr Tim Francis that even though the respondent had a lot of work on its books the respondent was 'struggling' because it could not employ a decent wood machinist. The applicant stated that on Friday 21 May 2004 he was told by Mr Francis that both he and Mr Blunsdon were to commence annual leave the following Monday and he was told that the respondent did not need either of them anymore as the respondent was downsizing for economic reasons. The applicant gave evidence that he sought advice from DOCEP about being forced to take annual leave and he was advised that he could not be made to take annual leave unless the employer had an official shutdown and that it was possible that the respondent may be making his position redundant. The applicant turned up to work as normal on Monday 24 May 2004 and told Mr Francis that he could not be forced to take annual leave and the options for the respondent were to stand him down with pay or to allocate him to other duties. Approximately five minutes later Mr Francis advised the applicant that the applicant and Mr Blunsdon were terminated. The applicant understood at that point that he had been made redundant.

9 That afternoon the applicant was paid the annual leave entitlements due to him and one week's pay in lieu of notice. He was subsequently paid an additional week's pay in lieu of notice when the applicant found out he was entitled to one more week's pay. The applicant again sought advice from DOCEP and was advised that as it was possible that he had been made redundant he should discuss his situation with the respondent. During discussions with the respondent's administration manager Mr John Bright later that week the applicant was advised that the respondent was in financial difficulties and Mr Bright agreed that the applicant was entitled to a redundancy payment and asked if the respondent could make this payment over a period of time. When the applicant rang the respondent to confirm this agreement the following week Mr Bright advised the applicant that the respondent would not be giving the applicant a redundancy payment as the applicant was terminated for not taking annual leave.

10 After being informed of this the applicant wrote to the respondent on 2 June 2004 as follows (formal parts omitted):

> "As you are aware I was employed by you between 28 January 2003 and the 21 May 2004 as a full time French Polisher in your company, during which time I did my job to the best of my abilities ensuring that your company was looked after in any way possible regarding my duties as an employee.
>
> I am writing to you in relation to certain employment entitlements that I believe I am entitled to under the "**Furniture Trades Award**" regarding redundancy, and based on information that I have provided to the Department of Consumer and Employment Protection it appears that I am entitled to 4 weeks (sic) severance pay as set out in the award under REDUNDANCY 20A, which I have enclosed a copy of to support my claim.
>
> I am also disappointed in the way that this matter was handled in that it was not conducted in a professional manner as set out in the award, Discussions Before Termination, as a result I believe I have been mistreated and seek a written apology from you regarding this matter.
>
> I would appreciate it if you would consider my claim, if you require independent advice you can contact WAGELINE on 1300 655 266. If I do not hear from you within 7 days I will approach the Department of Consumer and Employment Protection to formally investigate this matter.
>
> I look forward to an early resolution of this matter."
>
> (Exhibit A1)

11 As his dispute with the respondent was not settled, the applicant lodged a formal complaint with DOCEP. When the applicant became aware that DOCEP would not pursue his complaint any further the applicant liaised with DOCEP to obtain forms for lodging this complaint. The applicant stated that he made a mistake in the first lot of forms he was sent and as a result he had to request new forms from DOCEP. After he received these forms he filled out and lodged his application within two days.

The applicant stated that if the respondent had advised DOCEP earlier that the respondent still required French polishing work to be undertaken and if DOCEP had determined earlier than it did that he was not terminated due to a redundancy situation then he could have complied with the 28 day time frame for lodging this application.

12 The applicant stated that no discussions were held with him about the respondent's need to reduce costs prior to him being required to take annual leave and he had not been offered subcontract or casual work prior to his termination. The applicant maintained that when he advised Mr Francis that he had the right not to be told when to take annual leave he did not say to Mr Francis that if he did not take annual leave then the respondent could terminate him. The applicant was concerned that if he took annual leave he may subsequently be terminated as this happened to one of his colleagues after he went on annual leave.

Respondent's Evidence

13 Mr Bright stated that the respondent experienced a serious downturn in profits at the end of 2003 and sales diminished by approximately 50 per cent, and that this decline was exacerbated by poor work practices in the timber section. As the respondent was close to becoming insolvent directors injected approximately $660,000 into the respondent's operations and the respondent developed an action plan which included downsizing its workforce, outsourcing work and general cost reductions. Mr Bright stated that the respondent was unable to continue to employ everyone on a full time basis and he understood that employees were requested to take annual leave and consider undertaking subcontract work.

14 Mr Bright understood that Mr Francis approached employees in both the timber and polishing areas to canvass the possibility of employees undertaking subcontract work and that both sections rejected these proposals. As a result the respondent decided to encourage employees to take annual leave. Mr Bright stated a number of employees accepted this proposal and that some employees also took unpaid leave. Mr Bright understood that after declining to do subcontract work, both the applicant and Mr Blunsdon were approached by Mr Francis on 21 May 2004 and were asked to take their annual leave entitlements. Mr Bright understood that Mr Francis was advised by the applicant on 24 May 2004 that he could not be forced to take annual leave and the only action the respondent could take was either stand him down on full pay or terminate him. The respondent then decided to accept the applicant's ultimatum that he be terminated.

15 Even though the respondent disagreed that the applicant was due redundancy entitlements the respondent endeavoured to negotiate a settlement with the applicant but this was unsuccessful. After taking further advice the respondent confirmed with the applicant that he had not been made redundant and it was therefore not prepared to pay the applicant any redundancy payment. The respondent understood the matter was finalised when it received a copy of DOCEP's letter to the applicant on or about 29 July 2004.

16 Mr Bright stated that it would be unfair for the respondent to have to defend a second claim by the applicant and Mr Bright maintained that there was nothing preventing the applicant from lodging a claim in the Commission at the same time as he lodged the complaint with DOCEP. Mr Bright stated that the applicant was terminated because of the ultimatum he gave the respondent that it could either send him home on full pay or terminate him.

17 Under cross-examination Mr Bright stated that he understood that there were discussions with the applicant about taking time off but he was unaware if these discussions actually took place. Mr Bright confirmed that the respondent's polishing section was an integral part of its operations and that within two weeks after the applicant was terminated the respondent employed another French Polisher on a casual basis. This person has since been replaced with another casual employee who works varying hours each day.

Submissions

18 The applicant submits that even though he was aware that the respondent's sales had declined he understood from his discussion with Mr Francis that the respondent had plenty of future work. The applicant lodged a complaint with DOCEP as he was advised that he had been made redundant and it was only after he received the letter from DOCEP dated 29 July 2004 confirming that he was not terminated due to a redundancy situation and that another employee had been employed to perform his duties that he decided that his termination was unfair and he wanted to contest his termination. The applicant maintained that the delay in lodging his application was because he acted on initial advice from DOCEP that his position had been made redundant.

19 The respondent maintains that it was in extreme financial circumstances when it decided to encourage employees to take accumulated annual leave and to look at alternative employment options including working as subcontractors to the respondent. The respondent maintains that the applicant's position had not been made redundant as confirmed in the letter from DOCEP and argued that the applicant should have left his options open if he felt aggrieved by his termination and lodged a claim for unfair termination at the same time as making a complaint to DOCEP about his redundancy entitlements. The respondent maintains that when the applicant was terminated the relationship between the parties was amicable and that redundancy was only raised as an issue after the applicant was terminated.

Findings and Conclusions

Credibility

20 In my view both witnesses gave their evidence honestly and in a forthright manner and on this basis I accept their evidence. However, as the applicant gave direct evidence about his discussions with Mr Francis, I give more weight to his evidence than Mr Bright's hearsay evidence of the applicant's discussions with Mr Francis.

21 I accept the applicant's evidence and I find that he was unaware of the severity of the respondent's financial problems as at 21 May 2004. On the evidence currently before me I find that prior to 21 May 2004 the respondent did not have any specific discussions with the applicant about alternatives to him remaining as a full time employee. Furthermore, I accept the applicant's evidence that he was advised by Mr Francis in mid May 2004 that the respondent's workload would increase in the future.

22 I find on the evidence that when the applicant disputed the direction given to him by Mr Francis that he take annual leave on 24 May 2004 he did not tell Mr Francis that the only action the respondent could take was either to stand him down on full pay or to terminate him. I accept the applicant's evidence and I find that he told Mr Francis that one option was for him to be stood down on full pay or that he could be allocated other duties. I find that soon after this discussion the respondent decided to terminate both the applicant and Mr Blunsdon, effective immediately even though the respondent clearly had an ongoing need for French polishing work to be undertaken. I find that the direction that the applicant was given on 21 May 2004 to take annual leave commencing on 24 May 2003 may well be unlawful as it appears to be contrary to the requirements of Clause 18(2) of the Award and as an employee was subsequently employed by the respondent to undertake French polishing work after both the applicant and Mr Blunsdon were terminated the applicant may well have been terminated due to a redundancy situation. As the applicant was not given a redundancy payment as required under the Award and as other

consultative requirements in the Award relating to a redundancy situation appear not to have been complied with the respondent may well have acted unlawfully. It is therefore my view that there could well be merit to the applicant's claim.

23 Even though this application was lodged 52 days after the required timeframe I accept the applicant's reasons for the delay in lodging this application. I accept that the applicant was operating on the basis of advice he received from DOCEP that he was terminated due to a redundancy situation and he understood this issue would be finalised as result of representations on his behalf by DOCEP. In the event this did not occur. It was not until DOCEP's inquiry was completed and the applicant was informed of this on 29 July 2004 that the applicant became aware that he was not terminated due to a redundancy situation and that the respondent had employed someone else to undertake French polishing duties that the applicant took steps to lodge this application which in my view were reasonable and timely. It is clear that even though the applicant did not directly contest the reasons for his termination, I find that the respondent was aware that the applicant was concerned about his termination because he sought to be paid the redundancy payment to which he believed he was entitled. Furthermore, I accept that the applicant was unaware until well after his termination that he was terminated because he put an ultimatum to the respondent that he be sent home on full pay or be terminated.

24 As no evidence was given by the respondent to demonstrate that the respondent would suffer any prejudice in allowing this application apart from Mr Bright stating that it would be unfair to deal with both an award enforcement issue and an unfair termination claim, which in my view are two separate claims, it is my view that the respondent will not be prejudiced anymore than the normal disadvantage associated with a claim for unfair termination if this application is accepted out of the required timeframe.

25 As I have found that there was an acceptable reason for the delay in lodging this application, the respondent was aware that the applicant was unhappy about his termination, that there is sufficient to establish that the applicant has an arguable case and there is no significant prejudice to the respondent in allowing this application it is my view that notwithstanding the significant delay in lodging this application it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is granted.

26 An Order will issue to that effect.

2004 WAIRC 13053

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GAVIN EDWARD MAVERICK-PHILLIPS
	APPLICANT
	-v-
	BIBLOS NOMINEES PTY LTD ATFT PALMA UNIT TRUST T/AS ARTIFEX AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 18 OCTOBER 2004
FILE NO/S	APPL 1019 OF 2004
CITATION NO.	2004 WAIRC 13053

Result	Application to accept applicant's claim which was lodged out of time granted

Order

HAVING heard Mr G Maverick-Phillips on his own behalf and Mr J Bright and with him Mr N Moniodis 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 to accept the application out of time be and is hereby granted.

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

2004 WAIRC 11650

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER RICHARDS
	APPLICANT
	-v-
	WEBFORGE AUSTRALIA PTY LTD ACN 009 419 756 TRADING AS WEBFORGE (WA)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 31 MAY 2004
FILE NO/S	APPLICATION 269 OF 2004
CITATION NO.	2004 WAIRC 11650

Result	Direction issued
Representation	
Applicant	Mr C Fayle as agent
Respondent	Mr D Jones as agent

Direction

HAVING heard Mr C Fayle 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, hereby directs –

1. THAT each party shall give an informal discovery by serving its list of documents by 21 June 2004.
2. THAT inspection of documents shall be completed by 28 June 2004.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. 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.
4. THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely no later than 21 days prior to the date of hearing.
5. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 14 days prior to the date of hearing.
6. THAT the parties have liberty to file and serve upon one another any signed witness statements in reply no later than seven days prior to the date of hearing.
7. THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.
8. 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 seven days prior to the date of hearing.
9. THAT the matter be listed for hearing for two days.
10. THAT the parties have liberty to apply on short notice.

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

2004 WAIRC 13207

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER RICHARDS
	APPLICANT
	-v-
	WEBFORGE AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 2 NOVEMBER 2004
FILE NO.	APPL 269 OF 2004
CITATION NO.	2004 WAIRC 13207

Catchwords	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal – Whether genuine redundancy – No discussions with applicant about means to avoid significant effect or redundancy – Allegations of age discrimination – Applicant unfairly dismissed – Order and declaration issued – *Industrial Relations Act 1979* (WA) s 23A & s 29(1)(b)(i); *Minimum Conditions of Employment Act 1993* (WA) s 41, s 40(2); *Equal Opportunity Act 1984* (WA) s 66V, s 66W; *Human Rights and Equal Opportunity Commission Act 1986* (Cth); *Interpretation Act 1984* (WA) s 19(2)(d)
Result	Declaration and order issued
Representation	
Applicant	Mr C Fayle as agent
Respondent	Mr D Jones as agent

Reasons for Decision

1 The applicant commenced employment with the respondent in about November 1980. The respondent is in the industry of the production of steel products. The applicant worked in various positions within the factory operations until in or about the early 1990's, when the applicant was appointed as stock controller. In late 1997, the respondent business was taken over by another company. Subsequently, in about February 2003, a further takeover occurred. At all material times, the applicant remained in his position as stock controller. Circumstances changed in January 2004 when the applicant was purportedly made redundant. The applicant challenges his redundancy and alleges that he was harshly, oppressively and unfairly dismissed. He seeks the maximum compensation payable under s 23A of the Industrial Relations Act 1979 ("the Act").

2 The respondent employer denies the applicant's claim in its entirety.

Factual Background

3 The relevant factual background up until shortly before the dismissal of the applicant is not in essence controversial and is as follows. The applicant, as noted above, initially commenced employment with the respondent in 1980 and in the early 1990's was appointed to the position of stock controller. In this position, the applicant testified that he was responsible for

ensuring that raw materials for the purposes of producing the respondent's product were in stock, so that production could continue uninterrupted. Additionally, the applicant said that he was required to schedule stock allocation, in order to avoid over stocking the factory. Other duties on the applicant's evidence included arranging the transport of stock to and from the factory, and other duties as directed.

4 A takeover of the company occurred in late 1997, and the terms of the applicant's employment as stock controller were formalised. A further takeover of the business occurred subsequently, however there was no change to the applicant's position. The applicant testified that by reason of many of the respondent's steel products being "custom orders" completely accurate forecasting of materials and stock requirements was difficult. At all times in this period, the applicant said he performed his duties effectively and received regular pay increases and also bonuses from the respondent, indeed up until some nine days or thereabouts, prior to the applicant being informed of his redundancy. Copies of profit share and bonus scheme payments were tendered as exhibits A6 to A8 respectively (including salary reviews).

5 From the applicant's perspective, all appeared well until about mid 2002, when the respondent appointed a new factory supervisor Mr Mort, who subsequently became factory manager. The applicant testified that on Mr Mort's appointment, he began to take tasks performed by the applicant away from him that he had performed for many years without complaint. On this issue, it was Mr Mort's evidence that when he arrived at the respondent, given the changes in the competitive market for steel products, which the applicant acknowledged it became necessary to focus more closely on procurement practices, which Mr Mort said had to that time, involved the supply of product from one major supplier in the main. I pause to note that this was disputed by the applicant. Whilst he acknowledged that one supplier did supply much of the respondent's product, his evidence was that he also sourced material from other Australian producers and also from overseas. The applicant testified that this had been the case throughout his period of time as stock controller. Moreover, the applicant testified that the purchase of product from the respondent's major supplier, was as a result of the negotiation of a supply agreement nationally, over which the respondent locally had no control as to price or content. This was not disputed by the respondent.

6 The applicant also disputed assertions by Mr Mort in his evidence, that over the last 18 months or so of the applicant's employment, Mr Mort had to work closely with the applicant to get him to understand and undertake effective control of the position of stock controller. It was also the applicant's evidence that on Mr Mort's commencement, the tasks that Mr Mort removed from the applicant's duties included estimating requirements for raw materials, production from the grid machine and production from the saws. Additionally, the applicant testified that Mr Mort also took control of the six monthly stock takes, which reduced the applicant's role in this regard to only data entry. The applicant strongly denied that he had been counselled by Mr Mort as to his performance, and certainly questioned the need for formal qualifications to perform a role that he had been undertaking effectively in his view, since about 1990. Specifically, the applicant testified that at no time prior to Mr Mort's arrival, had his ability to perform the role of stock controller ever been in issue. On the contrary, regular bonus payments recognised his contribution to the respondent's overall performance.

7 On Mr Mort's evidence, matters seemed to have come to a head in about December 2003, when he had a discussion with the respondent's general manager Mr Taylor. According to Mr Mort, he discussed with Mr Taylor his concerns about the applicant's inability to perform the job of stock controller to the standard then expected by the respondent. This led to a review of the applicant's position, and an expansion of the requirements of the role, and the preparation of a document described as a "Profile Requirement". In short, Mr Mort seemed to have formed the view, that the requirements of the position as the respondent then saw it, went beyond the capabilities of the applicant. This was confirmed in the evidence of Mr Taylor, although I observe, that it was Mr Mort who had direct dealings with the applicant, and Mr Taylor's evidence was largely, if not in whole, based upon discussions he had had with Mr Mort. Mr Taylor's evidence also was that he had no actual knowledge of the applicant's "on the job" performance and he said that the respondent had in the past, been very poor in providing training to employees and none was offered to the applicant. Also it seemed that Mr Taylor had no real idea of the applicant's background in the company prior to Mr Taylor's appointment as general manager.

8 The applicant testified that up until 29 January 2004, he had no idea that his position was in jeopardy. He testified that he had not been informed by the respondent, of any proposed changes to his position, nor any expression of view in any formal way that his performance was not up to the standard required by the respondent. It was the applicant's evidence that in the late afternoon of 29 January he received a telephone call from Mr Mort for him to go to Mr Mort's office. On arriving at Mr Mort's office, the applicant testified that he was informed by Mr Mort, that the respondent was going to make him redundant and asked him what he would accept as a redundancy package. According to the applicant's evidence, he asked Mr Mort why the respondent was taking this course, and he was informed that his position was to be expanded and that the company wanted a younger person in the position, as the applicant was considered too old to train. The applicant testified that Mr Mort asked him what he would accept to go and he replied that as he had just turned 60 years of age he did not know what he would need to support his early retirement. It was the applicant's evidence that he was shocked by this discussion however asked Mr Mort for time to consider what had been raised and to go and to discuss the matter with his wife and family. Mr Mort required his answer the next morning.

9 Mr Mort's version of this meeting was somewhat different. He testified that at the meeting on 29 January he discussed the requirements of the new role as the company saw it, in accordance with the "Profile Requirement" document. There was no evidence that a copy of this document was ever seen by the applicant. Mr Mort's testimony was that the applicant informed him that he would not be able to fulfil the requirements of the position as then expected by the employer, because he did not have the management experience or relevant training in supply chain management and inventory management. According to Mr Mort, there was discussion between them that for the applicant to acquire this knowledge, would take some years of formal study and the applicant informed Mr Mort, that he did not have any inclination to undertake such study, as it was his intention to retire in less than five years or so from that time.

10 Mr Mort testified that whilst it was likely that any person chosen to occupy the position may be younger, this was not a condition of the appointment. I pause to observe that the applicant strongly denied that he ever expressed the view that he was not prepared to undertake any further training, and nor was there detailed discussion of the position as Mr Mort said in his evidence. The applicant testified that he had never been offered any training opportunities by the respondent prior to this time, apart from a computer course which involved the applicant establishing a computerised stock control system at the respondent.

11 The applicant and Mr Mort had a discussion the next day on 30 January. At this meeting the applicant informed Mr Mort, that a suitable redundancy package would involve two weeks salary for each year of service, plus one years pay plus entitlements on termination of employment. Mr Mort said he would speak to Mr Taylor and get back to the applicant. Mr Mort also testified that he told the applicant at this time, that his discussions on the previous day, regarding a suitable redundancy package, was in light of the fact that the respondent had made the decision and that was not negotiable.

12 At lunchtime that afternoon, a factory toolbox meeting was called by Mr Mort. This was a regular meeting on a weekly basis, to generally discuss matters arising in the workplace. The applicant testified that after the usual issues were discussed, Mr Mort then announced to the workforce in the applicant's presence that the applicant was to be made redundant as changes were being made to the applicant's position. Mr Mort informed the meeting that given the applicant's age, it would be some years to train a person in the role contemplated, and that the respondent would not be able to recover on its investment. Mr Mort then invited anyone present at the meeting, who may be interested, to express an interest in the position. As to this meeting, Mr Mort testified that he and the applicant had previously agreed earlier in the day, that the staff should be informed. According to Mr Mort's evidence, he said he outlined the requirements for the role and that the applicant did not have the technical and management skills necessary. Mr Mort testified that there was a question from one employee, about the change, to which Mr Mort responded in words to the effect that it would be "probable that somebody filling the new role would likely be younger than the applicant but this was not a pre-requisite for the job."

13 Later that afternoon, the applicant testified that Mr Mort came to his office with an envelope. He informed the applicant that the applicant's proposed redundancy package was not agreed by the respondent and that the respondent would pay the applicant 36 six weeks' redundancy pay, his long service leave and holiday entitlements and notice of termination. It was the applicant's evidence that he told Mr Mort that not only did he reject the redundancy package, but disputed that his position was in fact redundant. He also said to Mr Mort, that there were other positions within the factory that he could be considered for, which were then being performed by casual and contract labour. The applicant said there was no response from Mr Mort, who briefly looked at what the applicant was then working on and left the office.

14 Later, on 31 January, the applicant said his position was advertised in the "West Australian" newspaper. It was the applicant's evidence that from the advertisement, there was no aspect of the proposed role that he could or had not previously performed. He also said the same thing in his evidence when the new position profile was put to him. The only issue may have been whether he had any formal qualifications in materials management, which was in any event described as "preferable" in the profile.

15 The applicant testified that on the evening of 31 January, he felt unwell and by the next Monday was unable to attend work. He said he felt extremely stressed by the circumstances arising from his redundancy. The applicant wrote a letter to Mr Taylor dated 2 February 2004, tendered as exhibit A5. In that letter, the applicant outlined his discontent with the respondent's decision, and felt he had been treated poorly given his 23 years of loyal service without complaint or criticism about his work performance. The letter also refers to the fact that at 60 years of age, the applicant would have little chance of being able to support his family until he was entitled to receive the age pension. The applicant also referred to the toolbox meeting, and Mr Mort's comments that he would be replaced by a younger person, which he thought was discriminatory on the grounds of age.

16 Mr Taylor made no attempt to speak with the applicant on receipt of the applicant's letter of 2 February 2004. This was somewhat surprising given the applicant's length of service and employment history with the respondent.

17 Following receipt of the applicant's letter of 2 February 2004, a further toolbox meeting was held on 3 February to discuss the matter further. At this meeting, which both Mr Taylor and Mr Mort attended, Mr Mort testified that he asked those in attendance whether he had referred to the applicant being made redundant because of his age. A number of employees responded that he had. Mr Taylor then addressed the meeting and informed those present that of the reasons for the change and that there was no consideration of making the applicant redundant because of his age. The applicant said that at the meeting some employees pointed out that there was no compulsory retirement at age 65 and furthermore, government policy was to encourage older employees to remain in the workforce.

18 The applicant testified that he remained working as usual when on 25 February he became ill at work and had to go and see his doctor. He testified that he was diagnosed with stress caused by the circumstances of his redundancy and he was prescribed antidepressant medication. The applicant remained away from work on sick leave until 2 March when he returned. He testified that when he went into his office he found that all of his paperwork had been removed and his computer access had been cancelled. Mr Mort informed him that the respondent had decided that he would be finishing work on that day. At approximately 9.30am he saw Mr Taylor and said that he was able to work that day if he wished to. The applicant's evidence was that given that he had, by that stage, had all of his work taken away from him and his computer access cancelled, he felt insulted and said that he would finish work that day and was paid his entitlements and redundancy payment subsequently. On arriving home later that morning, the applicant testified that he collapsed on the back patio of his home due to the stress of what had occurred. He received further medical assistance from his doctor.

19 The applicant testified that since his dismissal, he had made numerous applications for employment through newspaper advertisements, employment agencies and through word of mouth. He said that he has not been able to find other employment, because of his age. He testified that he expected to remain in his employment at least until he turned 65. The only work he has been able to obtain is some casual work cleaning buses for which he has earned no more than approximately $250.00.

20 A number of the employees, who attended the toolbox meetings outlined above, were also called to testify. Generally, they referred to statements made by Mr Mort about changes to the applicant's position, and references to the issue of age and time to train etc. At least one of the employees called to testify, referred to the second toolbox meeting as an attempt to retract the earlier statements about the applicant's age and the respondent's unwillingness to invest in training.

Findings and Consideration

21 I turn to my findings. There is much common ground in this matter. There was a conflict in the evidence of the applicant and Mr Mort in particular, about Mr Mort working with the applicant and about the applicant indicating to Mr Mort that he was not prepared to undergo any formal training at his stage in life and that this was a significant factor in the respondent's decision to terminate the applicant's employment.

22 I have considered carefully the conflicts in the evidence on these issues. The applicant simply denied that there had ever been any discussion between himself and Mr Mort about aspects of his job performance. Furthermore, the applicant denied there was any discussion at all about the specifics of the role required by the respondent on 29 January with Mr Mort, and denied there was any indication from him that he may not be prepared to undergo any further training because of his stage of life. In essence, all of the central assertions by the respondent were met with bare denials by the applicant. Furthermore, I note that in the applicant's evidence in chief, he refers to his redundancy as being a "dead issue" by the time of the first toolbox meeting on the afternoon of 30 January and that any reference to it during that meeting by Mr Mort, came as a complete surprise to the applicant.

23 However, there was evidence from Mr Mort in cross-examination that one of the reasons that he convened the toolbox meeting was because an employee had asked him earlier that day about the applicant's redundancy package. Mr Mort testified that he wanted to avoid rumours about the applicant's position by informing the workforce of the situation. Mr Mort also testified that as at that time, only he, Mr Taylor, the applicant and the administration manager had any knowledge about the proposed redundancy. In my opinion, it is open to infer and I do infer from this evidence, that the applicant had informed at least some in the workplace, that he was to be made redundant, which stands in contrast to his assertion in evidence that at the meeting earlier that day with Mr Mort, the question of his redundancy was a "dead issue".

24 Additionally, I take into account in my assessment of the conflict in the evidence, to an extent, the evidence of Mr Taylor that he did hold from time to time, discussions with Mr Mort, about the applicant's position and reservations about aspects of the applicant's work performance. I do not conclude from this however, and in my opinion the evidence does not support it, that the applicant was formally counselled in any way about his work performance. I am prepared to accept on the evidence however, that from time to time issues were raised with the applicant, and I accept that the role performed by the applicant came under some scrutiny in late 2003, in terms of the requirements of the position of stock controller, as the respondent would prefer it to be undertaken.

25 Having regard to these matters, in the event of a conflict in the evidence as I have described it, I prefer the evidence of the respondent. That preference does not go as far as rejecting all other aspects of the applicant's testimony, rather, and in particular having regard to no doubt the stressful circumstances for the applicant, the respondent's witnesses' recollection of events and their timing, is in my opinion, to be preferred on this occasion. I therefore accept, that the applicant may well have indicated to Mr Mort, that he had performed the stock controller role adequately in the past and I have no doubt from the tenor of his evidence, that the applicant may have felt somewhat incensed that the respondent was proposing that he undertake the role in a different manner, given he had performed the role for many years without apparent complaint. I gained this impression also from the applicant's general demeanour, when he was giving his evidence.

26 I therefore accept and I find that as a consequence of changes in the environment in which the respondent was operating, consideration was given to the redesign of the stock controller's position towards the end of 2003. As a result, I am satisfied and I find that a new position description for the role of "materials controller" was prepared by Mr Mort in conjunction with Mr Taylor. I find however, that there was no discussion about that document, or otherwise the content of the revised job role, with the applicant prior to 29 January 2004. I also find that whilst the job description developed by the respondent may have enlarged some tasks required, the applicant's evidence was and I find that he had, over the years, performed each of the tasks set out in the revised job description from time to time, and as reflected in the advertisement for his position subsequently.

27 I also find that at no stage prior to 29 January, after the decision to terminate the applicant's employment had clearly been made by the respondent, did it comply with its statutory obligations under s 41 of the Minimum Conditions of Employment Act 1993 ("the MCEA") . That is, there was no discussion with the applicant, about means to avoid the significant effect or the redundancy, apart from the terms of any severance package. The only evidence of discussions about alternatives seems to have come from the applicant when he raised the possibility of him occupying other positions within the respondent presently at that time being performed by casual employees or contractors. I am also satisfied and I find, that whilst not specified in the revised job description as an essential requirement, it was clear on the evidence that the respondent's preference was for the occupant of the position to have some formal qualifications in materials management, which qualifications the applicant did not possess. I am also satisfied and I find, that the applicant was not offered the opportunity of working in the revised role, to ascertain whether he could in fact undertake the job requirements, as envisaged.

28 The respondent clearly took the decision, based upon the discussions with Mr Mort, that the applicant would not be given that opportunity. It was also quite clear on the evidence of Mr Mort, and I find, that the respondent's decision to terminate the applicant's employment, as advised to him on 29 January 2004, was final and not negotiable.

29 In cases of this kind, whether or not arising from circumstances of a redundancy, if there was one in this case, the test of whether a dismissal is harsh, oppressive or unfair, is well settled. *Miles and others trading as Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous (WA Branch)* (1985) 65 WAIG 385 is authority for the proposition that it is necessary to inquire whether an employee has received "less than a fair deal" or "a fair go all around".

30 In the context of the present case, it is necessary first to determine whether the applicant was in fact made redundant. The characterisation of the events is important. A "redundancy", has been classically defined as the circumstance in which a termination of employment results "not on account of any personal act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone": *R v The Industrial Commission of South Australia*; *ex parte Adelaide Milk Supply Co-Operative Ltd & Ors* (1977) 44 SAIR 1202 at per Bray CJ at 1205. Of course, that is not the only circumstance of a redundancy, as *Gromark Packaging v Federated Miscellaneous Workers Union, WA Branch* (1992) 46 IR 98 is authority for the proposition that a circumstance of "labour in excess of that reasonably required to perform the work available to the employer" also reveals a situation of redundancy.

31 What is the circumstance in this case? The respondent asserts that the applicant's position of stock controller was abolished and a new position of materials controller was created. It seems common ground that there was some enlargement of the applicant's existing role as stock controller, but it is difficult to be definitive on the evidence, as to what extent the position was enlarged. I am of the opinion that a redundancy circumstance may exist, where a position is changed and there is such a net addition of tasks and responsibilities, to warrant the creation of an entirely new position. In this case however, I have considerable doubts as to whether in fact that criterion was satisfied. It seems to the Commission on the evidence, that there may have been some enlargement and change of focus of the position of stock controller, but on the whole, it seems to me from the evidence, that the position at its core was substantially the same. It appears to be the case that there was more of an amalgam of duties into one position, that the applicant had previously performed over the years, and others returned to the applicant that had previously been removed from him.

32 Clearly also, the respondent sought to introduce a person with greater "professionalism" as it saw the position, probably through the possession of some formal qualifications or training in materials management. However, in my opinion, that requirement of itself, does not mean that the position is so different so as to constitute an entirely new role, with the former position becoming truly redundant.

33 In this case, in my opinion, the true position was that the applicant's job of stock controller, was somewhat enlarged but I am not persuaded on the evidence, that it was an entirely new position as was submitted by the respondent.

34 In effect, in my view, what occurred in this case was the employer decided that it wanted the position of stock controller performed in a different manner to that applicable during the time of the applicant's employment. The importance of some form of qualifications or training, to the respondent, was very clear on the evidence of Mr Mort, in his announcement to other employees at the toolbox meetings, about the requirement for further training. The work was still required to be done by someone but the respondent clearly did not want that to be the applicant. Moreover, this case is not a circumstance where the respondent had labour in excess of that required to perform the work required to be done.

35 In my opinion therefore, the dismissal of the applicant cannot be properly be characterised as a redundancy.

36 This leads me to consider the issue of allegations of age discrimination. It is of course, in this State and elsewhere in other Australian jurisdictions, unlawful for an employer to either directly or indirectly discriminate against a person in the context of employment, by reason of that person's age: (See s 66V Equal Opportunity Act 1984 (WA) ("the EO Act")). Specifically, under the EO Act it is unlawful to deny a person access to training or opportunities for promotion on the basis of age: s 66W EO Act. Additionally under Commonwealth law, the Human Rights and Equal Opportunity Commission Act 1986 contains a Schedule referring to the International Labour Organisation Convention No 111 – Discrimination (Employment and Occupation) (ILO 111) which jurisdiction was expanded in 1990 to include age discrimination.

37 Indeed all Commonwealth legislation in relation to human rights matters such as discrimination in employment has its basis in various international instruments ratified by the Commonwealth under the external affairs power of the Constitution.

38 The various Australian jurisdictions have also outlawed compulsory retirement, with this State having done so since 8 August 1995. In my view, it is open for the Commission to have regard to relevant principles established by international instruments to which Australia is a party, such as ILO Conventions and such like, in the exercise of its jurisdiction under the Act. It is those international instruments that inform domestic law on the same subject matter and regard may be had to them, within limits, in the application of domestic law: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; s 19(2)(d) *Interpretation Act 1984* (WA). It is always the case of course, that the Commission can have regard to compliance by an employer or employee with statutory obligations as a relevant consideration in determining overall, whether a dismissal is harsh, oppressive or unfair within the terms of the Act.

39 Whilst on the evidence in this matter the respondent disavowed any suggestion that the applicant's age was a factor in its decision to not give him an opportunity in the revised position of materials controller, I am not persuaded on all of the evidence that this was not an underling motivating factor, at least indirectly, in the respondent's decision making processes. The respondent was of the mind to "modernize" the position of stock controller as it saw it and I have no doubt on all of the evidence that it saw the applicant as being, to use the somewhat quaint phrase, of the "old school" in terms of how he approached the position. This is so notwithstanding that the applicant had, without formal qualifications previously, performed the role adequately it seems at least until Mr Mort took a different view on his arrival at the respondent.

40 I also have no doubt and I find, that as the employee witnesses testified, that reference was made to the applicant's age in the first tool box meeting in the context of the respondent not being able to recover any investment in training the applicant were he to continue to occupy the expanded position. In my opinion, the inference is open to be drawn from this evidence, and I do draw it, that the respondent did indeed have that view and this is so notwithstanding the subsequent attempt to retract the statements made when the second tool box meeting was held. It is this issue of training that brings into consideration whether the applicant has been treated unfairly in this regard.

41 It was common ground that the respondent had offered little training to the applicant or to anyone else for that matter, on the respondent's own evidence through Mr Taylor. The lynchpin of the respondent's case on this issue was the submission that it was the applicant's attitude to this proposal, when raised by Mr Mort that coloured it against having the applicant in the position. That is that the applicant was not prepared to undergo any further training to meet the requirements that the respondent wanted to impose on the position. In my opinion whilst that may have been relevant, it was not, viewed objectively, the only consideration that the respondent was obliged to consider when making its decision. The fact that the applicant had performed the role for many years without any substantial complaint, and given his long and loyal service to the company, in my view the applicant at least deserved the opportunity to perform the expanded position. If he did not perform to the respondent's expectations then the respondent would be entitled to deal with that situation in accordance with accepted human resources management practices. I also note that the revised position profile in evidence does not require, in any event, formal qualifications but rather refers to them as being "preferred". It is thus difficult for the respondent to maintain that any disinclination by the applicant to undergo any formal training was in relation to an essential requirement of the position because on the evidence, it was not an essential requirement of the revised position.

42 In my opinion, having regard to all of the evidence in this matter, the dismissal of the applicant was tainted with "ageism" in that the applicant's age was indirectly a consideration in the respondent's decision to not continue his employment in the position of stock controller. I note the terms of s 66V(1)(b) and (3) of the EO Act in this regard. It seems to me that the respondent may well have fallen foul of these provisions in this case although that is not a matter for this Commission to finally determine.

43 I turn now to consider some other matters. The respondent was obliged, both as a statutory and contractual duty, to discuss with the applicant, as soon as reasonably practicable after the decision to change the applicant's position was made, the matters set out in s 41(2) of the MCE Act. This provision imposes a positive duty on an employer, in the circumstances as set out in s 40, that in a redundancy or a change in the workplace having a "significant effect" (as defined in s 40(2) of the MCE Act) to discuss with the affected employee(s) the matters set out in s 41(2): *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893. In the present circumstances, whilst I have found that the applicant was not made "redundant" for the purposes of the definition in s 40(1) he was certainly, in my opinion, subjected to a "significant effect".

44 As I have already observed above, in this case, the respondent did not comply with this obligation in my view. This was confirmed in the evidence of Mr Taylor when he testified that no discussions of this kind were held with the applicant either prior to or after 29 January 2004. There was also no evidence that Mr Mort had any such discussions with the applicant. As noted earlier in these reasons, the only suggestion of alternatives came from the applicant himself when he asked Mr Mort about some other positions in the factory a few weeks after being told of his redundancy.

45 As to the manner of the applicant's ultimate dismissal, the evidence was that the applicant returned to work on 2 March 2004 after a period of sick leave to find his work area cleaned out and access to his computer cancelled. The applicant was not due to cease employment until it seems, 5 March. He was told by Mr Taylor that he could leave that day and because of what had occurred to the applicant's work area he did. In my view, this action by the respondent was unnecessary and constituted somewhat undignified treatment of the applicant, particularly given his age and length of service. There was no reason suggested in evidence why the respondent adopted this approach.

46 Having regard to all of the foregoing, as a matter of equity and good conscience, I consider the applicant's dismissal to have been harsh and unfair. In my view overall, the applicant was removed from his position without good reason. I turn to the question of the relief that should be granted.

Relief

47 The applicant did not seek reinstatement but rather an order of compensation for loss and injury caused by the unfair dismissal. I am satisfied that given the events that occurred at the respondent, and the loss of confidence of the applicant in the respondent, that an order of reinstatement or re-employment would be impracticable.

48 I therefore consider the issue of compensation. The relevant principles in this regard are well settled and reference to the decisions of the Full Bench in *Bogunovich v Bayside Western Australia* (1999) 79 WAIG 8 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886 is sufficient for present purposes. Furthermore, it is recognised on the authorities of this jurisdiction, that a payment made to an unfairly dismissed employee by their former employer does not extinguish the ability of the Commission to make an order of compensation for loss if loss caused by the dismissal is established: *FDR Pty Ltd & Ors; Gilmore & Anor v Cecil Bros & Ors* (1998) 78 WAIG 1099; *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193; *Garbett*.

49 In this case the applicant was paid a sum of money in excess of his contractual entitlements on termination of his employment representing some 36 weeks' salary. The submission of the agent for the respondent was there should be no further payment in the nature of an order for compensation because of this payment, which is in any event, in excess of the maximum amount of compensation payable under s 23A of the Act.

50 Having considered this matter, and on the authorities referred to above, I take into account the fact that a payment has been made by the respondent. However, I also consider other factors are relevant including the applicant's age; his length of service which was very substantial; the fact that the "redundancy" was not in my opinion really so; the applicant's prospects of gaining other employment at or similar to that held by him at the respondent which are in my view slim; the fact that the applicant saw himself remaining in employment for the foreseeable future and to his projected retirement at age 65; and that there was no assistance given to the applicant to find other employment outside of the respondent nor was there on the evidence even a reference given to the applicant.

51 Taking these factors into account, and as the payment already made to the applicant by the respondent was not and cannot be characterised as compensation for a harsh, oppressive or unfair dismissal, I consider the applicant should receive compensation of the maximum under s 23A of the Act of six months salary in the sum of $22,517.00. I consider also that given the manner of the applicant's dismissal, and the effect it had on him on the uncontroverted evidence, that $5,000.00 of this sum should be apportioned for injury. I am satisfied on the evidence that the applicant's stress reaction and the need to seek medical assistance was causally related to his unfair dismissal. I reduce this sum by $250.00 being the approximate sum of money earned by the applicant since his dismissal on the uncontroverted evidence. This total sum does not represent the applicant's total loss which in my view will be ongoing.

52 A declaration and order now issues.

2004 WAIRC 13209

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER RICHARDS
	APPLICANT
	-v-
	WEBFORGE AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 2 NOVEMBER 2004
FILE NO/S	APPL 269 OF 2004
CITATION NO.	2004 WAIRC 13209

Result	Declaration and order issued
Representation	
Applicant	Mr C Fayle as agent
Respondent	Mr D Jones as agent

Declaration and Order

HAVING heard Mr C Fayle 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 hereby –

(1) DECLARES that the applicant was harshly, oppressively and unfairly dismissed from his employment as a stock controller on or about 2 March 2004.

(2) DECLARES that reinstatement or re-employment is impracticable.

(3) ORDERS that the respondent pay to the applicant as compensation for his loss and injury the sum of $22,267.00 gross less any amount payable to the Commissioner of Taxation pursuant to the *Income Tax Assessment Act 1936* (Cth) and actually paid within 21 days of the date of this order.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2004 WAIRC 13003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE ANTHONY SAUNDERS
	APPLICANT
	-v-
	DEL BASSO SMALLGOODS
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 15 OCTOBER 2004
FILE NO.	APPL 845 OF 2004
CITATION NO.	2004 WAIRC 13003

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of a referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission not satisfied discretion should be exercised. *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) & s 29(3).
Result	Application to extend time under s 29(3) of the *Industrial Relations Act 1979* dismissed
Representation	
Applicant	In person
Respondent	Mr M Darcy (as agent)

Reasons for Decision

1 This is an application under s 29(3) of the *Industrial Relations Act 1979* ("the Act") for an extension in time for filing an application under section 29(1)(b)(i) of the Act by Wayne Anthony Saunders ("the Applicant"). The Applicant claims that he has been harshly, oppressively or unfairly dismissed by Del Basso Smallgoods ("the Respondent").

2 The Commission file records that the Applicant filed his application on 29 June 2004. The Applicant was employed on 30 September 2003 until 2 October 2003. Consequently, the application was filed 270 days out of time.

3 The Applicant says that he was employed as a bacon curer by the Respondent. The Applicant has many years experience working in the meat industry, having worked for a substantial number of employers as a boner by trade. The Applicant has also held the position of an Occupational, Health and Safety representative when employed by other employers. He says he was employed by the Respondent as a full-time employee, although it appears that he was paid as a casual employee. The Applicant was interviewed by Mr Del Basso, senior and agreed to be employed for a three month trial. He accepted this as a usual condition of employment in the industry.

4 The Applicant testified that on the first day he was employed, he was victimised and harassed by another employee, Mr Sam Tasconi. He said that Mr Tasconi made comments of a sexual nature about his (the Applicant's) ex-fiancée. The Applicant says he told Mr Tasconi to "knock it off". The Applicant complained to the Occupational Health and Safety representative, Ms Karen Richardson, who told him that something would be done about his complaint. On the second day, the Applicant worked for about six hours and was subjected to similar comments by Mr Tasconi. He complained again to Ms Richardson and the factory foreman, Mr John De Basso. The Applicant also said that he complained to Ms Barbara Del Basso, who told him that she would speak to Mr Tasconi and give him a warning. She told the Applicant to "go home and cool down". The Applicant says when he complained to Mr John Del Basso, he held a knife against his (the Applicant's) lower abdomen and told him to leave. When cross-examined he conceded that he was not concerned that Mr John Del Basso would have used the knife, although he later said that he was concerned for his safety.

5 The Applicant testified that on the next day, he requested new boots because he suffers from cellulitis. His request was refused by Mr John Del Basso. He tendered a medical certificate from Dr F Rodino, dated 17 August 2004, which states that the Applicant was treated for cellulitis in both lower limbs on 10 July 2003, 4 August 2003, 19 August 2003, 2 September 2003 and 25 September 2003.

6 On the third day, the Applicant determined that he would not work. Instead he went to the Respondent's premises dressed in a suit to inform the Respondent that he would take action against the Respondent because of harassment in relation to the action of Mr Tasconi. He informed Ms Del Basso, Mr John Del Basso, Mr Del Basso senior and Ms Richardson that he was taking legal action against the Respondent for unfair dismissal. The Applicant said he was physically removed from the premises by Mr John Del Basso and an unidentified person. He says that they threw him and his mobile telephone down the stairs. The Applicant says his mobile phone was destroyed. The Applicant telephoned the police. He later advised Acting Inspector Watts about what had happened and says he told Acting Inspector Watts that a knife had been pulled on him. He says that Acting Inspector Watts told him that due to the nature of the incident in the workplace and the likelihood of a conviction, it would be unwise for him (the Applicant) to make a complaint.

7 The Applicant says that the reason he delayed in filing the application was because he suffered post-traumatic stress syndrome, which was brought on after he saw a young friend stabbed and murdered in the mid 1980s. The Applicant was a primary school student at the time. When asked about the effect of the syndrome in cross-examination, the Applicant said that the post-traumatic stress affected him when he is confronted by someone with a knife. He said that the syndrome stopped him from filing an application for unfair dismissal because he had to consider whether to override his own fears. The Applicant says he deliberated in making the application. In particular, he had to weigh up whether his own personal safety was more paramount than the safety in the workplace, that is, whether he should override his own fears for the safety of all persons in the meat industry.

8 When cross-examined, the Applicant conceded that since his employment was terminated by the Respondent, he made and proceeded with a complaint that he was assaulted by a police officer in relation to an unrelated incident. He also conceded that he did not delay in making a complaint about an assault on that occasion.

9 Acting Inspector Watts was called by the Applicant to give evidence. Acting Inspector Watts testified that on 3 October 2003, he was a senior sergeant in charge of the Stirling Police Station. He received a call from DKI to attend an assault complaint by Mr Saunders at the Respondent's premises. Acting Inspector Watts attended the Respondent's premises and spoke to Mrs Del Basso, who informed him that Mr Saunders had made threats and used abusive language. Acting Inspector Watts says he spoke to other employees who supported Mrs Del Basso's version of events. He then returned to the police station. Upon his arrival at the police station he received a message that Mr Saunders was at the premises of Alf Barbagello. He went to those premises and conveyed Mr Saunders to the Stirling Police Station in relation to an unrelated matter. Acting Inspector Watts says that the Applicant was dressed in a suit, he was agitated but not dishevelled. Acting Inspector Watts says that the Applicant informed him that he had been assaulted but he did not wish to make a formal complaint. He said that he explained to the Applicant that he could make a complaint and it would be investigated but the Applicant said "what is the point". Acting Inspector Watts said that no mention was made to him by the Applicant about the use of a knife.

10 The Respondent elected not to give any evidence in relation to this application.

Legal Principles

11 In *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, Heenan J with whom Steytler J agreed held at [74] that the principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, should be applied when the Commission is considering whether to accept a referral of a claim for unfair dismissal out of time under s 29(3) of the Act. Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (op cit) set out these principles when considering whether to extend time to bring an application as follows:–

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the Applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the Respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the Respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the Applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

12 In relation to fairness, Heenan J in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) after citing the forementioned principles went on to observe:–

> "I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the Applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the Applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims."

13 Whilst the merits of the Applicant's claim may or may not be relevant, Steytler J at [25], in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit), observed:–

> "The Commissioner is empowered to accept a late referral if it would be 'unfair' not to do so and, while an assessment of the merits 'in a fairly rough and ready way' (see *Jackamarra v Krakouer* (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s 29(3) which imports any obligation on the part of an Applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s 27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an Applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the Applicant had no prospect of success."

Conclusion

14 Having considered all the evidence, I am of the view that I should not exercise my discretion to grant the application to extend the time to file an application for unfair dismissal. In my view the Applicant has not provided an acceptable explanation for the extensive delay in bringing the application. Whilst the Applicant says that he suffered from post-traumatic stress syndrome, there is no supporting medical evidence that he suffered from such a syndrome or the effects of such a syndrome. The Applicant produced medical evidence that he suffers from cellulitis, yet he produced no medical evidence about post-traumatic stress. I do not accept that the syndrome prevented the Applicant from filing a claim within time. He went to the Respondent's premises, the day after he says that he was threatened with a knife, to inform the Respondent and its representatives that he intended to make a claim. Such conduct, in my view, is inconsistent with a person who is frightened to bring a claim. In addition, the Applicant made a telephone report to the police on the day that he had been assaulted. He says he did not press the complaint because he did not have a strong case. The Applicant conceded that he does not have a strong case that he was threatened with a knife at the Respondent's workplace. The Applicant made no complaint to the police about this. The Applicant conceded that in the period of time prior to making the application for unfair dismissal, he was willing to make a complaint of assault by a police officer in respect of an unrelated matter.

15 As stated in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) the Commission is required to have regard to considerations of fairness, between the Applicant and other persons in a like position, which includes having regard to the public interest and the due and efficient administration of the jurisdiction of the Commission. It is my view that in all the circumstances it is not in the public interest that the application to extend time be granted in the absence of an acceptable explanation of the delay.

2004 WAIRC 13009

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE ANTHONY SAUNDERS
	APPLICANT
	-v-
	DEL BASSO SMALLGOODS
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 15 OCTOBER 2004
FILE NO.	APPL 845 OF 2004
CITATION NO.	2004 WAIRC 13009

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr M Darcy (as agent)

Order

HAVING heard the Applicant and Mr M Darcy, as agent, on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

ORDERS that this application be, and is hereby dismissed.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

2004 WAIRC 13168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER MAY SEATON
	APPLICANT
	-v-
	6PR SOUTHERN CROSS RADIO PTY LIMITED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 28 OCTOBER 2004
FILE NO/S	APPLICATION 15 OF 2004
CITATION NO.	2004 WAIRC 13168

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Applicant validly entered into contract of employment – Intent of parties considered – Applicant entered into contract of employment for a specified period of time – Contract came to an end by effluxion of time – No dismissal at the initiative of employer – Commission lacks jurisdiction – Application dismissed – *Industrial Relations Act 1979 (WA)* s 29(1)(b)(i) Contractual benefits claim – Period of reasonable notice – Entitlement under contract of employment – Fixed term contract – No entitlement – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	Application alleging unfair dismissal dismissed. Application for contractual benefit dismissed.
Representation	
Applicant	Mr B Jackson (of counsel)
Respondent	Mr N Ellery (of counsel)

Reasons for Decision

1 This is an application by Jennifer May Seaton ("the applicant") pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). The applicant alleges that she was unfairly terminated from her employment by 6PR Southern Cross Radio Pty Ltd ("the respondent") on 12 December 2003.

2 On 30 July 2004, a few days prior to the hearing, the applicant gave notice of her intention to seek leave to amend her claim to include a denied contractual benefit claim of 12 months' remuneration in lieu of notice. The respondent opposed leave being granted for the applicant to amend her claim. In support of her application to amend the applicant argued that she expressly reserved her rights to make a claim of this nature when her application was lodged and after lodging this application the applicant advised the respondent that a claim of this nature may be made at some stage prior to the hearing. The respondent opposed the amendment because it claimed that neither the applicant nor her representative had raised any claim for a denied contractual benefit during or after the conciliation conference before Deputy Registrar MacTiernan on 13 April 2004, or at any

time prior to the hearing. Furthermore, on 21 July 2004 the respondent faxed a letter to the applicant's representative requesting further particulars of the applicant's claim and despite receiving a response to this letter the applicant did not at the time raise any claim or potential claim pursuant to s29(1)(b)(ii) of the Act. The respondent argued that the applicant has had more than six months to formulate her claim and the parties were well advanced in preparing for the hearing when the applicant's claim was made and the respondent maintained that it was an abuse of process for the applicant to introduce an entirely new claim at his stage of proceedings and for the respondent to consider and respond to this claim at this late stage.

3 The Commission has the discretion to grant leave to amend an application under s27(1)(m) of the Act at any stage of the proceedings, if appropriate. After considering each party's submissions I reluctantly agreed at the commencement of the hearing to give the applicant leave to amend her application to include a claim for a payment of reasonable notice. In allowing this claim I have taken into account that the applicant foreshadowed the raising of a possible denied contractual benefit claim in the applicant's initial application and it is my view that by granting the amendment there was the opportunity to determine a real question in controversy between the parties and in doing so to decide the merits of the dispute, as it was not in dispute between the parties notice was not given by the respondent to the applicant when the applicant ceased employment with the respondent. As this claim relates to an unfair termination I formed the view that it was just in the circumstances to allow the amendment sought as the issue of notice would be in dispute if the applicant's claim for unfair termination was successful. However, being mindful that the respondent may have been disadvantaged given the short timeframe between the amendment being sought to be made and the date of hearing the respondent was given the opportunity to put further submissions subsequent to the hearing if it wished to do so in relation to this claim.

Background

4 The following was not in dispute between the parties. The applicant commenced employment with the respondent on 18 April 1996, her final day of work with the respondent was 12 December 2003 and subsequent to this date the applicant was paid for a period of four weeks' annual leave which commenced on 15 December 2003. During part of the applicant's employment with the respondent she was employed pursuant to a number of end dated written contracts. The following written contracts were agreed between the parties: Exhibit A1.1 dated 18 April 1996 which ceased on 30 June 1996, A1.2 dated 21 April 1997 which ceased on 30 April 2000, A1.5 dated 31 July 2000 which ceased on 31 July 2001, A1.6 dated 16 May 2001 which ceased on 30 December 2002 and A1.9 dated 21 November 2002 which ceased on 31 December 2003. Exhibit R2, dated 11 December 2003, is the contract the respondent offered to the applicant for 2004.

5 The applicant was employed as a full-time presenter on the respondent's afternoon radio programme and for most of the applicant's employment with the respondent she worked with fellow radio presenter Mr Gary Carvolth. On 12 December 2003 a meeting was held between the applicant, the respondent's General Manager Mr Declan Kelly and the respondent's Programme Director Mr John Solvander and arising out of this meeting the applicant ceased employment with the respondent as at 12 December 2003. The respondent is part of a national company which operates radio stations 6PR and 96FM in Western Australia.

Applicant's Evidence

6 The applicant has been a well known media personality in Western Australia since 1968 when she commenced working in television. The applicant gave evidence that since commencing work within the media industry she has interviewed over 30,000 persons, was awarded three Logies and was a finalist in the RA Awards.

7 The applicant stated that after successfully working with Mr Carvolth on 6PR's afternoon programme, which targets the over 40's market, the 'Jenny and Gary Club' was established with over 10,000 members. The applicant stated that she had a good relationship with the respondent's management, including its previous General Manager Mr Shane Healy, and with her direct manager Mr John Solvander. The applicant stated that her relationship with the respondent had been clear and honest.

8 The applicant gave evidence that approximately two months prior to a written contract ceasing it was usual for the applicant and the respondent to enter into negotiations with a view to renewing the contractual relationship between the parties.

9 The applicant stated that in the year 2000 she was on a remuneration package of approximately $94,500 which included a base salary and a set payment for each live advertisement that she read on air.

10 The applicant gave evidence that in 1999 she sought the assistance of a consultant to review the salary she was being paid and a report generated by this consultant recommended that she should be earning approximately $122,000 per annum. The applicant stated that a copy of this report was given to the respondent through her lawyers in November 2002 when the applicant was negotiating the terms and conditions of her 2003 contract (Exhibit A1.4).

11 The applicant gave evidence about a discussion she had with Mr Kelly in November 2002 about her terms and conditions of employment for 2003. The applicant stated that she was concerned at the time about the removal of the payment for live reads which constituted approximately $34,000 of her remuneration package. The applicant stated that as a result of negotiations a compromise was reached whereby the applicant was to receive goods to the value of $10,000 tax free (contra) in lieu of the respondent paying for live reads.

12 The applicant stated that in early November 2003 she applied to take annual leave between 15 December 2003 and 12 January 2004 and that this leave was approved by Mr Kelly on 6 November 2003 (Exhibit A1.10).

13 The applicant stated that she was puzzled that the negotiations for her 2004 contract had not commenced by November 2003 given that previous contractual negotiations had taken place in November. The applicant maintained that she was not aware of the reason for the delay in the negotiations taking place. However, as her annual leave had been approved the applicant was sure that she would be returning to work with the respondent in 2004. The applicant gave evidence that there was a feeling of unrest at the radio station at the time because other presenters were in the same position. Notwithstanding these reservations the applicant understood that signing a new contract for 2004 would be a formality.

14 The applicant gave evidence that the ratings for her afternoon programme had been very positive during the last ratings period for 2003 and there was an increase of approximately 14,000 listeners (Exhibit A1.12). The applicant stated that she understood that successful survey ratings were integral to the respondent's success.

15 The applicant gave the following evidence about the events of 12 December 2003. The applicant stated that on 11 December 2003 Mr Solvander arranged to meet with the applicant and Mr Kelly the following day at 10.00am to discuss the applicant's 2004 contract. The applicant stated that as this meeting was delayed until approximately 12.30pm she was concerned as she had an on-air commitment due to start at 1.00pm. The applicant confirmed that Mr Carvolth met with Mr Kelly and Mr Solvander immediately prior to her appointment. The applicant stated that when Mr Carvolth came out of his meeting he told her that the contract was the same as last year. The applicant gave evidence that when she went into the meeting Mr Kelly and

Mr Solvander's body language at the outset was such that there was to be no negotiation concerning her 2004 contract. The applicant maintained that Mr Kelly stated that he wanted both the applicant and Mr Carvolth back on air the following year and the applicant was handed a copy of the proposed 2004 contract. Mr Kelly then told the applicant that the contra provision of $10,000 had been removed from the contract. The applicant stated that she felt that her dignity was being attacked and she told Mr Kelly that she could not accept the respondent's proposal. Mr Kelly asked the applicant if she wanted until the end of that day's afternoon programme to consider the offer. The applicant reiterated to Mr Kelly that she could not accept the offer and she left the meeting.

16 The applicant gave evidence that when she spoke to her business manager, Cheri Gardiner on the telephone immediately after the meeting she told Ms Gardiner that she had made a significant compromise in her remuneration package the previous year and as the afternoon programme's ratings were good and its support base was high she could not accept the respondent's proposed contract.

17 Subsequent to this meeting the applicant was too upset to undertake the afternoon programme. The applicant stated that Mr Solvander approached her and she apologised to him for breaking down and not doing the programme that afternoon. The applicant told Mr Solvander that it was her view that the respondent was extremely unprofessional, that it had devalued her worth and "it was to do with dignity … and bullying".

18 The applicant stated that she was devastated after the meeting, and she packed up her personal effects and left the respondent's premises at approximately 1.20pm.

19 Subsequent to ceasing employment with the respondent the applicant has undertaken a number of contract positions and her earnings, totalling $17,392.00, were detailed in a range of invoices (Exhibit A1.17-26).

20 The applicant can see no reason why she cannot return to work with Mr Carvolth on the afternoon programme. The applicant maintains that she has substantial public support including a petition of 1,500 names which was sent to the respondent seeking to have her re-instated to the afternoon programme (Exhibit A1.15).

21 The applicant stated that she is worried about her future as future work options are limited given that her area of employment is highly specialised and there are limited local opportunities for television.

22 Since ceasing work with the respondent the applicant has suffered stress, she has had difficulty sleeping and even though she has been prescribed medication she is reluctant to take it.

23 Under cross-examination it was put to the applicant that the initial contract for 2003 was given to her as a draft and that the applicant was able to negotiate the terms and conditions of this contract. The applicant confirmed that she sought legal advice about the terms of this contract and she had a number of discussions with Mr Kelly to agree on a compromise. The applicant agreed that as a result of these discussions the final contract that was signed was more generous than the initial contract given to her by Mr Kelly. The applicant conceded that she was aware her 2003 contract ceased at the end of December 2003, however, she understood that her contract with the respondent would be re-negotiated and renewed as a period of annual leave (from 15 December 2003 to mid January 2004) was approved in early November 2003.

24 It was put to the applicant that she was anxious about whether or not she would be returning in 2004. The applicant stated that it was normal to be anxious before signing a new contract but once her annual leave had been approved she understood that she would be back working with the respondent. The applicant was asked to comment on some of her diary extracts covering the period 27 November 2003 to 12 December 2003 (Exhibit R1). The applicant maintained that the diary entry dated 27 November 2003 which states "We still don't know whether we will be re signing (sic) next year for 6PR" refers to a discussion about remuneration not whether she would be returning in 2004. The applicant stated that her diary entry of 10 December 2003 which states "6PR Still haven't told us if we're back next year. Very angry" and the entry of 11 December 2003 which states "We still haven't been told by 6PR as to whether we are coming back or not. They are so unprofessional." did not mean that she would not be returning to work with the respondent in 2004. The applicant reiterated that as her annual leave had been approved it was just a formality to sign a contract with the respondent and she was confident that she would be returning to work in 2004 notwithstanding the nature of her diary entries in November and December 2003.

25 The applicant agreed that she was aware that a number of the respondent's other broadcasters were having discussions about their contracts on 12 December 2003 and the applicant was aware that a number of the respondent's employees were on fixed term contracts and that it was not uncommon for employees in the radio industry to be on fixed term contracts. The applicant conceded that the respondent's management did not tell her that she would not be re-employed in 2004. The applicant agreed that she approached Mr Solvander and asked when a meeting would be held with Mr Kelly and when she would find out what was happening in 2004. The applicant agreed that Mr Solvander said that a decision would not be made until the final ratings for 2003 were available.

26 The applicant confirmed that the meeting held on 12 December 2003 was a short meeting. It was put to the applicant that she was uncomfortable and tense during this meeting. The applicant agreed that she was tense as she was due to be on air at 1.00pm. The applicant conceded that Mr Kelly told her that the respondent wanted her to return to work next year and she agreed that she did not read the contract that was handed to her at the meeting. The applicant stated that she did not review the remuneration schedule attached to the agreement as Mr Kelly told her that there would be an increase in her base rate of pay and the $10,000 of contra had been removed from the contract. The applicant confirmed that Mr Kelly advised her to have a look at the contract. The applicant maintained that Mr Kelly asked her to get back to him before the end of that day's programme about her decision and denied that Mr Kelly said she could consider the proposal over the weekend. The applicant gave evidence that even though the 2003 contract was open to negotiation at the end of 2002 on this occasion this was not the case.

27 It was put to the applicant that after this meeting she told Mr Carvolth and her producer Ms Melanie Bonolo that she had told the respondent to "shove it". The applicant stated that she did not state these words nor had she ever used this expression. The applicant denied that Mr Carvolth told her to have a think about her situation and not to rush her decision. The applicant stated that Mr Carvolth told her that he had wished she had thought about it over the weekend. Even though the applicant was aware that her decision had an impact on Mr Carvolth she stated that she could not accept the respondent's offer as her dignity was being stripped away.

28 The applicant stated that she was angry and confused about the delay in negotiating a new contract as in previous years contract negotiations had taken place in November.

29 When asked if she had packed up all of her personal effects prior to 12 December 2003 the applicant stated that she had packed up some personal items before the meeting as she was due to commence annual leave on 12 December 2003 and that she always took home some personal effects at the end of the year. It was put to the applicant that she resigned on

12 December 2003 as she had had enough of the respondent and the way it was treating her. The applicant stated that she loved her job and had no intention whatsoever of resigning. The applicant was asked about her diary entry for 12 December 2003 where she refers to resigning on 12 December 2003:

> "I resigned from 6PR and didn't go on air, too upset – Declan saw me at 12.45 with John Solvander & said they wanted Jenny & Gary back on air. I said thank you but no and he offered me the contract 70,000 and no contra less than last year. He wanted me to think about it over the weekend or let him know before 5pm & I said I wouldn't accept & resigned"

(Exhibit R1 diary entry 12 December 2003).

The applicant stated that "That word [resigned], in my mind, when I wrote it, signified that I would not be returning because I did not accept their offer. There is no other word to explain that I would not be back the following year because I did not accept that offer. That's just a terminology." and "I just wrote it as an explanation that I would not be returning. When you don't accept an offer it means that you are not going to go back into that station. That's how I wrote it. I never said the word "resign" ever. I did not want to resign. I wanted to continue with my employment."

(Transcript page 62)

30 The applicant stated that she did a short interview for an article published in the Sunday Times on 14 December 2003 (Exhibit R3). When asked if this article was accurate the applicant stated that she was upset and traumatised at the time, that she had not told the Sunday Times that she had resigned and that it was their interpretation of her not accepting the respondent's offer. The applicant agreed that she did not initiate any discussions about a possible return to work with the respondent subsequent to 12 December 2003.

Respondent's Evidence

31 Mr Kelly has had 15 years experience in the radio industry. As the respondent's General Manager Mr Kelly oversees the on-air and off-air operations of 6PR and 96FM and he has held this position for two years. Mr Kelly stated that the respondent has approximately 100 employees, 35 of whom are presenters, with approximately 22 working for 6PR and 13 for 96FM. He stated that the majority of 6PR's presenters are on fixed term contracts, which is a feature of the radio industry. Mr Kelly stated that the duration of contracts varied but currently it is common for presenters to have contracts of 12 months duration. Mr Kelly stated that a radio station's ratings were its 'life blood' and were therefore followed closely by both presenters and management as higher ratings led to greater advertising revenue. Mr Kelly stated that ratings are published eight times per year and are regularly communicated to staff.

32 Mr Kelly stated that he is involved in negotiating the respondent's presenters' contracts and the market place determined if a presenter was offered an increased remuneration package. He stated that sometimes it was necessary to negotiate a lesser remuneration package with a presenter. Mr Kelly confirmed that it was not uncommon for presenters to undertake additional work outside of their commitments with the respondent.

33 Mr Kelly gave details about the negotiations which took place to finalize the applicant's 2003 contract. Mr Kelly stated that at the end of 2002, he and Mr Solvander had a discussion with the applicant about a draft contract prepared by the respondent's Business Manager. Following this discussion the applicant took the contract away to seek independent advice and after receiving a letter from the applicant's lawyers (Exhibit A1.8) he had further discussions with the applicant and the applicant's contract was then re-negotiated and finalised. Mr Kelly gave evidence that towards the end of June 2003 he was instructed by his management that contra payments would no longer be an option for the respondent's presenters' remuneration package because of taxation issues.

34 Mr Kelly stated that the introduction of a new radio station in Perth called Nova in December 2002 impacted on the respondent's finances as the amount of advertising available to Perth radio stations was now being shared by a greater number of radio stations. Mr Kelly gave evidence that as a result of this change the respondent waited until the final ratings results for 2003 issued in December 2003 before re-negotiating presenters' contracts and Mr Kelly understood that the respondent's presenters were told by Mr Solvander that a decision on contracts for 2004 would not be made until late in 2003. Mr Kelly stated that the applicant's job was never offered to anyone else and Mr Kelly confirmed that as part of his role with the respondent he had ongoing discussions about possible new presenters.

35 Mr Kelly stated that when the final ratings for 2003 issued on 9 December 2003 the respondent decided to offer a new contract to the applicant and a meeting was set down for later that week to discuss a new contract with the applicant. Meanwhile, Mr Kelly instructed his Business Manager to draw up a new contract for the applicant (Exhibit R2). Mr Kelly stated that a number of meetings took place subsequent to the ratings period finishing and contracts were provided to presenters, questions were dealt with and presenters were advised they could take away their contracts to seek advice.

36 Mr Kelly confirmed that appointments with some presenters on 12 December 2003 commenced late due to a personal matter. He stated that when he met with Mr Carvolth on 12 December 2003 at approximately 12.20 pm, he advised Mr Carvolth that the respondent wanted to continue its relationship with him and he was given a copy of his new contract. Mr Kelly stated that Mr Carvolth's 2004 contract was in the same terms as the applicant's contract and Mr Kelly agreed to Mr Carvolth's request to take the contract away to consider its terms. A general discussion then took place about the future of the afternoon programme. The meeting finished after approximately ten minutes and Mr Carvolth was asked to send the applicant to Mr Kelly's office.

37 Mr Kelly stated that the meeting with the applicant lasted approximately sixty seconds. Mr Kelly stated that when the applicant came into the meeting she was tense and sat on the edge of her chair and he stated that there were no meaningful discussions with the applicant. Mr Kelly told the applicant what he had told Mr Carvolth, that is, that the respondent wanted to renew its contract with the applicant and he then gave the applicant a copy of the 2004 contract. Mr Kelly stated that the applicant reviewed the remuneration page attached to the back of the contract and told him she was not accepting the contract. Mr Kelly advised the applicant to take away the contract and obtain advice. Mr Kelly stated that the applicant declined this offer, said that she was not accepting the contract, she placed it back on his desk and told him that there was no need to worry as she had already cleared her desk. Mr Kelly maintained that he did not state that there would be no negotiations about the contract nor did he require the applicant to respond to the contract that day. After the applicant re-iterated that she would not accept the contract she left his office. Mr Kelly stated that he was dismayed, perplexed and shocked at the haste with which the applicant had made her decision not to agree to the contract as contract negotiations had always taken place in previous years. Mr Kelly confirmed that the applicant was upset and emotional after the meeting and as a result did not conduct the afternoon programme that day. Mr Kelly confirmed that the contract he offered to the applicant contained an increase in the amount of salary offered to the applicant and that the amount of $10,000 in contra had been deleted.

38 When Mr Kelly spoke to Mr Carvolth the following week Mr Carvolth advised him that he wanted to continue with the afternoon programme and accepted a contract with the respondent. Mr Kelly confirmed that Mr Carvolth is now doing the afternoon programme on his own.

39 Mr Kelly stated that on the afternoon of 13 December 2003 he received a telephone call from a Journalist at the Sunday Times seeking information about the applicant's resignation. Mr Kelly stated that he was annoyed about the content of the Sunday Times' article and he was dumbfounded about the allegations contained in the article and the tone of the article as he stated that he could not believe the applicant's claims about the morale of the respondent's staff. Mr Kelly disagreed with the comments contained in the article and he stated that as a result of the applicant's comments as reported in this article the door was shut about the applicant returning to work with the respondent. Mr Kelly stated that the respondent may have entertained the applicant returning to work prior to this article being published. Mr Kelly stated that the respondent has ongoing plans which do not include the applicant. He confirmed that he approved the applicant taking annual leave in December 2003 and January 2004 in November 2003 on the basis that he expected the applicant to continue working with the respondent after 31 December 2003.

40 Under cross-examination Mr Kelly stated that he was aware that the applicant received substantial payments for live reads prior to this payment being removed from the applicant's contract in 2003. When asked about the consultant's report about the amount of remuneration that the applicant should receive (Exhibit A1.4) Mr Kelly stated that he did not believe that the report's findings were relevant to current market conditions. Mr Kelly was not aware why in the initial stages of the applicant's employment with the respondent her written contracts were not continuous and he stated that he was not involved in the process at that time.

41 It was put to Mr Kelly that the respondent deliberately delayed offering the applicant a contract at the end of 2003. Mr Kelly stated that he understood Mr Solvander had informed the applicant about the reasons for the delay in contracts being offered and he stated that the respondent did not have a deliberate policy to leave presenters on edge to maximise the respondent's negotiating position. Mr Kelly stated that he waited until the last ratings results were published and then meetings were arranged with each presenter to take place in the following days. It was put to Mr Kelly that as a result of the afternoon programme's good ratings in December 2003 a pay increase should have been offered to the applicant. Mr Kelly responded by saying that advertisers, who the respondent derives its income from, do not make judgements based on the results of one survey. Mr Kelly confirmed that at meetings held with other presenters on 12 December 2003 presenters took their contracts away to obtain advice and he understood that the applicant would be doing the same.

42 Mr Kelly was asked about the impact of Nova coming into the radio market in December 2002. Mr Kelly stated that he was expecting ramifications on the respondent's advertising income even though Nova's audience was different to that of 6PR. It was put to Mr Kelly that the impact of Nova on 6PR was negligible. Mr Kelly stated that any new entrant into the commercial radio market in Perth has an impact on the respondent's revenue potential notwithstanding the age group of its audience. When asked about 6PR's 2003 ratings Mr Kelly stated that it was his view that it was an ordinary year overall whereas 96FM had good ratings. It was put to Mr Kelly that the respondent's profits for the period ending 30 June 2002 were positive. Mr Kelly conceded that this was the case but stated this was largely due to the Ten Network performing well. Mr Kelly stated that the Perth business unit was not doing so well.

43 Mr Kelly stated that when he met with the applicant on 12 December 2003 he was operating on the basis that the applicant would return to work in 2004. He stated that the applicant was agitated at the commencement of the meeting and when asked to sit down she sat on the edge of her chair. Mr Kelly could not remember telling the applicant that the $10,000 in contra was being removed from her contract and Mr Kelly confirmed that the impact of the removal of the $10,000 meant a substantial reduction in the applicant's remuneration. He stated that after being handed the contract the applicant went straight to the back page. It was put to Mr Kelly that it was made clear to the applicant that the respondent was not interested in negotiation with her over the contract and that it was a "take it or leave it offer". Mr Kelly disagreed that this was the case. Mr Kelly stated that the respondent did not offer the applicant a contract when it did in order to save money and he expected the applicant and other presenters to review their contracts and come back and negotiate as had always happened in the past.

44 Mr Kelly stated that the respondent's financial position had gradually deteriorated since having a good year in 2002.

45 Mr Solvander has been the respondent's Programme Director since January 2001. He is responsible for all facets of on-air sound and the production and content of programmes and the newsroom. Mr Solvander reports to Mr Kelly. Mr Solvander has worked in the radio industry for approximately ten years and he is aware that presenters are usually employed on fixed term contracts most of which are for one year duration. Mr Solvander stated that fixed term contracts were used so that a radio station could take into account ratings when deciding on its employment options. Presenters also had options with fixed term contracts. Mr Solvander stated that even though the introduction of Nova did not affect the respondent's ratings Nova took a slice of the advertising pie available to Perth radio stations. Mr Solvander stated that the ratings for the applicant's afternoon programme in 2003 were initially poor, then picked up, fell off and then picked up at the end of 2003. Mr Solvander stated that the applicant's job was not offered to any other presenter before December 2003. Mr Solvander was aware that there had been gossip about whether or not the applicant would be continuing with the respondent, however, there was no truth to these rumours and he told the applicant this.

46 When Mr Solvander spoke to Mr Kelly in October 2003 about the respondent's plans for the following year they decided not to make a final decision about presenters for 2004 until after the last ratings results came out on 9 December 2003. Mr Solvander stated that he had informal meetings with both the applicant and Mr Carvolth about this delay and he apologised to them. On 10 December 2003 Mr Solvander had a discussion with Mr Kelly about future presenters at 6PR and a decision was made to offer both the applicant and Mr Carvolth another contract.

47 Mr Solvander understood that Mr Kelly organised draft contracts for each presenter and meetings were set down with presenters to take place on Friday 12 December 2003. At the meeting held with Mr Carvolth, which took place at approximately 12.10pm, Mr Solvander confirmed that Mr Carvolth was informed that the respondent was happy to offer him a new contract, he was given a copy of the contract and when Mr Carvolth indicated that he wanted time to review the contract he was told that he could review the contract over the weekend. Mr Solvander stated that it was not unusual for presenters to require time to consider their contract and he had not previously seen a presenter sign a contract immediately it was offered.

48 Subsequent to Mr Carvolth's meeting the applicant arrived for her meeting. Mr Solvander stated she was hesitant and nervous and as a result perched on the edge of her chair. Mr Kelly told the applicant that they wanted her to present the programme for another year, offered the applicant a contract for 2004 and said that the applicant should take it away and consider the respondent's proposal. The applicant flicked to the back page of the contract and said that she would not accept the contract and left the contract on the desk. Mr Kelly asked the applicant if she was sure that she did not want to take the contract away

and review it over the weekend. The applicant responded by saying that she would not accept it and that things were 'OK' because she had cleared her desk. Mr Solvander recalled that the applicant was twice offered the opportunity to take the contract away to review. Mr Solvander stated that even though the applicant appeared to be composed and in control, he was surprised that the applicant would not take the contract away and negotiate a compromise as had happened in previous years. He understood the applicant would have been pleased to have been offered another contract and he was stunned that she would not discuss the contract.

49 Mr Solvander confirmed that the applicant's annual leave was approved to take effect from 15 December 2003 for four weeks and he stated that this prior approval was not unusual even though the applicant's contract for 2004 had not been finalised.

50 Mr Solvander stated that it would be disruptive and lead to chaos if the applicant was to be reinstated. He stated that the comments made by the applicant as reported in the Sunday Times on 14 December 2003 were unhelpful as the applicant was being highly critical of the respondent. As a result it would be difficult to accommodate the applicant's return. Further, Mr Carvolth was in the process of establishing his own programme.

51 Under cross-examination it was put to Mr Solvander that he did not give any reason to the applicant for the delay in negotiating the 2004 contract. Mr Solvander was adamant that both Mr Carvolth and the applicant were advised that no decision would be made about their contracts for 2004 until after the last 2003 ratings results were finalised.

52 Mr Solvander stated that Mr Kelly did not mention during the meeting with the applicant on 12 December 2003 that the $10,000 of contra was being removed from her remuneration package and Mr Solvander reiterated that he expected the applicant to take the proposed contract away and review it and was surprised and shocked that the applicant decided not to negotiate the terms of the contract.

53 Mr Carvolth commenced working in the television industry in 1961 and has worked with the respondent as a radio announcer/presenter for the last 18 years. Mr Carvolth stated that he currently presents his own programme at 6PR between 12.00 noon and 3.00pm each afternoon and occasionally a guest presenter is involved in the programme. Mr Carvolth confirmed that he is currently employed full time by the respondent and that he is on a twelve month contract which he understands to be the current practice in the industry. Mr Carvolth stated that in the past his contracts have covered periods of up to two or three years. Mr Carvolth confirmed that when each contract is coming to an end, negotiations take place for a new contract for the forthcoming year if his services continued to be required. Mr Carvolth confirmed that his 2003 contract was of twelve months duration.

54 Mr Carvolth stated that at the end of 2002 he was called into a meeting and was advised that his services were required for another year and he sought advice from his lawyers to assist him in negotiating a new contract.

55 Mr Carvolth stated that during 2003 there were rumours and gossip about whether or not he would be continuing with 6PR and the afternoon programme and his concerns about his ongoing employment with the respondent became greater as the year was coming to an end as no contract was in place for 2004. Mr Carvolth stated that both he and the applicant expressed these concerns to Mr Solvander.

56 Mr Carvolth confirmed that in 2003 the ratings for the afternoon programme were not as good as they could have been and that they fluctuated throughout the year.

57 Mr Carvolth stated that just prior to meeting with Mr Kelly and Mr Solvander on 12 December 2003 both he and the applicant were 'geared up' as the meetings were to occur just prior to going on air that afternoon and it was their last day before going on annual leave. Prior to being offered the contract for 2004 Mr Carvolth had a discussion with the applicant and he suggested to the applicant that even if she was unhappy with the terms of the contract they should review their contracts over the weekend before making a decision. Mr Carvolth confirmed that at the meeting with Mr Kelly and Mr Solvander he was offered another contract for 12 months and he was advised that his salary would not increase from the previous year. He then asked if he could review the contract over the weekend and this was agreed to. After leaving the meeting he told the applicant that there were no extras in the contract and he advised the applicant to keep to the plan and to get back to the respondent on Monday. He was surprised when the applicant returned from her meeting after approximately ninety seconds. Mr Carvolth gave evidence that she told him that she had advised Mr Kelly and Mr Solvander to 'shove it' or 'stick it' and that she was not going to accept the contract. Mr Carvolth confirmed that the applicant had packed up most of her personal effects in the week prior to the meeting as she was commencing annual leave and she completed packing the rest of her personal effects prior to leaving that day.

58 When Mr Carvolth had a discussion with the applicant in the evening of 12 December 2003 he stated that the applicant remained upset. He told the applicant that there was still a chance for her to continue employment with the respondent and he offered to assist the applicant with this process if she wanted. Even though Mr Carvolth advised the applicant not to speak to the press he was aware that the applicant was taking calls from the media. Mr Carvolth stated that over the weekend he telephoned Mr Kelly about the applicant continuing with the respondent, however, once the Sunday Times' article came out on the 14 December 2003 he stated that this prospect disappeared as the applicant's reported comments in this article were not helpful in resurrecting the relationship between the applicant and the respondent.

59 Mr Carvolth confirmed that on Monday 15 December 2003 he finalised his contract with the respondent and negotiated the return of two items, a mobile phone and fuel card entitlements which had been dropped from his previous contract. At the time he informed Mr Kelly that he preferred to do the afternoon programme on his own as it would be hard to replace the applicant and a new presenter would be constantly compared to her.

60 Under cross-examination Mr Carvolth stated that he declined an offer of additional remuneration by way of contra for 2003. Mr Carvolth believed that the quantum offered to him for his 2004 contract would not increase as he believed that the good ratings period for December 2003 was a one-off occurrence and he understood that the respondent would take all of the ratings for 2003 into account. As a result of indications given by Mr Solvander, Mr Carvolth understood that negotiations for 2004 would not take place until the final ratings for 2003 were available. Even though he was aware of this situation he was surprised that the 2004 contract discussions were delayed until 12 December 2003.

61 Mr Carvolth confirmed that he was anxious to find out about his position for 2004 prior going on annual leave. Mr Carvolth stated that after he attended the meeting on 12 December 2003 he told the applicant that it looks like the contract is the same and he understood the applicant would be offered the same contract. Mr Carvolth stated that the applicant stated that her dignity was being destroyed after leaving the meeting on 12 December 2003 and claimed that the respondent had deliberately acted to force her to react in this way. The applicant also stated that she felt ambushed by the respondent. Mr Carvolth stated that he would have no problem working with the applicant again but this would be the respondent's decision.

62 Ms Bonolo is the afternoon programme's producer and she has been undertaking this role for approximately six years. Ms Bonolo confirmed that there were a number of rumours in 2003 about whether or not the afternoon programme would continue in 2004. Ms Bonolo stated that after Mr Carvolth left the meeting with Mr Solvander and Mr Kelly on 12 December 2003 he

informed the applicant that he had been offered a new contract which was the same or similar as the previous year's contract and he advised the applicant to think about her contract over the weekend. Ms Bonolo confirmed that prior to the meeting held on 12 December 2003 both the applicant and Mr Carvolth decided to make a joint decision about their contracts. When the applicant returned from her meeting with Mr Kelly and Mr Solvander, Ms Bonolo recalled the applicant stated that she could not accept the contract and had told them to 'shove it' or to 'stick it'.

Submissions

63 The applicant maintains that she had a continuous and ongoing employment relationship with the respondent over a lengthy period of time. This is confirmed by the applicant being employed continuously since 1996. In December 2003 she had approval to take annual leave from Monday 15 December 2003 to Monday 12 January 2004 which indicates that the applicant had a reasonable expectation that the employment relationship and her employment contract with the respondent would continue into 2004. The applicant maintains that an employee employed on a series of fixed term contracts and with the expectation of future employment should be regarded as having continuous employment: *D'Lima v Board of Management, Princess Margaret Hospital for Children* (1995) 64 IR 19; *Andersen v Umbakumba Community Council* (1994) 56 IR 102; *Archer v State School Teachers Union of WA (Inc)* (1999) 79 WAIG 3413. Specifically the respondent relies on the comments of Marshall J in *D'Lima v Board of Management, Princess Margaret Hospital for Children* (op cit) at 26:

> "The practice of signing of further contracts for alleged periods of temporary employment appears to have been one of mere administrative convenience and cannot compel the Court to ignore the weight of strong countervailing factors indicating a continuous employment relationship."

64 The applicant argues that when the respondent offered the applicant continuous end dated contracts it was for administrative convenience and formed part of the respondent's standard employment practices. Furthermore, the applicant maintains that the Commercial Radio – Announcers' Award 1998 ("the Award") which covered her employment and binds the respondent does not allow for employees to be employed under fixed term contracts.

65 The applicant argues that in December 2003 she was treated in such a way by the respondent that she was given no choice but to resign (*Attorney General v Western Australian Prison Officers' Union of Workers* (1995) 75 WAIG 3166). In particular the applicant relies on the comments of Rowland J at 3169:

> "This is a case where the employee has been left with the impression given by those clothed with apparent authority by the employer that he has an option of either resigning or being dismissed in circumstances where, it not amounting to duress in a common law sense, it was clearly in circumstances of procedural unfairness."

The applicant maintains that she was pushed from her employment with the respondent (*The Attorney General v Western Australian Prison Officers' Union of Workers* (op cit); *Auckland Shop Employees Union v Woolworths (NZ) Ltd* (1985) 2 NZLR 372). The applicant argues that the meeting held on 12 December 2003 was an ambush and was specifically intended so that the applicant would either accept the lower remuneration package offered to her or cease employment with the respondent. The applicant maintains that the meeting held on 12 December 2003 was effectively an ultimatum. The applicant argues that there is duty on an employer to be good and considerate to employees and not to do anything likely to destroy the relationship of confidence or trust between them (*Woods v WM Car Services (Peterborough) Ltd* (1982) ICR 693). The applicant argues that the practice of "squeezing out" an employee from the workplace is in breach of the implied term to be a good and considerate employer and constitutes an unfair dismissal (Macken, O'Grady, Sappideen and Warburton '*Law of Employment'* 5th Edition at 115; *Woods v WM Car Services (Peterborough) Ltd* (1981) ICR 666; *Blaikie v SA Superannuation Board* (1995) 64 IR 145). The implied obligation to be a good and considerate employer constitutes judicial recognition that the employment contract is not just about economic exchanges (work for wages) but also social and personal relations (*Law of Employment, Macken O'Grady Sappiddeen Warbuton Law of Employment* Fifth Edition at 114).

66 The applicant argues that any attempt to force a wage reduction on an employee or to remove entitlements will be a repudiation of the contract by the employer (Macken, O'Grady, Sappideen and Warburton (op cit) at 225; *Local Government Engineers' Association of New South Wales v Woollongong City Council* (1995) 58 IR 245). The applicant specifically relies on the authority contained in *Blaikie v SA Superannuation Board* (op cit) at 167, where Olsson J made a finding of unfair dismissal in the following terms:

> "What ultimately occurred was little short of unconscionable. The sanctity of contract having been jettisoned to the four winds, the applicant was, for all practical purposes, denied adequate access to his legal adviser and not allowed an extension of time for that purpose. In essence "the gun was pointed at his head" and he was required to accept what had been put to him, or suffer the threatened potential adverse consequences. It is small wonder that, as he said, he "panicked" and felt that he had no option but to sign the instrument of resignation tendered to him."

67 The applicant maintains that she was unfairly dismissed given the respondent's behaviour towards her (see *Gilmore v Cecil Bros and Ors* (1996) 76 WAIG 4434 per Sharkey P at 4445), and that the respondent's conduct was unfair, calculated and capricious.

68 The applicant maintains that by not giving the applicant reasonable notice of her termination the respondent rendered the applicant's dismissal unfair.

69 The applicant maintains that she was denied procedural fairness as she was effectively told that she had to take a substantial reduction in remuneration or leave the respondent's employment without any negotiation. Further, the applicant was told of the substantial reduction in remuneration approximately 15 minutes before broadcasting the afternoon radio programme and the applicant had to respond to the contract by the end of the programme that day.

70 The applicant maintains that the respondent repudiated its contract of employment with the applicant and the applicant accepted the repudiation and terminated the agreement. The changes proposed by the respondent to the applicant's contract were fundamental and went to the heart of the parties' relationship as the change was a significant reduction in the applicant's remuneration (see *Russian v Woolworths (SA) Pty Ltd* (1995) 64 IR 169 at 174).

71 The applicant is seeking reinstatement to her former position and argues that it is practicable in the circumstances. Even though there may be some discomfort and embarrassment at the workplace this does not preclude a reinstatement order from being made (see Macken, O'Grady, Sappideen and Warburton (op cit) at 352; *Flinders Medical Centre Inc v Tingay* (1984) 7 IR 46).

72 The applicant is claiming reasonable notice of 12 month's pay as the applicant had a long term and ongoing employment relationship with the respondent and was not given reasonable notice of termination as required (see *Archer v The State School Teachers Union of WA* (op cit)). The applicant argues that the entitlement to a payment of 12 months notice is based on the indicia contained in *Antonio Carlo Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499. When calculating the amount

owing to the applicant, the applicant maintains that her remuneration package included her base salary, superannuation, $10,000 in contra, one eastern states air fare and work related mobile phone expenses to a maximum of $40.00 per month.

73 In addition to compensation for unfair termination the applicant is claiming compensation for injury as she suffered considerable distress given the manner in which the respondent terminated her contract of employment.

74 The respondent argues that there is no jurisdiction for the Commission to deal with this application as the applicant was on a fixed term contract with a maximum term that expired on 31 December 2003 and the applicant was aware that if a new contract was not signed she would not continue working with the respondent in 2004. The respondent maintains that maximum term contracts agreed with the applicant are common practice in the radio industry. Unless a new contract is agreed to for the following year by the expiry date of the existing contract the contract lapses due to the effluxion of time. Even though leave was provided for in the applicant's contract, this does not negate the fact that the applicant was employed under a contract for a specified term. Each time the applicant's contract expired, prior to the expiry date negotiations took place on a new contract and this pattern was no different in December 2003. As the applicant chose not to negotiate and/or accept a new contract for 2004 the 2003 contract expired in its terms. Therefore the applicant was not terminated. As the applicant was not dismissed the Commission does not have jurisdiction to deal with this application. In support of its claim that the applicant was on a fixed term contract the respondent relies on the following authorities: *Attorney General v Western Australian Prison Officers' Union of Workers* (1995) 62 IR 225; *Cargill Australia Ltd, Leslie Salt Division v Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch* (1992) 72 WAIG 1495; *Bonson v Ivory Investments Pty Ltd T/a "Dome" Mandurah* (1999) 79 WAIG 567 at 569 and *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) WASCA 166, per Heenan J at para 4.

75 If the Commission determines that the applicant was dismissed the respondent maintains that the applicant was not unfairly terminated. The respondent argues that when assessing whether or not the applicant was unfairly terminated the credibility of witnesses is an important factor. The respondent maintains that the applicant was not a credible witness because on key issues relating to the meeting held on 12 December 2003 at least two witnesses gave contrary evidence.

76 The respondent maintains that the meeting held on 12 December 2003 was not an ambush as the respondent expected that the applicant would continue in employment in 2004 and that the applicant would take the proposed contract away to consider as she had done when negotiating the 2003 contract. It was open to the respondent to adjust the terms and conditions of the contract offered to the applicant and these adjustments were not specifically targeted at the applicant. The respondent offered the applicant a contract on 12 December 2003 as decisions were not made about the terms of the applicant's contract until the final ratings for 2003 issued on 9 December 2003.

77 The respondent maintains that the applicant had already made up her mind to cease employment with the respondent prior to attending the meeting on 12 December 2003 as she had already packed up her personal effects, she informed Mr Carvolth that she had told both Mr Kelly and Mr Solvander to "stick it" or "shove it" and her comments to the Sunday Times confirm a negative attitude towards the respondent (Exhibit R3).

78 In the alternative the respondent argues that there was ample evidence to confirm the proposition that the applicant resigned. The applicant's diary entries demonstrate that she resigned as well as the evidence given by Mr Kelly, Mr Solvander and Mr Carvolth. The respondent maintains that it was not a case where the applicant was pushed, she jumped of her own accord.

79 The respondent refutes the applicant's claim that she is due twelve months' pay in lieu of notice. No payment in lieu of notice is due to the applicant as the applicant's contract of employment expired on 31 December 2003 or in the alternative the applicant resigned. In the event that the Commission was to assess what would be reasonable notice the respondent maintains that when taking into account the relevant authorities the applicant would be due no more than one month's pay in lieu of notice. Further, the respondent maintains that if the Award the applicant claims covered the applicant's employment then the Award binds the applicant and the respondent and notice should therefore be limited to the amount contained in the Award (*Brackenridge v Toyota Motor Corporation Australia Limited* (1996) 67 IR 162; *Elliott v Kodak Australasia Pty Ltd* (2001) FCA 807; *Hastings v JH Corporate Security Services Pty Ltd* [2000] SASC 216).

80 The respondent maintains that the applicant was under an obligation to mitigate her loss and did not do so as she did not consider the position offered to her by the respondent in December 2003.

81 The respondent maintains that reinstatement is impracticable given the applicant's comments as reported in the Sunday Times' article dated 14 December 2003 and given that there is no longer any position available for the applicant with the respondent.

82 In summary the respondent maintains that it did not act unfairly towards the applicant as there was a clear intention to negotiate with the applicant to finalise a contract for 2004 and there was no repudiatory conduct on the part of the respondent which could lead the applicant to form the view that she had no alternative but to resign.

Findings and Conclusions

83 In the first instance it is necessary to determine whether or not the Commission has jurisdiction to deal with this application. The respondent argues that the applicant was not dismissed as her last contract of employment with the respondent was subject to a fixed term and expired on 31 December 2003. In contrast the applicant maintains that she and the respondent had an ongoing contract of employment which was renewed on a regular basis as agreed between the parties and the applicant's last written contract of employment which had an expiry date of 31 December 2003 should be regarded in this context.

84 If an employee is subject to a period of fixed term employment which expires due to the effluxion of time a dismissal does not take place. In *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) 83 WAIG 3053 at 3055, Heenan J stated the following about the relationship between fixed term employment and a dismissal:

> "The single question of law which determines the outcome of this appeal was decided against the appellant by Kenner C at first instance and that decision was upheld on the appeal to the Full Bench. The question is whether the termination of the appellant's employment by the effluxion of the time fixed for the duration of that employment constitutes a dismissal by the employer. If not, no question of relief for alleged harsh, oppressive or unfair dismissal could arise under ss 23A, 29(1)(b) of the *Industrial Relations Act* or at all.
>
> Kenner C and the Full Bench both held that Mr Gallotti's employment came to an end in accordance with its express terms on the final day of the agreed term - that is, 31 July 2001 - resulting in a termination by effluxion of the limited period of employment agreed between the contracting parties.
>
> In his reasons for decision in the Full Bench the learned President said (AB 33 – 34- (sic)
>
> > "A dismissal is well understood to be the termination of the contract at the initiation of the employer and this may be done by notice or summarily (see Macken, O'Grady, Sappideen & Warburton 5th Edition, *'The Law of*

> *Employment*'). Where a contract provides for employment for a fixed term, the contract will automatically end when the time expires, unless, of course, it is lawfully terminated in some other way in the meantime (see '*The Law of Employment*' op cit at page 235).
>
> If, however, a contract of employment is terminated by agreement between the parties (ie consensually) or by effluxion of time then there is obviously not a dismissal because there is no termination at the initiative of the employer."

With respect, I agree with those observations of the learned President.

There is ample authority for the proposition that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a "dismissal".

One such case was cited by the respondent to this appeal and it is the decision of the Supreme Court of South Australia in ***Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia and Grivell*** (1999) 74 SASR 240, particularly the passage in the decision of Bleby J at par 28.

There will not be a dismissal where the term of a contract of employment expires: ***Richards v Port Lincoln Aboriginal Organisation*** (1991) 58 SAIR 61, or where such a contract is not renewed: ***Croci v South Australia***, unreported; ICSA (Pryke C); No 13/1995; 19 February 1985."

85 In *Katherine Stobie v The Director General, Department of Education and Training, Government of Western Australia* (2004 WAIRC 12843) (delivered 21 September 2004, unreported) at paragraph 46 his Honour the President stated the following:

> "In some circumstances, an employee who is employed under a fixed term contract which expires may be able to succeed in an unfair dismissal claim. However, this is generally limited to circumstances where there has been a series of fixed term contracts which evidence a continuing employment relationship (see *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) 83 WAIG 919 (FB), *Pritchard v Dolly Dolly Creations Pty Ltd* (1989) 31 IR 231, and *NSW Public Medical Officers Association v Prince Henry Hospital and Others Re Eikens) (No 1);* [1978] AR 259. That is not the case here."

86 After reviewing the contractual relationship between the parties throughout the applicant's employment with the respondent, the terms of the written contracts governing the applicant's contractual relationship with the respondent during this period and in particular the applicant's last contract of employment with the respondent and the terms of the Award which the applicant argues applied to her employment, I find that when taking into account the relevant authorities that even though the applicant was employed continuously between April 1996 and 31 December 2003, it is my view that the applicant did not have an ongoing and indefinite contract of employment with the respondent which would have continued as a matter of course after 31 December 2003. I conclude that the series of fixed term written and verbal contracts entered into between the applicant and the respondent between April 1996 and 31 December 2003 were not for administrative convenience but represented arrangements which varied over time as agreed between the parties and that if contracts of a fixed duration were not offered by the respondent to the applicant during this period and then agreed to the mutual satisfaction of both parties then the contractual relationship between the parties would not continue.

87 On the evidence given in these proceedings I find that the employment relationship between the applicant and the respondent only continued from April 1996 to 31 December 2003 because the respondent chose to offer the applicant contracts for specified periods and the terms of these contracts were then agreed between the applicant and the respondent for the duration specified in each contract. There was no dispute that the applicant's employment with the respondent was subject to five fixed term written contracts covering the following dates and that each contract had an agreed start and finish date:

1) 18 April 1996 to 30 June 1996
2) 1 May 1997 to 30 April 2000
3) 31 July 2000 to 31 July 2001
4) 21 May 2001 to 30 December 2002 (with an option for a further 12 months)
5) 31 December 2002 to 31 December 2003

(Exhibits A1.1, A1.2, A1.5, A1.6 and A1.9)

Each contract was a separate contract of service for a fixed term and a specific remuneration package applied for the term of each contract. I note that even though the applicant did not have written contracts for the periods 1 July 96 to 30 April 1997 and 1 May 2000 to 30 July 2000 it appears that the applicant and the respondent agreed to continue their employment relationship during these periods under arrangements which were suitable to both parties. Even though no specific evidence was given by either party about the formation of each contract governing the applicant's contract of employment with the respondent (except for the applicant's last contract – Exhibit A1.9) I find that each of the contracts was agreed between the parties after the respondent decided to offer a contract to the applicant. In reaching this conclusion I rely on the applicant's evidence that she was advised approximately two months prior to the expiry of each contract whether or not she was 'to come back' the following year. Furthermore, I find that the applicant was aware that the last contract she signed with the respondent was subject to a finite period and would only be replaced by a new contract if a new contract was offered to the applicant. For example, the applicant's diary extract of 11 December 2003, which reads as follows:

> "We still haven't been told by 6PR as to whether we are coming back or not. They are so unprofessional."

(Exhibit A1.13)

confirms that the applicant was uncertain about whether or not she would be offered a contract by the respondent for 2004 and indicates that the applicant's ongoing employment with the respondent when her last contact ceased was not guaranteed. The applicant's explanation about her diary entry of 12 December 2003 (Exhibit R1) whereby the applicant stated that she told the respondent that she would not be returning to work for the respondent in 2004 because she did not accept the respondent's offer also indicates that the ongoing employment relationship between the applicant and the respondent was subject to the parties agreeing on the terms of the contact, if one was offered by the respondent.

88 I accept the evidence of Mr Kelly, Mr Solvander, the applicant and Mr Carvolth that it was the respondent's custom and practice to enter into negotiations in the months preceding the expiry of each presenter's contract to negotiate a new contract for the following year, if a contract was to be offered to a presenter. I also accept Mr Solvander's evidence that the use of fixed term contracts is not unusual in the radio industry and this process could operate to the benefit of both parties to the contract. In my view this gives weight to my finding that even though the employment relationship between the applicant and the respondent was continuous between 1996 and 2003 it was not automatic that the employment relationship between the parties would continue beyond the expiration of the agreed end date of each contract. In the circumstances I find that the

employment relationship between the applicant and the respondent would have only continued after December 2003 if the applicant was offered a new contract by the respondent and if the applicant and the respondent were able to agree on terms and conditions to form a new contract to apply after the cessation of the previous contract.

89 The last written contract agreed between the applicant and the respondent in November 2002 (and signed on or about 21 November 2002) determined the basis of the applicant's employment with the respondent at the time the applicant ceased employment with the respondent. When reviewing the express terms of this contract I find that the applicant and the respondent agreed that it would commence operation on 31 December 2002 and expire on 31 December 2003 and that the contract was a discrete contract of service. Clause 1 of this agreement provides (in part) the following:

"**IT IS AGREED**

1 In this agreement:

…

"Commencement date" means the date of commencement of this Agreement which is 31ST of December 2002.

…

"Term" means the period from the Commencement Date until the expiry of a period of 12 months from the Commencement Date or the date of termination of this Agreement in accordance with **clause 7**, whichever is the earlier."

(Exhibit A1.9)

Under the agreed definition of Term it is clear that this contract ceased on 31 December 2003, unless the contract was terminated earlier by either party to the contract, in accordance with Clause 7.

90 Clause 7 of the applicant's last written contract with the respondent states the following:

"The Company may at any time immediately terminate this Agreement by giving written notice to the Presenter if any of the following events occur:

(a) the Presenter commits any serious or persistent breach of this Agreement which is, in the reasonable opinion of the Company, incapable of rectification;

(b) the Presenter commits any serious or persistent breach of this Agreement which continues unremedied for 14 days after the Presenter receives notice from the Company of that breach;

(c) the Presenter in the performance of Responsibilities commits any act of serious misconduct, fraud or dishonesty;

(d) the Presenter fails or refuses to comply with any lawful direction given by the Company;

(e) the Presenter is declared bankrupt;

(f) the Presenter is convicted of a criminal offence which in the reasonable opinion of the Company will detrimentally affect the Company or any of its Related Corporations;

(g) the Company's licence to broadcast is terminated;

(h) the Program achieves an AC Nielsen radio rating for all people 10 plus below 6.5 in any two consecutive surveys; or

(i) the Presenter is incapacitated by physical or mental illness, accident or any other circumstances beyond the Presenter's control for a period of more than 30 consecutive Business Days or an aggregate period of 90 Business Days during the Term.

The Presenter may at any time immediately terminate this Agreement by giving written notice to the Company, if:

(a) the Company commits any serious or persistent breach of this Agreement which is incapable of rectification;

(b) the Company commits any serious or persistent breach of this Agreement which continues unremedied for 21 days after the Company receives written notice from the Presenter of that breach; or

(c) the Company is placed under some form of official management or insolvency administration.

On termination of this Agreement by the Company pursuant to this **clause 7**, the Company will pay to the Presenter the amount of any Remuneration and reimbursement of approved expenses owing pursuant to **clause 4** up to and including the date of termination of this Agreement. Payment of this amount is acknowledged to be in full satisfaction and discharge of all claims and demands of the Presenter against the Company in respect of this Agreement.

The obligations of the Presenter under **clauses 6 and 10** survive the termination of this Agreement."

(Exhibit A1.9)

91 Clause 6 of the Agreement relates to copyright and syndication of the applicant's Programme and Clause 10 indemnifies the presenter in relation to any issue arising out of any matter broadcast by the presenter under the Agreement both during the terms of the contract and subsequent to the contract ceasing.

92 Clause 4 of the Agreement states that the respondent will pay the presenter the remuneration set out in Schedule 1. Schedule 1 reads as follows:

"1. For the term of the contract, the Company will pay the Presenter $65,000 per annum.

2. Contribute Superannuation in accordance with Government legislation currently at 9.00%.

3. Contra to the value of $10,000 per annum. Contra must be taken during the term of the contract and is to be coordinated via the General Manager.

4. Provide the Presenter with one Eastern States airfare during the term of the contract. Notice of eight weeks is required. Value of the trip is not to exceed $700.

5. Pay work related Mobile Phone expenses to a maximum of $40 per month.

6. Note: The Memorandum regarding "Live Reads" dated April 21, 1997. Ceases (sic) to be in effect from the start date of this contract."

(Exhibit A1.9)

93 I find that the reference in Clause 7 to the respondent paying the applicant remuneration and expenses up to and including the termination of the contract if the contract was terminated at the initiative of the respondent prior to its expiration supports the agreement between the applicant and the respondent being for the specified fixed term. Furthermore this clause demonstrates that the employment relationship may not have continued to the end of the contract if certain events occurred. I also find that the terms of Schedule 1, whereby there is reference to the applicant's remuneration package applying for the term of the contract, supports the applicant being employed for a finite duration. Schedule 1 refers to the applicant's salary being paid for the life of the agreement, 'contra' must be taken during the term of the contract and the airfare is to be taken during the term of contract. In my view these payments and entitlements are indicative of a contractual relationship of a fixed duration.

94 Clearly as the applicant's last contract with the respondent was of a fixed duration with a set start and finish date, the applicant's employment relationship with the respondent ceased due to the effluxion of time on 31 December 2003 when the applicant and the respondent did not agree to a new contact to apply in 2004. Furthermore, the applicant had no automatic expectation of an ongoing employment relationship with the respondent after this contract ceased to have effect on 31 December 2003 as there was no express intention in the applicant's 2003 contract for the terms of the contract to continue beyond the expiry date of the contract pending the negotiation of a new contractual arrangement between the parties.

95 Even though some of the recent written contracts between the parties provided for entitlements such as long service leave and maternity leave to accumulate throughout the life of the respective contract in my view this is not inconsistent with the applicant's employment being subject to a fixed term as these entitlements would continue to accrue if the employment relationship continued between the parties after a contract expired and a new contract was negotiated.

96 The applicant maintains that the respondent's approval for her to take annual leave beyond the expiry of her last contract confirms that the parties had an ongoing employment relationship. I reject this argument as I accept Mr Kelly's evidence that the applicant's annual leave was approved on the basis that the applicant would continue working with the respondent in 2004, subject to a new contractual arrangement being agreed between the parties if a contract was offered to the applicant. In the event the applicant, was offered a contract for 2004 however the parties were unable to agree on the terms of this contract.

97 The applicant argues that the terms of the Award applied to her contract of employment and as there is no provision in the Award for an employee to be employed for a fixed term this confirms that she was subject to an ongoing contract of employment. The respondent maintains that the Award does not have application to the respondent but if it does then it allows for employment for fixed periods. I accept that the respondent is a named party to the Award and that the Award applied to the applicant's employment given the terms of Clause 4. - Parties Bound of the Award. However, it is my view that the applicant's employment under a fixed term contract is not displaced by the applicant being covered by the terms and conditions of the Award. I find that some of the Award's clauses contemplate the possibility of fixed term contracts of employment (see Clauses 11.8 and 10.1.5) and I find that the respondent is not prohibited from offering maximum term contracts to its employees by virtue of the provisions of Clause 9 – Types of Employment. Indeed, at 9.1.2 of this clause it is contemplated that at the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be full-time, regular part-time, casual or trainee. Furthermore, *Byrne and Frew and Australian Airlines Ltd* 131 ALR 422 is authority which provides that an employee's contract of employment is not displaced by the terms and conditions of an award but sits along side it and continues to operate in relation to those matters which are not in conflict.

98 In conclusion I find that as the terms of a new contract were not agreed between the applicant and the respondent to apply subsequent to 31 December 2003 after the respondent offered the applicant a new contract for 2004 the contractual relationship between the applicant and the respondent came to an end when the applicant's last fixed term contract with the respondent expired on 31 December 2003. The employment relationship between the applicant and the respondent therefore ceased with effect from 31 December 2003 due to the effluxion of time. It follows and I find that when the employment relationship between the applicant and the respondent ceased due to the effluxion of time the applicant was not dismissed and the Commission therefore does not have jurisdiction to deal with this application.

99 If I am wrong in reaching the view that when the applicant ceased employment with the respondent that her employment was subject to a series of separate and distinct fixed term contracts the last of which expired on 31 December 2003, which I do not concede, and it is the case that the applicant had an ongoing employment relationship with the respondent, which should and would have continued after 31 December 2003 as a matter of course, after reviewing the events which took place at the meeting held on 12 December 2003 I find that the applicant was not dismissed by the respondent and therefore there is no jurisdiction for the Commission to entertain this claim. I find that during the meeting between the applicant, Mr Kelly and Mr Solvander held on 12 December 2003 the applicant resigned of her own accord and was not given any ultimatum which led to her resignation nor in my view was the applicant forced into a position where she had no alternative but to resign.

100 I am required to decide on witness credit as the applicant gave contrary evidence about what transpired at the meeting held on 12 December 2003 to the evidence given by Mr Kelly and Mr Solvander. I find that when determining witness credit, the weight of evidence is against the applicant as both Mr Kelly and Mr Solvander gave clear and consistent evidence about what transpired at the meeting. Furthermore, I found Mr Kelly and Mr Solvander to be credible witnesses who gave their evidence honestly and to the best of their recollection. Even though the applicant gave consistent evidence during her evidence in chief and when cross-examined and was adamant about her recollection of the events of this meeting it is clear that the morning of the meeting was emotionally charged for the applicant as she was preparing to commence her last afternoon programme for the year, she was due to commence four weeks' annual leave that afternoon and as a contract with the respondent was not in place for 2004 the applicant was uncertain about whether or not she would be employed by the respondent in 2004 (see the applicant's diary extract for 11 December 2003 Exhibit A1.13). In my view the applicant's anxiety was compounded by the respondent's delay in offering the applicant a contract for 2004 as the respondent was waiting for the results of the final ratings period which ended on 9 December 2003 and that this timeframe was later than previous years. It is within this context that the applicant's recollection about the meeting was as she recalled, however I am not convinced that the applicant's version of what took place at the meeting was accurate. In all of the circumstances I therefore prefer the evidence given by Mr Kelly and Mr Solvander about the events of 12 December 2003 in preference to the evidence given by the applicant.

101 I make the following findings based on the evidence given by Mr Kelly and Mr Solvander about what happened at the meeting held on 12 December 2003. I find that a meeting was convened with the applicant for the respondent to offer the applicant a new contract for 2004 and that this meeting lasted between 60 and 90 seconds. I accept that Mr Kelly was operating on the basis that the applicant would continue working with the respondent in 2004 if the negotiations for the 2004 contract were successfully concluded and I accept that the applicant's annual leave for December 2003 and January 2004 had been approved by the respondent in early November 2003 on the basis that the respondent expected to offer the applicant a new contract and to successfully negotiate and finalise a new contract with the applicant for 2004. I find that when Mr Kelly met with the applicant on 12 December 2003 the applicant was agitated at the commencement of the meeting and she sat on the edge of her

chair when asked to sit down by Mr Kelly and I accept Mr Solvander's evidence that the applicant was hesitant and nervous at the meeting. I find that Mr Kelly offered the applicant a new contract for 2004 with the intention of negotiating its terms and conditions and he advised the applicant accordingly. I find that when Mr Kelly informed the applicant that the respondent wanted to negotiate a new contract with the applicant for 2004 the applicant only reviewed the remuneration page of the proposed contract. After briefly considering the remuneration package offered to her I find that the applicant then told Mr Kelly that she was not accepting the contract. I find that Mr Kelly advised the applicant to reconsider the contract and to obtain advice about its contents and that the applicant declined this offer. I accept Mr Kelly's evidence, as confirmed by Mr Solvander, that he did not tell the applicant that the contract was not negotiable and that the applicant had to respond to the contract offered to her by the end of the afternoon programme that day. I accept that Mr Kelly was taken aback when the applicant rejected the contract outright and did not wish to negotiate its terms. I find that even though the applicant was advised on two occasions that she should take some time to consider the contract she told Mr Kelly that she would not accept the contract and that he need not worry as she had cleared her desk. After this exchange I find that the applicant left the meeting and that both Mr Kelly and Mr Solvander were shocked and surprised by the applicant's actions. I conclude that when the applicant told Mr Kelly that she was not accepting the contract and advised him that she had cleared her desk that this constituted a resignation at the applicant's initiative. Even though the applicant claimed she did not resign she referred to her non-acceptance of the 2004 contract on 12 December 2003 as constituting a resignation, as her diary entry for the 12 December 2003, on more than one occasion, specifically refers to her resigning:

> "I resigned from 6PR and didn't go on air, too upset – Declan saw me at 12.45 with John Solvander & said they wanted Jenny & Gary back on air. I said Thank (sic) you but no and he offered me the contract 70,000 (sic) & no contra (sic) less than last year. He wanted me to think about it over the weekend or let him know before 5pm & I said I wouldn't accept & resigned"

(Exhibit R1)

102 In reaching the conclusion that the applicant was given the opportunity at the meeting to negotiate her contract I take into account the evidence given by both the applicant and other witnesses in these proceedings that it was the respondent's normal custom and practice to enter into negotiations over a number of days prior to finalising a presenter's contract and this is what had occurred when the applicant's contract was negotiated in 2002 for 2003. I also take into account that at Mr Carvolth's meeting with Mr Kelly and Mr Solvander on 12 December 2003, which took place only minutes before the applicant's meeting, Mr Carvolth was offered the opportunity to consider his contract over the weekend. In the circumstances I conclude that the applicant resigned of her own volition on 12 December 2003.

103 The applicant argues that the respondent repudiated its contract of employment with the applicant given its behaviour towards the applicant and given the lower rate of remuneration offered to the applicant for 2004. Even though Mr Kelly offered the applicant a contract with a rate of remuneration which was less than what she had received the previous year it is my view that it was not inappropriate and offensive for the respondent to offer the applicant the remuneration package it did as a basis for ongoing negotiations. There was no requirement in the applicant's last discrete contract of employment with the respondent that the applicant was guaranteed a set income as a basis for any future contact negotiations. The applicant's written contracts with the respondent confirm that the applicant's annual base rate of pay had not changed substantially over the period 1996 through to December 2003. The applicant's base rate of pay was $60,000 in 1996 (Exhibit 1.1) and this was increased to $65,000 in her last contract with the respondent (2003) (Exhibit A1.9). I accept that the removal of the payment of live reads, which was in place from April 1997, had a significant impact on the applicant's earnings. However, the applicant agreed that this payment would cease to have effect from 31 December 2002 and it was notionally replaced in 2003 with the 'contra' payment of goods to the value of $10,000, plus minor entitlements such as phone expenses and an air fare. Clearly, the applicant's earnings in each separate fixed term contract negotiated and agreed between the applicant and the respondent fluctuated throughout her employment with the respondent. Even though the contract offered to the applicant for 2004 deleted the $10,000 contra entitlement her base salary was increased to $70,000, I do not find this offer to be a substantial reduction to the applicant's remuneration package when taking into account the applicant's 2003 remuneration package as a whole. Furthermore, I have already found that the remuneration package offered to the applicant by the respondent on 12 December 2003 was clearly open to negotiation as had happened in previous years. I accept that programme ratings and income from advertising is a relevant consideration for the respondent when offering a specific remuneration quantum to a presenter and these two factors may well have influenced the quantum offered to the applicant particularly given the afternoon programme's uneven ratings throughout 2003 and the introduction of Nova into the WA radio market in December 2002. I also accept that the respondent changed its policy regarding contra payments to presenters and that Mr Kelly was not in a position to offer this as an option to the applicant for 2004. Even though the applicant was upset at the ongoing diminution of her remuneration package and the 2004 contract was offered in the context of the applicant having accepted a significant reduction in her remuneration package after 31 December 2002 due to a change in the payment of live reads it is my view that it was open to the respondent to offer the applicant a contract on the terms that it did and it was open to the applicant to negotiate the contract offered to the applicant for 2004, as she had done so in the past. It is thus my view that the contract presented to the applicant was not unreasonable and the applicant clearly had the opportunity to negotiate the terms of the contract as she had done in the past and chose not do so. I therefore find that it was not inappropriate for the respondent to offer the applicant the remuneration package which it did.

104 Even though it was unfortunate that the respondent chose to offer the applicant a contract on her last day of work in 2003 I find that the timing of this offer was not designed to pressure the applicant into accepting a contract with a lower rate of remuneration than her existing contract. I accept that the respondent was awaiting the outcome of the last ratings period for 2003, that the applicant was offered a contract as soon as possible after the final ratings for 2003 were available and I find that both the applicant and Mr Carvolth were advised in general terms of the reason for this delay. It was also the case that the applicant was treated no differently to the respondent's other presenters whose contracts were also up for renewal.

105 I conclude that the respondent did not breach any implied term of its contract with the applicant in relation to its obligations to be a good and considerate employer towards its employees, nor in my view did the respondent repudiate its contractual obligations to the applicant by offering her the proposed contract. In the circumstances I find that the respondent did not repudiate its contract of employment with the applicant such that the applicant had the right to treat the employment relationship as being at an end at the initiative of the respondent.

106 As I have found that the applicant was on a fixed term contract which expired due to the effluxion of time on 31 December 2003, the applicant is therefore not due any payment for notice and as a result the applicant's claim for twelve months' payment in lieu of notice falls away. If I am wrong in reaching this conclusion (which I do not concede) and the applicant is due to be paid notice as I have found that the Award covered the applicant's contract of employment, the period of notice specified in the Award would apply to the applicant in any event.

107 An order dismissing this application will now issue.

2004 WAIRC 13167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER MAY SEATON
	APPLICANT
	-v-
	6PR SOUTHERN CROSS RADIO PTY LIMITED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 28 OCTOBER 2004
FILE NO/S	APPLICATION 15 OF 2004
CITATION NO.	2004 WAIRC 13167

Result Application alleging unfair dismissal dismissed. Application for contractual benefit dismissed.

Order

HAVING HEARD Mr B Jackson of counsel on behalf of the applicant and Mr N Ellery 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 12996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA UNDERDOWN
	APPLICANT
	-v-
	DOWFORD INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 12 OCTOBER 2004,
FILE NO.	APPL 376 OF 2004,
CITATION NO.	2004 WAIRC 12996

Catchwords	Contractual benefits claim – entitlements under contract of employment – application successful in part – claim for costs dismissed *Industrial Relations Act 1979* (WA) s 26 and s 29(1)(b)(ii).
Result	Declaration made Applicant entitled to take two days off work in lieu of two public holidays worked.
Representation	
Applicant	Mr A Heedes (as agent)
Respondent	Mr S Penglis (of counsel) Ms A Gotjamanos (of counsel)

Reasons for Decision

1 This is an application made under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). Samantha Underdown ("the Applicant") claims that she is owed benefits to which she is entitled under a contract of employment, not being a benefit under an award or order. The Applicant claims that she is owed the following:

(a) 15 days' pay in lieu for days worked on weekends and public holidays.

(b) Paid sick leave at the rate of $4,300.01 (net) per month from 9 February 2004, until the Applicant is deemed fit to return to work by her medical practitioners. The Applicant claims that failure to pay this money is in breach of clause 8 of her contract of employment. The Applicant says in her Final Amended Statement of Claim that she is prepared to put a ceiling on the sick leave pay to 31 August 2004.

(c) Reinstatement of the Applicant's accrued annual leave, which was 50 days taken from 9 February 2004, when her sick leave payments ceased.

(d) The sum of $4300.01 (net) illegally deducted from the Applicant's account on 23 February 2004, contrary to clause 8 of her contract of employment. The Commission understands that the use of the "illegally" is used in the sense of unlawfully deducted. It is conceded by the Applicant an amount of $4,300.01 (net) was paid to her on 24 February 2004.

(e) Costs and disbursements fixed in the amount, to 27 July 2004, of $250.00 being photocopying, computer ribbon, paper, postage, telephone calls, filing, parking fees, attendance and service of documents for these proceedings.

Background

2 The Applicant is still employed by the Respondent. It is common ground that the Applicant is an extremely hard working and conscientious employee. Unfortunately, the Applicant has been unable to work since she went on sick leave on 28 October 2003, after being diagnosed with grade 3 breast cancer. At the time of the hearing the Applicant was still medically unfit to work because of her illness.

(a) Claim for paid sick leave

3 At the time the Applicant went on sick leave, she was employed as the Business Manager of Mount Barker Chicken, which is the trading name of Dowford Investments Pty Ltd ("the Respondent"). She was also the Consumer Products Manager for Milne Agrigroup. The Applicant's breast cancer was diagnosed on 9 October 2003. On Monday, 13 October 2003, the Applicant met with the Respondent's Managing Director, Mr Graham Laitt. The Applicant claims that her entitlement to on going paid sick leave arises out of a contractual promise made to her at that meeting by Mr Laitt. The meeting was pre-arranged to discuss her performance. At that meeting the Applicant informed Mr Laitt that she had breast cancer. The Applicant says that she reached a binding agreement that the Respondent would pay her paid sick leave until she was fit to return to work. The Applicant contends the contractual obligation arose either as an agreement within the meaning of clause 8 of her contract of employment or, alternatively, as a separate contract or collateral contract.

4 The Respondent denies that any commitment or binding agreement was ever given or entered into that she be paid sick leave until she was fit to return to work.

5 It is not in dispute that the Applicant was paid sick leave from 28 October 2003, until 6 February 2004. If the Applicant is successful in her claim for paid sick leave, it is not in dispute that her 50 days of accrued annual leave should be reinstated, as the Applicant accessed 50 days of paid annual leave from 9 February 2004. It is common ground that if the Applicant was entitled to be paid sick leave from that date, she would not have accessed her accrued annual leave.

(b) Claim for pay in lieu of days worked on weekends and public holidays

6 The Applicant's claim for payment in lieu of 15 days worked on public holidays and weekends was made by the Applicant when she received a letter dated 6 February 2004, from the Respondent's Commercial Director, Mr Darryl Calligaro, advising her that her paid sick leave was to cease. In that letter, she was asked to advise by Friday, 13 February 2004, whether she wished to access her accrued annual leave. In a letter dated 12 February 2004, the Applicant advised that she was owed a minimum additional 15 days in lieu and that in order to alleviate some of the unexpected financial pressure she requested that she have access to those 15 days in lieu to make up her full monthly wage. She also stated in that letter that she did not want to access her accrued annual leave. In a letter dated 19 February 2004, Mr Calligaro advised that she was not entitled to additional days. He stated "…under your contract, you are not entitled to additional days as claimed for working weekends. Your contract provides that the salary you are paid is in satisfaction of, and takes into account, all aspects of your employment including hours of work that may be required of you to perform you role (which is inclusive of any requirement to work on weekends)."

(c) The sum deducted on 23 February 2004

7 The Applicant says the sum of $4,300.01 (net) deducted from her account on 23 February 2004, arose out of an instruction given by the Respondent's representatives to the Applicant's bank to stop payment of her monthly pay.

8 The Respondent says that prior to 23 February 2004, the Applicant had been advised her paid sick leave would cease and she was asked to notify whether she wished to access her accrued annual leave. The Applicant advised that she did not wish to access her accrued annual leave prior to 23 February 2004. As a result a "stop payment" advice was given to the bank, which was processed late by the bank so that the Applicant's monthly payment was reversed by the bank on 23 February 2004. A sum for the amount of $4,300.01 (net) was later paid into the Applicant's bank account on that day after the Applicant complained to the Respondent. The later payment of $4,300.01 (net) was deducted from her entitlement to accrued annual leave.

The terms of the Applicant's contract of employment

9 The Applicant commenced work for Milne Feeds Pty Ltd as assistant to the General Manager (Meat Operations), Mr Bevan Treloar on 2 April 2001.

10 The Applicant entered into a written contract of employment dated 2 April 2001. The document was signed by her and Mr Treloar. The Applicant testified that when she commenced work on 2 April 2001, she was given a standard template for a contract of employment and she amended the template to suit her employment conditions. She says she varied the template to take account of her salary, her working times and the fact that she had an existing contract to work part-time for Mustard Catering. She also inserted items such as an entitlement to a company car and other like items. When the contract was executed it was backdated to the date she commenced work.

11 The material terms of the Applicant's contract of employment provide as follows:

"Position and Duties:

1) You are employed as Assistant to the General Manager – Meat Operations. This position reports to Bevan Treloar.

2) You shall be required to satisfactorily perform duties and responsibilities described in the attached schedule and such other duties or responsibilities as may be reasonably assigned to you by management from time to time. You must comply with all Milne Feeds' workplace policies and procedures currently in existence or subsequently introduced by Milne Feeds during your employment.

3) You must not undertake or engage in employment with any entity or person other than Milne Feeds without having obtained, in advance, written permission from the Managing Director of Milne Feeds.

4) Prior to the commencement of this contract Samantha has a prior commitment to Mustard Catering as a Waitress for the duration of the AFL Football Season of twenty two weeks for one day a weekend.

…

Salary:

7) Milne Feeds will pay you a salary of $36,500 per annum. The salary is paid in satisfaction of, and takes into account, all aspects of your employment including hours of work that may be required of you. In the event that you are, or become entitled to, any amounts pursuant to an industrial instrument made by an industrial tribunal,

commission or authority (including an industrial award), Milne Feeds may apply all or part of your salary in full or part satisfaction to these amounts.

…

9) Your terms of employment shall be reviewed annually in December of each year. Following each satisfactory annual review, your salary may be (but need not be) varied in such a way as is agreed between you and Milne Feeds.

…

Hours of Work:

21) The normal business hours are from 8am to 5pm from Monday to Friday. However, in order for the Company to meet its service obligations and for you to adequately perform your duties and responsibilities, you may need to, or be required to, work additional hours or hours outside the nominated office hours.

…

Leave (Annual, Sick, Long Service, Bereavement):

23) Public Holidays

a. You are entitled to all Western Australian public holidays as indicated in the General Conditions of Employment section of the Milne Feeds Employment Policies, Induction and Safety Rules handbook.

23) Sick Leave

a. You will be entitled to 10 days sick leave in each year. At any time, the Company may require you to provide a medical certificate to support the claim for sick leave.

b. Sick leave is non cumulative from year to year. In the event of prolonged illness which requires a sick leave period in excess of 10 days, the individual circumstances of the case will be evaluated by the Managing Director and exceptions to this condition may then be applied at the discretion of the Managing Director.

c. Sick leave is not to be taken for purposes other than genuine ill health. If time is required for other reasons, you may make an application for consideration by your Supervisor.

…

Subsequent Positions:

31) Unless otherwise agreed between Milne Feeds and you, the terms set out in this letter apply to you in any subsequent position you are appointed to with Milne Feeds."*(Exhibit 1)*

12 Approximately 12 months after the Applicant commenced employment in 2001, the Respondent took over the business and Mr Laitt became the Managing Director. In May 2002, the Applicant was promoted from her position as Assistant to the General Manager to Business Manager. Mr Laitt backdated her promotion to March 2002, and increased her salary to $60,000 per annum. It was also agreed that she would receive a performance bonus of $10,000 if she met or exceeded budget for the financial year from June 2002 until June 2003.

13 From April 2002, Mr Treloar remained as the Production Manager responsible for the Mount Barker Chicken abattoir and the Applicant reported directly to Mr Laitt. At the beginning of 2003, she also became the Consumer Products Manager for Milne Agrigroup.

14 The Applicant says that prior to being employed by Milne Feeds Pty Ltd, she applied for a sales position with the Milne Agrigroup and was interviewed by Ms Leanne Hinch. Ms Hinch informed the Applicant that she had more potential than was required for the sales position and referred her to Mr Treloar because he was looking for someone to assist him in running his section. The Applicant says that when she spoke to Mr Treloar he made representations to her that "if you work on holidays, if you work weekends, if you work excess hours you are able to take personal time out during the week to make up for those excess hours at weekends worked and public holidays." (Transcript page 33A). The Applicant testified that after she was employed by Mr Treloar she had discussions about taking days off in lieu with other company employees. In particular, she spoke to Messrs Boas Cogan and Colin Aitken. She says that both men instructed her to take days off in lieu. When the Applicant was cross-examined in relation to this issue, she conceded that the written contract constituted a complete document. She then said "I knew that effect of the days in lieu would not be put in the document. It was an implied term that happens within the industry, from previous experience." (*Transcript* page 61). She also testified that she had been informed by Mr Cogan that he had taken time off in lieu when he had worked for another employer in the industry. The Applicant says that in her experience, as an employee, it has been a term implied in employment contracts of salaried people that if you work additional hours, you can take time off in lieu. The Applicant says that up until late 2002, she was able to take time off in lieu but in the year 2003, her workload became too heavy to enable her to do so.

15 The 15 days for which the Applicant says she should receive days off or pay in lieu of working extra hours are:

a.	Saturday, 8 February 2003, when the Applicant attended a strategic conference in Dunsborough	1 day
b.	Saturday & Sunday, 22 & 23 February 2003, when the Applicant attended a Trade Show held in Bunbury	2 days
c.	Saturday & Sunday, 15 & 16 March 2003, when the Applicant attended a turkey conference in Melbourne.	2 days
d.	Saturday, 31 May, Sunday & Monday, 1 & 2 June 2003, when the Applicant attended the Burswood Food and Wine Festival	3 days (including one public holiday)
e.	Saturday, Sunday & Monday, 27, 28 & 29 September 2003, when the Applicant worked at the Royal Show	3 days (including one public holiday)
f.	Saturday & Sunday, 4 & 5 October 2003, when the Applicant worked at the Royal Show	2 days

g.	Saturday & Sunday, 10 & 11 October 2003, when the Applicant worked at Mount Barker for the Commercial Production weekend.	2 days

16 The Applicant also says that she worked many other weekends during 2003, but makes no claim for those days. The Applicant maintained that she generally worked excessive hours. In particular, during the period of the Royal Show in 2003, she worked up to 130 hours a week.

17 The Applicant testified that in late 2003, she worked 26 days straight without a day off. She worked from the commencement of the Royal Show from Monday, 22 September 2003, to the completion of the Mount Barker Commercial Production weekend on Sunday, 17 October 2002. The Applicant says that prior to the Royal Show she spoke to Mr Callagaro about how tired and run down she was feeling. She cried because she was emotionally distraught from being so tired and only having one week's holiday in two and a half years. She informed him that she was struggling to cope because she needed a break and his comment was "well, we can't have that" but she says nothing was done about her workload. (*Transcript* page 30).

18 Ms Pauline Ward gave evidence on behalf of the Applicant. Ms Ward testified that she was employed on 5 May 2003, as the Applicant's second in charge of telesales and administration. Ms Ward testified that she generally worked an average of 50 hours' a week. On occasions she worked at trade shows on weekends and public holidays, including the Burswood Food and Wine Festival and the Royal Show. During her three month probationary period, she worked about 10 to 12 hours' per day. She said she commenced work at 7:00 am and worked through until 7:00 pm or 8:00 pm. She generally arrived at work at 7:00 am. When she arrived, the Applicant was already in the office and remained at work until she (Ms Ward) finished work for the day. Ms Ward said that she needed the assistance of the Applicant while she was learning her job but after she knew "what she was doing" the Applicant left work before her.

19 Mr Robert Underdown, the Applicant's brother, testified on behalf of the Applicant that he was employed by the Respondent to work at the 2003 Royal Show, and also to work at Mount Barker for the Commercial Production weekend that followed the Royal Show. He says that during the Royal Show period he worked between 12 to 18 hours' per day and the Applicant worked longer hours. In support of that contention, he gave uncontradicted evidence that she was required to do duties such as load the daily consumables from the trailer and take them into the showgrounds. She was also required to wash, dry and iron the uniforms and count thousands of dollars in coins and notes, which were the daily takings.

20 Mr Underdown's evidence was not substantially challenged in cross-examination. Mr Underdown was paid $18.00 per hour for 138 hours he worked during the Royal Show and the Mount Barker Commercial Production weekend.

21 Mr Colin Aitken was also called to give evidence on behalf of the Applicant. He is the Chief Financial Officer of the Milne Agrigroup. He commenced work in that position in December 2002. Prior to being employed by the Respondent he worked for "Peters and Brownes" where he worked very closely with Mr Laitt and Mr Cogan, who both came to work for Milne Agrigroup after the Applicant. Mr Aitken was unable to say what hours the Applicant worked. When asked whether or not he ever made any representations to the Applicant in relation to taking time off in lieu for weekends worked, he said that he could not recall speaking to her about it but he said work hours were flexible. He says it was up to the General Manager to give permission to an employee to take time off where they had worked a spate of long hours. (*Transcript* page 162a). Mr Aitken said that he did not have any authority to give the Applicant time off in lieu or give her any advice about taking time off in lieu as the Applicant did not report to him but to Mr Laitt.

22 Mr Bevan Treloar is presently employed as the Group Production Manager with the Respondent. He gave evidence on behalf of the Respondent. He said that during the time the Applicant worked for him she was an excellent worker who worked very hard and he recommended her for promotion. In his evidence in chief, Mr Treloar denied that he ever had any discussions with the Applicant prior to her signing her contract of employment about taking off time in lieu for working weekends or public holidays. Mr Treloar said that during the course of twelve months the Applicant worked with him, he would have said to her, in relation to taking time off in lieu of working weekends, that "there's a bit of give and take. You do a little bit of travel here and there and if you wish to have an afternoon off to go and do personal business, I've kind of always, in my management role, allowed that." He says that is the nature of working in a salaried position. He could not recall when he had this conversation with the Applicant. When cross-examined, Mr Treloar was asked whether it was possible that he had this conversation with the Applicant prior to the commencement of her employment, he said that he couldn't see why it would have been at that time but he couldn't recall the timing of the conversation. It was clear from his evidence that he was unable to positively recollect exactly what was said or when he had a conversation with the Applicant about taking time off during working hours.

Applicant's evidence in relation to her claim for paid sick leave

23 Paragraph 4 of the Applicant's Final Amended Statement of Claim states as follows:

> "In early October 2003, the Applicant was diagnosed with an aggressive and invasive type 3 cancer that required expedited surgery. Upon advising the Managing Director and CEO, Graham Laitt, of the need for surgery, Mr Laitt, having extensive personal involvement and experience with the disease, extended upon the Applicant an "ad finitum" amount of sick leave time in order to recover, pursuant to clause 24b of the contract. Mr Laitt repeatedly affirmed on the 13th, 23rd and 24th October 2003, "you take all the time you need to get over this and we'll cover your leave and wages aspect and make sure you have something to return to." verbatim …"

24 The Applicant testified that she suffered from "chemotherapy fog", which has affected her memory. Her evidence in this regard was not challenged by the Respondent.

25 The Applicant testified that when she met with Mr Laitt on 13 October 2003, he informed her that he was very happy with her performance, her pay would be increased to $75,000 per annum and her annual bonus would be increased to $12,500 per annum. She then told him that she had breast cancer, she would need time out to have surgery and possibly chemotherapy and radiotherapy. In examination in chief she said that he told her "to take all the time that I need, that my job would still be there for me because I expressly asked that". She said that she needed the positive things in her life to hang on to and her job was the one thing to keep her focussed on the future. She testified he said "Well, not to worry, but try not to dwell on what I'm doing now". He told her he would cover her for as long as it took". He also told her to keep positive, that she would be alright and he would look after her (*Transcript* page 35). The Applicant testified she spoke to him again in her office on 23 October 2003. They discussed cancer and he told her about the Brown's Institute at Sir Charles Gairdner Hospital and he told her to make full use of that facility. She says he also told her "not to worry, my job will still be there and I will be covered" (*Transcript* page 36). The next day she spoke to Mr Laitt again and they again discussed her diagnosis and he reiterated that she wasn't to worry about it. She says he said "Don't worry about it. I'll be covered". He also gave her assurances that the business would be okay and her position would still be there and everything would be looked after (*Transcript* page 37).

26 The Applicant testified that she made diary entries of her conversations with Mr Laitt on 13, 23 and 24 October 2003. She said that some of these notes were made in the afternoon of each day and some of them were made in the evening. On 13 October 2003, she recorded "Graham – West Perth – salary review – performance appraisal – medical problem have Graham's support and can take as long as I need. My job will be there for me." On Thursday, 23 October 2003, the Applicant recorded "Graham: You take all the time you need to get over this and we'll cover your wages and leave aspect and make sure you have something to return to. My job is safe and will be waiting for me when I am ready". On 24 October 2003, the Applicant recorded in her diary "Graham come [sic] and saw me and gave me his support again. We discussed further about cancer and support at Charles Gardner [sic]."

27 The Applicant was unable to return to work in January 2004, because her recovery was delayed. Instead of spending a week in hospital she was in hospital for three weeks because she contracted a Golden Staph infection and did not obtain clearance by the re-constructive surgeon until the first or second week of December 2003. Then she began chemotherapy. She wanted to go back to work and tried to do so on 5 January 2004. She was prevented from doing so because she was unable to produce a medical certificate stating she was fit for work. When cross-examined, the Applicant conceded that in October 2003, she was not intending to be away forever and that Mr Laitt never used the words that she was entitled to leave "ad infinitum." She also conceded that when she spoke to Mr Laitt in October 2003, she informed him that she was going to come back to work as soon as possible. She agreed her expectation was that she would be back in January 2004, and that was the context of her discussion with Mr Laitt. (*Transcript* pages 82-83). She also conceded that there was no obligation on the employer to allow her more than ten days' sick leave per year (*Transcript* page 83a).

28 After the Applicant produced her entire 2003 diary, she was cross-examined at length about a number of entries. It was put to her again that when she had the conversation with Mr Laitt on 13 October 2003, she informed Mr Laitt that she hoped to be back at work around Christmas/New Year and he told her that she had his full support and to take as long as she needed. She agreed she told him this and that was what he said in reply. It was then put to her that Mr Laitt made it clear to her that she only had a ten day contractual entitlement to sick leave and she agreed that Mr Laitt had said that. She then agreed what was important to her at that time was that there would still be a job for her when she returned. She also conceded that he did not inform her that he would pay her sick leave forever and a day.

29 When questioned again about the discussion that took place on 23 October 2003, the Applicant agreed that she was seeking comfort from Mr Laitt. She was challenged about the entry she made in her diary on 23 October 2003, in particular she was challenged about the words "you take all the time to get over this and we will cover your wages". She conceded that Mr Laitt did not say to her "we'll cover your wages". The Applicant says that this was implied in what he said to her on that day. As to the discussion that took place on 24 October 2003, the Applicant said there was no discussion on that occasion about her job or sick leave. She said the only conversation they had was about her illness.

30 When cross-examined about paragraph 4 of the Applicant's Final Amended Statement of Claim the Applicant conceded that Mr Laitt never said to her at any time "we'll cover your leave and wages aspect". She, however, reiterated that this was implied in what Mr Laitt had said. Further, she conceded that when she received the letter from the Respondent dated 6 February 2004, she did not respond by complaining that she had been promised sick leave "ad infinitum" but that her response at that time was to complain about the fact that her sick leave had been terminated without notice. It was only sometime later she made a claim that she was entitled to on going sick leave until she was fit to return to work.

31 Mr Laitt was not called to give evidence on behalf of the Respondent.

Credibility

32 I have observed the witnesses closely whilst they gave their evidence and concluded all gave their evidence honestly. To her credit the Applicant openly conceded a number of matters when they were put to her and made it plain that in part her evidence of what was said by Mr Laitt during the meetings in October 2003, were matters implied by her.

33 For the reasons set out below, it is my view that the evidence of the other witnesses is peripheral to the issues in dispute. Whilst Mr Treloar's evidence does not entirely conflict with the evidence of the Applicant, I found his evidence to be too vague to be reliable. Accordingly, where his evidence departs from the evidence given by the Applicant, I prefer the evidence given by the Applicant. I found the evidence given by Ms Ward and Mr Underdown to be reliable. Their evidence shows the Applicant worked long hours.

34 Whilst I found Mr Aitken to be a reliable witness, his evidence does not assist the resolution of the issues in dispute, as Mr Aitken was not the Applicant's supervisor. In any event, the evidence given by the Applicant, Mr Aitken and Mr Treloar showed that from time to time there was a practice within the Respondent's organisation for employees, who worked excess hours, to take time off during working hours. Whether such a practice or "custom" was authorised or formed part of the Applicant's contract of employment is an issue which for the reasons set out below turns on a question of law.

35 I have not set out in these reasons for decision the evidence given by Ms Jo Ellis as I did not find her evidence to be materially relevant to any issue in dispute.

Legal Principles

36 In *Matthews v Cool or Cosy Pty Ltd & Anor* (2004,) 84 WAIG 2152 the Industrial Appeal Court recently observed that the Commissioner's power to award claims for contractual benefits which are not restricted to sums accrued or due under an express or implied term of the contract but to monetary awards in the nature of damages for a breach in the term of contract (see Steytler J at [18], Pullin J at [49] – [54] and Heenan J at [64] and [73]).

37 The principles that apply to the Commission's function under s29(1)(b)(ii) of the Act, were set out as follows in the reasons for decision of the President in *Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867 at 1869:

> "1. In an application under s.29(1)(b)(ii) of the Act, the Commission must determine whether the claim is one for a benefit to which the appellant is entitled under her contract of service.
>
> 2. The Commission must make a finding as to what the benefits for which the contract prescribes an entitlement (see Perth Finishing College Pty Ltd v Watts 69 WAIG 2307 at 2313 (FB)).
>
> 3. The jurisdiction of the Commission, pursuant to s.29(1)(b)(ii) of the Act is judicial. It is limited to the ascertainment of existing rights by a determination of whether or not an employee has been denied a benefit to which the employee is entitled to under her/his contract of service (see Simons v Business Computers International Pty Ltd 65 WAIG 2039 (FB)).

4. S.29(1)(b)(ii) of the Act provides for a remedy under the Act. Once a claim is made and is within jurisdiction, the Commission is required to exercise that jurisdiction in accordance with s.26 of the Act (see Perth Finishing College Pty Ltd v Watts (FB)(op cit) at 2315-2316).

5. Once it was the (Applicant's) appellant's case and there was evidence as to the existence of a contract of employment, it was the duty of the Commission to make a finding as to what the contract was.

6. It is then necessary to make a finding of what benefits the appellant was entitled to under the contract, and, if there was such an entitlement, whether they have been paid."

38 As to construction of express terms of a contract, the general principles of interpretation were set out in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109-110 in which Gibbs, J observed:

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch D 387, at p 393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case* (1880) 16 Ch D 681, at p 686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, at p 514, that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects', should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, at p 437."

39 In relation to the Applicant's argument that her entitlement to on going sick leave arises out of a separate oral contract or collateral contract, for such a contract to be made there needs to be in addition, an offer, an acceptance supported on both sides, consideration and an intention by the parties to enter into contractual relations. Consideration is the act or promise provided by one party as the price of the other party's promise. See this discussion by Murray J in *McGellin v Mount King Mining NL* unreported; SCt of WA; Library NO 980164; 7 April 1998.

40 As to the circumstances of implying a term into a written contract Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346 said:

> "For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. …
>
> Accordingly, the courts have been at pains to emphasize that it is not enough that is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract. …
>
> The conditions necessary to ground the implication of a term were summarized by the majority in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* …
>
> 1) it must be reasonable and equitable;
>
> 2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> 3) it must be so obvious that 'it goes without saying';
>
> 4) it must be capable of clear expression;
>
> 5) it must not contradict any express term of the contract."

41 Where a term is implied on the basis of custom or usage it must be "strictly proved". It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the contract itself. (*Thornley v Tilley* (1925) 36 CLR 1 at 8). The implication, however, is excluded if the words of a contract are inconsistent with it (*Summers v Commonwealth* (1918) 25 CLR 144; *Rosenhaim v Commonwealth Bank of Australia* (1922) 31 CLR 46 at 53 and *Re v Nudgee Bakery Pty Ltd's Agreement* [1971] Qd R24).

Conclusions

42 The Applicant's evidence and case prior to making closing submissions was run on the basis that after the Applicant was employed, Milne Feeds Pty Ltd was purchased by the Respondent and the terms of the written contract entered into by the Applicant and Milne Feeds Pty Ltd continued to have force and effect. In closing submissions it was contended on behalf of the Applicant that the terms of the written contract ceased to have effect in July 2001. The Applicant contends in written submissions filed on 6 August 2004, that the written contract entered into by the Applicant and Milne Feeds Pty Ltd, was not legally binding upon the Applicant during 2003 and 2004. In particular, the Applicant says that all material times from July 2001, she was employed by and paid by Dowford Investments Pty Ltd trading as Mount Barker Chicken and not Milne Feeds Pty Ltd or Milne Agrigroup Pty Ltd, which did not legally exist until November 2002. Consequently, the Applicant says the written contract was void or legally unenforceable from July 2001 onwards. The Applicant also says the terms and conditions of her contract changed substantially as early as April 2002, when she first became a manager and reported to Mr Laitt. Despite these submissions the evidence does not support the Applicant's conclusions. Australian Companies and Securities Investment ("ASIC") documents were provided to the Commission by the Applicant with her submissions on 6 August 2004, do not support that proposition. Those documents show that Milne Feeds Pty Ltd changed its name to Milne Agrigroup Pty Ltd on 6 December 2002. Further, the ASIC documents show that the sole owner of Milne Agrigroup Pty Ltd is the Respondent. The ASIC documents show that the Respondent was incorporated on 20 June 2000, and sometime later became the owner of Milne Agrigroup Pty Ltd. Accordingly, these documents show that the Respondent's contention is correct, that is, the Respondent is part of the Milne Agrigroup group of companies. Further, pursuant to clause 31 of the

written contract it is clear that the terms of the written contract, at all materials times, applied to the Applicant's conditions of employment.

43 I do not accept the Applicant's contention that it was an implied term of her contract of employment that she was entitled to take days off in lieu for days worked on weekends or that she was entitled to pay in lieu for days worked on weekends. To imply such a term, would in my view, contradict an express term of the contract, namely, clause 21, which clearly provides that whilst the "normal" business hours are between 8:00 am to 5:00 pm from Monday to Friday, the Applicant was required, from time to time, to work additional hours outside the nominated office hours in order for her to adequately perform her duties and responsibilities. It is conceded, however, by the Respondent the Applicant has an arguable claim that she is entitled to be paid for the two public holidays that she worked. However, the Respondent argues her claim should not succeed as clause 21 prevails over clause 23, which provides that the Applicant is entitled to all Western Australian public holidays. A rule of construction that applies to contracts and statutory provisions is that whereby the entire terms of the contract of employment are read together, a general provision is read subject to a specific provision. When this rule is applied to this matter, clause 23 can be said to be a general provision and clause 21, a specific provision. It follows, therefore, the Applicant's claim that she is entitled to take time off in lieu of public holidays worked by her succeeds. If it were the case that clause 21 should be construed to mean that the Applicant was required to work additional hours, outside the nominated office hours including public holidays, clause 23 would be rendered inoperable and have no effect. I am of the view that when the two clauses are read together the Applicant is required to work at any time after office hours except on a public holiday. It follows, therefore, that if she works on a public holiday she is entitled to take a day off in lieu for that public holiday. I do not construe the terms of the contract to mean that she is entitled to be paid an additional sum of money for working on a public holiday as clause 7 provides an all up annual salary which includes payment in satisfaction of all aspects of her employment, including hours of work.

44 In relation to the Applicant's claim for paid sick leave from 9 February 2004, until 31 August 2004, it is my view that the Applicant's entitlement to sick leave is governed by clause 24b of the written contract. Clause 24b provides that where the Applicant has a prolonged illness that requires sick leave in excess of 10 days, the Managing Director is able to evaluate the circumstances of the case and make an exception to the condition of 10 sick days' paid leave. In my view the terms of clause 24b are clear. It provides an unfettered discretion vested in the Managing Director alone to determine a longer period of paid sick leave. It is a discretion that can be exercised at will. The facts establish that the Managing Director, Mr Laitt, exercised his discretion to provide the Applicant with paid sick leave from Tuesday, 28 October 2003, until Friday, 6 February 2004. Whether Mr Laitt used the words "you will be covered" in my view, is immaterial. In any event, I do not accept he used those words as the Applicant concedes that this was implied in what Mr Laitt said to her in the conversations that took place on 13 and 23 October 2003. Further, the Applicant clearly concedes that the conversation that she had with Mr Laitt was in the context of her intention to return to work by at least early January 2004. Even if those words were used or can be implied, the implication of those words in the circumstances was that Mr Laitt advised the Applicant he would exercise his discretion to pay the Applicant paid sick leave until she returned to work in early January 2004. However, it is my view that the sick leave provision in the written contract is clear and Mr Laitt had a discretion at will. The Respondent was not required by the express terms of the contract to be bound by the word "covered" so as to bind the Respondent at law to provide paid sick leave "ad infinitum" to the Applicant. In addition, it is my view even if the word "covered" was used expressly or implied in the circumstances the term was too ambiguous to be regarded as a specific contractual promise.

45 If I am wrong and clause 24b of the contract does not apply, and the terms of the conversation between the Applicant and Mr Laitt on 13 and 23 October 2003, could prima facie be construed as a separate contractual or collateral promise for ongoing paid sick leave, it is my view that such a promise cannot at law be regarded as a binding contractual obligation as there is a clear absence of any consideration provided by the Applicant.

46 Accordingly, the Applicant's claim for paid sick leave fails and so does her claim for reinstatement for 50 days' accrued annual leave. For the reasons expressed above the Applicant's claim in respect of the sum which is said to be unlawfully deducted from the Applicant's bank account on 23 February 2004, also fails. In any event, the money was not unlawfully deducted because at that particular point in time, the Applicant had advised the Respondent that she did not wish to access her accrued annual leave.

47 Although I will make a declaration that the Applicant is entitled to take two days off work in lieu of public holidays worked on 2 June 2003 and 29 September 2003, I will not make an order for costs. The test to be applied in awarding costs under s 27(1)(c) of the Act, was set out by the Full Bench in *Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 at 27:

> "The application, too, must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award* (1983) AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order)."

48 This case does not fall within this category. The application will otherwise be dismissed.

2004 WAIRC 13084

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA UNDERDOWN
	APPLICANT
	-v-
	DOWFORD INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 19 OCTOBER 2004
FILE NO.	APPL 376 OF 2004
CITATION NO.	2004 WAIRC 13084

Result	Declaration made
Representation	
Applicant	Mr A Heedes (as agent)
Respondent	Mr S Penglis (of counsel) Ms A Gotjamanos (of counsel)

Declaration

HAVING heard Mr A Heedes, as agent, on behalf of the Applicant and Mr S Penglis, of counsel and Ms A Gotjamanos, 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 is entitled to take two days off work in lieu of public holidays worked on 2 June 2003 and 29 September 2003; and

(2) ORDERS that the application is otherwise dismissed.

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

2004 WAIRC 13191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK WATTS **APPLICANT** **-v-** NORWATCH PTY LTD AND RON WATTS INVESTMENTS PTY LTD TRADING/AS CAPEL MARRON **RESPONDENT**
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 29 OCTOBER 2004
FILE NO.	APPL 1525 OF 2003
CITATION NO.	2004 WAIRC 13191

Catchwords	Termination of employment – harsh, oppressive and unfair dismissal – claim dismissed – contractual benefits claim dismissed – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) and (ii)
Result	Application dismissed
Representation	
Applicant	Applicant in person
Respondent	Mr D Smith (of counsel) for Norwatch Pty Ltd Mr R Watts on behalf of Ron Watts Investments Pty Ltd

Reasons for Decision

1 Mark Watts ("the Applicant") claims that he was harshly, oppressively and unfairly dismissed on 13 October 2003, by Norwatch Pty Ltd and Ron Watts Investments Pty Ltd trading as Capel Marron ("the Respondent"). The Applicant makes a claim under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act").

2 Pursuant to s 29(1)(b)(ii) of the Act, the Applicant also claims that he was denied a contractual benefit, not being a benefit under an award or industrial agreement. In particular, the Applicant says he was denied payment for extra hours of work. The Applicant claims he was entitled to be paid for an extra 603 hours work. The Applicant was paid $465.30 (gross) per week for 38 hours per week. Accordingly, he claims that he should be paid for hours he worked in excess of 38 hours per week at an hourly rate of $12.24 (gross).

Background

3 The Applicant commenced employment with the Respondent on 22 January 2003. Whilst it appears that the Applicant did not have any specific title, he says that he was employed as an aqua culturist, labourer and advisor. The Respondent companies are owned by the Applicant's uncle, Norbert van Heerwaarden, and the Applicant's father, Ronald Watts. The Applicant completed two certificates in Seafood Industry Aquaculture at TAFE in 2002. From about that period of time the Applicant, Norbert van Heerwaarden and Ronald Watts, discussed purchasing a marron farm. Initially, it was contemplated that the Applicant would be a partner in the business. Later it was decided that the Applicant would be engaged as an employee and Norbert van Heerwaarden and Ronald Watts' companies would own the business. Arrangements were made to purchase a rundown marron farm in late 2002. The property comprised 103 acres with 97 marron ponds covering 8 to 9 hectares. The farm includes a large hatchery, shed and other associated facilities. When the business commenced in January 2003, the only person with any knowledge in breeding and farming marron was the Applicant.

4 Prior to the purchase of the business, Norbert van Heerwaarden owned and ran a watch repair business in Wollongong. Prior to that he was a sergeant with the Protective Services in New South Wales, after serving a long period of time in the army. Ronald Watts at all material times is employed as an offshore installation manager. He works a 28 day rotation on rigs located offshore of East Africa or Asia, then travels back to Western Australia. He spent approximately 24 days of his 28 days off the

rig, working on the marron farm. Both the Applicant and Norbert van Heerwaarden resided at Capel Marron. Norbert van Heerwaarden resided in the farmhouse and the Applicant lived in a caravan in the farmshed.

5 The Applicant says that he was unfairly dismissed after a verbal altercation on Friday, 10 October 2003, with Norbert van Heerwaarden, which occurred on the Applicant's day off. The Applicant says that the argument was about a demand by Norbert van Heerwaarden that the Applicant register his kelpie puppy, Diesel with the Shire of Capel. The Applicant refused to register Diesel. Norbert van Heerwaarden spoke to other family members about this issue. The Applicant became aware of this and as a result he became angry. The Applicant and Norbert van Heerwaarden argued on Friday, 10 October 2003. On the following Monday, 13 October 2003, Norbert van Heerwaarden handed the Applicant a letter advising him that he was dismissed.

6 The decision to terminate the Applicant was made without consulting Ronald Watts. Ronald Watts, on behalf of Ron Watts Investments Pty Ltd, says that the Applicant was unfairly dismissed and says that he tried to retrieve the situation by trying to negotiate with Norbert van Heerwaarden to rescind his decision. Shortly thereafter, the partnership was dissolved by Ronald Watts and the Applicant was not reinstated.

7 Norbert van Heerwaarden contends that the Applicant was not unfairly dismissed. He says that the argument was the culmination of a long history of the Applicant refusing to comply with instructions, directions or advice by him (Norbert van Heerwaarden) as the day-to-day manager and co-proprietor of the business.

Applicant's evidence

8 The Applicant testified that after drawing up a rough business plan with Norbert van Heerwaarden and Ronald Watts throughout 2002 they looked at properties suitable for a marron farm. At the end of 2002, they decided to buy Capel Marron.

9 The Applicant said that either prior to or shortly after his employment commenced, he was provided with a proposed Australian Workplace Agreement ("the workplace agreement"), which set out detailed terms and conditions of employment. The Applicant did not sign the workplace agreement. He advised Norbert van Heerwaarden that if he wanted to discuss the workplace agreement, he would do so at some later time. The Applicant says that he had no input into the drafting of the document. The Applicant, however, conceded that he may have had a conversation about the workplace agreement in January 2003, with Norbert van Heerwaarden in the computer room at his father's home, when both Norbert van Heerwaarden and Ronald Watts were present. He said, however, that he does not recall what was said at that meeting. He says he told his father that he was not going to sign the workplace agreement as it was and he heard nothing further about it again. The Applicant says he informed Norbert van Heerwaarden on more than one occasion that he would sit down and discuss the workplace agreement with him if he wanted to but that never came about. (*Transcript page 38*). The Applicant denied that he had been engaged on a three-month trial and says that at all material times he was employed as a permanent employee.

10 The Applicant says that at all material times his terms and conditions of employment were set out in two documents. The first is a document headed "Conditions of Employment". That document states as follows:

> "The aquaculture qualified [sic] will be paid under the equivalent of the Animal Welfare Award of Western Australia. Weekly Pay being $465.30 per week.
>
> The hours to be worked are 38 hours based on a five day week and 2 days off per week. Because of the nature of the work the employee will be required to work at odd hours during the day/night as required by the harvesting and weather needs of the Marron and Perch. For example should the employee work for more than 8 hours on a given day then this will be adjusted throughout the week to balance out the hours. Based on these hours 8 to 5 this is 45 hrs a week does not work out.
>
> The employee will be paid a bonus in lieu of excess hours worked when the farm commences to produce profits.
>
> The employee will be provided with accommodation on the farm by means of a caravan. The employee will be provided with access to farm electricity, water, washing machine and use of the ablutions within the shed. And if required use of facilities within the farm house.
>
> The employee is responsible to maintain and keep clean these surrounds."

(*Exhibit 1*)

11 The second document is a Draft Job Description for a Aquaculture Worker, which states as follows:

> "The conditions of employment listed below are of draft form only and will remain so until the farm has been working sufficiently long enough to raise permanent conditions of employment.
>
> The qualified employee, that is, qualified at either University or at TAAFE [sic], will perform the duties listed below.
>
> Provide advise [sic] to the owners on techniques and best methods for the raising of both Marron and Silver Perch. In detail this would be:
>
> Methods on breeding of marron and perch;
>
> Best methods in utilization of ponds;
>
> Advise on feeding routines for both;
>
> Advise on best use of water.
>
> In addition to the above the employee would also be responsible to assist in the day to day duties around the farm, that is:
>
> Maintenance of the pond areas including mowing and cleaning out ponds;
>
> Maintenance and cleaning of the hatchery ponds and surrounds;
>
> Farm fences both boundary and ponds;
>
> Service and maintenance of all farm equipment;
>
> Assist in recording and maintaining aquaculture data in farm computer.
>
> Feed and water farm stock.
>
> When required will complete all the necessary forms for the direct sales of Marron and secure the monies in the farm safe.
>
> Any other duties as required by the owners from time to time as needed."

(*Exhibit 2*)

12 The Applicant says that whilst he was paid for 38 hours a week, the hours he worked varied from a bare minimum of 38 hours to 50 or 60 hours per week. His tasks were to carry out basic maintenance, farm refurbishment, monitor the stock, maintain stock, feed stock, water ponds, net ponds, sales and marketing and whatever was required. In his Particulars of Claim about the tasks performed during overtime hours, the Applicant states that feeding was carried out every second day at dusk. Usually the feeding would finish at 6:30 pm. In winter, this would occur between 5:30 pm to 6:00 pm and in summer between 7:30 pm to 8:00 pm. The feeding was carried out on public holidays and weekends. Trapping was always carried out at night time. The Applicant also says that he collected breeding stock with his brother at night when the marron were active. The Applicant recorded the majority of these duties in his diary (*Exhibit 3*). He said he was told to keep a record of his hours by Norbert van Heerwaarden and Ronald Watts. He made the notes in his diary each day after he finished work in the evening. He noted tasks that were carried out and what was going on at the farm at the time but he says that his diary was not 100% complete.

13 The Applicant's diary shows that during the first month of his employment, he only had one day off work prior to 22 February 2003. During that period of time his starting times for work varied from 8:00 am to on one occasion 12:00 noon. Throughout his employment his diary shows he usually started work at 8:00 am or 8:30 am during the week. Sometimes he started later at 9:00 am and sometimes later than that. He bitterly disagreed with Norbert van Heerwaarden about starting work by 8:00 am each day. The Applicant says he asked Norbert van Heerwaarden, "How many hours do you want me to work a week?" and Norbert van Heerwaarden's answer was, "I want you there at 8 o'clock." The Applicant then replied, "So what, it doesn't matter if I finish at 8 o'clock the night before, so I have done a 12-hour day, you still want me here at 8 o'clock in the morning?" and Norbert van Heerwaarden said, "Yes." (*Transcript page 52).* After this conversation the Applicant continued to work the same hours that he had done previously. He said if he had worked 12 hours the day before, he thought it was alright if he slept until 9:00 am in the morning and then worked another 10 hours. He said that marron are active at night, therefore the best time to work with them is in the evening and the afternoon. When it was put to the Applicant, "Isn't it normal to do what your employer asks of you?" He said, "It is, yeah. If you didn't care about your investment and you were just getting a cheque at the end of the week and you didn't care about the business, that would be exactly what you would do because you have no care for the job. I cared about the place. I wanted to see it succeed so I'd rather have done it properly. And I was never told, again, not to." (*Transcript page 52*)

14 On 3 April 2003, Norbert van Heerwaarden prepared a warning letter to be given to the Applicant. That letter states as follows:

> "Mark Watts
>
> RE: OFFICIAL WARNING
>
> You are hereby warned that your punctuality is not up to standard. During the last 39 days of work you have only managed to arrive by or near 0800 hours on 11 occasions. According to the work-place agreement your hours are from 0800-1630 with an [sic] half an hour break for lunch. This morning you arrived late again and you have been spoken to on several occasions by both Ron Watts and myself and reminded of the working hours. This is your last warning.
>
> You are also reminded that when you are given a task to complete it is not done at your convenience, but when given the task to perform. If there are functions which must occur before the task is done then you must tell me and I will decide whichever will be done first. As a consequence of you not carrying out the task of pumping out of nursery pond no. 1 has caused us to lose a full days sunshine which would have helped to dry it out sooner. You have also been spoken to before about not carrying out tasks. Again this is your last warning.
>
> Leaving the workplace without permission. On the 3 Apr 03 at 1300 hours you left the workplace without permission and without completing the tasks given to you this morning. You have been spoken to about this by Ron Watts and it is not acceptable to just leave to do un-work related errands. This is your last warning.
>
> On the 3 Apr 03 when I brought it to your attention for the third time that morning that the pond was still to be pumped out you said, it is Ok we'll get around to it and the bobcat still has plenty to do so it doesn't matter. I again informed you that we had good drying weather today and we were wasting it and the netting going up was a lot closer and it would interfere. You replied that if I wanted it done then to do it myself and you continued with a task that had not been allocated to you. Under no circumstances will I accept your attitude to work and unwillingness to perform functions not agreeable to yourself. I also will not accept you telling me if I want it done to do it myself. As this is not the first instance you are issued with a final warning.
>
> Your current employment status is 'on probation' and considering the above will now continue for another three months."

(*Exhibit M*)

15 The Applicant testified he never received the warning letter. It is common ground that Norbert van Heerwaarden discussed the warning letter with Ronald Watts and Ronald Watts advised Norbert van Heerwaarden that he disagreed with the contents of the letter. Consequently, Norbert van Heerwaarden did not give the letter to the Applicant. The Applicant was cross-examined at length about the matters raised in that warning letter. The Applicant says that he was never spoken to about his starting time or working hours by Ronald Watts. As to failing to complete tasks, he agreed that he had on one occasion not completed a task in the time frame Norbert van Heerwaarden wanted the task to be completed. He said that Norbert van Heerwaarden wanted him to pump out a pond so that it could be cleaned out. The Applicant said there was no need to do so at that time because the person digging out the ponds was not arriving for weeks. So he (the Applicant) made a management decision that the task could wait as he was doing something far more important at the time. He told Norbert van Heerwaarden, "I'm busy. If you really wanted it done you could go and do it." The Applicant said he did not see anything wrong with his attitude. He said that the bobcat was not delayed in getting to the pond. In relation to leaving the workplace on 3 April 2003, at 1300 hours, without permission, the Applicant agrees he left the farm on that day and at that time but says that he does not recall where he went. He says he was never told that he needed permission to leave the farm.

16 In late May 2003, Ronald Watts made an offer to Norbert van Heerwaarden to purchase his interest in the property and business. The Applicant said that he was not aware of that offer at the time it was made.

17 The Applicant says it was necessary for him to work on weekends because water had to be pumped into the ponds on weekends rather than during the week as the cost of electricity was cheaper on weekends. Consequently, he was obliged to be at the farm every two hours to turn taps on and off.

18 The Applicant said that there were some sales of marron whilst he was employed but that it would take sometime for the farm to become profitable, as it takes approximately two years for a marron to grow to maturity.

19 It is apparent from notes made in the Applicant's diary that the Applicant uses bad language as a matter of course. The Applicant was cross-examined about a young student called Josh, who worked at the farm for a period of time. The Applicant testified that Josh was a "great little kid". The Applicant said he enjoyed working with him on the property. The Applicant tendered a letter from Josh in which Josh indicated that he had enjoyed working on the property, he had learnt much and enjoyed himself immensely. Josh was given some money. However, the Applicant says that Norbert van Heerwaarden had refused to pay Josh. In a diary entry on 15 May 2003, the Applicant wrote, "Josh has so far done 85 hours for the farm. Throw the young c…. a couple of bucks." The Applicant was cross-examined about the bad language used by him in a number of entries. The Applicant said that the diary contained personal notes which were not meant to be read by anyone. When asked about his language he testified, "That's how I talk, that's how I write, that's how I say things."

20 Norbert van Heerwaarden later made an arrangement with the local school for another work experience student to work on the farm. The Applicant was not happy about this arrangement and refused to supervise the student. In an undated note to Norbert van Heerwaarden, he stated:

> "Norbert
>
> Damian from Busselton Senior High School rang Ph 97272685. Wants to know what time to start on Wendsday [sic]? & what to bring, ect [sic]. I have stated a couple of time I don't want another person for several reasons.
>
> : Wrong time of year (there's not that much for us to do let alone someone else.
>
> : Most of the time even with Josh it was a [sic] more of a hinderance [sic] than a help.
>
> : I don't wish to use my time teaching someone aquaculture.
>
> : I have no objection to him coming out but if he dose [sic] he will be your responsibility and not my shadow."

(*Exhibit K*)

21 When asked who did he understand had the day-to-day management of the property the Applicant testified, "It depends what you're talking about. Everything was done by me. I did the management on the marron side of things. I chased up a lot of things required for the farm. I did a lot of the sales for the farm. Norbert did a lot of sales for the farm. He did a lot of supplies for the farm. The management of the marron side of the farm was done by me. He (Norbert van Heerwaarden) never made any decisions on what we would do on the marron. He (Norbert van Heerwaarden) was consulted. They would put in their input but the major decisions were made by me." (*Transcript page 49*). When asked whether he acknowledged that Norbert van Heerwaarden was the manager of the farm including the manager of staff on a day-to-day basis. He said, "If he was a manager then what did he manage? He never told me what to do. He never signed - - assigned any jobs. He never discussed things with employees. He did nothing, so if that's what managing is, he managed his business side but that's all."

22 When pressed as to whether he knew what Norbert van Heerwaarden did from day-to-day he said that all he knew was that Norbert van Heerwaarden sat in front of the computer in the office for 8 hours a day.

23 The Applicant said that prior to his father going into business with his uncle, Norbert van Heerwaarden, he had admired him but after he was dismissed, his opinion of his uncle was of disgust and hatred but at the time of the hearing he had no opinion of his uncle whatsoever.

24 As a result of discussions between the Applicant and his father about Norbert van Heerwaarden's dissatisfaction with the hours the Applicant was working, Ronald Watts gave a letter to the Applicant dated 2 August 2003, directing him as from 4 August 2003, to restrict his hours of work to 38 hours per week. The letter stated that the hours to be worked were from Monday to Friday and on the days the stock had to be fed the Applicant could work longer hours and commence work later the following day to compensate for the extra time. A copy of this letter was given to Norbert van Heerwaarden. The Applicant says that after he was given that direction he worked a minimal number of excess hours. When cross-examined he was asked what duties he dropped to be able to do his work within a 38 hour week and he said, "The effort of going the extra mile, basically. Everything was still done the same. Everything was still managed the same. Everything was still up-to-date. We were going to do one drain-down a week, or I believe we were going to do two drain-downs a week. We stopped it to one." When asked to clarify, he said, "When it came down that I do less hours, there'd be things, 'oh – well – that doesn't really matter', or 'I should do that but I haven't got – 'there was no incentive to go the extra mile. I'm not getting paid for it so I didn't do those extra things. Everything else that needed to be done as part of running that farm on a 38 hour – week and keeping that farm moving was done. … some things missed out because 38 hours. If it had to be done I just left it." When asked whether his father had explained to him why he gave the direction in August about not working extra hours the Applicant said, "Yes, we needed to try and make Norbert realise somehow how much work we were actually doing for him for nothing. That's why." However, the Applicant denied there was a strategy to "get rid of Norbert van Heerwaarden" from the business. The Applicant's brother, Troy Watts and his mother worked on the farm. It appears common ground they were not paid for their work.

25 When the Applicant first commenced employment at the farm, he owned a red cloud pit bull dog called Chloe. Chloe was "put down" by the Applicant after she killed some sheep. Shortly after the Applicant acquired a kelpie puppy called Diesel. The Applicant's brother, Troy, also had a dog. Neither the Applicant nor his brother registered their dogs under the *Dog Act 1976*. The Applicant conceded when cross-examined he was aware that if you are living on a property and you own a dog it should be registered. Whilst it is not contended that Diesel was aggressive, the Applicant conceded that Diesel barks at people when they enter his territory but says as soon as the person says "hello" to him, or he works out who they are, he stops barking and leaves the person alone.

26 On 6 October 2003, the Applicant received a letter from Norbert van Heerwaarden, demanding that he register Diesel. The letter stated as follows:

> "Re: Registration of Dog – Diesel
>
> I believe Ron has spoken to you in relation to the registration of your dog if it is to remain on the property.
>
> My reason for being strict in relation to the registration requirements is that it [sic] the insurance company does not cover any dog full grown or otherwise who threatens, menaces and scares anyone to the point where they sue the farm. This then directly affects both Ron and I as we would have to bear the cost of the court case should it go that far, plus any fines for having an unregistered dog on the property.
>
> As I am not prepared to continue to place myself in that position your dog will have to be registered by the end of this week or remove the dog from the property. If the dog is not registered and not removed then I will ask the Capel Ranger to remove the dog, which will result in probable fines for an unregistered dog payable by you.
>
> I have mentioned this before and given you ample time to register the dog but I am not prepared to wait any longer."

(*Exhibit 4*)

27 The Applicant maintained that there was no discussion with Norbert van Heerwaarden about registering Diesel prior to receiving this letter. The Applicant testified that he did not like the way the letter was written and he decided he was not going to co-operate. He saw the letter as threatening. The Applicant said that they were on the property together for eight hours a day, everyday. He was of the view that Norbert van Heerwaarden should have come to him (the Applicant) and asked him to register Diesel rather than putting it in such a way on paper. Notwithstanding his attitude, he arranged a few days later, on 9 October 2003, for his father to register Diesel. The records of the Shire of Capel show that Diesel was registered on 9 October 2003, by Ronald Watts (*Exhibit 9*).

28 Prior to Diesel being registered, on 8 October 2003, the Applicant received another letter from Norbert van Heerwaarden. That letter was addressed to both the Applicant and his brother. The letter states:

> "Mark and Troy
>
> I again this afternoon have spoken to Ann Bretag the insurance representative for the farm in relation to the law and any vulnerability to me in relation to unregistered dogs and any person suing as a consequence of the dogs' actions.
>
> The first on the list to be sued is Capel Marron because that is where the dogs are, when they find out the real owners of the dogs then the owners will be added to the list. Unfortunately for me because I knowingly allowed the unregistered dogs to remain on the property it would be unlikely for Capel Marron to be dropped off the list especially as the likelihood of obtaining money from Capel Marron is better then the individual. Even if Capel Marron was dropped off the list the insurance company still has to pay minimum fees ($1000 plus) which will result in increased insurance costs for us the following year.
>
> So the situation remains the same as mentioned in the previous letter. The dogs are to be registered by the end of the week or I will arrange a visit from the Capel Ranger to whom I have spoken to in relation to this.
>
> What both of you are failing to realise is that we have customers coming in the front gate to buy or pick up marron who are entitled to enter via the front gate of a business or farm and not be confronted with loose running and barking dogs, that is the law. These customers should not have to put up with dog/s barking at them or coming up to them aggressively (hackles up or growling is classified as aggressive), and can sue in WA for that reason alone. Dogs do not have to bite a person or attack another dog to be taken to court (dog owners to court that is).
>
> Additionally, I have been informed by the Ranger should he find an unregistered dog on the property, both the owner of the dog and the property owner can be fined for the offence. Again I am not prepared to be placed in the position of paying a fine because you choose not to register your dog.
>
> The simple solution is to register and control your dogs."

(*Exhibit 5*)

29 When he received this letter the Applicant wrote on the bottom of the letter, "Well if he is so classified as the farm's responsibility then the farm can pay to register him. & as I said, I have no intention of registering him." He left the letter with the notation on Norbert van Heerwaarden's desk. Later Norbert van Heerwaarden made a notation in reply, "As I said before, your dog your responsibility."

30 On the next day, the Applicant spoke on the telephone to Ronald Watts, who was in Augusta and asked him when returning from Augusta to Capel, to register Diesel with the Shire of Capel. Ronald Watts agreed to do so. After the Applicant finished work that afternoon he went to visit his uncle and aunt, Franz and Sue van Heerwaarden. His uncle Franz spoke to him about not registering Diesel. The Applicant says that he was bewildered by the fact that his uncle Franz knew about Norbert van Heerwaarden's demand to register Diesel. The Applicant knew that Diesel had been registered that day but testified he thought "he would see what his uncle Franz would say", so he told him that Diesel had not been registered and that he was not going to register him. At some stage the Applicant's aunt, Sue van Heerwaarden, joined in the conversation. The Applicant and his aunt engaged in a verbal altercation. Words passed between them in anger. The Applicant was told to leave their house and not come back. It was put to the Applicant in cross-examination that he called his aunt, "A f…ing bitch", to which the Applicant replied that he had simply said to her, "You're being a bitch."

31 On Friday 10 October 2003, the Applicant decided to confront Norbert van Heerwaarden. Despite not working that day, the Applicant drove to the paddle wheels and turned them off and drove back to the shed. When he arrived back at the shed he walked up to Norbert van Heerwaarden and said, "Oi you gutless c…." Norbert van Heerwaarden said in reply, "Oh, you know, who the hell do you think you are?" and called him a "spoilt little brat". The Applicant then said to Norbert van Heerwaarden, "Who the f… do you think you're talking to Franz and [sic] my dog? Why would I be arguing with them about my dog?" and Norbert van Heerwaarden did not answer so he said, "Well you're just gutless," and then left (*Transcript page 42*). When cross-examined about this altercation the Applicant denied that he was red-faced and shouted at Norbert van Heerwaarden. He said he was calm and controlled. Further, he denied driving in a reckless manner. In particular, he denied driving his vehicle very fast or that he skidded to a stop near the paddle wheel or near the shed.

32 After the verbal altercation on Friday, 10 October 2003, the Applicant did not do any further work that day. The Applicant contends that it was his day off because he had worked 38 hours that week, having worked additional hours on the previous Saturday and Sunday. It was put to the Applicant in cross-examination that he later walked past Norbert van Heerwaarden's office on a couple of occasions that day and made abusive gestures. The Applicant conceded that he did so only on one occasion.

33 The Applicant maintained in his evidence that the argument about registering Diesel was not an employer/employee argument. He said that Norbert van Heerwaarden over reacted. He described Norbert van Heerwaarden's reaction as that of a school girl, in particular he testified, "Anyone should be able to just have an argument with someone that they're related to, and someone that they see everyday. No one in the world gets along 24/7. Everyone has arguments and gets over them and moves on. Someone can't do that."

34 The Applicant worked on Monday morning, 13 October 2003. After he had completed a drain-down of a pond, Norbert van Heerwaarden handed him a letter of dismissal. Norbert van Heerwaarden said to the Applicant as he handed the letter to him (the Applicant), "That's it, that's final. This is as of now, effective of now." The letter stated:

> "Mark Watts
>
> RE: Termination of Employment

> As a result of how you confronted me on Friday, how you said it, what you said, your contempt, and the way you continued to show contempt shown after the confrontation, and your total lack of respect to me, one of your employers, have left me no choice but to terminate your services. I am not prepared to pay anyone to work for me who speaks to me like that.
>
> The termination is from the time this letter is issued to you as you are still classified as a temporary employee because you refused to sign the Work Place Agreement."

(*Exhibit 6*)

35 The Applicant testified that when he was handed the letter he told Norbert van Heerwaarden, "I don't believe you can do this. It's over an issue that wasn't work related so why would you bring it back to being a work issue, and I don't believe you have the right to sack me" and Norbert van Heerwaarden replied, "Well stiff then", it was his decision as he pays half the wages and that is the way it was going to be.

36 The Applicant continued to work for a couple of days after be received the termination letter because he received a letter from his father, directing him to remain on the property and carry out his duties until the matter was settled. Norbert van Heerwaarden shortly thereafter cancelled a direct credit payment for the Applicant's pay. This resulted in Ronald Watts serving a notice on Norbert van Heerwaarden bringing the partnership to an end. The Applicant was later paid one week's pay in lieu of notice and accrued annual leave.

37 The Applicant continued to work on the property but was not paid until he became a paid employee of Ron Watts Investments Pty Ltd. The Applicant produced a group certificate that records that he was employed from 15 December 2003 until 14 June 2004 and during that period of time he earned $5,913.00 (gross). He said he did not work as many hours as he did before or with as much effort because management would not buy materials. He felt there was not much work to do if you don't have the resources to work with. He said he did not look for any work off the farm until the employment with Ron Watts Investment Pty Ltd came to an end on 14 June 2004. Since that time he has been receiving Centrelink payments and has applied for a number of jobs without success. He says whilst he was employed by Ron Watts Investments Pty Ltd he was paid approximately $200 (net) a week.

Evidence given by Ronald Francis Watts

38 Ronald Watts testified that he is a director and owner of Ron Watts Investments Pty Ltd. His company was in partnership with Norbert van Heerwaarden's company trading as Capel Marron. The land was jointly owned. Ronald and Anna Watts owned 50%. The other 50% of the land was owned by Norbert van Heerwaarden.

39 Ronald Watts testified that the two documents headed "Conditions of Employment" and "Draft Job Description" was prepared by Norbert van Heerwaarden as a result of discussions between himself and Norbert van Heerwaarden.

40 Ronald Watts was cross-examined about a series of emails that passed between himself and Norbert van Heerwaarden in 2002. Ronald Watts agreed that the correspondence shows that an agreement was reached to employ the Applicant on a three-month trial. Further, he conceded that as the result of discussions and re-drafting of the workplace agreement, he (Ronald Watts) was happy with the terms and conditions set out in the workplace agreement. However, the Applicant was unhappy with the terms of the workplace agreement and refused to sign it. He also conceded there had been some issues of dispute which were raised by Anna Watts, (the Applicant's mother) in relation to the workplace agreement. Ronald Watts also agreed that there had been some discussion with Norbert van Heerwaarden about the Applicant being a partner in the business but he (Ronald Watts) decided against that proposal.

41 As to the proposed warning letter, Ronald Watts testified that he received a copy of the letter shortly before 14 April 2003. He discussed the proposed warning letter with Norbert van Heerwaarden on 14 April 2003 and told him he did not agree with the contents of the letter. He advised Norbert van Heerwaarden that if he wanted to give the letter to the Applicant then Norbert van Heerwaarden should do so but it was entirely up to him. Ronald Watts maintained in his evidence that he did not discuss at anytime the contents of the proposed warning letter with the Applicant.

42 Ronald Watts agreed that he put a written proposal to Norbert van Heerwaarden on 22 May 2003 to bring the partnership to an end, by purchasing Norbert van Heerwaarden's share of the business. Ronald Watts said that he did so because the partnership was not working. He had argued with Norbert van Heerwaarden, about him (Ronald Watts) moving into the house. At that time Ronald Watts says that he was considering giving up his offshore employment, and if he did so he wanted to rent out his Gelorup property and move into the farm residence with Norbert van Heerwaarden on a shared basis. Norbert van Heerwaarden told him that he had no right of access to the house. Ronald Watts said that the partnership agreement provided for equal rights of tenancy to the farm residence. It is common ground the offer to purchase in May 2003, was rejected by Norbert van Heerwaarden.

43 Ronald Watts agreed that the partnership agreement reflected the agreement that Norbert van Heerwaarden was to be the day-to-day manager of the business, including managing staff on behalf of the partnership. The partnership agreement provides, "In order to be able to provide sufficient funds into the partnership for the purchase of the farm and to assist in the development of the farm, Norbert van Heerwaarden will work full time and be accommodated on the farm. This will provide on site supervision on the day-to-day running of the farm as agreed by and on behalf of the partners." (*Exhibit N*)

44 On 2 August 2003, Ronald Watts gave the letter to the Applicant directing him to restrict his hours of work to 38 hours per week. When cross-examined about this letter Ronald Watts conceded that he did not discuss the contents of the direction prior to writing this letter to the Applicant. When it was put to him that this was an important staff issue, Ronald Watts said the letter was to satisfy Norbert van Heerwaarden's continual complaints about the Applicant's start time each day. He said he gave the direction because "I was sick and tired of continual complaints about --- Mark's [sic] not attending work at 8 o'clock in the morning regardless of the hours he worked, and as I've stated in various correspondence with Norbert van Heerwaarden the starting time to me was not a major issue because he was doing in excess of his 38-hour weeks [sic] at all times. The fact that he didn't start at 8 o'clock in the morning was not a great concern to me." (*Transcript page 101*). Ronald Watts did, however, agree that on reflection he should have consulted Norbert van Heerwaarden before giving that direction. Ronald Watts also testified that the letter was given to Norbert van Heerwaarden with the purpose of revealing to Norbert van Heerwaarden the number of excess hours of work that was being done out of hours. Mr Watts said that once the Applicant started a 38 hour week the whole place started to shut down and slow right down. (*Transcript page 101*).

45 Ronald Watts testified that Norbert van Heerwaarden was an impossible person to talk to. He said, "You couldn't sit him down and talk to him about anything." In relation to the issue about the dogs he said that he didn't disagree with Norbert van Heerwaarden about this but they had a business worth $1million and all Norbert van Heerwaarden was worrying about was "dogs and four chickens".

46 Ronald Watts was asked a number of questions in relation to the following correspondence that passed between himself and Norbert van Heerwaarden from late September 2003 to early October 2003, in relation to a number of issues including the Applicant's dog and Troy's dog. One of those letters also raises the issue of the Applicant working a 38 hour week.

47 On the 24 September 2003, Ronald Watts wrote to Norbert van Heerwaarden in relation to the dogs as follows:

> "Dogs
>
> I can only remember this subject being discussed when Mark had the Pit Bull. And when this animal became a problem she was put down immediately. I have no idea what you are talking about regarding the insurance company when did this occur?
>
> As far as Diesel this is a 7 months old dog not a mature dog by any standards. He does bark but he is certainly not aggressive. As far as trained what do you expect from a 7 months old dog.
>
> We have a sign, which encourages people to enter the property to purchase marron. We have a sign, which tells them to keep out. We have signs, which tell them we have Guard dogs beware. We don't have guard dogs and if the sign intimidated people why would they bring a dog on the property.
>
> Troys [sic] dog is a one-man dog he will do whatever Troy tells him. He is a very placid animal and is not aggressive. He does not like other male dogs and does react to them not unusual with male dogs. As for you dragging him out of a car first I have heard of it.
>
> Both dog owners and dogs were on the property when you wrote this why did you not discuss this with them why drag me into it I understand the laws just like you. This could have been discussed will all parties while I was there and everyone could have had their say. Your statement about calling the ranger is aggressive and not warranted and as usual will lead to further conflict <u>what do you want me to do. Why do we have to go down this path using threats to get something done is counter productive and only leads to additional problems.</u>
>
> <u>My dog was not mentioned so I assume this is not an issue.</u>
>
> I spoke to both Troy and Mark about this issue."

(*Exhibit F*)

48 On 25 September 2003, Norbert van Heerwaarden responded to Ronald Watts. In part of that letter he stated:

> "Like you I'm not too happy with the letters but it is a way of putting everything that needs to be said in writing and not being missed verbally. I will discuss the issues as requested.
>
> Yes I do have some issues in regards to the day to day running of the farm as I feel like I am being left out of the decision process.
>
> In regard to Mark's hours you stated before you left for your last hitch that he would be working only a 38 hour week. I rarely see him now on Fridays apart from an odd hour or a note to say he has done all his hours. Is he working to some schedule he [sic] both of you have worked out? What I would also like to know is what exactly his duties are supposed to be. I have no idea what has been accepted as his duties by yourself and him. I would also like to know how and when and how long these duties take each week. The problem is as I don't know whatever it is he is supposed to do and I therefore cannot organise any work in the spare time.
>
> … Now to the dogs.
>
> I mentioned to you when Mark had the pit bull that I had contacted the insurance company and briefed you fully on her comments. Therefore all I did in my note was to repeat earlier comments. I repeated those comments again in writing to insure you were aware of your vulnerability as a partner in relation to the law. As I said previously, I am not prepared to leave myself in the position of being vulnerable just because they have not acted responsibly with their dogs.
>
> In regard to talking to the boys, I have mentioned it twice to Mark with no result. Troy completely ignores me to the point where he looks at me as if I don't exist whenever I approach, so why should I bother to talk to him. You are their father and also in a position of vulnerability as an owner, so you fix it. They listen but do not do as I ask, but then that is only what you have told them to do. I did not threaten to call the Ranger, regard that as something I will do if needed. In relation to your dog, it is registered and hardly a dog with a threatening nature."

(*Exhibit H*)

49 On 2 October 2003, Ronald Watts responded in relation to a number of issues. In his letter to Norbert van Heerwaarden he stated:

> "This is a copy of my letter regarding Marks [sic] work hours. What part of this do you not understand? To me it is perfectly clear I cannot empathize it any more. You are there daily not me if you have not got a clear picture of what he does by now then I believe you never will. You did not respond to this so I can only assume you chose to ignore or accept it. This was done 2 months ago and now it is another issue. If you had a problem with it why did you not discuss with Mark or at least respond to my letter.
>
> He does not and never has worked under any instructions from me on a daily basis. When I am at home I ask him what he has planned and if I can help I do if not I go about my own projects. This is the way I told you I would be working right from day one. The fact that you don't know what he does on a daily basis indicates a lack of interest or a complacent attitude on your part.
>
> As per letter on August 4th 2003.
>
> You and Mark will need to discuss as I feel it better if it is arranged between the people directly involved on a daily basis.
>
> I have discussed this with him and basically it will need discussion between the two of you.
>
> Not sure what you mean by tasking as far as I can see he generally goes about his work routine as required depending on what is happening on any given day.
>
> If we harvest this requires a lot of additional time to be allocated to this task and from what I see between harvesting sorting and general pond maintaince [sic] his days are pretty well accounted for.
>
> We have been on the farm for 6 months (now almost 9 months) and he has not been under direction from either me or Ann to perform specific tasks on a daily basis so I don't intend to start setting out a daily routine as it does not seem possible to get something like this to work due to the diverse nature of the industry.

> …Dogs,
>
> Pit bull has been dead for approx. 5 months. Not an issue. As I stated I am aware of the law.
>
> If you mentioned it to Mark then that is good and I don't need to repeat it.
>
> If you have not mentioned it to Troy then I assume it is not a great concern to you. Regardless of whether Troy or you talk to each other is a minor issue. Troy is a 28 year old man not some kid who is told who to talk to. The issues were the dogs.
>
> The ranger put it any way you like. It was taken as a threat and don't worry no one has any doubt that this is what you will do. Just like the safety and OH&S I know you will use what ever it takes to get your own way.
>
> Your comment about me instructing Troy or Mark not to do as you ask is the biggest line of bullshit I have heard. Let me know when this occurred. Your imagination must be working overtime to come up with this statement. Stick to facts.
>
> …Just like I said these letter [sic] cause nothing but trouble.
>
> As I have stated previously nothing I do will ever be right or to your satisfaction. Every time I think things are getting better you start on another round of problems. You don't hesitate to make derogatory comments. I am not out there to satisfy you or anyone else I am there to help as much as possible and get things done.
>
> You have a great tendency to dwell on minor issues and it is very frustrating and time wasting.
>
> You find fault in every aspect of anything that is done on the farm unless you are the one that instigates it.
>
> You go about any project that you see fit without consulting anyone but this is ok. But everyone has to answer to you.
>
> You say you are being left out of the decision making why don't you take a good look at this and let me know what decisions you are being denied. I have asked this question on numerous occasions but never had a response. And will probably not get one this time but unless you point out specific situations then I will never be able to fix them.
>
> I realise all this will be my fault but I have learnt to live my short comings and as I don't need you or any one else to judge me it is pretty easy to live with. I made a conscious effort while I was home to try and stick to business and hopefully get things working on a manageable basis but no chance. I can see now you don't want things to run smoothly you only want it your way well this does not work. Lets [sic] get it over with and put the place on the market and you can go your way and I will go mine."

(*Exhibit RW2*)

50 Ronald Watts was in Augusta on 9 October 2003, when the Applicant telephoned him and asked him to register Diesel. He testified that he could not recall having any discussion with his other son, Troy, about the dogs but that he probably did tell the Applicant to register Diesel. Ronald Watts, however, conceded that he did not telephone Norbert van Heerwaarden and tell him he had registered Diesel on 9 October 2003.

51 Ronald Watts played no part in the termination of employment of the Applicant. When he was handed a copy of the termination letter he was told by Norbert van Heerwaarden, "That's it, finished, no discussion." Mr Watts said that he had hoped to resolve the issue with Norbert van Heerwaarden as the Applicant was employed by the partnership and not by Norbert van Heerwaarden as a sole employer. He said, however, that did not occur and his company later employed the Applicant. When the Applicant's employment was terminated by Norbert van Heerwaarden there was no one who could do the Applicant's share of work on the farm, so it was necessary for him (Ronald Watts) to employ the Applicant to keep the farm going. Ronald Watts says that the Applicant was unfairly dismissed and that the Applicant worked the additional hours for which he is claiming payment. He, however, conceded that it was agreed the Applicant would be rewarded for working those extra hours by payment of a bonus once the farm became profitable.

52 After the Applicant's employment was terminated by the Respondent, Ronald Watts made arrangements for workers' compensation cover for the Applicant. On the application form he indicated to the insurance company that the wages to be paid to the Applicant was $25,000 per annum. Ronald Watts says he did not pay the Applicant that amount and he was not sure why that figure was indicated on the form other than to say that was the cheapest cover available.

53 Ronald Watts says that prior to the purchase of the property he was "very good friends" with Norbert van Heerwaarden. They had no problem communicating and had a lot of good times together. However, this matter has been unfortunate and Norbert van Heerwaarden has been a very difficult person to deal and communicate with whilst they were in business together. He said that if Norbert van Heerwaarden had not wanted to hire the Applicant at the start of the project, he should have said so.

54 Ronald Watts maintains that the Applicant was not an unsatisfactory employee and the farm has not been a failure. At the time of the hearing Ronald Watts had negotiated an agreement with Norbert van Heerwaarden to purchase his share of the farm.

Evidence given on behalf of Norwatch Pty Ltd

55 Norbert van Heerwaarden testified that he joined the army at the age of 17 and retired after 21 years as a flight officer class 2. He then joined the Australian Protective Service in Sydney and retired as a sergeant 12 years later in late 1997. He then purchased a business in partnership with a friend and opened a watch kiosk in Woollongong. He sold that business and moved to Western Australia when the Capel Marron farm was purchased.

56 Norbert van Heerwaarden testified that initially Ronald Watts and the Applicant were very enthusiastic about working together but whilst he (Norbert van Heerwaarden) was still residing in New South Wales his relationship with the Applicant changed. He said he did not know what caused the change but it was probably because he questioned the Applicant's suitability to work as a manager. After he discussed this with his sister, Anna Watts, the Applicant was much cooler towards him and he had great difficulty communicating with the Applicant. He says that prior to commencing the business he asked the Applicant to send information to him so he could work on a business plan or if he (the Applicant) had a business plan, to pass it on, but no information was forthcoming (*Transcript page 134*).

57 Norbert van Heerwaarden said from the day the business commenced he knew he would "have to take three or four paces back" because the Applicant had not been employed as an employee for a long period of time. He thought it was going to be difficult for the Applicant to adjust. He found it rather annoying that the Applicant did not turn up for work until 9:00 am or until 10:00 am in the morning but Norbert van Heerwaarden says that he "kept his mouth shut" for the first couple of weeks. Norbert van Heerwaarden claims that the Applicant's hours had been discussed and fixed as part of the terms of the workplace agreement. He said the Applicant's hours were to be 38 hours per week and to be worked mainly Monday to Friday. He says that if there was a requirement to work at night then the shifts would be split, meaning some work would be done in the morning, then the Applicant would have a break, and work at night if necessary. (*Transcript page 135*).

58 However the workplace agreement states:

> "The standard hours of work for a full time week shall be 38. The hours may be worked on any day from Monday to Sunday inclusive. Additional hours worked will be paid by bonus in lieu of pay when worked. The bonus would be paid when the farm returns a profit. The start and finish times on most days would be 8 AM to 5 PM, however, owing to the nature of the work, eg night feeding, that some days may extend well into the night necessitating late starts the next day. During harvesting in particular the hours will be arranged and as agreed to by the employers and employee. Each week the employee will have two days off as arranged between the employers and employee."

59 Norbert van Heerwaarden said the terms of the workplace agreement were developed by him. He gave the document to Ronald Watts, who advised him by email that he would ask the Applicant to look at the workplace agreement and inform the Applicant that if he had any issues with the document that he (the Applicant) should see him (Norbert van Heerwaarden) to discuss and resolve those issues. The workplace agreement was issued to the Applicant in mid January 2003, before they commenced work at the farm. Norbert van Heerwaarden said he told the Applicant to, "Have a good look at it, read it over the weekend, and I'd like it signed and back again on Monday." (*Transcript page 137*). Norbert van Heerwaarden says the Applicant never signed the workplace agreement nor returned the document to him. The Applicant did not provide him with a reason for not signing it. Sometime prior to issuing the warning letter, Norbert van Heerwaarden says that he spoke to the Applicant about the workplace agreement and told him that if the agreement was not signed he would remain on probation because he had no contract or agreement under which he could work and as such sacking him would be far easier. He said the Applicant commented, "Doesn't matter, you can't sack me anyway. You haven't got the authority." (*Transcript page 142*) When cross-examined by Ronald Watts, about the workplace Agreement, Norbert van Heerwaarden conceded that he informed Ronald Watts that the Applicant either signs the document or "knows where the gate is". (*Transcript page 186*).

60 After the first couple of weeks Norbert van Heerwaarden thought it was about time they started getting into a routine so each person knew what the other was doing during the day. He thought they should start work together in the morning so the work could be adjusted accordingly as time went on. The first few weeks of work required a massive cleanup of the living quarters and the hatchery. He said they all worked very hard during this time but after this initial period he noticed the Applicant was indifferent to normal time schedules, so he spoke to the Applicant about his timekeeping. He said things did not change, so he spoke to Ronald Watts about it on 18 February 2003. He says that Ronald Watts told him he would speak to the Applicant about his attitude to work.

61 Norbert van Heerwaarden says that it appeared to him, the Applicant had his own agenda as to what needed to be done on the farm and he (Norbert van Heerwaarden) was confused as to who was managing the farm. He said he was supposed to set the Applicant's duties according to the agreement he had reached with Ronald Watts but in practise the Applicant was not there in the morning to receive instructions. After he spoke to Ronald Watts about the Applicant's timekeeping, the Applicant started work at 8:30 am for a period of time. He did not know why 8:30 am was selected because they were office hours, not farm hours.

62 Norbert van Heerwaarden says he wanted to issue the warning letter to the Applicant in April 2003, because "he was at his wit's end to try and get some sort of normality on the farm". He said he spoke to the Applicant on a number of occasions and informed him that he wanted him to look at his attendances but he (Norbert van Heerwaarden) got "aggro" back from the Applicant. Norbert van Heerwaarden prepared the warning letter and gave it to Ronald Watts and Anna Watts. A couple of days later Ronald Watts told him that he would not support the warning and he did not agree with anything that was said in the letter. Norbert van Heerwaarden agreed that Ronald Watts told him that he could give the letter to the Applicant if he wished. Norbert van Heerwaarden did not do so.

63 Norbert van Heerwaarden says that after discussions with Ronald Watts about the warning letter he came to the conclusion that he had wasted his time and should not have gone into business. He was disillusioned and switched off. He hoped matters would change, so he kept working but the situation progressively deteriorated and the Applicant continued to do what he wished on the farm. (*Transcript page 143*). However, he rejected Ronald Watts' proposal in May 2003, to purchase the entire business, as he thought the farm was a going concern.

64 Sometime after May 2003, and after the work experience student, Josh, had completed his work experience, he (Norbert van Heerwaarden) was approached by a teacher from a local school for another child to work on the farm. Norbert van Heerwaarden agreed. On the first day the new work experience student turned up for work, he found a note on his desk from the Applicant stating that he (the Applicant) refused to supervise the work experience student.

65 In relation to the dogs, Norbert van Heerwaarden says that he was concerned that both the Applicant and his brother, Troy, had their unregistered dogs on the property. A sign on the front gate of the property says, "Beware, savage guard dogs". The sign had been left by the previous owners of the property. He had received complaints from people coming on to the property about Diesel. Norbert van Heerwaarden says that Diesel, as a kelpie, had a habit of coming up behind people. He also testified that he had been concerned about Troy Watts' dog, as it had approached another dog in an aggressive manner. He spoke to their insurance company and was informed that they were not covered under any form of insurance for damage caused by the dogs unless the dogs were registered.

66 Norbert van Heerwaarden says that he asked the Applicant to register Diesel and he agreed. Norbert van Heerwaarden waited for sometime to pass. Diesel was still not registered, so he spoke again to the Applicant about the matter and the Applicant informed him that he was not registering Diesel. Norbert van Heerwaarden raised the issue with Ronald Watts because he felt he could not get a satisfactory response from the Applicant. (*See letter dated 22 September 2003*). Norbert van Heerwaarden then prepared and gave the letter, dated 6 October 2003, to the Applicant. He later gave another letter to the Applicant and Troy Watts, on 8 October 2003. He found that letter on his desk with a notation from the Applicant stating that he refused to register Diesel. Norbert van Heerwaarden wrote his response on the letter and left it on the desk for the Applicant to read. He later spoke to his brother, Franz van Heerwaarden, about the matter to obtain Franz's opinion about the issue as he was concerned that he was "overstepping his bounds".

67 A few days after Norbert van Heerwaarden spoke to his brother, Franz, he was confronted by the Applicant. On Friday, 10 October 2003, he heard the Applicant's vehicle drive past the house, increase speed and skid to a halt near the hatchery. The Applicant drove back to the shed and again the vehicle came to a skidding halt. The Applicant got out of the vehicle and "stormed up" to him. The Applicant was very angry about him (Norbert van Heerwaarden) speaking to Franz van Heerwaarden about registering Diesel. (*Transcript pages 132 to 133*). Norbert van Heerwaarden says that he does not specifically recall the entire conversation. However he recalled that the Applicant said, "Who the f… do you think you are talking to other people about me?" to which he (Norbert van Heerwaarden) replied that he would speak to whomever he wished to obtain information as he saw fit. Norbert van Heerwaarden says that the Applicant continued to abuse and swear at him and called him a "f…ing w…ker". He suggested to the Applicant that he leave. Norbert van Heerwaarden went back into

his office to record the conversation. He later observed the Applicant walk past the office more than once and make rude gestures. Norbert van Heerwaarden said he made some notes of his conversation with the Applicant. However, he did not produce those notes at the hearing.

68 Over the weekend Norbert van Heerwaarden came to the view that he was not prepared to be spoken to in that manner by the Applicant, so he prepared the termination letter. He gave it to the Applicant on Monday, 13 October 2003. When he handed the letter to the Applicant he gave a copy to Ronald Watts at the same time. Norbert van Heerwaarden says that the Applicant screwed up the letter and threw it in the bin and said, "You can't f…ing sack me". Ronald Watts gave a similar response. Norbert van Heerwaarden later received a note from Ronald Watts, which indicated that the Applicant would continue working until the issue was resolved but Norbert van Heerwaarden was not prepared to resolve the issue. He later received a letter from Ronald Watts terminating the partnership after he (Norbert van Heerwaarden) cancelled the Applicant's pay. After Norbert van Heerwaarden, had discussions with Ronald Watts, they made arrangements for the Applicant to be paid one week's pay in lieu of notice and accrued annual leave.

69 In relation to the Applicant's claim for extra hours, Norbert van Heerwaarden says that the Applicant's conditions of employment were that if the Applicant worked additional hours he was to take time off the next day or within that week. The only occasion overtime was discussed and approved was when they were netting the ponds.

70 As to work in the evening, Norbert van Heerwaarden maintained that it would take approximately an hour to complete the feeding. Further, it is his view that feeding can take place in the late afternoons rather than at dusk. He agreed that pumping needed to be carried out in the evenings and on the weekends. As to trapping marron at night time, he says he asked the Applicant what the trapping was for and was informed by the Applicant that he was collecting data on pond numbers, sex and weight but the Applicant never provided any data to him. He agreed that all the trapping was carried out at night and conceded that trapping during the day is not as effective as night trapping because marron are night feeders. He agreed trapped marron were needed for breeding in the hatchery. Norbert van Heerwaarden conceded that he did not feed the marron on the farm until after the Applicant was dismissed.

71 As to the extra hours, which the Applicant claims he worked, Norbert van Heerwaarden says that he cannot say exactly what time the Applicant started work in the mornings because he, himself, was usually up working by at least 7:00 am. He, however, maintains that any extra hours worked by the Applicant were not authorised by him.

72 Norbert van Heerwaarden did not give any evidence about what tasks he performed in the business.

73 Wade Bloffwitch, a community ranger with the Shire of Capel, testified that a dog called "Diesel" was registered by Ronald Watts on 9 October 2003. He also testified that he had spoken to Norbert van Heerwaarden about the requirements of the *Dog Act 1976,* prior to Diesel being registered.

74 Suzanne van Heerwaarden gave evidence. She is the wife of Franz van Heerwaarden. She gave evidence about an unrelated attack on one of her cats by Troy Watts' dog in December 2002. She also gave evidence about the argument between herself and the Applicant on 9 October 2003. The argument was in relation to the Applicant's refusal to register Diesel, which resulted in the Applicant being asked to leave her house and not return. Both Suzanne van Heerwaarden and the Applicant exchanged abusive words. She says the Applicant called her "a bitch".

75 Franz van Heerwaarden testified that he had a conversation with Norbert van Heerwaarden about Diesel a few days before the Applicant visited his home on 9 October 2003. He also testified that he had a conversation with the Applicant, about Diesel and the Applicant informed him that he was not going to register Diesel. He also gave evidence that there was an exchange of words between his wife, Suzanne and the Applicant. He was vague about the specific words used by his wife and the Applicant in the argument.

Legal Principles

76 The question to be determined by the Commission is whether the Respondent has exercised its legal right to dismiss the Applicant in such a way that the right has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (see *Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

77 The general principles of the valid exercise of the remedy of summary dismissal were considered by Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 where he observed at 287 and 289:

> "… since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service … I … think … that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and … therefore … the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions."

78 In this matter it cannot be disputed that the Applicant was summarily dismissed.

79 The onus is on the Applicant to prove that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove in a case of summary dismissal that the dismissal is justified. (*Newmont Australia Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

80 It is well established that implied into an employee's contract of employment that they are required to comply with a lawful order of their employer. Wilful disobedience of a lawful order may constitute grounds for summary dismissal (*Adami v Maison De Luxe Ltd* (1924) 35 CLR 143). To do so the disobedience must strike at the essence of the contract of employment, that is, it must be inconsistent with the continuing relationship of employer/employee.

81 As to whether the use of bad language can constitute grounds for dismissal Salmon, C in *The Shop, Distributive and Allied Employees' Association of Western Australia v David Maguire t/as Handy Dans Discount and Hire* (1992) 73 WAIG 195 considered the observations of Edmund Davies, LJ that:

> "In Wilson vs Racher (Court of Appeal) [1974] ICR 428, the use of bad language by an employee towards his employer was the central issue in the matter under consideration. Edmund Davies LJ made the following observation, which is of a general kind, at p.430:

> What would today be regarded as almost an attitude of Czar-serf, which is to be found in some of the older cases where a dismissed employee failed to recover damages, would, I venture to think, be decided differently today. We have by now come to realise that a contract of service imposes upon the parties a duty of mutual respect."

82 In *Railway Appeal Board* (1999) 21 WAR 1 at [79] (9) Malcolm CJ observed that the use of bad language by an employee does not necessarily justify termination of the contract of employment. In particular he said:

> "Insulting or objectionable language may constitute misconduct depending on the standards of conduct and language used in everyday intercourse, in particular, at that workplace and accounting for the "give and take atmosphere" of the modern workplace: see *Drury v BHP Refractories Pty Ltd* (1995) 62 IR 467 at 473, which refers to *BHP v SUA* [1975] AILR par 255; *Wilson v Racher* [1974] ICR 428; *FLAIEU (NSW) v Ettalong Beach War Memorial Club Ltd* [1977] AILR par 259; *John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association* (1973) 15 AILR par 323; *Farley v Lums* (1917) 19 WALR 117; *Pepper v Webb* [1969] 1 WLR 514."

83 Malcolm CJ also implied at [79] (8) that dismissal for misconduct which occurs off duty may be relevant if it impacts on the employment contract. He held:

> "It is vital to begin the inquiry by ascertaining what work the employee is required to perform and what is essential to the contract, and also to be satisfied that the breach manifests an intention not to perform and contract in future. See also Privy Council in *Jupiter General Insurance Co Ltd v Andeshire Bomanji Shroff* [1937] 3 All ER 67 at 73-74, per Lord Maugham."

84 In the "Law of Employment" (5th Ed.) the learned authors Macken O'Grady Sappideen Warburton point out at 213 – 214:

> "The use of insulting and objectionable language may constitute misconduct. The standard is not that of the dainty and genteel but the standard applying in the "give and take atmosphere" of the modern workplace. If abusive language is common at the workplace its use by an employee would not normally be regarded as sufficiently serious to warrant dismissal unless it is directed to challenging the authority of a supervisor. This is on the basis that abuse may justify dismissal where it interferes with the proper performance of the employment. Insult is very often coupled with disobedience and insolence and rarely is there a single act but usually a course of conduct culminating in a final showdown. Illustrative is the case of *Pepper v Webb* [1969] 1 WLR 514 where the plaintiff was employed as gardener. Over a period of three months, his work deteriorated and he became inefficient. On the day of dismissal he was directed to put in some plants, which he refused to do retorting "I couldn't care less about your bloody greenhouse and your sodding garden." Although viewed singly his conduct would not have justified dismissal, the course of misconduct was held to be sufficiently serious to justify immediate dismissal."

Credibility and Findings

85 Having heard the evidence given by all the witnesses I found the evidence given by Ronald Watts to be more reliable than the evidence given by any other witness except Wade Bloffwitch, who is an independent witness whose evidence was not challenged by any party. Ronald Watts' demeanour was open and honest. He answered questions without hesitation. His answers were not equivocal or belligerent, nor was he argumentative. Franz van Heerwaarden gave his evidence in an open way without exaggeration. He was, however, vague about some matters. Suzanne van Heerwaarden obviously harbours feelings of hostility toward the Applicant and cannot be regarded as an impartial witness. At the end of the day the evidence given by Franz van Heerwaarden and Suzanne van Heerwaarden is of marginal relevance. When regard is had to the evidence given by the Applicant, Franz van Heerwaarden and Suzanne van Heerwaarden, whether the Applicant called Suzanne van Heerwaarden "a bitch" is equivocal. (See *transcript page 196*.) Plainly, both the Applicant and Suzanne van Heerwaarden used insulting language. As to Norbert van Heerwaarden, when he was cross-examined he was argumentative and did not answer questions directly. I did not, however, find him to be a dishonest witness. He was vague about a number of matters. I found the Applicant to be not entirely reliable. He too, was vague about a number of issues. I do not think he has been entirely honest about all matters. In particular, I do not accept that he did not converse with his father, Ronald Watts, or with Norbert van Heerwaarden about registering Diesel, until he received a letter from Norbert van Heerwaarden on 6 October 2004. In the letter from Ronald Watts to Norbert van Heerwaarden, dated 24 September 2003, Ronald Watts makes it clear that he had discussed registering Diesel with the Applicant. For these reasons, I prefer the evidence given by Norbert van Heerwaarden to the evidence given by the Applicant, where their evidence departs in relation to the events that occurred from late September 2003 until the Applicant's dismissal and the evidence given about the Applicant's attitude to Norbert van Heerwaarden. I do not, however, accept Norbert van Heerwaarden's contentions about the Applicant's duties or hours of work. Plainly, the Applicant was the only person who worked on the farm with experience in farming marron. I accept his knowledge of what was required to be carried out and when it was appropriate to carry out those tasks, was competent.

86 I do not accept that the continuing demand by Norbert van Heerwaarden that the Applicant commence work by 8:00 am was reasonable. I accept the Applicant's contention that his diary, establishes that until early August 2003, he worked at night and weekends. There was no reliable evidence adduced on behalf of Norbert van Heerwaarden that particular tasks were required to be carried out in the morning. Further, the express terms of the workplace agreement proposed Norbert van Heerwaarden contemplate late starts. Consequently, I find that the demand to commence work at 8:00 am was capricious. It is my view that there is a mutual duty vested in both employers and employees of trust and confidence, whereby they are obliged not to engage in conduct likely to undermine the trust and confidence required by the employer/employee relationship.

87 In this matter it was agreed between the owners of the business that Norbert van Heerwaarden would be the day-to-day manager of the Applicant. Apart from the issues raised in the warning letter, it appears clear that Norbert van Heerwaarden did not substantially seek to exercise that right of control. He says that he gave up trying because of the Applicant's attitude. Having heard the evidence, it is apparent that the Applicant did not accept that Norbert van Heerwaarden had the right to give him directions about matters, such as, whether he was to supervise the second student or register Diesel. Clearly, the Applicant wilfully refused to perform these instructions.

88 Whilst I have concluded that Ronald Watts is the most reliable witness, his conduct was unsupportive of Norbert van Heerwaarden with managing the Applicant in his role as an employee and did not assist the partnership in fulfilling their duty of mutual trust and confidence.

89 I do not accept the contention that it can be inferred from the evidence that the Applicant was given the warning letter in April 2003. It is plain to me that the Applicant received little direction from Norbert van Heerwaarden until late September 2003 or early October 2003, when he was requested to register Diesel.

90 I agree the Applicant's refusal to register Diesel was unreasonable and in breach of his duty as an employee to obey lawful instructions. Although, he later complied with the direction, he did not advise Norbert van Heerwaarden, on Friday, 10 October 2003, that his father had done so. Instead, he verbally abused Norbert van Heerwaarden for discussing the issue with Franz van Heerwaarden.

91 Given that Norbert van Heerwaarden and Ronald Watts did little to make it plain to the Applicant that he was an employee and the partnership was his employer, did the Applicant's behaviour warrant summary dismissal for wilful misconduct? Were there any surrounding circumstances which mitigated the effect of the Applicant's conduct?

92 In answering those questions, it is plain that I should take into account the fact that the parties were closely related and the farm was the home of both the Applicant and Norbert van Heerwaarden. In considering the circumstances, I do not consider it relevant whether Friday, 10 October 2003, was the Applicant's day off or not, as the issue relating to the Applicant's refusal to register Diesel did, in my view, impact on his employment contract. Diesel resided on the property, which was his (the Applicant's) place of work.

93 Whilst I accept the Applicant had refused to comply with Norbert van Heerwaarden's instructions to supervise the second student and to register Diesel, I accept that the direction to start work at 8:00 am was unreasonable. This direction was the principal cause of discontent between the parties. In light of the fact that the Applicant's "Conditions of Employment" and the workplace agreement contemplated that the spread of 38 hours per week was to be from Monday to Sunday, with flexibility in start and finish times, plainly this direction was unreasonable. I do not, however, accept the contention that the terms of the workplace agreement formed part of the Applicant's employment conditions.

94 It is apparent from the Applicant's evidence that he did not accept that Norbert van Heerwaarden was his manager and as such, had a right to direct him (the Applicant) as his employer. It appears his attitude had support from his father. In Ronald Watts' letter to Norbert van Heerwaarden, dated 2 October 2003, Ronald Watts states in relation to the Applicant that the Applicant has not been under direction from him (Ronald Watts) or Anna Watts, to perform specific tasks on a daily basis and he (Ronald Watts) did not intend to start setting a daily routine. At the same time, I am not satisfied that the Applicant was not competently carrying out his duties. There is no evidence before me that shows the marron farm was not on track towards becoming a profitable business. Norbert van Heerwaarden says he rejected Ronald Watts' offer to purchase in May 2003, because the business was a "good going concern". Yet despite the agreement with Ronald Watts, Norbert van Heerwaarden did not manage the day-to-day activities of the Applicant.

95 It is plain that at times Norbert van Heerwaarden, Ronald Watts and the Applicant all breached the duty of mutual trust and confidence so as to slowly erode the continuing relationship of employer and employee. The relationship of the partnership (as employers) and employee was bound to come to an end. The Applicant's attitude towards Norbert van Heerwaarden was intransient and was not going to change. Norbert van Heerwaarden never assumed control as an employer. His attempts to do so were thwarted in a large part by his unreasonable demands and Ronald Watts had his own conflict with Norbert van Heerwaarden.

96 In light of these circumstances, did the actions of the Applicant in relation to his dog, Diesel, in the last few weeks of his employment cross the line so that the only logical necessary step was summary dismissal? The answer to that question, in my view, is yes. This was not a one-off incident. It was the culmination of a course of conduct by the Applicant in which he made it plain he did not accept that Norbert van Heerwaarden had a right to "control" as one of his employers. Such conduct is a repudiation of the employment contract. Whilst Ronald Watts, on behalf of Ron Watts Investments Pty Ltd trading as Capel Marron, contends that the Applicant was unfairly dismissed, having heard the evidence, I do not accept his contention. In the circumstances I am satisfied that Norwatch Pty Ltd has proved that the summary dismissal was justified.

97 In relation to the Applicant's claim that pursuant to his contract of employment he was entitled to be paid for 603 hours of work, I am satisfied he worked those extra hours but am not satisfied that the Applicant has a legal entitlement to be paid for those hours of work. His conditions of employment provided that he was to work a 38 hour week and that he would be paid a bonus in lieu of excess hours worked when the farm commences to produce profits. The terms of the contract do not provide for payment for each extra hour worked. The terms of the contract only provide for an unquantified bonus, which is not payable until the farm commences to produce profits. There is no evidence before me on which I could draw the inference that the farm has commenced to produce profits. Accordingly, it is my view that the Applicant's claim under s 29(1)(b)(ii) fails.

98 For the reasons set out above I will make an order dismissing the Applicant's application.

2004 WAIRC 13192

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK WATTS
	APPLICANT
	-v-
	NORWATCH PTY LTD AND RON WATTS INVESTMENTS PTY LTD TRADING AS CAPEL MARRON
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 29 OCTOBER 2004
FILE NO.	APPL 1525 OF 2003
CITATION NO.	2004 WAIRC 13192

Result	Section 29(1)(b)(i) and (ii) application dismissed
Representation	
Applicant	Applicant in person
Respondent	Mr D Smith (of Counsel) for Norwatch Pty Ltd Mr R Watts on behalf of Ron Watts Investments Pty Ltd

Order

HAVING heard Mr M Watts, the Applicant and Mr D Smith, of counsel, and Mr R Watts on behalf of the Respondent, 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.) J H SMITH,
[L.S.] Commissioner.

2004 WAIRC 13257

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN MARK WINDASS
	APPLICANT
	-v-
	WAMMCO INTERNATIONAL
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 10 NOVEMBER 2004
FILE NO.	APPL 431 OF 2004
CITATION NO.	2004 WAIRC 13257

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 to be applied - application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), (2) & (3).
Result	Application dismissed.
Representation	
Applicant	In person
Respondent	Mr M J Darcy (as agent)

Reasons for Decision

1 This is an application under s 29(3) of the *Industrial Relations Act 1979,* ("the Act") for an extension in time for filing an application under s 29(1)(b)(i) of the Act, by Steven Mark Windass ("the Applicant") that he has been harshly, oppressively or unfairly dismissed by WAMMCO International ("the Respondent") on 30 October 2003.

2 The parties agreed the Commission could determine this application on written submissions and contentions compiled by the parties.

3 The Respondent says the Applicant's employment was terminated on 2 November 2003.

4 The Commission's file records that the Applicant completed a Form 1 application and particulars of claim on 24 November 2003. The Applicant lives in Katanning. The application was filed in the Commission on 2 December 2003. If the Applicant's employment was terminated on 30 October 2003, then his application was filed five days out of time. However, if the Respondent is correct and his employment was terminated on 2 November 2003, the application was filed one day out of time.

5 It is common ground that the Applicant's employment commenced on 24 September 2003. The Applicant was employed as a knife hand. The Applicant says that his employment was terminated because he had carpal tunnel syndrome. He says that his employment was terminated when he presented a medical certificate stating he was unfit for work.

6 The Respondent in its notice of answer and counter proposal says that after the Applicant commenced employment, he was absent on five occasions and his employment was terminated on 6 October 2003. The Applicant made an approach to the Respondent, pleaded for another opportunity, admitted his wrong doing and assured the company "it would not happen again" if he was given another chance. The Applicant was re-employed on 8 October 2003. However, after reinstatement he was absent on four occasions. Consequently, the Applicant's employment was terminated on 2 November 2003. The Respondent says in its notice of answer and counter proposal that the Applicant's employment was under the terms of the WAMMCO International (Katanning) AMIEU Processing Agreement (2001) AG 263 of 2001 ("the industrial agreement"). The Respondent says it was entitled to terminate the Applicant's employment pursuant to clause 2.1.4 of the industrial agreement, which provides for a probationary period of employment of 45 days and clause 2.1.11.6, which provides that if an employee is absent for more than three (3) consecutive working days without notifying the Respondent, he will be considered to have abandoned his employment and his services may be terminated.

7 In written submissions and contentions filed on behalf of the Respondent opposing the extension of time, the Respondent says that the Applicant's employment was terminated initially on 6 October 2003, due to his lack of attendance having been absent on five occasions without notifying the Respondent. After he was re-employed on 8 October 2003, he was again absent from work from 28 October 2003 to 31 October 2003, without making any contact with the Respondent. On 31 October 2003, the Applicant attended the office of the Respondent at Katanning and produced a medical certificate dated 30 October 2003, which stated he was unfit to attend work from 30 October 2003 to 7 November 2003, inclusive. The reason for unfitness for work was stated in a medical certificate from Dr Shazia Qureshi in Katanning, in which the doctor states that the Applicant has carpal tunnel syndrome of the left hand and going to see Dr Lai (surgeon) for "the management". The Respondent says it contacted the Applicant's doctor, Dr Qureshi, who advised that the Applicant's condition was "not workers compensation". As the Applicant had again been absent from work without contacting the Respondent, the Applicant was informed that his employment was terminated in accordance with the provisions of the industrial agreement. The Respondent, however, provided a Workers' Compensation Medical First Certificate completed by Dr Lai and the Applicant on 12 November 2003, in

which the Applicant states that he reported the occurrence of his symptoms to the Respondent at 11:00 am on 29 October 2004, by making a report to Mr Rodd Sheen.

8 The Respondent says the Applicant's claim for an extension in time should not be granted, as this claim was made some six months after his employment was terminated and the termination was in accordance with the provisions of the industrial agreement. Further, the Respondent says that the Applicant says in his particulars of claim that he is not seeking reinstatement, as he is unable to carry out his work duties. The Respondent also says that it would be prejudiced if an extension of time was granted, as the witnesses it wishes to rely upon have since left the company and the Respondent would have difficulty locating them. In particular, it says that Mr Sheen no longer works for the Respondent and his location is presently unknown.

9 The Commission records that although the Applicant's application was filed on 2 December 2003, the Applicant's claim was not progressed because he had not paid a filing fee. An application for waiver of the filing fee was sent to the Applicant on 2 December 2003. The Applicant subsequently filed the application for waiver of the filing fee on 30 March 2004 and the fee was waived by the Commission on that day. The Applicant served the application on the Respondent on 6 April 2004.

10 The Applicant says in a submission that the reason why he did not file his application until 2 December 2003, was because during the time he was employed by the Respondent and at and after the time he was terminated, he was going through a family relationship break up. As a result, he was unable to pay the filing fee and because of the problems within his household, it was very hard for him "to make things happen" and he is "not very good with paperwork and what to do".

Legal Principles

11 In *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, Heenan J with whom Steytler J agreed held at [74] that the principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, should be applied when the Commission is considering whether to accept a referral of a claim for unfair dismissal out of time under s 29(3) of the Act. Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (op cit) set out these principles when considering whether to extend time to bring an application as follows:–

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

12 In relation to fairness, Heenan J in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) after citing the forementioned principles went on to observe:–

> "I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims."

13 Whilst the merits of the Applicant's claim may or may not be relevant, Steytler J at [25], in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit), observed:–

> "The Commissioner is empowered to accept a late referral if it would be 'unfair' not to do so and, while an assessment of the merits 'in a fairly rough and ready way' (see *Jackamarra v Krakouer* (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s 29(3) which imports any obligation on the part of an applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s 27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success."

14 Clause 2.1.11.6 of the industrial agreement provides that "In the event that any employee is absent for more than three (3) consecutive working days without notifying the employer, they will be considered to have abandoned their employment and their services maybe terminated immediately by the employer". Pursuant to s 170CK(2) of the *Workplace Relations Act 1996*, an employer must not terminate an employee's employment for anyone or more of the following reasons, which include temporary absence from work because of illness or injury within the meaning of the *Workplace Relations Regulations.* Regulation 30C(1)(2) of the *Workplace Relations Regulation* provide:

> "(1) For paragraph 170CK (2) (a) of the Act, an employee's absence from work because of illness or injury is a temporary absence if:
>
> (a) the employee provides a medical certificate for the illness or injury within:
>
> (i) 24 hours after the commencement of the absence; or
>
> (ii) such longer period as is reasonable in the circumstances; or
>
> (b) the employee:
>
> (i) is required by the terms of an award, a certified agreement, an AWA, a State award, a State employment agreement or an old IR agreement to:
>
> (A) notify the employer of an absence from work; and
>
> (B) substantiate the reason for the absence; and
>
> (ii) complies with those terms.

(2) Subregulation (1) does not apply if:

(a) the employee's absence extends for more than 3 months, unless the employee is on paid sick leave for the duration of the absence; or

(b) the total absences of the employee, within a 12 month period, whether based on a single or separate illnesses or injuries, extend for more than 3 months, unless the employee is on paid sick leave for the duration of the absences.".

15 Clause 5.2.21 of the industrial agreement provides:

"The employee will, prior to 12 noon on the first day of absence inform the employer of the nature of the injury or illness and the estimated duration of the absence."

16 However clause 5.2.2.2 provides:

"Should the employee not observe the notice obligations prescribed under this sub-clause the employee shall not be entitled to be engaged on the employees next ordinary day or shift should that be the desire of the employer."

17 Pursuant to the operation of s 170CK of the *Workplace Relations Act*, and reg 30C of the *Workplace Relations Regulations*, the Respondent may have been entitled to terminate the Applicant's employment under to the terms of the industrial agreement.

Conclusion

18 Having considered all the matters put before me, I am of the view I should not exercise my discretion to grant the application to extend time to file an application for unfair dismissal out of time. The delay in filing the application was short.

19 Whilst I am satisfied that at the time the Applicant was dismissed he was under stress because of his family circumstances, I am not satisfied that the Applicant has provided an acceptable explanation or details of how the relationship problems prevented him from filing his claim in time. Whilst the Respondent provided medical evidence that the Applicant suffers form carpal tunnel syndrome, I do not accept that this syndrome prevented him from filing a claim in time. The Applicant claims that he is "not very good with paperwork", this is an unsatisfactory reason for the delay in filing the Application, making an application for waiver of the filing fee and serving the application. Whilst the Applicant filed the application on 2 December 2003, he did not serve it until 6 April 2004. I am satisfied that the Respondent will suffer prejudice if the application is to proceed because the applicant delayed in serving the application, witnesses are now unavailable.

20 As stated in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) the Commission is required to have regard to considerations of fairness, between the Applicant and other persons in a like position, which includes having regard to the public interest and the due and efficient administration of the jurisdiction of the Commission. It is my view that in all the circumstances it is not in the public interest that the application to extend time be granted in the absence of an acceptable explanation of the delay.

21 I am satisfied that I should not make an order to extend time. Accordingly I will make an order dismissing the application.

2004 WAIRC 13258

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN MARK WINDASS
	APPLICANT
	-v-
	WAMMCO INTERNATIONAL
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 10 NOVEMBER 2004
FILE NO.	APPL 431 OF 2004
CITATION NO.	2004 WAIRC 13258

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr M J Darcy (as agent)

Order

HAVING heard the Applicant and Mr M Darcy, as agent, on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

ORDERS that this application be, and is hereby dismissed.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

2004 WAIRC 13283

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRAD JAMES WINMAR
	APPLICANT
	-v-
	CALLACABARDEE ABORIGINAL COROPORATION INC. AND DEPARTMENT OF HOUSING AND WORKS - GOVERNMENT OF WA
	RESPONDENTS
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 8 NOVEMBER 2004
FILE NO.	APPL 252 OF 2003
CITATION NO.	2004 WAIRC 13283

Result	Application to be dismissed for want of prosecution
Catchwords	Termination of Employment - Harsh, oppressive and unfair dismissal - Applicant no longer represented and not able to be contacted - Application dismissed for want of prosecution - Industrial Relations Act 1979 (WA) s.27(1)
Representation	
Applicant	No appearance
Respondent	Mr Andretich (of counsel) on behalf of Department of Housing and Works No appearance on behalf of Callacabardee Aboriginal Corporation Inc

Reasons for Decision
(Extemporaneous)

1 This claim of unfair dismissal has been set down in the following circumstances. After some considerable history the Commission listed this application, together with another linked application, for hearing and determination on 1 and 2 November 2004. Before that date arrived the Commission was advised by solicitors then acting for Mr Winmar that they no longer acted for him and indeed the Commission was advised they were no longer able to contact him. Accordingly, the hearing was abandoned and the Commission made two attempts to make contact with Mr Winmar.

2 The first of those attempts was a letter sent to No. 38A Hobbs Avenue in Como, an address provided by his former solicitors, asking Mr Winmar to contact the Commission to advise whether or not he wished to proceed with his application. That letter was returned unopened to the Commission and as far as we know unseen by Mr Winmar.

3 The second attempt was a letter addressed to him at the address set out in his Notice of Application which is now over 12 months' old. The letter to that address enclosed a Notice of Hearing setting the application down for today, 8 November 2004. That letter has not been returned.

4 Further, I am advised by my Associate that she has called Mr Winmar's name outside the court and he has not responded to that call. There is no appearance either by him or on his behalf.

5 In the circumstances, I am satisfied that the Commission has taken all reasonable steps open to it to notify Mr Winmar of these proceedings today and he has not attended. For the purposes of s.27(1)(d) of the *Industrial Relations Act 1979* I am satisfied that I can proceed to deal with this application in his absence.

6 In my view, the submission of Mr Andretich that an order should issue dismissing the application unless Mr Winmar contacts the Commission within a certain period of time, has much to commend it. The background to this matter as I understand it to be is that the dismissal which Mr Winmar has referred to the Commission occurred in January 2003. There were then two Registrar investigations in May and September 2003 and the record shows that those investigations did not result in any agreement. Mr Andretich has just now observed there have been if not endless negotiations then certainly many negotiations in an attempt to try to reach a resolution in this matter. In part any resolution was complicated by my limited understanding that while Callacabardee Aboriginal Corporation Inc may have been Mr Winmar's employer, the reason for his dismissal was the removal of any funds from it to enable wages to be paid. On that basis Callacabardee Aboriginal Corporation Inc had no choice other than to dismiss Mr Winmar. That gives some strength in my view to Mr Andretich's submission that there is not much opportunity to resolve this matter in favour of Mr Winmar especially so if he is now apparently no longer represented.

7 Mr Winmar's application was originally set down for hearing on 17 November 2003. The hearing was adjourned on the request of Mr Winmar's then solicitors on the basis that there be further discussions between the parties and also some research as to whether the correct identity of his employer was Callacabardee Aboriginal Corporation Inc or the Department of Housing and Works as is named in the Notice of Application.

8 These proceedings today have largely resulted from the Commission itself pushing to have some decision made by Mr Winmar as to whether or not he wishes to proceed with his application. It is a matter of record that there has not been a satisfactory indication from Mr Winmar that he does intend to proceed with his application.

9 Given that the solicitors he had engaged can now no longer contact him and given that he has not responded to the Notice of Hearing that was sent out to the address in his Notice of Application, I reach the conclusion that the application really ought be dismissed for want of prosecution. Indeed, the letter that was sent to Mr Winmar accompanying the Notice of Hearing for today stated, "In the event no contact is received from you prior to the hearing, and you do not attend the hearing, your claim will be dismissed".

10 It would seem to me prudent to allow Mr Winmar a further 48 hours to contact the Commission in the event that for example he was unfortunately delayed in finding his way here for 4:00pm today but does intend genuinely to proceed with his application.

11 So for all of those reasons my decision is that unless Mr Winmar contacts the Commission within 48 hours, that is by 4:00pm on Wednesday 10 November 2004 advising that he does indeed wish to proceed with his application then an order will issue that dismisses the application for want of prosecution.

12 I add that in the event that Mr Winmar does contact the Commission that will necessarily mean that he will need to indicate a preparedness to proceed and we will give an opportunity to Callacabardee Aboriginal Corporation Inc and the Department of Housing and Works to comment on that indication before we merely list it for hearing.

13 Order accordingly.

2004 WAIRC 13281

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRAD JAMES WINMAR
	APPLICANT
	-v-
	CALLACABARDEE ABORIGINAL COROPORATION INC., DEPARTMENT OF HOUSING AND WORKS
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 11 NOVEMBER 2004
FILE NO/S	APPL 252 OF 2003
CITATION NO.	2004 WAIRC 13281

Result	Application to be dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondents	Mr R. Andretich (of counsel) on behalf of the Department of Housing and Works No appearance on behalf of Callacabardee Aboriginal Corporation Inc

Order

HAVING HEARD Mr R. Andretich (of counsel) on behalf of the Department of Housing and Works and there being no appearance on behalf of the applicant and there being no appearance on behalf of Callacabardee Aboriginal Corporation Inc, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders -

THAT the application be dismissed for want of prosecution.

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

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Adam James Spanich	Rockingham Basketball Recreation Ass. Inc.	990/2003	Gregor C	Discontinued
Allison Elizabeth Marshall	Benara Nurseries	980/2004	Gregor C	Discontinued
Andrew Robert Royal	John Rex	1116/2004	Harrison C	Discontinued
Anil Sebastian Fernando	Western Australian Turf Club	487/2004	Wood C	Dismissed
Annabel Dove	Street Chef	1137/2004	Smith C	Discontinued
Anthony John Beesley	D.I.M Furniture WA Pty Ltd	843/2004	Gregor C	Discontinued
Anthony Thomas Stephens	Master Flow Australia	1248/2004	Coleman CC	Discontinued
Bradley John Hewton	D.I.M Furniture (Aust) Pty Ltd	870/2004	Gregor C	Discontinued
Brian Taylor	Wizard Home Loans	663/2004	Scott C	Discontinued
Cameron Gregor Plater	Orrsum Designs T/as Tubular Creations	935/2004	Harrison C	Discontinued
Cameron Leon Byers	Parks Industries Pty Ltd	1103/2004	Scott C	Discontinued
Carmel Patricia Wright	The Spina Bifida Association of W.A. (Inc)	716/2004	Kenner C	Discontinued
Caroline Emma Strong	Tennille Trevaskis and Donna Garraway	805/2004	Kenner C	Discontinued
Chloe Hoyne	Leeuwin Ocean Adventure	1061/2004	Smith C	Discontinued
Christopher John Sanford	Big Bang Creations	357/2004	Gregor C	Concluded
Clinton Troy Cairns	Firby Line Work	796/2004	Harrison C	Discontinued
Colleen Debra Marlow	Tropica Pty Ltd T/As Kleenmaid Osborne Park	922/2004	Gregor C	Discontinued
Daniel Steven Loly	Natra Pty Ltd	944/2004	Kenner C	Discontinued
Dannielle Zappia	Nick Geracitano	1103/2003	Kenner C	Discontinued

Parties		File Number	Commissioner	Result
Denise Karen O'Brien	Broad Construction	849/2004	Harrison C	Discontinued
Frank Zuccala	Cervantes Seafood Ltd	928/2004	Harrison C	Discontinued
Genevra Billcliff	Hospitality Pty Ltd t/as Best Western Palms Resort Broome	66/2004	Gregor C	Discontinued
Graeme Aldridge	Showfield Holdings Pty Ltd T/as Allfast Torque Converters	135/2004	Harrison C	Discontinued
Graham Frederick Jamison	City of Stirling	1173/2004	Gregor C	Discontinued
Grant Wayne Heard	Transworld Shipping t/as Portside TPT	1048/2004	Gregor C	Discontinued
Hugh Rawling	The Bunbury Diocean Trustees	718/2002	Harrison C	Dismissed
Ian Raymond Jones	Riverslea Holdings T/As ABC Blinds, Curtains, Security	712/2004	Kenner C	Discontinued
Irma Johanna Maria Lange	Sullivans Hotel Co Pty Ltd	1292/2004	Coleman CC	Discontinued
Jaqueline Beatrice Bushby	Tom Price Bakery	971/2004	Coleman CC	Discontinued
Jenny Johansson	Roohan Pty Ltd T/A Two Rocks Tavern	906/2004	Kenner C	Discontinued
Julia Mary Day	Australia Institute of Company Directors	920/2004	Smith C	Discontinued
Karen Christine Hunt	ABC Developmental Learning Centres Pty Ltd	831/2004	Harrison C	Discontinued
Karina Lee Gray	Mercy Care Ltd	864/2004	Harrison C	Discontinued
Kathi Leanne Howes	Laine Furnishings Pty Ltd	775/2004	Smith C	Discontinued
Kathy Ownsworth	Frank Kesner	1850/2003	Harrison C	Discontinued
Kellie Ann Smith	Joseph Agnello	651/2004	Beech SC	Discontinued
Kelly Rae Espinos	Barry John Espinos	982/2004	Kenner C	Discontinued
Kenneth Neil	Cooltech Enterprises Pty Ltd Trading As ACMV Contractors (ACN 104 356 658)	800/2004	Harrison C	Discontinued
Kirsten Michelle Glen	Prime Corporate Finance Pty Ltd	1583/2002	Harrison C	Discontinued
Leon Slobe	Citypak Packaging	1020/2004	Scott C	Discontinued
Lynda Patricia Jones	Terravital Pty Ltd T/A Mr Fresh Carine	893/2004	Harrison C	Discontinued
Lynette Joyce Robinson	Presbyterian Ladies' College	654/2004	Gregor C	Discontinued
Malcolm Burden	Boral Window Systems Ltd	1429/2003	Wood C	Discontinued
Maria Chin Lin Hall	Millar Management Services	538/2003	Harrison C	Dismissed
Mark Andrew Jones	Charalambos Papis	1047/2004	Harrison C	Discontinued
Michelle Lynette Russell	St Louis Retirement Estate Ltd	987/2004	Kenner C	Discontinued
Mirjana Bowden	Community Vision Incorporated	1022/2004	Smith C	Discontinued
Mr Adrian Hawksley	Newfield Central Pty Ltd	981/2004	Scott C	Discontinued
Mr Alan Charles Jones	Lenny's Commercial Kitchens Pty Ltd	1145/2004	Coleman CC	Discontinued
Mr Alexander Gutman	Swan Districts Football Club (Inc)	985/2004	Smith C	Discontinued
Mr Anthony O'Grady	Foodland Associated Limited	1085/2004	Coleman CC	Discontinued
Mr Barry Richardson	Davro Commercial Furniture Pty Ltd	890/2004	Wood C	Discontinued
Mr Bart Parsons	W.R Carpenter Properties Pty Ltd (ACN 000 018 173)	235/2004	Harrison C	Discontinued
Mr Colin Ross Fraser	SGS Australia Pty Ltd	817/2004	Gregor C	Discontinued
Mr Darrell Leonard Jackson	Galvin Hardware	983/2004	Kenner C	Discontinued
Mr David George Young	Yura Yungi Medical Service	1039/2004	Coleman CC	Discontinued
Mr David Godfrey Eckhart	Paul Albert, Director General, Department of Education and Training	1702/2003	Harrison C	Discontinued
Mr Edward John Izydorski	Peter Martin ,Managing Director ,Sime Darby Travel	277/2003	Coleman CC	Discontinued
Mr Errol Edwin Turner	Challenge Australian Dairy Pty Limited	533/2004	Gregor C	Discontinued
Mr Evan Leslie Hayter	Farrell's Cafe	481/2004	Wood C	Discontinued
Mr Gary Bruce Hill	Geraldton Personnel Inc	767/2004	Harrison C	Discontinued
Mr Giuseppe Vecchio	Carmoa Industries Limited	787/2004	Gregor C	Discontinued
Mr Glenn Morgan	John Holland Group	1765/2003	Smith C	Discontinued
Mr Graham Townsend	Metzo Minerals (Australia) Ltd	490/2004	Harrison C	Discontinued
Mr James Arthur Ritchie	The Pool Table Man	614/2004	Wood C	Discontinued
Mr John Edward Thomson	Shire Of Coorow	827/2004	Harrison C	Discontinued
Mr Julian Lang Sanderson	Pacific Commercial Diving Supply Pty Ltd	457/2004	Wood C	Discontinued
Mr Kelvin Ross Mears	Structural Monitoring Systems	915/2004	Wood C	Discontinued

Parties		File Number	Commissioner	Result
Mr Lyndon Gascoigne	Toll West	1101/2004	Wood C	Discontinued
Mr Michael Matei	Doust Enterprises	1176/2004	Coleman CC	Discontinued
Mr Naif Abboudi	Artifex Australia	1131/2004	Smith C	Discontinued
Mr Nigel Bennett	ABX Logistics (Australia) Pty Ltd	260/2004	Smith C	Discontinued
Mr Paul James Thompson	Mr Peter Kneebone	940/2004	Smith C	Discontinued
Mr Peter Leahy	Polyaire Pty Ltd	741/2004	Smith C	Discontinued
Mr Peter Wayne Jones	Treeline Holdings Pty Ltd	218/2004	Harrison C	Discontinued
Mr Robert Carl Seelander	Callacabardee Aboriginal Coroporation Inc. (ABN 38 664 495 651), Department of Housing and Works - Government of WA	251/2003	Beech SC	Discontinued
Mr Robert William Smith	Sherrin Hire Pty Ltd	1612/2002	Harrison C	Discontinued
Mr Rodney John Halliday	Elico's t/as Better choice Petrol Station Malaga	1462/2003	Harrison C	Discontinued
Mr Steven James Coffey	St Ives Avalon Apartments	932/2004	Kenner C	Discontinued
Mr Timothy Graeme O'Neil	Carlton and United Breweries Limited	593/2004	Smith C	Discontinued
Mr Trevor Leslie Dennis	United Farmers Co-operative Company	1672/2003	Kenner C	Discontinued
Mrs Anne Kendall	Director General, Department of Education and Training	600/2004	Wood C	Discontinued
Mrs Jill Angela Spark	The Golf Club (WA) LTD	957/2004	Smith C	Discontinued
Mrs Karen Denese Dalla-Libera	Mike and Allison Heuer	963/2004	Kenner C	Discontinued
Mrs Narelle Elizabeth Topham	Wortley Group Pty Ltd	828/2004	Harrison C	Discontinued
Mrs Patricia Anne Storey	Prestige Property Services	379/2004	Wood C	Discontinued
Ms Angela McIntyre	Zurich Bay Holdings Pty Ltd ATF Minesite Construction Services Trust	842/2004	Harrison C	Discontinued
Ms Angelina Kovac	Craigcart Rentals Pty Ltd T/As Spearwood Estate Agency	1057/2004	Coleman CC	Discontinued
Ms Catherine Clethero	Advanced Traffic Management Pty Ltd	1880/2003	Harrison C	Discontinued
Ms Cherry Therese Garvey	Delstrat Pty Ltd T/as Seacrest Homes	905/2004	Wood C	Discontinued
Ms Deanne Shannon Donovan	Heuer Holdings Pty Ltd T/As Ultra Shine	962/2004	Kenner C	Discontinued
Ms Judith Knowles	Soils Aint Soils (Soiland Pty Ltd)	492/2004	Harrison C	Discontinued
Ms Katrina Jane Smith	Mr Scott Christie	1080/2004	Harrison C	Discontinued
Ms Lisa Marie Bacich	National Focus Commercial Cleaning	1058/2004	Coleman CC	Discontinued
Ms Lisa Marie Bedggood	Mack & Co, Chartered Accountants	140/2003	Harrison C	Discontinued
Ms Louise Evans	Samnictim Pty Ltd	752/2004	Smith C	Discontinued
Ms Marie-Helene Mallet	Stott & Hoare Business Computers	65/2004	Wood C	Discontinued
Ms Melissa Rimmer	Envy on Oxford	1582/2003	Wood C	Discontinued
Ms Robyn Santoro	Crompton Lighting Pty Limited (ACN 003 125 693)	196/2004	Coleman CC	Discontinued
Ms Roimata Louise McKenzie	Skilful Holdings Pty Ltd	1069/2004	Scott C	Discontinued
Ms Rosalind Kate De'Laney	Dr Morlet-Brown	1130/2004	Coleman CC	Discontinued
Ms Wendy Ruth Lobban	Blue Seas Pearling Company	320/2004	Beech SC	Discontinued
Mun Choy Wong	Hall Chadwick, Chartered Accountants & Business Advisers	1025/2003	Kenner C	Discontinued
Natasha Gansky	Illumination (1996) Pty Ltd ABN: 24 074 330 706 Lighting & Interior Solutions Euroluce (WA)	1054/2004	Harrison C	Discontinued
Neil Harold Shackleton	Tom Wilson Of T And C Supplies	968/2004	Harrison C	Discontinued
Norman Francis Salisbury	Australian Services Union W.A Branch	756/2004	Gregor C	Discontinued
Patrick Stephen Medwin	BGC Contracting	1098/2004	Kenner C	Discontinued
Pedro Da Cruz	Inghams Enterprises Pty Ltd	363/2004	Gregor C	Discontinued
Penelope Taylor	Boodarie Iron Division BHP Billiton	719/2004	Wood C	Discontinued
Peter Anthony Burgess	Powercrank Batteries Pty Ltd	1005/2004	Harrison C	Discontinued
Quinton Curran van Rensburg	The Bank's Family Trust Trading As Quantum Business Development	167/2004	Wood C	Dismissed
Raelene Anne Hooper	Norm Reynolds Retravision	2231/1998	Scott C	Discontinued
Renee Elise Butler	Cobbler’s Bar & Café	236/2004	Harrison C	Granted
Robert Stuart McArthur	Lionel Samson And Son Pty Ltd	1157/2004	Kenner C	Discontinued
Roger William Kiely	Planet Timbers WA Pty Ltd	1717/2003	Kenner C	Discontinued
Ronald Ashley Allen	Elizabeth Aden MacRory	278/2004	Gregor C	Discontinued
Russell Francis Cleal	Allcode Security Pty Ltd trading as	606/2004	Smith C	Discontinued

Parties		File Number	Commissioner	Result
	Perth Batteries, Club Assist Pty Ltd, Royal Automobile Club of WA (Inc)			
Russell Lindsay White	Malatesta Greenwaste Recycling	911/2004	Scott C	Discontinued
Sam Conway	Oaklane Products	688/2004	Smith C	Discontinued
Sarah Jane Cavallaro	Shane Poepjes	991/2004	Harrison C	Discontinued
Sharnee Ann Hibble	The sancar Unit Trust T/as Kings Bedding & Furniture	509/2004	Smith C	Dismissed
Sharon Ellis	WA Flick & Co Pty Ltd	1011/2004	Scott C	Discontinued
Shelly Ann Probert	Tapscore Nominee trading as Pastaboys	1838/2003	Harrison C	Dismissed
Shirley M Potts	L S Walzel & F.P. Frohlich (ABN 198 847 683 81) t/a Spotless Dry Cleaners	1067/2004	Harrison C	Discontinued
Stacey Ellen Mary Stonebanks	Carr & Co	1090/2004	Harrison C	Discontinued
Steven Van Doorn	G E Seaco Pty Ltd	396/2004	Coleman CC	Discontinued
Stuart Kenny	Murdoch University	774/2004	Gregor C	Discontinued
Thomas Anthony M Dudley	Robert Strowse & Elaine Strowse t/as Aussie West Limousine Hire	215/2004	Harrison C	Discontinued
Thomas Lynch	Bunnings Building Supplies Albany	943/2004	Kenner C	Discontinued
Thomas Scott Johnson	Bakers Delight	815/2004	Harrison C	Discontinued
Vashti Clare Schmid	Solid Gold Jewellers Pty Ltd CRN 009068937 T/A Solid Gold ABN 09809200 Registered Organisation - Jewellery Retailers	1115/2004	Wood C	Discontinued
Vicki Schmidt	South Hedland Lotteries House (Inc)	1207/2004	Coleman CC	Discontinued
Violet Edna Whitby	Carnarvon Family Support Service Inc	1926/2003	Gregor C	Discontinued
Walter Dendy	Onesteel Trading Pty Ltd	1143/2004	Kenner C	Discontinued

CONFERENCES—Matters arising out of—

2004 WAIRC 13174

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

PARKSIDE TOWBARS

RESPONDENT

CORAM COMMISSIONER J F GREGOR
DATE THURSDAY, 28 OCTOBER 2004
FILE NO. C 202 OF 2004
CITATION NO. 2004 WAIRC 13174

Recommendation

On 28th October 2004 the Commission conducted a conference between The Automotive, Food, Metals Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch (the Union) and Parkside Towbars (the Respondent) concerning a notification of a dispute from the Union over the non approval of annual leave for Mr Ralph Francis, a member of the Union, over the Christmas period 2004.

It is Mr Francis' contention that early in the year he asked for leave which had been granted by Mr McGlashan the Production Manager. In the conference Mr McGlashan made it clear that he had never authorised leave.

The issue of leave was raised again by Mr Francis to Mr Harben and during a conversation Mr Francis produced air tickets to Mr Harben. Mr Harben reviewed the situation but was unable to grant the leave because of the long standing policy that leave is not granted over the Christmas period due to production requirements.

The parties took part in discussions before the Commission. Mr Francis told the Commission of the reasons that he needed the leave this particular Christmas, those reasons all relate to family matters which would require his attendance in India over the period. The gathering in India would involve his family travelling to India from all over the world.

The Commission decided that in the circumstances it is appropriate that a recommendation be made to the parties for resolution of the dispute.

The Commission understands and accepts the validity of the Respondent's policy for leave over Christmas. It accepts that the Respondent's position is that at no time did it grant leave for Mr Francis over that period and that restriction of leave over the Christmas period is a policy it intends to maintain.

However in the circumstances the Commission recommended to the Respondent that on compassionate grounds that it should make an exception in the case of Mr Francis and grant him leave over the Christmas period. This would be granted on compassionate grounds and is clearly without prejudice to its policy not to grant leave generally over the Christmas period.

The Commission was told that while remaining committed to its policy concerning leave during Christmas the Respondent would in the special circumstances of Mr Francis' compassionate reasons grant leave.

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

2004 WAIRC 12957

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BASSENDEAN BOWLING CLUB (INC)
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	FRIDAY, 8 OCTOBER 2004
FILE NO	C 263 OF 2003
CITATION NO.	2004 WAIRC 12957

Result	Order issued

Order

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on the 23rd day of January 2004 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement as to the process to be applied to resolve the matter in dispute; and

WHEREAS on the 23rd day of September 2004 the parties advised the Commission that they had reached an agreement which they sought that the Commission issue as an order;

NOW THEREFORE, the Commission, pursuant to Section 44(8) of the Industrial Relations Act 1979, and by consent, hereby orders:

THAT the agreement contained in the attached schedule shall bind the parties as the resolution of the dispute in this matter.

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

SCHEDULE

1. TITLE

This agreement shall be known as **Bassendean Bowling Club (Inc) Enterprise Bargaining Agreement 2004.** This is a new agreement.

2. ARRANGEMENT

3. SCOPE

This agreement shall apply to Ms Sue Dale **("the employee")** who is a member of the **Liquor, Hospitality and Miscellaneous Union and the Bassendean Bowling Club (Inc).**

This agreement is to be read and interpreted wholly in conjunction with the **Club Workers' Award 1976**. Where there is any inconsistency between this agreement and the award this agreement shall prevail to the extent of any inconsistency.

4. PARTIES BOUND

The parties to this agreement are:

- **Bassendean Bowling Club (Inc)** ("the employer") and
- the **Liquor, Hospitality and Miscellaneous Union.** ("the Union")

5. TERM

This agreement shall come into effect on **1 January 2004** and shall expire 3 years after that date.

The parties agree to meet no later than six months prior to the expiration of the agreement to commence negotiations for an agreement to replace this one.

6. HOURS OF WORK

1. The ordinary hours of work for Ms Dale will be in accordance with the **Club Workers' Award 1976.**
2. The exception to this is in the "quiet times". Ms Dale's rostered hours can be reduced to a minimum of 16 hours per fortnight where the employer is unable to provide the Award minimum of 20 hours per fortnight. Ms Dale is to receive a level of preference over any casual employee during "quiet times".
3. Ms Dale is to receive a minimum of 20 hours per fortnight during "busy times".
4 For the purpose of this Agreement, "quiet times" are defined as those times where the employer cannot roster Ms Dale for the minimum of 20 hours per fortnight as per the award. "Quiet times" will not consist of anymore than 12 weeks in any given year.
5. For the purpose of this Agreement, "busy times" are defined as those times where the employer can roster Ms Dale for a minimum 20 hours per fortnight. There will be no less than 12 weeks of "busy times" in any given year.
6. The employer recognizes that as a permanent employee, Ms Dale is to have a level of preference over casual employees at times when it comes to rostering work, regardless of the time of the year.

7. ACCRUED ENTITLEMENTS

1. In recognition of Ms Dale's continuing service, Ms Dale will be credited with one weeks sick leave and one weeks annual leave on a pro rata basis at the time of certification of this agreement.
2. Ms Dale's entitlement to long service leave will accrue from the date she commenced employment for the employer.

8. WAGES

1. Ms Dale currently receives a wage in accordance with the **Club Workers' Award 1976**.
2. Ms Dale will continue to receive wages in accordance with the **Club Workers' Award 1976**.

9. UNION RIGHTS

1. The Employer shall confer with the Union party to this Agreement on matters affecting their member and this Agreement.
2. The Employer shall recognise any duly accredited employee as a Union Representative on matters affecting the Employer and its employee.
3. On notifying the Employer, an Officer of the Union party to this Agreement shall have the right to visit the job at any time when work is being carried out to interview the employee covered by this Agreement, provided that it does not unduly interfere with the work in progress.

10. DISPUTE SETTLEMENT PROCEDURE

1. Any dispute arising under this agreement shall be dealt with according to the following procedures.
2. In the first instance, in the case of a dispute between the employee and the employer the employee shall discuss the dispute directly with the employer's representative. These discussions shall occur as soon as practicable and in any event promptly.
3. If these discussions do not result in a settlement the dispute shall be referred to the management committee who shall convene as quickly as possible to discuss the dispute.
4. In the event that the dispute is not settled at this level either party may refer the matter to the Western Australian Industrial Relations Commission.

During the application of the Dispute Settlement Procedure the status quo shall remain.

The Employee may seek advice and representation in the discussions from a representative of the Union.

CONFERENCES—Matters referred—

2004 WAIRC 13032

PROPOSAL BY THE EMPLOYER TO EMPLOY SIX PART TIME PUBLISHING HANDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WEST AUSTRALIAN NEWSPAPERS LTD

APPLICANT

-v-

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

RESPONDENT

CORAM COMMISSIONER J H SMITH
DATE THURSDAY, 14 OCTOBER 2004
FILE NO. CR 116 OF 2004
CITATION NO. 2004 WAIRC 13032

CatchWords	Industrial dispute - proposal to engage part time publishing hands - whether authorised by the terms of the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003 – *Industrial Relations Act 1979* (WA) s 44
Result	Declaration and order made
Representation	
Applicant	Mr D Cronin (of counsel) and Ms I Scanlan (of counsel)
Respondent	Mr L Edmonds and Mr R Knox

Reasons for Decision

1 On 24 June 2004, pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") the Commission referred the following matters for hearing and determination:

1. The Applicant and the Respondent union are in dispute over the Applicant's intention to employ six part time publishing hands.
2. The Applicant claims it should be permitted to appoint part time publishing hands without delay.
3. The Applicant seeks:
   (a) A declaration that the applicant has that lawful right to employ part time employees in classifications covered by The Printing (Newspaper) Award 1979.
   (b) An order stipulating that the applicant can immediately appoint six part time publishing hands.

The Respondent union opposes the appointment of part time publishing hands.

Issues

2 The Applicant says that the appointment of six part time publishing hands to work fixed shifts on Tuesday, Thursday and Friday nights and during the day on Thursday, will assist the company in overcoming the workplace issues with excessive overtime. The Applicant also says that the appointment of six part time publishing hands:

(a) is the most efficient way of getting the work done;

(b) is a flexible employment option that is lawful and fair;

(c) will assist women and people with family responsibilities to gain permanent employment in the newspaper publishing industry; and

(d) will provide opportunities for part time work for the Applicant's aging workforce.

3 West Australian Newspapers Ltd ("the Applicant") says that it is authorised by clauses 9 and 11 of the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003 No AG 216 of 2003 ("the 2003 Agreement") to appoint six part time publishing hands.

4 Clause 9 provides:

> "Aim of this Agreement
>
> The aim of this Agreement is to continue to consolidate the shared benefits that the parties have gained from previous Enterprise Agreements. For this reason the increases provided for under this Agreement are provided on the basis that the parties are prepared to continue to make real and demonstrable changes in both attitudes and the way in which work is performed to facilitate further improvements in productivity and efficiency. These changes will enable the Company to achieve a fuller and more productive utilisation of its resources in the future.
>
> The parties agree that the Production Division operates in an increasingly competitive environment. The changes contained in this Agreement will assist the Production Division to more efficiently operate in this environment. In addition, further initiatives and/or changes may be required during the life of this Agreement to more effectively operate in this environment. These changes may be cultural, organisational and/or operational.
>
> There is a clear recognition by all parties that for this Company to remain competitive it must be able to respond quickly and positively to the demands of the market and the requirements of its customers."

5 Clause 11 states:

> "The Production Division needs to use the most efficient and effective way to meet production requirements. From time to time it will be necessary to introduce change – including alter hours of work, existing rosters, and/or work arrangements. In the event that it is necessary to introduce change the parties will follow this Introduction to Change Procedure. …"

6 The Applicant says that their construction of the authority to introduce part time employment is bolstered when regard is had to clauses 17 and 22 of the 2003 Agreement.

7 Clause 17 provides:

> "In recognition of this Agreement and the potential to further increase productivity and efficiency the parties have agreed to the following increases in wages: …"

8 Clause 22 provides:

> "Excessive overtime is a concern for all parties. The parties agree to ongoing discussions in regards to these concerns."

9 The Applicant employs 34 publishing hand A's. Twenty-seven publishing hand A's work night shifts and 7 publishing hand A's work day shift. One night shift runs from 7.30pm until 2.30am or 5.30am. The other night shift runs four nights a week from midnight until 8.00am. All publishing hand A's are employed on a full time basis and are male employees. The Applicant also employs publishing hand B's who are casual employees. Approximately 50% of the publishing hand B's are female. This application does not deal with or relate to the work performed by publishing hand B's. Further, it is not in

dispute that if this application is successful that there will not be a reduction in numbers of persons employed as publishing hand A's.

10 On the first floor of the Applicant's premises, the publishing department contains an "inserting area" in which both publishing hand A's and B's are employed. The publishing hand A's are responsible for the insertion of inserts into newspapers every Tuesday, Thursday and Friday nights. On the other nights of the week the inserting area is closed and the area is bypassed except if they have bookings to insert one-off commercial inserts. It is common ground that at all material times the Applicant has not been able to cover all of the shifts on the nights that inserting is carried out without employees working overtime. The overtime employees are generally night shift employees who are rostered off on those particular nights. Occasionally the day shift employees return to work to cover the additional work.

11 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch ("the Respondent") opposes the appointment of part time publishing hands. The Respondent says that the introduction of part time publishing hands breaches clause 23 of the 2003 Agreement. Clause 23 of the 2003 Agreement provides:

> "The parties agree that the entitlements in the Award, any contract of employment and this Agreement is a complete and comprehensive statement of the terms and conditions and mutual rights and obligations of the parties to the Agreement. The parties agree not to pursue any extra claims for the life of the Agreement."

12 The Respondent says that during the period the 2003 Agreement was being negotiated the Applicant as part of its "log of claims", informed the Respondent that it wished to reach agreement with the Respondent to engage part time and casual employees in all areas. This claim was rejected by the Respondent and later withdrawn by the Applicant prior to the parties entering into an agreement which was subsequently registered by the Commission as the 2003 Agreement. The Respondent argues that the declaration and order sought by the Applicant should not be made. It contends that the Applicant in seeking to employ the part time publishing hands is pursuing an extra claim and in doing so is in breach of clause 23 of the 2003 Agreement.

13 Both parties agree that whether an order should be made in the form sought by the Applicant turns on interpretation of the provisions of the 2003 Agreement.

The evidence

14 The Applicant called one witness to give evidence in this matter. The Respondent elected not to call any evidence at the conclusion of the Applicant's case.

15 Mr Ronald Allardice, the General Manager of the Herdsman Printing Plant, testified that he is responsible for the printing and publishing of *The West Australian* newspaper and has worked in this role for a period of 19 years. Mr Allardice's duties are to produce the paper in a timely manner through the printing and publishing department. It is also his responsibility to drive change.

16 Mr Allardice gave evidence about how the publishing department is physically located and the duties of publishing hand A's and B's.

17 It was not until 2003 that the Applicant tried to introduce part time employment. When cross-examined Mr Allardice conceded that the company in its negotiations for the 2003 Agreement tabled a log of claims which included reaching an agreement to engage part time employees in all areas. Mr Allardice agreed that he had received a letter from Mr Knox on behalf of the Respondent dated 20 May 2003 in which the Respondent advised that the inclusion of part time employees as part of the EBA was not accepted. Mr Allardice said that both parties put a lot of items on the table to negotiate and that the Applicant wanted to clarify their position in relation to a number of issues. Part time employment was one issue that they put on the table. He conceded that the Applicant dropped the matter and said that they only agreed not to pursue the claim for part time employees during the course of the negotiations for the 2003 Agreement. Mr Allardice maintained in his evidence that in his opinion the Applicant already had the right to introduce part time employment pursuant to the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2000 No AG 157 of 2000 ("the 2000 Agreement") as the 2000 Agreement contained the same provisions as clauses 9 and 11 of the 2003 Agreement. Mr Allardice also testified that during the negotiations for the 2003 Agreement the single bargaining unit advised they wanted to address excessive overtime and as a result of discussions about that issue clause 22 was inserted into the 2003 Agreement. The parties reached agreement in August 2003 and shortly thereafter the 2003 Agreement was registered.

18 The issue of engaging part time employees was raised again in 2004 when on 2 March 2004 Mr Allardice spoke to the Father of the Chapel, Mr Alan Lindsey, and asked for a document to be posted on the noticeboards informing employees that the Applicant would like to introduce permanent part timers into the publishing area to cope with peak production periods. The notice was signed by Mr Allardice and stated as follows:

> " PART TIME EMPLOYMENT IN PUBLISHING
>
> It is the company's intention to appoint six part time publishing hands to work shifts as follows:
>
> - Three to work Tuesday, Thursday and Friday nights;
> - Two to work Tuesday and Friday nights, and Thursday during the day;
> - One to work Thursday and Friday nights.
>
> These shifts cover Mid Week Motoring, Thursday's off-line production, Habitat insertion and Friday night's production.
>
> Why appoint part timers?
>
> - It assists the company in overcoming the issues with excessive overtime – a concern that was acknowledged by all parties in the most recent EBA (clause 22);
> - It is the most efficient way of getting the work done – we do not have sufficient work spread across the week to appoint full time publishing hands;
> - It is a flexible employment option that is lawful and fair;
> - It will assist women and people with family responsibilities to gain permanent employment in the newspaper publishing industry.
>
> How will the part timers be paid?
>
> - Part time employees will be paid in accordance with the existing Award and EBA;

- The hourly rate will be the same as for full time employees;
- All shift loadings and other benefits will be paid;
- Time worked in addition to the agreed part time hours will be paid as overtime;
- Leave will be calculated and paid on a pro-rata basis dependant upon part time hours.

How will this affect existing staff?

- No full time staff will be retrenched as a result of these part time appointments;
- No roster changes will be required to accommodate the appointment of part timers;
- There will continue to be opportunities for overtime in the publishing department;
- Existing company staff will be encouraged to apply for these positions.

The company has commenced the introduction of change process of the prevailing EBA. We expect all employees and their union to honour the continuous improvement commitments within the EBA by genuinely working through any issues associated with the appointment of part time staff."

19 Mr Allardice testified that if part timers are employed excessive overtime will be reduced. Further, he said that the work would be carried out in an efficient manner as the Applicant would be able to roster part time employees specifically to cover the known peaks in production. He also testified that part time employment would provide opportunities for women to work as publishing hand A's and also provide opportunities for the Applicant's aging work force who may wish to "ease themselves" out of the workforce. He said that of the "thirty-four" people who work in the publishing department, four employees are over the age of 60, five are over the age of 55, twenty-two are over the age of 40 and 12 people are under the age of 40.

20 The Chapel responded to the Applicant's proposition to introduce part time employees on 23 March 2004. Mr Allardice was advised by Mr Lindsey that motions were put to the day and night shift publishing department and a motion was passed unanimously which stated: "that the company look at hiring three more full time employees to work night shift to resolve the need of part time workers". Mr Allardice said that they costed the Chapel's proposal to employ three full time publishers. He said the results showed that employment of three full time publishers would not be of any real benefit. On 29 March 2004 Mr Allardice wrote to Mr Lindsey and set out the reasons why the counter proposal was rejected:

"The company has considered your members' counter-proposal to employ three fulltime employees to work night shift in good faith. As part of these considerations the company has assumed that those employees could be engaged on a roster that maximises the benefit to the company.

However, the company has found it is unable to accept the counter-proposal for the following reasons:

- It will not resolve the excessive overtime problem we are experiencing. It is the company's view that whenever there are full shifts that cannot be covered on ordinary time, there is a real risk employees will need to work excessive overtime to meet the production requirements. This is a significant expense to the operation and continues to prevent the company from meeting its health and safety obligations with staff.
- It is not the most efficient and effective way to get the work done. In fact an analysis of the counter-proposal has shown that it would actually be more expensive than the current arrangements. We have attached a summary of the cost analysis undertaken which we are happy to explain to you in more detail.
- It means that the new employees would be under-utilised on Sunday, Monday and Wednesday nights particularly when we are not inserting.
- It does nothing to meet the company's objective of offering flexible employment opportunities that will assist in attracting women and people with family responsibilities into permanent publishing roles.

I also note your correspondence has not detailed any concerns or justifiable reasons why the employment of staff on a permanent part time basis should not occur.

The company maintains the firm view that the engagement of part timers in accordance with part time initiative document is the most efficient, effective and safest way to meet production requirements.

We ask that your members reconsider their position and respond by Friday 2 April 2004."

(*Exhibit 3*)

21 In a document attached to that letter a table estimated that the employment of three new publishers would be $10,000 per annum more than the current system of rostering existing full time employees to work overtime, whereas the engagement of part time publishers would reduce the current system of working overtime to cover peaks in production by an amount of $194,000 per annum.

22 The Chapel responded to Mr Allardice's letter on 1 April 2004. In a letter to Mr Allardice from Mr Lindsey, Mr Lindsey stated that the day and night shift publishing departments had met again and had agreed that the company had not looked at the original motion to engage three new full time employees with any necessary roster changes. They also asked for a more complex breakdown of the figures. On 15 April 2004, Mr Allardice provided to the Chapel a copy of a proposed roster for the six part time employees, with additional costings and another roster which included three additional full time publishers. Mr Allardice stated in a letter dated 15 April 2004 that the cost of the roster for three additional full time publishers was still $153,699 per annum more expensive than the company's part time proposal and the Chapel's alternative did not resolve the excessive overtime issue.

23 On 22 April 2004, Mr Lindsey provided a copy of the following motion to Mr Allardice. The motion was a unanimous vote by the day and night shift publishing department:

"We believe the option of full time employment is more cost efficient than what is presently being used so this is a saving to the company compared to overtime costs being used and this will also address some of the excessive hours worked. We do not see part time employment as a benefit to our current and future members."

24 Mr Allardice testified that the Chapel's proposal was not acceptable as all three full time employees could not be rostered to work the peak periods because there would be two people short on Tuesday, one short on Thursday and three short on their "biggest" night, Friday night. After re-doing the roster Mr Allardice agreed that the roster enabled some savings to be made if the Chapel's proposal was adopted but he says the proposed savings which would be generated by using part time employees would be far more significant. When cross-examined Mr Allardice conceded that the employment of three full time employees

would be more efficient than the current system of existing employees working overtime. However, he said that the Chapel's proposal would be marginally more efficient than the existing system.

25 Mr Allardice was cross-examined in relation to calculations set out in an attachment to the letter dated 15 April 2004. Those calculations are contained in a table which compares the current overtime system to the proposal to engage six part time employees and the counter proposal to engage three full time employees. The table calculates that there would be a cost saving of $44,278.00 per annum if the current overtime system was abandoned and three new publishers were engaged to work the proposed roster, whereas the saving that would be generated by engaging six part time employees instead of the current overtime system would be $197,977.00 per annum. The notes attached to the table state the cost for three publishers was calculated as 3.4 publishers to cater for annual leave cover ($813.04 + $250.31+ 6% payroll tax + 9% superannuation). It was put to Mr Allardice that the cost of annual leave cover for six part time employees had not been taken into account in the costing. Mr Allardice said that these figures were put together with the assistance of the accounting department but he was unable to say whether those figures had calculated an amount to cover annual leave for the proposed six part time employees. He agreed that there was potential for an error in the calculations but said that any error would not account for a substantial difference as the savings came to an amount of $197,977.00 per annum. He said the figures were calculated on the basis that they needed 3.4 publishers to cover three full time employees and that the coverage of six part time employees could be assumed to be something less than .4, which would not be a significant increase.

26 In the past only one employee has worked part time in the production area prior to 2003. The person in question was a female apprentice who became pregnant and gave birth to a child. When she returned from parental leave she wished to work on a part time basis and the Applicant entered into an arrangement with the Chapel for her to return to work on a part time basis. It appears, however, that she resigned after three months because she said "it wasn't working for her".

27 Mr Allardice testified that the only ongoing discussions that the company had had with the Respondent as to the amount of overtime being worked has been through their efforts to introduce part time employment.

28 Mr Allardice also testified that since the 2003 Agreement was concluded the following improvements in productivity and efficiency have been introduced:

(a) The "Habitat" and "Premium Homes" inserts have become a permanent pre-print and a permanent insertion on a Thursday night rather than an ad hoc insertion;

(b) The way some commercial inserts have been inserted on a Thursday has changed. This has impacted on the workload as off line production occurs during the day because that is when they pre-insert some commercial inserts into pre-prints.

(c) Completion of the paper has been brought back by half an hour as the paper was getting out too late to the Applicant's distributors.

Conclusion

29 With respect to Mr Allardice his assumption about the cost of covering the annual leave of the part time employees does not appear to be correct. It is apparent from the proposed roster that six part time publishers would work a total of 125.5 hours per week. It is clear from clause 14 of the 2003 Agreement that the maximum number of hours per week for night workers is 36 hours per week. It follows therefore that three full time employees would provide an additional 108 hours per week. Six part time employees would provide an additional 17.5 hours above 108 hours per week. Accordingly, if the cost of six part timers in the calculations does not include the cost of covering their annual leave then the cost of the annual leave cover would be greater than .4 not less than .4. In any event, the summary sheet for comparison of payments made to current overtime employees as against the cost of six part timer employees for night publishing show there would be a total saving per annum of $197,977.00. This calculation shows the comparison between the base hourly rate, payroll tax, superannuation and total hourly rate. This amount and the basis for calculation was not challenged by the Respondent except as to whether the Applicant took account of the cost of covering annual leave. Plainly, even if the cost of annual leave is not accounted for in this figure, the cost of annual leave cover for six part time employees would not reduce the calculations to such a significant level so as to lead to the conclusion that the savings to be achieved by engaging six part time employees as compared to the existing system of covering peak periods of work with overtime would be less than significant.

30 The main issue to be determined in this matter is whether the proposal to engage six part time employees goes beyond the scope of the changes in work contemplated by the express terms of the 2003 Agreement. If so, then the proposal can be characterised as a matter that goes beyond the scope of the agreement and is thus an extra claim. Whether it does so in my view turns on a construction of the terms of the 2003 Agreement. Both clauses 9 and 17 contemplate changes to the way in which work is to be performed to facilitate improvements in productivity and efficiency are to occur during the life of the agreement. In fact clause 17 contemplates that reasonably substantial wage increases are to be paid in consideration of further increases in productivity and efficiency during the life of the 2003 Agreement.

31 "Productivity" means "a measure of efficiency of production which implies comparison of input in such terms as capital invested, wages paid, numbers employed, etc., with output". "Efficient" means among other things "effective in the use of energy and resources". "Efficiency" means "the fact or quality of being efficient; competency in performance". (*Macquarie Dictionary* 2003 online ed.)

32 Having heard and considered the evidence given by Mr Allardice, I accept the introduction of six part time publishing hands is a change in the way work is performed to facilitate productivity and efficiency within the meaning of clause 9 of the 2003 Agreement. Plainly the additional six part time publishing hands will in my opinion improve productivity and result in the efficient use of labour. Whilst the Chapel's counter proposal may produce some savings to the Applicant I do not accept that their proposal would improve productivity and efficiency as the three additional full time publishing hands would have to be rostered on to work at times when there would be insufficient work for them to carry out. Further the three additional employees would not be able to be rostered to cover all of the work during the peak periods. I am also satisfied that the evidence establishes that the Applicant's proposal is a measure to address excessive overtime.

33 I do not agree with the Respondent's submission that the Applicant's conduct in "dropping off" part time employment from their log of claims during the 2003 Agreement negotiations means that "part time employment" must be characterised as an extra claim within the meaning of clause 23 of the 2003 Agreement.

34 The principles which are to be applied by the Commission have been enunciated by the Industrial Appeal Court in *Norwest Beef Industries Ltd & Anor v West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers* (1984) 64 WAIG 2124 ("the Norwest Beef Case"). At 2127 Brinsden J set out those principles as follows:

"The principles applied in interpreting awards are the same principles as are applied in the Courts of law for the constructions of deeds, instruments and statutes: *Tramways Union v Commissioner of Railways* (1928) 7 WAIG 155; *AWU v Lake View and Star* (1934) 14 WAIG 279 at 289 and *AWU v Co-operative Bulk Handling* (1946) 26 WAIG 353 at 354. Applying those principles the argument goes, the meaning of a provision in an award is to be obtained by considering the terms of the award as a whole. If the terms are clear and unambiguous, it is not permissible to look to extrinsic material to qualify that meaning. A number of cases were quoted in support of that proposition and it is only necessary to mention a few: *Amalgamated Society of Engineers v Adelaide Steamship Co* 28 CLR 129 at 161-2; *Life Insurance Co of Australia Ltd v Phillips* 36 CLR 60 at 70; *Jones v Walton* (1966) WAR 139 at 142. As clause 12 is unambiguous and clear in meaning, earlier awards, the progenitors of these awards, and the reasons for the making of the earlier awards, and the behaviour of the parties over the years in acting pursuant to the awards, are therefore irrelevant."

35 In my opinion, the words of clauses 9, 11 and 17 are clear and unambiguous. Consequently, the conduct of the parties cannot be used to qualify the meaning of these clauses. In any event at the time the negotiations took place the 2000 Agreement was in place. The 2000 Agreement contained the same provisions as clauses 9 and 11 of the 2003 Agreement. Further, the 2000 Agreement also provided for pay increases to be paid during the life of the agreement in consideration of further increases in productivity and efficiency in the same manner as clause 17 of the 2003 Agreement.

36 In light of these reasons I will make a declaration and order in the terms sought by the Applicant.

2004 WAIRC 13088

PROPOSAL BY THE EMPLOYER TO EMPLOY SIX PART TIME PUBLISHING HANDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WEST AUSTRALIAN NEWSPAPERS LTD
	APPLICANT
	-v-
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 19 OCTOBER 2004
FILE NO/S	CR 116 OF 2004
CITATION NO.	2004 WAIRC 13088

Result	Declaration and Order made
Representation	
Applicant	Mr D Cronin (of counsel) and Ms I Scanlan (of counsel)
Respondent	Mr L Edmonds and Mr R Knox

Declaration and Order

HAVING heard Mr D Cronin of counsel and Ms I Scanlan of counsel on behalf of the Applicant and Mr L Edmonds and Mr R Knox 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 has the lawful right to employ part time employees in classifications covered by The Printing (Newspaper) Award 1979;

(2) ORDERS that the Applicant can immediately appoint six part time publishing hands.

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

2004 WAIRC 13243

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ANGLICAN HOMES (INC)
	RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 9 NOVEMBER 2004
FILE NO.	CR 86 OF 2004
CITATION NO.	2004 WAIRC 13243

CatchWords	Termination – Unfair dismissal – Constructive dismissal – Principles applied – No terminator at the initiative of the employer –No power to award costs at motion of a witness - *Industrial Relations Act, 1979 s.27(1)(c), s.44*
Result	Application dismissed. Application for costs by WorkSafe dismissed.
Representation	
Applicant	Mr M. Swinbourne appeared on behalf of the Applicant
Respondent	Ms J. Auerbach appeared on behalf of the Respondent

Decision

The Reference

1 This matter had its genesis in a notification on 6th April 2004 by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch (the Union) to the Commission of an industrial dispute between it and the Anglican Homes (Inc) (the Respondent).

2 By the application the Union sought an urgent conference for conciliation of an industrial dispute at the Edward Collick Nursing Home which is located in Kalgoorlie. The Commission was informed by the notification that at least six members of the Union were facing serious disciplinary action including termination over allegations the Union believed to be untrue and unfounded. The conference was sought to discuss and resolve the matters and for the Union to move the Commission to issue interim orders for reinstatement.

3 There were various conferences relating to the matter.

4 In a letter dated 17th May 2004 the Commission attempted to draw the issues together when it noted that the Union wished to have the application divided so that the terminations of Jennifer Dowsett and Susan Kolar to be separated and the balance of the matter be referred for hearing. There was a foreshadowed intention to discontinue that part of the application relating to other members of the Union pending receipt by the Union of letters from the Respondent concerning the status of each of those members.

5 It will suffice for this recitation of the history to record that the intention to discontinue never came to pass because the parties were unable to agree upon the content of the letters.

6 The Commission reconvened the matter in conference to clarify the remaining issues and endeavour to resolve them by conciliation and, ultimately, to identify which matters needed to be referred for hearing and determination and whether there needed to be a division of the application for that purpose.

7 The conference took place on 26th May 2004, no agreement was reached and with the consent of the parties the conference was adjourned for 14 days to enable the Union to provide to the Respondent its position in writing in respect to each employee concerned and the parties would meet for private discussions in an attempt to reach agreement. Suffice to say this attempt was unavailing and on 30th July 2004 the learned Senior Commissioner, who then had carriage of the matter, decided that the matters should be referred pursuant to s.44(9) of the *Industrial Relations Act, 1979* (the Act) for hearing and determination and produced a memorandum of those matters for determination.

8 The schedule attached to the application describes the dispute which is now before the Commission for adjudication.

9 It should be recorded that the part of the reference relating to Ms Dowsett and Ms Kolar was not pursued but the allegations relating to Anne Powell a carer, Kay Garbellini a carer, and Glenyse Denny an enrolled nurse, were.

10 Their situation was that in the interim they had resigned from employment with the Respondent. The Union claimed that those resignations constituted dismissals for the purposes of the Act and that they were unfair because the allegations against each employee were without foundation. Further there were no reasonable grounds upon which the Respondent could conclude that each or any of the employees were guilty of the alleged misconduct. The Respondent's conduct in respect of the allegations amounted to repudiation of the contracts of employment of each of the employees because it acted in a manner that caused them significant and unnecessary distress and to suffer illness. The conduct of the Respondent in causing that illness was a breach of its duty not to cause harm to an employee. This was compounded by the Respondent unilaterally varying the contracts of employment by altering rosters from night shift to day and evening shifts when previously these shifts had not been part of the employee's roster. It was common ground that each of the employees was engaged on permanent weekend night shift and had been for a considerable period.

11 As a result of these allegations the Union sought orders that the Respondent pay each employee reasonable notice, compensation for loss of ongoing employment and non transferable benefits and compensation for the alleged harsh, oppressive or unfair dismissal including non economic loss. The Respondent opposed the issue of such orders. It denied that its conduct was in any way describable in the terms that the Union alleged; on the contrary it had conducted itself in a proper manner given the industry in which it was operating. It conducted the investigations into serious allegations against the employees with speed and diligence and it properly reached conclusions about their conduct. Those conclusions dismissed most of the serious claims but found that the allegations on some less serious matters had been sustained against each of the employees.

12 Upon such a finding it had done nothing more than draw its conclusion to their attention through a written warning as it was required to do and in doing so had not altered the status of employment nor their salary. It had decided that in view of the nature of the findings that the employees should have some exposure to supervision by registered nurses, at least for a short while, to ensure that the conduct could be ameliorated by training if that was necessary. In short there had been no prejudice to any of them in their employment and their resignations, coming so long after the date on which they were stood down, give weight to the contention of the Respondent that each of the employees had made up their mind after conscious and deliberate consideration that they no longer wished to be employed by the Respondent. That was a decision of theirs and in reaching it they had neither been pushed or otherwise influenced by the Respondent to resign in fact they had jumped from the employment by submitting their resignations.

Witness Evidence from the Union

13 The Commission heard evidence from the parties over a period of three days in Kalgoorlie. There were nine witnesses called on behalf of the Union and five on behalf of the Respondent. The Commission also heard evidence from Sarah-Jane Bryant a Senior Inspector, employed by WorkSafe. Ms Bryant had conducted investigations of possible breaches of the *Occupational Health and Safety Act, 1984* by the Respondent in or around May 2004. Ms Bryant presented her findings and recommendations, outcomes of the investigation and her inspection notes to the Commission. Also made available were her conclusions in the form of Improvement Notices made under the *Occupational Health and Safety Act, 1984* s.48 (Exhibits S1, S2 and S3). Ms Bryant was examined and cross examined by the parties over those findings particularly as they relate to an allegation of bullying by the Human Resources Manager of the Respondent, Shellee Chapman.

14 I will deal with those allegations later in these Reasons for Decision.

15 It also should be recorded that Ms Bryant submitted a claim on behalf of the Director of WorkSafe for reimbursement of costs for her attendance at the hearing. The claim is dealt with later in these Reasons for Decision.

16 Dealing with the evidence of the employees in the order in which was presented to the Commission, Ms Powell had been employed by the Respondent on or about 1st March 2002. Her background, described in her employment history, indicates that in 1993 she commenced in the health care industry as a carer. In her application form she signed that she would accept the policies from time to time made by the Respondent (see more detail in Exhibit S5).

17 On 2nd April 2004 she received a letter from Philippa Wharton the then Regional Manager for the Respondent that there had been a number of allegations received in relation to her conduct. These allegations amongst other things related to inappropriate care of residents and conduct to residents and other staff which was bullying and harassing in nature. She was told that the Edward Collick Home had a duty of care towards residents and other staff and it took the allegations seriously. An investigation would commence immediately and when full and better particulars of the allegations were available they would be made known to her to allow her to respond. She was stood down from duty on full pay. The letter expressed an appreciation of the impact that the allegations and stand down might have on Ms Powell and she was assured that the Respondent would endeavour to complete the investigation as promptly as possible (Exhibit S6).

18 By 6th April 2004 the preliminary investigations had been concluded. These had been conducted over the weekend. Interviews with Ms Powell were held over pending an arrival of a Union representative to represent her. On 6th April 2004 the allegations were detailed to Ms Powell. Because many of them were later found to be unsustainable it would be wrong to record the allegations in these Reasons for Decision, however suffice to say that some of them are extremely serious because they relate to patient care and if those incidents had occurred there could have been serious consequences for both Ms Powell and the Edward Collick Home.

19 The allegations were put to Ms Powell in writing (Exhibit S7) and she was given time to fully consider them and was issued with an invitation to respond. This occurred on 7th April 2004. On 8th April 2004 Ms Chapman the Human Resources Manager acknowledged the response that Ms Powell had given to the allegations. Ms Chapman found that two allegations had been established that is, specifically, that the office door was sometimes closed during shift and there was a reluctance to attend to residents needs outside of established rounds. In relation to the findings some remedial action was set out in the letter and need not be reported here. The letter contained instructions as to future conduct. Failure to apply the remedial action may result in further disciplinary action. There was also a notification, to which I have referred previously that the roster would be adjusted to include day and evening shifts commencing on 19th April 2004. Otherwise the contract of employment was unaltered in that there was no diminution in pay and entitlements. Ms Powell was encouraged to make use of the roster request book to facilitate a roster which was practical.

20 There was then an interregnum during which there appeared to be little contact between the parties. During that time Ms Powell went to see her doctor, Dr Richard Austin, who gave evidence before the Commission. He certified that on 9th April 2004 Ms Powell was unfit for duty until 10th April 2004, he then issued medical certificates at various times which certified that she was continually unfit for duty until 28th May 2004.

21 The next event was that Ms Powell resigned from the employment of the Respondent. She did so because she thought she could no longer work in the environment. She was not happy, she was still upset by the allegations which she believed had been dismissed as easily as they were made, she described them as fabricated; but she felt that the two allegations which still stood should be set aside also. On the basis of her experience she decided to resign and did so with the following expression of opinion, which appears in her resignation letter:

> "*It is now with great sadness, much deliberation and on the advice of my Doctor that I hereby tender my resignation as of Sunday 13th June 2004….*"
>
> [Exhibit S9]

22 The resignation was accepted by the Respondent. It is useful at this stage to refer to evidence of the doctor providing the medical certificates. When he was asked whether he advised Ms Powell to leave her employment he denied that he had. He had said leaving was one of a number of options that he had presented to her as to how she could overcome the illness she was then suffering. But he did not order or prescribe medication nor did he suggest professional counselling or record the illness as workers compensation. His evidence seemed to be that the problem [illness] was one that time would heal.

23 The next employee concerned is Kay Anne Garbellini. Ms Garbellini commenced work with the Respondent after a long period of involvement with the predecessors of the Respondent at the Edward Collick Home. She signed an employment agreement on 7th March 2002 but her evidence seems to indicate that she may well have been employed on the premises with the predecessors to the Respondent for up to 30 years; at least that is what one can glean from the evidence. On 1st March 2002 she was offered a contract of employment (Exhibit S14) as a Nursing Assistant 3rd year. Her terms and conditions were in accordance with the Nursing Assistant's (ALHMWU) Interim Award 1996 (Federal). A number of accruals and staff leave entitlements were dealt with in the contract of employment, which she accepted.

24 On 2nd April 2004 she received a letter (Exhibit S15) which contained allegations along the same lines as those made against Ms Powell and because they are the same and the letter is couched in very similar terms I do not need to record the detail.

25 What can be recorded is that similar process then occurred. The allegations were detailed in a meeting between Ms Garbellini and Ms Chapman the Human Resources Manager of the Respondent. Ms Anne Reimers an ALHMWU Organiser attended as a representative of Ms Garbellini. There were 10 specific allegations raised and as in recitation of the material concerning Ms Powell I do not intend to detail them. The allegations are nevertheless of a serious nature but need not be recorded for public consumption because they have not been sustained. On 8th April 2004 the Respondent's consideration of her explanations was

published to Ms Garbellini in a letter (Exhibit S17). Similar findings were made as with Ms Powell and similar remedies were specified. Again there was advice of an adjustment to the roster to day and evening shifts, but the contact hours would be maintained. Ms Garbellini was urged to use the roster request book to facilitate a roster which would be practicable to her.

26 The Respondent says it then heard that Ms Garbellini was ill and rang her to offer access to the Employee Assistance Scheme which the Respondent had in place. Ms Chapman says that she was unable to speak to Ms Garbellini on the phone but made the offer to the person who answered the phone who she believed to be the Applicant's daughter. In her evidence Ms Garbellini acknowledged that the offer had been made but that she did not wish to take it up. On 16th April 2004 she submitted a simple resignation saying that her employment contract would end effective 30th April 2004, in other words she gave two weeks notice of her intention to resign from the Respondent's employment.

27 The third employee involved in these proceedings was Glenyse Denny. Ms Denny was offered a contract of employment effective 1st March 2002. According to her evidence she had previous experience working at Edward Collick House with the predecessor to the Respondent. Ms Denny is a qualified Enrolled Nurse. She is currently studying to become a Registered Nurse and in this pursuit she works fulltime at the Kalgoorlie Regional Hospital. On the weekends she would work night shift at the Edward Collick Home. Ms Denny is a senior person in the shift hierarchy to Ms Powell and Ms Garbellini who were nurse assistants, sometimes known as carers.

28 There is doubt about when Ms Denny was originally advised of the allegations about her conduct. The Respondent says that it attempted to give her a letter about its concerns. She had continued to work during the period but on 14th April 2004 the concerns were formalised in a letter (Exhibit S22) which required a meeting in the office of Libby Simpson the Regional Manager to 'address concerns' [in relation] to her conduct. These were specifically related to resident care issues and allegations of sleeping on duty and smoking in unauthorised areas. Ms Denny was advised that she was welcome to bring a representative or a witness to attend the meeting. She did so and invited a clinical nurse, Karen Kirk as her supporter. The meeting at which Ms Kirk attended took place on 14th April 2004. During the meeting the identity of a person who made allegations against Ms Denny was revealed to her. The specific allegations were also communicated to her and at the end of the meeting these allegations were committed to writing. Ms Denny was asked to take her time to fully consider the allegations and Ms Simpson invited her to submit her responses. Ms Simpson made clear there was flexibility in the timeframe by giving Ms Denny the option to reschedule if she wanted to. Ms Denny was also told that she was welcome to have a witness or representative present at the meeting.

29 Ms Denny responded in detail in writing on 24th April 2004. She asserted that care of residents was her top priority and she disputed the allegations. She denied sleeping for extended periods but did concede that it was difficult to control the urge to catnap on night shift because of the body's biological time clock, but only a rare occasion had she taken such a nap. In so far as the smoking policy was concerned she denied knowledge of the new policy but on being made aware of it indicated she would only smoke in the designated area. She thought that the allegations were malicious and damaging and she gave notice of her intention to seek legal advice regarding her rights concerning her professional status. She was disappointed that the word of a new employee was taken over hers and that the Respondent would consider her care to residents in question. She said that if she was to be given a warning or indeed dismissed, as others had been, she wanted the Respondent to be specific about the conclusions so that she could decide what she wanted to do about the accusations that had been made against her.

30 On 26th April 2004 she received the Respondent's conclusions in a letter from Ms Simpson. As with the other two ladies, some of the more serious allegations were dismissed but there were findings adverse to Ms Denny in a number of other areas. These related to knocking on doors, a reminder that residents are to be handled with dignity and respect at all times, an acknowledgement about her smoking but a concession that she could have three smoking breaks of no more than ten minutes duration during a shift. Although Ms Simpson could not reach a definite conclusion that Ms Denny slept while on shift she did make a finding that Ms Denny had been absent from the floor for a period of time and this practice was to stop. On the basis of these conclusions Ms Simpson issued a warning that any repeat of the breaches of the policies and procedures would result in further disciplinary action.

31 In a letter dated the same day Ms Denny resigned. It is useful to note that Ms Denny had attempted to see Ms Simpson after she received the first letter dated 20th April 2004 and had made phone calls to her. In response to telephone calls from Ms Denny Ms Simpson went back to the premises at night time to try and see her. Ms Simpson says she missed Ms Denny but found the resignation under her door. It is in the sequence of events important because this resignation was made prior to the Respondent detailing its conclusions in writing to Ms Denny. In short she resigned on 26th April 2004 before she received the letter dated 26th April 2004 (Exhibit S25). There was a response on 28th April 2004 from Ms Simpson accepting the resignation and acknowledging that the Applicant had no need to work out her notice.

32 Also relevant are medical certificates that Ms Denny was unfit for duty for five days until 4th May 2004 and she was unfit for duty on 20th April 2004 as well. Both certificates were made by Dr Harry J. Clarke.

33 The evidentiary matrix was completed as far as the Union was concerned by the evidence of Inspector Bryant which I have summarised before. All of that information concerning her findings is before the Commission and was in the possession of the parties prior to their closing submissions.

34 Evidence was also taken from Tera Cserney about her experiences in this matter. She received similar letters but the investigations relating to Ms Cserney did not result in any admonition being issued to her. On the contrary she was found to have acted in a proper manner at all times and this was communicated to her.

35 The Commission also heard evidence from Ms Reimers who is an organiser with the Union. Ms Reimers told the Commission that she had been summoned to Kalgoorlie at the request from her members. She attended as soon as practical; she confirmed that the various discussions with the employees did not take place until she was present. She advised the Commission that the members were very upset and she had a series of meetings with them trying to take care of them both in a pastoral sense and help them prepare their answers to the Respondent. She told the Commission that at no time did she ever think that they would resign and it came as a surprise to her when they did. As for the conduct of Ms Chapman, Ms Reimers described her approach as clinical and was a little disturbed about the way the various meetings were scheduled over three days and would have liked more consultation from Ms Chapman about that. However she did not describe Ms Chapman's conduct in any of the meetings she attended as bullying. I will deal with this later as it is an issue that has been raised by the Union.

Respondent's Witness Evidence

36 The Commission heard evidence from Ms Chapman. She told the Commission that upon the complaints being made by Faith Baker and Stephanie Farncombe-Smith she conducted an investigation. She was aware that Rose King had left the employment of the Respondent some time before and rang her to ask why that had occurred. Ms King then told her that she

had been concerned about the conduct of other employees on the night shift during weekends and she had resigned because of it. Ms King did not make any complaints at the time because she did not think that was in her interests to do so nor would it be a useful course of conduct for her, but she told Ms Chapman that she had some disquiet about the conduct. Over the weekend after the allegations had been made Ms Chapman set about interviewing residents, trying to conduct sensible preliminary investigations in order that the employees who had been stood down could be confronted with the specific accusations against them as soon as practicable and have the opportunity to answer them as soon as possible.

37 Ms Chapman did not commence interviews with any employee until they were represented and this waited upon the attendance of Ms Reimers. Ms Chapman asserted that she undertook the investigations quickly because she was aware of the distress that the allegations would cause the individual employees and that the way best to deal with that was investigate them quickly. It was untenable for the employees to remain on duty while this was happening because the Respondent has a heavy duty of care to patients. This duty is a matter of public policy and it was absolutely essential that the type of allegation had been made be investigated forthwith with an aim to ensuring the protection of residents. Ms Chapman said that in other employment settings the employees may not have been stood down but in the circumstances of aged care that made the decision to stand down imperative.

38 Ms Chapman said she went about the investigations then had a face to face meeting with the person accused, outlined the allegations against them and then put them in writing. After she had received the responses she investigated further and was satisfied that the more serious allegations could not be substantiated to the level necessary for her to conclude there had been misconduct by the employees concerned. There were in respect of each of them some issues of a lesser nature which caused her to conclude that in accordance with the Respondent's Human Resource Policy (Exhibit S35) that the level of discipline which ought to be applied was a written warning.

39 Ms Chapman said the Human Resources Counselling and Discipline Policy provide that there be counselling, verbal warning, written warning and dismissal. Counselling is used when an employee's work performance is below standard. A verbal warning is used when poor work performance or behaviour is not corrected through counselling or work performance or the behaviour is of such a nature that warrants more formal disciplinary action. A written warning is a warning in relation to a serious matter. The policy enjoins managers not to issue them lightly. Written warnings can be issued following a process of counselling, a verbal warning of an employee for poor performance or for issues for breach of company standards which did not warrant dismissal. If a written warning is made it must contain a statement of the nature of the unacceptable performance, full details of poor performance and the reason why it was unacceptable. There are various other requirements relating to placing the warning on employees files and the date of any review or performance audit. The written warning requires that it be signed and a copy given to the relevant employee. Significantly for this matter a breach of the contract of employment or unacceptable behaviour that does not warrant dismissal may result in the immediate issue of a final warning even though no previous warnings have been issued. In such cases a warning clearly states that it is a first and final warning.

40 This is the category of warning which was issued to each of the employees in this case. The final step in the disciplinary level is dismissal which occurs for a serious breach of the contract of employment incompatible with organisational policy where the written warning is not considered appropriate.

41 Ms Chapman gave evidence that in each of these cases she applied the policy and reached the conclusion that even though there was a significant breach, that breach warranted the immediate issue of a final written warning without going through the counselling stages. This is consistent with the policy.

42 Ms Chapman asserted that the action taken in respect of the three employees was in accordance with the policy of which they were aware and which they had indicated by the signing of their application forms that they had accepted.

43 The Commission also heard evidence from Ms Elizabeth Simpson. Ms Simpson is the Respondent's Regional Manager and she gave evidence relating to how she dealt with Ms Denny. She confirmed that Ms Denny was not stood down as were the others, she continued to work. From Ms Simpson's memory Ms Denny was unaware of the Respondent's detailed response to her position before she submitted her resignation. They crossed as it were.

44 The Commission heard evidence from Ms King, Ms Baker and Ms Farncombe-Smith. Each of these persons supported the allegations that they made originally to the Respondent and did not recant from them. They were concerned about the conduct of their colleagues and thought it their duty to make a response. Ms Baker was described by Ms Denny as a new employee, she may have been but she is a qualified person with a number of years experience in nursing homes in the Eastern States. Ms King and Ms Farncombe-Smith are both experienced persons in the caring industry. Ms King is an Enrolled Nurse and has been so for 34 years. Their evidence need not be summarised as it does not go to the issues which need to be decided in this case.

45 This is not a case where the finding of the witness credibility will have an affect on how the Commission views the evidence. Each of the persons who gave evidence to the Commission did so truthfully, albeit, from their own impression of the events. There is a large body of evidence before the Commission. The Commission's task is to analyse that evidence and reach a conclusion about the events which are most germane to deciding whether on the balance of probability there have been dismissals or not in the first instance.

The Law

46 It also should be said from the start that it is clear that on the evidence each of these ladies all brought their relationship with the Respondent to an end by resignation. For there to be an unfair dismissal it is trite that there must have been a termination by the employer. The law to be applied was established in *The Attorney General v Western Australian Prison Officers' Union of Workers (1995)* 75 WAIG 3166 where Kennedy J said:

> *"The position for the present purposes is, in my view, summarised in the judgment of Stephenson LJ in Sothern v Franks Charlesly & Co [1981] IRLR 278 at 280:*
>
> > *"did he trip or was he pushed? Was it murder or was it suicide? I know that such a simple consideration of starkly contrasted alternatives is too often outlawed by authority in deciding the issue of dismissal vel non. Even if the question, 'Was the employee dismissed?' cannot always be answered by answering the question, 'Who really terminated his contract?' the real answer to the second question gives the right answer to the first question in this case."*

47 The Full Bench has further explored the concept in *Pisconeri v Laurens and Munns (1999)* 79 WAIG 3187 where His Honour the President said:

"It is the law that a dismissal occurs when the employer dismisses the employee. The concept of dismissal is capable of including cases where an employer gives a worker an option of resigning or being dismissed; or where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign (see The Attorney-General v WA Prison Officers' Union 75 WAIG 3166 at 3169 (IAC) per Rowland J, with whom Anderson J agreed (and citing Auckland Shop Eployees Union v Woolworths (NZ) Ltd [1985] NZLR 372 at 374 per Cooke J). (See also Swan Yacht Club (Inc) v Bramwell 78 WAIG 579 (FB) and Tranchita v Wavemaster International Pty Ltd 79 WAIG 1886 at 1892-1893 (FB) and the case cited therein.)

There is no doubt that a resignation by an employee may be a dismissal by the employer, or the employee's employment is terminated if she is given no option but to leave (see Swan Yacht Club (Inc) v Bramwell (op cit)). Cargill Austrtalia Limited, Leslie Salt Division v FCU 72 WAIG 1495 at 1498 (IAC) per Rowland, Wallwork and Owen JJ, which is also a leading authority, related to a case where the Industrial Appeal Court found that there was a discussion about termination, at the end of which the appellant agreed to resign and to accept benefits which were much greater than her express contractual entitlements."

Analysis and Conclusions

48 Applying the law to the facts what happened in this case is that there were allegations made. In my view they were allegations to which any operator of a nursing home was required to give immediate attention and take strong action. Failure to do so could have left it in the position where it would be severely criticised for failure to ensure proper care to senior residents who are incapable of looking after themselves through age, dementia and other sickness.

49 That it stood down the employees on the face of the allegations was in my view understandable. It was aware that doing so would cause distress to the employees and it sought to ameliorate the distress by undertaking investigations as soon as it was practicable for it to do so. It may be that those investigations could have travelled faster if it were not for the time of the year that the incident took place and for the fact that it took some time for the Union to be able to properly represent its members. I should add there should be no criticism of the Union and nor do I make any finding that there ought to be. It responded as quickly as it could and its investigations were conducted with expedition. I conclude from the evidence of Ms Reimers that she diligently applied herself to the task and gave strong representation to her members.

50 It has been alleged that there was in those investigations bullying behaviour by the Respondent in particular Ms Chapman. The clear evidence of Inspector Bryant is that she made no such finding. On the basis of her investigation and analysis she concluded that the Respondent did not have an appropriate mechanism to deal with these issues and that there had been bullying but it was a corporate, not an individual problem. Inspector Bryant made no specific finding that Ms Chapman was guilty of bullying. The Inspector issued Improvement Notices upon the Respondent to install policies so that there would be no bullying generally in the operation. Ms Bryant's evidence was clear and concise; she gave the impression of a competent inspector going about her task in a thorough way. There is no reason why the Commission on what its heard in this case should supplant her finding and nor will it. I find the allegation of bullying by Ms Chapman is not made out.

51 The Respondent issued its warning letters to each of the employees. Significantly apart from Ms Denny, who I will deal with separately, there was no immediate response from the employees. They did not raise or take issue with the warnings forthwith nor did they demonstrate in the form that they resigned that they believed they had no alternative. Nor did they raise the matter with Ms Reimers who was surprised when she found out about the resignations. Ms Powell was sick for a considerable period and she was paid sick leave in accordance with the medical certificates. When she resigned she said she did so after careful thought and on the advice of her doctor. Clearly she misunderstood the advice of her doctor because his evidence, which I accept, is he did not tell her to resign, he mentioned resignation amongst a range of options she had available to her. This adds to the impression that her resignation was made for her own personal reasons.

52 There is nothing in the way Ms Powell went about resigning which indicates that she was anything other than upset about the allegations that were made about her and unhappy about the Respondent's conclusions in finding some were proved against her. She was clearly upset. It is argued that she was given a punishment, as it were, in that she would have to change her shift pattern. This complaint was not raised immediately after the warning was given. It was raised as part of these proceedings. It is open to find that was not raised initially because Ms Powell knew that the disturbance of her contract of employment was minimal. Be that as it may it was just not an issue at the time. Ms Powell definitely was not pushed by the Respondent to leave, it could be perhaps criticised by not being active enough to offer her access to the employee assistance scheme but that aside there is nothing on which one could found the conclusion that the conduct of the Respondent was so bad that Ms Powell had no alternative but to leave.

53 As for Ms Garbellini the situation is similar. There was some time between her warning letter and her resignation. When she put in her sick leave application she was contacted by Ms Chapman to ask if she wanted to use the support mechanisms that the Respondent had in place, but she declined them. There is nothing in the evidence at all which indicates that Ms Garbellini at the time of her resignation had thought that she had been put in the position by the Respondent that was untenable for her to continue. Again as with Ms Powell she may have been upset and unhappy about the situation in which she found herself but she made her own decisions about the outcomes that she wanted, that is, she did not want to work for the Respondent any more and she decided to resign. That is her right. Fundamentally so much time between the warning notice and the resignation is to make it quite unlikely that she eventually resigned because, at the instigation of the employer, there was no other option left to her.

54 Insofar as Ms Denny is concerned, on all of the evidence she remained at work while the investigations were undertaken. According to her evidence there were things going on all around her. There were more people than the three that the Commission is dealing with, involved in this exercise, things were unstable and she thought she might be involved in that generally. But she did not give any evidence which would indicate that she resigned because it was impossible for her to stay because of the Respondent's conduct. In fact she had her conversations with Ms Simpson, which I find were conducted in an appropriate and proper manner, and as a result of that she decided to resign. She did so before the Respondent's findings were made known to her. That is an act for which she is completely responsible.

55 It might be said though that she was concerned about the effect upon her earning capacity by the retraining regime that the Respondent indicated in its letter to her. It should not be forgotten that Ms Denny worked fulltime in another position at the Regional Hospital. She worked over the weekends for the Respondent. Ms Simpson had concerns about the effect upon her health of such long working hours given the fact that she was in a large study program as well. In any event Ms Simpson said that it could well be that the retraining or working under supervision of a registered nurse might only last a week or so but Ms Denny never pursued the matter or tested it to find out what the Respondent's intention really was because she had already resigned.

56 I cannot see how the tests set out in the cases dealing with constructive dismissal can be applied to Ms Denny, I conclude that she resigned and she did so without knowing what the Respondent had planned for her. Even when she found out she did nothing to re-establish contact.

Application for Costs by WorkSafe

57 Finally I need to deal with the application by Inspector Bryant for costs against the Union. The costs are requested by Ms Bryant on the instruction of her Director in these circumstances. Ms Bryant is a Senior Inspector of WorkSafe managing a team of eight inspectors and on Friday the week before the hearing she received a call from the Union's advocate regarding the issue of a summons to appear in this case. There was a very short timeframe to enable her to organise other work in the Kalgoorlie area which may have ameliorated the costs. Instead she had to get copies of other documentation required for the court and reorganise her other work. If she had been given more time she could have driven to Kalgoorlie and conducted other work in the area. Although WorkSafe was happy to assist the Commission in any way it could in the circumstances it had been subject to costs out of the ordinary and should not have to pay them.

58 The documentation she submitted to the Commission indicates that the total cost of Ms Bryant's attendance was $1235.18 being $106.78 for car hire, $517.40 for airfare and travelling allowance of $631.00.

59 These costs do not include the salary of the inspector.

60 Out of the total cost WorkSafe seeks reimbursement on the airfare alone in the sum of $517.40. Ms Bryant told the Commission she was given conduct money of $100.00 which would have covered a bus fare.

61 It is clear the conduct money to accompany summons is in the sum of normal public transport however it is obvious that if Ms Bryant had used the public transport she would not have been available because she was given no working time to prepare for proceedings before the Commission.

62 It is reasonable in the circumstances where WorkSafe is not requesting total reimbursement of its cost that it should receive the balance of the airfare in the sum of $417.40. However the principal authority on the award of costs in this jurisdiction is *Braily v Mendex Pty Ltd (1993)* 73 WAIG 26. The Reasons of His Honour the President make it clear that power vested in the Commission to award costs under s.27(1)(c) is restricted to ordering one party to pay costs to another party and then only in extreme cases; for example when cases are instituted without reasonable cause. In short there is no power to award costs at the motion of a witness who is not a party. The payment in Regulation 83(5) of the *Industrial Relations Commission Regulations 1985* of sufficient money by the person issuing the summons to the person named in summons to travel from his/her place of residence or employment to place of hearing mentioned in the hearing appears to be the limit of the power.

63 In this case while the equity of the circumstances lays with the request by Inspector Bryant for payment of a small part of WorkSafe expenses the Commission does not have power to make the order sought.

64 Finally I consolidate my findings in this matter. Concerning each of the three persons involved there has been no dismissal by the employer and the claims must be dismissed.

2004 WAIRC 13245

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ANGLICAN HOMES (INC)
	RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 9 NOVEMBER 2004
FILE NO	CR 86 OF 2004
CITATION NO.	2004 WAIRC 13245

Result	Application dismissed. Application for costs by WorkSafe dismissed.

Order

HAVING heard Mr M. Swinbourne who appeared on behalf of the Applicant and Ms J. Auerbach (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:

1. THAT the application be, and is hereby dismissed.
2. THAT the application for costs by WorkSafe is dismissed.

(Sgd.) J F GREGOR,
Commissioner.

[L.S.]

2004 WAIRC 12952

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BURSWOOD RESORT (MANAGEMENT) LIMITED, BURSWOOD HOTEL PTY LTD AND BURSWOOD CATERING AND ENTERTAINMENT PTY LTD
	RESPONDENTS
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 8 OCTOBER 2004
FILE NO/S	CR 11 OF 2004
CITATION NO.	2004 WAIRC 12952

Catchwords	Industrial Relations (WA) – Application for order to redeploy employee to valet position without entering into an AWA – Whether employee is a new employee or redeployee – Corporate veil lifted – Fairness and equity considered – Entities viewed as single employer – Objects of the Act considered – Employer ordered to redeploy employee into valet position under award conditions – Industrial Relations Act 1979 (WA) s6, s26 and s44(9)
Result	Order issued.
Representation	
Applicant	Mr J Winters
Respondents	Mr G Blyth (as agent)

Reasons for Decision

1 Antony Allis is currently employed by Burswood Hotel Pty Ltd (BHPL) and is a member of the applicant union. In early 2004 he was advised by BHPL that his position was to be made redundant on 13 April 2004. Prior to this date Mr Allis applied for and was offered a position as a valet car park attendant ("the valet position") by Burswood Resort (Management) Limited (BRML) effective 14 April 2004. Even though Mr Allis accepted BRML's offer of employment for the valet position he refused to sign an Australian Workplace Agreement ("AWA") to be registered under the *Workplace Relations Act 1996* ("the WR Act") for this position. The applicant argued that Mr Allis should be able to be employed in the valet position without signing the AWA and the respondents rejected this claim. As conciliation proceedings did not resolve the dispute the applicant asked that the matter be referred for hearing and determination under s44(9) of the *Industrial Relations Act 1979* ("the Act").

2 The schedule of the memorandum of matters referred for hearing and determination is as follows:

> "Background
>
> The applicant maintains the following:
>
> Burswood Hotel Pty Ltd (BHPL) made Mr Allis' position redundant, effective 13 April 2004.
>
> Mr Allis applied for and was offered a position as a Valet Car Park Attendant with Burswood Resort (Management) Limited (BR[M]L) effective from 14 April 2004. The offer of employment for this position was conditional upon Mr Allis signing an Australian Workplace Agreement (AWA) under the *Workplace Relations Act 1996* with BR(M)L.
>
> As Mr Allis declined to enter into an AWA for this position BR(M)L is refusing to employ Mr Allis as a Valet Car Park Attendant.
>
> As Mr Allis was unable to obtain alternative employment with any of the respondents as at 13 April 2004, BHPL is to terminate Mr Allis. The applicant believes that in all the circumstances Mr Allis's termination would be harsh and unfair.
>
> The respondents maintain the following:
>
> Mr Allis was advised by BHPL that if he is not redeployed into another position with BHPL his employment would be terminated effective from 13 April 2004.
>
> Mr Allis applied for and was offered a position with BR(M)L as a Valet Car Park Attendant, commencing on 14 April 2004. The offer of employment was conditional on Mr Allis entering into an AWA. Mr Allis has declined to enter into an AWA with BR(M)L.
>
> The matter referred for hearing and determination is as follows:
>
> The applicant seeks an order that BHPL not terminate Mr Allis and that he be redeployed into the position of Valet Car Park Attendant with BR(M)L from 14 April 2004 without entering into an AWA for this position.
>
> BR(M)L and BHPL reject that there has been any unfairness towards Mr Allis and objects to any order issuing."

3 An agreed statement of facts was tendered at the hearing as follows:

> "1) This application and the hearing of this dispute arises from Application C 11 of 2004. The history is summarized as follows:
>
> - On 15 January, 2004, (sic) the Applicant filed an application in the Western Australian Industrial Relations Commission ("WAIRC") as a result of a proposed amalgamation of five (5) departments at the respondents (sic) place of business to which the applicant claimed created inequities.

- The Respondents were to amalgamate five (5) departments that operated in the various group of companies, namely Burswood Resort (Management) Limited ("BRML"), Burswood Hotel Pty Limited ("BHPL") and Burswood Catering and Entertainment Pty Limited ("BC&E"). The departments to be amalgamated to form one (1) main Customer Contact Centre were Club Burswood, Guest Services, Communications, restaurant (sic) Reservations and Hotel Reservations.
- During several conferences before the Commission, it was clear that the affected workers' positions were to be made redundant.
- The Respondents encouraged existing employees to apply for new positions in the Customer Contact Centre as well as alternative positions available within the Burswood Group of companies (sic).
- The Respondents stated that if an affected employee was terminated and there was not an offer (sic) in the new Customer Contact Centre or any alternative positions within the Burswood group of companies, then redundancy was the likely outcome.

2) The Respondents confirmed they would assist affected employees in looking for alternative employment if they:

   (a) were unsuccessful in (sic) application for a Customer Contact Centre position; or

   (b) chose not to apply for a Customer Contact Centre position: and

   (c) where reasonable, would retrain an employee if that was required.

3) The Respondents also confirmed that any accrued entitlements, such as annual leave, sick leave and long service leave would transfer across if an employee was successful in (sic) a position at the Customer Contact Centre or another position around the one (sic) of the Burswood Groups of companies (sic). This would occur even if the employee changed employment from one of the group of companies to another where requested by the employee.

4) A member of the Applicant Union, Mr Antony Allis (sic) up until the 13 April, 2004 was employed in the Communications department (one of the five (5) departments subject to the amalgamation). Mr Allis had applied for a position as a valet car park attendant with BRML and had been advised he was successful in his application and was offered that position.

5) For the purpose of this hearing, the parties agree that the redundancy of Mr Allis was a bona fide redundancy."

(Exhibit A1)

4 There was no issue between the parties that Mr Allis was qualified and selected on merit to undertake the valet position. It was also not in dispute that Mr Allis commenced employment at the Burswood Resort Hotel with Victoria Co (Hotel Management) Pty Ltd on or about 12 March 1996 as a casual employee and on 1 October 1997 he commenced employment with BHPL, which became the hotel's new owner, on the same terms and conditions he had with the previous owner. Mr Allis became a full time employee of BHPL in December 1999. Mr Allis' service at Burswood International Resort Casino ("the Resort") has been continuous throughout the period 12 March 1996 up to the date of hearing (Exhibit R3). The applicant does not contest that it is open for an employer to require an AWA be signed as a pre-condition to employment when a new employee applies for a position.

Applicant's Evidence

5 Dr Margaret Henderson is one of the applicant's organisers and she deals with issues concerning the applicant's members at the Resort. Dr Henderson stated that Mr Allis contacted her on or about 4 March 2004 about reviewing an employment contract that he had been offered by BRML. After reviewing the AWA given to Mr Allis she advised him that there was an award classification for the valet position in the Burswood International Resort Casino Employees' Award 2002 (No A4 of 2002) ("the Award"). Dr Henderson advised Mr Allis that it was her understanding that as Mr Allis was an ongoing employee at the Resort he could not be required to sign an AWA to continue his employment there and she advised Mr Allis to accept the valet position with the qualification that he wanted to be covered by the Award in this position and not an AWA.

6 Dr Henderson stated that she attended a meeting at the Resort on 29 March 2004 to discuss general issues relating to the creation of the Customer Contact Centre ("the CCC"). Towards the end of the meeting the respondents' Manager of Human Resources, Kathleen Drimatis, raised the issue of Mr Allis' ongoing employment. Dr Henderson was informed by Ms Drimatis that the position that Mr Allis had applied for was an AWA position, and that signing an AWA was a precondition for Mr Allis to take up employment in the valet position. Dr Henderson was advised that if Mr Allis did not sign the AWA then no position was available for him and Ms Drimatis informed Dr Henderson that Mr Allis had 48 hours to sign the AWA. Dr Henderson stated that she responded by saying that she did not believe that as an existing employee Mr Allis should be required to sign the AWA to continue his employment at the Resort.

7 Dr Henderson stated that she was aware that employees who were redeployed within the respondents' operations as a result of the formation of the CCC had the option of having any accrued entitlements 'rolled over' to their new position or paid out.

8 Dr Henderson gave her views about the employee hand book given to all of the respondents' employees and which applied at the Resort up to September 2003 (Exhibit A8.1). It was Dr Henderson's view that even though there were a number of separate entities at the Resort, it presents as one employer and Dr Henderson referred to a number of examples within the handbook to support this claim. It was also Dr Henderson's view that a number of the Resort's practices and policies confirm that all of the Resort's employees are treated as one group of employees. For example, there is one Occupational Health and Safety Committee that covers all employees working at the Resort.

9 Under cross-examination Dr Henderson stated that she was aware that different entities existed at the Resort and she acknowledged that each entity is a separate employer. It was put to Dr Henderson that the reference to the Resort in the employee handbook can be understood to be referring to the separate entities within the Resort as well as the Resort generally. Dr Henderson stated that even though she accepted this proposition it was her view that when read as a whole, the employee handbook does not distinguish between the different entities within the Resort and there is no explanation to that effect in the handbook.

10 Dr Henderson was aware that BRML has a policy that new employees are required to sign an AWA as a pre-condition to employment and she was also aware that Burswood Catering and Entertainment Pty Ltd ("BC&E") gives new employees the option of either signing an AWA or being covered under the relevant award when they commence employment. Dr Henderson maintained that she was not advised during discussions with the respondents about the implementation of the CCC that employees whose positions were to be made redundant as at 13 April 2004 would be required to sign an AWA in order to be employed by a different entity at the Resort. It was Dr Henderson's view that as Mr Allis was not a new employee at the

Resort he should not have to sign an AWA as a pre-condition to taking on the valet position. It was her view that duress had been applied to Mr Allis given the process adopted by the respondents as Mr Allis was told he would be terminated if he did not sign an AWA. It was put to Dr Henderson that she was not told that if an employee obtained suitable alternative employment with BRML that this employment would be offered in a manner different to BRML's normal practice. Ms Henderson agreed that this was the case but stated that the issue is whether Mr Allis is a continuing employee or a new employee.

11 Mr Allis stated that he signed an AWA on the 3 July 2003 in order to retain his position with BHPL (Exhibit A11). Mr Allis stated that around December 2003 he raised an issue with Mr Gordon Dunbar regarding the payment of a higher duty allowance under the AWA to which he believed he had an entitlement. He stated that he was told that he would not to be paid this allowance and he was advised not to pursue the payment of this allowance with the applicant because this could be detrimental to his ongoing employment at the Resort.

12 Mr Allis gave evidence that when he was initially advised some time early in 2003 that the CCC was to be established he was told by Mr Dunbar that no employee would lose his or her job, that everyone's position was guaranteed, that more employees would be needed in the new CCC than were currently employed and that existing employees would be needed to train new CCC employees.

13 Mr Allis stated that when he became aware that redundancies were being contemplated by BHPL in November or December 2003 he sought out alternative employment within the Resort. Mr Allis stated that he did not apply for a CCC position because the positions entailed a heavy workload, it would be more stressful than his existing position and he would be subject to a 10% pay cut. He also did not approve of the CCC tracking clients. Even though approximately forty positions were available at the time to employees not interested in taking up a CCC position or who had been unsuccessful in gaining a CCC position, Mr Allis claimed that most of these positions were part time or casual and that there was no suitable position for him. Mr Allis found out about the valet position through word of mouth, and after speaking to the manager of this section he applied for the position, was interviewed and later selected for the position. When Mr Allis attended the interview for the valet position in February 2004 he stated that he could not recall any discussion about the terms and conditions of employment for this position. Approximately one week after being interviewed for the valet position Mr Allis was advised that he was the successful applicant and he was later asked to sign a an offer of employment for the position as well as an AWA (Exhibits A12 and A13). Mr Allis stated that as the offer of employment referred to him accepting a transfer he understood that he was being transferred from one department to another within the Resort. He stated that even though he accepted the position he refused to sign the AWA at the time because he was seeking further advice about it from the applicant.

14 Mr Allis confirmed that he spoke to Dr Henderson in early March 2004 about the AWA and he was told not to sign the AWA as there is a classification in the Award for the a valet car park attendant. Mr Allis was advised to inform the Resort's human resources department that he would accept the valet position but that he would not be signing the AWA as he wished to be covered by the terms and conditions of the Award.

15 On 28 March 2004 Mr Allis emailed Ms Caroline Bramich, who works in the Resort's human resources section, and advised her that he would not be signing an AWA for the valet position (Exhibit A14). In response he was advised that if he did not sign the AWA the valet position would not be available to him.

16 Mr Allis stated that he did not want to sign the AWA for the valet position. Mr Allis understood that if he did not sign the AWA then he would be made redundant by BHPL and the valet position would no longer be available to him and that he received a letter dated 20 April 2004 from Ms Drimatis subsequent to the interim order issuing confirming that he would be terminated if this application is unsuccessful (Exhibit A15).

17 Mr Allis confirmed that there were no issues raised about his performance whilst he was employed by BHPL and that his performance appraisals have all been satisfactory.

18 Mr Allis stated that he wanted to be covered by an award so that the applicant could represent him, he believed he would receive fairer conditions if covered by the Award as the applicant has input into the Award and he claimed that being covered by an award would make it easier for him to obtain advice. He stated that he was being naïve when he signed his current AWA in July 2003.

19 Under cross examination Mr Allis agreed that he received a pay rise after signing the AWA in July 2003 and he stated that even though he was unhappy with the terms and conditions of the AWA he did not raise any concerns about the AWA except the issue of the payment for higher duties. It was put to Mr Allis that he had a choice in July 2003 not to sign an AWA. Mr Allis stated that he was not fully aware of what he was being given to sign when he was presented with the AWA and he therefore asked his supervisor about signing the AWA. Mr Allis stated that his supervisor told him to sign the AWA so that he could receive a pay increase. Mr Allis stated that he was not aware that he had the choice at the time not to sign the AWA. Mr Allis stated that he was aware if he did not sign the AWA he would not receive a pay rise and he agreed that he was not told that he would be terminated if he did not sign the AWA. Mr Allis stated that he signed an AWA in July 2003 as it was a new contract given to him and he understood that he needed to sign the AWA to continue his employment with BHPL.

20 Mr Allis claimed that he wanted to be covered by an award because the applicant has input into the make-up of the awards applying at the Resort and he wanted the freedom to choose whether or not he wanted to be covered by an award. Mr Allis stated that it was his view that the applicant could only give him limited help if he was covered by an AWA and he understood that he could be better assisted by the applicant if he was under the Award. He gave by way of example the applicant representing him in this case.

21 It was put to Mr Allis that when he was interviewed for the valet position at the end of February 2004 he was told that an AWA was a pre-condition to being employed in this position. Mr Allis stated that he could not recall being advised of this. Mr Allis agreed that he accepted the valet position when he signed the offer of employment for this position on 8 March 2004. Mr Allis stated that even though he signed the offer of employment on that date, he took the AWA away to review (Exhibit R2). It was put to Mr Allis that in signing his offer of employment on 8 March 2004 he made a commitment to sign the AWA for the valet position. Mr Allis stated that this was not the case because when he signed the offer of employment on 8 March 2004 he had not signed the AWA at that stage as he understood he had a choice between signing an AWA or being covered by the Award.

22 Mr Allis stated that he would have continued to seek out alternative positions throughout the Resort if the valet position was not available. He stated that when a list of possible job options within the Resort was given to him it did not list which employing entity was attached to each job but it did contain information about whether or not the position was full time or part time. He stated that most of the jobs were not suitable for him as some positions were part time or casual, some required

specialist training and he had no experience to undertake the other positions. Mr Allis was aware that positions were becoming available on an ongoing basis and that the list of jobs was updated from time to time. Mr Allis stated that he applied for the valet position as he was not interested in any of the other jobs that were available at the time or they were unsuitable.

23 Mr Allis reiterated that when he was interviewed by Mr Andrew Harding and Mr Trevor Leavy for the valet position he was not told that if he did not sign an AWA then he would not be offered the position. Mr Allis stated that he did not accept signing an AWA as a precondition to employment in the valet position as he understood there was a classification for this position in the Award and he wanted to be covered by the Award. As a consequence Mr Allis sent an email to one of the Resort's human resources officers Ms Bramich, advising her he should have a choice about being covered under an AWA or the Award (Exhibit A14). Mr Allis confirmed that he was advised by Dr Henderson that he should be given a choice between being covered by an AWA or the Award, he relied on the applicant's advice that the Award contained a valet position and he believed that this was an option open to him. Mr Allis stated that he wanted to be covered under the Award because the applicant has input into the Award, he wanted the applicant to be able to assist him, he wanted the benefits of being covered by an Award, the applicant can represent members who are covered by the Award, he was advised by Dr Henderson that he could be covered by the Award and he was also advised by the applicant that he had the ability to choose between an AWA and the Award. Mr Allis stated that he was unaware of the specific differences between the terms of his current AWA and the AWA for the valet position and Mr Allis stated that he had limited knowledge of the impact of signing an AWA for the valet position.

24 Mr Allis believed that it was unfair for him to be terminated if he did not accept the valet position on the terms proposed by BRML because he had sought out and found an alternative position within the Resort, he was suitably qualified and capable for this position, he had previously successfully undertaken the duties of this position, his application to be transferred was successful and he believes he should have a choice about the conditions that apply to him in the valet position. Mr Allis understood that the Resort's human resource department offered transfers throughout the Resort and he did not see the Resort as being composed of separate entities. He understood that when he applied for the valet position he was being transferred from one department within the Resort to another as he filled out an internal application through the Resort's human resources department using a transfer form.

25 Under re-examination Mr Allis stated that in July 2003 his supervisor told him to sign the AWA and he was not advised at the time of any other industrial instruments which could apply to him.

26 David Kelly has been the applicant's Secretary for approximately two years and he has been employed by the applicant since 1992. Mr Kelly stated that since 1998 he has had regular dealings with the respondents. Mr Kelly understands that the Resort is operated by a group of companies which is controlled by one managing entity, Burswood Limited and that Burswood Limited is the controlling entity at the Resort. Mr Kelly acknowledged that there are a number of subsidiary companies operating within the Resort including BRML, BHPL and BC&E. Mr Kelly understands that the Resort has one human resources department with direct links to the Vice-President for Human Resources who is responsible to the Chief Executive Officer ("CEO") of Burswood Limited. He stated that when issues were usually discussed with the respondents they were handled by one group of representatives even though individual companies existed. Mr Kelly gave one recent example concerning right of entry provisions. Mr Kelly stated that Ms Drimatis wrote to the applicant about negotiating one set of provisions to apply across the Resort (Exhibit A16). In this instance the letter from Ms Drimatis did not specify the subsidiary entity or entities on whose behalf Ms Drimatis was acting.

27 Mr Kelly confirmed that the applicant's members employed by the respondents are variously covered by AWAs, state awards and industrial agreements. Mr Kelly stated that the applicant has at times sought to negotiate the terms and conditions of AWAs with the respondents however the respondents have declined this request as they wish to have individual agreements with their employees and he was advised that the respondents preferred to have employees covered under AWAs because employees are more compliant and flexible and because the respondents do not have to deal with the applicant. Mr Kelly stated that when comparing the awards applying at the Resort with the terms and conditions of the AWAs, the awards are the only instruments which recognise the role of unions. For example the awards recognise the rights of the applicant's delegates, there is a role for the applicant in the Award's dispute settlement procedures and the dispute settlement procedures refer to the ability to use the assistance of the Commission unlike the dispute settlement procedure in the AWA which has a private mediation process. Mr Kelly stated that on this basis there was a significant difference between the awards and AWAs applying at the Resort.

28 Mr Kelly claimed that the Resort operates as though it is one entity and he referred to a recent refurbishment which occurred across the Resort by way of example.

29 Mr Kelly stated that it was his view that it was unfair for Mr Allis to be terminated for refusing to sign an AWA because he has been a good and long term employee at the Resort and he was interviewed and selected on merit for the valet position. Mr Kelly stated that it was his view that Mr Allis has the right to have a union to represent him and to assist him to collectively bargain. It was his view that Mr Allis has been subject to duress by being required to sign an AWA as a pre-condition to employment with BRML and he claimed that the respondents are relying on legal technicalities by regarding Mr Allis as a new employee thus forcing him to sign an AWA.

30 Under cross examination Mr Kelly agreed that the Resort has different employing entities covering different areas at the Resort. Mr Kelly qualified this by stating that even though there are different employing entities at the Resort they do not always relate to their designated areas. For example, Mr Kelly understands that employees in the convention centre are usually employed by BRML however some employees who are employed by BHPL work in the convention centre.

31 Mr Kelly agreed that the applicant has applied for and has in place awards which bind different entities at the Resort.

32 It was put to Mr Kelly that he has been aware for some years that a single human resources department has provided services to the respondents. Mr Kelly agreed that this was the case but stated that the Resort's human resources department does not operate in the same way as an external human resources management service provider and Mr Kelly claimed that the Resort's human resources department implements the Resort's policies which come from Burswood Limited CEO Mr John Schaap and which are then implemented via the various companies across the Resort.

Respondents' Evidence

33 Ms Drimatis is employed by BRML and her role is to manage human resources issues at the Resort. Ms Drimatis stated that the chart confirming Burswood Limited's corporate structure confirms that Burswood Limited is the parent company and there are a number of subsidiary companies which are all separate entities (Exhibit R4). Ms Drimatis stated that the human resources department provides services to BHPL, BRML, BC&E and that within her department there are advisors with responsibility for each different entity. Ms Drimatis stated that BHPL has operated since 1997 and it employs hotel employees

and some employees in parts of the convention centre. BRML has been operating since 1985 and covers the casino and corporate services. BC&E has operated since 2001 and deals with employees in the catering and entertainment areas. Ms Drimatis stated that if one of the human resource department advisors in her section required directions or instruction he or she would contact the relevant management or supervisors in the various entities such as Mr Philip Thow who is the CEO of BC&E or the hotel's General Manager, Mr James Allen and the Managing Director of Burswood Limited, Mr Schaap.

34 Ms Drimatis stated that the Burswood Limited Concise Annual Report 2003 ("the Concise Annual Report") (Exhibit A7) had to be read in conjunction with the Burswood Limited Financial Report 2003 ("the Financial Report") (Exhibit R5). Ms Drimatis stated that references made to the consolidated financial statements in the Financial Report incorporate the assets and liabilities of all entities controlled by Burswood Limited which is referred to as 'the Company'. Ms Drimatis stated that 'the Company' and its controlled entities together are referred to in the Financial Report as the 'consolidated entity'. Ms Drimatis stated that the requirements of the Corporations Law are that entries must identify 'the Company' and the 'consolidated entity'. Ms Drimatis stated that because of this requirement to report globally, separate financial reports are not generated for the Resort's different entities however, Ms Drimatis stated that page 9 of the Financial Report details financial information on all of the consolidated entities.

35 Ms Drimatis confirmed that in August 2003 a decision was taken to establish the CCC and as a result a number of customer contact points throughout the Resort within each of the respondents' operations were consolidated into one centre. From August 2003 there was consultation with employees about the changes and in the week commencing 23 February 2004 individual meetings were held with each employee affected by the creation of the CCC. At this time employees were given notice of their termination and information about employment options, redeployment and retraining.

36 Ms Drimatis understood that Mr Allis was interviewed for the valet position on 23 February 2004 and that on 3 March 2004 Mr Allis was advised that he had been successful in gaining this position.

37 Ms Drimatis gave evidence about the interview process which operates across the Resort. Ms Drimatis stated that employees at the Resort can be trained and accredited to undertake job interviews without a human resources employee being present and during the job interview process accredited employees use a guide to assist them in conducting the interview. Ms Drimatis confirmed that an interview guide was used for the valet position and this document confirms that an AWA was a condition of employment in this position (Exhibit R6). Ms Drimatis stated that an interview evaluation sheet summarising a person's suitability for a position is completed by the interviewers subsequent to an interview and is sent to the respondents' human resources department. Once a recommendation has been made for an existing employee to fill a position an inter-company transfer form has to be signed off by the employee's current General Manager and the General Manager of the area where the employee is to be transferred. Once this process is completed a contract is generated and offered to an employee as occurred in Mr Allis' situation. Ms Drimatis stated that if an employee refuses to sign the AWA offered by BRML then that employee is not offered the position as the signing of an AWA is a pre-condition to being employed by BRML. Ms Drimatis confirmed that from December 1999 BRML adopted a policy that any employees being offered employment with BRML are required to sign an AWA as a pre-condition for employment with BRML, even if the employee was previously employed by another entity at the Resort. Ms Drimatis gave evidence that on 8 March 2004 the applicant signed an offer of employment accepting the valet position (Exhibit R2). Ms Drimatis was unaware that Mr Allis was unhappy about signing an AWA for this position until Ms Bramich received the email from Mr Allis on 28 March 2004 (Exhibit A14). At the meeting held the following day with the applicant, Ms Drimatis told Dr Henderson and Mr Winters that the necessity to sign an AWA was a pre-condition to Mr Allis' employment in the valet position and Ms Drimatis advised them that if Mr Allis did not accept the position on this basis and no alternative employment was found for Mr Allis, he would be terminated on 13 April 2004.

38 Ms Drimatis stated that as a result of the Commission's interim order requiring BHPL to continue employing Mr Allis she arranged for Mr Allis to be seconded to BRML pending the outcome of this matter. Ms Drimatis stated that this was difficult to arrange as the different entities have different pay systems.

39 Ms Drimatis confirmed that employees who found alternative employment with another entity at the Resort as a result of the formation of the CCC had their long service and sick leave entitlements transferred across to the new employer and due to legal requirements, annual leave entitlements could be retained or cashed out by employees. Ms Drimatis stated that redundancy payments were made to those employees who did not obtain alternative employment within the Resort even though some employees were not entitled to this payment. An update confirming these arrangements was distributed to employees on 18 February 2004 (Exhibit R9).

40 Ms Drimatis stated that employees in the Resort's human resources department are authorised to represent BHPL, BRML and BC&E. Ms Drimatis gave evidence that when distributing general information to employees, for example notices on notice boards, entities are not always identified on the letterhead but when specific events occur such as an employee's termination or a new contract of employment is entered into, the letterhead of the specific entity is used.

41 Ms Drimatis stated that when an employee is promoted to a new position within an employee's classification within BRML there is no requirement to sign an AWA as a pre-condition for this promotion. Ms Drimatis stated that BC&E allows new and existing employees the choice of signing an AWA or being covered by the relevant award when taking on a new position. Ms Drimatis stated that BC&E's policy was developed because of the relationship between BC&E and the applicant at the time. Ms Drimatis confirmed that BHPL employees are covered under an AWA for those classifications not covered by the Hotel and Tavern Workers' Award 1978 (No R31 of 1977).

42 Under cross examination Ms Drimatis confirmed that Mr Schaap is the CEO of Burswood Limited. Ms Drimatis stated that she did not know if he was the also the CEO of BHPL. Ms Drimatis confirmed that Mr Allen is the General Manager of the Resort's hotel. Ms Drimatis stated that human resources issues at the hotel that are unable to be finalised by middle management personnel are forwarded to Mr Schaap and Mr Allen to review. Ms Drimatis confirmed that as the CEO of BC&E Mr Thow has the final decision on matters relating to BC&E. Ms Drimatis confirmed that Mr Thow also has responsibility for some employees working within BRML and BHPL.

43 Ms Drimatis confirmed that an employee's termination by any of the respondents would have to be approved by her in her role as Manager of Human Resources.

44 Ms Drimatis stated that the employee share ownership plan mentioned at page 27 of the Financial Report (Exhibit R5) refers to shares in Burswood Limited and that this plan applies to any employee employed throughout the Resort.

45 It was put to Ms Drimatis that she could not state categorically that when Mr Allis was interviewed for the valet position he was informed that signing an AWA was a pre-condition for employment as she did not attend this interview. However, Ms Drimatis was confident that as the interview guide was specific about what was to be mentioned to Mr Allis that Mr Harding and Mr Leavy would have mentioned this requirement to Mr Allis. She stated that it was her view that this was not a critical

issue as soon after the interview it was not in issue that Mr Allis was aware that the signing of an AWA was central to being appointed to the valet position. Ms Drimatis was asked to comment on the offer of employment signed by Mr Allis on 8 March 2004 and the reference to a transfer on that document (Exhibit R2). Ms Drimatis stated that the reference is to an inter-company transfer, that is, an employee moving from one of the Resort's entities to another. Ms Drimatis stated that an employee is unable to transfer from one entity to another within the Resort when an employee is terminated by one entity and employed by a different entity.

46 When asked about her relationship with BC&E, BHPL and BRML, Ms Drimatis stated that she has the final say on a number of industrial matters affecting each entity. For example, if a manager disagreed with a decision to terminate an employee, she would have discussions with the head of that department. In some cases if Ms Drimatis is unable to reach a consensus with the manager in charge of each entity Mr Schaap would become involved as he is the CEO of Burswood Limited and she confirmed that if an outstanding issue was not finalised by Mr Schaap it would be dealt with by the Board of Burswood Limited.

47 Ms Drimatis confirmed that Mr Allen is the General Manager of the Resort's hotel and Mr John Osborne is responsible for the Resort's surveillance, security, human resource management and marketing and has recently been appointed as the Chief Operating Officer in charge of the Resort's operations, a position delegated to him by Mr Schaap.

48 Ms Drimatis confirmed that the Resort's human resources management, information technology, legal and marketing and maintenance departments service each of the Resort's separate entities.

49 It was put to Ms Drimatis that it was unfair to put Mr Allis in a situation where he would be terminated if he did not sign an AWA. Ms Drimatis stated that it would be unfair to allow Mr Allis to be treated differently to other employees who were terminated because they were unsuccessful in gaining a CCC position or a new position within the Resort.

50 Ms Drimatis conceded that Clause 34. – Resolution of Disputes in the AWA offered to Mr Allis (Exhibit A13) does not provide for the applicant to bring a dispute to the Commission on behalf of Mr Allis on issues relevant to the AWA. However, it was Ms Drimatis' view that if BRML agreed that the Commission could act as a mediator in a dispute dealing with the AWA then the matter could come to the Commission but she was not sure if the Commission has the power to mediate in these circumstances. Ms Drimatis conceded that if Mr Allis was employed under the Award then the Commission could be utilised if a dispute did not involve award enforcement. It was Ms Drimatis' view that if Mr Allis signed an AWA this would not limit the applicant's ability to represent him and Ms Drimatis claimed that AWAs were not offered to employees to exclude the applicant from the Resort. Ms Drimatis stated that BRML offered AWAs to its employees because AWAs allow for efficient and effective work practices and Ms Drimatis claimed that the respondents have previously had discussions with the applicant about issues concerning employees covered by AWAs.

Submissions

51 The applicant maintains that the evidence in this case establishes that Burswood Limited is the parent company and controlling mind of the Burswood Group of Companies and in equity and fairness the Commission should regard the Burswood Group of Companies as one employer. The applicant argues therefore that the Commission should order that Mr Allis should not be regarded as a new employee and be required to sign an AWA as a pre-condition to his employment in the valet position with BRML.

52 The applicant maintains that even though Mr Allis had limited knowledge of industrial instruments he was clear that he should have the right to choose to be covered by an award in preference to an AWA, he wanted the benefits of a collective agreement and he wanted the applicant to represent his interests at the Resort.

53 The applicant relies on a number of the objects contained in the Act in support of its claim that Mr Allis should have the right to be covered by an award in preference to an AWA in the valet position. The applicant maintains that the object of the Act relating to the promotion of collective bargaining and the establishment of the primacy of collective agreements over individual agreements (s6(ad)) is satisfied by allowing Mr Allis to have his terms and conditions of employment covered by the Award and the applicant argues that offering an AWA to Mr Allis as a pre-condition to his employment with BRML is contrary to s6(ad) of the Act. The applicant maintains that s6(af) of the Act, which relates to the facilitation of "the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprise" is met if this application is allowed as it would be unfair for Mr Allis, who is in reality a continuing employee, to be redeployed to another entity within the Resort conditional upon him signing an AWA in preference to his chosen industrial instrument. The applicant maintains that it is not inefficient for BRML to employ Mr Allis under the Award as there is a classification in the Award for the valet position and BRML currently employees workers under the Award. The applicant claims that s6(ab) of the Act which relates to the promotion of the principles of freedom of association and the right to organise is also satisfied by allowing Mr Allis to be covered by the Award. Mr Allis gave evidence that it is his view that the applicant can better represent his industrial interests if he is employed under the Award as opposed to being employed under an AWA and the applicant argues that the respondents are acting contrary to this object by requiring Mr Allis to sign an AWA. The applicant maintains that the Commission should facilitate Mr Allis' right to the benefits of being a union member and for the applicant to represent his industrial interests. The AWA offered to Mr Allis does not allow the applicant to bring disputes about the AWA to the Commission for conciliation or arbitration and Mr Allis is therefore being denied the right to the benefits of union membership.

54 The applicant relies on *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Catering and Entertainment Pty Ltd* (2002) 82 WAIG 544 in support of its claim as the Commission in Court Session made a number of findings in this decision supporting the applicant's contention that the Burswood Group of Companies operates as one entity. Current ASIC documents (Exhibits A2 to A6) establish that with the exception of BC&E (which is limited to two Directors and a Secretary) Burswood Limited, BHPL, Burswood Nominees and BRML all have the same Board of Directors, the same Secretary, the same registered office, the same principal place of business and all of the subsidiary companies are 100% owned by the Resort's parent company, Burswood Limited. The applicant maintains that ultimately Burswood Limited's Board of Directors has the responsibility to make decisions affecting the Burswood Group of Companies and this is evidenced by the recent take over offer for Burswood Limited where Burswood Limited's Board of Directors has the final say on whether or not the PBL offer should be accepted or rejected.

55 The applicant argues that the Concise Annual Report (Exhibit A7) cites numerous examples which confirms that the Burswood Group of Companies portrays itself as having one corporate identity. One example is the reference on the front cover of the report to Burswood being the largest single-site, private sector employer in the state, with more than 2700 employees. The applicant argues that the Financial Report (Exhibit R5) is another illustration of how the Burswood Group of Companies portrays itself as one corporate identity. This report states the overall financial state of the Burswood Group of Companies as a whole under the parent company, Burswood Limited. The applicant argues that as the information in this report does not

establish that the Resort's entities operate independently to that of the parent company, Burswood Limited, then this supports its argument that the Burswood Group of Companies should be regarded as a single entity.

56 The applicant maintains that the employee handbooks (Exhibits A8.1 and 8.2) are further evidence in support of its contention that the Burswood Group of Companies are effectively one corporate identity and operate as one company. There is one employee handbook for all staff irrespective of which entity employs an employee and the handbook refers to a number of common elements for all employees of the Burswood Group of Companies such as the same wardrobe department and shared lunch rooms.

57 The applicant maintains that the following should be taken into account when deciding the equity and merit of this case:

(a) Mr Allis is a long term employee at the Resort (eight years).

(b) Mr Allis is competent to perform the valet position and he has previously undertaken this role.

(c) There has been no disciplinary action against Mr Allis and his performance appraisals have all been satisfactory.

(d) It is not Mr Allis' fault that his position was made redundant.

(e) Mr Allis was given a guarantee that his employment contract would not be terminated.

(f) There is a classification covering the valet position in the Award.

(g) Mr Allis has the right to choose whether his employment is governed by an AWA or the Award.

(h) The applicant can best serve and represent Mr Allis in the Commission if a dispute arises over a term of the Award as opposed to an AWA, which excludes the Commission from hearing disputes about the terms and conditions of the AWA.

(i) Mr Allis wishes to remain as an employee at the Resort, no matter which entity employs him.

(j) Mr Allis is able to transfer all accrued entitlements to the new position with BRML, even though BRML is a different entity within the Burswood Group of Companies.

58 The applicant relies on the authority contained in *Shanka v Employment National (Administration) Pty Limited* (2001) FCA 579 in support of its claim. The applicant maintains that this case is similar to the case presently before the Commission where employees applied for and were transferred to new positions and the Federal Court in this case found that the requirement on employees to sign an AWA for their new positions constituted duress under the WR Act.

59 Even though Mr Allis will become a new employee employed by BRML, which the applicant concedes is a separate entity to BHPL, the applicant argues that in all of the circumstances it is only reasonable that Mr Allis be found to be an on-going employee and that Mr Allis be allowed to be redeployed in to the valet position without being regarded as a new employee and without entering into an AWA.

60 The applicant therefore submits that Mr Allis should not be terminated but redeployed into the valet position with BRML effective 14 April 2004 without having to sign an AWA for this position.

61 Each respondent adopted the same submissions.

62 The respondents argue that the Commission is not able to make the order sought by the applicant as this application seeks to deploy Mr Allis to a different employer. Mr Allis is currently employed by BHPL and a position has been offered to him by BRML, which is a separate legal entity. In the circumstances Mr Allis cannot be redeployed into the valet position as it is not possible for Mr Allis to be redeployed to be an employee of a separate legal entity.

63 The respondents argue that as Mr Allis' present employer is BHPL and as no position is available for Mr Allis within BHPL's operations then it is open to BHPL to terminate Mr Allis. As the applicant does not question Mr Allis' existing position as being a bona fide redundancy and as Mr Allis can only be redeployed within BHPL and no alternative position within BHPL exists, therefore the applicant's claim that Mr Allis be redeployed is not capable of being effected and his termination by BHPL is therefore not unfair.

64 The respondents maintain that the Commission should not lift the corporate veil in this instance as it is not in dispute that separate legal entities, including BRML and BHPL operate within the Resort.

65 The respondents argue that this dispute concerns an allegation that the termination of Mr Allis will be unfair. As Mr Allis is employed by BHPL and as his position has been made redundant and there is no vacancy for Mr Allis within BHPL there is therefore nothing preventing BHPL from bringing Mr Allis' contract of employment to an end and in these circumstances there is no unfairness towards Mr Allis. Mr Allis was at all times aware that if he was not redeployed into another position within BHPL then his employment would be terminated. Mr Allis has not been singled out for special attention and reasonable steps were taken by each of the respondents to look for alternative employment and to identify opportunities for Mr Allis so that he could take up alternative employment within the Resort. The respondents maintain that it would therefore not be unfair to terminate Mr Allis as an employee would ordinarily expect his or her employment to be terminated due to a redundancy situation unless suitable alternative employment is found with their present employer.

66 The respondents argue that there is nothing in the WR Act that prevents BRML from offering an AWA as a precondition to Mr Allis' employment in the valet position as Mr Allis is a new employee.

67 The respondents submit that the orders sought by the applicant and the applicant's submissions are "a legal nonsense" and that an order preventing BHPL from terminating Mr Allis cannot at the same time require BRML to employ Mr Allis.

68 The respondents argue that weight should be given to the respondents' case in this instance as Mr Allis did not apply for one of the new CCC positions and as Mr Allis is currently a party to an AWA this reduces the alleged unfairness towards Mr Allis and undermines his claim to be covered by the Award. The respondents also argue that there is no disadvantage to Mr Allis in being required to sign another AWA given that he is currently covered by the terms of an AWA.

69 The respondents maintain that even if there was confusion about whether or not the valet position was offered to Mr Allis subject to the signing of an AWA, this requirement was made clear to Mr Allis when he was formally offered this position.

70 The respondents argue that the AWA offered to Mr Allis, which passed the no disadvantage test provided for under the WR Act, is based on the terms and conditions of the Award. There is therefore no disadvantage to Mr Allis being covered by the AWA. The respondents argue that Mr Allis would be disadvantaged under the Award as the AWA contains entitlements over and above that which are contained in the Award.

71 The respondents maintain that as this issue relates to an allegation of unfair termination the Commission's powers are limited to those available under s23A of the Act. The respondents argue that under this section of the Act the Commission does not have the power to order a third party (BRML) to employ Mr Allis because he may have been unfairly dismissed by BHPL.

72 The respondents argue that the applicant's notion that the three legal entities should be treated as a matter of equity as one employer is a nonsense as the company extracts tendered by the applicant (Exhibits A2 to A6) confirm that the respondents are separate legal entities. Each of the respondents employees have contracts of employment with separate legal entities and the 2003 financial reports for the Burswood Group of Companies confirm the existence of separate legal entities at the Resort.

73 The respondents argue that nothing can be made of the fact that the same employee handbook is used for all of the Resort's employees. The respondents claim that for simplicity and convenience the handbook refers to employees generically.

74 The respondents maintain that the authority contained in *Chamber of Commerce and Industry of Western Australia v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch* (2002) 82 WAIG 405 confirms that it is not open to the Commission to become involved in determining contractual arrangements between parties when an employer offers a new employee an AWA which is permissible under the WR Act.

75 The respondents argue that it is beyond the Commission's powers to require particular contractual terms to be included in an employee's contract of employment. As there was a conditional offer of employment lawfully made by BRML to Mr Allis and as that offer was rejected by Mr Allis the Commission cannot require BRML to now offer a different contract of employment to Mr Allis. The respondents maintain that in any event any order requiring BRML to offer employment to Mr Allis under the Award would be of no effect as the WR Act, which has paramountcy over state laws, allows an employer to make an offer of employment conditional on the signing of an AWA.

Findings and Conclusions

76 I take no issue with the evidence given by each witness in these proceedings as it is my view that each witness gave their evidence honestly and in the main to the best of their recollection. Although I find that Ms Drimatis was hesitant at times whilst giving evidence and was not as forthcoming about relevant details concerning some of the Resort's senior personnel and their areas of responsibility nothing turns on this in relation to the issues in dispute.

77 In this matter the Commission is being asked to determine whether in all of the circumstances having regard to equity, good conscience and substantial merit and the objects contained in the Act it is appropriate that Mr Allis be redeployed into the valet position with BRML as an ongoing employee under the terms and conditions of the Award.

78 It was not in dispute and I find that Mr Allis' position with BHPL became redundant on 14 April 2004 as a result of a decision to establish the CCC in August 2003 and that the CCC is an amalgamation of five departments previously operated by BRML, BHPL and BC&E. Arising out of the decision to create the CCC, existing employees of BRML, BHPL and BC&E whose positions were made redundant could apply for a position in the CCC or could apply to be transferred to be employed by another entity within the Resort if a suitable position became available. If a displaced employee was deemed to be suitable for an alternative position with a different entity at the Resort a new contract of employment was offered to the employee as though the employee was a new employee. If an employee gained employment with one of the Burswood Group of Companies existing entitlements such as long service leave accruals and sick leave were transferred across to the new employer and annual leave entitlements could either be retained or paid out and an employee's service was deemed to be continuous. If an employee chose not to apply for a position in the CCC or was unsuccessful in obtaining alternative employment throughout the Resort or within the CCC then that employee would be terminated due to a redundancy situation and would cease employment with either BRML, BHPL or BC&E. Currently Mr Allis remains employed by BHPL on an interim basis and is undertaking the duties of the valet position. It was not disputed that even though Mr Allis accepted BRML's offer of employment to work in the valet position he did not sign the AWA which BRML claims is a pre-condition for Mr Allis to be employed in the valet position.

79 After considering the evidence given in the proceedings and taking into account the Commission's powers under the Act, s26(1)(a) of the Act and the objects contained in s6 of the Act it is my view that Mr Allis should be redeployed as an ongoing employee into the valet position with BRML under the terms and conditions of the Award.

80 I conclude that even though BRML and BHPL are separate corporations there is sufficient equity and merit in this case to regard the respondents as a single employer thereby allowing Mr Allis to be able to be treated as an ongoing and not a new employee who is able to transfer from BHPL to BRML.

81 It is my view that the three respondents' corporate veil should be lifted and that the respondents be regarded as one entity for the purposes of this application for the reasons set out in paragraph 83 of these reasons as it is my view Mr Allis would be treated unjustly and unfairly if this did not occur.

82 In *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Catering and Entertainment Pty Ltd* (op cit) the Commission in Court Session considered the general principles which apply when lifting the corporate veil as well as the principles applied by the Commission when lifting the corporate veil. At page 551 of this decision, the Commission in Court Session stated the following:

> "In *Adelaide Timber Company Pty Ltd v The West Australian Timber Industry Industrial Union of Workers, South-West Land Division* (1990) 71 WAIG 325, the Union claimed on behalf of one of its members that his redundancy pay should have been calculated on the basis of service with two companies. The Commission found at first instance that the legal distinction between the two companies was not apparent and that they were regarded as "one". Sharkey P and Halliwell SC held that not to pierce the corporate veil and regard the member's service as with one person in the circumstances would be unjust, inequitable and unconscionable. At 331 they observed:
>
> > "Whilst it should not be lightly pierced, the corporate veil should not be allowed in proper circumstances in an administrative tribunal such as this to prevent the Commission acting according to equity, good conscience and the substantial merits of the case (i.e. where it is used to justify wrong, protect fraud, or bring about an inequity which otherwise would not have been occasioned)."
>
> The reasoning in *Adelaide Timber Co Pty Ltd* was referred to by Sharkey P in *Old Ferry Company Pty Ltd v Bertelli* (1999) 79 WAIG 3547 at 3548 and Kenner C at 3550."

83 I have based my decision to lift the corporate veil on the following findings:

(a) I find that in practice the legal distinctions between the respondents are not apparent. The parent company Burswood Limited is the 100% owner of all of the subsidiary companies in the Burswood Group of Companies including the respondents, it is the ultimate controller of each of the respondents and it makes major decisions affecting the entities operating across the Resort (see the Financial Report (Exhibit R5). For example, Burswood Limited allocated $96 million to undertake significant refurbishments across the Resort in or around 2001 and the Concise Annual Report (Exhibit A7) refers to Burwood Limited launching a customer first programme in 2003 which applied across the Resort and this programme was based on a mission statement developed by a team of staff representing a cross section of areas at the Resort (page 23). Additionally, the CCC is an amalgamation of various departments within each of the respondents' operations, into one discrete section which will service the Resort as a whole. In my view this is indicative of the respondents acting as thought they are a sub-set of one entity. Ms Drimatis confirmed that the Managing Director of Burswood Limited, Mr Schaap, has overall responsibility for determining any disputes which cannot be settled by the CEO's of BC&E, BHPL and BRML and if a matter is not settled by Mr Schaap, Burswood Limited's Board of Directors determines the dispute (see transcript page 221-222) and that Burswood Limited's Board of Directors through Mr Schaap oversees the operations of BC&E, BRML and BHPL (Exhibit A8.2 page5). Furthermore, the Resort's finances are reported as though the Resort operates as one entity and the payment of each of the respondents' directors is not separately detailed.

(b) The Resort presents itself to the public as having a single identity. The Concise Annual Report refers to the Resort being the largest single employer in Western Australia and it is described on the inside cover of the Concise Annual Report as one operation (Exhibit A7).

(c) The areas covered by BHPL, BRML and BC&E overlap and do not operate as discrete entities. For example, in addition to being BC&E's CEO, Mr Thow is responsible for some employees operating within BRML and BHPL's operations.

(d) Burswood Limited, BHPL, Burswood Nominees, BRML and BC&E have the same secretary, the same registered office and the same principal place of business and all have the same board of directors, except BC&E (Exhibits A2 to A6).

(e) BC&E is not autonomous but operates as an agent of BRML (see *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Catering and Entertainment Pty Ltd* (op cit) and also the Industrial Appeal Court decision *Burswood Catering and Entertainment Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch* (2002) 83 WAIG 201 which upheld this finding.

(f) BRML provides a substantial range of corporate services to BC&E, BHPL and BRML including Human Resources, Finance, Information Technology, Legal services, Marketing and Maintenance (see transcript page 152 and 221-222). In my view the provision of these common services to the respondents demonstrates that each respondent does not operate separately from each other. Furthermore, the Resort's human resources department, through its manager, approves who is terminated within each entity which indicates that each entity's decision making processes are not separate and autonomous and this department acts as the clearing house for each of the respondents when an employee at the Resort 'transfers' from one entity to another.

(g) There is one job interview process applying across the Resort to all employees and the document outlining the Interview Process asks employee why they want to work at 'Burswood' as opposed to working with a particular entity at the Resort (See Exhibit R6).

(h) There is one employee handbook applying to all employees at the Resort and this handbook details a range of policies which apply to all employees employed at the Resort regardless of which entity employs an employee (Exhibit A8.2). The latest employee handbook confirms:

  (i) There is one Occupational Health and Safety Committee operating across the Resort, with one dedicated Occupational Health and Safety Manager (Exhibit A8.2 page 29).

  (ii) There is one wardrobe department which provides, stores and maintains all the Resort's staff uniforms (Exhibit A8.2 page 13).

  (iii) There is one set of grooming regulations applying to all the Resort's staff.

  (iv) Each employee at the Resort has a common set of benefits including staff meals, discount cards, staff parking, access to a share ownership plan in respect of Burswood Limited shares, one employee magazine, an employee of the month and service award across the Resort, access to an employee counsellor and a common social club.

  (v) Under the Resort's Promotional Prospects and Transfers policy all employees are able to transfer for internal advancement in the Resort after six months of employment in their existing position to positions in the Casino, Convention Centre, Dome or Hotel (Exhibit A8.2 page 25).

  (vi) There is one set of 'Company Rules and Regulations' applying to all employees, one disciplinary process and one Equal Employment Opportunity policy operating across the Resort.

(i) When applying for a new position within the Resort, employees fill out a transfer form.

(j) The respondents are frequently represented by one set of negotiators on a range of industrial issues, which is indistinguishable from a process adopted by a single entity. For example, Ms Drimatis recently sought to negotiate a single right of entry policy with the applicant to apply across the Resort.

(k) The Concise Annual Report (Exhibit A7) refers to promotional prospects and transfers being available to employees at the Resort and does not specify that a transfer is limited to occurring within a specific entity at the Resort.

(l) The Resort's human resources department established and administered one redundancy and redeployment programme for all of the respondents when dealing with employees affected by the establishment of the CCC and this programme was applied equally to all of the respondents' employees. Furthermore, the CCC staff update in relation to this programme (Exhibit R9) refers to 'Burswood' being the employer (see Clause 1.1, 1.2 and 1.3).

(m) When employees took on employment with another entity at the Resort when the CCC was established, each employee had his or her service and entitlements recognised as though they were in effect ongoing employees who had been transferred to a different area within the Resort.

(n) I accept Mr Allis' evidence that he regarded the Resort as being one employer and I accept that when Mr Allis applied for the valet position he understood that he would be transferring from one position to another position within the Resort. Furthermore I accept that the list of job opportunities available to employees displaced by the creation of the CCC did not specify which entity at the Resort was offering the job vacancy.

(o) Mr Allis has had a lengthy, ongoing and continuous employment history since 1996 at the Resort notwithstanding the fact that he has been employed by separate entities during this period, there have been no issues with his performance whilst employed at the Resort, Mr Allis was selected on merit for the valet position and no concerns have been raised by the respondents about Mr Allis' ability to undertake the valet position.

84 I conclude that given the circumstances of this case Mr Allis should be allowed the benefit of being covered by the Award when employed by BRML undertaking the duties of the valet position. Mr Allis was clear in his evidence that he wanted to be covered by the terms and conditions of the Award in the valet position, Mr Allis wanted the applicant to represent his interests at the Resort and it was not in dispute that the Award binding BRML contains a classification of valet car park attendant.

85 In my view the following objects contained in the Act are satisfied by allowing Mr Allis to be covered by the Award in the valet position:

"(ab) to promote the principles of freedom of association and the right to organise;

…

(ad) to promote collective bargaining and to establish the primacy of collective agreements over individual agreements;

…

(af) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;

…

(ca) to provide a system of fair wages and conditions of employment;"

86 Object 6(ad) of the Act, which refers to the promotion of collective bargaining and the establishment of the primacy of collective agreements over individual agreements is satisfied by allowing Mr Allis to be covered by the terms and conditions of the Award as Mr Allis will be represented collectively if he is covered by an award in preference to that of being covered by the individual AWA. I also accept Mr Allis' evidence that he wants to be covered by the Award to protect what he sees as his right to bargain collectively through his union.

87 Award coverage in this instance satisfies object 6(ca) as the Award provides the basis for an employee to have an entitlement to fair wages and conditions. Even though the respondents argue that the AWA contained terms and conditions which in their view were superior to those contained in the Award, clearly Mr Allis had indicated his preference to be covered by the Award.

88 In my view object 6(ab) is satisfied as award coverage allows the applicant to represent Mr Allis' interests at the Resort. For example, if Mr Allis was covered by the AWA he does not have the express right to be represented by the applicant if he has a dispute concerning the AWA. Clause 34. - Resolution of Disputes of the AWA does not allow for Mr Allis to be represented by the applicant when dealing with workplace disputes which contrasts with the rights given to the applicant to assist Mr Allis in Clause 40. - Resolution of Disputes of the Award. It is also the case that the AWA does not provide for the recognition of union representatives which contrasts with Clause 35 of the Award, Union Delegates and Meetings.

89 In my view s6(af) is met in this instance as both the Award and the AWA applies to BRML's operations and the AWA uses the terms and conditions of the Award as a basis to satisfy the no disadvantage test applying under the WR Act.

90 I also take into account Ms Drimatis' evidence confirming that the different entities within the Resort have varying policies with respect to new employees, with BC&E allowing employees the choice of being covered by an award or an AWA and it is the case that a range of awards, industrial instruments and various AWAs apply at the Resort.

91 The respondents argue that as Mr Allis is currently covered by the terms and conditions of an AWA this should be taken into account when deciding the outcome of this application. Even though Mr Allis was covered by an AWA in his previous position it is my view that this AWA ceased to have effect when Mr Allis' previous position was made redundant effective 14 April 2004 (except for giving effect to the interim order). I also take into account that Mr Allis' was unaware of the implications of signing the AWA when he accepted the terms and conditions of the AWA in July 2003.

92 Even though the respondents argue that as Mr Allis did not apply for a CCC position, this weighs against Mr Allis when deciding the merits of this application, I accept Mr Allis' evidence that he did not wish to apply for a CCC position as the new positions had a heavy workload and he would be paid less than his existing wages if he took on a position in the CCC.

93 I reject the respondents' argument that the dispute before me relates to an unfair termination and that the Commission's powers are therefore limited to re-instating Mr Allis to his employment with BHPL, which, the respondents argue, is not possible as Mr Allis' former position has been made redundant. It is my view that the issue before me is whether or not Mr Allis, who is a current employee at the Resort, should be regarded as a redeployee and ongoing employee and not as a new employee when taking on a position with BRML as a result of his position being made redundant by BHPL, and whether or not Mr Allis is entitled to be covered by the Award in this position.

94 I reject the respondents' submissions that the Commission has no jurisdiction to make the order sought by the applicant as the requirement to sign an AWA under the WR Act as a pre-condition to employment with BRML takes precedence over the Act and that the Commission has no power to become involved in determining Mr Allis' terms and conditions of employment. In this instance there is a valet carparking attendant position in the Award and I have found that Mr Allis is not to be regarded as a new employee when taking on this role. It follows in my view that it is therefore not open for BRML to require Mr Allis to sign an AWA as a pre-condition to his ongoing employment at the Resort. Further, as BHPL, BRML and BC&E are all parties to this application the Commission has the power under s44 when dealing with an industrial matter (which in my view this dispute is, as it relates to Mr Allis' rights as an employee) to issue the order sought by the applicant.

95 Having decided that there is sufficient equity and merit in Mr Allis' case that Mr Allis be covered by the terms and conditions of the Award and that the three respondents should be regarded as one employer for the purposes of this application I will order that Mr Allis be redeployed into the valet position with BRML, as though he is an ongoing employee who has not been terminated and that Mr Allis' terms and conditions of employment are to be covered by the terms and conditions of the Award.

96 A minute of proposed order will now issue.

2004 WAIRC 13035

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BURSWOOD RESORT (MANAGEMENT) LIMITED, BURSWOOD HOTEL PTY LTD AND BURSWOOD CATERING AND ENTERTAINMENT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 14 OCTOBER 2004
FILE NO/S	CR 11 OF 2004
CITATION NO.	2004 WAIRC 13035

Result Order issued

Order

HAVING HEARD Mr J Winters on behalf of the applicant and Mr G Blyth (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

1) THAT Antony Allis be employed by Burswood Resort (Management) Limited in the valet car park attendant position and that Burswood Resort (Management) Limited treat Mr Allis as an ongoing employee who has been transferred from Burswood Hotel Pty Ltd to Burswood Resort (Management) Limited.

2) THAT Mr Allis' terms and conditions of employment in the valet car park attendant position are to be those as set out in the Burswood International Resort Casino Employees' Award 2002 (No A4 of 2002).

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Anglican Homes (Inc)	Gregor C CR 86/2004	12/10/04, 13/10/04, 14/10/04	Disciplinary action	Dismissed
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	City of Canning	Scott C C 151/2004	21/09/2004	Termination of a Union member	Concluded
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	CSBP Ltd	Kenner C C 99/2004	21/05/2004	Termination of a Union member	Discontinued
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Kwinana Home Support Service	Scott C CR 85/2004	N/A	Termination of employment	Dismissed

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Morley Children's World Child Care Centre	Harrison C CR 9/2004	N/A	Alleged Unfair Dismissal	Dismissed
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	The Director General of Health, Department of Health	Scott C C 78/2004	21/04/2004	Review of Work Rosters	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Conduct Electrical	Gregor C C 187/2004	6/10/2004	Alleged termination	Concluded
Health Services Union of Western Australia (Union of Workers)	St John of God Health Care Subiaco Trading as St John of God Hospital Subiaco	Beech SC CR 244/2003	N/A	Contractual Entitlements	Discontinued
Nigel Bennett	ABX Logistics (Australia) Pty Ltd	Smith C CR 56/2004	N/A	Long Service Leave Entitlements	Discontinued
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	NRW Pty Ltd	Gregor C C 149/2004	26/07/2004	Alleged unfair dismissal	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Dampier Salt Limited	Wood C CR 123/2004	N/A	Dispute re termination of employment	Discontinued
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Parkside Towbars	Gregor C C 202/2004	28/10/2004	Dispute regarding annual leave	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Steelweld Personnel Pty Ltd and Quality Bakers Australia Limited	Gregor C C 189/2004	6/10/2004	Reduction of working hours	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	Blue Manna Contractors	Gregor C C 199/2004	N/A	Alleged Termination	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	DORIC Constructions (Australia) Pty Ltd	Gregor C C 139/2004	30/06/2004	Industrial action	Concluded
Western Australian Prison Officers' Union of Workers	Attorney General Department of Justice	Beech SC C 146/2004	19/07/2004	Members employment classification levels	Concluded
Wilkinson Brothers Pty Ltd trading as Wilroof Australia	Bristile Roofing	Gregor C C 201/2004	20/10/04; 21/10/04	Fixed Rates	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2004 WAIRC 13196

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	MONDAY, 1 NOVEMBER 2004
FILE NO/S	APPL 937 OF 2003
CITATION NO.	2004 WAIRC 13196

Result Interim order varied.

Order

WHEREAS an Interim Order issued in this matter on 10 December 2003 to remain in effect until 29 February 2004; and

WHEREAS liberty to apply was reserved to either party to apply to vary the terms of the Interim Order; and

WHEREAS on 28 October 2004 the Commission convened a conference to hear from the parties in relation to issues in dispute between the parties in a related application (PSAC 28 of 2003) and the parties sought to exercise the liberty to apply to vary the terms of the Interim Order; and

WHEREAS both parties requested the order be varied to remain in place until 30 June 2005;

WHEREAS after hearing from the parties the Commission formed the view that the interim order that issued on 10 December 2003 should be varied;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, and by consent, the Commission hereby orders:

1) THAT point 1 in the order that issued on 10 December 2003 be deleted and a new point 1 be included as follows:

> "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 30 June 2005;"

2) THAT point 2 of the interim order that issued on 10 December 2003 remain in place.

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

2004 WAIRC 13270

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER GRIFFITHS
	APPLICANT
	-v-
	BHP BILLITON IRON ORE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 10 NOVEMBER 2004
FILE NO.	APPL 228 OF 2004
CITATION NO.	2004 WAIRC 13270

Result	Direction issued
Representation	
Applicant	Mr L Gandini of Counsel
Respondent	Mr R Lilburne of Counsel

Direction

The Commission, having heard Mr L Gandini of counsel on behalf of the applicant and Mr R Lilburne of counsel on behalf of the respondent, and having determined that the following orders and directions were necessary and expedient for the just hearing and determination of the matter, it is ordered and directed as follows: -

1. The Applicant is to file and serve a schedule particularising the loss or injury that is claimed to have been caused by the dismissal by close of business Friday, 17 December 2004.

2. The Evidence in Chief will be adduced by way of written witness statements and shall stand as such. Any further evidence in chief to be adduced may only be done so by leave of the Commission.
3. The Applicant is to file and serve written witness statements by close of business Friday, 17 December 2004. Any document to be relied upon shall be appended to the witness statement or provided at the same time the witness statement is filed.
4. The Respondent is to file and serve written witness statements by close of business Friday, 25 February 2005. Any document to be relied upon shall be appended to the witness statement or provided at the same time the witness statement is filed.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2004 WAIRC 13116

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CHRIS DENNIS JOHNSON

APPLICANT

-v-

STOTT & HOARE BUSINESS COMPUTERS

RESPONDENT

CORAM COMMISSIONER J F GREGOR
DATE FRIDAY, 22 OCTOBER 2004
FILE NO/S APPL 758 OF 2004
CITATION NO. 2004 WAIRC 13116

Result Discovery of Documents Granted

Order

WHEREAS on the 20th October 2004 the Applicant in this matter applied for an Order for Discovery and Inspection of Documents from the Respondent; and

WHEREAS on 22nd October 2004the Commission, in chambers, having considered the parties submissions decided to make an Order that the Respondent discover for inspection to the Applicant's Agent invoices for sales listed in the Applicant's attachment to the letter dated 15th April 2004; credit notes for any returned goods or cancelled service in respect to those invoices; the terms of the Iluka warranty agreement and that the discovery and inspection herein is exercisable only by Mr Graham McCorry Agent for the Applicant and that the details of the discovery and inspection are not to be directly provided to the Applicant; and

WHEREAS discovery and inspection be provided by the Respondent to the Applicant's Agent by close of business 27th October 2004; and

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

THAT the Respondent discover the following documents for inspection to the Applicant's Agent:

1. all invoices issued by Stott & Hoare in respect of the sales listed in the attachment to Mr Johnson's letter dated 15th April 2004;and
2. all credit notes for any cancellation of purchase orders listed in those invoices; and
3. the terms of the Iluka warranty agreement; and
4. that discovery and inspection herein is exercisable only by Mr Graham McCorry, Agent for the Applicant, and the details of the discovery are not to be directly provided to the Applicant
5. that discovery and inspection be provided by the Respondent to the Applicant's Agent by close of business 27th October 2004.

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

2004 WAIRC 13068

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STEVEN JOHN GALLAHER

APPLICANT

-v-

ISABELLAS HYDROPONIC NURSERY AND GARDEN CENTER (ABN 18 300 435 41)

RESPONDENT

CORAM COMMISSIONER J H SMITH
DATE MONDAY, 18 OCTOBER 2004
FILE NO/S APPL 979 OF 2004
CITATION NO. 2004 WAIRC 13068

Result	Order issued
Representation	
Applicant	Mr M J Diamond (of counsel)
Respondent	Mr M Seaman (of counsel)

Order

HAVING heard Mr M J Diamond (of counsel) for the Applicant and Mr M Seaman (of counsel) for the Respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT within seven (7) days of the date of this order the Respondent shall provide to the Applicant discovery and inspection of the time and wage records relating to the Applicant's employment from 3 November 2001 until 2 July 2004.

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

2004 WAIRC 13235

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN RED CROSS BLOOD SERVICE, WESTERN AUSTRALIA REGION **APPLICANT** **-v-** AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 NOVEMBER 2004
FILE NO	APPL 1028 OF 2004
CITATION NO.	2004 WAIRC 13235

Result	Recommendation

Recommendation

WHEREAS this is an application dealing with the dispute between the parties in the process of negotiating a new industrial agreement; and

WHEREAS pursuant to s.32 of the Industrial Relations Act 1979, the Commission convened a number of conferences for the purpose of conciliating between the parties; and

WHEREAS at a conference convened on Friday, 25 October 2004, the parties informed the Commission that they had reached agreement in respect of all matters except those relating to flexible working arrangements and the appropriateness of all employees covered by the agreement having access to rostered days off ("RDOs"); and

WHEREAS the parties informed the Commission that they sought a recommendation to resolve the matter in dispute; and

WHEREAS on 29 October 2004, the parties each provided information to the Commission for the purposes of the Commission considering the dispute between the parties with a view to providing a recommendation for the resolution of the dispute; and

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

Given that one of the causes of discontent within workplaces generally is that employees do not enjoy the same conditions where all others things are equal, and that as a matter of fairness and equity all employees should receive the same benefits subject to the requirements of the organisation, the Commission recommends that the respondent's proposed wording for Clause 32. – Flexible Working Hours, subclause (3)(b)(i) and (iv) shall apply subject to the following:

(1) That in respect of those positions ("the positions") which the applicant says would be prevented from having access to RDOs due to operational requirements, including but not limited to:

(a) Information Service positions being;

(i) Desk Top Support

(ii) Help Desk

(iii) Local Blood Management System Administrator

(b) Human Resources Assistant

the parties establish a trial period of the operation of RDOs in the positions. Such trial period shall be:

(a) sufficiently long to enable an examination of the effects on operational efficiency and requirements of the positions having RDOs.

(b) not sufficiently long as to allow an expectation to arise in employees that the application to the positions of RDOs will necessarily become permanent.

(c) monitored by the applicant who shall record any issues arising during or as a result of the taking of RDOs in the positions, and any adverse effects on operational requirements of the particular RDOs being taken.

(2) No later than one week after the conclusion of each roster month, the parties shall meet and review those issues and effects referred to in (1)(c) above.

(3) At the conclusion of the trial period the parties shall meet to review the entire trial period, and shall report back to the Commission.

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

2004 WAIRC 13236

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN RED CROSS BLOOD SERVICE, WESTERN AUSTRALIA REGION

APPLICANT

-v-

AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH

RESPONDENT

CORAM COMMISSIONER P E SCOTT
DATE FRIDAY, 5 NOVEMBER 2004
FILE NO. APPL 1028 OF 2004
CITATION NO. 2004 WAIRC 13236

Result Correction Order issued

Correction Order

WHEREAS on the 5th day of November 2004, a Recommendation in this application was deposited in the office of the Registrar; and

WHEREAS the Recommendation contained an error;

NOW THEREFORE pursuant to the powers vested in it by the Industrial Relations Act 1979, the Commission herby orders:

THAT the words "subclause (3)(b)(i) and (iv)" in the Recommendation be deleted and replaced with the words "subclause (3)(b)".

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
2RM Installations Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 163/2004	19/10/2004	The Construction, Forestry, Mining and Energy Union of Workers	2RM Installations Pty Ltd	Gregor C	Agreement Registered
Aluminium Partitioning Supplies / CFMEUW Industrial Agreement 2002-2005 AG 165/2004	11/10/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for the R & R Whyte Family Trust t/a Aluminium Partitioning Supplies	Gregor C	Agreement Registered
Armani Aluminium Windows / CFMEUW Industrial Agreement 2002-2005 AG 166/2004	19/10/2004	The Construction, Forestry, Mining and Energy Union of Workers	G-Corp Pty Ltd t/a Armani Aluminium Windows	Gregor C	Agreement Registered
Australian Labor Party (WA Branch) Enterprise Bargaining Agreement 2004 AG 107/2004	13/10/2004	Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	Australian Labor Party (WA Branch)	Kenner C	Agreement Registered
Cape Modern / CFMEUW Industrial Agreement 2002-2005 AG 170/2004	3/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	Cape Modern Pty Ltd	Gregor C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Country High School Hostels Authority Residential College Supervisory Staff General Agreement 2004 PSAAG 16/2004	26/10/2004	Civil Service Association of Western Australia Incorporated, Country High School Hostels Authority	(Not applicable)	Commissioner J L Harrison	Agreement Registered
Crown Construction Services / CFMEUW Industrial Agreement 2002-2005 AG 171/2004	3/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee Crown Construction Services Unit Trust t/a Crown Construction Services	Gregor C	Agreement Registered
Culunga Aboriginal Community School (Enterprise Bargaining) Agreement 2004 AG 152/2004	19/10/2004	The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers, Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch, Cul	(Not applicable)	Harrison C	Agreement Registered
Duraseal / CFMEUW Industrial Agreement 2002-2005 AG 172/2004	3/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for The R McKinnon Family Trust t/a Duraseal WA Pty Ltd	Gregor C	Agreement Registered
Government Officers (Insurance Commission of Western Australia) General Agreement 2004 PSAAG 13/2004	6/10/2004	Insurance Commission of Western Australia , Civil Service Association of Western Australia Incorporated	(Not applicable)	Scott C	Agreement Registered
Gunns Limited Enterprise Agreement 2004 AG 151/2004	7/10/2004	Gunns Limited	The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch	Gregor C	Agreement Registered
JB Crane Hire / CFMEUW Industrial Agreement 2002-2005 AG 167/2004	19/10/2004	The Construction, Forestry, Mining and Energy Union of Workers	Lightrange Holdings Pty Ltd atf The Booth Family Trust t/a JB Crane Hire	Gregor C	Agreement Registered
Marble Man / CFMEUW Industrial Agreement 2002-2005 AG 158/2004	22/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee For The Antonio Corea Family Trust t/a The Marble Man	Gregor C	Agreement Registered
Parliamentary Employees General Agreement 2004 PSAAG 15/2004	11/10/2004	Civil Service Association of Western Australia Incorporated	President of Legislative Council, Speaker of Legislative Assembly, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, Media, Entertainment and Arts Alliance of Western Australia (	Scott C	Agreement Registered
Perth College (Enterprise Bargaining) Agreement 2004 AG 162/2004	19/10/2004	The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers, Perth College Inc	(Not applicable)	Harrison C	Agreement Registered
Piling Contractors (WA) / CFMEUW Industrial Agreement 2002-2005 AG 173/2004	3/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	Piling Contractors (WA) Pty Ltd	Gregor C	Agreement Registered
Pilkington (Australia) Operations Limited Glazing (Enterprise Bargaining) Stage IV Agreement 2004 AG 164/2004	19/10/2004	The Construction, Forestry, Mining and Energy Union of Workers	Pilkington (Australia) Operations Ltd	Gregor C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Precast Prestressed Building Perth / CFMEUW Industrial Agreement 2002-2005 AG 48/2004	N/A	The Construction, Forestry, Mining and Energy Union of Workers	Precast Prestressed Buildings Perth Pty Ltd	Coleman CC	Discontinued
Pyrotronics Fire Protection Pty Ltd ABN 73102333899 Enterprise Bargaining Agreement 2003 AG 272/2003	N/A	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Pyrotronics Fire Protection Pty Ltd	Coleman CC	Discontinued
Royal Flying Doctor Services of Australia, RFDS Western Operations, Medical Practitioners Industrial Agreement 2003 AG 23/2004	15/10/2004	The Western Australian Branch of the Australian Medical Association Incorporated	RFDS (Western Operations)	Scott C	Agreement Registered
St John of God Health Care Bunbury - HSUA Agreement 2004 AG 168/2004	8/10/2004	Health Services Union of Western Australia (Union of Workers)	St John of God Health Care Bunbury (a division of the St John of God Health Care System Inc)	Scott C	Agreement Registered
Swire Cold Storage Pty Ltd Employer, Employee Agreement 2004 AG 160/2004	13/10/2004	The Shop, Distributive and Allied Employees' Association of Western Australia	Swire Cold Storage	Harrison C	Agreement Registered
Western Australian Mint (GOSAC) Award 2004 PSAAG 14/2004	6/10/2004	Civil Service Association of Western Australia Incorporated , Board of Management of the Western Australian Mint	(Not applicable)	Scott C	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2004 WAIRC 13211

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES REGINALD JOHN EDGEWORTH-KELLY

APPELLANT

-v-

ALAN PIPER, DIRECTOR GENERAL, DEPT. OF JUSTICE

RESPONDENT

CORAM COMMISSIONER P E SCOTT
DATE WEDNESDAY, 3 NOVEMBER 2004
FILE NO PSAB 5 OF 2004
CITATION NO. 2004 WAIRC 13211

Result Appeal withdrawn by leave

Order

WHEREAS this is an appeal pursuant to section 80I the Industrial Relations Act 1979; and

WHEREAS on the 1st day of November 2004, the Appellant advised the Public Service Appeal Board that he no longer intended to pursue the appeal; and

WHEREAS on the 2nd day of November 2004, the Respondent consented to the appeal being withdrawn;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby withdrawn by leave.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2004 WAIRC 13237

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REGINALD JAMES HAIR-KEANE
	APPELLANT
	-v-
	ATTORNEY GENERAL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD CHAIRMAN - COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 NOVEMBER 2004
FILE NO	PSAB 6 OF 2004
CITATION NO.	2004 WAIRC 13237

Result Appeal withdrawn by leave

Order

WHEREAS this is an appeal pursuant to section 80I the Industrial Relations Act 1979; and

WHEREAS on the 27th day of July 2004, the Appellant's representative filed a Notice of Discontinuance in respect of this appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby withdrawn by leave.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 61 of 2003	David Stanley Durant	Minister for Health, East Metropolitan Health Service	Scott C.	Withdrawn by Leave	25/10/04
PSA 79 of 2003	John Stephen Ward	Minister for Health Incorporated as the Board of Sir Charles Gairdner Hospital under s.7 of the Hospitals and Health Services Act 1927 (WA)	Scott C.	Dismissed	03/11/04
PSA 6 – 14 of 2004	Derek William Tierney and Others	North Metropolitan Health Service, Sir Charles Gairdner Hospital	Scott C.	Dismissed	03/11/04
PSA 21 of 2004	Anna Marie Gault	Royal Perth Hospital	Scott C.	Withdrawn by Leave	02/11/04
PSA 23 of 2004	John William Burrage	Royal Perth Hospital	Scott C.	Withdrawn by Leave	10/11/04