Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 7 WEDNESDAY, 25 MAY, 2005 Vol. 85—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

85 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2005 WAIRC 01367

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID LEWIS **APPELLANT**
	-and-
	THE ROYAL AUTOMOBILE CLUB OF WA INC. **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S WOOD
DATE	THURSDAY, 28 APRIL 2005
FILE NO.	FBA 35 OF 2004
CITATION NO.	2005 WAIRC 01367

CatchWords	Industrial Law (WA) - appeal against decision of a single Commissioner - credibility of witnesses - verbal and written warnings - breaches of policy and procedure - procedural fairness - termination of employment - Industrial Relations Act 1979 (as amended), s29(1)(b)(i), s49.
Decision	Appeal dismissed.
Appearances	
Appellant	Mr T C P Crossley-Solomon, as agent
Respondent	Ms J Auerbach (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") and brought against the decision of the Commission, constituted by a single Commissioner, given on 26 August 2004 in application No 1449 of 2003.

2 I will refer to the grounds of appeal hereinafter. The appeal is against an order by the Commission which is constituted by a decision made on 26 August 2004 whereby the Commissioner dismissed an application made by the appellant, Mr David Phillip Lewis, under s29(1)(b)(i) of *the Act*, by which application Mr Lewis had claimed that he was harshly, oppressively and unfairly dismissed by the respondent. That application was filed in the Commission on 30 September 2003.

3 Mr Lewis appealed against the decision on grounds which were amended at the hearing by the deletion of Grounds 6, 7 (g), (h) and (k), 10 and 11. I will deal with the matters raised by those grounds later in these reasons.

BACKGROUND

4 There was evidence in this matter given by Mr Lewis on his own behalf, and on his behalf by two "patrolmen", also called "patrols", Mr Graham Andrew Crisp and Mr Mark Anthony Shearman, employed by the respondent, The Royal Automobile Club of WA Inc. (hereinafter referred to as the "RAC").

5 On behalf of the RAC, there was evidence given by Mr Anthony Thomas Shanahan, the Senior Manager, Operations, Motoring Division, for the RAC, and Ms Louise Ann Avon-Smith, formerly the Human Resources Manager for the RAC, but more recently the RAC's Patrol Manager before and at the time when Mr Lewis was dismissed. There was also evidence for the RAC from Mr Lewis' patrol team leader, Mr James McInerney Felvus. Mr Gregor Christopher Scott Nicholson, a member of the RAC, who made a complaint about Mr Lewis' driving, was also a witness called for the RAC.

6 At all material times, the RAC was and has been for many years a club representing motorists, promoting the interests of motorists and providing services to its motorist members in this State.

7 Mr Lewis was employed by the RAC for over nine years as a patrol officer ("patrol") and he was dismissed from his employment on 9 September 2003. Inter alia, the RAC provides services to its members who have problems with their motor vehicles. A patrol attends the member's home or wherever the vehicle is located and either repairs the vehicle on the spot or makes arrangements for it to be towed away for repairs if necessary.

8 Each patrol is provided by the RAC with a van to enable them to do their work and generally the van is permanently allocated to a particular officer for their use. It is garaged at the officer's home when they are not on duty. Each van contains a significant amount of valuable tools, equipment and motor vehicle manuals, as well as a manual setting out all procedures and policies of the RAC as they relate to the patrol's operation. The procedures and, in particular, those contained in the manual, are important and are required to be obeyed.

9 The patrols are not supervised in their work. Of necessity, they work on the roads on their own attending to the problems of members' motor vehicles. They are required to ensure the safekeeping of their vehicles and equipment. They must be able to be trusted in the way in which they perform their work, in attending to work on time, properly recording their activities and reporting back to their employer. Each patrol is assessed on a regular basis about his technical competence and ability to operate safely according to procedures. In addition, there are leaders of teams who meet with patrols in their respective teams for roadside chats at various locations when that is necessary or suitable.

10 There are procedures for matters such as seeking permission for the private use of an RAC van, promulgated.

11 The patrols are divided into teams. Mr Lewis had been in the team led by Mr Felvus for some time and was in that same team before Mr Felvus became its team leader. The previous team leader of that team was Mr Vaughn Richmond.

12 During his employment, Mr Lewis had received a number of letters of commendation and/or certificates of excellence from the RAC in recognition of complimentary feedback received from members for whom he had provided a service. So, as I understood the evidence, had other patrols.

Mr Richmond's Report

13 On 23 November 2001 (exhibit 12, page 73 of the appeal book (hereinafter referred to as "AB")), Mr Vaughn Richmond, Mr Lewis' previous team leader, reported to Mr Shanahan that, on Thursday, 22 November 2001, he travelled to Waterman to contact Mr Lewis to ask him how he was going with his 'Time on Job' development after his recent "Job Plan" review.

14 The report which Mr Richmond made was a record of a number of verbal warnings given to Mr Lewis on 22 November 2001. That the incidents noted had occurred was not denied at all by Mr Lewis. As he confirmed in writing in his report to Mr Shanahan, Mr Richmond spoke to Mr Lewis about or discussed the following matters with him following Mr Richmond's observations of Mr Lewis at work:-

a) That Mr Lewis had not fully grasped the concept of altering his work processes to reduce his 'Time on Job' figures. This arose from his completing a job in three to four minutes and then talking to the member whose vehicle he had attended to for 10 minutes.

b) That because Mr Lewis wore only open sandals and a green belt, he was issued a verbal warning on the basis of safety and health for the open sandals, and because he had inappropriate dress by wearing a non-standard green belt.

c) That Mr Richmond issued to him a verbal warning for not conforming to the safety and health guidelines for failing to wear a safety vest, which he was required to do. In fact he did not wear one at any time when Mr Richmond was observing him.

d) That a verbal warning was issued by Mr Richmond because Mr Lewis did not conform to the safety and health guidelines for usage of the hazard warning lights on his RAC patrol van.

e) That a verbal warning was issued because he did not conform to the safety and health guidelines for the starting of motor vehicles by standing in front of the member's motor vehicle whilst the member was starting the engine.

15 Mr Richmond noted that he had informed Mr John Payne of this and noted significantly "… we are discussing a plan for retraining David in the hope that he modifies his behaviour".

16 Mr Lewis admitted these breaches in evidence. Five of them were breaches of his employer's health and safety requirements. It is to be noted that breaches of what was contained in the manual were regarded as serious on the evidence of Mr Crisp and Mr Shearman.

17 His explanations in evidence were as follows.

18 Mr Lewis said that he wore the inappropriate green belt because he was "a little bit colour-blind". There was no other evidence that he was colour blind, or that he had worn clothes of the wrong colour on any other occasion, whether he was colour blind or not.

19 He also said that he wore the sandals instead of safe shoes or boots because he had tinea and needed air on his feet and because he thought that his work was finishing soon. I would interpose that he had never sought his employer's permission to change his belt or his footwear, particularly to wear footwear which could not properly protect his feet.

20 His reason for not putting hazard lights on was, he said, that he had pulled well off the road, which was, of course, no excuse at all.

21 He admitted all of the complaints, but gave flimsy or implausible excuses for his defaults.

22 There is no doubt on the undisputed evidence that, even though the health and safety procedures were called "guidelines", they were certainly required to be complied with, as is borne out by the approach taken by Mr Felvus and the evidence of Mr Shearman.

23 Mr Lewis admitted that Mr Richmond raised these matters with him and that he was at fault in these matters. He said that he was aware of all of these procedures and that the manual sets out those procedures.

2002 – Breaches of Policy & Procedures, Technical Mistakes and Omissions by Mr Lewis

24 It is quite clear that in 2002, which Mr Lewis did not deny, there were other acts of ill-discipline and failure to comply with procedures or to do his work properly:-

a) Mr Felvus spoke to Mr Lewis following a complaint from a member. Mr Lewis admitted assuming that the battery on the member's car had failed without testing it, when the actual fault was the alternator drawing the battery. Mr Felvus, on that occasion, asked him to follow procedures and to work in a more diligent manner. That was on 14 May 2002.

b) On 12 September 2002, Mr Felvus was required to speak to Mr Lewis because he was absent from work on the previous weekend, a period of three days. This, Mr Lewis said, was caused by the vehicle which he had borrowed whilst on leave in the Eastern States, breaking down and stranding him. They had a talk which was a counselling session and so characterised. Mr Felvus told him, and it was not denied, that Mr Lewis would be treated as being on unauthorised leave. Significantly, Mr Lewis was warned that were he to take unauthorised leave in the future then his employer might institute disciplinary proceedings against him, which was the first of several such warnings.

Furthermore, in the same counselling session, the evidence demonstrated that Mr Lewis had made arrangements with a number of other patrols to change his shifts so as to be not on duty. The number of changes was significant. He still owed a significant number of shifts to those other officers. In fact, it took Mr Lewis three months to work off the duty which he had not worked because of shift swaps, and which he therefore owed to other patrols. Mr Felvus told Mr Lewis that when paying back shift changes he was to conform to the RAC fatigue management policy. As he usually did, Mr Lewis admitted his misconduct and promised that "this situation" would not occur again.

c) On 18 September 2002, Mr Lewis' request to change his holidays was approved by Mr Felvus, but Mr Felvus told him that he would not be allowed to change them again.

d) On 1 October 2002 Mr Felvus had to speak to Mr Lewis about two matters. First, Mr Lewis admitted not completing the Service Request Form by not recording such basic details as the name, address, etc, of a member whom he was called out to assist.

Mr Lewis, as was the pattern of his conduct, having admitted his fault and agreed to be more diligent about completing forms in future.

The second matter about which Mr Felvus spoke to Mr Lewis that day was that Mr Lewis did not issue to a member authority for the member's vehicle to be towed away, even though the member's vehicle had an intermittent ignition fault. The next patrol officer had to do it, as a result. Mr Lewis agreed with Mr Felvus that he would issue such an authority in future if there was any doubt.

e) On 3 October 2002 Mr Felvus met Mr Lewis in Scarborough. Mr Felvus told Mr Lewis that he had concerns about his performance lately and asked him if he had any problems at work or at home that might be the cause of this (see pages 85-86 (AB)).

Mr Lewis told him "all is fine and he realises that he has let his standard drop in recent times and will make sure he follows procedures in the future".

Mr Lewis told Mr Felvus that he appreciated the fact that Mr Felvus had taken time to talk to him (see page 86 (AB)).

Mr Felvus encouraged Mr Lewis on that occasion by going to the trouble of telling him that his productivity was excellent and to keep up the good work in that area.

25 Mr Lewis was assessed for the period to 9 May 2002. Mr Felvus who noted that Mr Lewis had "achieved his goal of reducing his time on job" and also observed to him "Great Result well done" on 9 May 2002 (see page 72 (AB))Mr Felvus was fair in that respect to Mr Lewis, and as I say later in these reasons, was not responsible for the deterioration of the relationship between himself as team leader and Mr Lewis as a patrol.

The 2003 Competence Assessment by Stuart Rose

26 On 6 March 2003 Mr Stuart Rose, a patrol, wrote to Mr Lewis referring to a new "competency" assessment for all patrols.

27 On 24 March 2003 Mr Rose conducted the assessment of Mr Lewis. He noted the following flaws in his performance and reported accordingly (see exhibit 14, page 75 (AB)):-

a) (i) When driving, Mr Lewis stopped over the white line at lights and intersections and changed lanes crossing the solid white line also at intersections.

(ii) Further, he drove whilst reading the street directory.

These were both unsatisfactory aspects of his driving, on the evidence.

b) (i) In relation to roadside safety and safety equipment, he did not use the fend off method correctly, and blocked the lane when there was space in front of the vehicle being serviced to use the fend off method.

(ii) He did not use cones to warn other drivers when double-parked.

(iii) He did not use hazard lights to assist in alerting other motorists.

c) (i) When working on other vehicles, he left the RAC member standing on the traffic side of the road and did not advise her/him to move to the kerb side for safety reasons.

(ii) He also did not always check oil and water when there was an unidentified engine fault.

d) When starting vehicles, he was not always seated in the vehicle.

e) When the driver was assisting to try to start the vehicle he did not always explain to the driver what was required.

f) In relation to batteries:-

(i) He did not connect the earth jumper lead on the engine.

(ii) He did not have a tube for the hydrometer so therefore it was not stowed correctly.

g) When dealing with ignition systems, he did not have a test plug and was using a long handled screwdriver to test for spark.

h) When changing wheels:-

(i) To undo wheel nuts he would stand on one end of the wheel brace and bend over and pull – thus his back was excessively arched, which was unsafe.

(ii) He did not remove the jack handle after jacking up the member's car.

28 Mr Rose ended his report by saying this (see page 75 (AB));-

> "I went through these items with David after the assessment. I informed him that these items needed to be addressed and he should revisit his operations manual to be more aware of what is required of him. He was also told at the time that we would be getting back to him to ensure that he had indeed followed up on his OS&H procedures."

29 He was the only person of all the patrol employees who failed that assessment.

30 Mr Rose set out in his report the areas of substandard performance, and breaches of policies, procedures and requirements involving Mr Lewis, and there were 20 points of criticism, including points relating to breaches of occupational health and safety requirements.

31 Mr Lewis was aware, during the course of the assessment, that Mr Rose was assessing him and at the end of it, Mr Rose, as he admitted, went through the results with him and drew attention to those areas where he was found wanting and needed to be addressed. Mr Rose' final assessment was that Mr Lewis had not demonstrated competence.

16 April 2003 – Meeting and Second Warning

32 It was not until 16 April 2003 that Mr Felvus met Mr Lewis to discuss the assessment, and the points that were raised as deficiencies in performance by Mr Rose.

33 The meeting on 16 April 2003 was at the Maddington base of the RAC. At this meeting, Mr Felvus referred to Mr Lewis' "total" disregard of safe working guidelines and drew his attention to a written warning of 23 November 2001. He noted, as was correct, that at the meeting he informed Mr Lewis of all of the concerns raised by Mr Rose about what Mr Felvus said was a total disregard of safety guidelines.

34 Mr Felvus, at the end of the meeting, offered Mr Lewis training if he thought it would be of assistance. Mr Lewis said that he would accept training. What he also did was he moved the discussion to an offer by him to undertake dummy assessments which were assessments which would take place when he did not know that he was under assessment. According to Mr Felvus, the RAC did not have the people to undertake dummy assessments and does not generally undertake them.

35 In a letter dated 16 April 2003 to Mr Lewis (see exhibit 15, page 76 (AB)), Mr Felvus also noted, as was correct, that Mr Lewis accepted that all of the points that were raised at the meeting were valid and that he committed himself to comply with all RAC policies and procedures in the future. That he did so was not at all denied by Mr Lewis in evidence. The letter also noted that he was issued with a "formal verbal warning for not following safe working guidelines". Importantly, the letter said this:-

> "You were advised that, any re-occurrence or further breaches of RAC policies or procedures would result in further disciplinary action being taken against you."

36 That letter was significant because Mr Lewis received confirmation of his second verbal warning for breaches of safety and other guidelines. It is clear from that letter that the reference to guidelines is not a reference to guidelines, but a reference to binding rules or policies which the employer requires compliance with. That that was the effect of them was confirmed in evidence by Mr Crisp and Mr Shearman and by the approach which Mr Felvus took.

37 In the letter Mr Felvus offered Mr Lewis some encouragement by noting that, to his credit, Mr Lewis had dealt with two issues prior to their meeting. Mr Felvus commended him for taking that action.

38 In the last paragraph of the letter to Mr Lewis, Mr Felvus said this, quite clearly:-

> "This action has been taken to reinforce the RAC's commitment to your general well being and safety. I would like to take this opportunity to offer you one on one training to assist in addressing our concerns. Should you wish to take up this offer please contact me on 0419813164."

39 The RAC was very concerned about the safety of its employees as the last paragraph evidences, and Mr Lewis was clearly offered one on one training to assist his compliance in the future. It was not denied that that offer was never taken up by Mr Lewis.

40 What is significant, too, is that after his warning in November 2001 about several breaches of safety requirements, Mr Lewis was guilty of a number of other safety breaches all committed whilst his competence was being assessed on 24 March 2003 and whilst he knew that that assessment was occurring, and that he was doing these things in the presence of the assessor, Mr Rose.

41 As well as failures to carry out his work safely, Mr Rose noted road traffic law breaches and failures to carry out his work properly, there being 15 instances mentioned of breaches of safety requirements, again, multiple breaches observed over a short time.

42 Mr Lewis did not deny that he had done or had not done what it was alleged by Mr Rose that he had done or failed to do, and which matters were raised with him by his team leader, Mr Felvus.

43 It should also be noted that this was the second time when his employer had observed his not using hazard lights, when he was required to do so by policies or procedures.

The Fan Belt Incident

44 The Commissioner placed a great deal of emphasis on what has been called the fan belt incident. There was an incident where Mr Lewis, having been called to assist a member whose car had broken down, cut the fan belt, which he should not have done. The member, having complained to Mr Felvus that the fan belt was missing and also that Mr Lewis had entered their vehicle without permission after he had already left the scene, Mr Felvus asked Mr Lewis directly whether he had cut the fan belt. He just as directly replied "No", denying unequivocally that he had done so, even though he admitted in evidence that he had done precisely that. His reason for doing so, he said in evidence, was that he avoided giving a direct answer to Mr Felvus because he wished to inform Mr Felvus face to face about what happened. However, by the time that he had told Mr Felvus the truth the next time he saw him, it was too late. Mr Felvus had relayed to the member who had rung about it Mr Lewis' untrue denial that he had not cut the fan belt and that Mr Lewis had returned to the vehicle to retrieve a spanner when in fact Mr Lewis had returned to the vehicle to retrieve the cut fan belt.

45 On 29 May 2003, he met Mr Felvus to discuss the job plan and assessment which were to be developed. It was some time before this that the member had complained about the work that Mr Lewis had done when he had cut the fan belt on the member's car. At that meeting, Mr Lewis confessed to Mr Felvus that he had, contrary to what he had told Mr Felvus before, cut the fan belt. He was told by Mr Felvus that he would not tolerate any further deviation from policies and procedures and that if it occurred in the future it could be treated as a disciplinary matter. Mr Felvus told Mr Lewis that he had to re-establish the necessary trust between them. Mr Lewis, according to Mr Felvus, agreed that such a situation would never happen again. Mr Felvus agreed to keep the issue of the fan belt between them and not to record it as a formal disciplinary matter, or at all.

Mr Felvus did not discipline him as perhaps he should have done, and severely, but somewhat generously agreed not to reveal the incident to others.

Further Breaches & Failures to Comply, Another Warning

46 Within two months of this, it was necessary for Mr Lewis to be criticised again in writing by a letter from Mr Felvus dated 10 June 2003. What he had done, and what he had admitted he had done, was to swap shifts with other patrols more times than he was allowed to. In fact, it took him three months afterwards to make up the shifts which he had swapped and not worked. Mr Felvus wrote that it was necessary to manage Mr Lewis' shifts more closely (see exhibit 16, page 77 (AB)).

47 Mr Felvus warned him in the letter that a number of points of procedure had to be complied without "deviation or non-compliance" as it effected shift swaps by Mr Lewis, immediately:-

> "• All shift changes are to (sic) authorised by your Patrol Team Leader.
>
> • No more than 5 shift changes will be allowed to accumulate and no more will be authorised until these have been paid back to the Patrol(s) concerned.
>
> • No shift changes will be authorised if you or the Patrol you are requesting the change with is on a Communication or Job Appreciation shift.
>
> • No shift changes will be authorised if you or the Patrol you are requesting the change with has a van service.
>
> As of the above date no more shift changes will be authorised until you have cleared all outstanding shift changes you owe Patrols.
>
> You are required to provide me a list of these Patrols within one week of receipt of this letter."

48 Mr Felvus clearly told him in the letter that no more shift changes would be authorised until he had cleared all outstanding shifts swapped with other patrols.

49 Again, Mr Lewis admitted his non-compliance and undertook not to re-offend.

50 He was unequivocally informed that he was required to comply with the above-mentioned points as will be apparent from what I have quoted. He was unequivocally advised that any deviation or non-compliance with the points would result in the withdrawal of his privilege to swap shifts. More particularly, he was advised that not only would the shift change privileges be removed, but "possible disciplinary action (might be) taken".

51 This was the second clear warning of the likelihood of disciplinary action for failing to comply with instructions, requirements, procedures or policy (see exhibit 16, page 77 (AB)).

52 In July 2003, Mr Lewis used the RAC van allocated to him without permission. What he did was to use it to transport himself to an exhibition or show at Burswood Resort, and he left the van parked and unattended in a very large public car park for a considerable period of time, with all of its equipment on board. It was only discovered because Mr Felvus happened to be attending the same show and saw both Mr Lewis in the show and the van in the car park. Mr Lewis had no permission to take the van to the car park or to leave it there. His evidence was that he did not seek permission because he believed that he would have been given approval anyway.

Meeting – The First Written Warning – 14 & 15 July 2003

53 A meeting was held on 14 July 2003. Present were Mr Lou Torricella, Mr John MacMillan, Mr Felvus and Mr Lewis. It was alleged to Mr Lewis that he had again not complied with RAC policy and procedures, and a letter to Mr Lewis was written by Mr Felvus dated 15 July 2003, the first written warning, which, formal parts omitted, reads as follows (see exhibit 17, page 78 (AB)):-

> "I refer to our meeting on 14 July 2003 in the presence of Lou Torricella and John MacMillan.
>
> At the meeting, I confirm that the following matters were put to you concerning your employment.
>
> • Your non-compliance with RAC policy and procedure's (sic) namely unauthorised use of an RAC Patrol vehicle.
>
> • I refer you to a previous verbal warning (confirmed in writing) issued by me on the 16 April 2003 concerning your non-compliance with RAC policy and procedures.
>
> I further confirm that you were given the opportunity at the meeting to respond to each of these issues. Your responses have been noted and after careful consideration, I do not find your responses acceptable.
>
> The following aspects of your employment requires immediate attention and satisfactory improvement:
>
> • Full compliance with **all** RAC policies and procedures.
>
> The RAC will endeavour to assist you to achieve this standard by making available to you any training you feel would benefit you in achieving the above requirement.
>
> I will review your employment on or around 15 October 2003 or earlier if any repetition occurs before that time, and will organise a meeting for that date.
>
> The RAC considers the matters discussed in this letter to be serious. Failure to satisfactorily address these matters may result in further disciplinary action, including termination of your employment.
>
> The RAC has a counselling service available to all employees. Please ring 9225 4522 should you wish to access this service.
>
> Should you have any queries, please do not hesitate to contact me on 0419813164."

54 The letter informed Mr Lewis that full compliance with all RAC policies and procedures was required. That was clear, unequivocal and very wide. That was a reasonable and lawful direction to him, or perhaps I should say reiteration of a direction. Mr Felvus in the letter went on to tell him that the RAC would endeavour to assist him to achieve this standard by making available to him any training which he felt would benefit him in achieving this requirement.

55 That was the second offer of training made to Mr Lewis. Again he did not take up that offer, notwithstanding the seriousness of the matters raised at his meeting with Mr Felvus and in the letter of 15 July 2003.

56 The third last paragraph of the letter is very significant. It contains the third warning within three months of disciplinary action. However, in this case, the employer, through Mr Felvus, gives clear warning:-

> "The RAC considers the matters discussed in this letter to be serious. Failure to satisfactorily address these matters may result in further disciplinary action, including termination of your employment."

57 That is a clear and unequivocal warning that his employment might be in jeopardy if he fails to satisfactorily deal with the question of full compliance with all RAC policies and procedures. It is a serious warning.

58 It is to be noted that that letter also offers him advice by the RAC counselling service, a service available to all employees (see page 79 (AB)).

Mr Lewis' Letters & Allegations – 15 & 18 July 2003 – Events up to 13 September 2002

59 On the very same day that Mr Felvus wrote to Mr Lewis regarding the first written warning, 15 July 2003, Mr Lewis wrote to Ms Avon-Smith (see exhibit 18, pages 80-81 (AB)). In the letter Mr Lewis referred to the meeting of 14 July 2003, admitted unauthorised use of the patrol vehicle, and accused Mr Felvus of dishonesty "about some of the language and dialogue that took place between us", without giving any particulars.

60 There was some discussion in evidence, and, indeed, it was alleged by Mr Lewis, that Mr Felvus at the meeting of 14 July 2003 had threatened to dismiss him. This was denied by Mr Felvus who said that he did not have, in any event, power to dismiss him.

61 On 18 July 2003 in a meeting with Ms Avon-Smith, Mr Lewis said that on 14 July 2003 Mr Felvus had threatened to sack him. I have already observed that this was denied by Mr Felvus.

62 On Saturday, 19 July 2003, in a letter to Mr Felvus (see exhibit 19, page 82 (AB)), Mr Lewis accused Mr Felvus of dishonesty at the meeting of 14 July 2003, having sought transfer from Mr Felvus' team in his letter to Ms Avon-Smith of 15 July 2003 at the same time as he accused him of dishonesty.

63 He also, in his letter of 19 July 2003 to Mr Felvus, quite clearly complained that Mr Felvus had failed to keep his promise that he would not reveal what occurred in relation to the fan belt incident. There was a great deal of argument about what dishonesty was being alleged. It does not matter, however. Unequivocally, Mr Lewis accused Mr Felvus of dishonesty because he had misrepresented what he had said about sacking at the meeting of 14 July 2003, in his letters to both Mr Felvus and Ms Avon-Smith. Further, he had clearly accused him of dishonesty for allegedly breaking faith by telling another person or persons about what had occurred in the fan belt incident, which Mr Felvus had promised not to mention to others.

64 It is significant that Mr Lewis wrote a letter to Ms Avon-Smith in which he himself indicated that he was giving thought to his future and the RAC "in light of the situation". In that letter he made it clear that he was thinking things over and coming to a decision and would then contact her. That letter was written before the event with Mr Nicholson.

65 On 25 July 2003, having previously met with Mr Lewis and Mr Torricella on 18 July 2003 to try to overcome the difficulties about the situation, Ms Avon-Smith met with Mr Lewis and Mr Felvus and advised Mr Lewis that he was required to follow policies and procedures and do the job to the best of his ability.

66 An agreement was reached that any meeting between Mr Lewis and Mr Felvus would be held at Maddington with the ability to have a witness present, and that any shift changes were still to go through Mr Felvus until Mr Lewis' next job review. If he was unhappy about that he could refer the matter to Ms Avon-Smith.

67 Ms Avon-Smith investigated the allegation that Mr Felvus had acted dishonestly by revealing the incident involving the fan belt, but, in fact, Mr Felvus had not revealed that the fan belt incident had occurred because Mr Lewis had made that revelation himself to Mr Torricella and Mr MacMillan.

68 Subsequently, around 11 September 2003, Mr Lewis used the patrol vehicle without obtaining Mr Felvus' approval, although he had been told to do so. He had contacted the control room for approval to use the vehicle to take him to TAFE in Murdoch, even though Mr Felvus had made it clear what he was required to do if he wanted to use the van for his own private purposes. This was the second time he had used the van without his team leader's permission.

The Nicholson Complaint & Dismissal

69 On Saturday, 13 September 2003, Mr Keith D'Rozario, the motoring operations despatch team call centre supervisor, received a call from a Mr Nicholson who is a member of the RAC. Mr Nicholson complained that he had witnessed two incidents of dangerous driving by one of the RAC patrols and identified the vehicle concerned by reference to its registration number. He described the circumstances and the approximate time at which the incidents had occurred. Mr D'Rozario emailed the details to patrol team leaders. The email said there had been a complaint from a member, a road user, who complained about dangerous driving by one officer in a Hilux van, registration No 1BAP 497.

70 Mr Felvus on the following Monday read the email complaint and raised it with Mr Lewis. There was a meeting between Mr Lewis, Mr Felvus and Ms Avon-Smith. The details of the complaint, including the email, were drawn to his attention, and he was given an opportunity to prepare a written response. He did so by completing a General Report. He said in the report he had no recollection of bad or dangerous driving on that occasion or any other occasion.

71 Ms Avon-Smith and Mr Felvus discussed the matter with Mr Lewis and she decided that Mr Lewis would be suspended with pay while further consideration was given to the matter. Over the next couple of days, Ms Avon-Smith and Mr Felvus considered the matter.

72 On Thursday, 18 September 2003, Mr Lewis telephoned Ms Avon-Smith proposing that they come to some amicable financial settlement of the matter. Ms Avon-Smith said to him that no decision had been taken to terminate his employment and that he should come in and meet with them the next day. This he did on Friday, 19 September 2003. There was a discussion for about an hour in the course of which Mr Lewis asked Mr Felvus if there were any GPS records and they broke for about half an hour during which Mr Felvus made the inquiry as to whether or not there were GPS records and found that there were not.

73 Mr Felvus and Ms Avon-Smith resumed the meeting with Mr Lewis and during the course of this final discussion, dismissed him. That day a letter dismissing Mr Lewis was prepared and sent to him. That letter reads as follows, formal parts omitted (see page 48 (AB)):-

> "I advise that your employment with RAC has been terminated. Termination is effective from 19 September 2003.
>
> The reason(s) for termination was discussed at the meeting on 19 September 2003, attended by Jim Felvus, Louise Avon-Smith and yourself. You were given the opportunity to have representation at this meeting but declined.
>
> In summary, the following was discussed:
>
> - Members allegations of dangerous driving on 13 September 2003
> - Making yourself available on the MDT at the point start when you were not at the location – falsification of data records
>
> Your response(s) to the matters discussed was noted. The decision to terminate your employment was made after considering your response, a full investigation of the facts and consideration of your past conduct and performance.

You were warned on previous occasions about your poor performance, unsatisfactory conduct and failure to follow safe working practices, in particular on:

- 14 July 2003 written warning over breaches of policy & procedures
- 15 May 2003 formal verbal warning over failure to abide by safe working guideline policy
- A number of other verbal warnings which are diarised & documented regarding failure to follow procedures."

FINDINGS OF COMMISSIONER AT FIRST INSTANCE

74 The Commissioner at first instance found as follows:-

a) That where the evidence of Mr Lewis conflicted with other evidence she had no hesitation in accepting that other evidence, in particular the evidence of Mr Felvus and Mr Nicholson.

b) That Mr Lewis had demonstrated in his evidence that he was prepared to deliberately mislead Mr Felvus about the matter of the fan belt, was prepared to disobey instructions and policy by using the motor vehicle without authorisation and coming up with excuses for it in hindsight, while saying that he would rectify problems when they were brought to his attention.

c) That further problems arose throughout the last period of his employment, some of them being quite minor, but others being significant breaches of policy.

d) That Mr Lewis tried to deflect responsibility for his dishonesty onto Mr Felvus by falsely accusing Mr Felvus of dishonesty.

e) That Mr Lewis then sought to be transferred to another team.

f) That the Commissioner inferred from his actions in this latter regard that Mr Lewis thought that Mr Felvus was now alert to his approach, and sought a fresh start with someone who would not know quite so much about his history.

g) That the effect of Mr Lewis' allegation against Mr Felvus was also to attempt to bring Mr Felvus' word into question where it might have had an adverse impact on him.

h) That Mr Lewis' evidence was at times self serving and in many cases mere attempts at justification of his own position.

i) That in the last two years of Mr Lewis' employment up to the incident on Saturday, 13 September 2003, he had been the subject of informal counselling, verbal warnings and a written warning.

j) That on 14 July 2003, Mr Lewis was specifically warned, verbally and in writing, that he was immediately required to fully comply with all policies and procedures, and that his employment would be reviewed around 15 October 2003 or earlier if warranted.

k) That Mr Lewis was told that failure to properly perform his duty might result in disciplinary action, including termination of employment.

l) That two months before 13 September 2003, Mr Lewis was put on notice that further failings on his part might cost him his job.

m) That as at 13 September 2003, Mr Lewis' employment was to be subject to a review in a month or so following his breach of policy on the use of the RAC's vehicle.

n) That she found and had no doubt that on 13 September 2003, Mr Nicholson observed the van allocated to and driven by Mr Lewis at around 2.00pm, exiting the Mitchell Freeway south at Vincent Street and along Leederville Parade, and across the intersection into Loftus Street and beyond.

o) That while the time of that observation may not have been exactly 2.00pm, she found that Mr Nicholson witnessed Mr Lewis driving in an unsafe manner, overtaking a group of cars lined up behind another vehicle as it entered a car park, and further noticed as they turned into Thomas Street from Leederville Parade that Mr Lewis' vehicle changed lanes and caused Mr Nicholson to swerve out of his lane.

75 The Commissioner at first instance held that Mr Lewis was not treated unjustly, and that he was not treated differently from other officers.

76 The Commissioner then went on to find that the RAC had given Mr Lewis a fair go, that he had been warned that his job was in jeopardy following a number of matters raised with him relating to his failure to comply with proper procedures, some relating to technical aspects of the job, others to safety issues, and others relating to manipulation of rosters, conduct and honesty. These all arose within the last couple of years of his employment, and then he drove in an unsafe manner on 13 September 2003. This was not a trivial issue given the RAC's purposes as an organisation. The matter was put to him, and he responded. Mr Lewis' responses were considered. He requested the RAC to gather further information if it was available. The RAC considered his employment history, including his years of service and his previous conduct and performance, as well as the previous warning, and concluded, in light of all of the circumstances, that he should be dismissed.

77 The Commissioner therefore found that the dismissal was not harsh, oppressive or unfair and dismissed the application.

ISSUES AND CONCLUSIONS

Approach on Appeal

78 The decision appealed against 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.

79 That means that the appellant cannot succeed unless he establishes to the Full Bench that the exercise of the discretion at first instance miscarried, according to the principles laid down in *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC), and applied by Full Benches of this Commission for many years.

80 In particular, the Full Bench has no warrant to interfere with the exercise of discretion by the Commissioner at first instance unless such a miscarriage of the exercise of the discretion at first instance is established.

Credibility – Findings of the Commissioner at first instance

81 The Commissioner at first instance made a clear finding that:-

> "Where the evidence of the applicant (Mr Lewis) conflicts with other evidence I have no hesitation in accepting that other evidence, in particular the evidence of Mr Felvus and Mr Nicholson."

82 The Commissioner went on to observe that Mr Lewis had demonstrated in his evidence that he was prepared to deliberately mislead Mr Felvus as to the issue of the fan belt, and was prepared to disobey instructions and policy by using the motor

vehicle without authorisation, and coming up with excuses for it in hindsight, while saying that he would rectify problems when they were brought to his attention.

83 The Commissioner also found that further problems continued to arise throughout the last period of his employment, some of them being quite minor, but others being significant breaches of policy. For example, the Commissioner found, Mr Lewis sought to deflect responsibility for his dishonesty towards Mr Felvus by falsely accusing Mr Felvus of dishonesty.

84 Mr Lewis then sought to be transferred to another team. The Commissioner inferred from his actions in this latter respect that he thought that Mr Felvus was now alert to his approach, and sought a fresh start with someone who would not know quite so much about his history.

85 The effect of his allegation against Mr Felvus was also to attempt to bring Mr Felvus' word into question where it might have an adverse impact on him.

86 The Commissioner found that Mr Lewis' evidence was at times self serving and in many cases mere attempts at justification of his own position.

87 The Commissioner at first instance made a clear and strong finding that she preferred the evidence of Mr Nicholson and Mr Felvus, in particular, and that of other witnesses, to that of Mr Lewis.

88 Thus, applying the principle in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 and other cases, as well as *Fox v Percy* [2003] 214 CLR 118 and *Anikin v Sierra* (2004) 79 ALJR 452 (HC), it is clear that (see *Devries and Another v Australian National Railways Commission and Another* (op cit)):-

> "finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" (6) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" (7)."

That dictum is to be applied.

89 I also, however, follow what the High Court of Australia said in *Anikin v Sierra* (HC) (op cit) per Gleeson CJ, Gummow, Kirby and Hayne JJ at page 458:-

> "It is necessary to accept the large functions belonging to an appellate court, such as the Court of Appeal … Those functions, which derive from the provisions of the legislation governing the Court of Appeal in such proceedings, require that Court to conduct its own independent review of the facts, giving effect to its own conclusions about them. It must do this save to the extent, if any, that the primary judge enjoys advantages that cannot be fully recaptured by the appellate court. In these last respects, the appellate court should defer to the findings of the primary judge except for the very limited circumstances where it is authorised to substitute its own, differing conclusions."

Their Honours cited *State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 (HC) and *Fox v Percy* (op cit).

90 Those observations are applicable to Full Benches of this Commission exercising jurisdiction pursuant to s49 of *the Act*.

91 I wish to make comment about the credibility of the witnesses at this stage because of the finding of the Commissioner at first instance about credibility, and the central role which such a finding played in all of the findings at first instance.

92 The Commissioner made a definite and clear finding that where the evidence of Mr Lewis was in conflict with the evidence of other witnesses, particularly that of Mr Nicholson and Mr Felvus, then she had no hesitation in accepting that other evidence.

93 The fan belt incident was an incident which the Commissioner attached importance to for a number of reasons, not the least for the effect that it had on her view of the credibility of Mr Lewis. The incident is dealt with in some detail above. The fact of the matter is that, in evidence, Mr Lewis denied that he had been evasive when he was asked whether he had cut the fan belt, and it was submitted by Mr Crossley-Solomon to the Full Bench that he was not evasive in his reply about the fan belt to Mr Felvus. His evidence was that he had not told Mr Felvus that he had cut the fan belt because he wanted to tell Mr Felvus to his face that he had cut it. That was simply not a credible answer. In fact, he told a direct untruth to Mr Felvus, clearly and unequivocally denying that he had cut the fan belt and leaving Mr Felvus in difficulty with the member concerned. What he did then was to cause Mr Felvus, who accepted what he said, to mislead the member on the basis of Mr Lewis' denial that he had cut the fan belt, when he had. Mr Lewis was correct in evidence to deny that he was evasive because he was plainly and directly mendacious. The Commissioner was entitled to so find.

94 There is no doubt that later when things became difficult for Mr Lewis, he accused Mr Felvus of dishonesty and that that "dishonesty", on a fair reading, was alleged to be that Mr Felvus, contrary to his agreeing not to, had revealed the fan belt incident to others.

95 Mr Lewis also accused Mr Felvus of dishonesty in misrepresenting what he, Mr Felvus, had said at a meeting on 14 July 2003 to Mr Lewis, which was not true. Mr Felvus denied unequivocally, and was not shaken in his denial, Mr Lewis' accusation that he had threatened to sack Mr Lewis at the meeting of 14 July 2003.

96 As to the allegation that Mr Felvus, contrary to his agreeing not to reveal the fan belt incident to others, acted in breach of faith and did reveal it, the only evidence is that Mr Lewis himself informed Mr Torricella and Mr MacMillan about the fan belt incident. There was no evidence that Mr Felvus at all broke faith and revealed the incident. On his own admission, Mr Lewis was guilty of repeated breaches of policies and procedures, all of which he admitted, as will be evident from my observations later in these reasons, and from the undisputed facts which I have recited above. In relation to many of his breaches of policies and procedures, Mr Lewis received warnings, verbal and written, as well as counselling. It was not in dispute at all that he received those warnings and counselling and, in particular, the serious written warning of 15 July 2003. He admitted that he committed all of the breaches of which he was accused, except the "dangerous driving" incident, which Mr Nicholson reported. The denial was not an unequivocal one, merely a denial that he did not drive dangerously and the denial that he was driving was at least partially retracted in submissions to the Full Bench. There was no doubt, on the evidence, that he was driving, for the reasons which I shall explain later.

97 In the last two years of Mr Lewis' employment, his conduct was very unsatisfactory, characterised by frequent and multiple breaches of directions, procedures, rules and policies, some more serious than others, some contrary to health and safety requirements, some not, some repetitious and most not, and the actual ignoring of warnings that he should not repeat his misconduct. Almost all he admitted, offering for the most part entirely unsatisfactory excuses, and sometimes committing a breach of the same rule a second time. He was also spiteful. Not only did he accuse Mr Felvus falsely of dishonesty, but he entirely misrepresented Mr Felvus as being the source of his troubles to the extent that he sought a transfer to another team of

patrol employees. That transfer was refused. There is no doubt that in his letter to Ms Avon-Smith accusing Mr Felvus of dishonesty he was trying to discredit Mr Felvus and did so entirely falsely. He did so when Mr Felvus had, quite generously, not disciplined him or sought his disciplining, when he had deliberately misled Mr Felvus about the cutting of the fan belt.

98 Mr Felvus' evidence, on a fair reading, was uncomplicated, reasonable and credible. He was far more generous to Mr Lewis than the latter deserved, and far more lenient. In 2002, for example, he asked Mr Lewis if he had any problems at home or at work which might be affecting his performance. Mr Lewis said that he had none. On a couple of occasions he complimented Mr Lewis on his work, and, in addition to that, was friendly with him and talked to him after Mr Lewis was dismissed.

99 It is quite clear that, on Mr Lewis' admissions of his various acts of non-compliance and disobedience, Mr Felvus was doing his job in the actions which he took, and Mr Lewis did not like it. As Ms Avon-Smith said, Mr Lewis was being managed and he did not like it.

100 On a fair reading of the evidence, Mr Lewis' evidence was self serving and self justifying and, for the most part, palpably untrue, as the Commissioner at first instance found, if not in so many words. He was a dishonest employee who had very little interest in helping himself in his employment by changing his ways or undergoing training. Mr Lewis' assurances, given several times, that he would not re-offend meant nothing because he continued to fail to comply with policies and procedures and to offer fatuous, if not downright false, excuses for the breaches which he committed. At the best, he was thoroughly unreliable. At worst, his behaviour was dishonest and he showed a cavalier disregard of his obligations to his employer. He was also guilty of thoroughly unsatisfactory treatment of his team leader, Mr Felvus, constituted by untrue allegations and dishonest conduct.

101 Mr Felvus' evidence, on a fair reading of it, showed that he was a truthful witness, giving his evidence straightforwardly. His conduct was that of a fair man, doing the job which he should have done. It was open to find and correct to find. He was supported by Ms Avon-Smith in evidence where she had knowledge of the same matters of which he had knowledge.

102 No question of credibility arose in relation to Mr Lewis' conduct generally, with the exception of the alleged dangerous driving, because he freely admitted every breach of policy or procedure alleged against him and met it by offering some excuse and promising not to offend again or otherwise mend his ways. That is, he admitted expressly and by implication over a period of about two years that he had committed multiple breaches of policies and procedures which were lawful and reasonable and which he was required by his employer to obey.

103 Mr Lewis' real defence, mounted without the support of authority, was that he was dismissed for the "dangerous driving incident" when he was in fact dismissed for that incident and for a series of incidents of disobedience over about two years and the failure to heed a series of warnings over the same period, including a severe warning in July 2003 that he risked dismissal if he did not comply with procedures henceforth. He was, at the time he was guilty of the dangerous driving alleged by Mr Nicholson, under review.

104 I would also add, insofar as it is necessary to add, because I will deal with this later in these reasons in more detail, that Mr Nicholson, on a fair reading, was a credible witness who knew what he was talking about. The Commissioner was right to accept his evidence as I will explain later in these reasons.

105 It was not established in any way, pursuant to the principle in *Devries and Another v Australian National Railways Commission and Another* (op cit), that the Commissioner at first instance had misused the advantage which she enjoyed, and that findings based on lack of credibility should be overturned.

Warnings

106 I refer to Mr Lewis' admitted disobedience and misconduct, and the warnings given to him which I have referred to above in detail. A great deal of time was spent in warning and counselling Mr Lewis who, of his own volition, did not heed warnings or counselling and, of his own volition, derived no benefit from them.

107 It is clear and the Commissioner was correct to find, as the facts which I have related above unequivocally reveal, that, in the last two years up to the incident on Saturday, 13 September 2003, Mr Lewis had been the subject of informal counselling, verbal warnings and a written warning. On 14 July 2003 and 15 July 2003 respectively, Mr Lewis was specifically warned verbally and in writing that he was immediately required to fully comply with all policies and procedures, which he was, and which he disregarded. He was also then advised that his employment would be reviewed around 15 October 2003, or earlier if warranted. He was clearly warned that failure to properly perform his duty may result in disciplinary action including the termination of his employment. Therefore, for three months, he was on notice that further failings on his part might cost him his job, and that he was to be reviewed about a month or so after 13 September 2003, the day on which he was found by the Commissioner to have been guilty of dangerous driving.

108 It was submitted on behalf of Mr Lewis upon this appeal that there was something wrong with the issue of a warning to Mr Lewis after Mr Rose' assessment, when all that Mr Rose had conducted was an assessment of his "competency". The answer to that, of course, is that the assessment uncovered so many breaches of safety requirements (not for the first time), and also breaches of work requirements; and that his competence was so much lacking in safety matters that the employer had a duty to warn him about his non-compliance (particularly the second time around) and his repetitious breaches; and to warn him of the consequences. He had already received one verbal warning, as I have already said. Further, he was the only one who failed the "competency" test. If, for no other reason, he required a warning for that.

109 I wish to make other observations.

Mr Felvus' Diary

110 These incidents were noted at the time in Mr Felvus' diary which was tendered without objection. It was submitted that they were self serving and should not be relied on. The fact is that Mr Lewis admitted what occurred, that Mr Felvus was not shaken in his evidence and was a credible witness, nor were the notes discredited and that Mr Lewis was not a credible witness. As the Commissioner found, it was a diary, an aide memoire that Mr Felvus used as an active management tool, not a formal record. These were private records on which Mr Felvus was entitled to rely as a continuing record for his memory of individuals' personal circumstances and what he said to them. The submission had no basis.

Standards Slipped

111 There was also a submission that the admission by Mr Lewis to Mr Felvus, to which I have referred above, that his standards had slipped applied only to completing one form. I do not understand that submission. The evidence, which was undenied, was clearly and unequivocally that Mr Felvus said to Mr Lewis that Mr Lewis' standards had slipped generally, and that he, Mr Lewis, admitted this. It was a complaint about his performance generally. Again, further, Mr Felvus was not shaken on that evidence and was a credible witness. The submission has no merit.

The Driving Incident – Mr Nicholson's Complaint

112 On 13 September 2003 Mr Nicholson was driving his motor vehicle down Leederville Parade, having just come off the freeway. There was a vehicle turning into the car park in front of him. There was a line of two vehicles behind it, and behind those two vehicles in the line was Mr Nicholson's vehicle. As the vehicle proceeded to turn into the car park an RAC van overtook the line of vehicles travelling at a speed and at such closeness to Mr Nicholson that he noticed the vehicle. He said that it was in a dangerous situation. This, he said, was because, if a vehicle pulled out of the car park, there would have been no chance of the driver of that vehicle seeing the oncoming traffic and therefore no chance of stopping. He said he saw the RAC van proceed around those vehicles. This was after the vehicles should have merged. Mr Nicholson said it was obvious the RAC van was in a hurry of some sort. Further, they came down to the next set of lights which was the intersection of Leederville Parade and Loftus Street, and as they went around "the corner of the intersection" the RAC van started to move into Mr Nicholson's lane and started to push him out of his lane, and this caused him to swerve out of the lane. Then the RAC van moved back into his lane. Mr Nicholson's evidence was that they came very close to a collision on that occasion. Further down the road at the next set of lights the RAC van was parked in front of him. He had a pen and paper and immediately wrote down the registration number of the vehicle.

113 After he got home, he telephoned the RAC and reported the incident to Mr D'Rozario. He identified where the incidents occurred on a road map, in evidence. He also identified a document constituting a written report to the RAC by him in which he identified as a true and accurate record. Mr Nicholson said that he is an RAC member, that he knows that the RAC encourages safe driving, and, if that is so, then "patrolmen" should be leading by example.

114 There was discussion about whether these events occurred at 2.00pm in the afternoon which Mr Nicholson said was an approximate time, admitting that the incident could have been about 1.55pm. He also gave evidence in cross-examination that the incidents occurred over about three minutes and 750 metres. However, he wrote a written account after the event and was not shaken about the essentials of what he observed in evidence.

115 Mr Lewis did not deny that the event occurred, merely saying that he did not (generally) drive dangerously. He specifically admitted that he was in that precise location at about 1.55pm. In addition, his report about where he was to the controller meant that he was where Mr Nicholson said he was at the time.

116 As the Commissioner at first instance observed (see paragraph 5, pages 24-25 (AB)), while the time of that observation may not have been exactly 2.00pm, Mr Nicholson admitted that it may have been five and perhaps ten minutes prior to 2.00pm. The Commissioner found, as she was clearly entitled to on Mr Nicholson's evidence, that Mr Nicholson witnessed Mr Lewis driving in an unsafe manner, overtaking a group of cars lined up behind a vehicle as it entered a car park. The Commissioner also found, as it was clearly open to her to find, that Mr Lewis' vehicle drew up next to Mr Nicholson at the lights at the intersection of Leederville Parade and Thomas Street to turn right into Thomas Street. As they went around into Thomas Street, Mr Lewis' vehicle changed lanes moving towards Mr Nicholson's vehicle and forced him to move out of his lane. Then Mr Lewis saw Mr Nicholson and moved back into his original lane.

117 The Commissioner at first instance correctly found that the vehicle which Mr Nicholson saw was that driven by Mr Lewis and that his attention was drawn to it by the manner of driving which was dangerous and involved, in the first incident as well, excessive speed.

118 Upon appeal there was almost a concession on behalf of Mr Lewis that he was driving on that day at that time.

119 Further, the circumstances of this occurring included that Mr Lewis had indicated his availability when he was not available and that data had been falsified.

120 Further, as the Commissioner observed in paragraphs 10 and 11 (pages 25-26 (AB)), Mr Lewis was less likely to be truthful than he was as he was subject to a warning that his employment was in jeopardy. In any event, the Commissioner, for those reasons which I have expressed above, was entitled to find that Mr Lewis should not be believed as he was an untruthful witness (see the fan belt incident, for example, when he was untruthful about what he said, and untruthful in his explanation of why he said it).

121 Mr Nicholson, on the other hand, was not shaken in his evidence, and his observations of what he saw were clearly related in evidence. In particular, he wrote down the registration number of the van, which was the registration number of Mr Lewis' patrol van, shortly after two incidents which struck him as dangerous, and also recollected the matter in detail in speaking to Mr Felvus not so long after having telephoned Mr D'Rozario first was important and credible evidence.

122 Further, the submission that his written version of what occurred was expanded compared to what he said on the telephone to Mr Felvus it was therefore for some reason less credible is without merit.

123 In the normal scheme of things, of course, a written report would be a more comprehensive report than one given quickly by telephone after the event. Further, it was not submitted that there was any material difference either in his complaint over the telephone or in the written report.

124 The Commissioner at first instance was entitled to find that, on 13 September 2003, Mr Lewis drove his RAC van on two occasions, once at a dangerous speed and in a dangerous manner, and on the second occasion in a dangerous manner sufficient to cause a member of the RAC and the public, Mr Nicholson, to report those incidents to Mr Lewis' employer. Mr Lewis' own admission was an inadequate one.

125 Further, he was a witness who was not at all credible.

126 Again, whilst it was true that there was not a huge amount of investigation in the days between the incident and his actual dismissal, there was sufficient, and the result of the inquiry would not have been changed by any more investigation at that time. There was no element of unfairness in that. In my opinion, that finding was correct and open to be made.

Relationship Between Mr Lewis and Mr Felvus

127 I deal now with the submission on behalf of Mr Lewis that Mr Felvus should not have been involved in the inquiry following Mr Nicholson's report. However, Mr Felvus was his manager as team leader. It was to Mr Felvus that the complaint was made. A complaint to his manager did not mean, as a matter of fairness, that Mr Felvus should stand aside as team leader or not be engaged in the investigation of a complaint against a member of his team. In any event, Ms Avon-Smith was primarily engaged in investigating the matter and the decision to dismiss was made by her on the delegation of Mr Shanahan, who was her superior.

128 Mr Felvus had no power to dismiss Mr Lewis, and did not do so. Further, some attack was made on Mr Felvus' credibility in this appeal on the basis that the relationship between Mr Lewis and Mr Felvus had broken down or was breaking down, and, inferably, that Mr Felvus had it in for Mr Lewis.

129 First, there was no evidence that Mr Felvus had it in for Mr Lewis at all. Mr Lewis was guilty of a whole number of repeated breaches of safety and other procedures and policies, on his own admissions. He kept breaking his promises not to commit

breaches of them. He told a clear untruth about the fan belt incident to Mr Felvus who still did not inform anyone of this incident. Mr Felvus even asked him in a concerned manner how matters were at home or at work, and whether there was anything affecting his performance, on another occasion. Mr Felvus complimented him on a couple of occasions, the first for good work, and the second for remedying a couple of matters which were problems. Mr Lewis kept saying that he would not offend, and yet continued to do so. He received four serious warnings, both verbal and written, and took no notice. He was counselled on several other occasions. He failed an assessment which Mr Rose conducted, not Mr Felvus, and was the only patrol to do so. He wrongly accused Mr Felvus of dishonesty. He asked to be removed from his team when Mr Felvus properly disciplined him. In the end, he drove in such a manner that it merited a valid complaint by a member of the RAC and a member of the public. His conduct was entirely unsatisfactory and may well have merited a summary dismissal before that event. Mr Felvus was more patient with him than he deserved and certainly did not have it in for him; and, as the Commissioner correctly found, Mr Lewis was not treated differently from any other employee. This brought out the fact, as Mr Shearman described it, that Mr Felvus was hard but fair. The patience of Mr Felvus Mr Lewis repaid by wrongly impugning his honesty, having lied to Mr Felvus and failed to keep promises or comply with his employer's requirements. Further, Ms Avon-Smith went out of her way to assist by suggesting that matters of disagreement between Mr Felvus and Mr Lewis be discussed before witnesses, even though she correctly supported Mr Felvus. Mr Felvus performed his work fairly and correctly. Mr Lewis was clearly a most unreliable witness, but Mr Felvus was not. There is no merit in the submissions which do not take account of the facts as I have recited them.

Inconsistency in Treatment

130 It was submitted on behalf of Mr Lewis that his dismissal was unfair because he was treated more severely than other patrol employees in that he was suspended and dismissed. By contrast, Mr Shearman and Mr Crisp, in particular, it was submitted, were not.

131 Mr Shearman was a patrol with approximately eight years experience compared to Mr Lewis' nine years, and he reported to Mr Felvus for approximately three years. In mid to late 2003 another vehicle impeded Mr Shearman whilst he was driving and he sounded his horn at the motorist. The motorist continued to impede him and Mr Shearman changed lanes, but he said he did not cut him off. However, he made a rude gesture to the driver of the other vehicle with a finger or fingers. Mr Shearman did not report this and the motorist complained to the RAC. In no uncertain terms, Mr Felvus, his team leader, made it clear to him that his conduct was unacceptable. He was counselled. He was not given any warning in writing. It was not in dispute that, at the time, he was under fairly heavy emotional pressure which Mr Felvus knew about. He was coached at one time on certain safety matters after an assessment because he had not been wearing his safety glasses (see exhibit 26). Mr Shearman said that all patrols adhere to the guidelines, which was an important document making one "accountable". He said too that he had never been dealt with by the RAC for anything other than minor procedural matters. He agreed that things like not using hazard lights, not giving proper directions to members, and parking a vehicle in the wrong direction were serious matters in relation to which, if he were not following the correct procedure, he would expect to be spoken to.

132 Mr Crisp had been a patrolman with the RAC for a little over six years and for the last two years before the hearing at first instance, had reported to Mr Felvus as team leader. Recently, namely on 6 June 2004, he had been involved in a motor accident in his RAC van. He went through a stop sign whilst he was reading his directory to get more information, and had a collision causing damage to his vehicle assessed at about $8,000.00 worth. He was in hospital for one and a half to two hours and was later on light duties. After the incident was reported, he spoke to his team leader, Mr Felvus, and told him that it was his fault. Mr Felvus told him not to do it again. At the time of the hearing of this matter he had three demerit points. Mr Crisp admitted to having had two major collisions and two minor ones. The minor ones were reversing accidents. The major collisions included this last one. He had been given a verbal warning about one incident. The latest incident was, however, subject to an uncompleted police investigation. Ms Avon-Smith gave clear evidence that Mr Crisp might be the subject of disciplinary action after the police investigation was completed, because of the latest collision. That was the reason, of course, why no action had been taken at this stage, the fact that the police investigation had not been completed.

133 There is no inconsistency between the treatment of Mr Shearman and Mr Lewis. Mr Lewis in seriousness and frequency manifested a clear intention not to be bound by his employer's directions and requirements or his responsibility as an employee. Mr Shearman was guilty of one relatively minor piece of rudeness for which he was properly warned. Mr Lewis failed an annual assessment, the only one to do so amongst all the patrol employees. Mr Shearman at the time of his incident was suffering emotional strain, and there was no evidence given by Mr Lewis that he was suffering from any strain at all, notwithstanding that he had, at one time, been asked about this by Mr Felvus.

134 Mr Crisp had two minor traffic accidents in six years and two major ones. Any disciplinary measures in relation to the latest event could not occur until the police investigation had been completed. He had admitted his fault in relation to the last incident. It remained to be seen what, if any, disciplinary action might be taken against him. However, his situation is entirely different from Mr Lewis who, over a short period of time, despite frequent serious warnings, continued to fail to comply with, and acted in breach of, safety and other procedures or policies.

135 There is no inconsistency in the treatment of Mr Lewis established. Indeed, he had been treated, as I have, I think, already indicated, with some unexpected leniency and still offended. No inconsistency has been established, and certainly no inconsistency has been established which might constitute an element of unfairness.

Training

136 On two occasions his employer offered Mr Lewis training. He did not avail himself of it. He was even given the telephone numbers to ring to avail himself of the offers of training, including counselling. He did not take them up. At least, on appeal, he sought to attack RAC for not ensuring that he underwent training. In my opinion, the onus was on him, given the serious criticisms made of him and the circumstances of the case, to ensure that he received training if he were at all interested. However, consistent with his attitude to his work and his attitude to complying with his employer's reasonable and lawful requirements, he did not follow up training offers when they were made to him, and then sought to blame his employer for not compelling him to undergo training. It was another example of his unsatisfactory attitude to his employment.

Reasons for Dismissal

137 In the letter of dismissal of 19 September 2003 from his employer to Mr Lewis, signed by Ms Avon-Smith, she advised him that his employment was terminated effective from that date. She confirmed that the reasons for termination were discussed with him by Ms Avon-Smith and Mr Felvus, also on the same day.

138 That meeting involved a discussion of Mr Nicholson's allegation of dangerous driving. There was also a discussion of his falsification of data. The reason for the decision is clearly expressed as follows:-

> "The decision to terminate your employment was made after considering your response, a full investigation of the facts and consideration of your past conduct and performance."

139 The letter also noted that he was warned on previous occasions about his poor performance, unsatisfactory conduct and failure to follow safe working practices. There was reference, in particular, to the warning about breaches of policies and procedures and the meeting on 14 July 2003, as well as the "formal verbal warning" because of the failure to abide by safe working guideline policy and a number of other verbal warnings which were diarised and documented regarding failure to follow procedures.

140 As the Commissioner at first instance correctly found, these warnings had been given and I have referred to them above.

141 In submissions about inconsistency, and more generally, it was submitted to the Full Bench, at least implicitly, that the act of dangerous driving and the falsification of data records, by making himself available on the MDT at the start point when he was not at location, were the sole reasons for his dismissal. They were not, and they were expressly said not to be in the letter of 19 September 2003.

142 Mr Lewis' record was an unsatisfactory record of misconduct and poor performance culminating in these last incidents, and for all of which he was dismissed. There was no condonation alleged, nor could there be, of the earlier incidents for the purposes of any inconsistency, the whole of the conduct of the three employees over the years being properly considered also.

143 As the Commissioner correctly found, for all of the reasons which she expressed, and which I would find, (see paragraphs 24 and 25 of the Commissioner's reasons for decision) Mr Lewis was not unfairly dismissed.

Conclusions

144 For all of those reasons, it was open to find, and the Commissioner at first instance was correct to find, as follows:-

a) That the evidence of Mr Lewis where it conflicted with other evidence ought to be rejected as against the other evidence, particularly but not solely that of Mr Felvus and Mr Nicholson too.

b) That Mr Lewis was a dishonest and unreliable witness.

c) That Mr Felvus, Mr Nicholson and Ms Avon-Smith in particular were reliable and accurate witnesses.

d) That Mr Lewis had demonstrated in his evidence, and, indeed, admitted that he was prepared to and did deliberately mislead Mr Felvus about the issue of the fan belt.

e) That Mr Lewis was prepared to persistently disobey instructions and policies such as using the RAC van without authorisation (twice) and using excuses for doing so whilst saying that he would rectify problems when they were brought to his attention.

f) That that was Mr Lewis' continuing approach.

g) That further acts of misconduct, notwithstanding warnings and counselling, occurred frequently over the last two years of his employment, including significant breaches of policies and procedures, which continued to be committed by Mr Lewis.

h) That Mr Lewis did not respond to the warnings and counselling.

i) That he sought to deflect responsibility for his dishonesty onto Mr Felvus by falsely accusing Mr Felvus of dishonesty and by seeking to transfer to another team.

j) That he was clearly put on notice approximately two months prior to his dismissal that any further failings on his part might cost him his employment.

k) That Mr Nicholson witnessed Mr Lewis driving in an unsafe manner on two occasions, on 13 September 2003, one shortly after the other, that the vehicle was clearly being driven by Mr Lewis at the time, and that he was not close to the point start at Lemnos and Selby Streets when he reported that he was, thus misleading his employer.

l) That following the fan belt incident, there was a severe breakdown in trust, and that was added to by the unfounded allegations of Mr Felvus' dishonesty, made in the matter and made thereafter by Mr Lewis.

m) That Mr Lewis' overall conduct, notwithstanding some certificates of recommendation, was so unsatisfactory as to justify his dismissal.

n) That Mr Felvus was clearly entitled to participate in the investigation process because he was Mr Lewis' team leader; and he did not participate alone. Ms Avon-Smith was also involved.

o) That Mr Rose was not satisfied that Mr Lewis was competent, reported it to Mr Felvus, and that he was the only one who failed the assessment.

p) That the situations with Mr Shearman and Mr Crisp are not at all comparable to the situation of Mr Lewis, and there were no inconsistencies in the treatment of him, such as to constitute unfairness, or at all.

q) That the RAC was entitled not to have him work and to suspend him, given that issues of trust and confidence were in the balance, and given his previous work history. In addition, of course, he worked alone.

r) That the suspension, in all of the circumstances, was not unfair, particularly with regard to Mr Lewis' conduct over the previous two years.

s) That the final warning followed counselling, reprimands and verbal and written warnings of discipline, including the likelihood of dismissal.

t) That the incident of 13 September 2003 was properly investigated. Mr Lewis was given a chance to respond to the allegations which he did. His response was properly considered before a decision was made to dismiss him and he was dismissed.

u) That the unsafe driving on 13 September 2003 and his dishonesty in relation to it was not a trivial issue.

145 Correctly applying the principles in *Miles and Others t/as The Undercliffe Nursing Home v FMWU* (1985) 65 WAIG 385 (IAC), the Commissioner found and I would find that the RAC gave Mr Lewis a fair go. In fact, he was given a very fair go and might lawfully and fairly have been dismissed before he was, and indeed dismissed summarily. He had been warned that his job was in jeopardy. He had been warned that his performance was under review following a series of failures to comply with proper procedures and policies lasting over two years. He had been warned several times about his conduct and the likelihood of disciplinary action. He made promises to comply with policies and procedures, which promises he did not keep. He was given the chance to train and did not. The explanations which he gave for the breaches were fatuous or patently unbelievable. Some were simply not answers or explanations. He acted spitefully and dishonestly to his team leader, Mr Felvus.

146 During the two years before his dismissal, his failure to comply with procedures and policies of which some were repeated, and his misconduct, involved the technical aspects of his job, the failure to comply with safety requirements, dishonesty,

manipulation of rosters, and reporting back from leave three days late. He committed such breaches even when he was assessed by Mr Rose and in Mr Rose's presence. He was the only patrol who actually failed a competence test. He took no steps to remedy that serious failure, not even pursuing the training offered to him. It was open to find and correct to find.

147 That Mr Lewis might have had certificates of commendation for his work had no import in the face of his serious admitted misconduct. Again, as it was open to find and correct to find, that because Mr Lewis was not a credible witness and Mr Nicholson was, he drove "dangerously" on 13 September 2003 on two occasions and falsified data about the location of his vehicle on that day. That driving was not a trivial matter at all. The matter was properly investigated and he was given every opportunity to respond and his response was taken into consideration. The manner of his dismissal, it was open to find, was fair.

148 As far as substance went, of course, his conduct, as I have already said, was such as to thoroughly justify his dismissal. Indeed, if it were needed to be said, he himself even contemplated resigning in July 2003, but did not do so. He mooted a financial agreement to effect an end to the contract when he was in difficulty. His overall treatment of members of the RAC was unsatisfactory, it was open to find and correct to find. It matters not, against his reported misconduct, that he was said to have technical ability. In any event, there were episodes where, if he did have that ability, he used it very carelessly and made errors, which he admitted. Not the least of these was the failure to diagnose a failed battery correctly.

FINALLY

149 For all of those reasons, it was open to find, and the Commissioner at first instance was correct to find, that Mr Lewis was not harshly, oppressively or unfairly dismissed and, indeed, that he had not been.

150 For all of those reasons, it has not been established, according to proper principles, that the exercise of the discretion at first instance miscarried for any of the reasons alleged in the grounds of appeal.

151 For all of those reasons, I would find that there was no error according to the principles expressed in *Devries and Another v Australian National Railways Commission and Another* (op cit), *Fox v Percy* (op cit) and *Anikin v Sierra* (HC) (op cit).

152 I observe that this was an appeal which had no merit.

153 For all of those reasons, I would find the appeal not made out and dismiss it.

154 Counsel for the RAC foreshadowed an application for an order for party and party costs in the event of the appeal being dismissed and I would list the hearing of that application for a future date.

CHIEF COMMISSIONER A R BEECH:

155 I agree that the appeal should be dismissed. The finding central to the decision of the Commission at first instance was the Commissioner's conclusion that she preferred the evidence of Mr Felvus and Mr Nicholson over the evidence of Mr Lewis. The Commissioner had before her the evidence of Mr Lewis that he did not lie about cutting the fanbelt yet when Mr Felvus asked him a direct question whether he did cut the fanbelt, Mr Lewis replied that he had not cut the fanbelt. Mr Lewis was not honest in his answer and the Commissioner's conclusion of the issue of credibility of his evidence was a proper exercise of her discretion. That conclusion, in my respectful view, was sufficiently important to underpin the findings which led to the Commission's decision to dismiss Mr Lewis's application.

156 In this appeal, no evidence of error on the part of the Commission in first instance has been demonstrated, or could be demonstrated. It is not without significance that after Mr Lewis's grounds of appeal had been amended, the remaining appeal grounds merely allege that the Commission at first instance erred in preferring the evidence of persons other than Mr Lewis or that the Commission did not place sufficient weight on certain matters. It is well settled that the Full Bench must be slow to overturn a Commissioner's discretionary decision on grounds which only involve conflicting assessment of matters of weight.

COMMISSIONER S WOOD:

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

THE PRESIDENT:

158 For those reasons, the appeal is dismissed.

Order accordingly

2005 WAIRC 01472

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID LEWIS **APPELLANT**
	-and-
	THE ROYAL AUTOMOBILE CLUB OF WA INC. **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S WOOD
DATE	MONDAY, 9 MAY 2005
FILE NO/S	FBA 35 OF 2004
CITATION NO.	2005 WAIRC 01472

Decision	Appeal dismissed
Appearances	
Appellant	Mr T C P Crossley-Solomon, as agent
Respondent	Ms J Auerbach (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 21st day of February 2005, and having heard Mr T C P Crossley-Solomon, as agent, on behalf of the appellant and Ms J Auerbach (of Counsel), by leave, on the behalf of the respondent, and the Full Bench having reserved its decision on the matter, and the reasons for decision being delivered on the 28th day of April 2005, it is this day, the 9th day of May 2005, ordered and declared that appeal No FBA 35 of 2004 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2005 WAIRC 01475

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID LEWIS
	APPELLANT
	-and-
	THE ROYAL AUTOMOBILE CLUB OF WA INC.
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S WOOD
DATE	TUESDAY, 10 MAY 2005
FILE NO.	FBA 35 OF 2004
CITATION NO.	2005 WAIRC 01475

CatchWords	Industrial Law (WA) – appeal against the decision of a single Commissioner – application for costs – extreme circumstances – no merit in appeal - *Industrial Relations Act* 1979, s27(1)(c).
Decision	Application granted.
Appearances	
Appellant	Mr T Crossley-Solomon, as agent
Respondent	Ms J Auerbach (of Counsel), by leave

Supplementary Reasons for Decision
- Costs

THE PRESIDENT:

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

2 The respondent applied for costs of the appeal after the appeal was dismissed. Costs are awardable by virtue of s27(1)(c) of the *Industrial Relations Act* 1979 (as amended). S27(1)(c) reads as follows:-

> "(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it -
>
> …
>
> (c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent;"

3 The costs claimed were part of the costs of transcript obtained and used by the respondent in these proceedings.

4 The quantum of costs claimed was not contested by Mr Crossley-Solomon who appeared as agent for the appellant.

5 The long accepted principle in this Commission is that costs are not awarded by the Commission, constituted by the Full Bench or otherwise, unless there are extreme circumstances. It was the submission of counsel for the respondent that this was such a matter because the Full Bench had found the appeal to be without merit, and found much of it on the evidence of the appellant himself.

6 The Full Bench generally found that the appeal was without merit. It was an appeal which, as the reasons of the Full Bench delivered on the 28th day of April 2005 amply state, the appellant ought not to have instituted.

7 For those reasons, it is clear that this is an extreme case within the meaning of the principle in *Brailey v Mendex Pty Ltd t/as Mair and Co Maylands* 73 WAIG 26 (FB).

8 Mr Crossley-Solomon on behalf of the appellant made no objection to the order being made, and, in fact, made no submissions.

9 For those reasons, we were persuaded that we should join in making the order that the sum of $556.05, the agreed amount of costs, which were not the costs of a legal practitioner or agent, should be ordered to be paid within 21 days.

2005 WAIRC 01474

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID LEWIS
	APPELLANT
	-and-
	THE ROYAL AUTOMOBILE CLUB OF WA INC.
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S WOOD
DATE	MONDAY, 9 MAY 2005
FILE NO/S	FBA 35 OF 2004
CITATION NO.	2005 WAIRC 01474

Decision	Application for costs granted
Appearances	
Appellant	Mr T C P Crossley-Solomon, as agent
Respondent	Ms J Auerbach (of Counsel), by leave

Order

This application by the respondent for costs having come on for hearing before the Full Bench on the 9th day of May 2005, and having heard Mr T C P Crossley-Solomon, as agent, on behalf of the appellant and Ms J Auerbach (of Counsel), by leave, on the behalf of the respondent, and the Full Bench having determined the matter, and determined that the reasons for decision will issue at a future date, the parties having waived their rights pursuant to s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 9th day of May 2005, ordered and declared:-

THAT David Lewis, the above-named appellant, do pay to The Royal Automobile Club of WA Inc, the above-named respondent, the costs of the above-named respondent's appeal namely the sum of $556.05 within twenty one (21) days of the date hereof.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2005 WAIRC 01243

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA UNDERDOWN
	APPELLANT
	-and-
	DOWFORD INVESTMENTS PTY LTD
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER S J KENNER
DATE	MONDAY, 18 APRIL 2005
FILE NO.	FBA 45 OF 2004
CITATION NO.	2005 WAIRC 01243

CatchWords	Industrial Law (WA) – Appeal against decision of a single Commissioner – Application to adduce fresh evidence – Denial of contractual benefits – Contract of employment – Implied term – Express term - Ostensible bias – Procedural unfairness – *Industrial Relations Act* 1979 (as amended), s29(1)(b)(ii), s49 – *Industrial Relations Commission Regulations* 1985 (as amended)
Decision	Appeal dismissed
Appearances	
Appellant	Mr A Heedes, as agent
Respondent	Mr D Cronin (of Counsel), by leave, and with him Ms A Gotjamanos (of Counsel), by leave

Reasons for Decision

THE PRESIDENT AND COMMISSIONER S J KENNER:

INTRODUCTION

1 These are the joint reasons for decision of the President and Commissioner Kenner.

2 This is an appeal by the above-named appellant, Samantha Underdown, against the whole of the decision of the Commission, constituted by a single Commissioner, given on 19 October 2004 in application No 376 of 2004. This appeal is brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). The decision appealed against is constituted by a declaration as follows:-

> "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
>
> ….that the application made is otherwise dismissed."

GROUNDS OF APPEAL

3 That decision is now appealed against on the following grounds:-

> "The decision handed down by the learned Commissioner was manifestly wrong at law and one that was not open to be made in that;
>
> 1. The conclusions beginning at paragraph (42) were based and centered around the pivotally erroneous finding of fact that "the respondent is part of the Milne AgriGroup group of companies" and more importantly at the time of the execution of the written contract, that being the 2nd April 2001, that Milne Feeds Pty Ltd was thus effectively owned by the respondent. This is both wrong factually and wrong at law to attempt to enforce the applicant to such.
> 2. The learned Commissioner failed to give sufficient enough weight to the evidence before her that the contract that was in place was not the void written contract thus determined upon, but a specific totally verbal and implied contract executed between the applicant and the CEO.
> 3. Had the written contract indeed been valid and was to be interpreted as the learned Commissioner states, that would have given the employer the effect of being able to forcibly work the applicant every day of the week without a day off except for public holidays being the only days she gets off per year. This does not create legal intentions as to formation of a contract.
> 4. The applicant has a reasonable apprehension of bias held against her and in favour of counsel for the respondent.
> 5. The learned Commissioner failed to allow the applicant to have her prepared opening address read out prior to or even during the hearing of the application, in order to clearly outline the applicants claim and how it would be lead and what was relied upon to substantiate such.
> 6. The applicant was unable to obtain and thus accurately refer to copy of the hearing transcript in her written submissions due to not having sufficient time allowed by the Commissioner's orders, whereas the respondent in antithesis was able to answer the applicants submissions with the provision of the transcript and therefore referred specifically to various sections verbatim of such in their final submissions to support such.
>
> ORDERS OR DECISION SOUGHT BY APPELLANT
>
> 7. The decision handed down by the learned Commissioner on the 12th October 2004 in the first instance, be set aside, quashed and or expunged.
> 8. Orders or an affirmative decision as to the nature sought by the appellant /applicant in her claim that was the subject of the hearing, granting her full relief as sought or in the alternative an expedient full rehearing of the matter to be recommenced from inception.
> 9. Costs, with substantiating argument why this is a special circumstance application."

FRESH OR NEW EVIDENCE

4 The appellant, on the hearing of the appeal, applied to adduce fresh evidence. The fresh evidence consisted of a letter of resignation from her employment dated 14 August 2004 and addressed to Mr Graham Laitt, Managing Director of Dowford Investments Pty Ltd, the above-named respondent. There was also an affidavit sworn by Ms Underdown on 4 November 2004. In the affidavit, the substance of evidentiary matters deposed to related to the relationship between Dowford Investments Pty Ltd and Milne Feeds Pty Ltd, now known as Milne AgriGroup Pty Ltd (see paragraphs 2, 3, 4, 5, 6 and 7 of the affidavit).

5 In the affidavit, Ms Underdown also seeks to challenge some findings of the Commissioner and to complain about the decision approximately one month after it had issued (see paragraphs 8, 11, 12 and 13 of the affidavit).

6 There are also matters deposed to which are irrelevant to any ground of appeal (see paragraphs 9, 12 and 13 of the affidavit).

7 This appeal was heard and determined on 2 February 2005. The application at first instance was filed on 23 March 2004. The application was heard and determined on 26, 27 and 28 July 2004 and the decision and reasons are dated 19 October 2004 and 12 October 2004 respectively.

8 The evidence is fresh evidence and can only be admitted if certain conditions are complied with (see *FCU v George Moss Limited* 70 WAIG 3040 (FB) and see *Hanssen Pty Ltd v CFMEU* (2004) 84 WAIG 694 (FB)). The evidence, insofar as it was relevant, and some of it was not, could only be admissible if it were not "available to the appellant at the time of the trial" and could not by reasonable diligence have been made available. Further, it is only admissible if the evidence sought to be admitted is credible, although it does not have to be beyond controversy. Further, it can only be admitted if it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached.

9 We would add that, in *FCU v George Moss Limited* (FB) (op cit), we put the effect of this last condition too low by saying that the evidence sought to be admitted is required to be such that it would have had an important influence on the result of the hearing at first instance, and we wish to retract what we said in that case and substitute what we have said about the almost certain opposite result being likely to be achieved.

10 In this case, the letter of resignation could have been sought to be admitted by the appellant reopening the case because the decision and the reasons therefor did not issue until about six weeks later. There is no evidence that any such application was made. Second, its admission could have no effect at all on the finding concerning contractual benefits claimed. It is, whether credible or not, simply irrelevant to the question whether Ms Underdown was entitled to an order for the contractual benefits to which she alleged she was entitled, and which she alleged she was denied.

11 As to the evidence relating to the relationship between the companies involved in the matter at first instance, we see no reason why that evidence was not adduced if it were admissible or relevant, at first instance. It is not at all clear that some of it, or perhaps all of it, is admissible, since there seems to be an element of hearsay in the evidence. There is nothing to suggest, however, that that evidence was unavailable at first instance. If it were wrongly excluded, as was alleged in submissions, and indeed it does not seem to have been, then that should be a ground of appeal. It is not a matter to be cured by adducing fresh evidence.

12 In any event, it is not at all clear that the evidence, if adduced at first instance, would have achieved a different result in the face of the documents adduced on behalf of the appellant. It is to be borne in mind that it is the appellant who produced the Australian Securities and Investments Commission (hereinafter referred to as "ASIC") documents pertaining to the registration and other dealings by and with the companies referred to in this matter.

13 The evidence is either irrelevant, argumentative, or should be the subject of submission on appeal, and/or is not admissible fresh evidence, according to the conditions with which we have said above are required to be complied.

14 We would emphasise this aspect of fresh evidence:-

> "If a trial has been regularly conducted and the party against whom the verdict has passed cannot complain that evidence has been wrongly received or rejected or that there has been a misdirection or that he has not been fully heard or has been taken by surprise or that the result is not warranted by the evidence, the successful party is not to be deprived of the verdict he has obtained except to fulfil an imperative demand of justice."

(See *Orr v Holmes and Another* [1948] 76 CLR 632 at 640 per Dixon J).

15 There was, for those reasons, no merit in the application to adduce fresh evidence and we agreed therefore with our colleague to dismiss the application.

BACKGROUND

16 There was documentary evidence adduced at first instance. Ms Underdown, too, gave evidence on her own behalf, as did her brother, Mr Robert Stuart Underdown, a fellow employee of hers for about seven days, Ms Pauline Ward who was Ms Underdown's assistant, and Ms Jo Ellis, the Payroll Manager for Milne AgriGroup Pty Ltd. Mr Bevan Garfield Treloar was also called to give evidence, who was the Meat Division Manager for Milne Feeds Pty Ltd. Mr Colin Aitken, the Chief Financial Officer of Milne AgriGroup Pty Ltd, also gave evidence.

17 Ms Underdown, who was the applicant at first instance, claimed that she was owed benefits to which she was entitled under her contract of employment not being a benefit under an award or order. She therefore made application to the Commission under s29(1)(b)(ii) of *the Act*. She claimed 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 she is deemed fit to return to work by her medical practitioner. The appellant claimed that failure to pay this money was a breach of her contract of employment. She said in her final amended Statement of Claim that she was prepared to put a ceiling on the sick leave pay to 31 August 2004.

(c) Reinstatement of her accrued annual leave which was 50 days, taken from 9 February 2004, when her sick leave payments ceased.

(d) The sum of $4,300.01 net "illegally" deducted from her account on 23 February 2004, contrary to clause 8 of her contract of employment. The Commission understands that the use of the word "illegally" is in the sense of unlawfully deducted.

18 Ms Underdown commenced employment with Milne Feeds Pty Ltd in April 2001 as an assistant to Mr Treloar, then the Meat Division Manager. Ms Underdown's official title was the Sales Marketing Development Manager. As she described it, she worked in that position until approximately twelve months later "when Graham Laitt took over the company and then promoted me to Business Manager". Her salary was increased from $36,500.00 per annum to $43,000.00 and then to $60,000.00, because she was promoted.

19 Ms Underdown had signed a written contract of employment with Milne Feeds Pty Ltd dated 2 April 2001 (exhibit 1), the terms of which we will refer to hereinafter. That agreement was not replaced by a new agreement when Dowford Investments Pty Ltd, with Mr Laitt as Managing Director, took over in 2002 some twelve months later. Further, the existing written agreement was not varied in writing, and whether it was replaced by or varied by an oral agreement is a different question to which we will come to later in these reasons. Indeed, Ms Underdown's evidence was quite clear that she asked Mr Laitt if she should have a new contract, "especially as I was then working for Dowford", and he said, "no".

20 Ms Underdown was still employed by Dowford Investments Pty Ltd at the time of the hearing at first instance but had been unable to work, having gone on sick leave on 28 October 2003, after being diagnosed on 9 October 2003 with Grade 3 breast cancer. She was therefore medically unfit to work at the time of the hearing because of her illness. She was required to undergo extensive chemotherapy and radiotherapy. Her illness is obviously a very serious one.

21 At the time when Ms Underdown went on sick leave, she was employed as the Business Manager of Mount Barker Chicken, the trading name of the respondent. She was also the Consumer Products Manager for Milne AgriGroup Pty Ltd, formerly Milne Feeds Pty Ltd. The Milne AgriGroup includes Dowford Investments Pty Ltd. The business conducted under the name "Mount Barker Chicken" is the business of the production and sale of poultry meat.

22 The breast cancer having been diagnosed on 9 October 2003, on Monday, 13 October 2003, Ms Underdown had a meeting with Mr Laitt. After discussing various matters of business, including her good performance, Ms Underdown informed Mr Laitt that she had breast cancer and would need time off to have surgery. She said that she would probably have to undergo chemotherapy and radiotherapy. According to her, Mr Laitt, who was not called to give evidence by either side, told her that she should take all of the time that she needed and that "he will cover me for as long as it took". She said that Mr Laitt told her that he had experience of it and that she would get through it and he would look after her (see page 35 of the transcript at first instance (hereinafter referred to as "TFI").

23 Ms Underdown claimed that her entitlement to ongoing paid sick leave arose out of a contractual promise made to her at that meeting by Mr Laitt. She also contended that the contractual obligation arose either as an agreement within the meaning of clause 24(b) of her contract of employment, or, alternatively, as a separate contract or collateral contract.

24 Ms Underdown had subsequent discussions with Mr Laitt on 23 and 24 October 2003. On 23 October 2003, she admitted, Mr Laitt did not say "we will cover your wages". She said that that was implied. She also reiterated in evidence that Mr Laitt never promised an indefinite extension of sick leave, but he never said that sick leave would be for a set time either (see page 137 (TFI)).

25 On 23 and 24 October 2003, according to Ms Underdown's evidence, they discussed loose ends including offloading some of her work to other people. She said that, during these discussions, Mr Laitt again said that she should not worry because her job would still be there and that she would be "covered". In fact, as at the date of hearing, she was still employed, but not working and not in receipt of sick leave pay. Ms Underdown admitted that the written agreement which she had signed on 2 April 2001 she was satisfied with and that it accurately reflected what she and Mr Treloar had discussed.

26 Ms Underdown gave evidence that she expected to be covered by such leave until she came back to work because of what Mr Laitt told her, namely, "…I would be covered, take as long as I need…" (see page 81 (TFI) (page 139 of the appeal book (hereinafter referred to as "AB")). This, she said, was a verbal contract. She agreed that Mr Laitt did not say that she was to be covered "ad infinitum" as the particulars of her claim assert. Indeed, she said that she was not planning to be away from work for ever and ever. She had hoped to go back in December 2003/January 2004 but her recovery was delayed, it is clear. She agreed that some compassion was shown to her by Mr Laitt by allowing her a number of months' sick leave when there was no obligation to allow her more than ten days in any one year.

27 Ms Underdown also admitted that she had a job to go back to, as far as she was aware, because that was what she had been told. There was no evidence to the contrary. Ms Underdown admitted in evidence that, having no obligation to do so, Mr Laitt agreed that she could have more than ten days' leave (see page 89 (TFI)). She said, however, she had not considered her legal rights when she sent her letter of 1 March 2004, a letter to which we will refer hereinafter.

28 Ms Underdown was, in fact, paid sick leave from 28 October 2003 until 6 February 2004, when the payment of sick leave was unilaterally terminated without notice by a letter written by the Commercial Director of the respondent, Mr Darryl Calligaro, to her. She replied to that on 12 February 2004 and we will refer to that hereinafter.

29 If Ms Underdown was successful in her claim for sick leave, it was not in dispute that 50 days of accrued annual leave should be reinstated. The respondent denied any commitment or binding agreement was ever given or entered into.

30 The claim for payment in lieu of 15 days worked on public holidays and weekends was made by Ms Underdown when she received the letter dated 6 February 2004 from Mr Calligaro, advising her that her paid sick leave was to cease, because there was a limitation of three months on it. Mr Laitt had not told her, she said, that there was such a limitation on it. In that letter, she was asked to advise by Friday, 13 February 2004 whether she wished to access her accrued annual leave, which is all that she would be paid.

31 In a letter dated 12 February 2004, Ms Underdown advised that she was owed a minimum additional 15 days in lieu and, 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. Ms Underdown complained that her sick leave was being terminated without notice because she was led to believe that sick leave was being covered until she went back to work, the words being "you're covered" and "take as much time as you need". She considered, she said, that that was a verbal contract.

32 The response was that, under her contract, Ms Underdown was not entitled to additional days as claimed for working weekends. She was told that her contract provided that the salary which she was paid was in satisfaction of and takes into account all aspects of her employment, including hours of work that she may be required to perform on weekends. As to the sum deducted on 23 February 2004 from her account, she said that that arose out of instructions given by the respondent's representatives to her bank to stop payment of her monthly pay. The respondent said that, before 23 February 2004, Ms Underdown had been advised that her paid sick leave would cease and was asked to say whether she wished to "access" her accrued annual leave. She advised that she did not wish to. As a result, a "stop payment" advice was given to the bank which the bank acted on so that Ms Ellis said that the money was withdrawn, Ms Underdown's monthly payment having been "reversed" by the bank in February 2004.

33 It is quite clear from Ms Ellis' evidence that there are not two different bank accounts, or were not at the time, and there were not two different corporate entities for the purposes of financial transactions. She said "….. it always says Milne's because the bank …… banking system is set up as Milne AgriGroup." That was, of course, so even though Dowford Investments Pty Ltd's name appeared on some of Ms Underdown's payslips.

34 A sum for the amount of $4,300.01, however, was later paid into her bank account after she complained to the respondent. Later, the payment of $4,300.01 was deducted from Ms Underdown's entitlement to accrued annual leave.

35 Ms Underdown's contract of employment (exhibit 1) signed by her on 2 April 2001 with Milne Feeds Pty Ltd, in its material terms, is reproduced at pages 182-188 (AB).

36 Clause 21 of the contract reads as follows:-

> "**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."

37 Clause 23 of the contract reads as follows:-

> "**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."

38 The sick leave clause, clause 24, reads as follows:-

> "**24)** 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. (our emphasis)

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."

39 Clause 31 of the agreement reads as follows:-

"**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."

40 Ms Underdown did work at trade fairs at weekends as well as her normal hours, and worked on public holidays.

41 There is no clause in the agreement which gives any entitlement to receive extra days off in lieu of days worked at weekends, at trade exhibitions, or otherwise. Ms Underdown admitted that it was not in the written agreement and she knew that it would not be included, that she should claim days off in lieu of hours or days worked at weekends or public holidays. She said, "it was an implied term that happens within the industry, from previous experience". She also said in evidence that she discussed this with Mr Treloar but he did not put it in the agreement because it was not asked to be put in "…. because it was an implied agreement, verbal agreement between Mr Treloar and myself…. because it's industry standard." (see page 62 (TFI)). Mr Treloar strenuously denied, both in evidence in chief and cross-examination, that there was any such agreement between them but referred to a "bit of give and take" which we understood to be somewhat informal and not an agreement. As we have said, there was no new written contract or written amendment to the contract of 2 April 2001, as a result.

42 This unequivocal denial came in the face of other evidence of Ms Underdown, namely that they discussed the fact that, if she worked extra hours or on weekends, then she was to be able to take off personal time to do personal things. This, she said, was not part of the written agreement because she said she was inexperienced in handling contracts. She took Mr Treloar's word, she said, "at good faith" (see page 63 (TFI)). She did, however, say that she considered the written contract complete. She said that there was no express authorisation or agreement that she would receive days off in lieu of work done at weekends.

43 It is quite clear that there was no evidence that Mr Laitt, to whom she was responsible, agreed with any such arrangement and that Ms Leanne Hinch did not and had no authority to agree. We have already referred to Mr Treloar's evidence which was unequivocally that he did not represent to Ms Underdown that she could take time off or days off in lieu of weekends (see page 181 (TFI)).

44 Ms Ward's evidence seemed to be of little weight or relevance, on a fair reading, nor was Mr Aitken's, for the most part. Mr Robert Underdown, Ms Underdown's brother, gave evidence directed to corroborating her evidence of hours worked.

The Corporate Links

45 It is necessary to make some observations about the companies referred to in the proceedings at first instance. We refer to the ASIC records put in on behalf of the appellant. Originally, Milne Feeds Pty Ltd was Ms Underdown's employer for about one year. There was a group of companies which, on all of the oral and written evidence, included Dowford Investments Pty Ltd and Milne AgriGroup Pty Ltd, which was called the Milne AgriGroup. Mr Laitt and Mr Calligaro were directors of Dowford Investments Pty Ltd and Milne Feeds Pty Ltd at material times. Milne Feeds Pty Ltd changed its name to Milne AgriGroup Pty Ltd as at 11 November 2002 (see page 40 (AB)), however, it remained the same entity. The directors were Mr Spencer-Laitt (herein referred to as "Mr Laitt") from 16 February 1987 and Mr Calligaro from 11 October 2002, and then Mr Maxwell Alan James Cameron from 15 January 2003. The record shows the ultimate holding company for Milne AgriGroup Pty Ltd to be Dowford Investments Pty Ltd and also the sole shareholder (see page 45 (AB)).

46 What is clear and seems to be common ground is that Dowford Investments Pty Ltd became the sole holding company in Milne Feeds Pty Ltd, owning all of the shares, whilst Milne Feeds Pty Ltd remained in existence, changing its name to Milne AgriGroup Pty Ltd.

47 As we understand it, Milne Feeds Pty Ltd, which was Ms Underdown's employer, remained in existence under a different name. Her employer did not change but the management of and shareholder in it did. On all of the evidence, Milne Feeds Pty Ltd remained Ms Underdown's employer under its new name, Milne AgriGroup Pty Ltd, as the proprietor of Mount Barker Chicken for whom she worked.

FINDINGS OF THE COMMISSIONER AT FIRST INSTANCE

48 The Commissioner at first instance found as follows:-

(a) That the documents from the ASIC showed that Milne Feeds Pty Ltd changed its name to Milne AgriGroup Pty Ltd on 6 December 2002 and that the sole owner of Milne AgriGroup Pty Ltd is the respondent. The respondent was incorporated on 20 June 2000 and, some time later, became the owner of Milne AgriGroup Pty Ltd. Therefore, the respondent's contention was correct that the respondent was part of the Milne AgriGroup Pty Ltd group of companies.

(b) That, pursuant to clause 31 of the written contact, it is clear that the terms of the written contract, at all material times, applied to Ms Underdown's conditions of employment.

(c) That the Commissioner did not accept Ms Underdown'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.

(d) That to do so would contradict an express term of the contract, namely clause 21, which clearly provides that, whilst the normal business hours are between 8.00am and 5.00pm from Monday to Friday, Ms Underdown 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.

(e) That it was conceded by the respondent that Ms Underdown had an arguable claim to be entitled to be paid for the two public holidays that she worked.

(f) That, when clauses 21 and 23 of the contract are read together, Ms Underdown is required to work at any time after office hours except on a public holiday and that, if she works on a public holiday, she is entitled to take a day off in lieu for that public holiday.

(g) That the entitlement to sick leave is governed by clause 24(b) of the written agreement, and that the Managing Director is able to evaluate the circumstances of the case and determine a longer period of sick pay, but it is a discretion that can be exercised at will.

(h) That, if clause 24(b) does not apply, the terms of the conversation between Ms Underdown and Mr Laitt on 13 and 23 October 2003 could not at law be regarded as a binding contractual obligation as there is a clear absence of any consideration provided by Ms Underdown.

(i) That Ms Underdown's claim for sick leave fails and so does her claim for reinstatement for 50 days' accrued annual leave.

(j) That, for those reasons, Ms Underdown's claim in respect of the sum which was said to be unlawfully deducted from her account also fails. In any event, the money was not unlawfully deducted because, at that particular point in time, she had advised the respondent that she did not wish to access her accrued annual leave.

ISSUES AND CONCLUSIONS

49 We want to preface this part of these reasons for decision by noting that the "Final Amended Statement of Claim" (see pages 191-194 (AB)) at first instance pleads, inter alia, that:-

(a) Ms Underdown and Milne Feeds Pty Ltd entered into an employment agreement by way of a written contract signed by the parties on or about 9 April 2001.

(b) There was an implied term of the contract referred to above which entitled Ms Underdown to take days off in relation to "full weekends and public holidays worked".

(c) The respondent has committed breaches of clauses 9, 11 and 23 of the contract.

(d) Paragraph 4 contains the following allegation:-

> "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 infinitum" amount of sick leave time in order to recover, pursuant to section 24b of the contract. Mr Laitt repeatedly affirmed on the 13th, 23rd & 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" unquote verbatim. This promise was deliberately breached by way of personal discrimination in order to bear weight, by way of letter dated 6th February 2004 by Darryl Calligaro, without any prior warning or notice and causing extreme anguish, stress, financial hardship and subsequent substantive financial damage."

50 The relief claimed, as it emerged in the end, was a claim for paid sick leave at the rate of $4300.01 per month from 9 February 2004 "until the applicant is deemed fit to return to work by her medical practitioners, as promised by Graham Laitt the Managing Director and CEO of the respondent by way of verbal contract re-emphasised on the 13th , 23rd & 24th October 2003" (see paragraph 8).

51 Ms Underdown said that she was prepared to put a limit on her sick leave claim up to 31 August 2004.

52 There was also an order sought for costs and disbursements. That order was not granted and that part of the decision is not appealed against.

53 The onus fell on Ms Underdown, as the applicant at first instance, to establish that the benefits which she claimed were benefits to which she was entitled under the contract of service and which were denied her.

54 What Ms Underdown was required to establish was correctly set out by the Commissioner at first instance, referring to the reasons for decision of the Full Bench 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 (see paragraph 37 of the reasons for decision at first instance).

The Parties

55 The Commissioner was required to determine what the contract of employment was and whether the benefits claimed were conferred by the contract of employment on Ms Underdown.

56 First, we wish to say something about the parties to the contract of service. The documents from ASIC, which were produced to the Commissioner at first instance on behalf of the appellant/applicant, and which appear in the appeal book at page 31 et seq (AB) make it clear that a company, Milne Feeds Pty Ltd, the company which employed Ms Underdown pursuant to the written contract to which we have referred above, changed its name to Milne AgriGroup Pty Ltd on 6 December 2002. Those documents also show clearly that, at all times material to this claim, the respondent, having been incorporated on 20 June 2000, and having become the owner of Milne AgriGroup Pty Ltd, namely Milne Feeds Pty Ltd under its new name, some time later. However, it is arguable that Dowford Investments Pty Ltd may not have been Ms Underdown's employer because it was a company holding shares in her employer. However, that was not contended and it is not necessary for us to reach a judgment on it.

57 Thus, the respondent's contention that the respondent company was, at all material times, part of the Milne AgriGroup group of companies is entirely correct.

58 By virtue of clause 31 of the contract, too, the written contract applies and applied at all times to Ms Underdown's employment. Therefore, her only entitlement was what that contract expressed.

59 It is quite clear that Ms Underdown, at first instance and in her case before closing submissions were made, was that, during her employment by Milne Feeds Pty Ltd, the respondent purchased Milne Feeds Pty Ltd, but that the written contract between Ms Underdown and Milne Feeds Pty Ltd continued to have force and effect.

60 However, in closing submissions, Ms Underdown contended that the terms of the written contract ceased to have effect in July 2001 and therefore did not bind Ms Underdown during 2003 and 2004.

61 Indeed, her case was that, at all material times, she was, after July 2001, employed and paid by the respondent, Dowford Investments Pty Ltd, trading as Mount Barker Chicken, and not by Milne Feeds Pty Ltd or Milne AgriGroup Pty Ltd which did not exist until November 2002.

62 However, this is the fact. Milne Feeds Pty Ltd continued in existence as a company and to all intents and purposes continued until the time of hearing at least, in existence, because it merely changed its name on 6 December 2002 to Milne AgriGroup Pty Ltd. Thus, as we have observed, she continued to be employed by Milne Feeds Pty Ltd under its new name of Milne AgriGroup Pty Ltd, it was arguable. In any event, the contract, as was held by the Commissioner and not successfully challenged in the proceedings, applied to Dowford Investments Pty Ltd, as the Commissioner found at first instance.

63 The ASIC records which form part of the records at first instance (see page 32 et seq (AB)) record that Dowford Investments Pty Ltd was registered in this State on 20 June 2000 and that its directors were Mr Laitt and Mr Calligaro appointed respectively on 3 July 2001 and 11 October 2002, and that they remained directors as at 4 August 2004.

64 This application was heard on 26 July 2004.

65 No new written contract was entered into between the parties. Ms Underdown gave evidence, however, that she asked Mr Laitt whether she should have a new contract since she was then working for Dowford Investments Pty Ltd and not Milne AgriGroup Pty Ltd. Her evidence was, however, and it was not contradicted or challenged, that she would not need another contract. That is, of course, in part consistent with the fact that she continued to be employed by Milne Feeds Pty Ltd or Milne AgriGroup Pty Ltd.

66 The fact of the matter is that no written contract replaced the original written contract between Milne Feeds Pty Ltd and Ms Underdown and that it still had force and effect at all times relevant to this claim.

67 In any event, it was clear that, and it was open to find that, no new written agreement was ever entered into between the parties. Thus, it was open to find and correct to find, as the Commissioner at first instance did, that, at all material times, Ms Underdown was a party to a written contract, the one which has been identified, and that any benefits which she claimed could only be benefits conferred on her by that written contract of employment, namely that of 2 April 2001 (see pages 182-188 (AB)) insofar as her claim for sick leave was concerned. By that written contract the only entitlement she had was, at all material times, prescribed by clause 24 of the written contract which limited sick leave to ten days in each year. This, however, was subject to the managing director's discretion in the event of prolonged illness requiring sick leave for a period in excess of 10 days, to make an exception to the ten day limit.

68 The next question was, therefore, whether any and what exception to that limit was permitted by the managing director who was, at the material times, Mr Laitt.

69 There were discussions which occurred between Ms Underdown and Mr Laitt on 13, 23 and 24 October 2003, and Ms Underdown admitted in evidence that, on 13 October 2003, when she discussed her illness with Mr Laitt she told him that she hoped to be back at work around Christmas/New Year 2003 and he told her that she had his full support. He also told her, as was undenied, that she should take as long as she needed for her recovery. She also admitted that Mr Laitt made it clear to her that she only had a ten day contractual entitlement to sick leave. She also admitted, contrary to her evidence in chief, that she was not told by Mr Laitt that he would pay her sick leave for ever and a day, or ad infinitum, as is alleged in the particulars of claim. She herself said that she did not intend to be off work for ever and ever.

70 She admitted that on 23 October 2003 Mr Laitt did not say that "we will cover your wages". This, she said, was implied from what he said to her. On 24 October 2003, the only discussion, she admitted, was about her illness.

71 Her complaint when she received the respondent's letter of 6 February 2004 was not that she had been promised sick leave "ad infinitum", but that her sick leave had been terminated without notice. Some time later, of course, she claimed that she was entitled to continuing sick leave until she was fit enough to return to work.

72 There was no evidence that there was any agreement to pay sick leave until she returned to work, or any exercise of discretion in those terms under the agreement itself. There was clearly, on her evidence, as we have described it, no evidence that any verbal agreement which there was contained any term entitling her to be paid sick leave until she was well enough to return to work, and, in fact, that is not what occurred. Indeed, if we might add it, her own evidence was clearly to that effect.

73 What occurred in this case was quite clear. Mr Laitt, as Managing Director of Dowford Investments Pty Ltd, or Milne AgriGroup Pty Ltd, or both, pursuant to the written contract of employment, exercised his express power and discretion as conferred by clause 24 of the contract of employment, to grant sick leave to Ms Underdown for a period greater than the ten days sick leave to which she would normally be entitled, or any employee would be entitled, as a maximum, in any one year (see clause 24(b) of the contract). Because she had a prolonged illness, Mr Laitt granted her much longer sick leave, something which she actually admitted in cross-examination. That is what was correct to find and what the Commissioner at first instance was entitled to find. We would so find.

74 In accordance with the express terms of the written contract, the discretion was exercised and exercised for a finite period, fixed within the discretion of Mr Laitt. It might have been more helpful had the term of sick leave to which the respondent was agreeable had been communicated to Ms Underdown and had not been terminated so unceremoniously, but that does not vitiate the valid exercise of the company's right under clause 24 of the written contract of employment.

75 There was no express or implied condition of the agreement conferring a right to sick leave on Ms Underdown for any indefinite period, or indeed at all, and certainly not for the whole period of a prolonged illness until she was fit to return to work. Apart from anything else, there might, unfortunately, where an employee suffers a prolonged illness, come a time when the doctrine of frustration is invoked by the employer, and that of course could have occurred here. There was clearly no verbal agreement to the contrary, on all of the evidence.

76 Thus, the Commissioner was correct to find and we would find that the respondent, which was at all times the owner of Milne AgriGroup Pty Ltd formerly Milne Feeds Pty Ltd, was part of the Milne AgriGroup group of companies and that, at all material times, the written contract of 2 April 2001 applied to Ms Underdown's employment. For the reasons found by the Commissioner that her sick leave entitlement was entirely governed by clause 24 of the contract, the Commissioner was correct to find and we would so find.

77 Further, the Commissioner was correct to find and we would find that the terms of the conversations between Ms Underdown and Mr Laitt could not at law constitute a binding contractual obligation because there was a clear lack of any consideration provided. Indeed, it was not argued otherwise on this appeal, nor was that finding challenged in the grounds of appeal. In any event, there was no assertion at all in those conversations that she would be covered indefinitely. The promise that she would remain an employee was kept up to the time of the hearing at first instance, at least. The 50 days accrued annual leave she was not entitled to, the Commissioner found. Again, that finding was not appealed against, particularly the finding that no consideration was provided. We would so find and the Commissioner was correct to so find.

78 In any event, there seems to be no challenge to those findings in the grounds of appeal. There was no appeal against the finding that Ms Underdown's claim in respect of the monies said to be unlawfully deducted from her account failed.

79 For all of the reasons expressed by the Commissioner and to which we have referred above, the Commissioner did not err and we would so find.

80 Ms Underdown also alleged on this appeal that the written contract was void or legally unenforceable from July 2001 and afterwards. Her case was also that the terms and conditions of her contract changed when she became a manager and reported to Mr Laitt.

81 The Commissioner at first instance was correct to find that no such contractual benefit existed in the written contract, or by virtue of any collateral agreement, or by virtue of any verbal variation or new verbal agreement or implied term. The application did not so establish and grounds 1 and 2 fail.

Days Off in Lieu

82 It was not contended that there was any express provision in the written contract which entitled Ms Underdown to claim days off in lieu of time worked on weekends or trade fairs. There was no other express agreement to that effect. Mr Laitt did not agree to it. Ms Leanne Hinch did not agree to it, and had no authority to do so.

83 Indeed, as the Commissioner at first instance correctly found, such a term was not impliable because to do so would be to imply a term directly contrary to clause 21, an express term of the contract.

84 For the reasons expressed by the Commissioner, we agree that that was correct (see *BHP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] 180 CLR 266).

85 However, as was not appealed against, and as it was clearly open to find, reading clauses 21 and 23 together, that it was a term of the contract that if she worked on a public holiday she is entitled and was entitled to take a day off in lieu. This, of course, applied to public holidays only. To that extent what she claimed was a benefit under the contract. The Commissioner at first instance ordered the payment of that amount. It was not appealed against.

Ground 3

86 Ground 3 is difficult to understand, but nothing said in support of it could support a finding that there was any express or implied term of any contract of employment giving Ms Underdown the right to claim as a benefit days off in lieu of time worked at trade fairs at weekends. For all of those reasons, ground 3 is not made out either.

87 We now turn to grounds 4, 5 and 6.

Ground 4 – Ostensible Bias

88 By ground 4 it was alleged that there was ostensible bias in the Commissioner at first instance in that the Commissioner favoured through its counsel the respondent as against the appellant/applicant. In our opinion, although it was not argued, since that point was not taken at first instance, the ground might well be subject to waiver on the authority of *Vakauta v Kelly* [1989] 167 CLR 568. The test to be applied is laid down a large number of cases, and most recently in this Commission in *McCarthy v Sir Charles Gairdner Hospital* (2004) 84 WAIG 1304 (FB) and the cases cited therein.

89 The appellant was required to establish that a reasonable observer might apprehend that the Commissioner might not or would not resolve the issues with a fair and unprejudiced mind. The test is not subjective. It is objective. It certain does not depend on what the person who alleges bias may subjectively believe or understand.

90 "The test does take account of the fact that an unprejudiced and impartial mind is not necessarily one which has not thought about the issues in dispute or formed any preliminary views or inclinations of mind or conclusions about those issues" (see *McCarthy v Sir Charles Gairdner Hospital* (FB) (op cit) at page 1308 (paragraphs 42 and 43)).

91 In this case, the appellant was clearly required to establish that the reasonable apprehension was that the Commissioner's mind was so prejudiced in favour of a conclusion already reached, that it would not be altered irrespective of the arguments made and of any evidence which would be made or adduced.

92 There is simply nothing in this case to demonstrate that the Commissioner was biased or that there is any reasonable apprehension of bias from any objective stand point.

93 On a fair reading of the evidence, there is nothing which shows any attitude of favour to counsel for the respondent, and therefore to the respondent. Indeed, the Commissioner, within the bounds of her duty to both parties, was of assistance to the agent for the appellant. The Commissioner gave him some guidance about how to ask questions. In particular also, she gave him two opportunities to gather his thoughts, once over lunch and once over night when she could have required him to go on (see pages 55-56 (TFI). She twice gave him opportunities to tender further documents which had not been tendered, after she explained the necessity to tender them (see pages 58-59 (TFI)). It is not clear what documents he did not adduce but he said that some would be adduced through witnesses (see page 59 (TFI)). However, further documents were tendered (see pages 115-116 (TFI)). The Commissioner allowed the appellant's agent to commit his address to writing overnight instead of requiring him to address forthwith, as she could rightly have done. Again, that the respondent was permitted to address after him was not correct, but, in the circumstances where the agent for the appellant did not attend the next day, understandable but it could not have altered the result (see pages 192-196 (TFI)), (see *Stead v State Government Insurance Commission* [1986] 161 CLR 141).

94 That is as much as we can extract from a number of submissions, which, in any event, fail because they were not pleaded as part of the grounds. Indeed, the grounds did not comply with the *Industrial Relations Commission Regulations* 1985 (as amended) and the notice of appeal could have been rejected for that reason.

Ground 5

95 Ground 5 demonstrates a misunderstanding of what occurred. First, since the appellant was represented by an agent, it was for him to deliver the opening statement, and he did. Second, any opening statement is read and spoken from the bar table and is not evidence unless the parties agree or no objection is taken to evidence being given in that statement. That was not the case in this matter.

96 In this case, the witness, Ms Underdown, entered the witness box and proposed to read from a prepared statement in the witness box, a step which was rightly objected to. However, correctly, the Commissioner at first instance ruled that Ms Underdown could refer to this statement to refresh her memory, if her recall failed. As well as being correct, this ruling was helpful to a person who complained about the effect of chemotherapy and radiotherapy upon her. At no time did Ms Underdown need to do so, and no application was made on her behalf to that end. There was no error established by that ground (see pages 21-21(a), 22-23 (TFI)).

97 There is no merit in ground 5 and, for those reasons, it fails.

Ground 6

98 Ground 6 has no merit in it. Whether a party to proceedings in the Commission obtains transcript or relies on notes is a matter for the party concerned. We are aware that persons, on the ground of economic hardship, may apply for exemption from transcript fees to the Registrar. There was no evidence that that was done. The Full Bench was taken to nothing arising in or from that ground which might have evidenced unfairness which could be said to have been able to change the result (see *Stead v State Government Insurance Commission* (HC) (op cit)). That ground is not made out either.

99 There were a number of other procedural complaints made to the Full Bench by Mr Heedes who appeared as Ms Underdown's agent at first instance and before the Full Bench. Nothing was included in the grounds of appeal which went to these

complaints. This includes an allegation that the respondent "controlled" witnesses. Of course, none were called for the respondent and no application was made to call them on behalf of Ms Underdown.

100 In any event, nothing was put upon this appeal to the Full Bench which might constitute an allegation of procedural fairness or such as to be likely to change the result (see *Stead v State Government Insurance Commission* (HC) (op cit)).

101 Further, the appellant was given every reasonable opportunity to put her case and did so.

102 The appeal fails for all of those reasons. We would therefore dismiss the appeal.

COMMISSIONER P E SCOTT:

103 I have had the benefit of reading the reasons of decision of His Honour the President. I agree that none of the grounds of appeal is made out and that the appeal ought to be dismissed.

THE PRESIDENT:

104 For those reasons, the appeal is dismissed.

Order accordingly

2005 WAIRC 01244

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA UNDERDOWN
	APPELLANT
	-and-
	DOWFORD INVESTMENTS PTY LTD
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER S J KENNER
DATE	MONDAY, 18 APRIL 2005
FILE NO/S	FBA 45 OF 2004
CITATION NO.	2005 WAIRC 01244

Decision	Appeal dismissed
Appearances	
Appellant	Mr A Heedes, as agent
Respondent	Mr D Cronin (of Counsel), by leave, and with him Ms A Gotjamanos (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 2nd day of February 2005, and having heard Mr A Heedes, as agent, on behalf of the appellant, and Mr D Cronin (of Counsel), by leave and with him Ms A Gotjamanos (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 18th day of April 2005 wherein it was found that the appeal should be dismissed, it is this day the 18th day of April 2005, ordered that appeal No FBA 45 of 2004 be and is hereby dismissed.

By the Full Bench

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

2005 WAIRC 01264

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WEBFORGE AUSTRALIA PTY LTD
	APPELLANT
	-and-
	PETER RICHARDS
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S WOOD
DATE	TUESDAY, 19 APRIL 2005
FILE NO.	FBA 49 OF 2004
CITATION NO.	2005 WAIRC 01264

CatchWords	Industrial Law (WA) – Appeal against decision of a single Commissioner – No true redundancy – Dismissal – Procedural fairness – Credibility of witnesses – Age of employee - Finding of loss and quantum of compensation – *Industrial Relations Act* 1979 (as amended), s29(1)(b)(i), s49 – *Minimum Conditions of Employment Act* 1993, s40(1), s40(2), s41, s41(2)
Decision	Appeal dismissed
Appearances	
Appellant	Mr D Jones, as agent
Respondent	Mr C Fayle, as agent

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal by the above-named appellant employer against paragraphs 1 and 3 that is part of the decision of the Commission given on 2 November 2004 in matter No 269 of 2004.

2 The appeal is brought under s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). The decision appealed against is a declaration and order in the following terms:-

> "(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."

GROUNDS OF APPEAL

3 The appellant now appeals against that decision on the following grounds:-

> "1. The Commission erred in finding that the Appellant terminated the Respondent's employment unfairly.
>
> Particulars
>
> 1.1 The Commission failed to find, against the weight of the evidence, that the Respondent's "Stock controller" position was made redundant (Decision, paragraphs 30 to 35 inclusive).
>
> 1.2 The Commission was in error in finding that the Appellant did not comply with the *Minimum Conditions of Employment Act* or, if in the alternative it was, that compliance with that Act would have materially affected the decision to terminate the Respondent (Decision, paragraphs 27 and 43-44 inclusive).
>
> 1.3 The Commission erred in finding that the Respondent was not offered the opportunity to work in the "revised" role without making any finding of fact that the Respondent had eschewed the notion of his participating in any further training (Decision, paragraphs 27 and 28).
>
> 1.4 The Commissioner erred in finding that the Appellant's dismissal of the Respondent was tainted with ageism when the weight of the evidence from the Appellant demonstrated otherwise and the evidence from the Respondent's witnesses ought to have been found sufficiently unconvincing to draw the inferences that were made (Decision, paragraphs 36-42 inclusive).
>
> 2. The Commissioner erred in determining the quantum of compensation awarded to the Respondent.
>
> Particulars
>
> 2.1 The Commissioner fell into error in determining the factors that are relevant in deciding a quantum of compensation to be awarded (Decision, paragraph 50). In doing so the Commission omitted consideration of the Appellant's evidence that had the Respondent been given the new position he would have faltered in a short period (because the new position and its full responsibilities had never been done by the Respondent as part of one job) and that he had eschewed the notion of further training.
>
> 2.2 The Commissioner made no relevant finding to support his conclusion that the Respondent's "...total loss...will be ongoing." Accordingly, his finding as to loss was in error.
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> 3. The Appellant seeks an order that:
>
> (a) Upholds the Appeal and quashes the decision; or
>
> (b) Suspends the operation of the decision and remits the case to the Commission for further hearing and determination."

BACKGROUND

4 The above-named respondent, Mr Peter Richards, made application for relief by application filed on 4 March 2004 in the Commission and pursuant to s29(1)(b)(i) of *the Act*. Mr Richards alleged that he had been harshly, oppressively and unfairly dismissed. The application was opposed by the respondent at first instance who is now the appellant in this appeal.

5 Mr Richards commenced employment with the appellant in about November 1980. The appellant is in the industry of producing steel products. Mr Richards worked in various positions within the factory operations until about the early 1990's when he was appointed as stock controller. In late 1997, another company took over the appellant's business and later a further takeover occurred in February 2003, but, at all times, Mr Richards remained in his position as stock controller. In January 2004, Mr Richards was purportedly retrenched for redundancy.

6 As stock controller, Mr Richards' evidence was that he was responsible for ensuring that raw materials for the purposes of producing the appellant's products were in stock so that production could continue uninterruptedly. Further, he said that he was required to schedule stock allocation in order to avoid overstocking in the factory. He was also engaged, amongst other duties, in arranging the transport of stock to and from the factory.

7 In late 1997, when a takeover of his employer company occurred, there was no change to Mr Richards' position. He was of opinion that all was going well until about mid 2002 when the appellant appointed a new factory supervisor, Mr Neville Mort, who subsequently became the factory manager. Mr Richards said that Mr Mort began to take away tasks performed by him which he had performed for many years. Mr Mort's evidence was that, when he arrived at the factory, because of the changes in the competitive market for steel products, it became necessary to concentrate more closely on procurement practices and this involved the supply of product from one major supplier in the main. This was disputed by Mr Richards who said that what he did had been the case throughout his period of time as stock controller, and, further, he said that the purchase of the product from the appellant's major supplier was as a result of the negotiation of a supply agreement nationally over which the appellant locally had no control either of price or content. That was not disputed by the appellant.

8 It was also disputed by Mr Richards that it was necessary for Mr Mort, according to his evidence, to work closely with Mr Richards over the last 18 months or so of his employment to get him to understand and undertake effective control of the position of stock controller. Mr Richards also said that Mr Mort removed from the duties performed by him estimating requirements for raw materials, production from the grid machine and production from the saws. Further, he said that Mr Mort also took control of the six monthly stocktakes which reduced his role in this regard to only data entry. He strongly denied that he had been counselled by Mr Mort about his performance and questioned the need for formal qualifications to perform a role which he was of the opinion he had effectively performed since about 1990. Indeed, before Mr Mort's arrival, Mr Richards said, his ability to perform the job of stock controller was never queried.

9 There was a discussion, according to Mr Mort, in December 2003 between Mr Mort and the general manager, Mr Kevin Taylor, in the course of which Mr Mort discussed his concerns about Mr Richards' inability to perform the job of stock controller to the standard they expected. Mr Mort had formed the opinion that the requirements of the position, as the appellant saw it, went beyond the capabilities of Mr Richards.

10 It was the evidence of Mr Richards that, up until 29 January 2004, he had no idea that his position was in jeopardy. He said that he had not been informed by the appellant of any proposed changes to his position or any expression or view in any formal way that his performance was not up to the standard required by the appellant. In the late afternoon of 29 January 2004, he received a telephone call from Mr Mort asking him to go to Mr Mort's office. There, he was informed that he was to be made redundant and was asked what he would accept as a redundancy package. According to Mr Richards, he asked Mr Mort why the appellant was taking this course and he was informed that his position was to be expanded and the company wanted a younger person in the position since Mr Richards was considered to be too old to train.

11 According to Mr Richards, he was asked by Mr Mort what he would accept to go and he replied that, since he had just turned 60 years of age, he did not know what he would need to support his early retirement. He said that he was shocked by this discussion, but asked Mr Mort for time to consider what had been raised and to go and discuss the matter with his wife and family. Mr Mort said then that he required his answer the next morning.

12 Mr Mort said that, at this meeting on 29 January 2004, 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 Mr Richards.

13 Mr Mort gave evidence that Mr Richards informed him that he would not be able to fulfil the requirements of the position expected by the appellant because he did not have the management experience or relevant training in supply chain management and inventory management. There was then discussion about the fact that it would take some years of formal study for Mr Richards to acquire this knowledge and he informed Mr Mort that he did not have any inclination to undertake such studies since it was his intention to retire in less than five years or so from that time.

14 Mr Mort said that, whilst it was likely that any person chosen to occupy the position may be younger, this was not a condition of the appointment.

15 Mr Richards strongly denied that he ever expressed a view that he was not prepared to undertake any further training and denied that there was any detailed discussion of the position. He said that he had never been offered any training opportunities by the appellant prior to this time, apart from a computer course which involved Mr Richards establishing a computerised stock control system for the appellant.

16 There was a discussion the next day, on 30 January 2004, between Mr Mort and Mr Richards. Mr Richards informed Mr Mort that a suitable redundancy package would involve two weeks' salary for each year of service together with one year's pay and entitlements on termination of employment. Mr Mort said that he would speak to Mr Taylor and get back to Mr Richards.

17 Mr Mort also said that his discussions on the previous day regarding a suitable redundancy package were in light of the fact that the appellant had made the decision and it was not negotiable. At lunch time that afternoon, a factory toolbox meeting was called by Mr Mort, who announced, after other matters had been discussed, that Mr Richards was to be made redundant, as some changes were being made to his position. Mr Mort informed the meeting that, given Mr Richards' age, it would take some years to train a person in the role contemplated and the appellant 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. He also said that he and Mr Richards had previously agreed earlier in the day that the staff should be informed. One question put to Mr Mort by an employee was whether it would be probable that somebody filling the new role would be likely to be younger than Mr Richards and Mr Mort said that that might be so but this was not a prerequisite for the job.

18 Later that afternoon, Mr Mort came to Mr Richards' office with an envelope. Mr Mort said that the proposed redundancy package was not agreed to by the appellant and that the appellant would pay to Mr Richards 36 weeks' redundancy pay with long service leave, holiday entitlements and notice of termination. Mr Richards then rejected the package, and disputed that the 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. There was no response to this from Mr Mort.

19 On 31 January 2004, there was an advertisement for the position of "Materials Controller" in the newspaper and Mr Richards' evidence, not contradicted, was that he may not have had the preferable formal qualifications in materials management mentioned in the advertisement, but that he had done everything else referred to in the advertisement. He wrote to Mr Taylor, by letter dated 2 February 2004, complaining about his treatment and Mr Taylor did not respond.

20 On 3 February 2004, there was a further toolbox meeting to discuss the matter. Mr Taylor and Mr Mort attended. Mr Mort gave evidence that he asked those in attendance whether he had referred to Mr Richards being made redundant because of his age. A number of employees responded that he had. Mr Taylor then addressed the meeting and informed them of the reason for the change and that there was no consideration of making Mr Richards redundant because of his age. Some employees pointed out that there was no compulsory retirement at age 65 and furthermore that government policy was to encourage older employees to remain in the workforce.

FINDINGS AT FIRST INSTANCE

21 At first instance the Commissioner made the following findings:-

(a) That Mr Richards 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".

(b) That Mr Richards was not formally counselled in any way about his work performance.

(c) That, from time to time, issues were raised with Mr Richards and the role performed by him came under some scrutiny in late 2003 in connection with the requirements of the position of stock controller as the appellant would prefer it to be undertaken.

(d) That he preferred the evidence of the appellant's witnesses.

(e) That Mr Richards may well have indicated to Mr Mort that he had performed the stock controller role adequately in the past and that he felt somewhat incensed that the appellant was proposing that he undertake the role in a different manner, given that he had performed the role for many years without apparent complaint.

(f) That a new position description to the role of materials controller was prepared by Mr Mort in conjunction with Mr Taylor.

(g) That there was no discussion about that document or otherwise the content of the revised job role with Mr Richards prior to 29 January 2004.

(h) That whilst the true position was that Mr Richards' job of stock controller was somewhat enlarged, the Commissioner was not persuaded on the evidence that an entirely new position was created.

(i) That in the Commissioner's view, the employer decided that it wanted the position of stock controller performed in a different manner from that applicable during the time of Mr Richards' employment.

(j) That the importance of some form of qualifications or training, to the appellant, was very clear on the evidence of Mr Mort, in his announcement to other employees at the first toolbox meeting about the requirement for further training.

(k) That the work was still required to be done by someone but the appellant clearly did not want that to be done by Mr Richards.

(l) That this was not a case where the appellant had labour in excess of that required to perform the work required to be done.

(m) That as the employee witnesses said, in evidence, reference was made to Mr Richards' age in the first toolbox meeting in the context of the appellant not being able to recover any investment in training Mr Richards were he to continue to occupy the expanded position.

(n) That the inference was open to draw that the appellant did indeed have that view, notwithstanding the subsequent attempt to retract the statements made when the second toolbox meeting was held.

(o) That it was the issue of training which brought into consideration whether Mr Richards had been treated unfairly in this regard.

(p) That it was common ground that the appellant had offered little training to Mr Richards or to anyone else for that matter, on Mr Taylor's evidence.

(q) That it was the lynchpin of the appellant's case that it was Mr Richards' attitude to this proposal, when it was raised by Mr Mort, namely the training proposal, that "coloured it" against having Mr Richards in the position, in that Mr Richards was not prepared to undergo any further training to meet the requirements which the appellant wished to impose on the position.

(r) That, whilst that may have been relevant, it was not, viewed objectively, the only consideration which the appellant was obliged to consider when making its decision.

(s) That because Mr Richards had performed the role for many years without any substantial complaint, and given his long and loyal service to the company, that meant that he at least deserved the opportunity to perform the duties of the expanded position. Then, if he did not perform to the appellant's expectations, the appellant would be entitled to deal with that situation in accordance with "accepted human resources management practices".

(t) That the revised position profile did not require, in any event, formal qualifications but rather referred to them as being "preferred".

(u) That it was thus difficult for the appellant to maintain that any disinclination by Mr Richards 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.

(v) That, having regard to all of the evidence in the matter, the dismissal of Mr Richards was tainted with "ageism" in that Mr Richards' age was indirectly a consideration in the appellant's decision to not continue his employment in the position of stock controller.

(w) That s41(2) of the *Minimum Conditions of Employment Act* 1993 (hereinafter referred to as "*the MCE Act*") was not complied with in that there was no evidence that discussions, as required by the section, were held with Mr Richards either before or after 29 January 2004 by Mr Taylor, Mr Mort or anyone else.

(x) That the action in clearing his work area out and cancelling access to his computer which occurred whilst Mr Richards was on sick leave, and which he only discovered on his return from sick leave on 2 March 2004, when he was not due to leave his employment until 5 March 2004, and then telling him that he could leave that day was behaviour to be criticised.

(y) That this action was unnecessary and constituted undignified treatment of Mr Richards, particularly given his age and length of service and loyalty to the company.

(z) That there was no reason suggested in evidence for the appellant adopting this approach.

(aa) That Mr Richards was removed from his position without good reason, and that as a matter of equity and good conscience the dismissal was harsh and unfair.

(bb) That an order for reinstatement would be impracticable.

(cc) That, on the authorities, it is recognised in 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 for compensation for loss if the loss caused by the dismissal is established.

(dd) That a number of factors, including the fact that that payment was made, should be taken into account, including that no assistance was given to Mr Richards to find other employment or even a reference given to him.

(ee) That therefore the payment made to him of an amount equal to 36 weeks' salary cannot be characterised as compensation for a harsh, oppressive or unfair dismissal, and thus that he should receive compensation in the maximum amount of six months salary, namely $22,517.00.

(ff) That $5,000.00 of this sum should be apportioned to compensation for injury because of the dismissal.

(gg) That the total amount should be reduced by $250.00, being the approximate amount earned by Mr Richards since his dismissal.

ISSUES AND CONCLUSIONS

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

23 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) 73 WAIG 220 (IAC)). If that is not established, then the Full Bench has no warrant to interfere with the exercise of the discretion at first instance. In particular, there is no warrant for the Full Bench to substitute its decision for that of the Commissioner at first instance.

24 Further, it is clear that some of the Commissioner's findings depended on the credibility of witnesses (see paragraph 25 of the reasons for decision at first instance). Again, applying *Fox v Percy* [2003] 214 CLR 118 and the cases referred to therein, particularly *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472, the Full Bench is required to carry out its statutory duty to hear the appeal by way of rehearing and make findings of fact and/or law as required:-

> "a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact (5). If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" (6) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" (7)."

(See *Devries and Another v Australian National Railways Commission and Another* (HC) (op cit)).

25 I would also add that the High Court recently, applying *Fox v Percy* (HC) (op cit) has held that it must be accepted that an appellate court has a role to play. That role requires an appellate court:-

> "to conduct its own independent review of the facts, giving effect to its own conclusion about them. It must do this save to the extent, if any, that the primary judge enjoyed advantages that cannot be fully recaptured by the appellate court. In these last respects, the appellate court should defer to the findings of the primary judge except for the very limited circumstances where it is authorised to substitute its own, differing conclusion."

(See *Anikin v Sierra* (2004) 79 ALJR 452 per Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ).

Ground 1

26 In this case, the substance of ground 1 of the appeal was that the Commissioner at first instance erred in finding that Mr Richards' dismissal was unfair for a number of reasons.

Ground 1.1

27 The Commissioner found that the stock controller position, which was Mr Richards' position, was not made redundant, that is that the position in this case was not abolished and replaced by a newly created position of materials controller. The appellant's case, of course, was that it was indeed abolished and replaced by the new position of materials controller.

28 The Commissioner went on to find that there was some enlargement of the existing role of stock controller, but that it was difficult on the evidence to be definitive about the extent to which the position was enlarged. The Commissioner found, too, that he had considerable doubts about whether the position had changed and that there was such a nett addition of tasks and responsibilities as "to warrant the creation of an entirely new position" in this case. Indeed, the Commissioner, on the evidence, found that there may have been a "change of focus of the position of stock controller", but on the whole said that the position, at its core, remained the same. The Commissioner found, too, that there was more of an amalgam of duties into one position which Mr Richards had previously performed over the years and others which he had performed which returned to the position, having been previously removed from performance by the appellant.

29 Clearly also, the appellant, as was found, sought to introduce a person of greater professionalism, as it saw the position, probably through the possession of some formal qualifications or training in materials management. However, the Commissioner found that that requirement, of itself, did not mean that the position was so different that it constituted a new role with the former position having been made truly redundant.

30 The Commissioner found that the true position was that, whilst Mr Richards' job of stock controller was somewhat enlarged, he was not persuaded, on the evidence, that it was an entirely new position. In short, the Commissioner found that what occurred was that the employer decided that it wanted the position of stock controller performed in a different manner to the manner in which Mr Richards performed it during the time of his occupation of the position. Some form of qualifications and training were thought to be desirable but they, at no time, were said to be compulsory. Mr Mort said that they were important, however, when he spoke at two toolbox meetings about the fate of Mr Richards, to other employees, and the necessity for training, the Commissioner found that Mr Mort said that training for Mr Richards was not a satisfactory investment because of his age (I paraphrase).

31 Significantly, the Commissioner found that the work which Mr Richards did was required to be done by someone, but that the employer did not want it to be Mr Richards. The Commissioner also observed that this case was not a case where the appellant "had labour in excess of that required to perform the work required to be done" (see *Gromark Packaging v FMWU* (IAC) (op cit)). Thus, the Commissioner found that the dismissal of Mr Richards could not be properly characterised as a "redundancy".

32 The substance of the contention for Mr Richards in relation to ground 1.1 was that the weight of the evidence demonstrated that, over time, the appellant had taken different tasks from Mr Richards and had added new tasks and that the job being performed by Mr Richards at the date of the dismissal was not the job required to be done by him. It was alleged that, on the

authorities, the terms "duties" and "functions" are not necessarily interchangeable with the term "job", and the two "jobs" were different in their content and responsibilities and thus the position of stock controller was truly made redundant.

33 It is, amongst other things, necessary to determine whether the position of materials controller was a new position, and that the position of stock controller was abolished.

34 Mr Richards had been employed by the appellant since 1980 and, in the early 1990's, about 12 or 13 years later, he was appointed stock controller, remaining in that position after a takeover of the company in 1997, until his dismissal on 2 March 2004. His service to the appellant lasted for about 23 years.

35 In deciding that question, it is necessary to consider some matters other than the mere content of the "two jobs".

36 Mr Richards' evidence was that he performed his duties correctly and regularly in the early 1990's until the time of his dismissal, again another period of 12 or 13 years, and was paid bonuses right up until just before he was dismissed. That was not denied. That he was never warned about his performance of his job or criticised for it and certainly not warned formally, was not denied. The Commissioner did find, however, that there were discussions between Mr Richards and Mr Mort about the position and about aspects of his work performance. It was clear, of course, that the judgment of the appellant, particularly Mr Mort and also Mr Taylor, was that they were not satisfied with his performance. However, as the Commissioner correctly found, there was no substantial complaint about his performance. The Commissioner found that, from time to time, "issues" were raised with Mr Richards and the role performed by him was considered by them in 2003, in particular the requirements of the position of stock controller, as the appellant saw it.

37 However, the question first to be answered is whether Mr Richards had different tasks taken from him and new tasks added so that the modified role became a different job.

38 Mr Richards's work, on his evidence, included being responsible for ensuring that raw materials for the purposes of producing the appellant's steel and iron products were in stock so that production could continue uninterrupted. He had other duties which included arranging the transport of stock to and from the factory, he denied that, over the last 18 months or so of his employment, Mr Mort had to work closely with him to get him to understand and to undertake effective control of the position of stock controller. Indeed, some tasks which were taken from him by Mr Mort, he said that Mr Mort did not perform properly. That was, of course, denied by Mr Mort and Mr Taylor.

39 After Mr Mort commenced as the manufacturing manager, in mid 2002, according to Mr Richards' evidence, the duties which Mr Mort removed from him included estimating requirements for raw materials, production from the grid machine and production from saws. Further, Mr Mort also took control of the six monthly stocktakes, thereby reducing Mr Richards' role in this regard to only data entry.

40 In cross-examination, Mr Richards said that he took over a Mr Trevor Wood's work, that is the purchasing officer's work and Mr Mort took over "the flat bar and stuff like that". Mr Richards said that Mr Mort took three functions away from him which he "mucked up", but he did not take the purchasing officer functions off him.

41 Mr Mort took over ordering and estimating stock and the stocktake. The stocktake was an important function and there was no difficulty with Mr Richards' performance before Mr Mort came. The stocktake was part of the function of the stock controller's position. Mr Taylor agreed that the ordering of steel was taken from Mr Richards by Mr Mort. He also gave evidence that the actual controller, the stock controller, was not a full time job at Webforge. Mr Taylor also said that Mr Wood's job of purchasing officer, which Mr Richards took over, was not the stock controller's job and he was not asked to do both jobs. Some of his duties were taken over by Mr Mort. This was in 2002/2003 before he was dismissed. Mr Taylor said that, presumably, he and Mr Mort thought that there was enough scope for the right person to be able to perform both jobs. Mr Mort, as factory manager, had a lot of different tasks on his plate and "…. to take some of these things off Peter would have meant that he obviously didn't have confidence in Peter doing those particular important roles".

42 Mr Taylor went on to say that, "It's absolutely critical that the position of stock controller be staffed by a person who has experience and high levels of post-secondary education to degree level". The current incumbent at the time of the hearing, according to Mr Taylor, had a degree in "Strategic Securement". According to Mr Taylor, there was a lot more technical nous required for the new position and there was a management of people aspect to it and the capability to do three or four things at once rather than just one at a time. In fact, as Mr Taylor put it, he wanted the job to be done better than it was being done (see page 162 of the transcript at first instance) and, significantly not that he wanted a new job to be done.

43 There were four key components of the "new position". When Mr Taylor first started, Mr Richards was doing one function, stock control. Because of his struggling with the stock control, or the purchasing side of it, Mr Taylor was very clear that having another two roles would have been very difficult for Mr Richards to have managed.

44 Mr Richards was not capable of doing all of the functions of the new job, Mr Taylor said, because, prior to his retrenchment, he was only doing two of the functions, namely stock control and purchasing, and had struggled with those two aspects of the four functions that they required to be performed in the position. Mr Taylor said that Mr Richards was struggling, in his opinion, and Mr Mort felt that he had to take some of these roles off Mr Richards. However, Mr Richards had clearly performed all of the jobs in the position as it was advertised and profiled without substantial complaint or criticism for many years. The advertisement appeared apparently two or three days after his dismissal.

45 The meeting before Mr Richards' dismissal with Mr Mort followed Mr Taylor's direction to Mr Mort to go through the "new job role" with Mr Richards and find out how he thought that he would be able to cope.

46 Importantly, too, Mr Mort and Mr Taylor, when they discussed the position which they had jointly constructed, looked at "other" ways in which they could manage the situation brought about by the creation of the new position. Redundancy was one way. Another was to put Mr Richards in the new expanded role. However, both believed that he was incapable or did not have the capacity to carry out the new role, so that option was discarded. The final option which they thought was best and the most favourable to Mr Richards because of his level, years of service and loyalty, was to offer him "a fairly good redundancy" which is what was done. Significantly, what this meant, and clearly meant, was that he was to be dismissed and instead of it being a dismissal for incompetence his job would be made redundant and he would be retrenched, thus being able to receive a "redundancy" payment.

47 That was commendable, but the decision reflects the reality that he was not retrenched for redundancy, but was, in fact, dismissed, and that this was always intended.

48 In the meeting that occurred between Mr Mort and Mr Richards on 29 January 2004, Mr Mort said that Mr Richards agreed that the role was beyond him and he declined to undertake further training. In fact, Mr Richards did not say that the role was beyond him, he said that he could not do the job the way they wanted him to do it. He agreed that he declined to undertake further training, but admitted that he was unable to do the job as they wanted him to. He did not admit that he was unable to do the job as it was revealed to him.

49 Of course, Mr Richards, it was admitted, was dismissed from his employment. The question is whether it was a retrenchment or a dismissal of another type. I return to the matters raised by ground 1.1.

50 First, it is necessary to consider what a "redundancy" is. The classic but not exhaustive definition is that given by Bray CJ in *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd* (1977) 16 SASR 6 at 8 (hereinafter referred to as the "*Adelaide Milk Co-op Case"*), where His Honour said:-

> "the concept of redundancy in the context we are discussing seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, 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."

51 Redundancies can arise as the result of the closure of a business (see *Coles Fossey v Burton* (1992) 41 IR 49), the sale of a business (see *Re Government Cleaning Service (Privatisation) Award No 2* (1994) 55 IR 199), as a result of a privatisation of a government undertaking (see *Re Government Cleaning Service (Privatisation) Award No 2* (op cit)), or the "outsourcing" of the relevant part of the business.

52 Quite clearly, the introduction of technological or organisation change can also bring about redundancies in jobs (see *Short v F W Hercus Pty Ltd* (1993) 40 FCR 511 at 520-521). A redundancy may arise as a result of a restructure in order to increase the competitiveness or profitability of the business (see *Howarth v Babin*, ICR, Wilcox J, 30 September 1996, No 550 of 1996 (unreported)). More relevantly, it has been accepted that an employee's position is redundant where the duties that go to make up the position are split up and spread amongst other employees (see *Aitken v CMETSWU* (1995) 63 IR 1 (IRC of Aust) and *Quality Bakers of Australia Ltd v Goulding and Another* (1995) 60 IR 327 at 332-333 (IRC of Aust)).

53 Ryan J, in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 (IRC of Aust) at 308, quoted with approval in *Quality Bakers of Australia Ltd v Goulding and Another* (op cit), *Aitken v CMETSWU* (op cit), and *Association of Professional Engineers, Scientists and Managers Australia v Deniliquin Council No. 2* (1995) 13 ALR 267 at 285, referred to what a job was and also discussed the notion of redundancy:-

> "… it should be noted that Bray CJ's description of what can constitute redundancy is not expressed to be exclusive. His Honour's description was cast in terms of a "job" in the sense of a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employer's organisation, to a particular employee. However, it is within the employer's prerogative to rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. It is inappropriate now to attempt an exhaustive description of the methods by which a reorganisation of that kind may be achieved. One illustration of it occurs when the duties of a single, full-time, employee are redistributed to several part-time employees. What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant in the sense in which the word was used in the *Adelaide Milk Co-operative* case."

54 Of course, *Gromark Packaging v FMWU* (IAC) (op cit) 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 the situation of redundancy.

55 At the time when this appeal was heard, the High Court judgment in *Amcor Limited v CFMEU; Minister for Employment and Workplace Relations v CFMEU* [2005] HCA 10 (unreported) delivered 9 March 2005, related to the express terms of an agreement. However, that authority is not of assistance in this case.

56 In this case, the evidence was that the newly created job was a combination of the duties of stock controller, the purchasing officer, and other functions which had moved from that job to Mr Mort and were returned to it, as well as some other responsibilities. There were undoubtedly some new duties with greater emphasis on management. There was no evidence, however, that the position was paid at a different level, had different reporting requirements, or was remunerated differently or substantially differently. The qualifications for the position, which were not compulsory, were introduced anew. However, training in the past was not required and even at the time when Mr Richards was spoken to no training or qualifications were required or mandatory for the job. Strangely enough it was represented to Mr Richards that training was a required qualification not merely preferred, even though he had performed all of the duties in the enlarged position as advertised.

57 That evidence is all evidence that no new job was created, and that Mr Richards' existing job was not abolished.

58 At the time, of course, there is no doubt that some duties of Mr Richards, as stock controller, had been taken over by Mr Mort, but other duties were added to Mr Richards' position. At the time of his dismissal and the alleged making of his job redundant, it is clear that, as discussed in *Jones v Department of Energy and Minerals* (IRC of Aust) (op cit), Mr Richards' job, whether called "stock controller" or not, consisted of a collection of functions, duties and responsibilities as part of the scheme of the employer's organisation, given to him as a particular employee.

59 The employer, as part of its prerogative, rearranged the organisational structure, but in a very limited way, by amalgamating Mr Richards' duties with some of the duties which were originally his, which had been taken over by Mr Mort, and with some new duties into what was said to be a new and enlarged position. There was no breaking up of a collection of functions, duties and responsibilities attached to a single position and a subsequent distribution of them amongst the holders of other positions, which might include newly created positions. There remained in existence the stock controller's functions, duties and responsibilities being performed by Mr Richards at the date of his dismissal. To them and added to them, were former duties which Mr Mort had taken over and to them were added further duties.

60 Having established that the job was still in existence because of the preservation of his duties and functions, the evidentiary burden to establish that the job no longer was required to be done fell upon the appellant. The appellant's evidence amounted to this. Some functions of the job were removed in 2002-2003, but two functions remained, and two then were added: the whole job of the "materials controller". It is not at all clear that the preponderance of the duties in the alleged newly created job were those which Mr Mort was responsible for or that the nature and preponderance of the functions were not those being performed by, and constituted Mr Richards' job, at the time of his dismissal which, of course, became duties and functions of the enlarged position.

61 Further, Mr Taylor's evidence was that he wanted the same job done better, which is some acknowledgment that the job had not been abolished but remained, in substance, the same notwithstanding what was grafted onto it. That was, of course, inconsistent with the appellant's characterisation of it as a new job. Further, the characterisation of it by the appellant as an enlarged job is an acknowledgment that it was not a new job, merely an existing job which had been enlarged. Whether it was enlarged so that it was an entirely different job with a preponderance of entirely different duties which changed the nature of it and meant that Mr Richards' job no longer existed and he was therefore made redundant, is the question which exercised the Commissioner's mind at first instance.

62 The restoration of duties formerly Mr Richards' own, restored to the job in substance, augmented of course what it had been for years. I would also add that the evidence is clear that Mr Taylor and Mr Mort regarded Mr Richards as not being able to perform his work in the manner required by them. That opinion is what has permeated the proceedings at first instance and is a consistent skein running through the facts. It is also clear, significantly, that, at no time before the decision to terminate Mr Richards' employment, he was warned that his job would be abolished, nor was he ever formally disciplined or formally warned about his performance, nor was any express or substantial criticism of his performance conveyed to him. Indeed, Mr Taylor's evidence was that he performed the purchasing officer's job well.

63 There was also clear and uncontroverted evidence that Mr Richards was offered the job for another three years at least if he underwent training, although the training was not compulsory. That was the appellant's clear position. That, of course, meant that Mr Richards would be able to perform the job without training at the beginning and without complete training until he reached the end of the three year training period, which is itself strong evidence against the assertion that he was so incompetent that he could not perform his duties properly, or, alternatively, that the job required that he have a qualification. It can therefore be clearly inferred that the appellant was of opinion that he was able to do the job without training but that he should undergo training. That he undeniably performed all of the duties required to be performed was evidence of this. I also refer to the evidence to which I have referred above that Mr Richards received bonuses almost up until the time he was dismissed for his work, and that he had performed his work without substantial criticism for years. Further, when he was dismissed, by letter of 31 January 2004, he was thanked by Mr Mort for electing to work out his notice and give training to the person who would take up the position. That was a recognition of his competence firstly to do the job, and secondly to train another person in the job which had been advertised.

64 The non-compulsory requirement for training which, in any event, was to last three years whilst he performed the job, did not render the job a new job either and supports the view that it was not and that, therefore, Mr Richards' job had not been abolished.

65 What is critical for the purposes of identifying a redundancy is whether the former position has, after reorganisation, any duties left to discharge. It is perfectly clear that the former position had a number of and substantial duties left to discharge, indeed the bulk of them. If there is no longer any function or duty to be performed by that person, as Ryan J said, his or her position becomes redundant, as discussed in the *Adelaide Milk Co-op Case* (op cit).

66 If a job is merely added to or subtracted from without materially altering its nature and/or responsibilities, or if it is reconstituted superficially or cosmetically, then it has not been made redundant and any dismissal is not a dismissal for redundancy ((ie) retrenchment).

67 It is clear that Mr Taylor's evidence revealed that the appellant wished to terminate Mr Richards' employment because Mr Mort and he did not regard his performance as satisfactory and that what they did, in purporting to make his job redundant, was the preferred option amongst three. That is, to dismiss him so that he would receive "redundancy" benefits.

68 It was therefore open to the Commissioner to find, and correct to find, that as a consequence of changes in the environment in which the appellant was operating, consideration was given to the redesign of the stock controller's position toward the end of 2003. As a result, it was correct for the Commissioner to find that the new position description for the role of materials controller was prepared by Mr Mort in conjunction with Mr Taylor. There was certainly no discussion about that document or the fact of any revised job role with Mr Richards before 29 January 2004. It is also clear from the job description developed by the appellant that the appellant may have enlarged the position by the addition of further tasks, but over the years, as the Commissioner found, and it was clearly open to find, Mr Richards performed each of the tasks set out in the revised job description from time to time, which the advertisement for the position subsequently also reflected. Mr Richards was certainly not offered the opportunity of working in the revised role, to ascertain whether he could in fact undertake the job requirements as envisaged. I would so find.

69 It was therefore open to find and correct to find that a redundancy may exist where a position is changed and there is such a nett addition of tasks and responsibilities to warrant the judgement that an entirely new position has been created. It was clearly open to find, and correct to find also that, whilst there was an enlargement and change of emphasis in the position of stock controller, the whole the position at its core was substantially the same. Thus, it was open to find, too, that what occurred was an accretion of positions to the duties which, at core, constituted the duties which Mr Richards had performed over the years and also certainly at the time of dismissal, and that no new position was created, but that the stock controller position continued.

70 Further, and alternatively, it was open to find that there was sufficient evidence to say that the job continued and the evidentiary burden to establish that it was a new job, the old one having been abolished, was not discharged for the reasons expressed by the Commissioner.

71 In particular, it was open to find, for the reasons which I have expressed above, and correct to find that there was no such aggregation of new tasks and responsibilities so as to warrant the judgment that a new position had been created and an old one abolished, and that therefore the old job had not been made redundant.

72 I have already referred to the amalgam of duties with the substantially same position at its core, albeit with some new emphasis and some enlargement, which was the enlarged job as it was constructed.

73 However, for all of those reasons, it was open to find and correct to find that the job was not made redundant and that Mr Richards was dismissed for other reasons, namely the appellant's view of his performance, and more probably, at least as a component of the reasons, his age. The view of his performance, of course, was not at all borne out by the evidence as necessarily valid, even if the view was accurate or credibly held.

74 Further, as the Commissioner correctly found, any requirement for training only went to the "emphasis" of the position and not to its creation as a new position.

75 It was open to find, and correct find, too, that whilst the appellant sought to introduce training or qualification to the position, that did not alter the position or its nature. It did not do so because the training or qualification was not compulsory but "preferable", even though it was in substance and incorrectly characterised as compulsory by Mr Mort when he spoke to Mr Richards. Further, that finding was correct because Mr Richards was accounted able to train the new employee without undertaking further training himself. In addition, he was accounted capable of filling the position without training if he agreed to undertake training which would continue in the future for three years.

76 Indeed, Mr Mort himself as Works Manager, as I have said above, wrote to him on 31 January 2004 to advise him of his dismissal (see page 94 (AB)), expressing pleasure that he was working out his notice period and that there would be somebody trained to take over his role. He was also commended for his dignity and loyalty, and the gratitude of the appellant was expressed to him. The letter represents approbation and commendation for his efforts in his work. It also recognises that he was competent, too, and required to train the new occupant of the position.

77 For all of those reasons, it was open to the Commissioner to find, and it was correct to find, that there was no redundancy on those facts, and because, on all of those facts, it was correct, too, to find as follows:-

(a) That this was a case where there was not labour in excess of that reasonably required to do the work: indeed, the opposite was the case (see *Gromark Packaging v FMWU* (IAC) (op cit)).

(b) Further, that this was not the case where the employer no longer wished the job which Mr Richards was doing to be done by anyone (see *Adelaide Milk Co-op Case* (op cit)). In fact, it was required to be performed into the future.

(c) That this was a case unlike a redundancy situation, because the termination or dismissal resulted from the perceived default of the employee and/or something peculiar to him, not because the employer no longer wished the job which he had been doing to be done by anyone else (see *Adelaide Milk Co-op Case* (op cit)).

78 It was therefore open to find and correct to find that the job was not made redundant, that Mr Richards was not retrenched but was dismissed for other reasons, I would so find. I should now add that because there was a dismissal which was not a retrenchment for redundancy it was necessary for the Commissioner to consider the dismissal in that light to determine whether it was harsh, oppressive or unfair, and the Commissioner correctly did so.

79 For those reasons, in my opinion, ground 1.1 is not made out.

Ground 1.2

80 By that ground, it is alleged that Commissioner at first instance erred in finding that the appellant did not comply with the provisions of *the MCE Act*. The law, in respect of s41 of *the MCE Act*, is well settled (see *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 (IAC)). The Commissioner found that the appellant was obliged both as a contractual and statutory duty to discuss with Mr Richards, as soon as reasonably practicable after the decision to alter his position, the matters referred to in s41(2) of *the MCE Act*. This provision imposes an unequivocal and positive duty on an employer, where s40 applies, to, namely, in the case of a redundancy or a change in the workplace, having "a significant effect", as defined in s40(2) of *the MCE Act*, to discuss with the affected employee the matters referred to in s41(2) of *the MCE Act*.

81 The Commissioner found that, whilst Mr Richards was not made "redundant", for the purposes of the definition of "redundant" in s40(1) of *the MCE Act*, Mr Richards was certainly subject to a significant change in his employment. That finding was not appealed against or challenged. Accordingly, s41, whether he was made redundant or in this case subjected to a change having a significant effect, applied and the duties prescribed by s41 were required to be carried out by the appellant.

82 It is quite clear that no discussions, as required by s41 of *the MCE Act*, took place with Mr Richards either before or after 29 January 2004. Neither Mr Taylor nor Mr Mort had any discussion with Mr Richards. The only suggestion of alternatives came from Mr Richards himself when he asked Mr Mort about some other positions in the factory a few weeks after being told of his retrenchment.

83 The Commissioner correctly found that it was decided by the appellant not to offer Mr Richards the position, as they said. The fact of the matter is that it was proposed that Mr Richards be dismissed because of his inability to do the job, allegedly because he refused to undergo training, but s41 of *the MCE Act*, in any event, was not complied with, as the Commissioner found correctly. Because his job was not made redundant, that did not absolve the employer from the obligation to discuss the prescribed matters because there was a proposed significant change in his employment, namely the prospect of dismissal. It is fair to observe that this conduct was conduct of a similar type to the unfeeling execution of his dismissal (see paragraph 45 of the reasons for decision at first instance).

Ground 1.3

84 By ground 1.3, it was asserted that the Commissioner at first instance found that Mr Richards was not offered the opportunity to work in the "revised" role without his making any finding of fact that Mr Richards had eschewed the notion of his participating in training.

85 The Commissioner made specific findings about training and Mr Richards declining to undergo training. The lynchpin of the appellant's case was that he declined to undergo training and that was the reason for the dismissal (see paragraphs 40 and 41 of the reasons for decision at first instance).

86 Further, as the Commissioner found, the employer, the appellant, did not deem it necessary to offer Mr Richards or anyone else any or much training in the past.

87 It is quite clear, of course, that Mr Richards was given no opportunity to work in the enlarged role at all and, indeed, dismissed before he could continue in the role when it was enlarged. Even if no such finding was made about his declining to participate in training, and it is clear that such a finding was in fact made, such an error would not be fatal to the decision at first instance. In fact, however, Mr Richards was not "offered" the job or told that he could not continue in his own job, modified, unless he underwent training. Mr Mort was merely "sounding him out", pursuant to the directions he had received from Mr Taylor. Mr Richards was not "offered" the new position and was given no, or no sufficient notice, of his dismissal. Further, it is quite clear that further training was preferred and not compulsory and his declining to undertake it did not necessarily constitute a stumbling block to his continuing in the position as it was modified.

88 In addition, the uncontradicted evidence was that Mr Richards had carried out the job without any serious complaint or any threat of dismissal.

89 The view that Mr Richards' refusal to undergo further training was crucial in causing his dismissal is also greatly diluted by the fact that no employee in the past had been trained, including Mr Richards. In other words, Mr Richards did not, in any event, require training for the bulk of the duties which he had performed over the years and which remained in the job said to be expanded, or were duties which he had previously performed which were restored to that job. It is also not clear in which areas of his work he was to receive training.

90 It is also significant that the appellant's evidence was that it was prepared to allow Mr Richards to continue in the job, as expanded, even when he was "untrained" at the beginning of the period and whilst he was being trained, and was accounted competent enough to remain to train the new employee in the position. That demonstrates that training was not essential as the advertisement for the position and the profile of the position expressly recognised by use of the word "preferred". There is no complaint against the finding in the grounds of appeal that Mr Richards' treatment in relation to the question of training was unfair.

91 In any event, as the Commissioner found, even that was a relevant consideration, however, it was not the only matter which the appellant was obliged to consider when making its decision to dismiss Mr Richards. As the Commissioner correctly found, there were other relevant matters. They, in the context of things, it is fair to say, were more important. They included Mr Richards' performing the job for many years without any substantial complaint, and his long and loyal service to the company. The Commissioner's finding was that this meant that he deserved the opportunity to perform the "expanded position" or, put more correctly, to perform in what was his own position which had been expanded.

92 Again, too, the Commissioner made the finding which it was clear it was open to him to make, and correct to make for the reasons which I have expressed above, namely that the fact that Mr Richards was unwilling to undergo training to meet the appellant's "requirements" was, whilst relevant, not, viewed objectively, the only consideration which it was obliged to consider when making its decision. There are many reasons expressed for the finding about his not being prepared to undergo training, which finding was indubitably made, and which finding was not, in fact, challenged on appeal. What was challenged on appeal was based on an allegation that he had not made any finding.

93 For the reasons which I have expressed above, I would find that the Commissioner was correct to find that the refusal to undergo training was not an essential requirement of the "expanded position" and was merely used as a factor beyond its real importance, to justify the dismissal. It was clearly open to find, and correct to find, and I would find that Mr Richards was unfairly treated in that regard and unfairly dismissed as a result. It was unfair, therefore, to dismiss him for declining to undergo training.

94 It is unnecessary to say this because of the limited scope of ground 1.2. However, overwhelmingly, of course, the whole question of training or not pales into insignificance because of the correct finding of the Commissioner, justified on all of the evidence, which was a finding which was unchallenged in the grounds of appeal that Mr Richards had performed the same position, which he was now being "offered", for many years without substantial criticism, and, indeed, with the payment of bonuses and some commendation and approbation. Therefore, as the Commissioner, too, correctly found, given his long and loyal service, he did deserve the opportunity to continue in the job, which was still his job, when it did not require formal qualifications at all as any mandatory matter when he had already performed it.

95 Further, it was arguably unfair because Mr Richards was not warned that such a refusal would result in his dismissal. However, I make no judgment on that because it was not argued in this matter. In addition, his dismissal was arguably unfair, given his age, even if that were the main reason for his dismissal when it was a consideration, and his likely great difficulty in obtaining new employment at that age.

96 For all of those reasons, ground 1.3 is not made out, in my opinion.

Ground 1.4

97 By ground 1.4, it was alleged that the Commissioner at first instance found that the dismissal of Mr Richards was tainted with ageism, in that his age was indirectly a consideration in the appellant's decision not to continue with his employment in the position of stock controller.

98 It is quite clear from the evidence of what Mr Mort said at the first toolbox meeting, evidence which was credible, given that it was reduced to statutory declaration form shortly after the event, and particularly Mr Quentin Dias' evidence, that Mr Richards' age was an indirect factor at least in his dismissal. The unshaken and clear evidence of other witnesses was that, at the first toolbox meeting, Mr Mort referred to Mr Richards' age in the context of the appellant not being able to recover any investment in Mr Richards' training because of his age, and therefore Mr Richards was not able to occupy the "expanded position".

99 As the Commissioner found, and I am not persuaded that he was wrong in so finding, the appellant did have that opinion, even though Mr Mort tried to retract it at the second toolbox meeting. There was sufficient or credible evidence to justify an inference that his age played a part in the decision to dismiss him and it was open to the Commissioner to draw the inference which he did, and I so find.

100 I would so find for all of those reasons that, in my opinion, ground 1.4 is not made out.

Ground 2

101 Ground 2 contains two complaints. First, it alleges that the Commissioner at first instance fell into error in his finding as to loss and consequently his determination of the quantum of compensation.

102 This error, as alleged, was that the Commissioner omitted consideration that had Mr Richards been given the new position, he would have faltered in a "new position", within a short period, because he had refused to undertake further training and, further, because the "new position" and its full responsibilities had never been undertaken by him.

103 The second complaint was that the Commissioner made no relevant finding to support his conclusion that Mr Richards' "total loss" would be ongoing. The Commissioner found (paragraph 49 of the reasons for decision at first instance) that Mr Richards was paid a sum of money in excess of his contractual entitlements on the termination of employment in an amount equal to 36 weeks' salary. The Commissioner took into account the fact and amount of that payment but noted that other factors were relevant, including his age, substantial length of service, that the "redundancy" was not genuine, the slim prospect of employment, that Mr Richards saw himself remaining in employment for the foreseeable future, that 65 years is the usual retirement age, that there was no assistance given to him to find alternative employment, and no evidence of any reference given to him. Thus, the Commissioner determined, taking those factors into account, and since the payment already made cannot and could not be characterised as compensation for harsh, oppressive or unfair dismissal, then Mr Richards should be compensated in an amount equal to six months' salary, namely $22,517.00. ($5,000.00 of this sum was apportioned as compensation for injury and was not appealed against.)

104 There was no appeal against the finding that the payment by the appellant of monies on termination of employment in a sum equal to 36 weeks' salary was not taken into account in a finding as to the amount of loss and determination of the amount of compensation ordered to be paid. The Commissioner did make a finding that the total loss would be ongoing, namely that the loss was a figure in excess of the six month statutory cap on compensation.

105 It is correct that insufficient reasons were expressed for the finding of ongoing loss extending beyond six months. In particular, the Commissioner did not consider whether Mr Richards was likely to be dismissed fairly and lawfully after a period of less than six months. In my opinion, if Mr Richards were employed in the position and, if he were properly counselled and supervised and his abilities dealt with objectively, there exists sufficient evidence, because of his long service and his successful performance of the bulk of the duties thrust upon him over a period of many years, it not having been seen as necessary to train him in the past or substantially warn him in that past, to justify a finding that he probably would have continued in employment for a period of six months at least, perhaps longer. After all, Mr Richards had worked in the job for approximately 13 years and received bonuses up until the end of his employment, practically, as well as no substantial criticism, and some commendation. Also, as I have pointed out, when he volunteered to and was accepted as the trainer of the new employee, he was accepted implicitly as competent to train a new person for the position.

106 I am therefore not persuaded that any error was made, because there was sufficient evidence, as I have outlined it above, to warrant such a finding and I would so find.

FINALLY

107 I also observe that no attack was made on the finding that Mr Richards was harshly, oppressively or unfairly dismissed as a finding. It is therefore unnecessary to deal with that matter, but insofar as it is necessary to say so, it was open to the Commissioner, and correct to find, that the dismissal was harsh, ,oppressive or unfair because:-

(a) Training was not required of new applicants for the position and yet it was made a compulsory requirement for Mr Richards who knew the position and had performed the job and whose offer to train the new person for the position was accepted.

(b) Mr Richards was treated unfairly because s41 of *the MCE Act* was not complied with.

(c) He was dismissed finally by the unilateral shortening of his period of notice unceremoniously and callously.

(d) That the dismissal was unfairly tainted by his age.

(e) That there was no true redundancy, but a dismissal for other reasons, and insufficient reasons at that, and that it was not a true redundancy was in part borne out by the conversation between Mr Taylor and Mr Mort in which they had selected the "redundancy" option. Cogently, a redundancy was unfair because the fact of the matter was that his employer did not want Mr Richards to perform the job, his employer wanted someone else to. The Commissioner so found, and was correct to so find.

108 In addition, whilst the matters to which I now refer were not argued, and I make no finding on them, it could be argued that the dismissal was also unfair because:-

(a) No account was taken of Mr Richards' age (60) and the likely difficulty of finding new employment.

(b) No or no sufficient warning was given to him of his dismissal.

(c) No proper counselling was given about the alleged deficiencies in his performance.

109 For all of those reasons, I am not satisfied that it has been established that the exercise of the Commissioner's discretion at first instance, in any respect, miscarried, applying the principles laid down in *House v The King* (HC) (op cit). I am not satisfied, for those reasons, that any ground of appeal is made out. I would therefore dismiss the appeal.

CHIEF COMMISSIONER A R BEECH:

110 I agree that the appeal should be dismissed. I merely wish to add that in relation to the issue of the compensation ordered to be paid, the view of the Commission that Mr Richards' loss will be ongoing has its origin in paragraph [50] of his Reasons. The Commissioner noted that the prospect of Mr Richards gaining other employment at or similar to that held by him at Webforge were slim. Ground 2.2 of the appeal which alleges that the Commissioner made no relevant finding to support his conclusion that the respondent's total loss will be ongoing is, with respect, wrong.

111 Although there is evidence from the respondent that had Mr Richards worked in the new position he would not have lasted beyond two months, that pre-supposes that a dismissal of Mr Richards after that two month period would have been a fair dismissal. The evidence would not allow such a conclusion given that there is no evidence that during that two months the company would have provided him with any in-house training. This, together with the evidence of Mr Taylor that he would have had allowed Mr Richards to have done the job if he had shown any enthusiasm suggests that Mr Richards' potential length of employment would have been greater than two months.

112 As to loss, it was open to the Commission at first instance to conclude that Mr Richards would have intended to have stayed there for three more years until age 65. Given his length of service and lack of warnings about his work performance it is not unrealistic to assume that Mr Richards' expectation would have been close to the reality.

113 Thus, if the Commission concluded that Mr Richards' loss was an ongoing loss, until for example age 65, then that is the loss for which compensation is to be ordered. The Commission would then take into account the 34 or 36 weeks' pay paid to Mr Richards in addition to any entitlement. This additional payment would not satisfy Mr Richards' loss as found by the Commission at first instance. The Commission had the power under s.23A to order payment of compensation up to and including six months without double counting the 34 or 36 weeks' payment in compensation. The authorities of *FDR Pty Ltd and Others v Gilmore* (1998) 78 WAIG 1099 and *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 (as cited by the Commission) allow such approach. Although the Commissioner's view that Mr Richards' total loss "will be ongoing" comes as the final sentence in his Reasons it is, in my respectful reading of the Reasons, a view based upon his reasoning in paragraph [50]. The Reasons show that the Commission at first instance approached the calculation of loss in accordance with the stated authorities.

COMMISSIONER S WOOD:

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

THE PRESIDENT:

115 For those reasons, the appeal is dismissed.

Order accordingly

2005 WAIRC 01263

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WEBFORGE AUSTRALIA PTY LTD
	APPELLANT
	-and-
	PETER RICHARDS
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S WOOD
DATE	TUESDAY, 19 APRIL 2005
FILE NO/S	FBA 49 OF 2004
CITATION NO.	2005 WAIRC 01263

Decision	Appeal dismissed
Appearances	
Appellant	Mr D Jones, as agent
Respondent	Mr C Fayle, as agent

Order

This matter having come on for hearing before the Full Bench on the 3rd day of February 2005, and having heard Mr D Jones, as agent, on behalf of the appellant, and Mr C Fayle, 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 19th day of April 2005 wherein it was found that the appeal should be dismissed, it is this day the 19th day of April 2005, ordered that appeal No FBA 49 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—

2005 WAIRC 01196

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ANDREW BENNETT AND CRAIG BRADLEY DIX T/A FINESSE PAINTING AND PROPERTY MAINTENANCE **APPELLANTS** **-and-** MURRAY ROSS HIGGINS **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S WOOD COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 13 APRIL 2005
FILE NO.	FBA 1 OF 2005
CITATION NO.	2005 WAIRC 01196

CatchWords	Industrial Law (WA) - appeal against decision of Industrial Magistrate - denial of contractual benefits - failure to comply with order of the Commission - jurisdiction to appeal against/review a decision of the Commission - meaning of s34 of the Industrial Relations Act 1979 (as amended) - whether order complied with by payment to Australian Taxation Office - Industrial Arbitration Act 1940 (NSW), s84 - The Constitution, s109 - Industrial Relations Act 1979 (as amended), s23A, s34, s34(4), s49, s81, s81B, s83, s83C(2), s84 - Income Tax Assessment Act 1997 (Cth) - Taxation Administration Act 1953 (Cth).
Decision	Appeal dismissed.
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Ms K L Scoble (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal by the above-named appellant employers against the decision of an Industrial Magistrate made in the Industrial Court at Perth on 24 February 2005, in claim No M287 of 2004, whereby His Worship ordered that:-

> "1. The respondent pay to the claimant 2,006.40 (sic) forthwith.
>
> 2. The respondent pay a penalty in the sum of $750.00 which shall be payable to the claimant.
>
> 3. There is a finding that the proceedings have been frivolously and vexatiously defended.
>
> 4. The respondent pay to the claimant costs fixed at $1,400.00."

2 The appeal is brought to the Full Bench against that decision pursuant to s84 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*").

GROUNDS OF APPEAL

3 I will refer to the grounds of appeal later on in these reasons.

BACKGROUND

4 On 19 March 2004 the Commission, constituted by a single Commissioner, made an order (see page 19 of the appeal book (hereinafter referred to as "AB")), a copy of which is contained in the appeal book. That order was perfected also on 19 March 2004 by being lodged in the office of the Registrar.

5 On 15 August 2003 the above-named respondent, Mr Murray Ross Higgins, made an application, No 1251 of 2003, to the Commission, constituted by a single Commissioner, claiming that he had been harshly, oppressively or unfairly dismissed by his employers, the above-named appellants, Mr Paul Andrew Bennett and Mr Craig Bradley Dix, trading as Finesse Painting and Property Maintenance (hereinafter referred to as "Finesse"), and seeking orders pursuant to s23A of *the Act*. The application was opposed. The Commission heard and determined, having determined, inter alia, the important question whether Mr Higgins was an employee or an independent contractor, by finding that he was Finesse's employee, on 19 March 2004 made the following order and declarations, formal parts omitted:-

> "1. THAT the Applicant was unfairly dismissed.
>
> 2. THAT reinstatement would be unavailing.
>
> 3. THAT the Applicant be paid compensation of $2006.40."

6 I should add, as the order reflects, that the amount ordered to be paid was not calculated by the deduction of any tax liability which might have attached to the sum or to be paid. That issue was squarely dealt with in paragraph 22 of the reasons for decision where the Commissioner noted that Mr McCorry, as agent for Finesse, as respondents to the application, submitted that *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB), correctly applied, meant that the applicant "should not receive the benefit of tax deductions which I interpolate were the result of an alleged manipulation of the tax system and that any compensation should take into account tax benefits the Applicant has achieved from carrying on a business".

7 The Commissioner rejected that submission, finding that the taxation issue was not one which was properly dealt with by him, but that it was a matter for the Australian Taxation Office (hereinafter referred to as the "ATO").

8 Importantly, there was no appeal by Finesse against the Commissioner's decision or any part of it.

9 By claim No M287 of 2004 filed in the Industrial Magistrate's Court at Perth on 25 November 2004, Mr Higgins, the applicant at first instance, made a claim in its general jurisdiction alleging failure to comply with the order of the Commission in application No 1251 of 2003 dated 19 March 2004.

10 Summarised, the grounds of appeal were that the order of 19 March 2004 of the Commission had not been complied with by Finesse, and that the Commissioner's discretion in relation to the making of orders for costs and penalty, miscarried.

11 Orders were sought that monies due in the sum of $2006.40, the amount of the order of the Commission, together with costs and penalty, be paid; in other words, that the order be enforced.

12 There is no doubt that Finesse had failed to comply with the order, and, in fact, had purported to deduct monies and pay them to the ATO in satisfaction of what they alleged was a liability to the Commissioner of Taxation.

13 The application was opposed and a response filed wherein the agent for Finesse stated as follows:-

> "The monies have been paid to the Australian Taxation Office --- in accordance with the provisions of the Commonwealth legislation."

14 Letters and documents were produced in the hearing in the Court at first instance. A taxation statement called a "YTD Monthly Tax Deduction Summary" was amongst them, along with various payment summaries. They do no appear to have been marked as exhibits but they appear to have been tendered to the Court by Mr McCorry, as agent for Finesse, and they appear in the appeal book. Mr McCorry wrote to Mr Higgins' then solicitors, Slater and Gordon, dated 21 March 2004, and there was correspondence after that between them, and also a letter from Finesse themselves to Mr Higgins himself dated 19 April 2004.

15 The substance of what Finesse alleged was that, because Mr Higgins had been found to be an employee and not an independent contractor, there were "tax implications" for Finesse and indeed for Mr Higgins.

16 Thus, Mr McCorry advised Slater and Gordon that his principals intended, pursuant to an obligation which Finesse had, to deduct an eligible termination payment of 47.5% of the compensation ordered, namely an amount of $950.00 and pay the amount to the ATO (the Commissioner of Taxation). The letter also asserted that Finesse were obliged to deduct the PAYG instalments due in respect "of your client's earnings of $2588.80 in July 2003", an amount calculated by Finesse at $1229.68. This was notwithstanding the fact, of course, that the monies had originally been paid to Mr Higgins without deduction.

17 The letter then notes that the total of those deductions leaves Finesse with nothing to pay. In other words, Finesse purported to say that the payment to the ATO would liquidate the amount of their liability pursuant to the order of the Commissioner at first instance.

18 In the letter, there is also an offer to settle the matter. Slater and Gordon wrote back requiring payment of the total amount ordered within 14 days (see the letter of 24 March 2004 (page 21 (AB)).

19 A letter from Finesse to Mr Higgins dated 19 April 2004 reiterates in substance what Mr McCorry had said in his letter and advises Mr Higgins that a detailed account of how he "defrauded" the Commonwealth would also be forwarded to the ATO, a letter with an unmistakeable tone of asperity.

20 It was not in dispute that monies were paid to the ATO as Finesse had advised they would, but the amount ordered by the Commission to be paid to Mr Higgins, namely $2006.40, was never paid to him, nor was any part of it. In any event, the amount of $1229.68 withheld by Finesse was withheld in respect of Mr Higgins' previous earnings.

21 The only oral evidence given before His Worship at the hearing of the application at first instance which requires consideration in this appeal was that of the appellant, Mr Bennett, and in particular his evidence in cross-examination when he said that he was unhappy with how things turned out in the Commission. He also said that he was not particularly unhappy with the idea of paying $2006.40 to Mr Higgins. He asserted that what he did, in relation to the ATO, was to do what he was supposed to do.

FINDINGS

22 Summarised, His Worship found the following:-

(a) That the question before the Commission was not a case of Commonwealth legislation overriding State legislation.

(b) That what was being suggested was that an order of the Western Australian Industrial Relations Commission can be rendered nugatory and it could not because in the matter the Commission acted judicially.

(c) That the order is clear and specific.

(d) That it makes no reference to any amount being deducted from the sum of $2006.40 for tax or any other reason.

(e) That the Court is required to enforce the order and cannot go behind it.

(f) That if Finesse had an issue concerning the ability of the Commission to make an order, then they could have appealed against the decision and did not do so.

(g) That the order of the Commission is clear in its terms and must be strictly complied with.

(h) That Finesse's approach had been to render the order nugatory.

(i) That Finesse had failed to comply with the order of the Commission, and the failure to comply was wilful and aimed at rendering the order nugatory so as to deny the claimant the fruits of his "judgment".

23 The Industrial Magistrate then made orders for costs and other orders, and he found that the defence of the application was frivolous or vexatious.

ISSUES AND CONCLUSIONS

24 The appeal grounds contained a number of complaints.

25 The first complaint was that the learned Industrial Magistrate erred in law in failing to find that Finesse were not obliged to deduct PAYG tax from the amount of the order and remit the monies to the Commissioner of Taxation.

26 The *Income Tax Assessment Act* 1997 (Cth) and the *Taxation Administration Act* 1953 (Cth) were said to cover the field and, insofar as the order of the Commission required otherwise than that the monies be withheld and remitted to the ATO, then the Commonwealth law prevailed and the order was invalid.

27 There was reference of course to s109 of *The Constitution* of the Commonwealth of Australia which reads:-

> "When a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

28 The attack on the findings of the Commission really all stem from that, namely that there was an obligation on Finesse to comply with the overriding Commonwealth law. In doing so, so the submission went, they complied with the order of the Commission. There were other submissions, inter alia, that the decision of the Commission was arbitral and not judicial and that Finesse satisfied the judgment by paying the amount to the ATO. Further, there were complaints that the learned Industrial Magistrate erred in finding that there was a failure to comply with the order and by finding that the defence of the matter was wilful and directed to rendering the order of the Commissioner at first instance nugatory and, further, therefore, to denying Mr Higgins the fruits of his judgment.

29 There was also an appeal against the decisions to order costs and impose a penalty.

30 The Full Bench took Mr McCorry, who appeared as agent for Finesse upon the appeal, and Ms Scoble (of Counsel), who appeared for Mr Higgins, to s34(4) of *the Act*. S34(4) of *the Act* reads as follows:-

> "**34. Decision to be in form of award, order, or declaration**
>
> (4) Except as provided by this Act, no award, order, declaration, finding, or proceeding of the President, the Full Bench, or the Commission shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court —
>
> (a) on any ground relating to jurisdiction; or
>
> (b) on any other ground."

31 That section, in clear and unambiguous terms, provides that no award, order, declaration, finding or proceeding of the President, Full Bench or Commission can be appealed against etc. by any court or on any ground at all.

32 The Industrial Magistrate's Court is a "court" within the meaning of s34(4) of *the Act* (see s81 and s81B of *the Act*). The decision of the Commissioner at first instance consisted of two declarations and an order within the meaning of s34(4). The only means prescribed by *the Act* for an appeal or any review of a decision of a single Commissioner is prescribed in s49. That is by way of appeal to the Full Bench. There is no other prescribed means of challenge, review or appeal, quashing or calling into question of, a decision such as that which was made by the Commissioner and sought to be enforced at first instance.

33 No challenge to the decision of the Commission, constituted by a single Commissioner, can be mounted in any court otherwise and that court has no jurisdiction to entertain, in broad terms, a challenge to a decision in any manner proscribed by s34(4) of *the Act*. Such an action is simply prohibited by the section. Further, no such jurisdiction is conferred on the Industrial Magistrate's Court by s83 or any other section.

34 The main question in this matter is whether, in proceedings before the Industrial Magistrate, Finesse sought to have the learned Industrial Magistrate act contrary to s34(4) of *the Act* and therefore act without jurisdiction and without power.

35 A decision is challenged if it is taken exception to or called into question (see *Macquarie Dictionary*, 3rd Edition).

36 A decision is appealed against in the sense of the use of the word "appeal" or "appealed" in s34(4) and s49 if there is "a complaint to, and a judicial examination by, a higher court of a decision of an inferior court. The higher court then approves, corrects or sets aside the judgment of the inferior court" (see *Sita v Olivier* 1967 (2) SA 442(A) at 447-448.)

37 The word "review" is a word of wide import. Whilst it has the quality of an appeal a review is not confined to the narrow kind of "appeal" allowed from discretionary decisions where some element of principle must be shown. A review may often occur by means of a hearing de novo. That the word "reviewed" is broader than "appealed against" is borne out by their juxtaposition with each other in s34(4) of *the Act* (see *Boston Clothing Co Pty Ltd v Margaronis* (1991-1992) 27 NSWLR 580 at 584-586 per Kirby P (CA)).

38 The word "quash" means, if it is unmodified by statute as it is here, to render "null and void and wholly set aside as though it had never been", an order, award, finding or decision, etc (see *Hancock v Prison Commissioners* [1959] 3 All ER 513 at 514 per Winn J.)

39 In *Young v Public Service Board* [1982] 2 NSWLR 456 at 467-468, the words "call in question" and a provision of the *Industrial Arbitration Act* 1940 (NSW), namely s84, very similar to s34(4) of *the Act*, were considered by Lee J. That section, inter alia, contained the words forbidding a challenge to an award or order proceeding or contract determination of the New South Wales Industrial Commission, by prescribing that such decisions or orders were not "... liable to be challenged, appealed against, reviewed, quashed or called in question by any court of judicature on any account whatsoever."

40 As His Honour, if I might say so with respect, correctly made the following observation about that section, which is in very similar terms to s34(4) of *the Act*, and I apply the same observation to s34(4):-

> "It is to be observed that the section, in using the expressions "challenged, appealed against, reviewed, quashed", is plainly referring to circumstances in which some court in fact scrutinises the decision of the Commission and passes judgment upon it or makes some adverse ruling in respect of it."

41 I now turn to the expression "called into question". That, as Lee J said, should be defined as follows:-

> "… has a similar intention and contemplates some positive action or step taken by a court in relation to the final decision of the Commission, by which action or step the court asserts the invalidity in law of the Commission's decision and declines to act upon that decision."

42 One such instance might be, as His Honour said:-

> "… where a court rejected a tender of an award on the ground that it considered it invalid or defective for some reason, or allowed evidence to be allowed to establish error in it."

43 His Honour referred to the *Shorter Oxford English Dictionary* definition of "called in question", which means the same, in my opinion, as "called into question" in s34(4) of *the Act*. That definition is:-

> "To examine judicially, bring to trial, to take to task"; "to question the validity or status of; to raise objections to."

44 In this case, Finesse, by their case and by their response to the application before the learned Industrial Magistrate, sought to have a ruling made that the order was invalid by the operation of s109 of *The Constitution* and therefore required His Worship to refuse to enforce the order of the Commission because it was invalid. They sought to have the learned Industrial Magistrate scrutinise, within the meaning of the dicta of Lee J in *Young v Public Service Board* (op cit), the decision of the Commission, pass judgment upon it, and make an adverse ruling in respect of it. That is and was beyond the power of the Industrial Magistrate. Thus, Finesse sought to call the decision into question.

45 Finesse also sought to call the decision into question by taking a positive action or step in the proceedings before His Worship in relation to a final decision of the Commission by which action or step they sought to have the court assert the invalidity in law of the Commission's decision and sought, further, that His Worship decline to act upon that decision. That was a clear calling into question of the decision, too, and that is forbidden by s34(4) of *the Act*. Finesse also purported to do so on evidence and on submissions not before or put to the Commissioner at first instance.

46 Clearly and simply, too, within the meaning of s34(4) of *the Act*, as I have expressed it above, Finesse sought to have the Industrial Magistrate's Court, contrary to s34, accede to a challenge to the decision of the Commissioner at first instance in that they sought to call it into question and took exception to the Commission's decision.

47 Next, Finesse sought to conduct a quasi appeal against the decision by obtaining obliquely an order in the nature of striking the decision down or declaring it invalid as a basis for dismissing the application to enforce the order. It was not an appeal as such unless it could be said that the Industrial Magistrate's Court was a higher court examining judicially the decision of an inferior court. That, of course, could not be validly submitted because the industrial court had no jurisdiction to do what was asked of it.

48 Next, within the definition of "calling into question" which I have adopted above, they sought to have the order of the Commission judicially examined, to have its validity questioned, to raise objection to it, to have it considered defective, and to have evidence adduced to establish error in the order.

49 There was also an attempt to have the order reviewed, in the broad sense of that term, because there was evidence adduced which occurred after the Commission's order was made, as a basis for having the order questioned by the Industrial Magistrate's Court. All of this was expressly prohibited by s34(4) of *the Act.* There was no attempt to have the order quashed as such, although it might be held that the effect of asking His Worship to find the order of the Commission invalid was precisely that.

50 The Industrial Magistrate's Court had no jurisdiction or power to dismiss the application to enforce the order or to otherwise deal with the application on the grounds proposed and for the reasons advanced on behalf of Mr Higgins.

51 There was no right in Finesse to oppose the application. Their only right was to appeal against the decision of the Commissioner at first instance, pursuant to s49 of *the Act*. This they elected not to do. There was therefore no other relief available to them under *the Act*.

52 Having said that, I observe that, because of the effect on s34 of *the Act*, it is unnecessary to decide whether the decision of the Commission was arbitral or judicial.

53 I make no finding as to the merit or otherwise of the constitutional argument because it is unnecessary to do so.

54 I would also add this. It was submitted on behalf of Finesse that the amount alleged to be in satisfaction of the order at first instance and paid to the ATO, was in fact paid in satisfaction of the order. That, it was submitted, meant that there was a compliance with the order. It was simply and clearly not paid in compliance with the order. These were monies paid over Mr Higgins' objection and in defiance of his solicitors' request that the monies be paid to him, to the ATO. The payment of monies to the ATO by Finesse was in direct breach of the clear and simple words of the order of the Commissioner at first instance that the sum of $2006.40 be paid to Mr Higgins. The order was simply not complied with, as in the end, Mr McCorry conceded, and a breach of it was committed, as alleged. It followed that the order made by His Worship was entirely correct.

55 I would also add that, given that Mr McCorry's argument was that the order of the Commission was inoperable and invalid, having regard to s109 of *The Constitution*, it could not be argued that a payment in compliance with Commonwealth law was a payment in compliance with the order because of the fact that the order, on Mr McCorry's argument, was invalid or inoperable.

56 The appeal fails, for those reasons, too.

57 As to ground 3 which attacks the orders for costs and penalty, I would observe that nothing of any substance was submitted in relation to them. The learned Industrial Magistrate was entirely correct in what he decided. The defence at first instance was entirely without merit and could never have succeeded. It was a defence to the application to enforce the order, which was frivolous and vexatious, within the meaning of s83C(2) of *the Act* (see *WABLPPU v Clark and Another trading as Mike Clark Contracting* (1995) 76 WAIG 4 (IAC); and *TWU v Tip Top Bakeries* (1994) 58 IR 22 (IAC) and the cases referred to therein). I refer also to the attempt to deny Mr Higgins the fruits of his "judgment" by the two partners in Finesse, and, in particular, Mr Bennett.

58 The Industrial Magistrate was entitled to so find and I would so find.

59 Accordingly, nothing was established in relation to the discretionary decision for costs which might at all warrant a finding that the discretion at first instance had miscarried (see *House v The King* [1936] 55 CLR 499; and see *Cummings v Lewis* (1993) 41 FCR 599 at 604). (In any event, of course, it is unusual for appeal courts or tribunals, including this Full Bench, to interfere with orders for costs.)

60 As to the penalty imposed, that took into account the fact, correctly found, that Finesse, or at least Mr Bennett, was bitter and that Finesse's aim was to deny Mr Higgins the fruits of his judgment and to render the judgment nugatory. Mr Bennett's evidence, read with the letter to which I have referred above in which, inter alia, he said that he was going to advise the ATO that Mr Higgins had committed fraud, was evidence in its tone and content of that bitterness. His evidence before the Industrial Magistrate read with that, and indeed alone, was also evidence of bitterness. It was obvious that he resented the decision made in Mr Higgins' favour.

61 The Industrial Magistrate who found as he did on that point, had the benefit of seeing Mr Bennett and Mr Higgins, and his finding in that regard should not be disturbed.

62 There is nothing in the transcript which would indicate that that finding should be overturned according to the principle in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 and, not the least, because the finding of fact was not glaringly improbable, but probable.

63 In any event, Finesse have not complied with the order, for no good reason, and had deprived Mr Higgins of the fruits of his judgment for about 11 months, defending the application to enforce the order frivolously and vexatiously.

64 His Worship was entitled to find and I would so find. In the circumstances, the amount of the penalty imposed and the fact that the penalty was imposed are unexceptionable. There was not established any miscarriage in the exercise of the discretion in relation to the orders for costs and penalty by His Worship.

FINALLY

65 For all of those reasons, the appeal in my opinion is not made out. I would dismiss it. Since the parties indicated that they wished the Full Bench to entertain applications for the costs of the appeal, I would do that on a date to be fixed after the delivery of these reasons.

COMMISSIONER S WOOD:

66 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 L HARRISON:

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

THE PRESIDENT:

68 For those reasons, the appeal is dismissed.

Order accordingly

2005 WAIRC 01309

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ANDREW BENNETT AND CRAIG BRADLEY DIX T/A FINESSE PAINTING & PROPERTY MAINTENANCE
	APPELLANTS
	-and-
	MURRAY ROSS HIGGINS
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S WOOD COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 APRIL 2005
FILE NO/S	FBA 1 OF 2005
CITATION NO.	2005 WAIRC 01309

Decision	Appeal dismissed.
Appearances	
Appellants	Mr G McCorry, as agent
Respondent	Ms K L Scoble (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 6th day of April 2005, and having heard Mr G McCorry, as agent, on behalf of the appellants, and Ms K L Scoble (of Counsel), by leave, on the behalf of the respondent, and the Full Bench having reserved its decision on the matter, and the reasons for decision being delivered on the 13th day of April 2005, and the supplementary reasons for decision being delivered on the 22nd day of April 2005, it is this day, the 22nd day of April 2005, ordered and declared that Appeal No FBA 1 of 2005 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2005 WAIRC 01311

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ANDREW BENNETT AND CRAIG BRADLEY DIX T/A FINESSE PAINTING & PROPERTY MAINTENANCE **APPELLANTS** **-and-** MURRAY ROSS HIGGINS **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S WOOD COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 APRIL 2005
FILE NO.	FBA 1 OF 2005
CITATION NO.	2005 WAIRC 01311

CatchWords	Industrial Law (WA) - appeal against decision of Industrial Magistrate - party and party costs - respondent represented by organisation of employees' employee legal practitioner - whether appeal was frivolous or vexatious - *Industrial Relations Act* 1979 (as amended), s60, s83(4), s84, s84(5) - *Legal Practitioners (Local Court) (Contentious Business) Determination* 2000 - *The Constitution of the Commonwealth of Australia*, s109.
Decision	Application granted.
Appearances	
Appellants	Mr G McCorry, as agent
Respondent	Ms K L Scoble (of Counsel), by leave

Supplementary Reasons for Decision
- Application by Respondent for Costs

THE PRESIDENT:

INTRODUCTION

1 This was an application by the above-named successful respondent on this appeal for an order for party and party costs against the above-named appellants.

2 The appeal was brought pursuant to s84 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") and heard and determined by the Full Bench pursuant to s84 of *the Act*.

3 The jurisdiction and power to award party and party costs on an appeal pursuant to s84 of *the Act* is conferred by s84(5), which reads as follows:-

> "(5) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party."

4 The only person who can seek and be granted an order for costs under s84 of *the Act* is a party to the proceedings. The proceedings are obviously an appeal under s84, properly construed within the meaning of s84(5) and in the context of s84(5) as a whole.

5 Therefore, and importantly, by the express terms of *the Act*, no-one can seek an order for party and party costs unless that person is a party and, implicitly, only a party can be ordered to pay party and party costs because only a party can institute or defend proceedings.

COSTS FOR SERVICES OF EMPLOYEE SOLICITOR

6 There was uncontroverted and unobjected to evidence from the bar table given by Counsel for the respondent, Ms Scoble, that she was an employee legal practitioner employed by the organisation of employees of which the respondent, Mr Higgins, was and is a member. That is, he is a was a member of a "union" (ie) an organisation of employees, put colloquially, as a point not disputed. These facts emerged in the course of a submission that the fact that Ms Scoble was an employee solicitor was no bar to an order for costs in favour of the respondent. In fact, before His Worship, the "union" was identified as an organisation of employees, the Construction, Forestry, Mining and Energy Union of Workers, in recording the appearance of Ms Scoble (see page 7 of the appeal book). I accept those facts.

7 It is well settled that the Crown and corporations which employ salaried legal staff are allowed party and party costs on the same basis as a litigant who acts through a private legal practitioner. The authority cited, which I would apply, is *Bank of Western Australia Ltd v O'Neill* (unreported) Civ 1161 of 1998 (Supreme Court of WA) delivered 22 January 1999, per White J; but see also the ample authority for that proposition contained in *Lenthall v Hilson* [1933] SASR 31, *Registrar of Titles v Watson* [1954] VLR 111; *Whitbread v Velliaris* [1969] SASR 291; and *Inglis v Moore (No 2)* (1979) 25 ALR 453 at 454-457.

8 The organisation of employees, of which Mr Higgins was a member at material times, is Ms Scoble's employer and it is incorporated therefore by virtue of its incorporation under s60 of *the Act*. It was not contended that the organisation, which was not named, was not registered.

9 *Bank of Western Australia Ltd v O'Neill* (op cit) and the other authorities to which I have referred above are plainly applicable to this case therefore and costs are clearly awardable if an association's or organisation's employee solicitors represent a member. That often occurs in this Commission whether the organisation or association represents employers or employees.

COSTS TO BE ORDERED TO ORGANISATION MEMBER

10 For the appellants, Mr McCorry submitted that no order for costs could be made against the appellants in favour of the respondent because, having been represented by his organisation's salaried legal practitioner, Mr Higgins had not incurred any

costs. Of course, prima facie, as a party to the proceedings, he has a right to seek and be granted an order for party and party costs pursuant to s84(5) of *the Act*.

11 Party and party costs are quantified as the costs necessary or proper for the recipient of the costs to enforce or defend a right, which Mr Higgins was doing on this appeal. It is, of course, just and reasonable that a party who causes another to incur legal costs should reimburse the other party for those costs. Party and party costs are intended as a partial indemnity for the successful party against liability for costs (see *Latoudis v Casey* (1990) 170 CLR 534). The statute confers the power to award party and party costs to and against a party upon appeal.

12 There are well established exceptions to the principle that an order for party and party costs depend on the liability of the receiving party to pay solicitor and own client costs. One such important exception is an insurer acting in the name of an insured, as is the case in almost all personal injury litigation. In those cases, even though an insured defendant is the defendant named on the record, the insured is the real defendant. The insurer retains the solicitors for the defendant on the record and pays their fees. However, a plaintiff is liable to pay a successful defendant's costs in a personal injury matter where there is an insurer, even though the defendant is insured and under no liability to pay legal costs. The same applies to a claim for costs as between co-defendants (see *Johnson v Santa Teresa Housing Association* (1992) 107 FLR 441 (NT Sup Court) per Mildren J).

13 In any event, the applicant for costs, Mr Higgins, would be liable for legal costs if an order were to be made against him. That is what the statute prescribes, (ie) that the party should pay or receive the benefit of an order for party and party costs. Thus, there is no need to go beyond the plain words of the statute which obviously contemplates that whoever the named party is, is entitled to an order for costs or is liable to be ordered to pay costs, as the case may be, subject to the law relating to costs. It might be argued that, in this jurisdiction, the Parliament would well know that, because of the terms of *the Act*, organisations represent and/or fund the representation of individual employers and employees who are parties to proceedings.

14 That accords with the principle, too, that the party on the record is liable to pay costs and liable to be paid costs.

15 The payment of the costs of a union member by the union is lawful (see *Stevens v Keogh* [1946] 72 CLR 1 and *Hill v Archbold* [1967] 3 All ER 110 (CA)).

16 In a system such as this *Act* regulates and has created where associations and organisations of employers and employees underpin its operation and represent their member employers or employees, or provide or fund their representation, it is quite clear that the party on the record is liable to pay costs or be paid costs by virtue of s83(4) of *the Act* because that person is on the record. The question of whether an organisation or association funds it is irrelevant, just as it was in relation to other organisations in *Lenthall v Hilson* (op cit) and *Backhouse v Judd* [1925] SASR 395. It is quite clear that such an order can be made for costs, for those reasons.

FRIVOLOUSLY OR VEXATIOUSLY INSTITUTED

17 I now turn to the question of whether this appeal was frivolous or vexatious. This question has been considered in *TWU v Tip Top Bakeries* (1994) 58 IR 22 (IAC) and *WABLPPU v Clark* (1995) 76 WAIG 4 (IAC). Full Benches of this Commission in a number of appeals, including *ALHMWU v Falcon Investigations and Security Pty Ltd* (2001) 81 WAIG 2425 (FB), have also considered this question. It is unnecessary and wrong for the appellants to seek refuge in persuasive authority from other jurisdictions in the light of these decisions.

18 The appellants' submissions on this appeal were that the point argued had merit; namely that the order was invalid and/or inoperative because the Commonwealth Taxation Acts to which we were referred and the operation of s109 of *The Constitution* rendered it so. That was in fact a re-argument of the appeal.

19 The Full Bench found that there was no jurisdiction or power in the Industrial Magistrates Court to entertain the defence to the claim that was raised at first instance and sought to be justified on appeal.

20 The Industrial Magistrate himself found that he had no jurisdiction to call into question or strike down the order of the Commission or dismiss the application to enforce the order on the implicit basis that the order at first instance was invalid, and he found so entirely correctly. I should add that the question of jurisdiction can be raised at any time and was raised at first instance (see *SGS Australia Ltd v Taylor* (1993) 73 WAIG 1760 (FB) and *Carroll Realty v Chambers* (1996)76 WAIG 1656 (FB)), as it was raised on this appeal.

21 The argument based on s109 of *The Constitution* before the Industrial Magistrate was an argument which was misconceived, without merit and untenable because it could not be raised before the Industrial Magistrate. It could only be raised on appeal under s84 of *the Act*, as is clear from the reasons of the Full Bench upon the appeal.

22 The quantum claimed for costs was not put in issue by the agent for the appellants in these proceedings and we were assured by Counsel for the respondent that the costs claimed were based on the *Legal Practitioners (Local Court) (Contentious Business) Determination* 2000 (hereinafter referred to as "*Local Court (Contentious Business) Determination)* scale of costs which is not in dispute and is applicable to these proceedings by virtue of *the Act*. Whether the *Local Court (Contentious Business) Determination* scale of costs refers to matters upon appeal to the Full Bench, of course, is entirely another matter and can await determination on another day.

23 For those reasons, I would order that the appellants pay to the respondent the respondent's costs quantified at $3,244.50 within 21 days of the date of the order of the Full Bench. That is in addition to the order that the appeal be dismissed.

COMMISSIONER S WOOD:

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

COMMISSIONER J L HARRISON

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

THE PRESIDENT:

26 For those reasons, the application is granted.

Order accordingly

2005 WAIRC 01342

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ANDREW BENNETT AND CRAIG BRADLEY DIX T/A FINESSE PAINTING & PROPERTY MAINTENANCE
	APPELLANT
	-and-
	MURRAY ROSS HIGGINS
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S WOOD COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 APRIL 2005
FILE NO/S	FBA 1 OF 2005
CITATION NO.	2005 WAIRC 01342

Decision	Application granted
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Ms K L Scoble, (of Counsel), by leave

Order

This application by the respondent for costs having come on for hearing before the Full Bench on the 18th day of April 2005, and having heard Mr G McCorry, as agent, on behalf of the appellants, and Ms K L Scoble (of Counsel), by leave, on the behalf of the respondent, and the Full Bench having reserved its decision on the matter, and the supplementary reasons for decision being delivered on the 22nd day of April 2005, it is this day, the 22nd day of April 2005, ordered and declared:-

THAT Paul Andrew Bennett and Craig Bradley Dix trading as Finesse Painting and Property Maintenance do pay to Murray Ross Higgins the above named respondent the sum of $3,244.50 within twenty one (21) days of the date hereof, as and by way of the party and party costs of the appeal herein.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

PRESIDENT—Matters dealt with

2005 WAIRC 01223

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID JAMES
	APPLICANT
	-and-
	WESTERN AUSTRALIAN MUNICIPAL ROAD BOARDS, PARKS, AND RACECOURSES UNION OF WORKERS
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	THURSDAY, 14 APRIL 2005
FILE NO.	PRES 7 OF 2004
CITATION NO.	2005 WAIRC 01223

CatchWords	Industrial Law (WA) – application pursuant to order giving liberty to apply – parties to proceedings – jurisdiction to enforce orders – Industrial Relations Act 1979 (as amended), s61, s66, s66(2), s66(2)(a), S84A, s90.
Decision	Application dismissed.
Appearances	
Applicant	Mr D L Smith (of Counsel), by leave
Respondent	Mr D L Smith (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

1 This was a matter in which a member of the respondent organisation, the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers was alleged to have committed breaches of or failed to comply with a number of the organisation's rules, by the applicant, Mr David James, a member.

2 On 9 February 2005, I made orders by consent in the matter, both parties being represented by Counsel. The orders were signed by Counsel on behalf of each party, Mr D L Smith of Counsel representing the applicant, Mr James, and Mr P W Nichols of Counsel representing the respondent organisation.

3 By those orders the Commission, constituted by the President, appointed an interim Executive, ordered that an election take place immediately for all positions on the Executive of the Council and, more particularly, ordered that the records of the State and Federal union, other than those required for the audit, be returned to 112 Charles Street, West Perth within seven days, and those required for the audit, on completion of the audit. Most appositely, Order 10 read as follows:-

> "10. THAT there be liberty to apply for such further orders or directions as may become necessary on 48 hours notice to the other party."

4 There were other orders as well. I do not need to refer to them here.

5 Written notice dated 18 March 2005 was given on behalf of the applicant, Mr James, seeking further orders and directions, that notice being given by Mr D L Smith, to Mr Hal Colebatch, purporting to be the solicitor acting for the respondent organisation, and to the Commission.

6 Further orders and directions were sought because it was alleged on behalf of the applicant that difficulty was being experienced in "progressing the audit" because much of the computer records and hardware were missing. Letters had been written about these matters to Mr Colebatch but no response had been received.

7 In accordance with the application pursuant to the order giving liberty to apply, that application was listed for hearing and came on for hearing in the Commission on 5 April 2005.

8 When the Commission heard the matter, Mr Smith announced himself as appearing for Mr James, the applicant, and also appearing for the respondent organisation. This was because Mr James had become the President and the organisation had appointed Mr Smith as its solicitor in accordance with resolutions passed at a meeting of the interim Executive held on 15 February 2005 (see exhibit 6). There was, therefore, a cordiality and agreement between the parties which had not previously existed.

9 I put aside, for the present, the question of whether Mr Smith could appear for both parties in the proceedings.

10 However, what he sought to do was obtain orders for the return of papers which were said to be in the custody of the persons formerly purporting to be President and Secretary of the organisation, namely Ms Kirwan-Bennett and Mr Adrian Bennett. Both of those persons, by virtue of the orders of the Commission of 9 February 2005, ceased to purport to be members of the Executive, because an interim Executive was appointed by consent by me and they were excluded. They agreed, and the orders reflect this, to act as consultants and to facilitate the transfer of authority to the interim Executive, including the signatories to the bank accounts and the re-opening of the premises at Charles Street, but that communication be between solicitors. It was so ordered.

11 It is now complained that equipment and furniture, in particular computers and "hardware", have not been returned to the respondent organisation and that documents necessary for the audit have not been returned contrary to my orders. That was not disputed. I am satisfied and find that that was the case.

12 It is not quite clear what orders were being sought, except that it seemed to be envisaged that there be orders that Mr Bennett and Ms Kirwan Bennett return this material and equipment and furniture.

13 It is trite to observe that, upon registration, an organisation such as the respondent and also during registration, becomes and is, for the purposes of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"), a body corporate by the registered name having perpetual succession and a common seal, subject to its right to change its name with the consent of the Full Bench of this Commission.

14 It is also trite to observe that s61 of *the Act* reads as follows:-

> "**61. Effect of registration**
>
> Upon and after registration, the organisation and its members for the time being shall be subject to the jurisdiction of the Court and the Commission and to this Act; and, subject to this Act, all its members shall be bound by the rules of the organisation during the continuance of their membership."

15 Having regard to s61 and s66 of *the Act*, there is, in my opinion, nothing to prevent the Commission exercising jurisdiction in relation to individuals as well as the organisation where an allegation is made of the type referred to in s66(2) of *the Act* and there are sought orders or directions relating to the rules of the organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case, and also the particular orders referred to thereafter in s66(2)(a).

16 No such orders were sought and no such orders were made in this matter requiring individuals and, in particular, Mr Bennett and Ms Kirwan-Bennett, to do anything. They were never parties. Ms Kirwan-Bennett and Mr Bennett were never named as parties, formed as parties or sought to be joined as parties in these proceedings.

17 By the consent order, which was an order made to settle a dispute between Mr James and the respondent organisation, the only orders made were made to bind the respondent organisation and the applicant. In particular, the order of 9 February 2005 was made by the consent of the two above-named parties and no-one else. In particular, Order 9, which refers to the return of audit records, binds the organisation, its servants and agents. In other words, the order sought exists and it binds the respondent and, of course, the respondent can compel its officers and employees. In any event, there is no existing order which requires the return of furniture or equipment.

18 Further, what was in fact being sought, as well as an order against persons not parties to the proceedings and certainly not encompassed by Order 9 of the orders made, was an order enforcing the order made on 9 February 2005.

19 First, the order could not be enforced against Mr Bennett and Ms Kirwan-Bennett. Second, the President has no jurisdiction to enforce his orders, except possibly under s90 of *the Act*, and no such application was made.

20 Enforcement of orders of the President made pursuant to s66 of *the Act* are certainly within the jurisdiction of the Full Bench pursuant to s84A of *the Act*. However, Mr James could not enforce the order because he is not one of the persons who are prescribed in s84A.

21 I agreed to accept further submissions in writing by Mr Smith, on behalf of Mr James, who was present in court during the proceedings. I directed that they be forwarded to my Associate before close of business on Friday, 8 April 2005. However, as at the date of writing these reasons, they have not been received. I therefore assume that none will be forwarded.

22 For all of those reasons, it is quite clear that I can make no order in the terms which seem to have been sought in the letter seeking further orders pursuant to the right to apply for further orders.

23 Further, I have doubts, which it has not been necessary to decide because I have not yet invited submissions, that Counsel can or should represent both parties, however, *ad idem*, those parties might be about matters in proceedings. Certainly, in the absence of authority, I am not disposed to say that that is a proper or valid course to pursue.

24 For those reasons, I cannot make the orders sought. I therefore will dismiss the application made pursuant to the liberty given to apply.

Order Accordingly

2005 WAIRC 01220

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID JAMES
	APPLICANT
	-and-
	WESTERN AUSTRALIAN MUNICIPAL ROAD BOARDS, PARKS, AND RACECOURSES UNION OF WORKERS
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	THURSDAY, 14 APRIL 2005
FILE NO/S	PRES 7 OF 2004
CITATION NO.	2005 WAIRC 01220

Decision	Application dismissed.
Appearances	
Applicant	Mr D L Smith (of Counsel), by leave
Respondent	Mr D L Smith (of Counsel), by leave

Order

This matter having come on for hearing before me on the 5th day of April 2005, and having heard Mr D L Smith (of Counsel), by leave, on behalf of the applicant and provisionally on behalf of the respondent, and having reserved my decision on the matter, and the reasons for decision being delivered on the 14th day of April 2005, it is this day, the 14th day of April 2005, ordered and declared that the application pursuant to the liberty to apply for such further orders be and is hereby dismissed.

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

AWARDS/AGREEMENTS—Variation of—

2005 WAIRC 01365

ACTIV FOUNDATION (SALARIED OFFICERS) AWARD, NO. 13 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	THE BOARD OF MANAGEMENT, ACTIV FOUNDATION INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 28 APRIL 2005
FILE NO	APPL 239 OF 2005
CITATION NO.	2005 WAIRC 01365

Result	Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the ACTIV Foundation (Salaried Officers) Award, No. 13 of 1977 be varied in accordance with the following Schedule and that such variation shall have effect on and from the 28th day of April 2005.

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

SCHEDULE

1. Clause 22. – Travelling: Delete subclause (11) of this clause and insert the following in lieu thereof:

(11) An employee who is relieving at or temporarily transferred to any place within a radius of fifty kilometres measured from the employee's headquarters shall not be reimbursed the cost of midday meals purchased, but an employee travelling on duty within that area which requires the employees absence from the employee's headquarters over the usual midday meal period shall be paid at the rate prescribed by Item 17 of Clause 26. – Travelling, Transfers and Relieving Duty – Rates of Allowance for each meal necessarily purchased, provided that:

(a) such travelling is not a normal feature in the performance of his duties, and

(b) such travelling is not within the suburb in which he resides, and

(c) the employees total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item 18 of Clause 26. – Travelling, Transfers and Relieving Duty – Rates of Allowance.

2. Clause 23. – Transfers: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) An employee who is transferred to the employer's accommodation shall not be entitled to reimbursement under this clause: Provided that where entry into the employer's accommodation is delayed through circumstances beyond the employers control an employee may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the employee and the employee's spouse and dependent children under sixteen years of age or other children wholly dependent on the employee, less a deduction for normal living expenses prescribed in Column A, Items 15 and 16 of Clause 26. – Travelling, Transfers and Relieving Duty – Rates of Allowance and provided that if any costs are incurred under subclause (5)(b), they shall be reimbursed.

2005 WAIRC 01335

GATE, FENCE AND FRAMES MANUFACTURING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	CAI FENCES AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 26 APRIL 2005
FILE NO	APPL 122 OF 2005
CITATION NO.	2005 WAIRC 01335

Result	Award varied
Representation	
Applicant	Mr L Edmonds
Respondent	Ms C Taylor Tobin on behalf of DBS Fencing

Order

HAVING heard Mr L Edmonds on behalf of the applicant and Ms Taylor Tobin on behalf of DBS Fencing, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Gate, Fence and Frames Manufacturing Award No 24 of 1971 as varied, be further 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 date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 7. – Overtime: Delete paragraph (f) of subclause (3) and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (h) of this subclause, an employee required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.65 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.95 for each meal so required.

2. Clause 14. – Special Rates and Provisions: Delete subclause (1), (2) and (4) of this clause and insert in lieu thereof the following:

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

(2) Confined Space: An employee shall be paid an allowance of 52 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association appointed by the employer to perform first aid duties, shall be paid $8.50 per week in addition to the ordinary rate.

3. Clause 20. – Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $26.95 for any weekend the employee returns to the employee's home from the job, but only if -

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

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

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

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

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $11.85 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

4. First Schedule – Wages: Delete subclauses (2) and (6) of this clause and insert in lieu thereof the following:

(2) Leading Hand: In addition to the appropriate rate prescribed in subclause (1) of this clause, a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than 10other employees	22.70
(b)	If placed in charge of more than10 and not more than 20 other employees	34.70
(c)	If place in charge of more than 30 other employees	44.70

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

(i) $12.50 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $12.50 being the percentage which appears against the year of apprenticeship in subclause (a) of subclause (3) of this Schedule.

For the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

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

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

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through their negligence.

2005 WAIRC 00783

QUARRY WORKERS' AWARD, 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANT

-v-

PIONEER CONCRETE (WA) PTY LTD, THE READYMIX GROUP (WA) PTY LTD, CSR READYMIX

RESPONDENT

CORAM SENIOR COMMISSIONER J F GREGOR
DATE TUESDAY, 22 MARCH 2005
FILE NO/S APPL 1283 OF 2004
CITATION NO. 2005 WAIRC 00783

Result Award Varied

Order

HAVING heard Mr G. Trotter on behalf of the Applicant and Mr K. Dwyer on behalf of Pioneer Concrete Pty Ltd and Others for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial relations Act, 1979, hereby orders:

THAT the Quarry Workers Award 1969 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 11 March 2005

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

SCHEDULE

1. Clause 12. – Meal Allowances – Delete subclause (1) of this clause and insert in lieu the following:

12. - MEAL ALLOWANCES

(1) Subject to the provisions of subclause (2) an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $7.95 for a meal.

2. Clause 21. – Distant Work – Delete subclauses (1) and (2) of this clause and insert in lieu the following:

21. - DISTANT WORK

(1) Where an employee is sent by his/her employer or is engaged or selected or advised by an employer to proceed to a job or is told by an employer that a job will be available at such distance that he/she cannot return to his/her home each night, he/she shall, subject to this clause, be paid an allowance of $48.35 per day or part thereof for the first six days and $338.30 per week for seven days thereafter, except where full board and lodging is provided by the employer.

(2) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $24.70 for any weekend that he/she returns to his/her home from the job but only if -

(a) he/she advises the employer or his/her agent of his/her intention no later than the Tuesday immediately preceding the weekend in which he/she so returns;

(b) he/she is not required for work during that weekend;

(c) he/she returns to the job on the first working day following the weekend; and

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

3. Clause 26 – Special Rates – Delete subclause (1) of this clause and insert in lieu the following:

26. - SPECIAL RATES AND PROVISIONS

(1) Any employee working in wet ground shall be paid $1.40 per day extra. "Wet ground" for the purpose of this subclause shall mean, ground, where the water is over the employee's ankles, or where in performing the work, the splashing of water or mud saturates the employee's clothing. If any dispute arises as to whether or not a place is a "wet place" and failing agreement by the parties, the matter shall be referred to the Board of Reference for determination.

4. Clause 27 – Wages:

A. Delete paragraph (a) of subclause (1) of this clause and insert in lieu the following:

27. - WAGES

(1) (a) The wage rate per week payable to employees under this award shall be as follows:

	$	ASNA	TOTAL
Quarry Employee Level 5	363.70	142.00	505.70
Quarry Employee Level 4	377.70	142.00	519.70
Quarry Employee Level 3	392.90	142.00	534.90
Quarry Employee Level 2	397.80	142.00	539.80
Quarry Employee Level 1	407.10	142.00	549.10

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.

B. Delete subclause (2) of this clause and insert in lieu the following:

(2) Leading Hands: In addition to the appropriate margin prescribed in this subclause, a Leading Hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	21.90
(b)	If placed in charge of not less than ten and not more than 20 other employees	35.10
(c)	If placed in charge of more then 20 other employees	43.50

C. Delete paragraph (a) of subclause (4) of this clause and insert in lieu the following:

(4)	Cookhouse Personnel:	$	ASNA	TOTAL
	(a) Head Cook	392.10	142.00	534.10
	Wage rate loading for broken shifts			10.80
	Assistant Cook	378.10	142.00	520.10
	Wage rate loading for broken shifts			8.90

(b) All time worked by employees in the mess outside the ordinary hours as agreed and arranged in accordance with subclauses (1) and (2) of Clause 7 - Hours (other than continuous shift workers) and subclause (1) of Clause 10 - Continuous Shift Workers of this award shall be deemed overtime and 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 or Sunday, shall be paid for at the rate of time and one half.

(d) All time worked during ordinary hours on a holiday as prescribed in Clause 15 - Holidays of this award shall be paid for at the rate of double time.

D. Delete subclause (5) of this clause and insert in lieu the following:

(5) Quarry Work Allowance:

In addition to the above an allowance of $19.80 per week shall be paid to compensate for dust, general climate conditions and all other disabilities involved in quarry work.

2005 WAIRC 01366

SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT**
	-v-
	ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA (INCORPORATED) **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 28 APRIL 2005
FILE NO	APPL 240 OF 2005
CITATION NO.	2005 WAIRC 01366

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Salaried Officers (Association for the Blind of Western Australia) Award 1995 (No. A 5 of 1995) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 28th day of April 2005.

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

[L.S.]

SCHEDULE

Clause 19. – Travelling: Delete subclause (11) of this clause and insert the following in lieu thereof:

(11) An employee who is relieving at or temporarily transferred to any place within a radius of fifty kilometres measured from headquarters shall not be reimbursed the cost of midday meals purchased, but an employee travelling on duty within that area which requires an absence from headquarters over the usual midday meal period shall be paid the rate prescribed by Item 17 of Clause 21. – Travelling, Transfers and Relieving – Rates of Allowance for each meal necessarily purchased provided that:

(i) such travelling is not a normal feature in the performance of duties; and

(ii) such travelling is not within the suburb in which the employee resides; and

(iii) the total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item 18 of Clause 21. – Travelling, Transfers and Relieving – Rates of Allowance.

2005 WAIRC 00782

STATE RESEARCH STATIONS, AGRICULTURAL SCHOOLS AND COLLEGE WORKERS AWARD 1971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	MINISTER FOR AGRICULTURE, FORESTRY AND FISHERIES, MINISTER FOR EDUCATION AND TRAINING, WA STATE GOVERNMENT TREASURER
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 22 MARCH 2005
FILE NO/S	APPL 1625 OF 2004
CITATION NO.	2005 WAIRC 00782

Result Varied Award

Order

HAVING heard Mr G. Trotter on behalf of the Applicant and Mr A. Harper on behalf of the Minister for Agriculture, Forestry and Fisheries and Others for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the State Research Stations, Agricultural Schools and College Workers Award 1971 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 11 March 2005.

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

SCHEDULE

1. Clause 20. – Additional Rates for Ordinary Hours – Delete subclause (1) of this clause and insert in lieu the following:

(1) 20. - ADDITIONAL RATES FOR ORDINARY HOURS

A domestic who is required to work on any of his or her ordinary days between 7.00 p.m. and 7.00 a.m. Monday to Friday both inclusive shall be paid at the rate of an extra fifty eight cents per hour for each hour worked.

22. - CAMPING ALLOWANCE

2. Clause 22. – Camping Allowance – Delete subclauses (1) and (2) of this clause and insert in lieu the following:

(1) Employees who are required to camp or live at the site of any work either by direction of the employer, or because no reasonable transport facilities are available to enable them to proceed to and from their homes each day, shall be paid a camping allowance of $106.10 for every complete week they are available for work. Such weekly allowance is to cover the disability of living in a camp, the cost of food and incidentals and any fares incurred at the weekend by men travelling away from camp to their homes and return, but an employee who is absent from duty without the employers approval on the working day immediately prior to or succeeding a weekend shall be paid as provided in the following sentence.

If required to be in camp for less than a complete week, they shall be paid $15.15 per day, including any Saturday or Sunday if in camp and available for work on the working days immediately preceding and succeeding such Saturday and Sunday.

(2) Provided however, where an employer, at his own cost provides the employee with a proper mess room and cooks the employees food free of charge, the allowance provided in subclause (1) hereof shall be reduced to $58.00 per week or $8.30 per day as the case may be.

37. - SHIFT WORK

3. Clause 37. – Shift Work – Delete subclause (5) of this clause and insert in lieu the following:

(5) The employer may operate split shifts within establishments conducting dairy operations. Where a split shift pattern is used an allowance of $4.95 per split shift shall be paid for that day.

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

2005 WAIRC 01316

FIRE BRIGADE EMPLOYEES (WORKSHOPS) AWARD 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	WESTERN AUSTRALIAN FIRE BRIGADES BOARD AND THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 APRIL 2005
FILE NO/S	APPLA 1301 OF 2003
CITATION NO.	2005 WAIRC 01316

Result Application discontinued

Order

WHEREAS an application was lodged in the Commission to vary Clause 19(2)(a) of the *Fire Brigade Employees (Workshops) Award 1983 No A6 of 1981* ("the Award"); and

WHEREAS on 31 March 2005 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conference the applicant advised the Commission that it no longer wished to proceed with the amendment sought and the respondent advised the Commission it did not oppose the matter being discontinued; and

HAVING heard Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and as agent on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Of Workers, Western Australian Branch and Ms C Holmes on behalf of the Western Australian Fire Brigades Board, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

AGREEMENTS—Industrial—Retirements from—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 449 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

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

The Department of Education Services will cease to be a party to the Department of Education Services Agency Specific Agreement 2003 PSA AG 66 of 2002 on and from the 29th day of May 2005.

DATED at Perth this 10th day of May 2005.

[L.S.]

(Sgd.) J.A. SPURLING,
Registrar.

CANCELLATION OF—Awards/Agreements/Respondents—

2005 WAIRC 00975

ABENRA CONSTRUCTIONS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	SIMTEC FAMILY TRUST T/A ABENRA CONSTRUCTIONS **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 260 OF 2003
CITATION NO.	2005 WAIRC 00975

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

Order

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

THAT the *Abenra Constructions/BLPPU and the CMETU Collective Agreement 2001*, AG 66 of 2001 be and is hereby cancelled.

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

2005 WAIRC 01115

ALPO CLAD AUSTRALIA / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	CEILING SYSTEMS & PARTITIONS (2000) PTY LTD T/A ALPO CLAD AUSTRALIA **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 155 OF 2003
CITATION NO.	2005 WAIRC 01115

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

Order

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

THAT the *Alpo Clad/CFMEUW Collective Agreement 2002,* AG 61 of 2002, be and is hereby cancelled.

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

2005 WAIRC 01025

AUSTRALIAN FIRE DOOR COMPANY / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	AUSTRALIAN FIRE DOOR COMPANY PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 171 OF 2003
CITATION NO.	2005 WAIRC 01025

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

Order

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

THAT the *Australian Fire Doors/BLPPU and the CMETU Collective Agreement 2000*, AG 27 of 2000 be and is hereby cancelled.

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

2005 WAIRC 00978

CAMOTECH / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	CAMOTECH PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 256 OF 2003
CITATION NO.	2005 WAIRC 00978

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

Order

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

THAT the *Tech Fab/BLPPU and the CMETU Collective Agreement 1999*, AG 240 of 1999 be and is hereby cancelled.

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

2005 WAIRC 01018

CDJ CARPENTRY AND CEILING CONTRACTORS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	CRAIG & DONNA ALLAN T/A CDJ CARPENTRY & CEILING CONTRACTORS **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 168 OF 2003
CITATION NO.	2005 WAIRC 01018

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *CDJ Carpentry Industrial Agreement,* AG 327 of 1996 and the *CDJ Carpentry/BLPPU and the CMETU Collective Agreement 1999*, AG 228 of 1999 be and are hereby cancelled.

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

2005 WAIRC 00902

COCHRANE'S CONTRACTING SERVICES PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	COCHRANE'S CONTRACTING SERVICES PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 129 OF 2003
CITATION NO.	2005 WAIRC 00902

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

Order

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

THAT the *Cochrane Contracting/CFMEUW Collective Agreement 2001*, AG 220 of 2001 be and is hereby cancelled.

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

2005 WAIRC 01016

CONSPECT CONSTRUCTION / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	CONSPECT CONSTRUCTION PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 166 OF 2003
CITATION NO.	2005 WAIRC 01016

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Conspect Constructions/BLPPU and the CMETU Collective Agreement 1999,* AG 93 of 2000 and the *Conspect Constructions/BLPPU and the CMETU Collective Agreement 2000*, AG 7 of 2001 be and are hereby cancelled.

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

2005 WAIRC 00985

DE FRANCESCH BUILDERS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	DE FRANCESCH BUILDERS PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 250 OF 2003
CITATION NO.	2005 WAIRC 00985

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *De Francesch Builders Industrial Agreement*, AG 156 of 1994 and the *De Francesch/CFMEUW Collective Agreement 2002*, AG 24 of 2002 be and are hereby cancelled.

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

2005 WAIRC 00998

DELKEY HOLDINGS PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	DELKEY HOLDINGS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 204 OF 2003
CITATION NO.	2005 WAIRC 00998

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

Order

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

THAT the *Delkey Holdings Industrial Agreement,* AG 63 of 1995, be and is hereby cancelled.

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

2005 WAIRC 01545

DEPARTMENT OF MARINE AND HARBOURS, HARBOUR MASTERS, RELIEVING HARBOUR MASTERS AND ASSISTANT HARBOUR MASTERS AWARD, 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	MINISTER FOR PLANNING AND INFRASTRUCTURE AND THE AUSTRALIAN MARITIME OFFICERS UNION, WESTERN AREA UNION OF EMPLOYEES
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 13 MAY 2005
FILE NO/S	APPL 502 OF 2005
CITATION NO.	2005 WAIRC 01545

Result	Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 19th April 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Department of Marine and Harbours, Harbour Masters, Relieving Harbour Masters and Assistant Harbour Masters Award, 1984

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

2005 WAIRC 01104

DIAMOND CUT CONCRETE SAWING / CFMEUW INDUSTRIAL AGREEMENT2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	HART NOMINEES (WA) PTY LTD ATF THE HART FAMILY TRUST T/A DIAMOND CUT CONCRETE SAWING **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 140 OF 2003
CITATION NO.	2005 WAIRC 01104

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

Order

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

THAT the *Diamond Cut Concrete/BLPPU Collective Agreement 2001*, AG 92 of 2001 be and is hereby cancelled.

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

2005 WAIRC 01131

DUNMAR AIRCONDITIONING & SHEETMETAL / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	KEITH MARTYKA, CHRISTOPHER MARTYKA & HEATHER MARTYKA T/A DUNMAR AIRCONDITIONING & SHEETMETAL **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 220 OF 2003
CITATION NO.	2005 WAIRC 01131

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

Order

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

THAT the *Dunmar Airconditioning & Sheetmetal Industrial Agreement,* AG 166 of 1995, be and is hereby cancelled.

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

2005 WAIRC 00907

EARTHCARE (WA) PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	EARTHCARE (WA) PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 205 OF 2003
CITATION NO.	2005 WAIRC 00907

Result	Agreement Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	Mr R Webb

Order

HAVING HEARD from Mr Kucera on behalf of the applicant and Mr R Webb on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act, 1979* hereby orders:

THAT the *Earthcare (Australia) Pty Ltd/CFMEUW Collective Agreement 2001*, AG 256 of 2001 be and is hereby cancelled.

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

2005 WAIRC 01546

ENGINEERING TRADES, (FREMANTLE PORT AUTHORITY) AWARD, 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	FREMANTLE PORT AUTHORITY, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND COMMUNICATIONS, ELECTRICAL AND PLUMBING UNION, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 13 MAY 2005
FILE NO/S	APPL 500 OF 2005
CITATION NO.	2005 WAIRC 01546

Result	Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 19th April 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Engineering Trades, (Fremantle Port Authority) Award, 1968.

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

2005 WAIRC 01023

ENTACT CLOUGH / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	ENTACT CLOUGH **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 177 OF 2003
CITATION NO.	2005 WAIRC 01023

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Entact Clough Industrial Agreement*, AG 45 of 1995 and the *Entact Clough Industrial Agreement,* AG 318 of 1995 be and are hereby cancelled.

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

2005 WAIRC 01010

EVANS ENTERPRISES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	THE MKC TRUST T/AS GEORGE EVANS ENTERPRISES **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 183 OF 2003
CITATION NO.	2005 WAIRC 01010

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Evans Enterprises Industrial Agreement*, AG 240 of 1998 and the *Evans Enterprises/BLPPU and the CMETU Collective Agreement 2001,* AG 24 of 2001, be and are hereby cancelled.

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

2005 WAIRC 01041

FREMANTLE STEEL FABRICATION / CFMEUW INDUSTRIAL AGREEMENT2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	FREMANTLE STEEL FABRICATION CO (WA) PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 275 OF 2003
CITATION NO.	2005 WAIRC 01041

Result	Agreements Cancelled
Representation	
Respondent	No appearance

Order

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

THAT the *Fremantle Steel Fabrication Industrial Agreement, AG 7 of 2000 and the Fremantle Steel Fabrication Industrial Agreement AG 6 of 2002* be and are hereby cancelled.

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

2005 WAIRC 00905

GEMSTATE SCAFFOLDING / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	GEMSTATE PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 178 OF 2003
CITATION NO.	2005 WAIRC 00905

Result	Agreement Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	Mr G Humphreys

Order

HAVING HEARD from Mr Kucera on behalf of the applicant and Mr G Humphreys on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act, 1979* hereby orders:

THAT the *Gemstate Scaffolding/BLPPU Collective Agreement 2000*, AG 134 of 2000 be and is hereby cancelled.

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

2005 WAIRC 01118

GFWA CONTRACTING PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	GFWA CONTRACTING PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 157 OF 2003
CITATION NO.	2005 WAIRC 01118

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *GFWA Industrial Agreement 1996*, AG 204 of 1996, the *Bachy Industrial Agreement 1997*, AG 359 of 1997 and the *Bachy / BLPPU & CMETU Industrial Agreement 2001* AG 208 of 2001 be and are hereby cancelled.

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

2005 WAIRC 01045

GLASS WORKS (WA) PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	GLASS WORKS (WA) PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 276 OF 2003
CITATION NO.	2005 WAIRC 01045

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

Order

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

THAT the *Glassworks/BLPPU and the CMETU Collective Agreement 1999* AG 249 of 1999 be and is hereby cancelled.

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

2005 WAIRC 00970

GMF CONTRACTORS PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	GMF CONTRACTORS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 164 OF 2003
CITATION NO.	2005 WAIRC 00970

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *GMF Contractors Industrial Agreement*, AG 62 of 1996 and the *GMF Contractors/BLPPU and the CMETU Collective Agreement 2000*, AG 253 of 2000 be and are hereby cancelled.

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

2005 WAIRC 01547

GOVERNMENT DREDGE MASTERS, MATES AND ENGINEERS AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	MINISTER FOR PLANNING AND INFRASTRUCTURE AND THE AUSTRALIAN MARITIME OFFICERS UNION, WESTERN AREA UNION OF EMPLOYEES
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 13 MAY 2005
FILE NO/S	APPL 503 OF 2005
CITATION NO.	2005 WAIRC 01547

Result	Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 19th April 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Government Dredge Masters, Mates and Engineers Award

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

2005 WAIRC 00926

HIGH RISE PAINTING CONTRACTORS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	HIGH RISE PAINTING CONTRACTORS PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 52 OF 2004
CITATION NO.	2005 WAIRC 00926

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

Order

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

THAT the *High Rise Painting Contractors/BLPPU and the CMETU Collective Agreement 2001*, AG 103 of 2001, be and is hereby cancelled.

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

2005 WAIRC 01094

INTERSTATE CRANE AND TRANSPORT HIRE / CFMEUW INDUSTRIAL AGREEMENT 2002 - 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	INTERSTATE CRANE & TRANSPORT HIRE PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 277 OF 2003
CITATION NO.	2005 WAIRC 01094

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Interstate Crane and Transport Hire Industrial Agreement*, AG 8 of 2000 and the *Interstate Crane and Transport Hire Industrial Agreement*, AG 7 of 2002 be and are hereby cancelled.

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

2005 WAIRC 01096

LINEAR CEILINGS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	LINEAR CEILINGS PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 130 OF 2003
CITATION NO.	2005 WAIRC 01096

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

Order

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

THAT the *Linear Ceilings/BLPPU Collective Agreement 2000*, AG 92 of 2000 be and is hereby cancelled.

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

2005 WAIRC 00910

MALDONADO TILING / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	JM MOLINA & RM MOLINA T/A MALDONADO TILING **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 53 OF 2004
CITATION NO.	2005 WAIRC 00910

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

Order

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

THAT the *Maldonado Tiling/CFMEUW Collective Agreement 2002,* AG 56 of 2002 be and is hereby cancelled.

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

2005 WAIRC 01004

M & W INSTALLATIONS /CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	CAROL WARD & RONALD WARD T/A M&W INSTALLATIONS **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 212 OF 2003
CITATION NO.	2005 WAIRC 01004

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

Order

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

THAT the *M & W Installations/CFMEUW Collective Agreement 2001,* AG 219 of 2001, be and is hereby cancelled.

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

2005 WAIRC 01006

MARBLE & CEMENT WORK (WA) PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	MARBLE & CEMENT WORK (WA) PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 213 OF 2003
CITATION NO.	2005 WAIRC 01006

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

Order

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

THAT the *Marble & Cement Work (On-Site) Industrial Agreement,* AG 266 of 1998, be and is hereby cancelled.

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

2005 WAIRC 01106

MARBLE & GRANITE EXPO / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	MARBLE & GRANITE EXPO PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 141 OF 2003
CITATION NO.	2005 WAIRC 01106

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

Order

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

THAT the *Marble and Granite Expo/CFMEUW Collective Agreement 2002*, AG 195 of 2002 be and is hereby cancelled.

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

2005 WAIRC 00914

MIRAGE INDUSTRIES PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	MIRAGE INDUSTRIES PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 7 OF 2004
CITATION NO.	2005 WAIRC 00914

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

Order

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

THAT the *Mirage Industries/BLPPU and CMETU Collective Agreement 1999*, AG 103 of 2000, be and is hereby cancelled.

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

2005 WAIRC 00988

MIRVAC CONSTRUCTIONS (WA) PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	MIRVAC CONSTRUCTIONS (WA) PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 241 OF 2003
CITATION NO.	2005 WAIRC 00988

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

Order

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

THAT the *Mirvac Constructions (WA) Pty Ltd Industrial Agreement*, AG 47 of 2002 be and is hereby cancelled.

(Sgd.) W S COLEMAN,
Chief Commissioner.

[L.S.]

2005 WAIRC 01108

MURPHY PLANT HIRE & DEMOLITION / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	MANNOR HOLDINGS PTY LTD T/A MURPHY PLANT HIRE **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 142 OF 2003
CITATION NO.	2005 WAIRC 01108

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

Order

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

THAT the *Murphy Plant Hire & Demolition/BLPPU Collective Agreement 2000*, AG 91 of 2000 be and is hereby cancelled.

(Sgd.) W S COLEMAN,
Chief Commissioner.

[L.S.]

2005 WAIRC 00899

NAUS BUILDING PRODUCTS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** NAUS FIRE PROTECTION PTY LTD T/A NAUS BUILDING PRODUCTS **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 172 OF 2003
CITATION NO.	2005 WAIRC 00899

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Naus Building Products Industrial Agreement*, AG 251 of 1997 and the *Naus Fire Protection/BLPPU and the CMETU Collective Agreement 1999*, AG 198 of 1999 be and are hereby cancelled.

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

2005 WAIRC 010302

NU-TEX CONSTRUCTION SERVICES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** SKYWAY CONSTRUCTION SERVICES PTY LTD AND THE SKELTON FAMILY TRUST T/A NU-TEX CONSTRUCTION SERVICES **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 179 OF 2003
CITATION NO.	2005 WAIRC 01032

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

Order

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

THAT the *Nu-Tex Constructions/BLPPU Collective Agreement 2001*, AG 62 of 2001 be and is hereby cancelled.

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

2005 WAIRC 00993

PARA-QUAD INDUSTRIES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	THE PARAPLEGIC-QUADRAPLEGIC ASSOCIATION OF WA (INC) T/A PARA-QUAD INDUSTRIES **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 235 OF 2003
CITATION NO.	2005 WAIRC 00993

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Paraquad Industries Industrial Agreement,* AG 43 of 1998 and the *Paraquad Industries/BLPPU and the CMETU Collective Agreement 2000*, AG 229 of 2000 be and are hereby cancelled.

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

2005 WAIRC 01008

PERTH ASBESTOS REMOVAL CO PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	PERTH ASBESTOS REMOVAL CO PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 214 OF 2003
CITATION NO.	2005 WAIRC 01008

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

Order

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

THAT the *Perth Asbestos Removal Company/BLPPU and the CMETU Collective Agreement 2001,* AG 261 of 2001, be and is hereby cancelled.

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

2005 WAIRC 01135

S & L DEMOLITION / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	HAYSTEAD HOLDINGS T/A S & L DEMOLITION
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 223 OF 2003
CITATION NO.	2005 WAIRC 01135

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *PS & L Demolition Industrial Agreement,* AG 84 of 1995 and *S & L Salvage / BLPPU Collective Agreement 2001* AG 79 of 2001 be and are hereby cancelled.

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

2005 WAIRC 00932

QUAKE HOLDINGS PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	QUAKE HOLDINGS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 187 OF 2003
CITATION NO.	2005 WAIRC 00932

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Quake Holdings Industrial Agreement*, AG 183 of 1994, *Quake Holdings Industrial Agreement*, AG 152 of 1995 and the *Quake Holdings Pty Ltd/BLPPU and the CMETU Collective Agreement 2000,* AG 218 of 2000, be and are hereby cancelled.

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

2005 WAIRC 01543

OUTSTATION PILOT CREWS - HARBOUR AND LIGHT DEPARTMENT AWARD, 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	DEPARTMENT OF PLANNING AND INFRASTRUCTURE AND THE AUSTRALIAN MARITIME OFFICERS UNION - WESTERN AREA UNION OF EMPLOYEES
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 13 MAY 2005
FILE NO/S	APPL 501 OF 2005
CITATION NO.	2005 WAIRC 01543

Result Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 19th April 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Outstation Pilot Crews – Harbour and Light Department Award, 1981

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2005 WAIRC 01122

READ BROS PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	READ BROS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 159 OF 2003
CITATION NO.	2005 WAIRC 01122

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

Order

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

THAT the *Reads Riggers & Erectors / BLPPU Collective Agreement 2000,* AG 209 of 2000 be and is hereby cancelled.

[L.S.]

(Sgd.) W S COLEMAN,
Chief Commissioner.

2005 WAIRC 01020

REEVES ENGINEERING / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	REEVES STEEL FABRICATION PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 169 OF 2003
CITATION NO.	2005 WAIRC 01020

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

Order

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

THAT the *Reeves Steel Fabrication/BLPPU and the CMETU Collective Agreement 2000*, AG 113 of 2000 be and is hereby cancelled.

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

2005 WAIRC 00921

ROOF SAFE PTY LTD / CFMEUW INDUSTRIALS AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	ROOF SAFE PTY LTD (STANDARD) **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 43 OF 2004
CITATION NO.	2005 WAIRC 00921

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *Roof Safe Industrial Agreement*, AG 232 of 1995, and the *Roof Safe/CFMEUW Collective Agreement 2002*, AG 104 of 2002 be and are hereby cancelled.

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

2005 WAIRC 00991

SLICK FIX PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	SLICK FIX PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 238 OF 2003
CITATION NO.	2005 WAIRC 00991

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

Order

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

THAT the *Slick Fix/BLPPU and the CMETU Collective Agreement 2000*, AG 183 of 2000 be and is hereby cancelled.

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

2005 WAIRC 01044

SUBIACO MARBLE & GRANITE / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	SUBIACO MARBLE & GRANITE PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 167 OF 2003
CITATION NO.	2005 WAIRC 01044

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

Order

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

THAT the *Bernini Stone and Tiles Industrial Agreement*, AG 224 of 1997, be and is hereby cancelled.

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

2005 WAIRC 00205

UNITED CRANE HIRE ENTERPRISE AGREEMENT 2001, AG 166 OF 2001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** UNITED CRANE HIRE PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 9 OF 2004
CITATION NO.	2005 WAIRC 00205

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

Order

HAVING HEARD from Mr T Kucera (of counsel) on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* hereby orders -

THAT the *United Crane Hire Enterprise Agreement 2001*, AG 166 of 2001, be and is hereby cancelled.

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

2005 WAIRC 00928

ULTRA SPEED RIGGING & CONSTRUCTION / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** ANTHONY FOREMAN & MICHAEL FISHER T/A ULTRA SPEED RIGGING & CONSTRUCTION **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 182 OF 2003
CITATION NO.	2005 WAIRC 00928

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

Order

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

THAT the *Ultra Speed Rigging/BLPPU Collective Agreement 2001*, AG 98 of 2001, be and is hereby cancelled.

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

2005 WAIRC 01099

WACI WALL AND CEILING CONTRACTORS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	AUSTRALASIA GYPSUM PTY LTD T/A WACI WALL & CEILING CONTRACTORS **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 131 OF 2003
CITATION NO.	2005 WAIRC 01099

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

Order

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

THAT the *WACI Wall and Ceiling Contractors/BLPPU Collective Agreement 2000*, AG 265 of 2000 be and is hereby cancelled.

(Sgd.) W S COLEMAN,
Chief Commissioner.

[L.S.]

2005 WAIRC 01101

WA PROJECT CARPENTERS / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	HENNESSEY (WA) PTY LTD T/A WA PROJECT CARPENTERS **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 132 OF 2003
CITATION NO.	2005 WAIRC 01101

Result	Agreements Cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

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

THAT the *WA Project Carpentry Industrial Agreement*, AG 198 of 1997 and the *WA Project Carpenters/BLPPU and the CMETU Collective Agreement 2001*, AG 199 of 2001 be and are hereby cancelled.

(Sgd.) W S COLEMAN,
Chief Commissioner.

[L.S.]

2005 WAIRC 01000

WEST COAST BUILDING SERVICES PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	WEST COAST BUILDING SERVICES PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 206 OF 2003
CITATION NO.	2005 WAIRC 01000

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

Order

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

THAT the *West Coast Building Services Industrial Agreement*, AG 136 of 1998, be and is hereby cancelled.

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

2005 WAIRC 01002

WESTWARD SCAFFOLDING PTY LTD / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	WESTWARD SCAFFOLDING PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 207 OF 2003
CITATION NO.	2005 WAIRC 01002

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

Order

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

THAT the *Westward Rigging & Scaffolding/BLPPU Collective Agreement 2000,* AG 180 of 2000, be and is hereby cancelled.

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

2005 WAIRC 01029

WILDFLORA LANDSCAPES / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	WF LANDSCAPE INDUSTRIES PTY LTD T/A WILDFLORA LANDSCAPES **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 262 OF 2003
CITATION NO.	2005 WAIRC 01029

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

Order

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

THAT the *Wildflora Landscapes Industrial Agreement*, AG 235 of 1997 be and is hereby cancelled.

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

NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 77 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "DEEP GREEN LANDSCAPING / CFMEUW INDUSTRIAL AGREEMENT 2005-2005"

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

1. DEFINITIONS

The following terms will have the following meanings when used in this Agreement:

. . .

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

. . .

"Employer" means, subject to clause 2, The Trustee for the Rose Landscape Trust t/a Deep Green Landscaping ABN 59 455 407 033;

. . .

2. PARTIES AND PERSONS BOUND

This Agreement will be binding on the Employer and any successor, assignee or transmittee (whether immediate or not) to or of the business or any part of the business of the Employer, including an entity that as acquired or taken over the business or part of the business of the Employer; the Union and all employees of the Employer who are or are eligible to be members of the Union.

3. APPLICATION

3.1 This Agreement will apply to all employees of the Employer, including junior workers and unregistered apprentices, engaged in work on, in connection with, or in any way incidental to: building, civil works, construction, alteration, maintenance, repair or demolition of or on; buildings or other structures of any kind whatsoever.

3.2 This Agreement will apply in Western Australia and, unless otherwise provided by agreement between the Parties, the Christmas & Cocos (Keeling) Islands Groups only. There are approximately 3 employees covered by this Agreement.

3.3 The term and conditions of this Agreement are a condition of employment and must be explained to all new employees by the Employer prior to the commencement of their employment.

4. RELATIONSHIP TO PARENT AWARD

4.1 This Agreement is supplementary to and must be read and interpreted wholly in conjunction with the Award.

4.2 Unless otherwise provided, if there is any inconsistency between the Award and an express provision of this Agreement, the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J.A. SPURLING,
[L.S.] Registrar.

5 May 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. P 7 OF 2005

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989"

NOTICE is given that an application has been made to the Commission by "The Civil Service Association of Western Australia Incorporated" under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the variation which relate to area of operation or scope are published hereunder:-

Add to existing " SCHEDULE A. LIST OF RESPONDENTS"

"Crime and Corruption Commission" after that of "Chief Executive Officer, Curriculum Council" and before that of "Dental Health Services".

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J.A. SPURLING,
[L.S.] Registrar.

28 April 2005.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 78 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "HHH TRANSPORT / CFMEUW HAZELMERE INDUSTRIAL AGREEMENT 2004-2005"

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

1. DEFINITIONS

The following terms will have the following meanings when used in this Agreement:

. . .

"Award" means the Engine Drivers (Building and Steel Construction) Award as amended from time to time;

. . .

"Employer" means, subject to clause 2, HHH Transport Australia Pty Ltd ACN 083 061 714;

. . .

2. PARTIES AND PERSONS BOUND

This Agreement will be binding on the Employer and any successor, assignee or transmittee (whether immediate or not) to or of the business or any part of the business of the Employer, including an entity that as acquired or taken over the business or part of the business of the Employer; the Union and all employees of the Employer who are or are eligible to be members of the Union.

3. APPLICATION

3.1 This Agreement will apply to all employees of the Employer, engaged in work on, in connection with, or in any way incidental to; building, civil works, construction, alteration, maintenance, repair or demolition of or on; buildings or other structures of any kind whatsoever.

3.2 This Agreement will apply to employees working out of the Hazelmere depot. There are approximately 1 employees covered by this Agreement.

3.3 The term and conditions of this Agreement are a condition of employment and must be explained to all new employees by the Employer prior to the commencement of their employment.

4. RELATIONSHIP TO PARENT AWARD

4.1 This Agreement is supplementary to and must be read and interpreted wholly in conjunction with the Award.

4.2 The terms and conditions of the Award as at 30 December 2002 are expressly preserved by this Agreement as if the Award were set out in full in this Agreement and will be binding upon the parties during the currency of this

Agreement by operation of this Agreement, if not otherwise. Where this Agreement is silent, the terms of the Award as at 30 December 2002 will apply, unless contrary to the law, provided that any variations to the Award after 30 December 2002 resulting in increases in allowances and improvements in conditions to the benefit of employees will also apply.

4.3 Unless otherwise provided, if there is any inconsistency between the Award and an express provision of this Agreement, the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J.A. SPURLING,
Registrar.

[L.S.]

5 May 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. 338 OF 2005

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002"

NOTICE is given that an application has been made to the Commission by The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the variation which relate to scope and area are published hereunder:-

Vary "SCHEDULE III- AWARD CLASSIFICATIONS" by adding the following at the end of SCHEDULE III:-

6.	Train controller	A person at this level will be competent to perform train control duties over all or any part of the Company's rail road
7.	Train Co-Ordinator	A person at this level will be competent to co-ordinate train movements and organise all work at and around a junction within the Company's rail road
8.	Crew Development Officer	A person at this level will be competent to instruct and develop the skills of engine drivers in all aspects of the operation of trains on the Company's rail road
9.	Rail Supervisor	A person at this level will be competent to supervise all aspect of rail road operations on the whole of or any part of the Company's rail road.

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J.A. SPURLING,
Registrar.

[L.S.]

9 May 2005.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 65 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "LHMU – iPLEX PIPELINES (WAREHOUSE) UNION RECOGNITION AGREEMENT 2005"

NOTICE is given that an application has been made by The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

4. APPLICATION OF THIS AGREEMENT

4.1 For the purposes of this Agreement, 'Team Member' means an employee on the payroll of iPlex Pipelines Pty Ltd who works within its warehouse operations.

4.2 This Agreement shall apply to iPlex Pipelines Pty Limited located at 25 King Edward Road Osborne Park WA 6017, in respect of all Team Members employed therein who are members of or eligible to be members of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.

4.3 . . .

4.4 Relationship to Award

This Agreement operates, and must be read and interpreted, wholly in conjunction with the Plastic Manufacturing Award 1997 ("the Award").

4.5 This Agreement applies to approximately 8 employees.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd.) J.A. SPURLING,
Registrar.

[L.S.]

13 April 2005

INDUSTRIAL MAGISTRATE—Complaints before—

2005 WAIRC 01518

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CFMEU MINING & ENERGY DIVISION, WA DISTRICT BRANCH
	CLAIMANT
	-v-
	TIWEST PTY LTD (ACN 009 343 364)
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	WEDNESDAY, 23 MARCH 2005
FILE NO.	M 243 OF 2004
CITATION NO.	2005 WAIRC 01518

REPRESENTATION	
APPLICANT	MR J BOOTS (OF COUNSEL) INSTRUCTED BY *MESSRS BOOTS & CO LAWYERS*
RESPONDENT	MR P VAN HATTEM (OF COUNSEL) AND MR D CRONIN (OF COUNSEL) INSTRUCTED BY *MESSRS FREEHILLS BARRISTERS & SOLICITORS*

REASONS FOR DECISION

Claim

1 By its claim filed on 20 September 2004 the Claimant seeks the imposition of monetary penalties on the Respondent for its alleged contravention of section 49M(1) of the *Industrial Relations Act 1979* (the Act) and an injunction to prevent further breaches of that provision.

2 The alleged contraventions are set out in paragraphs 3, 4 and 5 of the schedule to the claim, as amended during the course of the hearing on 2 March 2005. I set out those paragraphs:

i.. The Respondent employer permitted the authorised officials of the Applicant Union to enter the site but not to speak with members and eligible members of the Applicant Union at the place where the employees take their meal breaks during the employees' meal breaks. The Applicant Union asserts that this is contrary to s. 49H(1) of the Act and a contravention of s. 49M(1) of the Act.

ii. Further, the Respondent employer refused the authorised officials of the Applicant Union to discuss safety issues with employees at the employees' work station. The Applicant Union asserts this is contrary to s. 49I(1) of the Act and a contravention of s. 49M(1) of the Act.

iii. And further, the Respondent employer refused the authorised officials to investigate breaches of the Occupational Health and Safety Act 1984 (WA) by discussing the same with the employees at the employees' work station, and the Applicant Union asserts this is contrary to s. 49I(1) of the Act and a contravention of s. 49M(1) of the Act.

Response

3 By its response filed on 13 October 2004 the Respondent denied the alleged contraventions but did not give any particulars in that regard.

4 Statutory Provisions

5 The relevant provisions are contained in Division 2G of the Act which is headed "*Right of entry and inspection by authorised representatives*". I set out the relevant provisions within that Division.

6 *49G. Interpretation*

7 *In this Division —*

8 *"**authorised representative**" means a person who holds an authority in force under this Division;*

9 *"**relevant employee**", when used in connection with the exercise of a power by an authorised representative of an organisation, means an employee who is a member of the organisation or who is eligible to become a member of the organisation.*

10 *49H. Right of entry for discussions with employees*

(1) An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of holding discussions at the premises with any of the relevant employees who wish to participate in those discussions.

(2) If an award, order or industrial agreement that extends to the relevant employees makes provision as to entry onto premises by an authorised representative and —

(a) does not require notice to be given by the representative; or

(b) requires a specified period of notice to be given by the representative

the authorised representative is not required to give notice under this section.

If subsection (2) does not apply, the authorised representative is not entitled to exercise a power conferred by this section unless the authorised representative has given the employer of the employees concerned at least 24 hours' written notice.

11 It is common ground that section 49H(2) did not apply.

12 Section 49I, so far as it is material, provides:

13 *49I. Right of entry to investigate breaches*

(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 this Act, the Long Service Leave Act 1958, the

MCE Act, 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) For the purpose of investigating any such suspected breach, the authorised representative may —

(a) subject to subsections (3) and (6), require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records of employees or other documents kept by the employer that are related to the suspected breach;

(b) make copies of the entries in the employment records or documents related to the suspected breach; and

(c) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach.

14 Section 49J(1) provides for the Registrar, on application by the secretary of an organisation of employees, to issue an authority for the purpose of the Division to a person nominated by the secretary. It is not in dispute in this matter that Mr Gary Wood and Ms Kathryn Heiler at the material time held valid authorities.

15 "*Organisation*" is defined in section 7(1) of the Act to mean "*an organisation that is registered under Division 4 of Part II*" (of the Act). Section 58 of the Act provides for the registration of an organisation. By section 60 of the Act an organisation shall, upon and during registration, become and be for the purposes of the Act a body corporate by its registered name, having perpetual succession. An organisation can sue and be sued.

16 It will be noted that sections 49H and 49I confer a right upon an authorised representative of an organisation to enter any premises where relevant employees work for the purposes of holding discussions with employees and investigating suspected breaches of specified legislation, an award, order, industrial agreement or employer-employee agreement.

17 Section 49M specifies the conduct which gives rise to civil penalties. It provides:

18 *49M. Conduct giving rise to civil penalties*

(1) The occupier of premises must not refuse, or intentionally and unduly delay, entry to the premises by a person entitled to enter the premises under section 49H or 49I.

(2) A person must not intentionally and unduly hinder or obstruct an authorised representative in the exercise of the powers conferred by this Division.

(3) A person must not purport to exercise the powers of an authorised representative under this Division if the person is not the holder of a current authority issued by the Registrar under this Division.

19 Section 49O provides that a contravention of section 49M is not an offence but is a civil penalty provision for the purposes of section 83E of the Act. A contravention of a civil penalty provision renders a person liable to a monetary penalty and/or injunctive control (See section 83E(1) and (2))

20 Section 83E(6) provides:

(6) An application for an order under this section may be made by —

(a) a person directly affected by the contravention or, if that person is a represented person, his or her representative;

(b) an organisation or association of which a person who comes within paragraph (a) is a member;

(c) the Registrar or a Deputy Registrar; or

(d) an Industrial Inspector.

The Facts

21 On 23 August 2004 Gary Wood and Kathryn Heiler working for The Construction, Forestry, Mining and Energy Union of Workers (CFMEU) sent a facsimile transmission to Tony Martin of "Tiwest" concerning the Kwinana "*site*". I set out the narrative text of the message contained in the facsimile transmission:

RE: Right of Entry

You are advised that the above named CFMEU officials hold a current permit issued pursuant to section 49J of the Industrial Relations Act1979 ("the Act").

This fax gives you notice that the above named CFMEU officials intend to exercise right of entry, by visiting the site nominated above in order to speak with members and eligible members from/on:

11.30 am Tuesday 24 August 2004

The purpose of entry to the premises is to hold discussions with employees.

Any queries in relation to this matter should be addressed to Gary Wood on

GARY WOOD & KATHRYN HEILER

22 The site referred to is a pigment plant at Kwinana where synthetic rutile and other raw materials are processed to produce white pigment for use in paints and other products. The production process is hazardous by its very nature. There are many potential hazards on site including exposure to acids and other chemicals; exposure to harmful gasses and exposure to moving vehicles and the moving parts of plant and equipment. There are both audible and visible alarms in case of difficulty or emergency. Accordingly persons who have not completed a full safety induction are not permitted to move about the site unescorted. Those entering the site are required to wear protective clothing, helmets, goggles and footwear. They are issued with a respirator and instructed concerning the use of the same.

23 The plant is located within a large site containing an administration area, maintenance area, two production areas and an amenities building containing lockers, showers and changing rooms. Located in the Southeastern corner of the site is a third party facility, being a chemical factory.

24 The operation on the site runs continuously facilitated by two twelve-hour shifts over twenty-four hours. At the material time about seventy people worked at the site. Workers on site receive a paid meal break, which is usually taken in one of the fifteen crib rooms scattered throughout the site. Meal breaks are taken at times which are suitable having regard to operational requirements.

25 On 23 August 2004 the facsimile message sent by Mr Wood and Ms Heiler came to the attention of Ms Karen Franz, a Human Resources Adviser at the Kwinana site. She consequently contacted Mr Wood and discussed with him the proposed visit. She

thereafter made enquiries as to the availability of a suitable venue for Mr Wood and Ms Heiler to meet with relevant employees and to have discussions. She located an office at the North end of the administration building to be used for the requisite purpose. She regarded the office to be suitable because it was adequately furnished and permitted privacy. Employees could enter and leave the office without having to walk through the administration building, which some employees might have found intimidating.

26 Leading up to the arrival of Mr Wood and Ms Heiler, Ms Franz contacted supervisors to inform them of the forthcoming attendance of the union representatives. One of those contacted was Mr Graham Ireland who was in turn instructed to advise all supervisors in production areas 1 and 2 about the attendance and availability of the union representatives. Mr Ireland duly advised the supervisors in those sections that they should inform employees within those sections of the fact that union representatives would be attending and would be available to meet with employees. Ms Franz and Mr Ireland were both of the view that only a very small number of employees at the site were eligible for membership of the union and might be interested in meeting with union representatives.

27 At about 11.30 am on 24 August 2004 Mr Wood and Ms Heiler attended the security gate immediately outside the site. Ms Franz was informed by security of their arrival. She left the administration building and exited the site in order to meet with the representatives and escort them onto the site. Each of Mr Wood and Ms Heiler received respirators and were instructed in their use and thereafter were issued with entry cards. They were then accompanied to the administration area.

28 Both Mr Wood and Ms Heiler testified that they spoke to Ms Franz in the foyer of the administration building at which place Mr Wood requested that they be permitted to see members at their place of work and he specifically asked to be able to meet with members at the crib room. Both Mr Wood and Ms Heiler testified that Ms Franz informed them that such was not possible. Mr Wood said that he repeatedly asked to be permitted to go onto site, which was refused. Ms Heiler too made the same requests, which were similarly refused. Ms Franz said it was not possible for them to go to work areas given that the site was a chemical plant. She is alleged to have said that there was no one available to escort them and that she was too busy to do so. She told them that a meeting room had been made available for them to meet with any employee who wanted to speak to them.

29 Mr Wood was concerned with what had transpired and accordingly sought legal advice by telephoning a lawyer. He was advised that there was little that they could do in the circumstances. Both he and Ms Heiler accepted that they could not do anything at that time and therefore reluctantly proceeded to set up in what was described as a "*dusty, dingy room*". Subsequently a couple of members arrived to see them. A couple of other curious employees just dropped in to see what they were doing.

30 Ms Heiler testified that one of the reasons for attending the site was to discuss with relevant employees health and safety issues and also to investigate possible breaches of legislation, which governed the same. During their discussions with workers at the site a complaint was received concerning the safety risks posed by inadequate manning levels. Consequently it was decided to ask Ms Franz to be permitted to inspect the work area to investigate such concerns. Mr Wood and Ms Heiler allege that Ms Franz initially refused their request but about twenty minutes later had a change of heart and agreed to accompany Mr Wood and Ms Heiler on a tour of the site in the company of Mr Ireland. Ms Franz's evidence is that she did not refuse but wanted to know the specific detail of the suspected breaches. Her evidence is that she then went to contact Mr Ireland to escort the authorised representatives around the site. Accordingly the four of them subsequently walked through the site. According to Mr Wood and Ms Heiler they specifically asked to be taken to see members at their work places and also asked to be taken to specific places within the site but were not taken to the places requested. Consequently they were not able to see or speak to employees and their tour of the site was little more than a walk-through of short duration. Ms Franz and Mr Ireland on the other hand testified that they took Mr Wood and Ms Heiler to each particular location requested and that they were not refused entry to any part of the site they had asked to be taken to with the exception of the crib rooms. They were not denied an opportunity to inspect or view anything they had asked to see.

31 It is common ground that the tour was completed at about 2.30 pm and Mr Wood and Ms Heiler left the site at about 2.40 pm. Later that afternoon Mr Wood and Ms Heiler met just outside the perimeter of the site with fifteen or twenty employees, some of whom became quite vocal during the course of their meeting.

32 Where there is a direct conflict in the evidence, I prefer the evidence of Mr Wood and Ms Heiler to that of Mr Ireland and Ms Franz. Mr Ireland was rather too careful in the delivery of his evidence. He lacked spontaneity and was far too considered in his approach. The same can be said of Ms Franz. Ms Franz in particular was unimpressive under cross-examination. She was most hesitant. She was not forthright in answering questions. She did not answer some questions directly. Her recollection of the events is poor. Answers given in cross-examination revealed that she does not now recall aspects of what occurred and what was said. Ms Heiler too, albeit to a lesser extent, suffers from a degree of lack of recollection of certain matters. The same cannot be said of Mr Wood. He was by far the most impressive of the witnesses. He was spontaneous in answering and came across as being truthful. I accept his testimony as being accurate. I prefer his version of events to those of other witnesses on issues in direct conflict.

Considerations under sections 49H and 49I

33 The right of entry provisions in sections 49H and 49I of the Act are enabling provisions. They give power to authorised representatives to do those things specified within those provisions. The term "*entry*" connotes more than the physical entry into premises, but rather must be taken to mean, within the context of section 49M(1) of the Act, an entry for the purpose of doing the things specifically sanctioned by sections 49H and 49I.

Claimant's submissions

34 The Claimant submits that sections 49H and 49I should be interpreted to give full effect to the rights conferred. To do so, those sections should be read in conjunction with the objects of the Act found at section 6 and in particular the following subsections thereof which provide:

> *(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;*
>
> *(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes; and*
>
> *(f) to encourage the democratic control of organisations so registered and the full participation by members of such an organisation in the affairs of the organisation;*

35 It is suggested that when that is done the inevitable conclusion that flows is that the authorised representative may enter the employer's premises, being the whole of the premises and not a room designated by the employer, and may, for the purposes set out in sections 49H and 49I, interview employees at their workstation.

36 The Claimant says that the intention of section 49H is to enable registered organisations to communicate with and service members in relation to matters concerning their employment and/or union affairs and to recruit new members. That intention is thwarted if the employer can dictate where the representative will go and where discussions will be held. Such an approach effectively renders section 49H otiose and of no effect.

37 The proper construction of section 49H was examined in a decision of the Full Bench of the Western Australian Industrial Relations Commission in *The Most Reverend B Hickey, Archbishop of Perth v ISSOA 83 WAIG 3953*. His Honour the President said at page 3955 (paras 27 – 31):

> *It was not contended to the Full Bench, and certainly not seriously, that entries to the school premises during lunch hour were not entries "during working hours" within the meaning of s49H(1) of the Act. In any event, I would, if necessary, apply the authority relating to the same words in the Workplace Relations Act 1996 (as amended), s285C, that the words refer to the period of time during which the premises are open for work and ordinarily occupied for that purpose, and does not include a time when employees are merely on the premises to work overtime (see AMIEU v Australian Food Corporation Pty Ltd (2001) 111 IR 425).*
>
> *What is embraced by the word "discussions" with employees is not easy to define. "Discussions" with employees are, in my opinion, not meetings, but discussions may involve more than two persons, and certainly might include a debate (see AMIEU v Thomas Borthwick and Sons (Pacific) Ltd (1001) 39 IR 379). That point was not in issue in these proceedings either and I make no judgement on the issue (see Re Steelworks Employees and Others – Port Kembla Awards [1962] AR 334 at 373 (NSW IC) per Richards, Beattie and Kelleher JJ – which goes a little further).*
>
> *There is a useful discussion of these sorts of these provisions, too, in Re An Application by the Director of Brisbane Catholic Education Office Re J S Shepley (1987) volume 29 number 4 AILR 61, where reasons for decision are given by Birch C of the Queensland Industrial Commission (as it was then called). Whilst I have not been able to examine the precise terms of the then relevant Queensland legislation, some of the observations made by Birch C are relevant to the Act in its own terms.*
>
> *That case is authority, if it were needed, for the proposition that authorised representatives exercising a right of entry have a right to go where teachers are when they are not actually working, but during working hours and to seek to hold discussions and to hold discussions with those who wish to participate in such discussions and not to do so with those who do not. That as a matter of evidence seems to occur to a great extent without disputation in the schools the subject of this application.*
>
> *The crux of this matter was that the ISSOA was not seeking to hold discussions with relevant employees in school staffrooms alone. (I use the word "staffroom" in these reasons to include lunchrooms, tearooms or other rooms of a similar kind where teachers gather during the working day). It was seeking that its representative not be excluded from such places for the purposes of s49H discussions. The order which was made met this application in that it stated the obvious, namely that school premises could be entered, and that this did not exclude school staffrooms.*

38 The construction of section 49H was also examined in the matter of *The Construction, Forestry, Mining and Energy Union of Workers v SNC-Lavalin (SA) Inc and Another 85 WAIG 139*, a decision of Commissioner Kenner arbitrating a dispute referred to the Commission pursuant to section 44(9) of the Act because it was alleged that the employer had denied entry to an authorised representative.

39 At page 143 (paras 35- 43) of his decision Commissioner Kenner said:

> *As I observed in Transfield Services, the statutory scheme in Divisions 2F and 2G of the Act is in similar terms to the right of entry provisions contained in Division 11A of the WR Act. The statutory scheme in relation to right of entry under the Act as it now is, seems to seek to balance the legitimate interests of both employee organizations and employers. In relation to employee organizations, the right of entry provision enables accredited representatives to enter employer premises, for the purposes of holding discussions under s 49H. Presumably, the intention of the legislature in relation to a provision of this kind, is to enable registered organizations under the Act, to communicate with and to service existing members in relation to matters concerning their employment or union affairs, and additionally, no doubt to enable an opportunity to recruit new members.*
>
> *Additionally, the right of entry prescribed by s 49I of the Act, perhaps as complimentary to the scheme in Divisions 2F and 2G of the Act as a whole, seems to acknowledge the legitimate role of registered organizations in the process of observance and enforcement of awards, industrial agreements and other legislation relevant to the workplace, as recognized in a long line of authority of industrial courts and tribunals throughout the various jurisdictions.*
>
> *The rights of employee organizations under the scheme, are balanced against those of employers, as in recognition that a right of entry to an employer's premises can involve a substantial interference with an employer's rights otherwise possessed, a power exists under s 49J of the Act, for the Commission to suspend or revoke an authorized representative's authority to enter premises in the event that such a representative acts in an improper manner or intentionally and unduly hinders an employer or employees during their working time. In this regard, by s 49N of the Act, the Commission is given a general supervisory power in relation to matters arising under Divisions 2F and 2G, as long as it does not make any award, order or register an industrial agreement, containing provisions additional to or inconsistent with the statutory scheme.*
>
> *Also in my view, the statutory scheme under the Act in relation to right of entry, must be interpreted consistent with the principal objects of the Act, in particular those contained in ss 6 (ab), (ad), (af), (d), and (f).*
>
> *In my opinion, as a matter of construction, the approach adopted by the applicant as to the meaning and effect of s 49H is to be preferred to that suggested by the respondents. That is, the focus of the inquiry when one considers the operation and effect of s 49H is the relevant "purpose" for which a right of entry is sought to be exercised. It seems to me that the same rationale of construction, would also apply to s 49I of the Act, in relation to the right of entry to investigate the various breaches, set out in this section. In my view, as a matter of plain language, taking the words used in s 49H(1) on their ordinary and natural meaning, the words "for the purpose of" control and condition the operation of the preceding words in the subsection, by which the right to enter is invoked.*
>
> *What s 49H does in my opinion, is enable an authorised representative, to enter premises during working hours to hold discussions with relevant employees, who wish to participate in those discussions. There is no obligation on any relevant employee to participate in those discussions. Whether a relevant employee wishes to do so or not, is a matter entirely for him or her.*

If the contention of the respondents as to the proper construction of s 49H were correct, it seems to me that there would be such barriers to a right of entry, for discussion purposes, to effectively render s 49H otiose and of no effect. That is, it is difficult to see in practical terms, if an accredited representative of an organization cannot enter relevant premises for the purposes of holding discussions, without first identifying the relevant employees who wish to participate in those discussions, how such matters could be ascertained. It seems unlikely that parliament would have intended that the employer would effectively maintain an ongoing survey of employee wishes in this regard, about which accredited representatives could be informed, on seeking to exercise a right to enter to hold discussions. Furthermore, such a construction is predicated upon the assumption, that employees would be sufficiently informed and aware of their rights, in relation to the expression of such a desire.

Given the general purpose of right of entry provisions, including those existing in the Act prior to the legislative amendments in August 2002, such a construction in my opinion, would have been very unlikely in the ordinary course. In that regard, it is appropriate, as the applicant did in its written submissions, to have regard to the relevant parliamentary debate leading to the enactment of Divisions 2F and 2G of the Act, as an aid to construction, having regard to s 18 of the Interpretation Act 1984 (WA) and as is permitted by s 19 of that Act. In that regard, it seems to be the case that the intention was to repeal the existing provisions in ss 49AB and 49B of the Act, which relied upon provisions in awards, industrial agreements and orders of the Commission, and replace them with comprehensive provisions similar to those contained in the WR Act. Given that the rights of entry under the Act prior to its amendment, were conditioned by such rights existing in awards, industrial agreements and orders of the Commission, and no such instruments that the Commission is aware of, required the ascertainment of the expressed wishes of employees as a condition precedent to entering premises, it would be a surprising result, if the new provisions were intended to erode rights which formerly existed.

Furthermore, some assistance can be gained from the terms of the right of entry provisions contained in the WR Act as set out in Division 11A, particularly section 285C dealing with the right to enter to hold discussions, which is in similar terms as s 49H of the Act. Whilst great weight cannot be placed on it, some support for the "purpose" focus of the interpretation of s 49H, can be drawn from the fact that a proposed amendment to the terms of Division 11A of the WR Act, to restrict right of entry to accredited representatives (permit holders under the WR Act) who had been expressly invited or requested by employees to enter premises, was not favored by the Commonwealth Senate: See Senate Employment, Workplace Relations, Small Business and Education Legislation Committee "Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999"1999. Presumably, if the contention of the respondents was correct, then such an amendment would be unnecessary.

40 Sections 285B and 285C of the *Workplace Relations Act 1996* provide similar, although not identical, powers to those contained in sections 49H and 49I of the Act. In *ANZ Banking Group Ltd v FSU Print 951766* the decision of the Full Bench of the Federal Commission was delivered on 8 September 2004. The issue before the Commission was the right to interview employees at their workstation pursuant to section 285B. At paras 39-43 of the Commission's decision it said:

[39] It is clear that right of entry under s.285B (or C) of the Act is not at large. It is for specified purposes and subject to specified conditions. In that statutory context, it can be concluded that the conditions or limitations upon the right of entry are specified in the Act. If further conditions or constraints were intended, the Parliament would have identified and specified such further limitations. It follows that there is no warrant for imposing further conditions upon the statutory right of entry. There is also no warrant for inferring a condition that the permit holder identifies the suspected breach to the employer. Nor is there any warrant for importing a condition that the right of entry for the purpose of interviewing employees during working hours may not be at the worksite. With respect, we do not agree with the ANZ's contention that the location of interviews undertaken pursuant to s.285B(3)(c) of the Act is entirely at the employers prerogative. Any additional condition not evident in s.285C of the Act might be seen to detract from the purpose of the provision and exercise of a statutory right of entry.

[40] The statutory right to an interview should not be negated and should be substantively implemented, and the Commission may make orders to facilitate that if a dispute occurs. We think it likely that the Commission has a broad discretion as to the location of an interview that it designates in any order, if it issues an order. Factors have to be balanced, and factors such as the need not to disrupt a business, privacy or health and safety considerations may conceivably lead to a range of locations for an interview being ordered, but always having regard to the need for the statutory rights to be substantively implemented.

[41] Again, the touchstone for entry and for the power to make orders is the statutory right to have an interview for the relevant statutory purpose. The word "interview" should not be interpreted in a narrow, broad or in a technical manner, but according to ordinary usage.

[42] Did the FSU seek an "interview" pursuant to s.285B of the Act? The ANZ submitted that the dispute should be characterised as having two dimensions, namely, an FSU claim to walk through the employer's place of business and to interview employees at their workstations. Whilst the proceedings at first instance included reference to a "walk through", to the extent that it formed a discursive fact it did not become a juridical concept in the order of Smith C. We see nothing in the order, the subject of this appeal, which deals with a general and unconditioned right to walk through the premises of the appellant.

[43] In our view, the real issue in dispute was, simply, does s.285B of the Act confer upon the FSU the right to interview employees at their place of work, wherever that might be within the premises of the appellant, and was this being sought by the FSU? There is no conditional aspect of the legislation in relation to where the right to interview an employee conferred by s.285B of the Act might take place. The dispute was not about a generalised unconditional right or a power to walk through the appellant's premises, and if it had been then both jurisdictional and discretionary objections could be made. The terminology of a "walk through" is more likely to cause confusion and error than to be helpful in the process of determining the Commission's relevant jurisdiction and the discretionary exercise of its dispute settlement function provided for by s.285G of the Act. The right of entry and the exercise of the power conferred upon an authorised person by s.285B of the Act is conditioned by the object of an interview and not otherwise.

41 The Claimant submits that the observation of the Australian Industrial Relations Commission in *ANZ Banking Group Ltd v FSU* (supra) has equal application to the state legislation. As with the federal legislation, the state legislation does not designate what part of the premises the authorised representative may enter, nor does it give the employer the right to designate a particular place for the investigation of breaches, the conducting of interviews or the holding of discussions.

Respondent's submissions

Section 49H

42 The right of entry conferred by section 49H may not be exercised unless the representative has given the employer of the employees concerned at least twenty-four hour's written notice of the entry. Accordingly it is for the Claimant to prove for the purpose of section 49H(3) that the Respondent was the employer of relevant employees at that time. The Respondent suggests that there is no evidence to prove that the Respondent was the employer of relevant employees.

43 The Respondent also asserts that in any event that, entry onto the Kwinana site by the representatives was not refused by any person. Indeed the undisputed evidence is that the representatives did enter the Kwinana site.

44 The Respondent submits that the alleged refusal of entry is the refusal to permit the representatives to speak with relevant employees at the place where employees take their meal breaks during their meal breaks. In that regard the Respondent points out that there were no set meal breaks, given that the plant operated with a degree of flexibility which permitted employees to take their meal breaks when they chose having regard to their particular circumstances. Further it is suggested that the right of entry is confined to the premises where relevant employees work. The places at which they had their meals were not places where the employees work. They were places where employees took breaks from work.

45 Another argument advanced by the Respondent is that the notice given by Mr Wood and Ms Heiler did not identify any premises (as defined) other than the Kwinana site, to which entry was permitted. If the representatives intended to exercise a right of entry in relation to any particular part of the premises comprising the Kwinana site, such part being "*premises*" in its own right, it was incumbent on Mr Wood and Ms Heiler to have specified each part in the notice given. They did not do so. The statutory right was, at best, a right to enter the Kwinana site as a whole, which right was exercised. There was no statutory right to enter any premises within the site, because no notice of their intention to do so had been given. It is suggested that Parliament could not have intended that the representatives, having gained entry, could insist on entering particular parts of the premises without notice, particularly in areas where employees do not work, such as crib rooms, changing rooms, showers and toilet facilities and the like.

46 The Respondent argues that, as an occupier of a hazardous site, it has statutory and common law duties concerning the safety of persons on the premises. There is also a duty to afford the right of entry. Neither duty overrides or is subservient to the other. Both must be discharged. As long as entry is permitted, and the purpose of the entry is not frustrated, reasonable measures to protect the safety of the representatives must be permissible. Accordingly there was a need for the representatives to be escorted in hazardous areas.

47 The Respondent says that the arrangements made by Ms Franz in response to the notice were sensible, practicable and convenient to all concerned. Entry in accordance with the notice occurred without undue delay. The representatives were provided with a furnished office to be used exclusively for their purposes and all employees were notified of their attendance. The arrangements made by Ms Franz were conducive to and facilitated the purpose for which the entry was made.

48 By contrast the requirement that the representatives be taken to the crib rooms for discussions was not going to be fruitful given that there were fifteen crib rooms on site, of which, in seven of them there was no real possibility of encountering any relevant employees. Of the remaining eight rooms, it was possible that they could have been used by up to seventy employees of whom no more than six could have been relevant employees. It would have been a matter of chance or coincidence if a relevant employee had been present at the precise time that the representatives attended the same. Further their attendance may have been objected to by other employees.

Section 49I

49 The Respondent says that although the right of entry conferred by section 49I does not require prior written notice, the entry must nevertheless be for a specified purpose, namely, investigating any suspected breach of the legislation and other matters specified in the section.

50 The claim alleges a suspected breach of the *Occupational Safety and Health Act 1984* (OSHA) as the basis of the right under section 49I, however the evidence of the representatives fell far short of them having a suspicion on 24 August 2004 that there had been a breach of the OSHA. Mr Wood, in cross-examination, suggested that he suspected a breach of the *Mines Safety and Inspection Act 1994*. It is pointed out that such Act was not specified in the claim but in any event has no application to the Kwinana site and was not capable of being breached in relation to that site. Accordingly the Respondent submits that there is no evidentiary basis on which the Court could conclude that any right under section 49I had been enlivened on 24 August 2004.

51 The Respondent submits that entry was not refused in any event. It points out that after the representatives had been on site for some time they expressed the desire to investigate suspected breaches. They were then escorted around the site, and taken to each part of the site they specifically asked to see. Any questions raised were answered. In the circumstances it cannot be said that there was a refusal to permit the representatives to discuss safety issues with employees at their workstation or a refusal to permit the representatives to investigate breaches of the OSHA.

52 Further the Respondent points out that the matters of complaint are the refusal to permit discussion with employees for the purpose of investigating suspected breaches. That is a right which is not conferred by section 49I. That section is to be contrasted with section 285B(3)(c) of the *Workplace Relations Act 1996*, which expressly confers the right to "*interview*" relevant employees. The omission of any right of interview can only lead to the conclusion that the legislature did not intend section 49I to confer on an authorised representative the rights claimed by the Claimant. Accordingly it is submitted that the failure to facilitate interviews during the investigation was not a denial of any right conferred by section 49I. In particular it was not a denial of entry under the section.

Respondent's Further Submissions

53 The Respondent submits that the claim should be dismissed for any of the following reasons:

The Claimant has not adduced evidence to found an inference that it has the legal capacity to apply to the Court for the orders sought in the claim.

The Claimant has not adduced evidence to found an inference that the Respondent has the legal capacity to be the subject of the orders sought in the claim.

The Claimant has not adduced evidence to found standing to apply to the Court for the orders sought in the claim.

The Claimant has not adduced evidence to found an inference that the Respondent was the occupier of the Kwinana site.

The Claimant has not adduced evidence to found an inference that the Respondent engaged in conduct for the purposes of section 49M.

Conclusions

The Claimant alleges that the Respondent has contravened section 49M(1) of the Act in the following ways:

> By refusing to permit the authorised officials of the Claimant union to speak with members and eligible members of the Claimant union at the places where the employees take their meal breaks during their meal breaks; and
>
> By refusing to allow authorised officials of the Claimant union to discuss safety issues with employees at their workstation; and
>
> By refusing the authorised officials to investigate breaches of the Occupational Health and Safety Act 1984 (WA) (sic) (*Occupational Safety and Health Act 1984*) by discussing the same with the employees at the employee's workstation.

54 With respect to each alleged contravention of section 49M(1) the Claimant must prove, on the balance of probabilities, the following matters:

> That it is registered under section 58 of the Act and that it is capable of suing whether under section 60 or otherwise; and
>
> That the Claimant is a registered body corporate and is capable of being sued; and
>
> That the Claimant has standing pursuant to section 83E(6) of the Act to make the claim; and
>
> For the purposes of section 49M(1), that the Respondent was at the material time the occupier of the relevant premises; and
>
> That Mr Wood and Ms Heiler were duly authorised representatives pursuant to section 49J of the Act and that they gave the requisite notice; and
>
> That the Respondent has in the three specified instances refused entry into the relevant premises for Mr Wood and Ms Heiler, being persons who were entitled to enter the premises under section 49H or section 49I of the Act.

55 The Respondent takes issue with respect to all matters requiring proof save that Mr Wood and Ms Heiler on 23 August 2004 gave notice of their intention to exercise their right of entry and that at the time of exercise of such right each of them held a valid authority issued pursuant to section 49J of the Act.

56 The Industrial Magistrate's Court is a court of law and is governed by the powers conferred on it by the Act. Its jurisdiction differs from that of the Western Australian Industrial Relations Commission (WAIRC). In particular, section 26 of the Act, which requires the WAIRC to act "according to equity, good conscience and the substantial merits of the case", does not apply. In this Court, matters in issue between the parties need to be strictly proved to the requisite standard of proof. The Respondent has not filed any particulars of response. Its substantive response has accordingly only been ascertained during the course of the hearing. It made no admissions prior to the hearing. During the hearing its sole pertinent concessions were that Mr Wood and Ms Heiler were authorised representatives pursuant to section 49J of the Act and that they gave notice of their intention to exercise the rights conferred by section 49H of the Act.

57 The Claimant must accordingly prove each of the elements, which remain in issue. I shall deal firstly with the proof of capacity.

Capacity

58 The Claimant has not adduced evidence in the form of a certificate issued by the Registrar of the WAIRC to prove its existence; nor has it called the Registrar to prove its registration. There has been no attempt made to formally prove the Claimant's existence. Notwithstanding that, its existence can be established in two ways. Firstly its registration is a matter of public record. Section 105 of the Act provides that the Western Australian Industrial Gazette (WAIG) shall, before all courts and persons acting judicially, be evidence of any of the matter stated therein. In the WAIG published on 24 October 2001 there appears at page 2724 (81 WAIG 2724) the order of the WAIRC, which establishes the registration of the Claimant. In any event the registration of the Claimant can be established by inference having regard to exhibits 1 and 2 produced to the Court. Exhibits 1 and 2 are copies of the identity cards issued to Mr Wood and Ms Heiler. John Spurling, the Registrar of the WAIRC, issued the cards on 9 October 2002 and 14 August 2004 respectively. The face of each card shows that the cardholder is approved as an authorised representative of the CFMEU. Given that pursuant to section 49J(1) of the Act the Registrar can only issue such an authority upon the application of the secretary of an organisation of employees, it follows that at the time of issuance of the authorisation the Claimant must have been registered pursuant to section 58 of the Act. By virtue of its registration it has the ability to sue pursuant to section 60(2) of the Act. In the circumstances the registration of the Claimant is proved. Its continued existence can be inferred by the evidence given by Mr Wood who described himself as the senior vice-president of the Claimant union.

59 The Claimant has not however adduced any evidence that the Respondent is a registered body corporate. There is consequently no evidentiary foundation to support an inference that the Respondent, as described in the claim, exists or is incorporated and is capable of being sued, whether under the *Corporations Act 2001* or its predecessors or otherwise. Given this fundamental deficiency in the Claimant's case, the claim cannot succeed.

60 Notwithstanding that finding, I intend for the sake of completeness to address the other matters in issue.

Standing

61 I move to consider the issue of standing to apply. In the present case the Claimant must come within either paragraph (a) or (b) of section 83E(6) of the Act in order to maintain its claim. That is to say it must be:

> A person directly affected by the contravention or, if that person is a represented person, his or her representative; or
>
> An organisation or association of which a person who comes within paragraph (a) is a member.

62 The Respondent contends that paragraph (a) is not available to the Claimant because the persons directly affected by the contravention of section 49M(1) are those who were refused entry, in this case Mr Wood and Ms Heiler. The Respondent argues that it cannot be said that the Claimant was directly affected by the contravention. At best it was only indirectly affected. Further the expression "*represented person*" (as defined) has no application in the present circumstances given that the expression is defined to relate to a person with a mental incapacity. I agree with the Respondent's submissions.

63 The Claimant's standing to bring the claim must be under paragraph (b). The Respondent argues that there is no evidentiary basis for concluding that in August 2004, when the relevant facts arose, or in September 2004, when the claim was made, that the Claimant was a registered organisation. I reject the Respondent's contention in that regard for the reasons previously expressed.

64 The Respondent submits further that it cannot be established on the evidence that either Mr Wood or Ms Heiler, the persons directly affected, was a member of the Claimant at either the time of the occurrence or when the claim was made. The

Respondent argues that the authorisation under section 49J is not predicated on membership of the organisation concerned, so no inference of membership is open from the fact of authorisation. It would have been a simple thing for the Claimant to have adduced evidence that either or both Mr Wood and Ms Heiler was a member of the Claimant in August or September 2004, if that were the case. The Claimant did not do so. Mr Wood gave evidence on 2 March 2005 that he was a senior vice-president of the Claimant from which it can be inferred that he was then (2 March 2005) a member. However there is no presumption or other evidentiary basis for inferring that he was a member in August or September of 2004.

65 I agree with those submissions. It follows that the Claimant has not adduced evidence to found standing to apply to the Court for the orders sought. There is no direct or inferential evidence of membership at the material times. There is no presumption in law, which would otherwise assist the Claimant. Section 105 of the Act does not assist either because there is nothing within the WAIG which would establish either directly or inferentially that on the material dates Mr Wood and Ms Heiler were members of the Claimant union. Accordingly the Claimant has failed to prove a fundamental fact which goes to its standing to make the claim. Accordingly for such reason also the claim cannot succeed.

66 I now move to consider whether there was, by virtue of Ms Franz's conduct, a refusal of the exercise of rights held by Mr Wood and Ms Heiler to enter the Kwinana site for the purpose of discussion with employees and to investigate breaches.

Powers under sections 49H and 49I

67 It is self evident that both section 49H and section 49I should be interpreted to give full effect to the rights conferred by the Act in the attainment of the objects of the Act. When that is done the inevitable conclusion, which flows, is that authorised representatives may enter premises occupied by the employer, being the whole of the premises and not just a room or other place therein designated by the occupier. It is not the case that there is a requirement on the part of the authorised representative to identify each particular place within the site which he or she wants to enter. Specificity is not required. In my view the definition of "*premises*" in section 7 of the Act is an inclusive definition and not one, which ought to be applied in the manner suggested by the Respondent, which results in the restrictive approach adopted. Their right of entry is one at large, subject of course to the recognition of the fact in some instances having entered the site that representatives cannot wander throughout the same without supervision. In the present matter supervision was required because of the hazardous nature of the site and the Respondent's obligation to ensure their safety, and the safety of others, both at common law and pursuant to statutory provisions. Indeed the right of entry contained in section 49H should be construed in the manner suggested by Kenner C in *The Construction, Forestry, Mining and Energy Union of Workers v SNC-Lavalin (SA) Inc and Another* (supra). I agree with the learned Commissioner's observations therein. The authorised representative may for the purposes set out in sections 49H and 49I of the Act interview the employees at their workstation or at any other place including the place at which such an employee takes his or her meal break. There is no restriction. The occupier may not dictate, subject to legitimate safety considerations, where the authorised representative may speak to members and to those eligible to become members. In the present instance Ms Franz, by her actions and words, dictated the terms of entry and thereby impeded the ability of the authorised representatives to invoke their powers pursuant to section 49H of the Act. The authorised representatives were quite entitled to meet with the Claimant's members and for those eligible to become members in the crib rooms but were denied the opportunity to do so. There was, in the circumstances, a refusal of entry to the premises by persons entitled to enter pursuant to section 49H of the Act.

68 Moving to a consideration of section 49I of the Act I find as a matter of fact, having preferred the evidence of Mr Wood and Ms Heiler to that of Ms Franz and Mr Ireland, that the authorised representatives were not taken to workplaces that they wanted to see, nor were they permitted to speak to employees at their workstation for the purpose of investigating a breach or breaches of the occupational safety and health laws.

69 The Respondent argues that the authorised person's rights under section 49I are conditional upon and subject to a suspicion being held by him or her that there has been a breach of the specified legislation, award, order, industrial agreement or employer-employee agreement. In this matter the Claimant alleges a suspected breach of the OHSA as the basis of the right under section 49I. The Respondent contends that Ms Heiler did not assert that she suspected that a breach of any legislation had occurred. With respect I disagree. It is the case that in discussion with an employee on the material date a complaint was made about the adequacy of manning levels and the ability of the operators to respond in an emergency situation between various areas. The person spoken to was concerned that there was a risk posed to safety. Mr Wood had also received complaints prior to his visit on the material date in relation to the risk posed by inadequate manning. In such circumstances it was the case that each of the authorised representatives suspected a breach of the OSHA. It was that very reason which caused Ms Heiler, who had expertise in the area of safety, to accompany Mr Wood. So far as Mr Wood's reference to the *Mines Safety and Inspection Act 1994* during the course of cross-examination is concerned, I take that to be no more than a misnomer on his part. It is obvious that his suspicions relating to the hazards and risks posed by the alleged lack of manning levels was a matter falling within the provisions of the OSHA. In the circumstances it cannot be said that the authorised representatives' rights were not enlivened.

70 The Respondent argues that section 49I does not confer the right to interview relevant employees. I respectfully disagree. It is the case that an investigation pursuant to section 49I will almost inevitably and necessarily involve the process of interview. It is implicit that any investigation will involve an interview. The Respondent's contention in that regard is rejected. The approach taken by the Respondent is too restrictive. If not explicit, it is implicit within the provision that a right to interview is conferred. I am fortified in that view given the meaning of "*investigate*" found in the Shorter Oxford Dictionary, which is:

> "*To search or inquire into.*"
>
> The term "*inquire*" is also defined therein to mean:
>
> *"2. To seek knowledge of (a thing) by putting a question; to ask about; to ask (something) of, at (a person); and*
>
> *5. To seek information by questioning; to put a question or questions; to ask."*

71 The failure to facilitate interview during an investigation must necessarily be a denial of the rights conferred by section 49I.

Considerations under Section 49M(1)

72 The conduct referred to in section 49M(1) of the Act is the conduct of the "*occupier of premises*". Accordingly only the occupier of the premises is capable of contravening section 49M(1). For the contravention to be made out there must be evidence before the Court capable of establishing that:

> The conduct of Ms Franz was the conduct of, or attributable to, the Respondent; and
>
> The Respondent was on the material date the occupier of the Kwinana site, being the premises in question.

73 In that regard the Respondent contends that the Claimant has failed to adduce evidence capable in law of satisfying either requirement. It points out that there is simply no evidence as to the identity and tenure of the land comprising the site, be it freehold, leasehold, reserve, unalienated Crown land or otherwise, or who occupied the site at the relevant time. Land identity

and tenure are matters of public record. It would have been a simple matter for the Claimant to ascertain whether the Respondent had sufficient interest in the land to exercise the level of control, which might afford it the status of occupier, if that were the case, and to adduce evidence to that effect. The Claimant failed to do so.

74 Further there is no evidence to support an inference that the conduct of Ms Franz must be attributed to the Respondent, so as to be regarded as its conduct.

75 It suffices to say that I agree with those submissions made by the Respondent. Indeed the relationship between Ms Franz and the Respondent was not explored in evidence. Consequently I do not know who her employer is. She was not asked whether the Respondent was her employer at the material time. Her evidence was that she is employed as the Human Resources Adviser *"at"* Tiwest. Whether the Respondent or some other party employs her, I do not know. All I know is that she works at the Tiwest plant. Accordingly I cannot find, on the balance of probabilities, that the actions of Ms Franz were the actions of the Respondent.

Determination

The claimant has failed to prove its claim.

G. CICCHINI,
Industrial Magistrate.

2005 WAIRC 01509

BARCLAY MOWLEM CONSTRUCTION LTD, THORNLIE RAILWAY STATION ANDBRIDGE STRUCTURAL WORK PROJECT CERTIFIED AGREEMENT 2004-2005 ANDCONTRAVENTION OF SECTION 170MN

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARCUS THOMAS CLARKE
	CLAIMANT
	-v-
	MICHAEL POWELL, WALTER VINICIO MOLLINA, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
DATE	THURSDAY, 28 APRIL 2005
FILE NO.	M 237 OF 2004
CITATION NO.	2005 WAIRC 01509

REPRESENTATION	
CLAIMANT	MR A D LUCEV (OF COUNSEL) AND MS MC CASH (OF COUNSEL)
RESPONDENT	MR T J DIXON (OF COUNSEL) AND MR TR KUCERA (OF COUNSEL)

REASONS FOR DECISION

1 The Claimant in these proceedings is an inspector appointed pursuant to section 84 of the ***Workplace Relations Act 1996*** (the Act). He has brought this action against the Respondents claiming the Respondents are in breach of the provisions of section 170MN of the Act in that they were engaged in industrial action contrary to the terms and conditions of a certified agreement. The agreement was made pursuant to the provisions of section 170LL of the Act which provides for what is commonly called a pre-start agreement.

2 The agreement was made between Barclay Mowlem Construction Ltd (Barclay Mowlem) and the First Respondent, the Construction, Forestry, Mining and Energy Union (the union) and is titled the ***Barclay Mowlem Construction Ltd, Thornlie Railway Station and Bridges – Structural Work Project Certified Agreement 2004-2005*** (the agreement). It was certified by Deputy President McCarthy of the Australian Industrial Relations Commission on 26 May 2004 and came into operation from that day and remains in force until 1 July 2005.

3 It was intended by the parties to the agreement, and is provided therein in clause 1.5, that the agreement:

> *"shall stand alone and operate to the exclusion of any other Federal or State awards, orders or agreements that would otherwise apply had it not been for the making of this Agreement."*

4 Clause 1.6 under the heading "***No Extra Claims***" provides:

> *"This agreement is made in full and final settlement of all claims in relation to this project and the parties shall not make any further claims for the period of operation of the Agreement. The parties agree that the wages, allowances and employment conditions set out in this Agreement cover all circumstances, conditions and disabilities associated with the Project."*

5 Notwithstanding the provisions of clause 1.6 and the agreement therein that the wages, allowances and employment conditions set out in the agreement covered all circumstances, conditions and disabilities associated with the project, it is apparent from the evidence that within a short time after the commencement date of the agreement there were three provisions of the agreement that at least the employees wanted to vary.

6 Firstly, there was the issue of redundancy. Clause 2.10 generally provided for the payment of $60.00 per week ($65.00 with effect from 1 December 2004) where the redundancy was occasioned otherwise than by the employee. The employees wanted the redundancy provision payable to those employees who left of their own accord and they wanted redundancy contributions for all employees to be paid into the Western Australian Construction Industry Redundancy Fund Ltd.

7 Secondly, the employees were not happy with the inclement weather provisions of clause 6.5. They wanted the same inclement weather conditions that were provided for in clause 21 of the ***National Building and Construction Industry Award 1990***.

8 The third issue was the special project allowance provided for in clause 3.7 of the agreement. Clause 3.7 provided for an allowance of $110.00 per week as follows:

> *"Notwithstanding that the site allowance provided for by this agreement covers all general disabilities and special circumstances arising from construction activities on site, an amount of $110.00 per week worked will be paid as a Special Project Allowance provided, however, pro rata entitlements will be calculated as detailed below."*

9 The clause goes on to provide:

> *"For the purposes of pro-rata entitlements, the allowance applicable shall be calculated at the rate of $22.00 per day, Monday to Friday inclusive."*

10 In respect of the special project allowance, it was the employees' position that they should be paid an extra $22.00 for their work on Saturday, which was a normal working day, and the same amount if required to work on a Sunday.

11 Dispute resolution procedures are provided for in clause 4.5 as follows:

> *"Where any questions, disputes or difficulties arise, the provisions of this Section shall be applied in resolving the matters. Provided always that work shall continue in the usual manner without loss of time or wages and without bans or limitations so as to allow the steps below to be followed:"*

12 Seven steps are listed progressing from step one where the employee or his elected job representative raises the matter with the immediate supervisor for resolution, through to step seven where the matter is referred to the Australian Industrial Relations Commission:

> *"for assistance which may include the Commission exercising its conciliation and arbitration powers with respect to the interpretation and determination of any dispute arising under this Agreement. The decision of the Australian Industrial Relations Commission shall be accepted by all Parties subject to legal rights of appeal."*

13 Clause 4.5 goes on to provide that:

> *"Sensible time limits shall be allowed for each step and work shall continue as it was prior to the matter being raised.*
>
> *No Party will be prejudiced as to any final settlement by the continuance of work."*

14 It is not in issue that employees who were the subject of the agreement took industrial action by going on strike and leaving the site on 9 July 2004, 29 July 2004 and on 19 and 20 August 2004.

15 The Claimant's position is that preceding each decision by the employees to withdraw their labour a meeting had been arranged and organised by the site shop steward Mr Peter Levy (Levy). All the meetings were attended by Mr Michael Powell (Powell) and he was accompanied by Mr Mick Buchan (Buchan) on 9 July 2004, by Mr Walter Vinicio Molina (Molina) and Mr Joe McDonald (McDonald) on 29 July 2004 and by McDonald on 19 August 2004.

16 Powell and Molina are the Second and Third Respondents and are employed organisers of the Union, as is Buchan. McDonald is one of the Union's assistant secretaries.

17 The meetings were also attended by the site shop steward Levy.

18 Mr Ante Radalj (Radalj) gave evidence that he was a civil engineer who was employed by Barclay Mowlem as its project manager. He was in charge of the Thornlie Railway Station and Bridges Structural Work Project (the project) and responsible for "*everything to do with the program, budget, safety, the quality, the environment*".

19 Radalj gave evidence of the attendance on site of Powell and Buchan on the morning of 9 July 2004. He said Powell told him he was there to investigate the incident on 8 July 2004 where a truck dumping fill in area B had its tray tip over onto its side. Radalj described Powell as becoming hot-headed after Radalj had queried Powell's right to enter the site without giving notice. He said Powell had told him to "*fuck off*" and that "*he would come on site when I want to when it's to do with the boys' safety*" and when told that there had already been an investigation into the truck incident Powell said he would do his own investigation and stormed out.

20 Radalj said he was aware of a meeting of basically the entire workforce and Powell. The meeting lasted fifteen to twenty minutes and after it finished Powell came back to the office and said the boys are withdrawing their labour. When asked why, Radalj said Powell told him it was because management had failed to consult about the incident with the truck, the facilities in area D were not up to standard, toilets were not cleaned and there was no first aid box in area D. It was Radalj's view that the issues were of a minor nature and could have been readily resolved.

21 Relevant to the incident on 29 July 2004 Radalj gave evidence that Powell and Molina came to the site and had a meeting with the workforce. After the meeting Powell and Molina attended at the site office and raised with Radalj the issues of the $22.00 per day allowance and the redundancy payment. On that day the workforce left the site after the meeting.

22 The evidence of Radalj about what took place on 19 August 2004 was that Powell came to the site around 10.00 am. He said:

> *"A meeting was held. The meeting was later transferred outside the gates. On the conclusion of the meeting Mr Powell came in and spoke to me and basically said that the workforce is out on strike. I'm not sure if it was one, two or three days. He identified the reasons why they were going on strike.*
>
> *. . . One of them was that I was hassling people on how to do their job; that I was taking money away from people by saying when they can and cannot work; that I was allowing work to proceed in an unsafe area. I'm pretty sure inclement weather was raised again – about when people can go home."*

23 On all three occasions the workforce went on strike the entire workforce left the site and it is the evidence of Radalj that they did so without the dispute resolution procedures being applied.

24 It is not my intention to refer in detail to the evidence of the other prosecution witnesses. Generally the evidence leads me to the conclusion that the issues in dispute centred on the special project allowance, redundancy and inclement weather clauses of the agreement and supports the prosecution claim that the dispute resolution procedures were not followed.

25 The Respondent's claim that they did nothing to encourage the workforce to withdraw their labour but tried to prevent the strike and direct the workforce towards the dispute resolution procedures.

26 Powell gave evidence of his involvement. When he arrived on site on 9 July 2004 with Buchan they "*ran into some very disgruntled people*" who were upset about access and egress to area D where there were no toilets, first aid facilities, provision for washing hands or communications.

27 Powell said he also observed a number of other situations of a safety nature which gave him concern, including workers on an abutment with no fall protection, a lot of integration between "*trucks and people carrying materials*" and lack of a traffic management plan.

28 When Powell attended at the site office he claims Radalj raised the issue of Powell not giving the required notice before entering the site and threats to call the police were made. He then described what followed as a bit of a slanging match between them and claims Radalj, when told there were a lot of safety issues on the site, responded by saying that the things he had put in place were adequate.

29 Powell said he took that response "*back to the blokes*" during the meeting and said he was verbally attacked by the members on the site. Despite Powell telling those at the meeting "*we've got a dispute resolution procedure and that we should be following it*" and that "*they remain on site while we go through those dispute resolution procedures*" the workforce voted to go on strike for the day.

30 On 26 July 2004 Powell attended at the site with Molina and spoke to Radalj. Powell said he raised the issues of a list of contractors for the site, the special project allowance and redundancy.

31 At the request of site steward Levy, Powell and Molina again attended the site on 29 July 2004 and a meeting "*just outside the gates of the project area*". The issues raised were about the special project allowance and the redundancy payments. Powell said "*there were also some issues on safety, scaffold components and the like*".

32 When asked in examination in chief did he say anything else at that meeting after addressing the workers, Powell said:

> *"I told the blokes in that meeting that we were in a position that - - that there is an agreement already been made, that there's - - there's a site agreement already been made, and - - and basically, the conditions of those agreements we have to wear."*

33 The meeting concluded with the workforce withdrawing their labour and leaving the site. Powell then went to see Radalj and "*told him that they'd gone because of - - they're very unhappy with the - - the redundancy clause, the $22 productivity clause, and there were some other issues raised at the meeting as well*", and he also said the inclement weather clause was an issue raised. He said he told Radalj "*we needed to sit down and get these issues fixed*". Radalj had replied that he could not do anything and would have to talk to someone higher up. Powell raised the issues later that day with Mr Kevin Reynolds (Reynolds), the secretary of the union, and made contact with Mr Damien Meaney, the operations manager for Barclay Mowlem.

34 On 19 August 2004 Powell attended a meeting with the workforce on site at the request of the site steward. As a result of that meeting the workforce went on strike and Powell said he reported to Radalj that the "*blokes withdrew their labour*" over the issues of redundancy, overtime, inclement weather and the site allowance of $22.00 per day. Powell again said he told the meeting of the "*need to be following* (the) *procedure*".

35 Evidence was given on behalf of the Respondents by Mr Roger Aleknavicius (Aleknavicius), a crane driver employed by Barclay Mowlem. He said he was not happy with the agreement, in particular with the site allowance, redundancy and inclement weather provisions. His evidence is that at the meeting on 9 July 2004 his major concern was for his safety, although the other issues were raised. He said the redundancy package (was) brought up again. "*There was also the $22.00 and the inclement weather again*". The motion which resulted in a vote to withdraw their labour was put and he said Powell "*turned around and said to the guys that it was in our best interest to stay at work because it was a safety issue. He - - he told us that we could actually work into maybe a safer area. As far as I was concerned no other area was safe at that time*". When asked what happened next he said "*There was a motion put on the floor and I stuck my hand up in favour of going home because I'm not working on an unsafe site*".

36 Of the meeting on 29 July 2004 Aleknavicius, when asked who called that meeting, said "*Once again, that was called by the workers of the union, CFMEU . . . It was brought to my attention by some of my other workers and basically I was still not happy with the proceeds of what was going on . . . Basically we'd asked for Mick* (Powell) *to go and talk to management*

to get a - - come-back on our $22.00, our redundancy, and inclement weather, at this stage still - - still ongoing, nothing had happened". Once again a motion to withdraw labour was put to the meeting and the workers went on strike.

37 Aleknavicius said that Powell had told the meeting "that he still wanted to try and negotiate with the company at that stage, and he believed that if they had time they could negotiate with the company a bit more". Aleknavicius said his attitude was "*we'd had a meeting on the 26th and they'd gone and talked after that meeting. There was still no outcome, so I was not happy with what I had - - . . . Well, I was - - I was not happy with Mick, simple reason that we'd asked him to go and do a job for us and it wasn't happening and we weren't happy with the company's result as they weren't giving us any information that we required.*"

38 The meeting on 19 August 2004 was called "*over the $22, inclement weather, and the redundancy*" and he said "*Once again there was a motion put forward that we withdraw our labour and hopefully get something resolved*".

39 The third Respondent Molina gave evidence of his attendance at the site on 15 June 2004. He was on his own and convened a meeting with workers on site. He said he was passing on information about the agreement. He met with Radalj and conveyed to him the workers' concern that they were not being paid the special allowance for Saturday.

40 Molina attended the site on 29 July 2004 with Powell and while he said little in examination in chief about what happened, he did in cross-examination confirm that a motion was put in the terms of "*If they're not prepared to fix the - - the problems, let's go home for 24*". He explained the problems were the "*issue of the $22 and the issue of the redundancy*".

41 As I have mentioned the site shop steward was Peter Levy. His evidence generally supports the Respondents' position that the workers withdrew their labour of their own volition notwithstanding being advised of the agreement and Powell's advice to the contrary.

42 Levy gave evidence that it was he who arranged for the union officials to attend the site each time they did and he was instrumental in gathering the workers for the meetings, including collecting them from the various site areas.

43 The issue in these proceedings is not whether there has been a breach of the agreement but whether the breaches were by the Respondents.

44 Issues of safety have been raised throughout the Respondents' evidence, particularly by Levy who mentioned "*the serious concerns about safety issues on the job*" and almost without failure added safety issues when detailing the reasons for the meetings.

45 Clause 6 of the Agreement provides for the Procedure for Dealing With and Resolving Safety Issues. It sets out the steps to be taken when an employee becomes aware of an unsafe situation as follows:

> *1. When an employee becomes aware of an unsafe situation, the employee is required to rectify it, if it is within the employee's range of skills/competencies and authority to do so.*
>
> *2. If the employee is not able to rectify the unsafe situation, the employee is required to notify the leading hand, or supervisor who will take all necessary steps to rectify the unsafe situation.*

3. If there is to be any delay in rectifying the situation, the supervisor responsible for that area will ensure that employees who are working in the affected area are relocated to work in other areas on the project until the unsafe situation has been rectified. The employer safety personnel and employee safety representatives should also be advised or notified.

4. Provided it is safe to do so, all employees with appropriate skills will be used to restore safe working conditions and normal productive work will progressively resume in the affected area.

5. Employees who are not able to be transferred to perform productive work in a safe area shall remain on the project in the site sheds if safe to do so, or at an agreed alternative safe location.

6. If there is disagreement over the existence of an unsafe situation or method of dealing with an unsafe situation, the work process in question shall not be carried out until such time as the matter has been resolved except under such conditions as are agreed between the parties. The matter will then immediately be referred to the company representative responsible for the coordination of project safety and the relevant safety & health representative, who shall meet and inspect the work area in an attempt to resolve the matter.

7. If the issue is still not resolved, then the relevant safety and health committee will meet to discuss the matter. The Safety & Health Committee will agree on whether an unsafe situation exists and, if so, agree a method of restoring safe working conditions.

8. Where no agreement is reached by the Safety & Health Committee a WorkSafe Inspector will be called to the site to make a determination.

9. Should all work be deemed to be unsafe, employees will not leave the site, but will remain either in the site sheds if safe to do so or at an agreed alternative safe location.

10. Provided the above safety procedure is complied with, entitlements to pay and other benefits shall continue in accordance with Section 28 of the Occupational Health and Safety Act 1984.

46 Clearly clause 6 requires efforts to rectify the unsafe situation and where there is disagreement a resolution procedure involving a Worksafe Inspection if necessary. In any event even if "*all work be deemed to be unsafe, employees will not leave the site but will remain either in the site sheds if safe to do so or at an alternative safe location*" (clause 6(9)).

47 Although safety has been raised by the Respondents as an issue there can be no doubt in my mind, on the evidence before me, that there was anything on site which rendered it unsafe. There were some minor issues of safety which were easily rectified and when brought to the attention of Radalj were actioned by him. The incident involving the truck on 8 July 2004 was investigated and the cause identified. It took place in an area where only a few employees were working and which was some distance from where the majority of the employees were. A Worksafe Inspector was called to the site and his investigation report concluded "*Visited site from complaint number 26388 and did a full inspection of site with the safety manager on site. Issued improvement notice for no facilities on location D. The rest of site is adequately covered*". He had "*no issue with*" the truck incident.

48 The issues of concern to the employees and obviously the union and its hierarchy and officers were the three which had dominated the relationship between the parties and which featured consistently throughout the hearing. They are the issues of the special project allowance, the redundancy provision and the inclement weather clause.

49 These issues became a concern to the union soon after the agreement was certified on 26 May 2004. Molina expressed dissatisfaction with the special project allowance to Radalj on 15 June 2004. I heard evidence of Reynolds's dissatisfaction with those provisions and his rebuking of the union's solicitor Kucera for allowing them to "*slip through*". It was the union's view that the special project allowance of $22.00 per day should be paid on the Saturday as was agreed for the employees on another site. The union was clearly not happy with the redundancy provision and believed employees should be paid the redundancy allowance when an employee left his employment of his own accord. As Powell explained, if that did not happen it might encourage an employee who wanted to leave to engage in misconduct which would result in him being dismissed. In relation to the inclement weather clause the union wanted the same provision as that in the National Building and Construction Industry Award 1990. In fact the union pursued those issues and was successful in changing the redundancy and inclement weather provisions to the terms sought.

50 Prima facie it must have been the intention of the parties when they entered into the agreement that they agreed with the provisions of the agreement. That is fundamental to any agreement. It follows that the union accepted at the time that the agreement, as it was, would continue in force until 1 July 2005 and, as set out in clause 1.6, there would be no extra claims (see page 3 of these reasons).

51 As I understand the evidence all workers on the site were aware of the agreement before accepting employment and I would have thought the union had an obligation to ensure its members were fully aware of the provisions of the agreement. Copies of the agreement were made available to employees and I would find it unbelievable that any employee was unaware of the existence of the agreement although some may not have taken the trouble to read it.

52 On any construction of the agreement the action of the workers on the three occasions they withdrew their labour and left the site was in breach of the provisions of the agreement. As I have found, there were no safety issues of any significance and, even if there were, the procedure set out in clause 6.1 should have been followed. That procedure does not allow the workers to withdraw their labour and leave the site. The evidence does not support any claims that the industrial action was "*based on a reasonable concern by the employees about an imminent risk to his or her health or safety*" as provided in section 4 of the Act.

53 I can only conclude that the workers withdrew their labour in pursuance of their claim in relation to the three issues identified.

54 The Respondents claim they played no part in the industrial action taken by the employees. In my view that claim cannot be substantiated on the evidence and there is an irresistible inference that the union by its officers mentioned in these proceedings played a significant part in the activities which lead to the withdrawal of labour and, in turn, the breach of the agreement.

55 There can be no doubt on the evidence that the union was not happy about the three issues of concern and it pursued them until two had been resolved in its favour.

56 There is no evidence of any bona fide attempt by the union to follow the dispute resolution procedures of clause 4.5. In fact the evidence leads me to conclude that at least Powell was not conciliatory in his dealings with Radalj. I accept Radalj's evidence that Powell had been hot headed, told him "*don't fuck with me*" and generally presented in an aggressive manner. That evidence was supported by Nathan Richardson who was present on 9 July 2004 when Powell "*went off*" at Radalj and told him "*to get fucked quite a few times*".

57 Section 170MN of the Act prohibits "*an employee, organisation or officer covered by subsection (2)*" from engaging in industrial action for the purpose of supporting or advancing claims against the employer during the currency of an agreement. Subsection (2) provides:

(2) For the purposes of subsection (1), the following are covered by this subsection:

(a) any employee whose employment is subject to the agreement or award;

(b) an organisation of employees that is bound by the agreement or award;

(c) an officer or employee of such an organisation acting in that capacity.

58 All three Respondents are therefore covered by the section and I find that the industrial action was for the purpose of supporting and advancing claims against the employer.

59 Section 4(8) of the Act provides:

In this Act, a reference to engaging in conduct includes a reference to being, whether directly or indirectly, a party to or concerned in the conduct.

60 In this case the union by its officers including its organisers and site steward called, arranged and attended the three meetings which resulted in the withdrawal of labour. They had direct involvement in the industrial action and, in my view, at least with the knowledge of the outcome of the meeting on 9 July 2004, it was foreseeable that a similar outcome was likely following the next two meetings as the three issues had still not been resolved and the union had not engaged in the steps provided for in the dispute resolution procedure.

61 I find therefore the Respondents did engage in industrial action for the purpose of supporting and advancing claims against the employer herein as claimed and the Respondents are in breach of section 170MN of the Act.

WG Tarr,
Industrial Magistrate.

2005 WAIRC 01507

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MURRAY ROSS HIGGINS
	CLAIMANT
	-v-
	PAUL ANDREW BENNETT AND CRAIG BRADLEY DIX TRADING AS FINESSE PAINTING & PROPERTY MAINTENANCE, REGISTRATION NO. BN09367846
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	THURSDAY, 24 FEBRUARY 2005
FILE NO.	M 287 OF 2004
CITATION NO.	2005 WAIRC 01507

Representation	
Claimant	MS K SCOBLE (OF COUNSEL) OF THE *CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS*
Respondent	MR G McCORRY OF *LABOURLINE*

Reasons for Decision

Background

1 On 19 March 2004 Commissioner Gregor (as he then was) of the Western Australian Industrial Relations Commission (WAIRC) made orders with respect to Application 1251 of 2003 between Murray Ross Higgins as Applicant (hereinafter referred to as the Claimant) and Paul Andrew Bennett and Craig Bradley Dix trading as Finesse Painting & Property Maintenance as Respondent. He ordered that:

2 The Applicant was unfairly dismissed.

3 Reinstatement would be unavailing.

4 The Applicant be paid compensation of $2006.40.

5 It is noted from the Reasons for Decision delivered by Commissioner Gregor (exhibit 1) that the pivotal issue requiring determination in the matter before him was one of whether the Claimant was at the material times an employee of the Respondent or alternatively a subcontractor engaged by the Respondent. It suffices to say that the Claimant successfully contended that he was at all material times an employee of the Respondent.

6 By letter dated 21 March 2004 the Respondent's agent, Mr McCorry, wrote to the Claimant's solicitors stating inter alia:

The finding that your client was an employee at the material time has tax implications for our client.

In addition to the obligation to deduct as an eligible termination payment 47.5 percent of the compensation ordered, a total of $950.00, our client is also obliged to deduct the PAYG instalments due in respect of your client's earnings of $2588.80 in July 2003. That tax liability amounts to $1229.68.

Those deductions leave nothing to pay to your client.

Our client will also be taking up the Australian Taxation Office you (sic) *client's claiming as a tax deduction, so called business expenses of $3279 in respect of the period he was found to be an employee of our client and GST input credits of $2577 in respect of the same period.*

7 On 24 March 2004 Messrs Slater and Gordon Lawyers acting on behalf of the Claimant responded to Mr McCorry stating inter alia:

Mr Higgins does not authorise your client to make any deduction from the amount your client has been ordered to pay under any circumstance.

8 The Respondent was invited to pay the amount ordered under threat of enforcement in this Court.

9 That letter drew the following response from Mr McCorry contained in his letter to Messrs Slater and Gordon dated 28 March 2004;

> *I refer to your letter of 24 March 2004.*
>
> *Mr Higgins is not in a position to authorize or not authorize the deduction of monies from the compensation ordered by the Commission to be paid to him. The Respondent is obliged by Australian taxation legislation to deduct tax from this sum and remit it to the ATO and is exposed to a penalty if this is not done.*
>
> *This should be self evident to any legal practitioner. If it is not I suggest you look it up or seek professional advice.*
>
> *Should your client be misguided enough to challenge the obligation of the Respondent to deduct tax from the compensation sum by instituting proceedings in the magistrate's court to enforce the order for payment of the full $2000, this letter will be relied upon as the basis of a claim for costs for instituting frivolous and vexatious proceedings and a complaint for unprofessional conduct.*

10 Messrs Slater and Gordon responded by letter dated 1 April 2004 by continuing to demand payment and suggesting that Mr McCorry was erroneous as to his view on the law.

11 On 19 April 2004 Mr Bennett wrote directly to Mr Higgins. He said in his letter:

12 *APPLICATION 1251 OF 2003*

> *On 19 March 2004 Commissioner Gregor made an order that you be paid $2006.40 compensation in respect of your so called unfair dismissal from our firm.*
>
> *As you have been found to be an employee and not the contractor that you at all times represented to us that you were, we are obliged to tax you as an employee. Accordingly tax is required to be deducted from all payments made to you.*
>
> *Of the $2006.40 ordered to be paid, tax at the rate of 48.5 percent is required to be deducted, leaving a balance of $1033.30.*
>
> *You also received from our firm in this financial year payments totalling $2566.08 in respect of which you rendered invoices numbered 57 and 58 and claimed GST. These must now be considered as monies earned as an employee and we are obliged to deduct tax in respect of them. As you never represented yourself to be an employee and did not provide a tax file number or seek to claim the general exemption, the tax to be levied on these payments is also 48.5 percent amounting to $1244.55. This is more than the balance owing to you therefore no payments will be made to you.*
>
> *In due course the tax deducted will be remitted to the ATO along with a detailed account of how you may have defrauded the Commonwealth by claiming tax deductions and GST credits that you are not entitled to do if you are an employee.*

13 Mr Bennett's letter drew a response from Messrs Slater and Gordon by letter dated 24 May 2004. Messrs Slater and Gordon demanded payment of $2006.40 as ordered by WAIRC within 7 days failing which it was indicated that enforcement proceedings would be commenced. The Respondent was also put on notice that the Claimant would in any enforcement proceedings be seeking costs and the imposition of a penalty.

14 On 27 May 2004, Mr McCorry again wrote to Messrs Slater and Gordon. In his letter he said:

> *I refer to your letter of 24 May 2004 to Mr Bennett.*
>
> *Neither Mr Higgins nor yourself on his behalf are entitled to direct our client not to deduct tax from any monies that are due to him. Our client is complying with its obligations under the tax laws.*
>
> *I consider your letter to amount to demanding money with menaces* (sic) *in circumstances where you know or should reasonably be expected to know that there is no lawful basis for you to do so.*
>
> *A complaint about your behaviour has been made to the Legal Practitioners Complaints Committee.*

15 Mr Bennett did not subsequently pay to the Claimant that which he was ordered to pay by the WAIRC. Instead the Respondent remitted the sum of $2006.40 to the Australian Taxation Office in purported compliance of his alleged obligations under Commonwealth taxation legislation.

Determination

16 A review of the correspondence passing between the parties and/or their representatives establishes that the Respondent is extremely unhappy with the finding that the Claimant was at the material times an employee. The initial unhappiness has now developed into a high degree of bitterness. Such is quite apparent from the correspondence and from what Mr Bennett said in evidence. The Respondent has embarked on a course of action, which has had the effect of circumventing the decision of the WAIRC that the Claimant be paid compensation. The Respondent's stance also undermines the Claimant's successful award by denying him the fruits of the judgment in his favour. Mr Bennett for the Respondent justifies his position by saying he has acted on advice from his accountant and his "*counsel*".

17 Mr McCorry argues that the Respondent's tax obligations were such that he was required to deduct the tax that he did and remit the same to the Australian Taxation Office. The requirement to comply with Commonwealth taxation laws is paramount. Accordingly in this instance the Respondent's obligation to comply with the Commonwealth taxation legislation takes precedence over any requirement to pay the Claimant.

18 I reject such contention. In the present matter it is not a case of Commonwealth legislation overriding State legislation. What is being suggested is that an order of the WAIRC can be rendered nugatory. However that cannot be so. The WAIRC, in its determination of the matter, acted judicially. The order it made is a judicial pronouncement and cannot be overridden or rendered nugatory. The order is clear and specific. It makes no reference to any amount being deducted from the sum of $2006.40 by reason of tax or for any other reason. This court is required to enforce the order. It cannot go behind the order. If the Respondent had an issue concerning the WAIRC's ability to make the order that it did, then it could have appealed the decision; however it did not do so. The order of the Commission is clear in its terms and must be strictly complied with. The Respondent's approach has been to render the order nugatory.

19 I find that the Respondent has failed to comply with the order of Commissioner Gregor, made 19 March 2004, that the Claimant be paid $2006.40. I find the failure to comply was wilful and aimed at rendering the order nugatory so as to deny the Claimant the fruits of his judgment.

20 I will now hear the parties as to the orders to be made.

G Cicchini,
Industrial Magistrate.

2005 WAIRC 01528

METAL TRADES (GENERAL) AWARD 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN CHARLES JONES
	APPLICANT
	-v-
	LENNY'S COMMERCIAL KITCHENS PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	THURSDAY, 17 FEBRUARY 2005
FILE NO.	M 166 OF 2004
CITATION NO.	2005 WAIRC 01528

REPRESENTATION	
APPLICANT	MR D McLANE OF STRATEGIC ADVOCACY INSTRUCTED BY *WORKCLAIMS AUSTRALIA*
RESPONDENT	MR D JONES OF *THE CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA (INC).*

REASONS FOR DECISION

The Claim

1 By his claim filed on 22 June 2004 the Claimant alleges that the Respondent has breached various provisions of the ***Metal Trades (General) Award 1966*** (the Award) by failing to give five week's notice of termination contrary to clause 6 and further by failing to make payment of severance pay, contrary to clause 32A. The Claimant therefore claims $9,227.92 being the totality of the alleged underpayment flowing from the breaches of the Award.

Response

2 The Respondent by its notice of response filed on 21 July 2004 rejects the claim and says that at all material times it employed the Claimant as an Engineering Tradesperson Level 1 pursuant to the terms of the ***Sheet Metal Workers' Award No 10 of 1973*** (S.M.A.) being the specific award which bound the Respondent. It denies that it is obliged to observe the provisions of the Award. In the alternative it says that in the event that the latter award is also binding on the Respondent the S.M.A. overrides the Award.

3 The Respondent contends that there is no provision in the S.M.A., which sustains a claim for redundancy. Further it says that the Claimant was given adequate notice of termination in accordance with clause 16 of the S.M.A.

Outline of Claim

4 In his outline of claim filed on 3 September 2004 the Claimant introduced two further causes of action. He alleged therein that the Respondent had failed to comply with section 41 of the ***Minimum Conditions of Employment Act 1993*** (M.C.E. Act) in that it failed to have discussions with him to minimise the effects of his redundancy. Further he also contends that the Respondent has breached section 170CM of the ***Workplace Relations Act 1996*** (W.R.A.) by failing to give five week's notice of termination. The Claimant therefore seeks to recover severance pay, pay in lieu of notice, and penalties for breaches of the Award, W.R.A. and the M.C.E. Act. He also claims interest and costs.

Points of Defence

5 In addition to those matters outlined in its response the Respondent denied the further claims made pursuant to section 170CM of the W.R.A. and section 41 of the M.C.E. Act.

The Facts

6 The Claimant is a qualified electrician, plumber and gasfitter. He was throughout the material period engaged by the Respondent as a service technician responsible for servicing kitchen equipment that the Respondent had manufactured and/or installed for its clients. He commenced working for the Respondent on 28 February 1998 and remained with the Respondent until 21 May 2004 at which time his services were terminated. Although his employment was terminated on that date he was paid until 28 May 2004.

7 The Respondent is and was at all material times the manufacturer and vendor of commercial kitchens for restaurants, hotels, cafeterias, takeaway food outlets and the like. It manufactured its product in stainless steel sheet metal. Its products included stainless steel benches with or without sinks, trolleys, serving counters, front benches and bain maries. The kitchens were usually custom built and included both loose and fixed equipment. The kitchens also often included ovens, cook tops, bain maries and refrigeration units which were sourced elsewhere but which were incorporated and integrated into the kitchen manufactured by the Respondent. In its own advertising material (see exhibit 14) the Respondent described what its business does. It holds itself out to be in the business of design, custom manufacture, supply, installation, commissioning and on-going service of commercial kitchens.

8 The Claimant was employed to commission and service equipment manufactured and sourced elsewhere but which was integrated into the finished kitchen produced by the Respondent. Mr Peter Lenny, the Respondent's director, testified that although the Claimant was based at the Respondent's Osborne Park factory he would inevitably spend most of his time outside the factory. He said that the Claimant's major purpose was to service equipment after sale. The major percentage of the Claimant's work was electrical with some plumbing and gas work, which was carried on outside the factory. However there were occasions when he carried out the wiring of electrical equipment manufactured at the Respondent's factory. Mr Lenny testified that the mainstay of the Respondent's operations was the manufacture of product at its Osborne Park factory. Outside contractors would usually be contracted to install the kitchens it manufactured. The Respondent's own employees would commission the kitchens and provide ongoing service and maintenance.

9 In about late March or early April last year Mr Lynn Mayer, the Respondent's financial controller, reported to Mr Peter Lenny that the service side of the business was performing poorly. The service department accounted for only two to three percent of the business' total turnover and the decision was made to outsource the provision of service and maintenance. It was concluded that it would be more cost effective to do so. It was decided therefore to close the service department. The

goodwill of the service aspect of the business was to be sold. That inevitably was to result in the Claimant and his supervisor, Service Manager Phillipe Kaison losing their jobs. They were the only employees engaged in the service department.

10 After having in early April 2004 made the in-principle decision to close the service department, Mr Peter Lenny proceeded to approach prospective buyers. It seems that he engaged in informal discussions with prospective buyer resulting in an in-principle agreement for the sale and purchase of the goodwill of the business being achieved in about mid April 2004. The agreement was concluded on a handshake. Soon thereafter the Respondent informed Mr Kaison of his decision with intention of also telling the Claimant as soon as practicable.

11 According to Mr Kaison, rumours about what was to happen began to circulate within the factory. It was in that context that he told the Claimant that the service section was to close. The Claimant on the other hand says that he found out only in passing from Mr Kaison as to what was happening, which resulted in him confronting Mr Peter Lenny on 23 April 2004. Mr Lenny's version, as supported by Mr Mayer and Mr Kaison, is that he caused the Claimant to be called into his office for the purpose of telling and explaining to him what was to transpire.

12 There is an obvious conflict in the evidence concerning the circumstances by which the meeting on 23 April 2004 came about. There is also conflict in the evidence as to who was present at the meeting and what was said. It suffices to say that the weight of evidence is against the Claimant on both issues. The evidence of Mr Mayer is supportive of Mr Lenny and is generally (with some significant exceptions) corroborative of his evidence.

13 With respect to that meeting it was the Claimant's evidence that after having been appraised of the fact that the service department was closing he obtained legal advice and then went to Mr Peter Lenny's office and confronted him by asking,

"*What's going on*"?

14 Mr Lenny explained that the service section of the business was being sold and that the person who was buying the business might be interested in speaking to him. The Claimant then asked,

"*What about redundancy?*"

15 Mr Lenny did not respond but looked fairly shocked. The Claimant then said,

"*I will get it in writing, won't I?*"

He then left the room.

16 Mr Lenny's version of what transpired is that he caused the Claimant to attend his office. At the meeting that followed Mr Lenny informed the Claimant that given that the service side of the business was not going as had been hoped that he had decided to sell that aspect of the business. He advised the Claimant that he had in fact arranged to sell the business and identified who the buyer was. He said that he informed the Claimant that he anticipated finalising everything *"by the end of May"* and advised him that his services would not be required after that date. Later in his evidence he said that he "*definitely told him* (Mr Jones) *that after the 26th of May his service was - - would no longer be required*" (Transcript page 109). Mr Lenny went on to say that the Respondent had already established that it had an obligation to pay the Claimant four week's notice with an additional week's notice on account of his age. Accordingly the five weeks notice given on 23 April 2004 complied with what was required.

17 Mr Mayer's testimony about that meeting was that Mr Lenny informed the Claimant that the service department had been sold. The Claimant was also told that the actual date of sale (settlement) had not been finalised, however Mr Lenny was very confident it would take place before the end of May and accordingly that the Claimant's employment would be severed immediately. The Claimant was informed that he was entitled to receive five week's notice as required under the Sheet Metal Workers' Award. He was also told that if he found another job he would not be required to work out the five weeks. It was Mr Mayer's evidence that Mr Lenny informed the Claimant that his five week's notice would take him through to 28 May 2004. He further told the Claimant that no redundancy was payable pursuant to the Sheet Metal Workers Award. Mr Jones thereafter left the room visibly upset. It was Mr Mayer's recollection that Mr Jones did not mention redundancy. It was Mr Lenny who raised that issue.

18 Given that I have no particular reason to disbelieve Mr Mayer, I do accept that he was present at the meeting that took place on 23 April 2004. As to whether his recollection of events is accurate, that is another matter. It is the case that neither Mr Mayer nor Mr Lenny made any notes of the conversation but Mr Jones on the other hand did make some brief notes. It is of importance that although the evidence of Mr Lenny and Mr Mayer is generally consistent there are aspects of their evidence that differ. They differ on the issue of the actual termination date and they also differ on the issue of redundancy. It suffices to say that neither of them has a word perfect recollection of what was said. It is apparent that there has been some reconstruction of events. Neither Mr Lenny nor Mr Mayer in their initial thrust of evidence testified that the Claimant was given a specific date of termination. Later they said that he was but were inconsistent as to the date of termination. The first tranche of Mr Lenny's evidence on point is inconsistent with his second tranche of evidence on the same issue.

19 He initially said (at page 109 of the transcript):

"I would have given him details as to whom I'd - - I'd made an arrangement with and that I would anticipate that finalising everything would be somewhere towards the end of May and that I was therefore advising him that his services would no longer be required after that date."

And later, at the same page, he said:

> *"I noticed you've used the words "would have told him". Do you - - do you recall whether you definitely told him this?--- Yes. I definitely told him that after the 26th of May his service was - - would no longer be required."*

20 Given the inconsistencies in Mr Lenny's evidence and between Mr Lenny's evidence and that of Mr Mayer I am not at all satisfied that there was any particular date given as to when termination would take place. All I can be satisfied about, on the balance of probabilities, is that the Claimant was advised that his services would no longer be required with effect from "*somewhere towards the end of May*". I am fortified in that view given the delay in confirming the details of the discussion. That in my view is indicative of the fact that the arrangement for the take over of that arm of the business was still in a state of flux. Indeed the formal sale agreement was not concluded until 14 May 2004. That explains Mr Lenny's letter to the Claimant dated 18 May 2004 (exhibit 3) setting out the precise details of termination. Up until then nothing was certain. Having said that, I am nevertheless satisfied that the Claimant was informed that he was being terminated. That in turn caused him to raise the issue of redundancy, which I am satisfied, he did. Redundancy was not an issue considered by Mr Lenny or Mr Mayer until raised by the Claimant. It follows from what I have said that I both accept and reject aspects of each witnesses' evidence concerning who was at the meeting and what was said. In the end I find that the Claimant was on 23 April 2004 told that his employment would be coming to an end some time at the end of May 2004. However I find there was no specificity given to the Claimant until he received the letter dated 18 May 2004.

21 It was Mr Kaison's evidence, which I accept, that the Claimant was, following the April 23 meeting, unco-operative and difficult. He was clearly upset at what had happened. On 10 May 2004 the Claimant went to Mr Lenny and asked him for a month's holiday to commence 7 June 2004. He recorded in his diary entry that in response to his request Mr Lenny said *"Err-yes-OK".* Mr Lenny seemed taken aback by the approach for holidays. In my view the Claimant's conduct following receipt of advice regarding the termination of his employment was aimed at strengthening his position with respect to future action to be taken. His application for holidays was mischievous. He knew that he would not have a job sometime after late May and accordingly must have known that holidays would not be an issue but took advantage of the fact that the Respondent had not nominated a specific termination date. He seeks to rely on Mr Lenny's response to support his contention that he was not on 23 April 2004 given notice of termination. However, in my view, Mr Lenny's response uttered in a state of bewilderment does not assist the Claimant. The effect of the response was nugatory given that it was well understood by all concerned that the Respondent would not employ the Claimant after late May 2004. As previously stated I am satisfied that the Claimant was informed on 23 April 2004 of the fact that he was to be terminated however whether or not such notice of termination was adequate or appropriate is quite another matter. In my view the notice given on 23 April 2004 was inadequate in that it did not specify the date of termination. It was simply an indication that termination would occur and that it would occur some time in late May. The lack of specificity made the notice ineffective. The Claimant was entitled to know with some specificity as to when his employment was to end. To be told that your employment will end somewhere at the end of May is not good enough. It follows that the Claimant was not given sufficient notice of termination.

22 On 19 May 2004 the Claimant received an envelope, which was on his desk when he arrived at work. It contained a letter from Mr Lenny dated 18 May 2004 (exhibit 3). In essence the letter inter alia confirmed that the Claimant's employment had been terminated and gave details as to the date that the Claimant was to cease work. It was indicated therein that the Claimant was to cease work on 26 May 2004. It was only then that the Claimant knew the precise details of his termination. It follows therefore that the Claimant did not receive proper notice of his termination until 19 May 2004 when he received what is now exhibit 3. Time with respect to notice of termination therefore commences to run from 19 May 2004.

23 On Friday 21 May 2004, whilst at work, the Claimant was instructed by his employer to empty out from his van the equipment and materials belonging to the Respondent, which he did. In the course of the emptying of the van a dispute arose concerning hand tools in the possession of the Claimant. The Claimant regarded certain tools as his. However it is common ground that they had been purchased by the Respondent. Notwithstanding that fact, Mr Lenny permitted the Claimant to retain certain tools in an endeavour to diffuse what had become a heated situation. Immediately thereafter Mr Paul Lenny drove the Claimant home.

24 A week later he received his pay. Later still he received his other entitlements.

Determination

Section 170CM of the Workplace Relations Act 1996

25 Pursuant to section 170CM of the W.R.A. the Claimant is to be paid five week's pay in lieu of notice. However the entitlement pursuant to that provision can only be enforced by virtue of the code set out in Part VIA Division 3 of the W.R.A. In particular, section 170CP(2) and (5) provides:

> *(2) Subject to subsection (5), an employee may apply under this section to the Court or to a court of competent jurisdiction as defined in section 177A for an order under section 170CR in respect of an alleged contravention of section 170CM by his or her employer.*
>
> *(5) An application under subsection (1), (2), (3) or (4) in respect of an alleged contravention of section 170CK, 170CL, 170CM or 170CN may not be made to a court unless the applicant:*
>
> > *(a) has received a certificate under subsection 170CF(2) regarding conciliation of an application made wholly or partly on the ground of the alleged contravention; and*
> >
> > *(b) has elected under section 170CFA to begin proceedings in that court for an order under section 170CR in respect of the alleged contravention.*

26 It suffices to say that as a precondition to the making of a claim pursuant to section 170CM the Claimant must receive a certificate pursuant to section 170CF(2) and make an election under section 170CFA to bring proceedings under section 170CR. In this matter the Claimant has not done any of those things, which are the necessary prerequisites for the making of an application or claim. Accordingly the alleged breach of the provision is not properly before this Court and is not justiciable by it.

Section 41 if the Minimum Conditions of Employment Act 1993

27 The Claimant alleges that the Respondent well knew in its negotiations to sell part of its business that the Claimant was going to lose his job. Section 41 of the M.C.E. Act obliged the Respondent to have discussions with the Claimant about the ways in which the effects of redundancy upon him could be minimised. It is alleged that the Respondent has failed to do so.

28 Section 41 of the M.C.E. 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.*

29 The provision is to be construed having regard to the interpretation provisions found in section 40 of the M.C.E. Act which provides inter alia:

> *40. Interpretation in Part 5*
>
> *(1) In this Part —*
>
> ***"employee"** does not include a casual employee or an apprentice or trainee;*

"redundant" *means being no longer required by an employer to continue doing a job because the employer has decided that the job will not be done by any person.*

(2) For the purposes of this Part, an action of an employer has a significant effect on an employee if —

(a) there is to be a major change in the —

(i) composition, operation or size of; or

(ii) skills required in,

the employer's work-force that will affect the employee;

(b) there is to be elimination or reduction of —

(i) a job opportunity;

(ii) a promotion opportunity; or

(iii) job tenure,

for the employee;

(c) the hours of the employee's work are to significantly increase or decrease;

(d) the employee is to be required to be retrained;

(e) the employee is to be required to transfer to another job or work location; or

(f) the employee's job is to be restructured.

30 There can be no question that in mid April 2004 the Respondent decided to make the Claimant redundant. I am further satisfied that on 23 April 2004 being very soon after that decision was made the Respondent called the Claimant into a meeting and informed him of the decision that had been made. As a result of that meeting there could not have been any misapprehension on the part of the Claimant as to what was to occur. Further, given the nature of the Claimant's qualifications and having regard to the nature of the Respondent's remaining business activities, it was axiomatic that the Claimant could no longer work for the Respondent. There was simply no other job that the Claimant could do. Accordingly the Claimant was told that by virtue of the sale of the service section of the business that he would become redundant as an employee of the Respondent. At that time he was given details as to the prospective purchaser and was invited to discuss his position with the purchaser with a view to obtaining employment with the purchaser. Further it was also the case that the Claimant was informed that he would be able to leave his job early and would not be held to the five week's notice period in the event that he found an alternate job. I am also satisfied that the Claimant used the Respondent's telephone and facilities to contact prospective employers. Indeed he was successful in that regard and was able, on 19 May 2004, to arrange an interview with his now employer Arcus with whom he commenced working immediately following his termination. The question however remains as to whether all of that was enough. What is required was discussed in ***Garbett v Midland Brick (2003) 83 WAIG 893*** a decision of the Industrial Appeal Court of Western Australia. At page 899 (paras 54 and 55) His Honour Hasluck J said:

31 *It is significant that s 41(2) speaks of "the matters to be discussed". This suggests that the employer has an obligation to raise the matters for discussion and to ensure that the relevant points are in fact covered. Further, and in any event, in the case of remedial legislation of this kind which is obviously designed to ameliorate the effects of redundancy to some extent, the provision clearly requires that there be a discussion.*

32 *To my mind, if the employee remains silent, possibly because of shock or diffidence or ignorance about his statutory entitlement, it is not open to the employer to leave the matter in abeyance. The employer must ensure that a discussion of the prescribed kind takes place, so that the employee will be able to draw the employer's attention to any considerations that may have been overlooked such as, adverse effects upon the employee or measures that might be taken to avoid or minimise the effect.*

33 At page 905 (para 94) His Honour Heenan J said:

Accordingly, in the present circumstances, I consider that the term implied in all contracts of employment by s 41 of the MCEA that, where the employer has decided to take action that is likely to have a significant effect on an employee or 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 on the redundancy, as the case may be, and the obligation to discuss with the employee the various matters mentioned in s 41(2), actually requires the employer to bring that entitlement to the attention of the employee and to discuss the matters so arising, notwithstanding that the employee may not be aware of the existence of his or her entitlement to be so informed or of the obligation of the employer to discuss the matters provided. In the absence of such an obligation, the statutory provision is likely to have haphazard and random effect depending upon the existence or otherwise of knowledge by the individual employee, at the relevant time, of the effect of s 41. As the section applies to contracts of employment of all kinds, and the Act is designed to provide minimum conditions of employment which will, inevitably, involve many employees at the lower end of the employment scale whose knowledge and experience is likely to be limited, I consider that any different approach would fail to ensure that such employees receive the benefit of the statutory provision which its policy demonstrates is a necessary ingredient of their employment.

34 Further His Honour also commented at page 904 (paragraph 90) that compliance with section 41 of the M.C.E. Act also necessarily imports a requirement that the worker be told of his or her rights pursuant to section 43 of that Act that there is an entitlement to paid leave of up to eight hours for the purpose of being interviewed for further employment and that the eight hours need not be consecutive.

35 In the present matter the approach taken by the Respondent was haphazard. There was no concerted attempt to discuss measures that might be taken to minimise the effects of the redundancy. It was very much left to the Claimant to sort out. The Claimant was not informed of his rights pursuant to section 43 of the M.C.E. Act. Although it is the case that the Claimant used the Respondent's facilities to arrange an interview, that occurred not at the suggestion of the Respondent but rather as a result of the Claimant's proactive stance. In the end there was not the strict compliance with section 41 as was required. The amelioration of the impact of redundancy resulted more from the Claimant's endeavours rather that any assistance gained in discussion with his employer. Indeed the discussions had on 23 April 2004 failed to specifically address what was required. Therefore there has been a breach of section 41 of the M.C.E. Act. Fortunately for the Respondent, the Claimant, given that he was able to move immediately to find alternate employment, did not suffer loss or damage by virtue of its failure to comply with the provision.

Breach of the Metal Trades (General) Award No 13 of 1965

36 The Claimant asserts that the Award is binding upon the Respondent by virtue of the operation of section 37 of the ***Industrial Relations Act 1979***. In that section a "common rule" award is said to bind all employees employed in a calling mentioned therein, in the industry or industries to which the award applies and all employers employing those employees.

The area and scope clause found at clause 3 of the Award provides:

3. - AREA AND SCOPE

37 *This award relates to each industry mentioned in the Second Schedule to this award and applies to all employees employed in each such industry in any calling mentioned in Clause 31. - Wages and Supplementary Payments (including the appendix thereto) of Part I - General or Clause 10. - Wages of Part II - Construction Work of this award but does not apply within the area occupied and controlled by the United States Navy at and in the vicinity of North-West Cape in relation to Increment 1 of the construction of the Communications Centre.*

38 The Claimant must therefore prove, on the balance of probabilities, the following:

That the industry in which the Respondent is engaged is an industry to which the Award applies, and

That he was employed in a calling mentioned in the Award.

39 The Claimant asserts that, given that the Award is one where its scope can be determined by reference to the Award itself, it is unnecessary for the Claimant to call evidence to establish what the industries are which are covered by the Award. It is a "*Donovan clause*" (See ***RJ Donovan and Associates Pty Ltd v Federated Clerks Union (1977) 57 WAIG 1317***). Therefore the clause can be construed by looking at the Award itself. In that regard the Claimant says that there are two identifiable industries within the *Second Schedule – Schedule of Respondents* of the Award that apply to the Respondent. They are specifically identified as being "*Engineers – General*" and "*Plumbers & Sheetmetal Workers*".

40 The Claimant says that:

The Award relates to each industry mentioned in the *Second Schedule – Schedule of Respondents* including "*Engineers – General*" and/or "*Plumbers & Sheetmetal Workers*", and

The Award applies to all employees employed in each such industry in the callings mentioned in clause *31. – Wages and Supplementary Payments* of the Award, and

By virtue of the definition of the classifications found in *clause 5. – Definitions and Classification Structure* of the Award the Claimant falls into *Wage Group C9* given that he qualifies as an *Engineering Tradesperson (Electrical/Electronic) – Level II* by reason of his qualification as an electrician, plumber and gasfitter.

41 The Claimant contends that the broad industry of the Respondent is the sale and installation of commercial kitchens wherein the Respondent would buy in equipment and manufacture sheet metal cupboards and benches and then install those into the clients' kitchens. That it is said brings it within each of the industries specifically previously identified. It is also argued that in each instance the calling identified in the Award as fitting the description of what the Claimant did is that *of Engineering Tradesperson – Level II.*

42 The Respondent on the other hand submits that there is evidence before this Court to establish that the Respondent is a manufacturer of stainless steel kitchen furniture both fixed and mobile for use in commercial settings. The service and maintenance aspect of the business was only a small and incidental part of its operations. The Respondent says that it is the manufacturer of kitchen furniture taking it outside of the scope of the Award. The Respondent says that it fits within the scope of the S.M.A. in that the scope clause of that Award provides at clause 4:

4. - SCOPE

43 *This award shall apply to workers employed to do work in galvanised iron, sheet-tin and other sheet metal, including stove and oven making and repairing, canister making, gas meter making and repairing, manufacture of metal furniture, making and repairing circulating radiators, Porcelain Enamelling wet and dry.*

44 It is suggested by the Respondent that its position in this matter is on all fours with the position of the Respondent in ***Patrick Louis v KDB Engineering Pty Ltd T/As K-Care (2003) 83 WAIG 3676***. Further it is said that when that decision is read with what was said in ***Bell-A-Bike Rottnest Pty Ltd v Automotive Food, Metal, Engineering, Printing and Kindred Industries Union (1982) 82 WAIG 2655*** that the conclusion must inevitably be reached that the Award does not apply to it.

45 It is the case that the Claimant must establish by way of the facts whether the activities carried on by the Respondent are covered by the description of the industry and whether those have been established as a matter of fact (see ***Bell-A-Bike*** supra).

46 In my view the industry in which the Respondent operates is that of the design, custom manufacture, supply, installation, commissioning and ongoing service of commercial kitchens. The core activity is that of the design and manufacture of stainless steel commercial kitchens. The rest is ancillary. It is unhelpful to attempt to characterise the Respondent's industry by having regard to what the Claimant did in the application of his skills in carrying out work for the Respondent because the evidence dictates that his function in service and maintenance was ancillary to the Respondent's core function. Indeed he is in no different situation to the bike repairer in ***Bell-A-Bike*** (supra).

47 The onus rests with the Claimant to establish on the balance of probabilities that the activity carried on by the Respondent is covered by the description of the industry in the Award. Whether that has been established is a matter of fact. In my view there is a paucity of evidence on such issue. Indeed the only way in which this Court can construe the particular industries entitled "*Engineers – General*" and "*Plumbers & Sheetmetal Workers*" identified in the *Second Schedule – Schedule of Respondents* to the Award is by having regard to the names of the respondents listed under each industry to ascertain what the industry is. When that is done it is apparent that none of the named respondents under the heading *"Engineers – General"* are in the same industry as the Respondent. They deal, as can be seen from their titles, with engineering, cranes and building. None of those enterprises could be said to be in the same industry as that within which the Respondent operates. Similarly under the heading "*Plumbers & Sheetmetal Workers*" the listed respondents are those, which carry out plumbing and air conditioning manufacturing. So far as Astra Metal Products Pty Ltd is concerned, I simply do not know what it does. In that regard the Claimant has failed to discharge the evidentiary burden that it has.

48 In the end the Claimant has failed to prove that the Award applied to the Claimant's employment. Consequently the Claimant has not made out its claims based on the operation of the Award.

Conclusion

49 Having failed to prove the operation of the Award the claims for redundancy and pay in lieu of notice based on the operation of the Award have not been made out. Further the Claimant's action pursuant to section 170CM of the W.R.A. is defective and therefore cannot be used as a vehicle for the recovery of pay in lieu of notice. That is so notwithstanding that there has been a clear failure to give the appropriate notice. The Claimant would, it seems, be entitled to five week's pay from 19 May 2004

less the amount payable for the period from19 May to 28 May 2004, which has already been paid. Given that the claim herein is not one under the S.M.A. I have no power to make an order for the payment of the same.

50 The Claimant has only been successful in establishing a breach of section 41 of the M.C.E. Act. That provision is enforceable by virtue of section 7(c) of the M.C.E. Act, which enables section 83 of the ***Industrial Relations Act 1979*** to be used as the vehicle for enforcement. Accordingly the only remedies available to the Claimant are those set out in section 83(4)(a) which provides:

> *(4) On the hearing of an application under subsection (1) the industrial magistrate's court may, by order —*
>
> *(a) if the contravention or failure to comply is proved —*
>
> *(i) issue a caution; or*
>
> *(ii) impose such penalty as the industrial magistrate's court thinks just but not exceeding $2 000 in the case of an employer, organisation or association and $500 in any other case;*

51 The Claimant, in summing up, indicated that he seeks the imposition of a penalty for the Respondent's failure to comply with Section 41 of the M.C.E. Act notwithstanding that such had not been indicated in the Claim itself or in the pleadings filed in this matter. The Court is therefore required to consider the same particularly in the light of the decision in ***Carol Penn v Patricia Edwards of Verschuer Edward (2004) 84 WAIG 3474***.

52 I will now hear from the parties regarding the orders to be made.

G Cicchini,
Industrial Magistrate.

2005 WAIRC 01281

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	KEITH LEONARD WATKINS
	CLAIMANT
	-v-
	J CORP PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	THURSDAY, 7 APRIL 2005
FILE NO.	M 203 OF 2004
CITATION NO.	2005 WAIRC 01281

Representation	
CLAIMANT	Mr R W Clohessy of *Union Industrial Advisory Services*
RESPONDENT	Mr J Park (of Counsel) instructed by *Valenti Lawyers*

Reasons for Decision

(Given orally at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

Claim and Response

1 On 27 July 2004 the Claimant filed his claim in this Court, alleging that the Respondent failed to comply with the Building Trades Award and was therefore in breach of the ***Workplace Relations Act 1996***. The Claimant sought in the claim the payment of $24,942.66 plus costs and penalties.

2 By its response filed 17 August 2004, the Respondent denied that claim and stated that the Claimant was not an employee of the Respondent pursuant to the Building Trades (Construction) Award 1987. The Respondent contended that the Claimant was a subcontractor pursuant to an agreement made between the parties on 20 November 1999.

3 In his particulars and outline of claim filed 1 December 2004, the Claimant asserted that he was employed by the Respondent to clean houses. The employment relationship it is said was commenced by verbal arrangement. The Claimant says that between July 1999 and 30 June 2000 he worked on 72 houses and was paid for each job. Travelling expenses were not paid, notwithstanding that Richard Bray, a supervisor employed by the Respondent, undertook that the Respondent would pay to him 50 cents per kilometre travelled to do each job. The Claimant asserts that he travelled 34,165 kilometres to do the work but was not paid for such travel. Further he was not supplied with any means of transport.

4 The Claimant in his particulars and outline of claim contends that his work was governed by the Building Trades (Construction) Award, which also binds the Respondent by virtue of common rule. There has been a shift in the claim from that indicated on the claim form to that which is now stated in the outline of claim. It is noted that the Claimant changed the basis of his claim from one of an alleged breach of a federal award to one which alleges a breach of a state award. It is on that basis that the Claimant says that he is entitled to 73 cents per kilometre travelled, amounting to $24,942.64.

5 It seems also that the Respondent has from the outset misapprehended the claim to be one under the state award, and proceeded on that footing throughout. In its outline of case in defence, the Respondent reaffirmed its contention that the Claimant was not employed by the Respondent and that the Claimant was at all times engaged as a subcontractor. Further the Respondent contends in its outline of defence that from time to time on specific jobs where the Claimant was required to re-attend at a property that the Respondent would pay the Claimant's travelling expenses claimed in his invoices. In all other circumstances or instances the Claimant did not include a claim for travelling expenses, as it was not agreed between the parties that he would be paid for such travelling. The Respondent denies that Richard Bray, on its behalf, entered into an agreement that the Claimant be paid travelling expenses at the rate of 50 cents per kilometre. The Respondent says that the work carried out by the Claimant for the Respondent was carried out pursuant to the subcontract agreement, and was not subject to any award. The Respondent says that the claim has been frivolously or vexatiously instituted.

Application of Award.

6 I proceed on the basis that the claim is made pursuant to the state award. The parties have argued the matter upon that basis, notwithstanding that the initial claim was made pursuant to the ***Workplace Relations Act 1996*** alleging a breach of the federal award. To establish a breach of the state award the Claimant must, on the balance of probabilities, prove the following:

The existence of an award; and

That the employer was bound by the award; and

He was employed in a classification under the award; and

That the Claimant was an employee within the meaning of section 7(1) of the ***Industrial Relations Act 1979***.

7 In this matter the threshold and pivotal issue to be determined is whether the Claimant was at the material times an employee of the Respondent. The parties at the commencement of the hearing agreed that this Court should determine the issue of liability first and quantum later. There is now dispute as to what was meant by that. I will return later, if necessary, to consider that issue but it simply demonstrates the difficulty associated with splitting issues and why the High Court of Australia has repeatedly stated that where possible issues ought not to be split.

The Evidence

8 I now consider the evidence. The Claimant, prior to 1999, had worked for the Respondent for a period of between six months and a year. It appears from the evidentiary material before me that that may have occurred in about 1995. The nature of the relationship between the parties at that time was not explored in evidence. The parties re-engaged in about July of 1999. At that time the Claimant's daughter was building a house at Gidgegannup. The Respondent was the builder. Given that the house was nearing completion and the necessary brick clean and house clean had not been performed, the Claimant's daughter asked Richard Bray, the Respondent's supervisor, who had responsibility for the construction of her home, whether her father could do the job. It transpires that the Claimant had done this type of work previously and had extensive experience in the cleaning industry. Mr Bray agreed. Consequently the Claimant and Mr Bray discussed the matter, and it was agreed that the Claimant would be paid for the clean of the house that was being built for his daughter. Whilst carrying out that particular job, Mr Bray spoke to the Claimant. He asked the Claimant whether he wanted to do another job, also at Gidgegannup. The Claimant agreed. Although Mr Bray wanted him to do that job immediately, Mr Watkins was not in a position to do so and subsequently did the job some time later. It transpired that the Claimant then carried out a further two or three job for the Respondent. It is important to note that the Claimant was, at all material times, a resident of, or at Cervantes, and further, that he held other jobs within or near that particular locality. He testified that he was a gatekeeper for CALM at the Pinnacles and that he cleaned the local tavern. He also testified that he did other paid work.

9 On a date unknown following the first two or three cleaning jobs Mr Bray telephoned the Claimant at his home. He was not there at the time. Mr Bray spoke to the Claimant's wife about the issue of travelling. As a consequence of that conversation Mr Watkins later spoke to Mr Bray concerning the issue of the payment of travelling fees or expenses. Mr Bray told him that a travel fee or expense would be paid but the quantum would be worked out by head office. It was not until November of 1999 that he was asked to sign a subcontract agreement. That was subsequent to the conversation relating to the payment of travelling fees.

10 The subcontract agreement is dated 20 November 1999. The actual date of signing is unclear from the document itself. It suffices to say that the agreement evidences the fact that the relationship between the parties was one of contractor and subcontractor. The relationship was recorded as being a subcontract relationship. Nothing really changed by the signing of the subcontract agreement. The Claimant continued to work in the same manner and under the same circumstances that had existed from the start in July of 1999.

11 The Claimant carried out various brick cleaning, floor scraping and house cleaning jobs for the Respondent. In each instance he did not negotiate a price for those jobs and simply accepted what he was paid. The arrangement was clearly an informal one. The evidence dictates that either Mr Bray or some other person from the Respondent would telephone the Claimant to see if he could do a job, and the necessary arrangements would then be made with respect to that job. The Claimant would be told of the particular time frame and other material details, and thereafter he would attend the job and carry out the work. On occasions he would not see the supervisor whilst carrying out his work. On other occasions the supervisor would attend. Often he would carry out the work without a purchase order being given to him prior to commencement. Purchase orders were on those occasions received retrospectively. Upon completion of the work Mr Watkins would submit a docket or invoice statement to the Respondent for payment. All that was stated on such document addressed to the Respondent was the address of the site at which the Claimant worked, and the description of the work that he did. He did not provide any other information. He did not therein specify any order number or the quantum of payment sought. In some instances he claimed travel, but did not quantify the amount that he claimed in that regard. However travel was not always claimed. The Respondent paid him its pre-determined rates. Where travel was paid, it seems that payment was paid at a flat rate. It seems that the Claimant did not take issue with either the quantum of payment for each specific job or the fact that his travel claims were paid at a flat rate.

12 At the end of June 2000 the Claimant was overpaid $1283.23 because of a computer system error within the Respondent's accounts department. Upon the error being discovered the Respondent sought to recover the amount overpaid. It accordingly wrote a letter to the Claimant seeking repayment of the same, but the Claimant refused to pay the money back. That led to the Respondent suing the Claimant in the Local Court at Perth for the recovery of that money. In turn the Claimant counterclaimed. In the end, that matter in the Local Court was settled on the basis that the Claimant pay the Respondent $2500 inclusive of costs and that the counterclaim be dismissed. These proceedings were instituted after the commencement of the Local Court action but before the resolution of the same.

13 The Claimant acknowledged during evidence in chief that the Respondent was well aware of the fact that he worked for others. He also acknowledged that the Respondent throughout deducted tax according to the Prescribed Payments System. He said that he never refused to carry out any of the work that he was asked to do by the Respondent. He agreed also that there was never any discussion between the parties concerning the application of the Building Trades (Construction) Award. The parties did not contemplate the application of any award.

14 Mr Watkins was asked in cross-examination whether he was, at the material time, an employee of the Respondent. In response to that question he refused to assert that he was, only saying that he did not know what the law was. At no time when he was given the opportunity to do so did he assert that he was an employee. He agreed that he was paid on a job-by-job basis. He also agreed that he took his wife with him to do the work that he did for the Respondent and that he paid her for such work. He conceded that in his 1999/2000 tax return he declared having paid her wages. He also claimed therein other expenses incurred in carrying out his work. He agreed that he was not paid sick leave, annual leave, or any other entitlement that would normally be paid to an employee under an award. He conceded also that he did not claim the same. He was not told when to start work

or when to finish work or how to do his job. He was not supplied with tools or materials. He used his own tools. He was free to do other jobs and was unrestricted in that regard.

15 The Claimant did not call any other witness and his case rests solely on his own evidence.

16 The Respondent called two witnesses, namely Alan Clarke, its building manager, and Sally Hellier, its former accounts clerk. It suffices to say that much of Mr Clarke's evidence related to the Respondent's operations, its general procedure with respect to the hiring of subcontractors, and its procedure with respect to the payment of invoices received from subcontractors. It will not, having regard to such, be necessary for me to review Mr Clarke's evidence in its entirety. It suffices to say I will refer to only the pertinent aspects of his evidence.

17 Mr Clarke was Mr Bray's supervisor. All payments to subcontractors had to be sanctioned by Mr Clarke. He testified that the Respondent in carrying out the construction of homes, only ever engaged and dealt with subcontractors. He said that the Respondent did not employ anyone to carry out construction work. The system by which the Respondent operated was one where a subcontractor would, following his initial job, be asked to sign a subcontract agreement which was usually sent out to the subcontractor, completed by the subcontractor and returned. Such agreement reflected the arrangement between the parties. He said that was what occurred with Mr Watkins. The subcontract agreement before the Court (exhibit 1) reflects that. He said that Mr Watkins and other subcontractors were only paid on a job-by-job basis upon the production of invoices. They were free to work elsewhere. Subcontractors had tax deducted according to the PPS system that then applied which required the Respondent to deduct tax at the rate of 20% unless varied.

18 With respect to the payment of a flat rate fee for travel paid to Mr Watkins he agreed that the same was, indeed, paid. He said that the same was paid as an incentive so that Mr Watson would continue working for the Respondent. He said that the industry is affected by supply and demand. When the supply of subcontractors is short, then incentives are used to ensure that those people continue to work for the Respondent. He said that in this particular instance the payment made to the Claimant was an incentive payment in recognition of the fact that cleaners were in short supply and that was the sole basis for acquiescing to the payment for travel at a flat rate. Market forces drove such payments. There was no agreement to pay Mr Watkins a set rate per kilometre. That was particularly so having regard to the fact that

19 Mr Watkins resided at Cervantes. The costs of having him drive from Cervantes to clean were considered to be prohibitive.

20 The cross-examination of Mr Clarke was uneventful and I need not comment upon it. It suffices to say that Mr Clarke was, in my view, an excellent witness. He was a truthful witness and a person upon whose testimony I can rely. I accept his evidence in totality.

21 Ms Hellier was called to testify about certain matters and particularly about the letter that she wrote on 11 July 2000 addressed to the Claimant in which she sought to recover from the Claimant the overpayment made. In that letter she described it to relate to wages payment. She testified that the terminology "*wages*" used in the letter was just a general one. She was not intending to categorise the overpayment received by the Claimant as an overpayment of wages. I accept her evidence.

22 The Claimant has attempted to utilise the letter as evidence of an employer/employee relationship. In my view it does not evidence that relationship at all. It cannot assist the Claimant. The fact that the accounts clerk in seeking to recover the overpayment used loose terminology cannot be evidence of the intention of the parties in entering into their agreement or evidence of the relationship itself. The use of the word "*wages*" in that context is not material. The use of the word in that context appears to be an aberration on the part of the accounts clerk. It will not therefore be necessary to comment further upon the other evidence given by Ms Hellier. Ms Hellier's evidence is accepted.

Determination

23 In determining this matter I start by considering whether the Claimant has been able to establish, on the balance of probabilities, that he is an employee of the Respondent within the meaning of section 7(1) of the ***Industrial Relations Act 1979***. Interestingly, the Claimant did not assert within his own evidence that he was an employee. Indeed at no stage during the currency of the relationship did the Claimant assert that he was an employee or make any claim for the usual entitlements such as leave and so forth.

24 I will now consider whether the Claimant has been able to establish by reference to the well known indicia, that he was at all material times an employee of the Respondent.

Control

25 An examination of his conduct reveals that he was not controlled. He could refuse to work. He was not controlled as to how the work was done. He was permitted to unilaterally choose how and when he carried out his work subject of course, to the Respondent's overriding time frame. Other than setting the parameters as to the time frame and the nature of the work to be done, the Claimant was not otherwise controlled in any way.

Start and Finish Times

26 I move to consider starting and finishing times, which, in itself, is a subset of the control indicia. In that regard it is clear that the Claimant was not told what time he should start work, when to take his breaks, or how many hours he should work in a given day. He chose his work times, and he did so quite unilaterally subject to the Respondent's overall requirements.

Business

27 I now move to the business indicia. The Claimant did conduct his own business as is reflected in his tax return for 1999/2000. Therein it shows that he paid others wages and he also sought deductions for expenses incurred. His tax return is reflective of a business operation and is also reflective of the type of deduction claims made by business operators.

Obligation to Work

28 It will be self-evident from the evidence that I have reviewed that the Claimant had no obligation to work for the Respondent. He could choose which jobs he did and which ones he did not want to do. He could refuse to do any particular job. He could work for others and was not expected, nor was he required to work for the Respondent at the Respondent's command.

Remuneration

29 The Claimant was paid on a job-by-job basis upon completion of the work carried out. Although he did not quote for jobs and did not discuss his remuneration, he nevertheless was happy to accept the going price for the job, which was paid by the Respondent. He had the ability to negotiate if he wanted to, but did not do so. He only negotiated his claim for travel and was paid at flat rate for that. His remuneration was achieved only when he presented an invoice and was paid for what he did. He was paid like a subcontractor normally would be paid. The method of his remuneration is not reflective of that of an employee, but rather that of a subcontractor.

Taxation

30 Taxation was deducted using the PPS method as is reflected in the documents before me. That too is reflective of the fact that he was a subcontractor. He did not take issue with the mode of tax deduction made during the course of his engagement.

Termination

31 If one looks then to the indicia of termination, it can be seen that the Claimant was not terminated; he left of his own accord, upon his own terms. He did not have to provide any letter of resignation, or provide notice to the Respondent. He simply, as a matter of courtesy, informed the Respondent of his unavailability due to the fact that he acquired work in the city.

Equipment and Materials

32 It suffices to say that the Respondent did not supply any equipment or materials. Indeed, the Claimant supplied his own tools and materials.

Organisation Test

33 I move to consider the organisation test. The Claimant was not part of the Respondent's business. He was simply one of the numerous subcontractors that it had on its list who, if called, may or may not have been able to carry out the work required to be carried out. There was no continuing obligation on the part of either party.

Conclusion

34 When one considers the indicia to which I have referred and which are discussed in decisions such as ***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 other authorities, it becomes apparent that the Claimant was, right from the inception of the relationship in July of 1999, never an employee. Indeed, he was at all material times a subcontractor. He confirmed his position of subcontractor in the subcontract agreement, which he signed, dated 20 November 1999. The subcontract agreement signed at that time reflects the then existing situation and the intention of the parties for the future. The agreement was not a sham. It correctly described the relationship between the parties. There can be no question of the written agreement attempting to label the relationship as being different to the one that it actually was. The Claimant's situation, in my view, is no different to the situation of Dr Sinclair in the matter of ***Sinclair v Startune Holdings Pty Ltd 84 WAIG 3590***. It is most difficult for the Claimant to argue that the agreement was a sham because there is no evidentiary basis for supporting such an assertion.

35 The Claimant's claim is and has always been, in my view, without merit. The evidence even on the Claimant's own case establishes, and quite clearly so, if I might say, that he was at all material times a subcontractor. Quite frankly, there is not a scintilla of evidence supporting the claim that the Claimant was an employee. Indeed he did not even assert that in his own testimony. The Claimant cannot succeed in this claim for the reasons stated. The Claimant has failed to establish that he was an employee. On that basis alone the claim must fail.

(After having heard from the parties as to costs His Worship went on to say the following:)

36 The Respondent seeks that this Court makes a declaration that the proceedings have been frivolously or vexatiously instituted. The Claimant opposes the making of such a declaration.

37 I have found that the claim was without merit. There is no evidentiary basis to support the fact that the Claimant was an employee. He did not meet any of the well-known indicia, which are to be considered in the determination of that issue. There was, with respect, not one scintilla of evidence supporting his claim. On his own evidence his claim could not succeed. Further not only did his evidence fail to support his own case but rather supported the Respondent's case that he was in a subcontract relationship. In those circumstances, given that an agent represented the Claimant, his making of and pursuance of the claim without any prospect of success can only be categorised as both frivolous and vexatious, particularly when viewed in the light of the Local Court proceedings to which I have referred earlier.

38 It will only be in rare circumstances that this Court will make an order or a declaration that the proceedings have been instituted frivolously or vexatiously. However, this will be one such occasion. The Respondent will have suffered the considerable expense of defending a claim which the Claimant, even on his own evidence, had no reasonable prospect of proving. Therefore it would be appropriate that I make the declaration sought. I declare that the claim has been frivolously or vexatiously instituted.

39 (After having heard further from the parties with respect to quantum of costs His Worship went on to say the following)

40 The sole remaining matter to be resolved is the quantum of costs payable to the Respondent. The Respondent seeks indemnity costs. In my view, indemnity costs are not payable in relation to this matter. The quantum of costs to be awarded is a matter very much at the discretion of this Court and although the Local Court scale could be used as a guide, there is no particular scale of costs applying to this particular jurisdiction.

41 In determining quantum the Court must have regard to the nature of the jurisdiction and to the particular conduct of the hearing. Although this matter has proceeded for two days, it must be recognised that the pre-trial procedures of this Court are uncomplicated, and are not ones, which would normally draw any great expense to the parties. Having said that I appreciate that expense has nevertheless been incurred. In the end this Court is required to determine in all the circumstances what the proper and just amount to be awarded should be. The amount that is sought by the Respondent is certainly far too high and inappropriate, having regard to the nature of the matter. I would have thought that the award of $5000.00 to the Respondent is appropriate having regard to the nature of this matter.

42 I accordingly order that the Claimant pay to the Respondent costs fixed at $5000.00.

G Cicchini,
Industrial Magistrate.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2005 WAIRC 01401

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY ABBOTT-ETHERINGTON
	APPLICANT
	-v-
	AUTO GROUP AUCTIONS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 2 MAY 2005
FILE NO.	APPL 536 OF 2004
CITATION NO.	2005 WAIRC 01401

CatchWords	Contractual benefits claim -- Entitlements under contract of employment - Whether commission payments are due - Annual leave - Long service leave - Application dismissed - Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)
Result	Application dismissed
Representation	
Applicant	Mr L Margaretic of Counsel
Respondent	Ms K Reid of Counsel

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act"). The application was made on 20 April 2004. The applicant filed further and better particulars of claim on 19 November 2004 and stated that she did not wish to pursue her claim for unfair dismissal and instead pursued a claim for contractual benefits as follows:

1. Unpaid contractual entitlements for the period February 1999 to 30 December 2003 in the amount of $330,432.49
2. Unpaid contractual entitlements for the period 1 January 2004 up to date of dismissal in an amount to be determined by the Commission at hearing.
3. Unpaid holiday pay and accrued long service leave to be determined by the Commission at hearing.

2 Part 1 of the claim in relation to underpayment is said to comprise as follows:

a) February 1999 to 30 June 1999 - $62,306.14
b) Fiscal year 2000/2001 - $55,973.45
c) Fiscal year 2001/2002 - $97,969.18
d) Fiscal year 2002/2003 - $96,116.71
e) July 2003 to 30 December 2003 - $30,978.53

Total Unpaid Salary & Commissions - $330,432.49

3 Part 3 of the claim is set in paragraph 25 of the further and better particulars of claim to be a claim for "6 months outstanding holiday pay and accrued long service leave as she had been employed by the respondent for in excess of 5 years." A fuller explanation of the salary and commission claim was annexed to the claim. I include Annexure F in full to provide a clear explanation of what commission and retainer are claimed and how they are calculated.

ANNEXURE F

MARY ABBOTT-ETHERINGTON/AUTO GROUP AUCTIONS
REMUNERATION OVERVIEW

PERIOD		GROSS INCOME GENERATED	20% COMMISSION	RETAINER	TOTAL	R'cd as per Group Certif	Balance Outstanding	Plus Car Allow
Feb-99 to	30-Jun-99	304,864	60,972.81	10,833	71,806.14	9,500	62,306.14	Drv car & fuel
Jul-99 to	30-Jun-00	687,488.21	137,497.64	26,000	163,479.00	176,109	-12,630.00	Drv car & fuel
Jul-00 to	30-Jun-01	859,977.22	171,995.44	26,000	197,995.45	142,022.00	55,973.45	25000
Jul-01 to	30-Jun-02	917,047.92	183,409.58	26,000	209,409.18	111,740.00	97,669.18	25000
Jul-02 to	30-Jun-03	943,443.08	188,688.71	26,000	214,688.71	118,572.00	96,116.71	25000
Jul-03 to	30-Dec-03	588,514.00	117,702.90	13000	130,702.80	99,724.37	30,978.53	25000 Part there
	Totals	4301334.3	860,266.86	127833	988099.86	657667.37	330,432.49	

TOTAL AMOUNT OF UNDERPAYMENT $330,432.49

The above to be adjusted for Establishment Fees National Bonus etc., (these would usually be confirmed by C Brash – Business Manager at the end of the financial year and payment made thereafter)

4 By consent at hearing the respondent's name was amended to Auto Group Auctions (WA) Pty Ltd.

5 The applicant commenced employment with the respondent in January 1997. She was given the responsibility for establishing, developing and managing the finance operation of the respondent. The owner, Mr Bob Fowler signed the following letter.

"To: The Company Accountant
From: The Managing Director
Re: Finance Manager's Package
(Mary Abbott-Etherington)

As of next pay week the retainer to be paid to Mary will be $500 per week.

Mary will submit a claim for commissions on department income (20%) each month when all payments from Finance Company etc are available and deptment income verified and approved by yourself.

Commissions to be paid as of June '97."

6 It is common ground that the applicant was to receive a retainer of $26,000 per annum and commission of 20%. The contention of the applicant is that for a period of time she was not paid her retainer and that as her duties extended beyond the finance department and included at a point in time car selling, she should have received but was not paid commission of 20% for the car selling department. The respondent in turn contends that Ms Abbott-Etherington's retainer was reduced by virtue of how she structured her package. Specifically because she chose to drive an expensive car, the retainer payment by way of salary was reduced considerably. Secondly, the respondent contends that Ms Abbott-Etherington was never entitled to commission in respect of the car selling department. I will deal with the leave issues separately.

7 The applicant says that since her termination she has received net payment of $26,993.40 by way of direct deposit in her bank account. There was no supporting documentation as to what the amount was for but the amount should be deducted from any amounts the Commission finds are due.

8 Ms Abbott-Etherington's evidence is that she was invited to join the company by Mr Fowler to establish and set up a finance operation and associated departments. This occurred early in 1977. She says she was initially offered an $800 a week retainer. Then in September they agreed on a retainer of $500 per week and a commission of 20% across the departments that she operated. The applicant wrote the contract and Mr Fowler signed it. Ms Abbott-Etherington said that when negotiations between Mr Fowler and Auto Group Auctions were concluded then her contractual entitlements did not change and she continued to be paid the same. In February 1999 the applicant asked Mr Fowler whether she could work under a sub-contract agreement. She says nothing ever resulted from these discussions. There were discussions also in respect of document 4 [Exhibit A1] which is an employment offer of 15 February 1999. Ms Abbott-Etherington marked amendments on that document and signed it. She says that as of June 1999 her terms and conditions of employment were a $500 retainer, 20% commission on the gross income from her departments and use of a drive car, fuel, mobile phone (transcript p.10).

9 Ms Abbott-Etherington worked as a Finance Manager for the respondent. Her position description is at document 5 [Exhibit A1]. She says that she took care of all elements in relation to finance. She established an after-market element and also established an insurance element. The after-market operation included facilities such as risk, glaze, fabric protection, window tinting and warranty, etc. ie, anything relevant to a motor vehicle.

10 Ms Abbott-Etherington says that she was provided with a "drive car". She says this is common term in the motor industry where you are allocated a vehicle for personal use and depends on the situation you may be allowed petrol, etc. In her case she was given a company vehicle.

11 There was an agreed list of exhibits [Exhibit A1]. Document 9 in the list is a letter dated 31 October 2000 headed up "Variation of Employment/Salary Packaging". This is an important document in the context of this claim. Ms Abbott-Etherington says that prior to the proceedings before the commission she had never sighted the letter. The letter is from Mr Mark England, Managing Director of Auto Group Ltd to the applicant. Of this letter Ms Abbott-Etherington says as follows:

> "From this document it would appear that there's been a minor change to the - - to the package that I had incorporating the $25,000 car allowance. Also it talks about fringe benefits tax for which I'd had no conversation. Running costs; well, there had been no conversation about any of that at all. So looking at that, it states that my total salary package would be 44,597 where my understanding was I had a salary of 26,000 with a $25,000 motor vehicle allowance, and that was the only changes that I was aware of." (transcript p.14)

12 Ms Abbott-Etherington says that at no time did she sign or acknowledge document 9 or return it to Auto Group. In relation to document 10 which is a memorandum of 18 December 2000 from Mr Robert Lupton to the applicant, Ms Abbott-Etherington says she has no recollection of this document.

13 There is an email from Mr Lupton to the applicant headed up "Salary Apportionment Advise" (document 11). The email reads:

> "Mary, you are delinquent in providing me with your package apportionment advise, please do so by return. Unless the abovementioned advise is received by return your salary may be ammended to the pre-pacpage amount."

14 Ms Abbott-Etherington says that she had a discussion with Mr Lupton and informed him that she had not received the letter. She knew that others had but she told him that she was pressed for time and had to consider what vehicle she would wish to purchase. It would be lucky for her to do so until early the following year as that would probably be the best time to purchase. The year being 2002. She says Mr Lupton was angry with her. She says shortly after Mr England visited and she spoke to Mr England about the matter.

15 Document 12 is a memorandum from Mr Lupton dated 26 February 2001 regarding salary package expenditure. Ms Abbott-Etherington says that she was aware of this memorandum and received it. Ms Abbott-Etherington says importantly of her discussions as follows:

> "Did you in fact end up deciding upon purchasing a vehicle?---I did. After a brief discussion with Mr England and Mr Glen Smith in the boardroom. They were having discussions and I was invited in there whilst passing, and he told me that he'd asked Glen Smith, who was the then general manager, to assist me in deciding on and purchasing a vehicle, or selecting a vehicle, and reference was made to the little red thing on the floor being a Mercedes Kompressor. Both parties were aware of my single status, and as Mr England put it, being a workaholic I should reward myself. He went on to tell me a story about his ownership of a similar car, or the same vehicle, type of vehicle, and what great fun he'd had with it. It happened to be a blue one, and he only got rid of it because of the comments when he was taking a rocking-horse home for his child, and it was at that point he felt he should change it and go for a family car. He then went on to inform me that he'd had the vehicle for some considerable time and sold it for more than what he had purchased it for, encouraging me to consider that particular vehicle. He later said to me that, in confidence, that he would love to have given me the vehicle as a reward for my efforts, but obviously with the management he couldn't do that." (transcript p.18)

It is the applicant's evidence that she then, following from these discussions, bought from Auto Group WA a 1999 Mercedes SLK 230 and arranged a chattel mortgage with Esanda of approximately $90,000.

16 Ms Abbott-Etherington says that she spoke to the relationships manager about the feasibility of re-financing the car and there appeared to be no objection. Not all of the monies went towards the car. At the time she conducted the refinancing of the vehicle Ms Abbott-Etherington says that she was having difficulties obtaining payment for her conditions. Ms Abbott-Etherington wrote to Mr Karl Cope, the respondent's chief financial officer, on 4 December 2002. She says she met him only once briefly and after discussions with Mr England he instructed her to direct a full reconciliation of her claim to Mr Cope. In that letter Ms Abbott-Etherington refers to her remuneration as, "my package is $26,000 per annum with commissions of 20% on income generated within my department(s)." The attached documents then refer to gross profit and commission on profit centres I, II and III up to and including June 2003. There is an earlier document (document 17) which is an email from the applicant to Mr England dated 18 November 2002. The email is headed up "Request for Assistance" and seeks a drawing out of funds and a discussion with Mr England. The applicant refers to the calculations and says, "In the event my reconciliation is flawed, as a matter of record, I have some five months plus annual leave accrued which would certainly offset this amount". There is a hand written note on the email from Mr England to Mr Cope which reads, "Can you please speak with Mary and resolve this one way or another. You may like to ask Tony what he had agreed."

17 Ms Abbott-Etherington says that she had discussions with Mr England following Mr Smith's resignation. She followed up these discussions with a proposal which seemingly is dated 26 October 2002 whereby she raised the possibility of her "stepping up" as "Team Leader/Head of WA Operations". Document 16 is in respect of improving the business.

18 Ms Abbott-Etherington says that she did not include the car buying service which operates through telemarketers as part of her claim because in discussions with Mr England she indicated that albeit it was under her control and she had set it up she was not hands on at that time and did not consider that it was fair that she would expect the same commission from that department. For this reason she left it off her final claim (Transcript p.29). The applicant says that she discussed profit centres I and II with Mr England prior to sending her reconciliation to Mr Cope. Profit centre I reflects finance, insurance, after market products and profit centre II reflects the retail element. The applicant says it is not calculated on the total amount of profit on the motor vehicle and she says she discussed with Mr England that it would be unfair for her to claim a percentage on the whole amount. She says profit centre III refer to the car buying service and that is the area she said to Mr England was now almost self operating with the right team marketer in place and the buyers referred to the general manager more than to her for direction. She says she did not really expect a commission of 20% on that particular department and Mr England instructed her to put her commission in at the level that she was normally awarded and he would look at the situation at a later date (transcript p.34). The applicant says that following her facsimile to Mr Cope of 4 December 2002, neither Mr Cope nor Mr England contacted her to tell her that she was not entitled to any of the amounts claimed in profit centre I or II. She says between November 2002 when she first raised the matter with Mr England and up until March 2004 nobody at Auto Group ever indicated to her that she was not entitled to the commissions claimed. Ms Abbott-Etherington says in relation to profit centre II that from March 2001 she managed to get additional staff which meant that the areas were starting to get a positive result and it was built up from there. Hence she claimed the 20% commission from July 2001. The document (document 18) includes profit centre III figures but for the reasons expressed she does not believe she should claim those amounts.

19 The applicant says that Mr Cope indicated that he would attend the matter after Christmas but he could not see that there were any problems. She says she was never paid the amounts and was never told why she was not entitled to the amounts.

20 Ms Abbott-Etherington says as follows:

> "Well, as explained this morning, I took up the situation with the confusion of my remuneration and my retainer and package with Mr England. He said the situation was abominable. He instructed me to put everything together as I saw it and present it, and basically from that point in time no-one had ever stated that I was not entitled to those moneys. Mr Cope, I spoke to him and sent emails on several occasions, trying to press him to bring the matter to a conclusion. Again the situation of a possible - - possibility of me going self-employed had been raised with Mr England, and he had agreed, and I was in the process of revamping a contract to present, but Mr McGillivray informed me that it wouldn't happen. He later told me that it might happen, and then after that subsequently told me that he was going to look to subcontract out the whole of my areas of responsibility. That being the case I assumed, rightly or wrongly, that if it was contracted out it was going to be contracted out to me, but Mr Fowler visited me and informed me that he'd asked that I get the last bite of the cherry. It was at this point that I really stopped pursuing Mr Cope, because my interpretation of it was, well, if they're doing all this, it's obviously the intention, and it obviously would have to be that, all contractual commitments would have to be paid out before a new contract would be entered into. And - - but at no point did anyone ever approach me and say that I was not entitled to those items of remuneration that I had presented. Being faithful that they may contract out to someone else, as Mr Fowler had indicated, I felt it was pertinent and - - -
>
> it was pertinent and timely that I should raise the issue again just to make sure that I was paid and the matters were resolved in an effective manner." (Transcript pp.79-80, 81)

21 Ms Abbott-Etherington says that, "it was formally agreed on discussion with Mr Mark England shortly after the takeover". She says it was agreed at that time that her responsibilities would include separate to the finance department the client liaison and direct sales departments as well. She says in subsequent discussions the payment of commission for those departments was discussed in detail (Transcript p.97). She says that Mr England advised her that he was more than happy to pay all those commissions for those areas and to put a reconciliation forward to Mr Cope so that the matter could be dealt with and sorted out. The later discussion occurred in 2002. Ms Abbott-Etherington says that during their discussion in 1999 Mr England said as follows:

> "Mary, these are the areas of responsibility we wish you to take over. There are - - develop your car search initiative, take on car net. Fixed price sales is going to come in in the future, so we would like to use your retail experience to further enhance what you've already started." (Transcript p.97)

22 She says her claim for profit centre II dates from 2002 when Mr England agreed commissions would be paid. Ms Abbott-Etherington says also that in 1997 Mr Fowler indicated there would be opportunities to develop other business.

23 Ms Abbott-Etherington says in relation to her discussion with Mr England about the purchase of car that she had been spoilt over the years working as manager in the industry and had top of the range everything. She indicated to Mr England that she did not really know what she wanted to buy. She then went on to explain :

> "Well, when your CEO asks you to do something like that, and you - -and (b)? you haven't got a letter; he tells you you have a car allowance and not to worry about it; he makes comparison to a similar car of his and says you should be rewarded, "and I would like to give you the car if I could" - you don't doubt the integrity of your CEO." (Transcript p.101)

24 Ms Abbott-Etherington went along with the request to purchase the car on the understanding that she had a $25,000 car allowance (transcript p.101). At the time of taking out the chattel mortgage on the vehicle additional funds were taken out to enhance the vehicle.

25 In relation to the additional loan or refinancing of the vehicle which was taken by Ms Abbott-Etherington she says that she understood that was still part of the car allowance and part and parcel of her package. She says she spoke to payroll and informed them she was refinancing the vehicle and no one had any objections. She provided them with a copy of the documentation.

26 The applicant says that the departments for which she claims was finance and after market; car buying services; and retail car search; fixed price selling, which is an element of profit centre II. The applicant says these were all discrete business units under her control. She was delegated to run them. She says that she discussed profit centres I, II and III with Mr England; he advised her to put in her reconciliation. She said to him that she did not really think that in relation to profit centre III that now it was up and running the company should pay her 20% for that element. She says as follows:

> "So I suggested to him that whilst he said to put my request in, my reconciliation in, at my current level, which was 20 per cent of commission, that I indicated I would be happy to take a lesser commission for car buying services because my role there wasn't as hands-on and as demanding as it was in the other areas." (Transcript p.106).

She then goes on to say that back then she was giving Mr England the opportunity to assess her whole situation and to look at it and she told him clearly that she would be happy with a lesser commission on car buying services as it needed less personal attention. She says Mr England acknowledged that she was entitled to the commission. (Transcript p.106) There is then the following exchange:

> "When was it agreed that you would get commissions on car buying service?---It was - - it was agreed with Tony McCulloch when he came over and I was asked why I wasn't fully involved with car buying services, and I indicated that Glen Smith had put David Haldane into that situation and Mr McCulloch said he wanted it changed. Mark's directive was that I had to head that side and - -
>
> Okay. Let's deconstruct that. When did that happen? When was it agreed that you would be paid commissions on car buying services?---In discussions with Tony McCulloch.
>
> When?---It would have been very early in - - in that - - very early in the period - - in the initiation of that particular department, but then focus was - - we had all these problems with David Haldane - -
>
> Okay. So that was - -?--- - - and that's when - -
>
> - back in 1999, when Auto Group first comes on board?---No. It would have been when - - the period when the car buying services first became established.
>
> Okay. And it was agreed that you'd be responsible for those and you'd get the commission - -?---Yes.
>
> - - on the car buying services?---Tony's words were "Between car buying services, the retail operation and your finance, Mary, you're probably going to be top paid person in the company."" (Transcript p.106)

27 Ms Abbott-Etherington says that she is absolutely certain that Mr McCulloch told her that she would be responsible for the areas and that she would be paid commission on those. She indicated to Mr England that she had not been paid remuneration for a considerable time and that her existing level of commission was 20%. She says that she went through the way it was calculated and what she believes she is entitled to for each of the areas and he said he had no problems with that and to document that and send it to Karl Cope. (Transcript p.107). She says that Mr England praised her considerably and advised her that Mr Cope would have to deal with it. She says that Mr England approved her commission payments at that time. She says, "I'm totally confident and I can't see any reason why the CEO would tell me to put a reconciliation to the chief financial officer to have the payment organised and have him review the reconciliation if there was no intent to pay me". Ms Abbott-Etherington goes on to say, "Well, I would suggest that Carl was probably just to check the calculations. I don't know. I was in - - with no uncertain terms confident that once I presented that to Carl Cope and he had found the time to check the figure work, that I would be paid. And at no time did anyone tell me anything to the contrary." (Transcript p.109).

28 The amount clarified in the claim in document 34 is $389,936.18 (Transcript p.113). Mr Margaretic for the applicant confirmed that Ms Abbott-Etherington's bonuses and establishment fees were not to be claimed (Transcript p.117).

29 Ms Abbott-Etherington says that for the whole of the period of employment she took no leave other than three weeks in financial year 2001-2002. She says for this three week period she was paid $8.00.

30 Ms Abbott-Etherington says that her conversation with Mr England was that she would get 20% of the difference between the purchase price of a vehicle and the reserve price, without accounting for any of the other monies involved in the transaction. (Transcript pp.153, 154). She confirmed that her claim relates to a period before the discussion with Mr England, namely financial year 2000/2001 in the amount of $7,452.25 on the basis that payment for these commissions were formalised with Mr England in their discussions.

31 Ms Abbott-Etherington says one issue she has is that she was never told there would be fringe benefits tax. She acknowledges that the lease payments, registration costs, insurance costs and all other costs associated with vehicle should come out of the allowance. Ms Abbott-Etherington confirmed that the key area in the dispute was profit centre II and whether she was entitled to them contractually (Transcript p.167). Additionally she confirmed the other dispute being whether there was a salary package or a car allowance. The applicant acknowledges that she had a conversation with Ms Dot Murray whereby Ms Murray explained to her how her expensive motor vehicle was eroding the value of her salary package. She says she never had a conversation with Mr Cope to do with her motor vehicle at all. She says she never discussed with Mr Cope in general terms her salary package at all. Similarly she never had any specific conversations with Ms Dowd about the value of her motor vehicle and how it affected her salary package. She says there was never a conversation in detail. She says she had one conversation with Ms Dowd in respect of a printout which did not make sense to Ms Dowd and hence Ms Abbott-Etherington took up the matter with the CEO.

32 The applicant says that she indicated to Mr England that she was concerned about entering into an agreement regarding the purchase of her car on a car allowance when she did not have a letter explaining that. She denies Mr England ever went through the detail of her salary package with her. She says the only discussion she had with Mr McGillivray regarding salary package was in 2003, around September/October, it arose in their discussion about Mr McGillivray wanting her to write GE Finance instead of Esanda Finance. She advised him that if he insisted she would do this then she wanted her package reviewed so as to have a fixed income. She denies ever having a conversation with Mr McGillivray that the value of her motor vehicle was eroding her salary package. The applicant denies that she was told repeatedly by Mr England and Mr Smith that she would not be paid any additional commission other than by way of the commission on the finance department. The applicant says she received payment but it did not reflect her annual leave. She says she is entitled to long service leave because if she had not been unfairly dismissed then she would have worked for the company for a period of at least 10 years if not until retirement. She had no intention of leaving the company. The applicant agrees that she was on sick leave or restricted hours for six months from February 2004 for stress related matters.

33 In re-examination, Ms Abbott-Etherington says that she believed any surplus by way of car allowance was to be deposited to superannuation. She says she was not aware of options (a) and (b) in document 9. Had she been aware of that she would have taken the cash amount into her salary and then got the added benefit of claiming depreciation through her company. The applicant says she was reimbursed the monthly payments to Esanda for her motor vehicle by the respondent. She says that until 10 March 2004 for the previous 17 months she had had no communication from the respondent indicating that her claim had not been accepted.

34 Mr Brian McGillivray gave evidence that he is the general manager of WA Auto Auctions and has been since May 2003. He had previously worked for the respondent and had an absence of some 20 months. He worked from 1995 as a buyer manager until the middle of 2001. He says human resource matters such as pay are handled in Sydney but hiring and firing and the authority to set someone's remuneration is handled by him. He says that the respondent employs car buyers who are paid 50% of the profit after a loading, which is set to defray costs of the vehicle, and purchase price is deducted from the sale price of the car. Whether it be direct sale or auction, the buyers get 50% of the profit. If there is a loss on sale of a car then the buyers pay for 50% of the loss. The sales staff gets paid $40 a car for direct sale. They are also paid a retainer of $500 per week.

35 Mr McGillivray says that the applicant was not involved in direct selling of cars at all; she was involved in arranging finance on the direct sales. He says the applicant was never entitled to commissions on anything other than the finance department income. He never agreed to pay her any additional commission other than that ascribed to finance, insurance and after market. Mr McGillivray agrees that Ms Abbott-Etherington ran the telemarketing team. There were initially two staff involved in the team and then finally one. He says Ms D Barker was doing telemarketing and he moved her away from the applicant's control so that she could get on with doing telemarketing. In relation to Ms Julianne May she was responsible for the selling of cars and she was also moved away to get on with the business of selling cars. After this occurred her sales increased from 40 cars a month to 100 cars a month. He says he was happy with the applicant's performance in selling finance, apart from the end of her employment. He says Ms Abbott-Etherington was always happy to tell him what other people should be doing. In the two periods that Mr McGillivray was employed by the respondent, the buyers reported to him. He says that he was concerned that Ms Abbott-Etherington got involved in other aspects of the business rather than getting on with doing what she was there for, namely running the finance department.

36 Mr McGillivray says he advised Ms Abbott-Etherington after discussion with Ms Dowd that her retainer was being eaten up by the large cost of fringe benefits tax and other costs on her car. He says Ms Abbott-Etherington replied along the lines of "Right" and the conversation did not proceed from there. Mr McGillivray says that Ms Abbott-Etherington never took up the subject again with him. He does recall the applicant advising him that if she was to write simply GE Finance then he would need to address the level of her pay. Mr McGillivray says Ms Abbott-Etherington raised the issue of her remuneration on her termination. He indicated that if she was owed money it would be paid to her. He says she was paid what she was owed. Mr McGillivray says that on the two occasions he worked for the respondent not once did Ms Abbott-Etherington ever say that she was not being paid a huge amount of money that she was owed.

37 Mr McGillivray says that as buyer manager he received a 5 per cent overrider on the profit made on sales. He says:

> "Now certainly if Bob was paying someone else in addition to the buyer, paying someone else 20 per cent, I can assure you Mr Fowler would have been saying to me, "Brian, I'm now paying someone else 20 per cent on these deals, I'm not paying you as well"."(Transcript p.201)

38 Under cross-examination Mr McGillivray says that he had one conversation with Mr Cope who mentioned that Ms Abbott-Etherington had put in a claim. The claim was lodged whilst he was not employed with the respondent. In terms of the finance under profit centre I (Transcript p.207) and expenses paid on the car (Transcript p.210), Mr McGillivray says he is not sure why the figures do not match up. Mr McGillivray says that no one in the respondent company ever discussed with him the applicant's claim for that amount of money. He says that document 17, including the note from Mr England to Mr Cope, was never raised with him.

39 Mr Mark England gave evidence that he has been the Managing Director of Auto Group Limited since 1 September 1999 and has been employed by that company since 14 July 1997. Auto Group Limited acquired WA Motor Auctions in about January 1999. Ms Abbott-Etherington was the Finance Manager of the business at that time. She continued in this role up until the termination of her employment. The WA business was variously run by Mr Fowler and Mr Smith, then Mr McGillivray. The WA managers reported to Mr Tony McCulloch who was the National Manager of auctions for Auto Group Limited. Mr McCulloch then reported to Mr England. Mr England says that he ultimately approves the remuneration of every staff member throughout the whole organisation. Mr England says that the applicant was paid a weekly retainer of $500 and commission equal to 20% of the income generated by the finance/warranty department. She was paid superannuation in line with legislation and prior to the salary packaging was given a fully maintained drive vehicle. At the time Auto Group took over the WA operations, Mr England says there were some issues about the commission levels for Ms Abbott-Etherington and they resolved to pay her 20% commission as opposed to 15% commission. This 20% commission applied to finance department income.

40 Mr England says the respondent changed from using drive cars because the group had in excess of $3 million worth of drive cars being utilised by staff. $25,000 as the car value was the group policy in terms of what people were allowed to drive. He says some executives were allowed to drive more expensive cars but very few. He says it was not the intention to alter the remuneration of an employee when salary packaging was introduced. It was simply to introduce the freeing up of $3 million in drive vehicle funding of the balance sheet. He put it to a third party financier. He says document 9 setting up the remuneration package was sent to Ms Abbott-Etherington and was signed by David Watson who was the group administration manager at that time. Mr England recalls that Ms Abbott-Etherington was the last employee in the group to change over her vehicle. He says at the time salary packaging was introduced he had a discussion with Ms Abbott-Etherington. He says in the motor industry the drive car was a closely held perk of the job. He made a point of sitting down individually with each of the four or five people in Perth and went through their packages at the time of the change; this included the applicant. This meeting occurred in December 2000. He says at no time did he tell Ms Abbott-Etherington during that conversation that the salary package included a cash car allowance. He says he returned to Perth in March or April 2001 and was shown a red Mercedes SLK by Ms Abbott-Etherington. He owned a silver one at that time and they talked about the car and how nice it was. He passed a fairly serious comment that without knowing the cost of the car there was no way that Mary could fund the car within the package that had been made available. He then went to her office and had a discussion about commission because Ms Abbott-Etherington was paid quite a lot of commissions and it was her view that she could pay the monthly payments out of the commissions that she was being paid. He is certain that he indicated to her there was not the capacity within her package for that particular vehicle. He says after that conversation Ms Abbott-Etherington did not ask him for more information about the package. The applicant did have ongoing issues in terms of the level of commissions and the calculation of those; these were referred to the head office accounting team. Mr England says that Ms Abbott-Etherington also had a desire to be a contractor at one point of time. This was not agreed to but Ms Abbott-Etherington did not ask to go back to her previous remuneration arrangement.

41 Mr England says that he was one of the applicant's supporters in the organisation. He says Ms Abbott-Etherington did not have good relations with the other business units and the state manager, and seemed to be at loggerheads all the time about what the business was trying to do and how they were trying to do it. The applicant put forward to him documents suggesting how to improve the business. He says that given her relations with the other business units he did not see her as an option to become the state manager and consequently Mr McGillivray was appointed to the position. This was after the departure of Mr Smith.

42 Mr England explained that direct sales means retailing cars directly to the public outside of the auction process. This method was introduced in early to mid 2000 around the time of the Government contract review period. Mr England says that Ms Abbott-Etherington did not have a role in direct sales initially. It was run by Mr Smith. Mr England said that the applicant had put several proposals to him and had several discussions with him about how the back end processes of direct sales could work in terms of telemarketing and following up clients. He says he felt that they could incorporate the telemarketing area with direct sales and do what Ms Abbott-Etherington was already doing and have the same employee do it. Ms Abbott-Etherington would oversee the process. This would achieve a better hit rate from enquiries. There was no point of sale involvement, it was simply a merging of telemarketing and the back end marketing of direct sales and to do what she already did. More cars were sold and more finance opportunities were presented to the finance department.

43 Mr England says that one of the reasons why Ms Abbott-Etherington approached him was that she felt that the people who were physically selling the cars were not referring enough clients to the finance department. The applicant wanted to get involved in the backend process to encourage more finance to occur out of direct sales. Mr England said that he agreed with the concept (Transcript p.236). He spoke to Mr McCulloch and Mr Smith and it was agreed they would merge the telemarketing and backend processes to try and get some better discipline. It was agreed that Ms Abbott-Etherington would oversee that. They knew that the applicant was hungry for finance transactions and would make sure the process occurred promptly and would maximise the finance penetration. Mr England says there was no adjustment to the applicant's remuneration as a result of this. He says this issue was addressed expressly. The applicant raised it and Mr England says that he indicated to her that the company was already paying the buyer to buy their car anywhere between 35 and 50% of the gross profit, in addition the seller of the car was being paid a commission and given the margin on the direct sales there was not a lot of margin left. He says there was no room for the applicant to be paid directly on the car sales where the applicant was to benefit was out of the number of finance transactions that were finalised (Transcript p.236). He says if the applicant had insisted on additional commission he certainly would not have agreed to it and Mr McCulloch and Mr Smith definitely would not have agreed to it. Given the margin on the car that was left it would have been a futile exercise to even undertake the program. He says in late 2001/early 2002 the applicant raised the issue again and he indicated that he did not want her involvement in the direct sales if they had to pay her. He confirmed this with Mr McCulloch. He says the back end processes did not include the point of sale management. He says given the personality of the applicant, without even knowing, she probably tried to get involved in the front end of the business. This was certainly not correct from his perspective. It was not part of her authorised job description. He says it would have been something that was done by the applicant of her own bat if she did it at all.

44 Mr England says that in late 2001/early 2002 and from then on, on occasion Ms Abbott-Etherington raised queries about her level of commissions and the reconciliation of what she had been paid. He saw this as an accounting issue to reconcile payments, as opposed to the breadth of commissions. He says he read the applicant's claim and referred it to Mr Cope to finalise the matter. He says as a result of the reconciliation if there are moneys to be made they would have been paid. Mr England says that he never had any conversation with Ms Abbott-Etherington in respect of payment of commission on the car finder service. He says sometimes she found cars outside of the Auto Group. He did not think the idea had sufficient merit to warrant discussion. Mr England says that Ms Abbott-Etherington also got involved in trying to drive the advertising programmes. Other business managers were opposed to this. Mr England says he got on very well with Ms Abbott-Etherington, they would discuss issues within the business. He says at times she would seek through him to usurp the management process within the business. He said he would never go against what management wanted to do and at best he would refer the matter to them if he thought it had enough significance.

45 Mr England says when he read the email of 13 February 2004 (Document 27) he had no appreciation that the applicant's claim for unpaid commission retainer was approximately $330,000. He says when he became aware of document 30 dated 10 March 2004 he went to Mr Cope to ascertain the history of the matter. This discussion centred on the commissions for the applicant. He says from that discussion he felt comfortable with where the business was in relation to their position on the matter. In relation to the calculations of commission, he is not aware of what profit centre I and profit centre II is. His guess is that profit centre I relates to finance.

46 Under cross-examination Mr England says that in his discussion with Ms Abbott-Etherington, pre-Christmas 2000, he had a pad and paper and he went through the numbers himself. He is certain there was a specific discussion about the salary package. Mr England says that Mr Cope is responsible for calculating payments on the car. These payments would normally be sent through the local accountant Ms Dowd. Mr England says he had discussions with Mr McCulloch following his discussions with the applicant regarding her claim for commission from profit centre II. He says that Mr McCulloch indicated that if she wants money "it won't happen". In relation to document 18, dated 4 December 2002, Mr England says he has not seen the document or discussed the contents with Mr Cope. He says he is surprised that nothing was put in writing to the applicant about the amounts claimed. In respect of document 30, dated 10 March 2004, Mr England says he spoke with Mr Cope, Mr McCulloch and Mr McGillivray and he considered the claim to be ambit and would deal with it legally.

47 In relation to the reconciliation of her commissions Mr England said that he indicated to her as follows: "Look, I'd like to finalise the reconciliation of these. Can you please send us your version of events, your - - your numbers so we can deal with it", and that was obvious in the letter that she sent to Mr Cope of 4 December 2002. (Transcript p.273). Mr England is aware that Mr McCulloch and Ms Abbott-Etherington had a conversation regarding her claim. He says he is not aware of that conversation and on that basis he wrote a note to Mr Cope "You may like to ask Tony what he had agreed". Mr England says that he is aware that the applicant did not take a lot of annual leave.

48 Ms Catherine Dowd gave evidence that she is a business manager with the respondent and started with Auto Group in October 2000. She says she is a qualified certified practicing accountant, has worked as an accountant for 13 years. At the time she commenced employment the applicant was the Finance Manager. Ms Dowd says that she dealt with the applicant on a daily basis in relation to "her department and other matters in relation to the day to day running of the business that related to finance." (Transcript 285) Ms Dowd says that the payroll was done in Sydney and sent over to her on a spreadsheet. There was a monthly payroll and a weekly payroll. Ms Abbott-Etherington's commission was calculated based on a percentage of commission received from finance, insurance and after market. The calculation of the commission Esanda sent the settlement sheets showing the commission due. Ms Dowd would then determine the actual income from the department as well as the applicant's commission. If the information did not come in time from Esanda then information would be taken from sheets provided by Ms Di Taylor within the finance department. The figures provided by Ms Taylor did not always reconcile exactly

with the figures from Esanda. This was often a timing question in terms of settlement. Once Ms Dowd had done her calculations the information was sent to Sydney to calculate the payroll. Ms Dowd then handed out the payslips to employees locally. Ms Dowd would field payroll questions locally.

49 Ms Dowd says she has never seen document 9, ie the variation of employment/salary packaging document. She says the document would have gone to Mr Shilling as Ms Dowd says she commenced in October 2000. Ms Dowd said that Mr Lupton spoke to her and to Ms Dot Murray about following up with the applicant as she had not detailed how she wanted her salary package broken up. Ms Dowd said she spoke to Ms Abbott-Etherington about this and the applicant said she did not fill out a form as yet because she had not found a car. Ms Dowd said that the applicant "did not understand what it meant by the splitting out of the document of the money." Ms Dowd said she tried to explain it to the applicant but Ms Abbott-Etherington did not seem to understand and Ms Dowd suggested that she discuss it with Mr Shilling as he was on the same sort of package deal. Ms Dowd said she also had a role in reimbursing employees as part of their remuneration package. She would send claims for reimbursement off to Sydney to be authorised and would pay the cheques when they were returned. In relation to Ms Abbott-Etherington's motor vehicle the respondent made the payments on that vehicle.

50 Ms Dowd says that she discussed with Ms Abbott-Etherington the fact that her package would be affected by the higher value of her vehicle. This arose when the applicant questioned her regarding the remuneration in her pay slip. Ms Dowd says I had the following exchange:

> "When - - do you remember when roughly that was?---The first time was - - I don't remember the exact date, was when there was a - - in relation to a calculation done where we worked a' term' and Mary actually owed the company money because too much cash had been paid to Mary so we had to - - and the tax wasn't enough to cover it, so we had to make a deduction out of Mary's pay and the accountant at the time in Sydney, Robert Innes, did actually send to Mary that we were doing this and she questioned the amount they had taken out and that would have been early 2002. I don't know the exact date, but it would have been early 2002. The next time Mary spoke to me was after she came back from annual leave which would have been, I think, about August 2002 because she did go overseas for about 3 weeks and she questioned the amount that was calculated as the annual leave component of her salary.
>
> And what discussion did you have about why that component was so low at that time?---Because the - - these deductions that had been taken in previously, also the value of her car in relation to how much it was costing her package, they had to get the money to pay for her package from somewhere so that's what they did, was they did a calculation into her salary and reduced her salary to make up that amount.
>
> Okay. And you're quite clear that you mentioned to her that it was the value of the vehicle that affected - - ?---Yes." (Transcript p.291)

51 On other occasions Ms Dowd would say to the applicant when she queried her about the payslip that she would need to speak to Sydney as Ms Dowd was not aware what they had done with her cash package.

52 Ms Dowd said she also spoke quite often with Mr Cope about the applicant's package. Mr Cope could not understand why the applicant did not understand the calculation given that she was a Finance Manager and also had her own business. These discussions occurred regularly from about August 2002 when the applicant queried her annual leave component. Ms Dowd says that the applicant got a payslip every month and Ms Dowd says that she got to a point where she would ask the applicant to open it in front of her because of the problems being experienced. Ms Dowd said she wanted to make sure that everything was correct. Ms Dowd says in about May 2003 she had a discussion with Mr McGillivray, the new general manager, about the problems the applicant was having with her package. She asked Mr McGillivray to speak to the applicant. The problem being experienced was the amount the applicant was receiving as a cash basis, not the commission. The cash basis amount was very low. Ms Dowd says she explained this was to do with the fringe benefits tax on the value of the vehicle which was eroding the cash portion of the package. Ms Dowd then says that she explained this to Mr McGillivray.

53 Ms Dowd says that the terms profit centres I and II do not mean anything to her. She says the accounting unit is simply finance, insurance and warranty. The figures in document 34 are not the records of the business. Ms Dowd recognises document 35, the first pages are reconciliation and the start of the salary packaging (July 2001) until the time the applicant's employment was terminated. This reconciliation was prepared by Mr Cope. Ms Dowd says that she was asked to review the figures. She says that the commission figures do accord with the records of the business and are correct. In relation to document 59 Ms Dowd says the first column reflects the records of the business. The column is headed finance department income. Ms Dowd says of document 34 that the mathematical process of taking the gross income, or multiplying it by 20%, adding the retainer and coming to a total does not reflect the correct amounts in terms of what the respondent applies to pay the applicant. The gross income would not be what is shown in the accounts for that month. There are other adjustments to be made. (Transcript pp.295, 296) Ms Dowd says that the car package for $25,000 is not a car allowance to that value. Ms Dowd says that to her knowledge the applicant was never entitled to commission on direct sales. Ms Dowd says in respect of document 34 the profit centre II figures are not figures that accord with the records of the business. To reconcile those she would need to check the document numbers and dates for each vehicle sold. In terms of the overall reconciliation of payments Ms Dowd says she cannot comment because they were calculations done by Mr Cope. Ms Dowd says that she only calculated the commissions. Ms Dowd says that to her knowledge Ms Abbott-Etherington was paid out her annual leave after her termination. This was paid by the Sydney office. Ms Dowd says that under the policy employees were entitled to long service leave after 10 years with the company and the applicant had not been there for 10 years. She says she was not entitled to long service leave.

54 Under cross-examination Ms Dowd says that a car package to the value of $25,000 means that the cost of running that car, lease payments and the fringe benefits tax portion of that is equivalent to $25,000. The amount of that calculation is not to exceed $25,000. The lease payments for the car went straight to Sydney. Ms Dowd was involved in payment of running expenses. Ms Dowd does not believe that she has previously seen document 18, that is the letter from the applicant to Mr Cope of 4 December 2002. Running costs were paid by the employee and reimbursed to the employee. Running costs were mainly in relation to insurance, registration, petrol and any servicing of the vehicle. The employee would be paid based on invoices. The invoice would be sent to Sydney by Ms Dowd who would authorise her to reimburse the employee and the amount would be deducted against the person's package. Ms Dowd says that at a point in time the applicant was given cash amounts and she cannot say correctly what the group certificate should contain in that period in time. Ms Dowd says that the fringe benefits tax calculation is based on the actual value of the car and on how many kilometres the employee has used the car for work purposes. She says the fringe benefits incurred because the payments are made by the employer as part of the employee-employer relationship. She says there are two different ways of calculating the fringe benefits tax, a statutory method and the hire running cost method. The respondent uses the statutory method based on the value of the car.

55 Mr Robert Fowler gave evidence that he was the founder of WA Auto Auctions. He sold the business in 1999 and stayed as a director of the new business until 2001. Mr Fowler originally employed Ms Abbott-Etherington in 1997. He says the applicant was paid a retainer of $500 per week and 20% commission on income from the finance department. He says the

applicant was never entitled to commission on direct sales. Mr Fowler says that Ms Abbott-Etherington was the last person to move over to purchasing a vehicle. Mr Fowler says that for a direct sales to go ahead it was up to 3 people either himself, Mr McGillivray or Mr Smith.

56 Mr Karl Cope gave evidence that he is the National Manager of the Financial Services Division of Auto Group. He previously held the role of Chief Financial Officer. He is a member of the Institute of Chartered Accountants. The respondent's payroll function is centred in Sydney and overseen by the group accountant, Ms Dorothy Murray. A computerised payroll system automatically calculates group tax, income tax; the fringe benefits tax calculations are conducted by Ms Murray and checked off by Mr Cope. Mr Cope says that the applicant had raised with him on a couple of occasions the issue of her monthly retainer being diminished after the introduction of the salary packaging. She first raised this issue in about June 2002. He says that on purchase of her motor vehicle the fringe benefits tax was substantially more than had been envisaged and therefore the monthly retainer was reduced. He says Ms Murray previously spoke to the applicant about this issue. Ms Murray had indicated to him that in her opinion the applicant did not understand the consequences of obtaining such an expensive car and hence the effect on the package. He explained to her how the package worked. He says her response to the conversation was that she was a little confused and a little disappointed. He says that ultimately she seemed to understand it, but was disappointed. He says from time to time the applicant requested to be advanced some monies and these were recouped over a short period of time and included in the deduction from the retainer. Mr Cope says that between mid 2002 and late 2002 when he received the document regarding the salary claim she did not raise the issue with him. On receipt of her letter (document 18) Mr Cope says he queried local management and WA Auto Auctions as to the calculation of the commission payable. The applicant was claiming commissions for direct sales and car buying departments, as well as the finance department. Mr Cope says there was no entitlement for the applicant to be paid commissions on direct sales or car buying. He spoke to Ms Dowd who confirmed the basis of commission calculations and that the applicant was not entitled to commission other than the finance department. His understanding was that the local management were going to deal directly with Ms Abbott-Etherington about the issue whether she was entitled to direct sales commission. He says the applicant did not raise the issue with him again. It was never indicated to him that Mr England or anyone else had approved payment of commission on direct sales for the applicant.

57 In relation to document 34, Mr Cope says that the figures do not accord with the records of the respondent in respect of income generated by the finance department. Mr Cope said he did a reconciliation of what the respondent had paid to the applicant during her employment. That is represented in document 35. He concluded from this reconciliation that over that period of time the applicant had been overpaid a figure of $23,205.43. At the time of the reconciliation the final commission outstanding was approximately $3,690 which had not been paid and hence that needed to be deducted from that figure. This left a net payment of $19,515.43. Mr Cope explained the calculation of the fringe benefits tax in respect of the applicant's package. Mr Cope says that the applicant never raised with him specifically the calculation of the fringe benefits tax. Mr Cope explained that in relation to taxation legislation, if the applicant's motor vehicle was not considered to be a car benefit, then it might be considered to be a residual benefit or an expense benefit but regardless would be subject to taxation. The calculation might alter but otherwise would be subject to taxation. The applicant was paid out her annual leave after her termination. In respect of long service leave her length of service did not qualify her for long service leave.

58 Mr Cope says that he cannot say specifically whether he took the matter up of the applicant's salary package with Mr McCulloch, the National Auction Manager, but he suggests that he would have (Transcript p.368). Mr Cope confirmed under cross-examination that he had left the matter to be dealt with locally. Mr Cope agrees there is no written denial of the applicant's claim. Mr Cope says that the difference between the applicant's car being under chattel mortgage as opposed to novated lease may mean the benefit would be an expense payment as opposed to a car benefit, and this would have a minor effect on the calculation of taxation. He says under the different calculation there would have been an overpayment of fringe benefits tax of about $1580. Mr Cope says that if a calculation of fringe benefits tax was undertaken by the Australian Tax Office and they refunded the monies paid then these monies could be paid to the applicant. Mr Cope says that it is his experience of Mr McCulloch that he is not into details about recording matters in writing. He tends to do with things over the phone. He says Mr Smith was aware that the applicant was claiming commission on areas outside of the finance department.

59 Mr Cope says that the salary figure in document 9 is a notional figure. If the employee spends less than that in salary package then he/she would be paid additional salary up to that amount. If the employee spends more than that in salary package then it would be deducted from their salary. Mr Cope explained the large variation in the fringe benefits tax calculations (Transcript pp.391, 392). He says there is also a variation in figures due to some recoupment of some overpaid monies.

60 Mr Glen Smith gave evidence that he was the General Manager of the respondent from about 1996 until May 2003. Initially he reported to Mr Fowler then later to Mr McCulloch. The applicant was the Finance Manager. The applicant's commission was initially settled by Mr Fowler. Her package was then later negotiated with Auto Group. Mr Smith says that the applicant was very good at her job. He says they would "head butt each other all the time". He says basically the applicant would always want more commission and wanted to better herself in the position in the company. Mr Smith says that the applicant asked him for commission on direct sales and he responded "No". This was because she should not have been renegotiating her deal when she already had one. He says that Mr McCulloch and Mr England advised him that Ms Abbott-Etherington had also spoken to them in an attempt to get more money from them. He says they never indicated that they had agreed to any additional money for her. He says after he rejected her claim for additional commission he just "let sleeping dogs lie" (Transcript p.403).

61 Mr Smith says that the applicant was not forced to buy the Mercedes vehicle. He says Ms Abbott-Etherington was adamant that she wanted that car. He says initially the applicant was not involved in direct selling but later on she was. He says the applicant "had a small team of her finance girls used to go and do that as well". Mr Smith does not recall specifically seeing anything in writing from Mr Cope about the applicant's claim.

62 Ms Reid for the respondent says in closing submissions that there are four issues in contention before the Commission. Firstly, was the applicant contractually entitled to be paid 20% commission on the gross profit for profit centre II, that is, direct or retail sales and not simply commission on the finance and insurance department? Secondly, was there an agreed variation in the contract effective from 1 July 2001? Thirdly, did the respondent pay the applicant in accordance with the salary package with effect from 1 July 2001? Fourthly, did the respondent pay the applicant her other entitlements under her contract of employment with respect to annual leave, long service leave and notice of termination. Ms Reid says that Ms Abbott-Etherington's matter is on all fours with *Bruce Shaddock v Cockburn Cement Ltd* 84 WAIG 2341. She submits that the applicant may or may not have received the letter seeking out the basis on which her employer was proposing to pay her, however the substance of the letter was communicated to her several times by several different people including Mr England, Mr Cope, Ms Murray, Ms Brash and Mr McGillivray. Ms Reid submitted that Mr England in fact explained the effect of the salary package to the applicant prior to the purchase of her Mercedes vehicle. He sat down with her in her office with a pad and pen and went through the figures with her. Further, it is submitted that Ms Abbott-Etherington not only took up the benefits of the package by purchasing the vehicle, but loaded up the finance on the vehicle in the form of a personal loan.

During her employment, she claimed reimbursement for the running expenses of the vehicle in accordance with the package. Previously with "drive car" arrangements the car was fully maintained hence there was no need to claim reimbursements.

63 Ms Reid says that in relation to whether the applicant was not paid in accordance with the salary package, the evidence of Mr Cope in relation to document 35, a reconciliation prepared by him is only challenged in respect of whether fringe benefits tax calculation is correct. Mr Cope conceded that the car benefit basis of fringe benefits tax may have been incorrectly applied and that in fact it is arguable that an expense benefit basis of fringe benefits tax should have been applied. The difference between two methods of calculation being $1,080. This should be weighed against the other payment to the applicant of some $19,000. At no stage during proceedings has the applicant alleged that fringe benefits tax was incorrectly calculated. The applicant has maintained that the fringe benefits tax has not been discussed with her.

64 In relation to whether commission was payable on profit centre II, Ms Reid submits that the applicant's position was that of finance and insurance manager and her description never changed in the course of her employment. Document 4 refers to department singular in the applicant's own handwriting. Ms Reid says that there is no doubt that the applicant worked hard in improving direct sales in that through the increase she could substantially increase her finance commissions. This is different to agreeing that the base of commission had changed. Ms Reid submitted that the applicant's only evidence, which was sketchy, was that in late 2002 Mark England agreed for her to be paid commission based on direct sales in addition to finance and insurance. This evidence was rebutted by Mr England. Mr England's evidence is corroborated by Mr Smith who gave evidence that the applicant was constantly after additional commission and he rejected her claims. No payment was ever made by the respondent in respect of profit centre II to the applicant. Additionally, Ms Reid submitted that in December 2002 the applicant asked for an advance on moneys which could be covered by accrued annual leave. She did not indicate at the time that she was due commissions in respect of profit centre II which might have covered the advance. Therefore at that point in time there was doubt hanging over her claim.

65 Ms Reid submitted that in respect of annual leave Mr Cope gave evidence that all of the applicant's annual leave was paid out on termination and her final payslip displays this. As for long service leave the respondent submits that the applicant was not entitled to long service leave under the policy and hence was not paid it. As for notice the applicant was entitled to four weeks notice under her contract. The respondent paid her five weeks notice having regard to the provisions of the Workplace Relations Act 1996. The applicant was paid notice in lieu and no further obligation arises.

66 Mr Margaretic for the applicant submitted that Ms Abbott-Etherington's case can be distinguished from *Shaddock v Cockburn Cement* (op cit) as in the earlier case the applicant accepted payments in accordance with the contract. In Ms Abbott-Etherington's case there has been a reduction in the remuneration. The applicant is adamant that she never received the letter dated 31 October 2000 (document 9). There is no evidence before the Commission that the applicant did in fact receive that letter. The applicant constantly sought an explanation as to what was allegedly her new salary package. This is evident from the series of emails (document 60) between Ms Murray and Ms Abbott-Etherington regarding reconciliation remuneration. That document talks of salary sacrifice; it does not talk about fringe benefits tax. The applicant was simply informed that there would be no more "drive cars" and she would have to obtain a vehicle for her own use and benefit; and the amount of $25,000 would be paid towards the expenses of operating and acquiring that vehicle. Mr Margaretic submitted that it would be foolish to suggest that the applicant accepted a reduction in her package whereby she reduced her annual income to an amount of $212 per annum for the privilege of driving a motor vehicle which she herself owned. If any benefit was paid in addition to her contractual entitlements, that benefit was amounts paid for lease payments and running expenses of the vehicle to bring that salary up to the amount of $44,000 per annum.

67 Mr Margaretic submits that importantly document 17 has the handwriting of Mr England which says, "ask Tony what he had agreed". This is directed towards Mr Cope in terms of addressing the problem with Ms Abbott-Etherington. He submitted that the only evidence in respect towards Mr Tony McCulloch agreed was that Ms Abbott-Etherington indicated that she had talked to Mr McCulloch about the terms of her commission and remuneration. She says that Mr McCulloch indicated that given the way in which profit centre II was performing she would be the wealthiest paid employee in the company. Mr McCulloch was not called to give evidence.

68 Mr Margaretic submitted that document 18 supports the applicant's contention that she was entitled to profit centre II remuneration. There is not any evidence in writing that the claim made by the applicant is in dispute. Ms Abbott-Etherington constantly raised her claims during the last 3 years of her employment. Mr Margaretic submitted that it is clear on the evidence of Mr Smith that Ms Abbott-Etherington on the return from their trip to Sydney instituted direct sales by way of telemarketing. She instituted advertising campaigns to facilitate direct sales. This is clearly shown in document 34. The respondent concedes that the applicant worked hard in those departments but claims that she was not entitled to those commissions. The applicant has been claiming commissions from those departments since they came under her control. The documents overwhelmingly support this claim. There is no evidence that the applicant's claim was previously disputed until it came to the Commission. The claim was simply ignored.

69 Mr Margaretic submitted that the respondent is claiming that the amounts were paid in terms of fringe benefits tax. Fringe benefits tax is not applicable because there was no agreement by the applicant to accept the salary package apportionment and in fact it was put to her as a contribution towards purchase of a vehicle that is precisely what occurred. Mr Margaretic submitted that when one looks at document 9 and goes through the calculations the applicant would have been better off simply taking the direct selling apportionment and having her car expenses paid for in terms of lease payments and running expenses. The respondent is claiming that because the value of the motor vehicle was never provided by the respondent, never registered by the company and never used for work purposes, then it could never be considered something to which fringe benefits tax is applicable. Mr Margaretic submitted that this conclusion is plainly wrong. Mr Margaretic submitted that even if one considers only profit centre I and the total earnings and accepts the proposition that no fringe benefits tax was applicable, and in fact there was applicable was income tax in the amounts that were paid in relation to contribution to what's her own vehicle then there is approximately $180,000 still owing to the applicant.

70 Both parties submit if it is a matter of simply of taxation and the application of fringe benefits tax then this would require a tax ruling and be beyond the powers of the Commission.

71 Whilst the calculations, taxation questions and evidence in this matter might seem complex, the contentions are not. The applicant maintains that her remuneration package included the provisions of a fully maintained motor vehicle, a retainer of $26,000 per annum and a 20% commission on the profit from the departments until her control. I do not need to refer to other benefits not in question such as the mobile telephone and superannuation. I will deal later with the benefit claimed for leave and notice. The applicant maintains that she never agreed to a change to her remuneration package to include provision of a notional cost of $25,000 for a motor vehicle, purchased by her. She thought this was a car allowance. She maintains also that her departments included not simply finance, insurance and after market; her departments included also direct or retail selling which she refers to as profit centre II. The respondent says that the amended contract was agreed and operated and that the applicant was never entitled to commissions on direct or retail sales.

72 Leaving to one side for now the leave and notice claims, there are two key questions. Was the variation to the contract agreed, and was the applicant, under the contract, to be paid commission for what she refers to as profit centre II? On a cursory look at the evidence it is difficult to see how it can be said that the variation to the contract was not agreed. This is a separate issue as to whether the respondent's calculations were correct. Certainly there is no signature by the applicant on the letter expressing the variation to the package (Document 9). The applicant did not sign the original contract in 1997 (Document 1) but she says that she wrote out the contract. The applicant says that she signed the next contract (Document 4) in February 1999. The applicant says that she never received the variation in question (Document 9).

73 In deciphering the terms of a contract the conduct of the parties to the contract may be a consideration as to whether some condition may be said to be a term of the contract. The simple change was to replace "drive cars" with the provision of a component of $25,000 in salary packaging which could be apportioned in a range of ways. The issue of the variation to the contract does not affect the question of the commission which may be due. It affects the payment of the retainer. The respondent required, as a change of policy that "drive cars" were to be replaced with the salary package. Document 9 outlines the range of options available under the package and included the lease or purchase of a motor vehicle. The applicant then purchased a vehicle from the respondent, the business of the respondent being sales of motor vehicles. The contract change was said to take place in July 2001 and the applicant was dismissed in April 2004.

74 The applicant says that she was not aware of Document 9. The respondent in closing submission does not challenge this but says that the vehicle allowance clearly became part of the salary package. One way I could make sense of the applicant's position that the variation to the contract was not agreed is if somehow I could conclude that the respondent simply decided to change the applicant's usual "drive car" (a vehicle designated by the auctioneer) and upgrade it substantially to a fully maintained vehicle to a Mercedes SLK230. On the applicant's own evidence clearly this did not happen and the applicant purchased a vehicle. The applicant's evidence and case is more that she considered she had an allowance and the salary package arrangements were never agreed, never shown to her or explained to her.

75 The applicant says that Mr Fowler told her that she was no longer going to have a "drive car" and would need to purchase a car and receive an allowance. She says that she protested this change but was told that she had to adhere to the new policy. She says that there was no discussion about fringe benefits tax or running costs. She says that she did not receive a memorandum from Mr Lupton dated 18 December 2000 (Document 10). She then had a conversation with Mr Lupton who was angry with her for not having purchased a car. She indicted that she had not had time to purchase a vehicle but would probably be able to do so early the following year. This followed a discussion with Mr England because she was distressed about the issue. Mr England told her not to worry about Mr Lupton and to decide upon a vehicle. He later encouraged her to consider the Mercedes. Then later again told her that, "he would love to have given me the vehicle as a reward for my efforts, but obviously with the management he couldn't do that". The applicant then purchased a car by use of a chattel mortgage with Esanda for over $90,000. About 18 months later she re-financed the vehicle and included monies in the loan to pay for surgery for her daughter. At that time she was having difficulties with the payment of her retainer and commissions. She says that she recognises Document 12 which is a memorandum to staff, including the applicant, of 31 January 2001 concerning salary packaging expenditure. These facts alone would lead to a conclusion that the applicant, whilst she may have protested the change, shortly thereafter adhered to the change and purchased a vehicle. The applicant then submitted costs to the respondent regarding the interest payments on the loan, running costs and repairs which were paid for by the respondent. I find that the variation to the contract was agreed. The contract is as described in Document 9.

76 There is a separate issue as to whether the applicant knew how the $25,000 for a vehicle was applied to her package, as opposed to say an open ended commitment to incur costs on the vehicle. I consider that the applicant must have known how the $25,000 was applied. She may have struggled to come to an understanding as to how the package worked in practice. However, I find the applicant's evidence totally unconvincing that the package and the effect on the package of buying an expensive car were never explained to her. I accept unreservedly the respondent's evidence, from several witnesses, over that of the applicant.

77 The main claim of the applicant is that she was entitled to be paid commission on profit centre II income. The respondent does not recognise the terms profit centre I or II in their accounts. However, in simple terms the applicant claims payment of 20% commission on income from direct selling and finance. The respondent says the applicant was never due any commission on direct selling and has been overpaid commission on finance. The applicant's evidence seems to be that her original contract, through Mr Fowler, incorporated payment of 20% commission for all her work, ie all operations under her control. Her evidence is effectively that it was envisaged at the time of making that contract that her 'business' would expand, I use the term 'business' as it appears from the evidence that Mr Fowler and Ms Abbott-Etherington expected the profits and business to grow. It is not at all clear that they expected her role to be bigger than that of Finance Manager.

78 Irrespective of this point the real issue is that the applicant alleges that both Mr McCulloch and Mr England, at the very least, specifically agreed to pay her commission on direct selling. She alleges also that later Mr England when dealing with her claim specifically agreed to pay her the commission she sought. Mr England denies the applicant's allegations. I unreservedly accept Mr England's evidence over the evidence of the applicant. I note also that Mr McCulloch was never called and the applicant bears the onus to prove her claim. Mr England's evidence is more credible for a variety of reasons. Firstly, he writes an instruction to Mr Cope at the time the applicant sought an advance of monies (see document 17, 18 November 2002) and tells him he might 'like to ask Tony (Mr McCulloch) what he agreed'. Mr England is the most senior officer in the company. He delegated to Mr Cope the task of reconciling and resolving the applicant's claims. Mr England on his unchallenged evidence was sympathetic to the applicant and a supporter of her in the company. He never directed Mr Cope to pay the applicant as claimed. He did not direct Mr Cope to give him a view of recommendation on the applicant's claim. Most importantly, he did not at any time suggest to Mr Cope that Ms Abbott-Etherington was to be paid commission on direct sales. The evidence of Mr McGillivray, Mr Smith, Mr Cope, Ms Dowd, which are all credible in my view, say that the applicant was never to be paid commission on direct sales. The evidence of Mr McGillivray is that the applicant's involvement in direct sales was limited.

79 There is one other issue which in my view casts considerable doubt on the applicant's claim. Mr McGillivray says he is a direct person and indeed he appeared to be so. He refers to his own commission of 5% on sales when he was the buyer manager and says Mr Fowler would certainly have told him if he was paying someone else 20%. The period he refers to is not the same period of the applicant's claim, but this matters not. The point is the arithmetic of the claim, namely a 20% commission, appears suspect when one considers this evidence. This evidence should be taken together with the evidence of Mr England about what payments the buyers and sellers of cars were paid. In this light the claim appears incredible.

80 Finally, it is apparent from document 4 that commission relates to the finance department. Nothing in the variation of the contract, document 9, alters this. There is then no written record to substantiate what would be a very significant claim for monies, namely a claim also for commission on direct selling. Whatever involvement Ms Abbott-Etherington had in direct sales, and whatever the extent of that involvement may have been, there is nowhere an agreement that she would be paid 20% of the profit from those operations. The respondent's witnesses do not deny that the applicant was at one time responsible for

telemarketing. This is not part of the claim. The respondent's evidence is that the applicant had some involvement with direct sales to ensure that clients were referred to the finance department to improve profits in that area. I accept that this is a more accurate portrayal of what transpired. The claim for unpaid commission is rejected.

81 In relation to her claim for long service leave the applicant was questioned about document 14 and says as follows:

> "It indicates there that in relation to long service leave, which I think is the third last page, in some circumstances payment of pro rata long service leave may be authorised after five years continual service by the group managing director after consultation with the accounting committee. Do you acknowledge that?---Yes.
>
> Why do you believe you're entitled to that claim?---I remember getting this document, and signing it in a rather flustered and hurried way with Catherine standing at the desk, and flipping through it, but I believe I would be entitled to pro rata long service leave because the department that I operated, or one of the departments that I operated, I am informed has been subcontracted out, as Mr McGillivray said he would do; therefore it is closed, so pro rata long service leave or redundancy - - basically I had - - I had no recollection of having read that, but I've worked there long hours for seven years and given 110, 150 per cent to the company, and therefore I believe the circumstances would be such that I would warrant my long service leave." (Transcript p.89)

82 This evidence displays clearly that there exists no contractual basis upon which the applicant can claim long service leave. The respondent's evidence says simply that long service leave was not due under the contract and Ms Abbott-Etherington did not work there that long. This was unchallenged. The applicant's claim appears to be more that she is owed this leave as she worked hard. I reject the claim for long service leave as having any foundation.

83 In relation to the claim for annual leave the applicant says she rarely took leave and there appears to be a record of three weeks leave in 2002. Mr England says that the applicant did not take much leave. He agrees she worked hard for the business and was good at her finance duties; albeit she interfered wrongly in other areas of the business which caused tensions. Mr Cope says that the applicant was paid out her annual leave. He also says that the applicant was overpaid commissions in the vicinity of more than $19,500. The final payslip, document 38, shows an amount of $52,413.40 as being paid as a gross payment for unused annual leave. The applicant does not deny that the final payment as a net amount was received. The applicant says the final payment should be deducted from any award by the Commission. It is clear in my view that the outstanding annual leave was paid on termination. I would add also that given the doubts which I expressed generally about the applicant's evidence and also the paucity of evidence by the applicant on this issue, the claim has simply not been made out.

84 In summary, my clear view is that the applicant's claim is an exaggerated claim without basis. It would appear that when one looks at her evidence as a whole then the claim is premised not on the actual contract, but a view that she worked hard for the respondent and deserved what she seeks. Additionally, both in submission and evidence there is a sentiment that the claim is justified, or has been proven, because there is no document from the respondent expressly rejecting the claim as made in document 18 by the applicant. The fact is the claim has no contractual basis, was never assented to and never paid. For all the above reasons I would dismiss the claim in its entirety.

2005 WAIRC 01400

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY ABBOTT-ETHERINGTON
	APPLICANT
	-v-
	AUTO GROUP AUCTIONS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 2 MAY 2005
FILE NO	APPL 536 OF 2004
CITATION NO.	2005 WAIRC 01400

Result	Application dismissed
Representation	
Applicant	Mr L Margaretic of Counsel
Respondent	Ms K Reid of Counsel

Order

HAVING heard Mr L Margaretic of Counsel on behalf of the applicant and Ms K Reid of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2005 WAIRC 01160

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE GEORGE CARVELL
	APPLICANT
	-v-
	AVON TELECOMMUNICATIONS PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY 12TH APRIL 2005
FILE NO.	APPL 746 OF 2004
CITATION NO.	2005 WAIRC 01160

CatchWords	**Termination of employment – unfair dismissal – Employers financial obligation – no unfair dismissal – Industrial Relations Act 1979 s23A, s29**
Result	Dismissed
Representation	
Applicant	Mr Wayne George Carvell appeared on his own behalf
Respondent	Mr Eddy Rea appeared on behalf of the Respondent

Reasons for Decision
(Ex Tempore as edited by Senior Commissioner Gregor)

1 This is an application by Wayne George Carvell (the Applicant) pursuant to S. 23A of the Industrial Relations Act 1979 (the Act); wherein he seeks orders for payment of compensation for what he says was a harsh oppressive or unfair dismissal of him by Avon Telecommunications Pty Ltd (the Respondent).

2 Briefly the facts are Mr Carvell started to work for the Respondent in April 2003 following upon an interview with Mr Wayne Harm who is the Principal of the Respondent and one of its Directors. The Applicant was employed as a technician. Initially he worked on installation of telephone and security systems and data cabling in the Merredin area. Mr Harm says part of the deal was that the Applicant was to do promotional work. The Applicant disputes that claim however nothing turns on this disagreement.

3 What is clear is the work in Merredin started to run down and this caused the Respondent to have to use the Applicant's services in Northam. He would travel to Northam from time to time for that purpose. Some of the travel was in his own time. Mr Harm accepted that was the case. The evidence suggests that there was a generally a good feeling between the parties in the work place.

4 However, that good feeling was ameliorated to some extent when there was a dispute between the Applicant and another employee over an affair of the heart with the Respondent's receptionist. This caused a friction between the men and the result was that the Respondent had to make arrangements to keep them apart, and it did so.

5 The events concerning the lady took place some two months before the contract of employment was brought to an end. That happened in May 2004 when Mr Harm told the Applicant that his services could no longer be retained because of the financial position of the Respondent. The Applicant never really believed that was why he was dismissed. He thought that the reason was because of the difficulty between him and the other technician emanating from the relationship with the same young lady by both of them. He never accepted and I suspect still does not, that the real reason for his dismissal was the financial viability of the Respondent.

6 The Applicant produced little other than his viva voce evidence about his impressions about what was going on. The only document that he produced to support his contentions is an email (Exhibit C1) from the receptionist Ms Zupanic to him which was a copy of an email that the other employee in the triangle had sent to her. There is no other evidence from him other than his 'feeling' about how the Respondent was trading.

7 The Commission heard evidence from Mr Wayne Harm and his wife Mrs Janice Harm. Both of them are Directors of the Respondent. From the description they gave the Commission this looks like a small business operating in the Telecommunications industry. Like many small businesses in that industry it is a family business with two members of the family being the only Directors. As is the case in many family small businesses, one part of the partnership looks after the technical and the practical work, while the accounting and administration is done by the other half of the partnership. In this case that was Mrs Janice Harm.

8 There was evidence from Mr Harm that the business had been trading poorly for a period of time that was why he tried to promote business in the Merredin area but was not successful. This being the case he was pinning his hopes upon obtaining a large contract (Exhibit R1) with the Commander telephone company for installations into the Health Department across the Avon District. Mr Harm had confidence that contract would come to fruition and it was with confidence that the Respondent had continued to employ the Applicant. It came to pass just prior to the termination that the Respondent was advised it did not get the contract and this was a blow to their business in a financial sense.

9 The balance sheets, account transactions and profit and loss statements which have been presented in evidence (Exhibit R2) paint a picture of a business struggling to continue. To make ends meet both Mr Harm and Mrs Harm had personally injected capital into the business. Without that injection of capital the profit and loss statements show that the business would have been in a worse loss situation. Through July 2003 to the 30th April 2004, which covers the time in which the Applicant was employed, the total loss was $50,000. The monthly profit and loss statements show that there was regular loss of $14,000 to $15,000 a month. This is notwithstanding the cash injections and efforts that have been made to improve the performance of the company. For instance Mr and Mrs Harm forgoing wages or drawings.

10 It was against this background that there was a meeting between Mr and Mrs Harm about what should be done and they reached the conclusion that they needed, for the continued viability of the business, to make adjustments to the number of people they employed. The receptionist, who was the subject of the affections of both of the gentlemen technicians, was retrenched and so was the Applicant.

11 When an employee is made redundant a prudent employer goes through a systematic process of selection. Sometimes those processes involve a sophisticated matrix system but in a small business what needs to be demonstrated is that thought was given as to how to distinguish between those employees who may be selected for redundancy. When an Applicant comes before this Commission they have to establish that in the event of redundancy someone else should have been selected other then them. The onus rests on the applicant to do so *AMWSU and Another v Australian Ship Building Industries (WA) Pty Ltd* (1997) 67 WAIG 733 is authority for that proposition.

12 What the Respondent did here is to consider both of its technicians. Their head to head comparison was that the Applicant lacked experience of the technician they decided to keep. He had been employed for about 12 months, the other man had been employed for 5 years. In addition they had paid for training over that period in order to up skill the other technician. They made the comparison as to who would be best for the business and decided that the Applicant had to go.

13 The Applicant says that the Commission should take into account in considering whether the Respondent was genuine about his redundancy that they employed a new technician after the Applicant left. The documents before the Commission show in the relevant period the new technician worked 35 hours. This is consistent with the contention of the Respondent that they had to use him to cover work that Mr Harm, who returned to the tools, could not do himself. That is consistent with the Respondent's argument that the new technician was not employed to cover the loss of the full-time employee who is the Applicant in these proceedings.

14 The onus of proof rests upon the Applicant to establish on the test set out in Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985) 65 WAIG 385 case (Undercliffe case) that there has not been a 'fair go all round'. That not only means a fair go to the employee, it means a fair go to both parties. The Commission in considering whether that onus has been discharged has to consider the broad picture.

15 The broad picture here is the Applicant has lost his job. The Commission also has to consider the situation of the Respondent and clearly, on the evidence, here is a company which was in financial difficulties and was faced for making sensible managerial decisions to keep it afloat. The Corporation Law requires companies to do so. It requires them not to trade insolvently and if the company does not take action to reduce its costs and trade in the black then it is in trouble with the Corporation Law. This Respondent has in its dealings with the Applicant tried to do so and the Commission should take that into account.

16 Finally, in considering whether there has been a fair go all round the Commission must take notice of the Applicant's contention that this was a personal problem between him and another employee brought about by a relationship with the same lady and that he has been penalised because the other person has been retained in employment.

17 It is open to find on the evidence, and I do, that the Respondent tried to manage that conflict in the most sensible way possible given the size of its workforce. It kept the employees apart. The Applicant concedes that to be the case. There is no evidence of any ill will between the parties in this matter concerning the way they conducted their relationship.

18 It is open to conclude, and I do, that eventually the trading position was such that the Respondent was entitled to take action to remediate the financial situation. It acted fairly when it made its selection and for that reason the Applicant has not been denied a fair go as described in the Undercliffe case.

19 For those reasons this application will be dismissed.

2005 WAIRC 01164

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE GEORGE CARVELL
	APPLICANT
	-v-
	AVON TELECOMMUNICATIONS PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY 12TH APRIL 2005
FILE NO/S	APPL 746 OF 2004
CITATION NO.	2005 WAIRC 01164

Result	Dismissed
Representation	
Applicant	Mr Wayne George Carvell appeared on his own behalf
Respondent	Mr E Rae as Agent appeared for the Respondent

Order

HAVING heard Mr Wayne George Carvell on his own behalf as the Applicant and Mr E. Rae as Agent for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application is hereby dismissed.

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

2005 WAIRC 00277

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR JULIE ELIZABETH COPEMAN
	APPLICANT
	-v-
	DERBAL YERRIGAN HEALTH SERVICE INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 15 FEBRUARY 2005
FILE NO.	APPL 589 OF 2004
CITATION NO.	2005 WAIRC 00277

Result	Direction issued
Representation	
Applicant	Mr N Devine as agent
Respondent	Mr S Hawkes of counsel

Direction

HAVING heard Mr N Devine as agent on behalf of the applicant and Mr S Hawkes of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

1. THAT the matter of the Commission's jurisdiction for the purposes of s 29AA(3) be dealt with as a preliminary issue and that evidence in chief be adduced by affidavit.
2. THAT the respondent file and serve upon the applicant any affidavit(s) upon which it intends to rely no later than 1 March 2005.
3. THAT the applicant file and serve upon the respondent any affidavit(s) upon which she intends to rely within 7 days of service of the respondent's affidavit(s).
4. 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 3 days prior to the date of hearing.
5. THAT the parties have liberty to apply on short notice.

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

2005 WAIRC 01294

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR JULIE ELIZABETH COPEMAN
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 31 MARCH 2005
FILE NO.	APPL 589 OF 2004
CITATION NO.	2005 WAIRC 01294

Catchwords	Industrial law – Termination of employment – Alleged harsh, oppressive and unfair dismissal – Whether reg 5(2) applies to the applicant's circumstances - Whether applicant's salary exceeded prescribed amount for the purpose of s 29AA(3) - Commission lacks jurisdiction – Application dismissed – Order issued – *Industrial Relations Act 1979* (WA) s 23A, s 29AA, s 29(1)(b); *Industrial Relations (General) Regulations 1997* (WA) reg 5.
Result	Application dismissed. Order issued.
Representation	
Applicant	Mr N Devine as agent
Respondent	Mr S Hawkes of counsel

Reasons for Decision
(Ex Tempore)

1 The substantive application before the Commission is brought by the applicant against the respondent by which it is alleged that, on or about 2 April 2004, the applicant was harshly, oppressively and unfairly dismissed by the respondent from her employment as a medical practitioner.

2 The respondent has raised as a preliminary issue the question of the Commission's jurisdiction to inquire into and deal with this matter. The respondent says that at all material times the applicant was in receipt of a salary, which salary

exceeded the prescribed amount for the purposes of s 29AA(3) of the Industrial Relations Act 1979 ("the Act"), and also for the purposes of the Regulation 5 of the Industrial Relations General Regulations 1997 ("the Regulations").

3 It is common ground between the parties that, for the purposes of s 29AA(3)(a) of the Act, an industrial instrument does not apply to the employment of the applicant.

4 The matter was directed by the Commission to proceed on the basis of the filing of affidavits and written submissions, which the parties duly have. The only evidence before the Commission is adduced by the respondent by way of an affidavit of Margot Philippa Tobin, also supplemented by brief oral evidence from her in the proceedings today. Also before the Commission are written submissions in respect of the jurisdictional question filed by both the respondent and the applicant.

5 The affidavit evidence of Ms Tobin, sworn 15 March 2005, goes essentially to the payments made to the applicant over the material times, and I simply quote the evidence of Ms Tobin contained in her affidavit as follows:

> "I am employed by Derbarl Yerrigan Health Services Incorporated as Senior Manager, People Support. I am responsible for the coordination of all staffing matters and have access to personnel files and payroll records.
>
> I swear this affidavit in support of the respondent's objection to the applicant's application on the basis that the Commission has no jurisdiction to hear the application.
>
> The statements made by me are true to the best of my knowledge and belief.
>
> On 10 March 2005, in response to a request from our solicitors, I generated a payroll report on the applicant for the period from 3 April 2003 to 2 April 2004, defined as 'the period'. Annexed to this affidavit and marked 'MPT1' is a true copy of that payroll report.
>
> On page 2 of MPT1, approximately two-thirds down the page, there is a line entitled 'Report Total'. That line reports the total gross amount paid to the applicant during the period pursuant to her contract of employment as $112,699.80.
>
> On page 1 of MPT1, the fourth record, dated 16 May 2003, records a total payment to the applicant on that date of $20,330.61. On the basis of an examination of the applicant's personnel file, I believe that most of that amount represents back-pay of a casual loading of 20 per cent on all work performed by the applicant prior to that pay period.
>
> On 20 March 2005, in response to a request from our solicitors for further information, I obtained from our files a printout of a full report on the payroll for the date 16 May 2003. Annexed to this affidavit and marked 'MPT2' is a copy of the relevant page of that report. The names of other employees have been obscured to protect their privacy.
>
> The breakdown of the applicant's pay for 16 May 2003 is shown about halfway down the page of MPT2, and entitled '0635 Post F1 Copeman JA'. The breakdown shows, on the first line of the entry, a gross amount of $3,133.67 paid as normal pay for that pay period.
>
> Further down, under a heading 'Additions and Deductions', it shows a further gross payment of $17,196.94. I believe that this figure represents the back pay of a 20 per cent casual loading on all work performed prior to that pay period.
>
> The applicant received three payments between 2 April 2003 and 5 May 2003. I believe that a part of the $17,196.94 represents back pay of a casual loading for these pay periods.
>
> According to my calculations, 20 per cent casual loading on these three payments amounts to a total of $1,273.85. Therefore, $17,196.94 less $1,273.85 leaves an amount of $15,923.09, which represents back-pay of a casual loading for work performed prior to the period. Annexed to this affidavit and marked 'MPT3' is a printout of a spreadsheet showing the basis of my calculations.
>
> On the basis of the reports MPT1 and MPT2, and the calculations at MPT3, I believe that the gross amount paid to the applicant pursuant to her contract of employment during the period, being for work performed for the period, was $96,776.71."

6 There was also further brief oral evidence, which I have referred to, adduced through Ms Tobin to the effect that a document tendered as exhibit R1, which was an unsigned contract of employment purporting to be between the applicant and the respondent, described the applicant as a "general practitioner sessional" to be paid on a casual basis, with certain prescribed hours of work and so on. It is unnecessary for the Commission to refer to that document any further as it is common ground that the parties never executed that instrument.

7 Ms Tobin also testified that at some point, indeterminate on the evidence, there was a statement made by the applicant to the effect that she appeared to not want to sign this document but leave her employment arrangements loose; and also, at some further stage, the testimony was the applicant said she was employed casually and would come and go as she pleased. I say nothing further about that aspect of the evidence at this stage.

8 I simply note, however, that exhibit R1 contains a hand-written notation on the top right-hand corner made by Ms Tobin, referring to a telephone conversation on or about the 18 September 2003 to which reference to the refusal to sign and the statement about her employment arrangements being loose is referred to.

9 The Commission, on the basis that the affidavit evidence of Ms Tobin which was not in any way challenged in cross-examination, accepts that evidence, and I find accordingly.

10 In relation to the further evidence as to what might have been said by the applicant about her employment arrangements, I do not place great weight upon that. Rather, I am satisfied on the facts that the payments made to the applicant were as set out in the affidavit of Ms Tobin and the documents annexed to her affidavit in her testimony.

11 For present purposes, the issue to be determined is the nature of the payments made in the 12 month period prior to the termination of the applicant's employment, as set out in reg 5(2) of the Regulations. On the evidence, which is uncontested before the Commission, those payments were either the sum of $95,502.86 or, alternatively, $96,776.71, both figures, self-evidently, being greater than the prescribed rate for the purposes of s 29AA(3) of the Act.

12 However, the issue before the Commission in this matter is the nature of the casual loading said to have been paid by the respondent to the applicant over the relevant period which was, on the uncontested evidence, a rate increase of some 20 per cent of the applicant's agreed sessional rate as it was described.

13 The definition of "salary" for the purpose of s 29AA(3) of the Act is a more narrow concept than remuneration, for example, for the purposes of s 23A(8) of the Act. The issue of the meaning of "salary" has been dealt with somewhat extensively both by this Commission and in other jurisdictions, and insofar as it is necessary to do so, I simply refer to the observations of the Full Bench of this Commission in *Edith Fisher v The Totalisator Agency Board* (1997) 77 WAIG 619,

and the decision of the Industrial Appeal Court on appeal from that Full Bench decision in the *The Totalisator Agency Board v Edith Fisher* (1997) 77 WAIG 1889. In particular in the judgment of Anderson J at page 1891, his Honour referred to various authorities, in particular in United Kingdom jurisdictions, concerning the meaning of "salary" and said as follows:

> "If resort is had to case law to ascertain the ordinary meaning of the word 'salary', I can find nothing in the cases to which we have been referred, including the cases mentioned above, which would support the conclusion that the commission or other entitlements provided for in this agency agreement are salary. Both parties relied upon the case of in re Shire ex parte Shine in support of their opposite contentions. In my opinion, the judgments provide no support for the respondent's case. At 529 Lord Justice Bowen said, and I quote:
>
> 'Salary I think must mean a definite payment for personal services arising under some contract and (to borrow an expression of my brother Fry) computed by time'."

The quote goes on to say:

> "As I have tried to point out, the agency commission is anything but a definite payment for personal services computed by time. In that same case, Lord Justice Fry said, at 531, and I quote:
>
> 'Whenever a sum of money has these four characteristics: first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and, fourthly, that it is payable at a fixed time, I am inclined to think that it is a salary, and not the less so because it is liable to be determined at the will of the payer, or that it is liable to deductions'."

14 In my view, from the evidence before the Commission and on the authorities to which I have referred, I have no doubt that a casual loading as described is "salary" for the purpose of s 29AA(3) of the Act.

15 In effect, in my opinion a casual loading is simply an increase in the rate of wage or salary otherwise payable to an employee to compensate for the lack of provision of certain other benefits such as some leave entitlements. However, and critically for present purposes, such an increase in the rate of salary or wage does not at all alter the character of the salary paid itself.

16 The applicant argued that on its proper characterisation, the relationship between the applicant and the respondent was something other than casual employment. However, the only evidence before the Commission is that of the respondent, and the applicant, on that evidence, seems to have willingly accepted all payments made to her over the period of her employment without demure, and there is no evidence before the Commission to the contrary.

17 For the purposes of reg 5(2)(a) of the Regulations, the focus of the inquiry must be, in this case, on the actual payments received by the applicant as opposed to what she may have been entitled to receive, whichever is the greater. Plainly in my view that is what the Regulations provide and contemplate, for example, that an employee may, in fact, be paid a greater sum than what his or her contract of employment actually entitles the employee to receive over the relevant period.

18 Therefore, the focus is, in my opinion, for the purposes of reg 5(2)(a) what, in fact, the applicant was paid over the relevant period in this case. Even if, despite there being no evidence to this effect, the applicant's contentions were correct as to the proper character of the employment relationship, in my opinion that does not alter as a fact the payments made to the applicant, although that may expose the respondent to an action for recovery of other entitlements under, for example, the Minimum Conditions of Employment Act 1993 in another jurisdiction. On what is before the Commission in these proceedings, the Commission cannot be satisfied that the relationship is other than what it is asserted to be.

19 The Commission is satisfied on the balance of probabilities that the applicant was at all material times for the purposes of s 29AA(3) in receipt of a salary greater than that prescribed for the purposes of that section at the material times, and therefore the Commission has no alternative but to dismiss the application for want of jurisdiction.

2005 WAIRC 00844

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR JULIE ELIZABETH COPEMAN
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 1 APRIL 2005
FILE NO/S	APPL 589 OF 2004
CITATION NO.	2005 WAIRC 00844

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr N Devine as agent
Respondent	Mr S Hawkes of counsel

Order

HAVING heard Mr N Devine as agent on behalf of the applicant and Mr S Hawkes of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2005 WAIRC 01480

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAREE D'ARCY
	APPLICANT
	-v-
	SWIFT & MOORE PTY LIMITED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 11 MAY 2005
FILE NO.	APPL 145 OF 2005
CITATION NO.	2005 WAIRC 01480

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	Ms P Smith (of counsel)
Respondent	Mr M Jensen (of counsel)

Reasons for Decision

1 On 9 February 2005 Maree D'Arcy ("the applicant") referred a claim to the Western Australian Industrial Relations Commission ("the Commission") pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively and unfairly dismissed on 18 August 2004 by Swift and Moore Pty Limited ("the respondent").

2 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 February 2005 it is 147 days out of the required timeframe for lodging a claim of this nature.

3 The matter was listed for hearing to allow the parties to put submissions and 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."

4 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 in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, 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."

5 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

6 It was not in dispute that the applicant commenced employment with the respondent on 1 October 2003 as a full time permanent employee on an annual salary of $37,000 per year plus an annual bonus and that the applicant was subject to the terms of a written contract of employment (Exhibit A1). Throughout the applicant's employment with the respondent she was not given any formal warnings about her performance or behaviour although in June 2004 the respondent raised a concern about the applicant's attitude towards an employee from the respondent's head office.

Applicant's evidence

7 The applicant gave evidence that she was employed by the respondent as a sales support/office coordinator and in this role she undertook a range of administrative duties including front office reception duties and file maintenance. The applicant also provided support for the respondent's managers and sales representatives. The applicant stated that she was well organised and efficient.

8 Soon after arriving at work on the 18 August 2004 the applicant was called into a meeting with the Manager of the respondent's Western Australian office, Mr Andrew McNamara. Mr McNamara told the applicant that her position was being made redundant and the applicant was advised that the position she occupied was being made redundant in each of the respondent's offices throughout Australia. The applicant was then handed a letter confirming her termination and a document outlining her termination payment (Exhibit A2) and the applicant was told to sign this letter in order to receive her termination payment. Mr McNamara told the applicant that her termination was effective immediately. The applicant queried the reason

for her termination as she understood that the respondent was doing well at the time and had recently employed four new territory managers. The applicant stated that she was totally unaware that she was going to be made redundant as this was the first time her termination had been raised with her. The applicant stated that during this discussion Mr McNamara informed her that he had known for some time that her position was to be made redundant.

9 At the end of the meeting the applicant informed Mr McNamara that she would not sign the termination letter as she wanted to review the make-up of the termination payment. Mr McNamara then told the applicant that she was required to leave the respondent's premises straight away after packing up her personal items. The applicant stated that she was humiliated when she was required to leave in this manner and she was upset as she had no opportunity to say goodbye to other staff who were good friends. The applicant stated that she was upset and very emotional when driving home from the office after this meeting.

10 The applicant stated that she asked the respondent for assistance obtaining alternative employment but this assistance was denied.

11 After she was terminated the applicant contacted Mr McNamara seeking further details about her termination payment and she was advised to contact the respondent's payroll section in Sydney, which she did so. However after two weeks she had no response. As a result the applicant visited Mr McNamara on 30 August 2004. The applicant stated that even though she disagreed with the quantum of her termination payment she signed her letter of termination on this date so that she could access her redundancy payment and other entitlements.

12 The applicant gave evidence that once she signed her termination letter, which referred to her accepting her termination due to a redundancy situation, she understood she could not dispute her termination. The applicant also claimed she could not afford to obtain legal advice about her termination at the time she was terminated.

13 The applicant stated that at the time she was terminated she was unaware that there was a 28 day time limit within which to file an application claiming unfair dismissal.

14 The applicant stated that on 6 February 2005 a friend asked her if she had seen her previous position with the respondent advertised in the "The West Australian" on 29 January 2005. After reading this advertisement the applicant sought legal advice the following day about her termination because she believed that the advertised position was the position she previously occupied and within two days of obtaining this advice this application was then lodged. The applicant also understood that after she was terminated a temporary employee had been employed to undertake her role.

15 The applicant claims that as most of the applicant's previous duties are now undertaken by the new employee in the position advertised on 29 January 2005, the applicant believes that her termination was not based on a genuine redundancy situation and that the respondent masked her termination by calling it a redundancy so as not to terminate her for disciplinary and/or performance reasons.

16 The applicant stated that since her termination she has been unsuccessful in obtaining alternative employment notwithstanding efforts to find another position.

17 A duty statement for the applicant's position was put to the applicant (Exhibit R1). The applicant agreed that this document was drawn up in April/May 2004 by agreement between herself and Mr McNamara and that it contained most of the duties she normally undertook.

Respondent's evidence

18 Mr McNamara was the respondent's Manager in Western Australia when the applicant was terminated. Mr McNamara has since been appointed as Manager of the respondent's Victoria office as at 1 April 2005. Mr McNamara stated that the applicant was employed as an office coordinator when the previous incumbent took up a field position with the respondent. Mr McNamara stated that the applicant's duties revolved around office management and that the applicant had the responsibility of managing the respondent's office. Mr McNamara stated that this role did not involve the applicant undertaking any duties outside of the respondent's office. Mr McNamara stated that the applicant's duties did not alter after the duty statement was generated for this position (Exhibit R1) however he conceded that the applicant may have undertaken additional small tasks.

19 Mr McNamara stated that the Sales Support Role position which was advertised on 29 January 2005 was a different job to the application's position. Mr McNamara stated that this position was established to provide support for the respondent's Operations Manager, Mr Peter Jones because of Mr McNamara's pending move to Victoria. Mr McNamara stated that the Sales Support Role involved a substantial amount of out of office duties managing a promotional agency, a role previously undertaken by Mr Jones and the position also involves some administrative duties being undertaken one day a week in the respondent's office. Unlike the applicant's former position, which was from Monday to Friday during normal office hours, the incumbent in the new position is required to work four nights per week in the field in addition to one day in the office.

20 Mr McNamara stated that the decision which led to the applicant's position being abolished was part of an ongoing review process which he commenced undertaking in June 2004 and Mr McNamara stated that he has since destroyed the notes he made about these proposed changes. Mr McNamara stated that after he decided to have more employees working outside of the respondent's office this resulted in him reviewing the applicant's role. Mr McNamara stated that as the applicant had put in place a number of administrative processes which efficiently dealt with the respondent's administrative demands, the applicant's duties had diminished. Mr McNamara stated that when the applicant was terminated her remaining duties were allocated to Mr Jones.

21 Mr McNamara stated that he considered placing the applicant in other positions including a field role but he thought the applicant to be inappropriate for this role given the applicant's personality. Mr McNamara also took into account that the applicant had only expressed an interest in progressing to a manager's role or a marketing position with the respondent. As there was no vacancy as a manager Mr McNamara did not believe that there was any option for the applicant apart from being terminated.

22 Mr McNamara stated that he decided to make the applicant's position redundant two weeks prior to effecting the applicant's termination. Mr McNamara stated that two field sales representatives resigned and left around the time the applicant was terminated and he gave evidence that these positions were never replaced. Mr McNamara stated that after terminating the applicant he requested and was granted permission from the respondent's head office to employ additional territory managers in lieu of these positions.

23 Mr McNamara stated that the first time the applicant was aware that she was being terminated was when he met with the applicant on 18 August 2004. Mr McNamara stated that he went out of his way to negotiate a fair package for the applicant with the respondent's Human Resource Manager in Sydney and Mr McNamara confirmed that he advised the applicant that he could not authorise payment of her termination monies until the letter dated 18 August 2004 was signed. Mr McNamara stated that the meeting with the applicant was very emotional.

24 Mr McNamara stated that at the time the applicant was terminated she did not state that she believed she was being unfairly terminated and Mr McNamara maintained that he never advised the applicant that she could not contest her termination.

25 Mr McNamara stated that when the applicant visited him on 19 August 2004 to clarify the calculation of her redundancy payment he was unable to explain the rationale for the payments and Mr McNamara stated that he later had further discussions with the applicant about the quantification of the payment however he was unable to reach agreement with the applicant about the calculation.

26 Mr McNamara stated that from time to time the respondent employed temporary employees to be in the office when all of the respondent's managers were out of the office. Mr McNamara stated that this had happened between six and nine occasions in the past year and he stated that a temporary employee was not engaged to replace the applicant.

27 Under cross-examination Mr McNamara stated that the applicant undertook at least half of the tasks currently undertaken by the new Sales Support Officer and he confirmed that the applicant spoke on a daily basis with the respondent's sales representatives.

28 When asked if he considered the applicant for the Sales Support Officer position Mr McNamara re-iterated that he knew the applicant would not fit this role given her character and the way she operated. Mr McNamara stated that he would have offered the applicant this position if she was suitable for this role. Mr McNamara stated that he explored an alternative position for the applicant in the respondent's interstate offices but none were available.

29 Mr McNamara stated that he was unaware of the obligations required of an employer under the *Minimum Conditions of Employment Act 1993* ("the MCE Act") when making an employee redundant. When asked if pressure was put on the applicant to sign her termination letter Mr McNamara stated that he was advised by the respondent's head office that it would not pay her the termination payment until she signed the letter.

30 Mr McNamara agreed that when the applicant was terminated she was confused and he stated that after the applicant was terminated the applicant may have told him that she believed her termination was wrong.

Submissions

31 The applicant submitted that there was a valid reason for the delay in lodging this application as the applicant understood that her termination was final when she signed the letter accepting her redundancy payment. At the time the applicant was terminated she was unaware of her legal rights, she was stressed by the manner of her termination, the applicant was confused and emotional and she was focused about the quantum of her termination payment. However, once the applicant became aware of her right to contest her termination after she became aware that the new position was advertised she acted expeditiously to file this application.

32 The applicant argues that she did not readily accept her termination as she did not sign her termination letter immediately and she did not indicate that she accepted the respondent's decision to terminate her.

33 Even though Mr McNamara may no longer have notes he made about the restructure which led to the applicant's termination, the applicant maintains that as Mr McNamara is available to give evidence there is therefore no prejudice to the respondent. Additionally there was no evidence that Mr McNamara's notes would have been available if there was no delay in lodging this application.

34 The applicant maintains there is merit to her application as there is a live issue as to whether or not the applicant was terminated due to a genuine redundancy situation, the respondent conceded that it was not aware of the obligations on it under the MCE Act and it conceded that it did not canvass alternative employment options with the applicant and the applicant was not advised of her termination until some time after Mr McNamara made the decision to abolish the applicant's position. The applicant argues that the advertisement for the Sales Support Role was for a position that is similar to the role previously undertaken by the applicant and a temporary employee was brought in to undertake the applicant's position subsequent to her termination. The applicant therefore argues that she may not have been terminated due to a genuine redundancy situation. Even though a redundancy payment was made to the applicant at termination this does not cancel out the fairness or otherwise of the applicant's termination.

35 The respondent maintains that the applicant did not raise any concerns with the respondent that her termination was unfair and if the applicant did have the view that her termination was unfair she should have sought advice about contesting her termination at the time of her termination.

36 The respondent maintains that the applicant was terminated due to a valid redundancy situation and that the job advertised in January 2005 was not the same as the job previously undertaken by the applicant. For example, the new position requires a significant amount of on-site work dealing with customers face to face and the management of a promotional agency, duties which the applicant did not undertake in her role of office coordinator. The respondent argues the new position arose from a change of circumstances and was a result of an evolutionary change in the respondent's operations. The respondent maintains that even if there were procedural defects in the process used when terminating the applicant, which the respondent does not concede, the amount paid to the applicant at termination would more than cover any compensation which would be due to the applicant.

37 The respondent contests that the applicant believed that by signing her termination letter she waived her rights to bring any action in relation to her termination as this letter was not signed until 12 days after she had been advised that her position was redundant. During this period the applicant had time to consider her termination and if she believed it was unfair to obtain advice.

38 The respondent maintains that there were no special circumstances raised by the applicant which explains the delay in lodging this application and the respondent argues that it will be severely prejudiced if this application is accepted as notes made by Mr McNamara and other documentation in relation to the abolition of the applicant's position was not retained by him.

Findings and conclusions

39 Even though there were some minor inconsistencies in the evidence given by Mr McNamara, for example he gave conflicting evidence about whether or not the applicant stated that her termination was inappropriate I accept the general thrust of the evidence given by both the applicant and Mr McNamara.

40 It is my view that there could well be merit to the applicant's claim. I accept that the applicant's termination was effected without any notice being given to the applicant even though the respondent had known for some time that the applicant was to be terminated and it is clear that it was not a condition of the applicant's contract of employment that she could be given a payment in lieu of notice at termination (see Exhibit A1). It was not in contest that there was a lack of consultation with the applicant about alternatives to termination and there was no opportunity for the applicant to avail herself of paid time in order to seek out alternative employment. As a result it could well be that the requirements of the MCE Act in relation to a redundancy situation were not met by the respondent. Even though it appears on the evidence currently before me that the

applicant may have been terminated due to a genuine restructure, if given the opportunity, the applicant may have been able to convince Mr McNamara that she could undertake a different role with the respondent as the respondent created a number of new positions around the time the applicant was terminated.

41 Even though this application was lodged 147 days out of the required timeframe which is a significant delay, I accept the applicant's reasons for the delay in lodging this application. I accept the applicant's evidence that she had a genuine belief when she was terminated that she was terminated due to a redundancy situation and that she was unable to contest her termination as she understood that once she signed her termination letter and accepted her termination payment she could not contest her termination. I also accept the applicant's evidence that she was unaware of the required timeframe for lodging an application of this nature and that she only sought advice about lodging this application after becoming aware that a position similar to her own was advertised by the respondent. I accept that the applicant lodged this application immediately after becoming aware that a position similar to her previous position was advertised by the respondent at the end of January 2005.

42 Even though the applicant did not advise the respondent that she would be contesting her termination I find that the respondent was aware that the applicant was distressed and unhappy about her termination. I also note that Mr McNamara stated that the applicant may have advised him that she believed her termination was wrong after she was terminated and it was not until approximately two weeks after her termination that the applicant reluctantly signed the letter accepting her termination payment.

43 I accept that there may be some prejudice to the respondent given the effluxion of time between the applicant's termination and this application being lodged and I accept that some of Mr McNamara's notes about his decision to abolish the applicant's position no longer exist. However, as Mr McNamara will be available to give oral evidence about his decision to make the applicant's position redundant the notes of his deliberations would in all probability not be critical to the respondent's case.

44 When balancing the above findings and when taking into account the relevant factors to consider in an application of this nature it is my view that in all of the circumstances of this case it would be unfair not to accept this application. In reaching this view I take into account that I have found that there was an acceptable reason for the delay in lodging this application and there is sufficient to establish that the applicant has an arguable case. Even though the respondent may be prejudiced to some extent in allowing this application I balance this against the prejudice to the applicant in not allowing this application. It is my view therefore that 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.

45 An order will issue to that effect.

2005 WAIRC 01540

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAREE D'ARCY
	APPLICANT
	-v-
	SWIFT & MOORE PTY LIMITED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 13 MAY 2005
FILE NO/S	APPL 145 OF 2005
CITATION NO.	2005 WAIRC 01540

Result Application to accept applicant's claim which was lodged out of time granted.

Order

HAVING heard Ms P Smith of counsel on behalf of the applicant and Mr M Jensen of counsel on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application to accept the application out of time be and is hereby granted.

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

2005 WAIRC 01386

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HELEN DODDS
	APPLICANT
	-v-
	JB & S BUILDING CONTRACTORS (ABN 90 130 403 452)
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	MONDAY, 2 MAY 2005
FILE NO.	APPL 1264 OF 2004
CITATION NO.	2005 WAIRC 01386

CatchWords	**Termination of employment - unfair dismissal - whether applicant is employee – jurisdiction – Industrial Relations Act 1979 s29(1)(b)(i)..**
Result	Dismissed for want of jurisdiction
Representation	
Applicant	Ms H. Dodds appeared in person
Respondent	Mr K. Prunty, of Counsel, appeared on behalf of the Respondent

Reasons for Decision

1 On the 28th September 2004 Helen Dodds (the Applicant) applied to the Commission for orders pursuant s23A of the Industrial Relations Act 1979 (the Act) claiming that she had been unfairly dismissed by JB & S Building Contractors (the Respondent) from employment with the Respondent as a caretaker of a block of units in Laverton in Western Australia.

2 The Applicant gave evidence for the Commission. She says that the employment was terminated pursuant to correspondence received by her on the 1st September 2001 (Exhibit D3). The letter alleged that certain issues had been brought to attention of the Respondent regarding the running and reputation of the units owned by it in Shirley Avenue, Laverton. The Applicant was advised the Respondent had concluded that it would be in the best interest of the business if she were no longer caretaker of its units.

3 Even though the Respondent had gathered information to assist in reaching its conclusion, none of the issues were put to the Applicant prior to the Respondent deciding to end the relationship. It follows that she has been denied procedural fairness and natural justice because she has not had the opportunity to address any of the allegations made about her.

4 In the evidence before the Commission the Applicant said that she had been employed as the caretaker of the Respondent's units. She had already been in residence prior to the Respondent becoming the owner. It had been her intention to purchase the properties herself but the then owner had told her some three weeks after she became a resident that the property had been sold and if she had a continuing interest she should negotiate with the Respondent.

5 Evidence is that there were no specific hours of work agreed. The Applicant described the situation as "*We had not actually negotiated the tin tacks, so to speak"*

The Applicant said that negotiations were difficult because Mr Stopforth, the Respondent's representative, was very hard to meet because of his infrequent and spasmodic visits to the property.

6 The Applicant said that in due course she tried to organise a letter of employment or a contract with Mr Stopforth but she was unable to go to Mandurah to negotiate this. However she did receive a letter she described as a contract of employment. (Exhibit D1).

7 There is some controversy about this letter. Its terms, formal parts omitted are as follows:

> *To Whom it May Concern*
>
> *Helen Dodds has been employed as a domestic/caretaker since 15th April 2004.*
>
> *Her wages is based on 38 Hours a week at $15.00 per hour, capital gross earning $570.00 per week with free rent and utilities.*
>
> *Helen has a contract which expires on 15th April 2006. (Sic).*

8 It is relevant to note that this letter was undated. The Respondent says no date was put on it because it was produced at the request of the Applicant and drafted by her in order to support her application for a bank loan.

9 According to the evidence of the Applicant the document was created on or about the 20th January 2005 which is considerable time after the commencement of the employment on 15th April 2004.

10 The Applicant told the Commission that much of her recollection of events was embodied in an affidavit which was presented to the Commission in MFI D2. This is the affidavit of Rodney Huddleston who apparently at that time was the Applicant's domestic partner.

11 The Respondent through its Counsel Mr Prunty challenged the use of the affidavit because it contained information that he was unable to cross examine. Mr Prunty argued the probative value of the document was low and it should not receive any weight.

12 The balance of the Applicant's evidence related to events which occurred during her tenure at Shirley Avenue. In short she says that she had a interest in buying the property and had made enquiries about vendor terms. She had worked hard to upgrade the properties and continued to negotiate with the new owner and from this she concluded that Mr Stopforth wished to continue the relationship. In addition she marketed the facilities. She washed linen and performed basic house duties and had spent many hours in upgrading the facilities. Money for rent had been collected on behalf of the Respondent but had never been paid to the Respondent. The Applicant worked as effectively as she could with no money or adequate supplies and spent her own money in the hope that the Respondent would reimburse her. All in all she had received very little payment from the Respondent. What payments she had received were included in Exhibit D4 which is an invoice and statement book.

13 It is claimed by the Applicant that she negotiated an ongoing relationship with the Respondent where she would get $15.00 an hour for work that she did. Later she became worried about the reputation of the Respondent in the town. That is why she obtained the employment letter (Exhibit D3). Ultimately she was dismissed by the Respondent giving her a letter of dismissal which is reproduced, formal parts omitted hereunder:

> *We regret to inform you that certain issues have been bought to our attention regarding the running and the reputation of the 9 units in Shirley Avenue, Laverton.*
>
> *After much consideration and information gathered we feel that it is in the best interest of our business and yourself that you will no longer be required for the position of caretaker. You will be expected to hand in the keys to Mackay Services who will resume your position immediately.*
>
> *You are welcome to stay in the unit providing you comply with the conditions set in the tenancy agreement which will be set up by both ourselves and Mackay Services.*

14 The Respondent answers the claim in the following way which I extract from the evidence of Mr Stopforth. It is denied that the Applicant was ever employed by the Respondent. This is clear because the Applicant was in occupation at the property prior to the 16th July 2004 when the Respondent took over the business. About that time there were some brief discussions between the parties when it was agreed that in the short term the Applicant would be a caretaker of the business but there were no discussions or agreements made relating to income or any other entitlements. There was no letter of engagement or

appointment given to her or agreed to by the Respondent at that time. Notwithstanding the claim that the Applicant says she was employed from the 15th of April 2004 and terminated on 1st September on a permanent basis to work 30 hours per week; no such agreement was ever entered into with the Respondent for the Applicant to work these hours. Since the Respondent took possession of the property nothing about the running of the business has been provided to it by the Applicant. For instance periodical reports, documentation or receipts for any cash received on the Respondents behalf; nor any details of money received from Centrelink for short term accommodation which the Respondent knows to have been received by the Applicant.

15 The draft of letter of 1st September 2001 (Exhibit D3) was prepared by the Applicant. The Respondent signed the letter which was undated and was generated at her request by telephone on the basis that the Applicant would never hold the Respondent to the letter as she only required it to support a loan application to finance a house. The letter is clear from its own terms to be a misrepresentation of the truth because it is inaccurate. The Respondent was not even the owner of the business during the dates covered by the letter. It is the Respondent's belief that the Applicant merely used it to support the loan application. In short the Applicant was never employed by the Respondent; she was an ad hoc caretaker and there was never an employment agreement reached between the parties. In the meantime the Applicant collected monies and never accounted for them and appropriated those monies for her own purposes.

16 The Commission has had the opportunity to see the prime witnesses give evidence. The evidence presented by the Applicant is less than satisfactory. Her story about the sequence of events was inconsistent and she conceded that the letter which she relies on as a contract of employment was produced for the purpose of the loan even though initially it was presented as evidence of a contract of employment. In evidence in chief she claimed to have a contract in the form of the letter, a contention she repudiated in cross examination.

17 All in all her evidence is inconsistent and self serving and the Commission is not confident that it truly reflects the real sequence of events. I find the evidence should not attract much weight.

18 The evidence from Mr Stopforth seems to be logical and consistent, excluding the unorthodox dealings between the parties, but on the basis of credibility it can not be impeached.

19 The Commission is required to in all matters established its jurisdiction. This application is taken under s29(1)(b)(i) of the Act which enables an employee who has been dismissed to excite the jurisdiction of the Commission. Once the jurisdiction is excited the Commission can deal with the matter and make orders that are set out in s23A of the Act.

20 It is a condition precedent that the Applicant in a matter like this is an employee. In this case there are grave doubts this is the situation. The best that can be ascertained from the evidence before the Commission is that the Applicant was in residence at a set of units in Laverton prior to the purchase of those units by the Respondent. The evidence indicates there was some sort of arrangement between them for her to continue looking after of the units. Units which she had intended to buy at one stage. That process involved her managing the units and she did so. On the Applicant's own evidence she never got down to 'tin tacks' with the Respondent about their contractual arrangement save a nebulous claim that she would be paid $15.00 an hour. The Applicant's contentions as to her contract of employment are all based upon Exhibit D3 from which she sets out those terms.

21 The letter is undated. It appears to have been created some months after she started the alleged employment contract. It is clearly a letter to serve the purpose of providing information to a finance organisation that the Applicant has a job that it is full time, that it is of a long duration to end in 2006.

22 In my view it is self serving of the Applicant to try and use the letter to establish that she had an employment contract. On the contrary, the indication from the evidence is that she never had an employment contract. She had an arrangement with the Respondent whereby she was in occupation of the units and looked after them. On her own admission she collected rentals for the Respondent which she never paid. On balance it cannot be said that there was relationship of employer/employee between the parties.

23 The way the relationship was brought to an end in the so called letter of termination supports the contention that there was no employment contract. That letter in Exhibit D3 is more likely to be the type of letter one would give a person who is managing the units but not in a relationship as an employee. There is a complaint in it that there have been issues relating to the running and reputation of the unit. There is an expression of view that it is no longer in the best interest of the Respondent that the Applicant continue to run them and it invites her to stay in a unit providing she complies with the tenancy agreement. The letter is not a letter one would normally expect for a termination of a contract of employment.

24 In these circumstances I have reached a conclusion that there was no employment contract and even if I am wrong about that and there was an employment contract the Applicant was not dismissed from it. That being the case the Commission has no jurisdiction to hear and determine this matter and it will be dismissed for want of jurisdiction.

2005 WAIRC 01387

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HELEN DODDS **APPLICANT**
	-v-
	JB & S BUILDING CONTRACTORS (ABN 90 130 403 452) **RESPONDENT**
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	MONDAY, 2 MAY 2005
FILE NO/S	APPL 1264 OF 2004
CITATION NO.	2005 WAIRC 01387

Result	Dismissed
Representation	
Applicant	Ms H. Dodds appeared in person
Respondent	Mr K. Prunty, of Counsel, appeared on behalf of the Respondent

Order

HAVING heard Ms H. Dodd on her own behalf as the Applicant and Mr K. Prunty, of Counsel, for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application is hereby dismissed.

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

2005 WAIRC 01496

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW WAYNE FINNERTY
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 13 MAY 2005
FILE NO.	APPL 42 OF 2005
CITATION NO.	2005 WAIRC 01496

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Jurisdiction of Commission to hear application under general jurisdiction when the Applicant was a probationary Constable - General jurisdiction ousted by specific provisions *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), Schedule 3, s 80C, s 80E, s 80F; *Police Act 1892* (WA) s 7, s 8, s 9, s 10, s 11, s 23, s 33E, s 33L, s 33N; *Police Force Regulations 1979* (WA) reg 103; reg 505A.
Result	Application dismissed
Representation	
Applicant	Ms C Adams (of counsel)
Respondent	Ms P Lochore (of counsel)

Reasons for Decision

1 Matthew Wayne Finnerty ("the Applicant") makes an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that he was harshly, oppressively and unfairly dismissed on 24 December 2004, by the Commissioner of the Police ("the Respondent").

2 On 26 January 2004, the Applicant commenced as a police recruit at the Western Australian Police Academy ("the Academy"). The recruit training period consisted of a 26 week course. It is common ground that the Applicant was appointed by the Respondent, pursuant to s 7 of the *Police Act 1892*, as a constable on 26 January 2004 and that he subscribed to the office of engagement as prescribed in s 10 of the *Police Act*. The Applicant was to graduate from the Academy on 23 July 2004. However, prior to his graduation an issue was raised in relation to his honesty and integrity, which resulted in the Respondent serving the Applicant with a stand down notice on 25 June 2004 and a notice to show cause why the Respondent should not seek the Minister's approval to remove him from the Police Force. The Applicant provided written submissions to the Respondent on 16 July 2004. Prior to the Respondent considering the Applicant's written response he provided to the Applicant a report from Acting Superintendent S J Brajkovich, Principal of the Western Australian Police Academy dated 9 July 2004, in which the Acting Superintendent recommended that the Applicant be removed from the Western Australian Police Service, under reg 505A(2) of the *Police Force Regulations 1979*. The Applicant's solicitor made submissions on his behalf in response to the matters raised in the report on 5 August 2004.

3 On 18 November 2004, the Respondent informed the Applicant that he had examined the Applicant's submissions and taken all relevant matters into account and he had formed the opinion that the Applicant should be removed from the Police Force and had written to the Minister for Police, Emergency Services, seeking approval to do so. The approval was subsequently given and the Applicant was removed from the Police Force on 24 December 2004.

Legislative Background

4 Pursuant to s 7 of the *Police Act*, the Respondent is empowered to appoint so many non-commissioned officers and constables of different grades as he shall deem necessary for preservation of peace and order throughout the State. Under s 7(2) of the *Police Act*, the Minister has power to appoint police cadets who are not members of the Police Force. It is common ground that the Applicant was not appointed as a police cadet.

5 Pursuant to s 10 of the *Police Act*, no person shall be capable of holding any office or appointment in the Police Force, or of acting in any way therein, until he or she have subscribed to the oath of engagement set out in s 10. Under s 11 of the *Police Act*, every person on subscribing such engagement is bound to serve Her Majesty as a member of the Police Force until legally discharged. Further, s 11 provides that such engagement may be cancelled by the lawful discharge, dismissal or removal from office of any such person.

6 Section 8 of the *Police Act* provides for the removal of commissioned and non-commissioned officers. Section 8 provides that the Respondent may, from time to time, as he shall think fit, suspend and, subject to the approval of the Minister, remove any non-commissioned officer or constable. Section 8(2) provides the powers of removal by the Respondent can only be exercised if the Respondent has complied with s 33L of the *Police Act*, and that removal action has not been revoked under s 33N(1) of the *Police Act*. Section 8(4) relevantly provides that subsection (2) does not apply to the removal of a police probationary constable.

7 Pursuant to s 9 of the *Police Act*, the Respondent may, from time to time, with the approval of the Minister, frame regulations for the general government of the members of the Police Force including the control, management and discipline thereof as may be necessary for rendering the same efficient for discharge of the several duties thereof, and for the purpose of preventing neglect or abuse.

8 Pursuant to the power vested in the Respondent under s 9 of the *Police Act*, reg 505A of the *Police Force Regulations* was made by the Respondent. Regulation 505A provides:

> "(1) A person appointed as a member is on probation for a period of 2 years beginning on the day of his induction into the Police Academy or, where the person did not attend the Police Academy, beginning on the day of his appointment as a member.
>
> (2) Where the Commissioner is of the opinion that a member on probation will not give satisfactory service, he may, subject to the approval of the Minister remove the member from the Force.
>
> (3) The Commissioner may, at his discretion, shorten or lengthen the period of probation of any member.
>
> (4) Where the period of probation of a member is lengthened in accordance with subregulation (3), the Commissioner shall notify the member, in writing, of the date to which the probationary period is extended and the reason for that extension."

9 A "member" is defined in reg 103 to include any person holding office as a constable under the *Police Act*.

10 Schedule 3 of the Act provides that the Act applies to a police officer and is to have effect accordingly, as if the police officer were a "Government officer" within the meaning of s 80C of the Act and the Respondent were the employer within the meaning of s 80C. A "police officer" is defined in clause 1 of Schedule 3 to mean among others a person appointed under Part I of the *Police Act* to be a member of the Police Force of Western Australia. Clause 2(3) of Schedule 3 relevantly provides that despite subclause (2), a Public Service Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench any matter relating to or arising from the removal or dismissal under the *Police Act* of a police officer.

The Respondent's Submissions

11 The Respondent says that the Commission has no jurisdiction to deal with this application under s 29(1)(b)(i) of the Act, as the provisions of Schedule 3 of the Act expressly denies jurisdiction to the Public Service Arbitrator to deal with any matter relating to the removal, discharge or dismissal under the *Police Act* of a police officer including a probationary constable. The Respondent says it follows therefore that because Schedule 3 of the Act deems the Applicant to be a Government officer, the Public Service Arbitrator otherwise has exclusive jurisdiction over all "industrial matters" relating to a Government officer including a police officer, there is no scope for the Commission in its general jurisdiction to consider the application.

12 The Respondent says in order to ensure that all members of the Police Force are trained to the requisite standard, the Respondent ordinarily requires all constables to complete a standard training regime at the Academy. It is contended that for administrative convenience that the attendees at the Academy's basic training course are referred to as "police recruits". The Respondent says there is no concept of a "police recruit" contained within the *Police Act* or the *Police Force Regulations* and for the purposes of the *Police Act* and *Police Force Regulations*, police recruits are more properly referred to as police constables. Counsel for the Respondent points out, however, that the *Western Australian Police Service Enterprise Agreement for the Police Act Employees 2003 No. PSA AG 45 of 2003* ("the Agreement") does make specific reference to recruits in training". In clause 16, a salary is prescribed for "recruits in training" under the heading constable. A "recruit in training" is defined in clause 6 to mean an employee undertaking Academy based initial training as a member of the Police Force. Further, a "member of the Police Force" is defined in clause 6 to mean an employee appointed as such under the provisions of the *Police Act*. It is contended that when these definitions are read together it is clear that a "recruit in training" describes a person who has been appointed as a member of the Police Force under the *Police Act* as a constable.

13 The Respondent says that all police constables have all the legal powers and responsibilities as constables from the time they are appointed but in the exercise of his discretionary powers of management, the Respondent, through the staff at the Academy, advises all constables attending the basic training course not to exercise any of their powers as a constable except as directed by their instructors at the Academy. This is done to prevent recruits exercising the powers of a constable before receiving training as to how to properly exercise those powers.

14 It is common ground there is no appeal mechanism available to challenge a decision by the Respondent to remove a probationary constable pursuant to reg 505A(2) of the *Police Force Regulations*. Whilst for members who are removed from the Police Force pursuant to s 8 of the *Police Act*, an appeal procedure is expressly provided in Part IIB Division 3 of the *Police Act*. Section 8(4) of the *Police Act* expressly provides that the provisions of Part IIB of the *Police Act* do not apply to the removal of a probationary constable.

The Applicant's Submissions

15 The Applicant points out that the *Police Act* is silent in relation to the definition of "police recruit". Section 7(1) of the *Police Act* simply states "the Commissioner of Police may appoint so many non-commissioned officers and constables of different grades as he shall deem necessary…". The Applicant says that there is no definition in the *Police Act* to assist in the interpretation of what constitutes a "different grade of constable" for the purposes of s 7. The Applicant says that it follows therefore it is only a "convenient presumption" that a probationary constable and a recruit are one of the same when in fact the Respondent treats them as two distinct categories of employees. The Applicant points to a number of examples of this as follows:

(a) Police recruits have no discretion to act independently outside their training environment, whereas a probationary constable has autonomy to act and make decisions as independent officers of the Crown;

(b) Whilst the Respondent argues that the Applicant was appointed to the office of constable pursuant to s 10 of the *Police Act*, in real terms he was frustrated from exercising his oath of office because he was absolutely fettered from exercising the power of the office. Consequently, the Applicant submits that for all legal and practical purposes the Applicant's appointment as a constable is a legal fiction;

(c) The Agreement has a different pay scale for a police recruit and a first and second year constable which includes the period of probation; and

(d) A police recruit is precluded from being called a probationary constable until such time they have successfully graduated from the 26 week Police Academy course.

16 In support of the Applicant's case, his counsel referred to the memorandum of Acting Superintendent Brajkovich, dated 9 July 2005, where it is stated that the police service does not regard a recruit to be a "probationary constable" until graduation. In the memorandum Acting Superintendent Brajkovich states:

> "On behalf of the Police Service, the Police Academy has a responsibility to ensure only those recruits who possess all the attributes required of a police constable graduate as Probationary Constables. Recruit Finnerty's actions, conduct and behaviour at the Police Academy causes me to have no confidence in his suitability to graduate as a Probationary Constable."

17 The Applicant points out that although open to the Respondent, he did not invoke s 23 of the *Police Act* to dismiss the Applicant, which had the consequence of denying the Applicant an appeal to Police Appeal Board pursuant to s 33E of the *Police Act*.

18 Whilst, the Applicant concedes he was appointed as a police constable under s 7 of the *Police Act* and removed pursuant to reg 505A of the *Police Force Regulations,* he says that as stated in the memorandum by Acting Superintendent Brajkovich, the police service did not deem him to be a probationary constable until such time as he had graduated from the Academy. The Applicant says that it follows therefore that, as a police recruit, s 8(4) of the *Police Act* does not apply to him because it cannot be maintained at law that he was appointed as a probationary constable.

19 As to the construction of the provisions of the Act, the Applicant's counsel referred to a decision by Kennedy C in *Australian Railways Union of Workers, West Australian Branch v Western Australian Government Railways Commission* (1989) 70 WAIG 225, in which Kennedy C had cause to consider the general jurisdiction of the Commission under s 23 of the Act. In that matter it was argued that the jurisdiction general of the Commission was ousted by the operation of s 77 of the *Government Railways Act 1904*, which provided that where a person who was permanently employed on a Government railway whose employment in particular circumstances was terminated that person had a right of appeal to the Railways Appeal Board. In that matter the employees in question could not appeal to the Railways Appeal Board as the jurisdiction under s 77 of the *Government Railways Act* could not be invoked, as s 77 was limited to dismissals grounded in misconduct, and the termination of the employees in question was for a reason other than misconduct. After hearing argument Kennedy C at 227 observed:

> "The Act provides a means for resolving industrial disputes. In the absence of a clear statutory preclusion, the jurisdiction of the Act over an industrial matter should not be read down (see the reasons of the Full Bench in its decision in *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch and Mt Newman Mining Co Pty Ltd,* 69 WAIG 1036)."

20 Commissioner Kennedy then observed that as the employees did not have a right of appeal to the Railways Appeal Board that the Commission had jurisdiction to deal with the claims that the dismissals were unfair.

21 The Applicant contends that whereas s 80F of the Act states that an industrial matter "may" be referred to an Arbitrator under s 80E by an employer, organisation or association or by the Minister, the Applicant says he can also refer an application under s 29(1)(b) of the Act because s 80F does not require a mandatory referral of an industrial matter. The Applicant submits that in any event any preclusion can be cured by the WA Police Union of Workers submitting an application on behalf of the Applicant or be joined as an Applicant to the proceedings.

22 The Applicant also contends that as an employee he is entitled to refer an unfair dismissal claim pursuant to s 29(1)(b)(i) of the Act to the Commission as an "industrial matter".

23 It is conceded, however, on behalf of the Applicant that if the Commission finds the Applicant has been lawfully appointed as a police officer under Part I of the *Police Act*, the Applicant is therefore deemed to be a Government officer within the meaning of s 80C of the Act, the consequence of which is that his jurisdictional arguments fail. The Applicant says that if he has no right of appeal or review of the Respondent's decision then he would be denied his industrial right as an employee to seek redress for unfair dismissal or to have his removal reviewed by the Commission as to whether the decision was harsh, oppressive or unfair.

Conclusion

24 It is argued on behalf of the Applicant that his appointment to the office of constable was a legal fiction on grounds that:

(a) he was precluded from exercising his powers as a constable until he graduated from the Academy; and

(b) that his graduation was a precondition to the Applicant being able to carry out the duties of the office of constable.

25 A legislative legal fiction involves the creation of a legal finding or consequence which is taken to have been the case when it is not in fact so. An example of legal fiction is where a fact is "deemed" to be the case. In such a case the legislative gives voice to presumption and courts are required to give effect to them despite any apparent absurdity (see *Maroney v R* (2003) 202 ALR 405 at [54]-[57] per Kirby J; *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696 per Griffith CJ). The creation of industrial association as corporate bodies is another example of a fiction. An industrial association has a legal personality, which is a fiction as they cannot act other than through natural persons (see the discussion in *Rowe v Transport Workers' Union of Australia* (1998) 90 FCR 95 at 111-112).

26 Sections 7 and 10 of the *Police Act* do not however create a legal fiction. In my opinion, at the heart of the Applicant's argument is an argument that, when the factual circumstances of his appointment are considered together with the fact that he subscribed to the oath of engagement as a constable, his appointment was a "sham" as he was precluded from carrying out his legal obligations under ss 10 and 11 of the *Police Act.*

27 A "sham" is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences (*Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 211 ALR 101 at [46]).

28 What constitutes a sham at law was discussed at length by Lockhart J in *Sharrment Pty Ltd and Ors v Official Trustee in Bankruptcy* (1988) 82 ALR 530. At pages 536 and 537 His Honour observed:

> "The meaning of the word 'sham' has been considered in many cases. In *Scott v FCT (No 2)* (1966) 40 ALJR 265 Windeyer J said at 279: 'On the other hand, if the scheme, including the deed, was intended to be a mere facade behind which activities might be carried on which were not to be really directed to the stated purposes but to other ends, the words of the deed should be disregarded ... A disguise is a real thing: it may be an elaborate and carefully prepared thing; but it is nevertheless a disguise. The difficult and debatable philosophic questions of the meaning and relationship of reality, substance and form are for the purposes of our law generally resolved by asking did the parties who entered into the ostensible transaction mean it to be, and in fact use it as, merely a disguise, a facade, a sham, a false front – all these words have been metaphorically used – concealing their real transaction.'
>
> ...
>
> Diplock LJ described the 'popular and perjorative [sic] word' sham in *Snook v London and West Riding Investments Ltd, supra*, at 802 in these terms: 'I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating

between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a 'sham', with whatever legal consequence follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.'

...

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."

29 Having considered the factual circumstances of this matter (which are not substantially in dispute), in my view, it cannot be said at law the appointment of the Applicant as a constable on the first day he commenced training as a recruit at the Academy was a "sham". There is nothing before me to suggest the appointment was deceptive. At its highest the Applicant's contentions establish that the Applicant was directed not to exercise the powers of a constable until he graduated or was fettered from doing so. Whether such a direction is lawful or not, is not an issue for me to determine. The fact that Acting Superintendent Brajkovich apparently did not regard the Applicant to be a probationary constable until he graduated is irrelevant. His opinion is not capable of effecting a legal consequence and in any event appears to be at odds with the Respondent's opinion in Exhibit 1 wherein he described the Applicant as having being sworn in on 26 January 2004, as a probationary constable (recruit in training). It is apparent from the Respondent's description that the description as "recruit in training" could be characterised as a subgroup or subgrade of a probationary constable.

30 This conclusion is supported by the terms of the Agreement. Pursuant to clause 5, the Agreement only applies to "members" of the Police Force. "Member of the Police Force" is defined in clause 6 to mean an employee appointed as such under the provisions of the *Police Act*. Pursuant to s 7 of the *Police Act* the Respondent is only empowered to appoint non-commissioned officers and constables of different grades. Once officers and constables subscribe to the oath in s 10 they are bound to serve as a "member" of the Police Force under s 11. It is clear from provisions of the *Police Act*, the Agreement and reg 505A(1) of the *Police Force Regulation*s that a probationary constable is a grade of constable and a recruit in training is a subgroup or subgrade of a probationary constable.

31 The Applicant points out that in making this finding he is denied any right of review of the Respondent's decision. Whilst this is an unfortunate consequence for him, in my opinion this concession was properly made as the history of the enactment of Schedule 3 and amendments to s 8 of the *Police Act* distinguish the facts of this matter and legislative provisions considered by Kennedy C in *Australian Railways Union of Workers, West Australian Branch v Western Australian Government Railways Commission* (op cit).

32 Schedule 3 was enacted by the *Industrial Relations Amendment Act 2000*, Act No 58 of 2000, which became operative on 4 December 2000. The enactment of Schedule 3 followed a history of uncertainty whether a Police Officer could be characterised at law as an "employee" within the meaning of s 7 of the Act, so as to enliven the jurisdiction of the Commission to deal with an "industrial matter". This issue was heard and determined by the Full Bench a few weeks before Schedule 3 became operative. In *The Hon Minister of Police and Anor v Western Australian Police Union of Workers* (2000) 81 WAIG 356, the Full Bench held that police officers are not employees for the purposes of the Act. Schedule 3 remedied in part the effect of that decision by deeming police officers to be Government officers within the meaning of s 80C of the Act but not to the extent of empowering the Public Service Arbitrator to deal with any matter to or arising from the removal or dismissal of a police officer. A right of appeal from the decision to remove a police officer under s 8 of the *Police Act* was later expressly created by the *Police Amendment Act 2003*, Act No 7 of 2003, which amended s 8 of the *Police Act* and enacted Part IIB of the *Police Act*. Act No 7 of 2003, however, also expressed excluded a probationary constable from the procedure of removal under s 8 and thus any right of appeal to the Commission by operation of Part IIB of the *Police Act*. No amendments were made to Schedule 3 of the Act by Act No. 7 of 2003.

33 For the reasons set out above I will make an order dismissing the application.

2005 WAIRC 01497

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW WAYNE FINNERTY **APPLICANT** **-v-** COMMISSIONER OF POLICE **RESPONDENT**
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 13 MAY 2005
FILE NO/S	APPL 42 OF 2005
CITATION NO.	2005 WAIRC 01497

Result	Application dismissed
Representation	
Applicant	Ms C Adams (of counsel)
Respondent	Mr P Lochore (of counsel)

Order

HAVING heard Ms Adams, of counsel on behalf of the Applicant and Mr Lochore, 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 H SMITH,
Commissioner.

[L.S.]

2005 WAIRC 01396

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY FOGG
	APPLICANT
	-v-
	GELETE FURNITURE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 18 MARCH 2005
FILE NO.	APPL 156 OF 2005
CITATION NO.	2005 WAIRC 01396

Catchwords	Industrial law - Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(2), s 29(3).
Result	Order issued
Representation	
Applicant	In person
Respondent	Ms A Spencer

Reasons for Decision
(Ex Tempore)

1 The substantive application is one brought by Mrs Mary Fogg against the respondent, Gelete Furniture Pty Ltd. The application was filed on 10 February 2005. The application alleges that the applicant was unfairly dismissed on or about 10 January 2005.

2 There is no material dispute as to the facts in the matter. The Commission has, of its own motion, listed the application for hearing today to consider whether the applicant's claim should be accepted out of time, it being filed some 3 days or thereabouts beyond the 28-day time limit prescribed by s 29(2) of the Industrial Relations Act 1979 ("the Act").

3 The submissions of both the applicant and the respondent appearing in person are essentially as follows, and as I have said, the factual matters do not appear to be essentially in dispute.

4 The applicant left the employment of the respondent and the country on or about 8 January 2005 for personal bereavement reasons, and returned to Australia on or about 30 January 2005.

5 The position is, as the Commission understands it, that the applicant did not seek the approval of the employer to undertake what was inevitably a period of unpaid leave, given the applicant's short length of service, but merely informed, as she told the Commission, the relevant store manager of her plans.

6 Whilst the applicant was away, which was for a period of approximately 3 weeks, on or about 19 January 2005 there was an attempt to, by email, communicate with the respondent employer but no other attempted contact with the employer took place, it seems, until the applicant returned to Australia on or about 30 January 2005. It seems also from the submissions, that the applicant's absence and its circumstances caused some inconvenience to the respondent employer.

7 As I have already observed, the application was filed some 3 days out of time. The first issue for the Commission to determine is whether, in all the circumstances on what is before it, which necessarily at this point is relatively limited material, the applicant has merit in her claim for the purposes of an extension of time.

8 In the circumstances of the applicant's departure, I am of the view, whilst accepting that the applicant did have personal circumstances to deal with, that her abrupt departure from her employment without any express approval, either at the time or subsequently, amounted to a breach by her of her contract of service and her obligations to her employer. In my view, that circumstance was a matter which constituted by the applicant, a breach of her contract of employment. I am satisfied on what is before the Commission that the applicant did have time to at least foreshadow her circumstances with the respondent, but for whatever reason, she decided not to do so.

9 I am also satisfied that the applicant did have time in some days prior to her departure, to seek the approval of the employer for her course of action, but as I have said, simply informed the employer that she was to travel and she departed the country.

10 The Commission must take into account not only the interests of the applicant, but also the interests of the employer under s 26(1) of the Act. I am satisfied that in all the circumstances the applicant's conduct was a repudiation of the employment contract and, more particularly, it is relevant to observe that the applicant claims reinstatement but the respondent has now employed another person to occupy the applicant's position, and hence, in my view, there would be considerable prejudice for the Commission to accept the application out of time.

11 For all of those circumstances, I am not satisfied that the claim has sufficient merit to warrant the extension of time, and for those reasons the application is dismissed.

2005 WAIRC 00792

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY FOGG
	APPLICANT
	-v-
	GELETE FURNITURE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 23 MARCH 2005
FILE NO/S	APPL 156 OF 2005
CITATION NO.	2005 WAIRC 00792

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	In person
Respondent	Ms A Spencer

Order

HAVING heard Ms M Fogg on her own behalf and Ms A Spencer on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2005 WAIRC 01201

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MOIRA MACLACHLAN HEDDLE
	APPLICANT
	-v-
	MHS GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 15 APRIL 2005
FILE NO.	APPL 1045 OF 2004
CITATION NO.	2005 WAIRC 01201

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Frustration of contract – Application dismissed – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) and (ii)
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr P Kiley

Reasons for Decision

1 This is an application under s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act"), by Moira MacLachlan Heddle ("the Applicant"). The Applicant claims that she has been harshly, oppressively or unfairly dismissed by MHS Group Pty Ltd ("the Respondent") on 14 June 2004. During the proceedings the Respondent agreed to pay any outstanding contractual entitlements. Following the hearing the Applicant provided a number of documents to the Commission but made no claim for outstanding contractual benefits.

2 The Applicant came to Australia from Scotland in January 2001. She arrived as an international student on a student's visa. She completed an 18 month enrolled nurse course at the Central West TAFE in Geraldton in July 2003. She then obtained an occupational training visa to complete a graduate program at Fremantle Hospital and Health Service, which she completed in March 2004. The Applicant wished to continue to reside in Australia. Prior to finishing her course at Fremantle Hospital and Health Service, she sought a sponsor for a business visa. During 2003, the Applicant contacted the Respondent's Nurse Registration and Immigration Coordinator, Bronwyn Markey, in Sydney, New South Wales. At that time the Applicant canvassed work prospects in New South Wales and Queensland as an enrolled nurse. Some time in early 2004, the Applicant was contacted by Jocelyn Ramage, the Respondent's Business Development Manager – Medical, located in Perth who had recently been engaged by the Respondent to set up a medical labour hire division in Western Australia. Ms Ramage explained to the Applicant that she (Ms Ramage) was starting work in Perth and the Respondent was interested in sponsoring her. When the Applicant first spoke with Ms Ramage, no specific length of sponsorship was discussed. The Applicant says she was not sure if the sponsorship was for two or four years. The Applicant informed Ms Ramage that she was interested in working in mental health and Ms Ramage told her that they may be able to obtain work for her with head injured clients. Ms Ramage

asked the Applicant whether she was interested in aged care work and the Applicant told her that she did not want to work in aged care on a full-time basis as she wanted to obtain experience as an enrolled nurse but she was happy to work part-time in aged care.

3 Following discussions with Ms Ramage the Applicant was sent a contract of employment which she later signed. The contract is dated 24 February 2004. The material provisions of the contract are as follows:

> "I am pleased to offer you the position of Enrolled Nurse with MHS Medical Pty Ltd, ABN 32 095 653 204, effective 25 February 2004 subject to confirmation of successful visa approval and reference checks. The principal terms and conditions relating to your appointment are as follows:
>
> **Duties**
>
> The position currently reports to the undersigned. The place where you will commence your employment will be located at Suite 15, 342 Albany Hwy, Victoria Park, WA. However, as circumstances change, you may be required to accept relocation.
>
> Your responsibilities are as outlined in the Position Description provided. As opportunities become available and/or MHS's needs change and develop, you may be required to accept different responsibilities, tasks and location.
>
> You are to comply with MHS's policies and procedures and apply yourself diligently and to the best of your ability to meet the performance standards of your job.
>
> **Hours of Work**
>
> You are employed on a full time basis with MHS. At times you will be required to work extended hours to complete the job requirements. These may be at irregular times and shift allowances are payable. You will not, however, be expected to work excessive hours.
>
> **Probationary Period**
>
> The probationary period for this position is three months. The probationary period is to enable both parties to satisfy themselves as to the suitability of the arrangement and your work performance.
>
> During the probationary period, we will provide adequate training and support to assist you in your transition into this role. If your performance is satisfactory during this period, you will continue as a permanent employee with MHS. If during this period however, the relationship is not satisfactory, either side may end the appointment with a week's notice or its equivalent payment of salary and benefits. By consent of both parties in writing, the probation period maybe extended by another month, but no longer.
>
> **Remuneration**
>
> Your initial annual salary will be in accordance with the relevant award and has been assessed as a base salary of AUD$37,720 per annum according to DIMIA Employer Nominated Sponsorship requirements. This is payable electronically into your nominated bank account on a fortnightly basis. Your leave entitlements are in addition to your base salary.
>
> Your salary is to be reviewed on an annual basis, having taken into account your performance and economic and market movements at the time of review.
>
> …
>
> **Termination of Employment**
>
> Once your probationary period has completed, your employment may be terminated by yourself or by MHS, with notice of at least one pay cycle or by MHS without notice on the payment of two week's [sic] salary in lieu of notice. MHS reserves the right of immediate dismissal in cases of gross misconduct or breach of your terms and conditions of employment (eg. theft or fraud)."

(*Exhibit 1*)

4 The Applicant maintained in her evidence that the contract was for a four year term. However, the copy of the contract tendered by the Applicant she says she signed, does not contain any term other than a period of probation of three months. After she secured the contract of employment with the Respondent, the Applicant was granted a four year temporary residence business visa to expire on 7 April 2008. Pursuant to the sponsorship and business visa requirements of the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") and her contract of employment, the Applicant was required to be paid a minimum base salary of $37,720.00 per annum, which was equal to $19.07 per hour.

5 Some time in either February or March 2004, the Applicant was informed by Ms Ramage that she would work as part of a team of enrolled nurses and registered nurses to look after a brain injured girl who would reside in Como. The Applicant was provided with a roster and attended a meeting with the team leader, Ms Jan Bishop, in March 2004. Notwithstanding the express terms of her contract, it was anticipated that the Applicant would commence employment with the Respondent on 6 April 2004. On the Friday prior to 6 April 2004, the Applicant travelled to Geraldton for her graduation ceremony. Whilst in transit, the Applicant received a telephone call from Ms Ramage who informed her that the contract with the brain injured girl was not going to proceed and she (Ms Ramage) would explain what happened the following week when the Applicant came to work on Tuesday, 6 April 2004.

6 The Applicant commenced employment on Tuesday, 6 April 2004 and was given work to carry out in the Respondent's office. She worked for one month then was given notice that her contract of employment was to terminate on 14 June 2004. Prior to being given notice, principally her "work" was to attempt to canvas work for herself with the assistance of Ms Ramage. As part of the efforts that were made, Ms Ramage took the Applicant to a number of nursing homes and introduced the Applicant to the directors of nursing. During that period the Applicant obtained some work as an enrolled nurse and carer. On one occasion, Ms Ramage arranged for the Applicant to work four shifts as an enrolled nurse at a nursing home in Como. She also worked one shift at a nursing home supervising carers. On another occasion, she was asked to supervise a lady who needed a carer for a few hours. The Applicant otherwise worked in the Respondent's recruitment office up until 6 May 2004.

7 On Thursday evening, on 6 May 2004, the Applicant went to Agmaroy Nursing Home with Ms Ramage where Ms Ramage was to interview two registered nurses from the United Kingdom. Whilst there, Ms Ramage spoke to the owner of the nursing home and told her that she was looking for work for the Applicant. The Applicant left Ms Ramage and the owner to speak alone. Later when the Applicant was being driven home by Ms Ramage, Ms Ramage asked the Applicant whether she was interested in a two year contract to work at the Agmaroy Nursing Home. The Applicant told Ms Ramage that at this stage of her contract she did not wish to be "signed over" to an aged care institution. She testified that in her opinion if Agmaroy Nursing Home became her sponsor they would not pay her a sufficient base salary to comply with the visa conditions, which required that she be paid a base salary of $37,720.00 per annum, if she wished to work and reside in the metropolitan area.

When questioned about whether she discussed the visa base salary with Ms Ramage in relation to the offer of work at Agmaroy Nursing Home, the Applicant said that she told Ms Ramage that she was worried about how she could afford to make her car repayments. The Applicant, however, did not enquire as to the rate of pay. The Applicant says that she had looked into aged care wages while she was at Fremantle Hospital and Health Service and ascertained that aged care wages were less than hospital rates. It is apparent from the Applicant's evidence that it was only after her employment was terminated she ascertained that if she worked at Graylands Hospital as an enrolled nurse, she would be paid less than the minimum base rate of pay required by DIMIA. No evidence was given by the Applicant whether Agmaroy Nursing Home would have paid her less than that offered by Graylands Hospital or less than required by DIMIA.

8 On Friday, 7 May 2004, the Applicant was at a medication competency course at Sir Charles Gardner Hospital, which was paid by the Respondent. The course was conducted on a Friday of each week for four weeks and this was the last day of the formal part of the course. Ms Ramage anticipated that after the Applicant had finished the course the Applicant would complete the practical training to obtain her certificate of competency at Agmaroy Nursing Home. On Friday, 7 May 2004, the Applicant was required to complete an exam.

9 On Friday morning, 7 May 2004, Ms Ramage telephoned the Applicant at home prior to her attending the course. Ms Ramage asked the Applicant whether she had changed her mind about the offer of work at Agmaroy Nursing Home, the Applicant said, "No" and that she had to terminate the telephone call because she had to go to Sir Charles Gardner Hospital. The Applicant says that Ms Ramage was not happy with her response and spoke to her about revoking her visa. Ms Ramage told the Applicant that she (Ms Ramage) would have to speak to the Respondent's State Manager, Mr Michael Underwood. She also told the Applicant that if she did not take up the work at the Agmaroy Nursing Home, she need not think she could finish her medication course at Agmaroy Nursing Home. The Applicant says she went to the course very upset. Some time during the morning she received a message that Ms Ramage and Mr Underwood would be visiting her at lunch time. The Applicant said that she was very stressed. When she first gave her evidence about this meeting she could not recall what was said. When the Applicant thought about it further, she testified that she could recall some of what occurred at the meeting on Friday, 7 May 2004. She said that Ms Ramage and Mr Underwood were not happy with her because she had declined to work as a carer for a lady in Trigg who suffered from dementia. The lady needed a carer 24 hours a day. The Applicant was offered the work on the basis that she would be paid $240.00 for each 24 hour shift. The Applicant indicated that she would be happy to carry out the work on a weekend but she would not do the work unless she was paid weekend rates as an enrolled nurse that is, time and a half on Saturday and double time on a Sunday. The Applicant testified that Mr Underwood informed her that there were only about five hours' work as a carer, the remaining time was passive care and after some discussion he told her that he would pay her for five hours' work at the rate of $15.80 and $10.00 an hour for the remaining hours of a 24 hour shift. The Applicant says that she agreed to this arrangement. However, the Applicant testified that Mr Underwood put to her that he would need a long term commitment from her to do this work that is, a commitment for at least six months. The Applicant said that for various reasons she did not want to give that commitment. It was apparent from the Applicant's evidence that she did not accept that the client would only need five hours' care a day. The Applicant was told to think about the offer of work at the Agmaroy Nursing Home, then to come into the office and meet with Ms Ramage and Mr Underwood on the following Tuesday. The Applicant claims that when Ms Ramage and Mr Underwood came to see her at the course on Friday, 7 May 2004, she felt very intimidated and bullied. She says that they could have waited until the following Monday to speak to her.

10 On Tuesday, 11 May 2004, the Applicant attended the Respondent's office and met with Ms Ramage and Mr Underwood. She says they went on about the aged care work and she kept telling them that she did not have a problem working in aged care work for the Respondent because it meant that she would not be tied down to it for two years (as opposed to being directly sponsored by a nursing home). They also discussed her carrying out work as a carer for the dementia client. The Applicant maintained in her evidence that she had agreed with the pay rate, but again Mr Underwood asked for a commitment to that work and the Applicant was unable to give that commitment. Ms Ramage informed the Applicant that she would try to find her work but no work appeared to be available, as it was very quiet but hopefully, there was going to be eight weeks' work coming up. The Applicant was then informed that she was very good at doing "leg work" in obtaining her visa, so she was not to bother to come back into the Respondent's office. Consequently, they gave her the time off so she could find alternative work. The Applicant later received a letter in the mail informing her that her employment with the Respondent was to be terminated. The letter was dated 7 May 2004, stated as follows:

> "Dear Moira
>
> Thank you for meeting with Mike Underwood and Jocelyn Ramage on 7 May 2004.
>
> As discussed at the meeting MHS have raised their concerns and listened to your concerns regarding your employment as an Enrolled Nurse.
>
> As you are aware you were initially employed by MHS to assist in the care of a brain injured client who required 24 hour care by Enrolled and Registered nurses. Unfortunately as you are aware the client is no longer with MHS.
>
> MHS personnel have made several attempts to find you suitable duties, including but not limited to, care in the Aged care industry. We understand that you are not willing to work indefinitely in the aged care sector and do not want to participate in the care of a client who requires 24 hour care in her home. Given the current situation in the acute care market we are unable to provide you with work in the acute hospital arena.
>
> It is therefore with regret that we need to terminate your employment with MHS to take effect from the 14 June 2004. We will continue to work towards a suitable agreeable solution to MHS and yourself in the interim. All monies owing to you will be deposited in your nominated bank account as previously agreed up until Friday the 14 June 2004. We require a signed acknowledgement of your receipt of this letter below.
>
> I wish you well with your career.
>
> Yours sincerely
>
> Mike Underwood
>
> State Manager – WA" (*Exhibit 4*)

11 The Applicant testified that when she received the letter she was quite shocked because the text of the letter asked her to read the letter and to sign an acknowledgement receipt. She said that she telephoned Mr Underwood and told him that she did not agree with the matters stated in the fourth paragraph of the letter. She told him that she was not happy with the way the letter was worded and if he changed it, she would sign it. She says that she received an aggressive response from Mr Underwood. She says that he became abusive and said that he would cancel her visa earlier. When asked what was the tone of his voice? She said that it was not very pleasant.

12 After receiving the letter dated 7 May 2005, the Applicant sought to obtain alternative employment and another sponsor. The Applicant attempted to find work and was offered a job as an enrolled nurse at Graylands Hospital but she was not able to

obtain a visa, as the base salary for the position did not meet the base salary required by DIMIA. The Applicant later obtained employment at Quairading District Hospital as an enrolled nurse because the visa requirements of DIMIA do not require a minimum base salary to be paid if she works in a country area. She commenced employed at the Quairading District Hospital on 23 August 2004. The Applicant was unemployed for a period of 10 weeks.

13 After the Applicant's employment with the Respondent come to an end on 14 June 2004, the Applicant went to the Respondent's office on 18 June 2004 and spoke to Mr Underwood about a job that was posted on the Respondent's job www.seek.com.au website on 25 May 2004. The advertisement stated that an opportunity exists for a registered and enrolled nurse to work regular shifts, commencing late June for eight weeks, "If you wish to know more about these positions please contact Jocelyn Ramage …". The Applicant asked Mr Underwood why she was not contacted by Ms Ramage about this job and Mr Underwood told her that he would have to speak to Ms Ramage about it. The Applicant also had seen an advertisement for enrolled nurses on the Respondent's Sydney job www.nursingjob.com.au site, which was dated 2 June 2004. The Applicant did not raise this advertisement with Mr Underwood nor did she contact the Sydney office in relation to the advertisement. The Applicant testified that Ms Ramage had spoken to her about relocating to the eastern states and the Applicant told her that she really did not want to do that, but certainly she would do it because it was better than going home. The advertisement, however, for the Sydney position cites the person to contact as Laurinda and has a telephone number to contact in Sydney for that job. Some time after the Applicant had seen these advertisements she received a telephone call from Ms Ramage saying that she might have work for her in June 2004, however, the contract would not be to work for the Respondent but for the Craigcare Group and it would be a two year contract. At that stage the Applicant was negotiating with Graylands Hospital about employment and was aware of the wage's rates that the Graylands Hospital was offering, however, she told Ms Ramage that in her opinion it "wouldn't work".

14 The Applicant says that as a result of her employment being terminated and the loss of her sponsorship with the Respondent, her health suffered and she had to obtain counselling. The Applicant tendered into evidence a letter from her doctor, Dr Deborah McKay who states as follows:

> "To whom it may concern
>
> Re Moira Heddle
>
> DOB 24.7.56
>
> Ms Heddle has consulted this practice since February of 2004. I have been the primary general practitioner providing her care since 15/3/04. During this time Ms Heddle has displayed acute anxiety symptoms in addition to depressive symptoms which are longer standing. Ms Heddle was referred for counselling and provided medical therapy to assist with her health issues.
>
> The primary precipitant for the acute symptoms was noted to be her ongoing problems gaining residency in Australia. My notes of 8.5.04 detail the problems she was having with the employment agency which was unable to provide her with the promised hours of employment, so facing her with deportation again.
>
> Should you require further details please contact me at the above address.
>
> (Signed)
>
> Dr Deborah McKay
>
> MBBS DRANZCOG FRACGP GDPopH
>
> Provider 059743HH"

(*Exhibit 9*)

15 The Applicant said that whilst she was out of work she did not receive any funds for 10 weeks, she had to break her tenancy, which resulted in her being served with a summons and had to obtain an overdraft to pay it. The Applicant is seeking compensation for 10 weeks' loss of pay, together with an ongoing loss of a base rate of pay, being the difference between her base weekly salary with the Respondent of $726.00 a week and $634.60 a week, which is her weekly base salary paid to her by the WA Country Health Service. The Applicant also claims the medical costs of obtaining a new business visa to work at the Quairading District Hospital. These costs are as follows:

(a) $54.40 - blood tests,

(b) $113.30 - medical examination,

(c) $69.00 - chest x-ray.

16 The Applicant provided receipts to the Commission for these amounts. The Applicant also claims $2,000.00 for the cost of obtaining a new visa and an amount of $2,000.00 for telephone calls she had to make in trying to obtain a new visa. The Applicant did not provide receipts to support these amounts.

17 Mr Underwood, the Respondent's State Manager, Western Australia, testified that he has been employed by the Respondent since January 2004. The Respondent is an industrial labour hire company who expanded their operations to include medical training and medical labour hire services. Ms Ramage was employed as a consultant to "ramp up" the Respondent's Western Australian medical operation. She is a registered nurse who had worked for over 10 years as a director of nursing.

18 Mr Underwood testified that Ms Ramage recommended the Applicant be employed by the Respondent, as she was assembling a team to look after a brain injured girl. The team was to include the Applicant, a number of other enrolled nurses and registered nurses. The new client informed the Respondent that the starting date of the contract was contingent upon the young girl's tracheotomy being removed. However, the contract fell through as the tracheotomy was unable to be removed, so the young girl needed to be cared for by registered nurses only. Mr Underwood said that the Respondent did not have a sufficient number of registered nurses to meet the requirements of the client. Consequently, the contract did not proceed.

19 Mr Underwood testified that Ms Ramage's position was fairly senior within the organisation and a big effort was made by the Respondent to obtain work for the Applicant. He said that the efforts made to obtain work for the Applicant were far greater than for any other person on their books for labour hire work. Mr Underwood produced in evidence an email from Ms Ramage dated 29 June 2004, in which she had listed all the organisations she contacted to find temporary and permanent work for the Applicant. The list comprised of 15 organisations. It included private hospitals, nursing homes and other care groups including one organisation in Kalgoorlie.

20 Mr Underwood said that Ms Ramage informed him that Agmaroy Nursing Home was looking to employ the Applicant on a two year contract because they were concerned about staff moving on. They told the Applicant that she would have to be on the nursing home's books as the sponsor. In order to place the Applicant at the Agmaroy Nursing Home, they would have waved their fee to the Agmaroy Nursing Home to achieve a positive outcome. Mr Underwood said that the Applicant was fixed in terms of her objectives, which were to work in mental health. Mr Underwood also said that the Applicant found it

very difficult to grasp the difference in rates of pay that were paid in an aged care facility compared to working in a hospital. He said that where domestic care is provided, a fairly flexible pricing structure has to be provided, as there is a combination of care and being in a house without being required to do anything. He said that in relation to the job offered to the Applicant to care for a client who suffered from dementia, the job had been assessed by a registered nurse who completed a care plan. He said that the assessment showed that the first couple of months it would be a very straight forward assignment whereby there would probably be 3 or 4 hours concentrated work over a period of 24 hours together with 12 to 14 hours of passive care almost on standby. He said, however, that if the circumstances changed they would change the remuneration model and they would normally remunerate people based on the job requirements.

21 He said that the reason why they went to see the Applicant at Sir Charles Gardiner Hospital when she was carrying out a medication course was because on Friday, 7 May 2004, was because the Applicant did not have any transport and he was not aware that visiting her on that day had caused her any undue stress. He says that they needed to get a long term commitment from the Applicant for some of their clients and they needed more flexibility in the things that the Applicant would do. He stressed to the Applicant at that meeting that they needed that commitment and they were finding it very difficult to find her the opportunity she was looking for. In particular, he wanted the Applicant to consider the opportunity at the Agmaroy Nursing Home, so they gave her the weekend to think about it and come back to discuss it the following week.

22 At the meeting on Tuesday, 11 May 2004, the Applicant's position had not changed. He says that she was not prepared to consider the flexible arrangements they had put to her about caring for the dementia patient and she was reluctant to consider the opportunity to work for the Agmaroy Nursing Home. Consequently, the decision was made to provide the Applicant with four weeks' notice and bring her employment to an end on 14 June 2004.

23 Mr Underwood testified that the feedback he obtained from Ms Ramage is that when the Applicant had carried out assignments as an enrolled nurse, she had performed her duties very diligently and the only reason why her employment was terminated was that they could not find her permanent ongoing work. As an employment agency they could only make money if they "on hire" the Applicant to their clients and they could not on hire her for long enough in a given week to satisfy the conditions of her visa and to meet what the Applicant was looking for.

24 In relation to the job advertisements on the Respondent's website on 25 May 2004 and 2 June 2004, Mr Underwood said that he was not aware of the advertisement in Sydney but he did speak to Ms Ramage about the job which was advertised for 8 weeks' work in late June 2004. He said that Ms Ramage informed him that the role had been filled internally by the clients, so the opportunity for the work did not arise. He says that this was not unusual, as clients in the medical health industry often deal with four or five agencies at the same time, so that even though the Respondent advertises jobs, the jobs may not eventuate.

Conclusion

25 Whilst there is little dispute about the factual circumstances of the case, having heard the evidence of the Applicant and Mr Underwood, I prefer the evidence given by Mr Underwood to evidence given by the Applicant, where the Applicant's evidence departs from the evidence given by Mr Underwood. I do not accept the Applicant's contention that Mr Underwood was abusive towards the Applicant. The Applicant did not give any specific examples of how Mr Underwood was abusive. Having heard Mr Underwood give evidence in this matter and in the application for an extension of time it is clear to me that Mr Underwood is very quietly spoken and his demeanor can best be described as meek. He gave his evidence quietly, dispassionately and answered all questions without exaggeration. The Applicant to the contrary is gregarious and was quite forceful in her cross-examination of Mr Underwood.

26 The onus is on the Applicant to demonstrate that the dismissal was not fair on the balance of probabilities. 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 abuse of that right (*The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

27 The evidence clearly establishes that the Applicant was employed by the Respondent on the basis that she would be engaged to work on an ongoing permanent basis provided she passed a period a probationary employment to work in a team of enrolled nurses and registered nurses to care for a brain injured client. Unfortunately, this contract did not proceed and the Respondent was unable to place the Applicant in alternative employment. I am satisfied that the Respondent earnestly and extensively sought to find the Applicant alternative employment. The Applicant, however, restricted the options which were open to her. In my opinion she did not make sufficient enquiries of the Agmaroy Nursing Home's offer of work, as to whether they were prepare to pay her an amount equivalent to a base salary which was required to be earned by her to satisfy DIMIA's visa requirements. Consequently, the contract of employment was frustrated and the Respondent was entitled to take steps to bring the contract to an end. In addition, I am not satisfied that the Applicant would have taken the eight weeks' employment, which was advertised on 25 May 2004, even if it was offered to her. The Applicant spoke to Ms Ramage after that advertisement was placed on the Respondent's job search website and Ms Ramage again offered the Applicant alternative employment, which she declined to investigate. In all of the circumstances, I am not satisfied that the Applicant has discharged her burden of proof that she was unfairly, harshly or oppressively dismissed.

28 In the alternative, even if I was to conclude that the Applicant was unfairly dismissed on the basis she should not have been terminated whilst there was a prospect of eight weeks' work that could become available to her in late June 2004, I am not satisfied that the Applicant has proved that her employment would not have come to an end at the conclusion of the probationary period, which would have expired some three weeks after the Applicant's employment was terminated. If I reached this conclusion (and I do not do so) I would have awarded the Applicant three weeks' pay as compensation being $19.07 per hour @ 38 hours per week, which is a total of $1,945.98. Further, I would not make an award for injury as the letter from the Applicant's doctor establishes that her medical condition commenced prior to her commencing work for the Respondent and related to her ongoing problems with obtaining residency in Australia. Given that her period of probation would have expired on 4 July 2004, the Applicant would have encountered the same or similar problems obtaining another visa to remain in Australia.

29 In light of my findings I will make an order that the Applicant's application be dismissed.

2005 WAIRC 01202

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MOIRA MACLACHLAN HEDDLE
	APPLICANT
	-v-
	MHS GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 15 APRIL 2005
FILE NO/S	APPL 1045 OF 2004
CITATION NO.	2005 WAIRC 01202

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr P Kiley

Order

HAVING heard the Applicant and Mr Kiley 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 H SMITH,
[L.S.] Commissioner.

2005 WAIRC 01283

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICIA ROSE HILLS
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE INC
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 20 APRIL 2005
FILE NO.	APPL 1249 OF 2003
CITATION NO.	2005 WAIRC 01283

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Industrial Relations Act 1979 (WA) s 29(1)(b)(i) and (ii) – Authority to make contract – Fixed term contract - Whether contract valid - Summary dismissal - Whether fair go all round afforded – Compensation ordered
Result	Applicant dismissed harshly and unfairly; compensation ordered
Representation	
Applicant	Ms M Farrant of Counsel and Mr T McPhee of Counsel
Respondent	Mr G Stubbs of Counsel

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant, Ms Hills was initially employed by the respondent as a casual and then progressed through a series of contracts, finally working as a personal assistant to the Chief Executive Officer, Ms Marion Kickett, performing a range of secretarial duties. It is uncontentious that Ms Hills' contracts are as follows:

Exhibit A1 - 29 July 2002 to 31 January 2003

Exhibit A2 - 1 February 2003 to 30 June 2003

Exhibit A3 – 1 July 2003 to 1 August 2003.

2 It is the case that the first two contracts were written contracts; the initial contract being signed after commencement of the contract. The second contract was signed on 10 January 2003 prior to the expiry of the first contract. The third contract was an oral extension of the second contract. Each contract was for a fixed term. The third contract, or extension, says that the contract will be extended to 1 August 2003 and then goes on to say "Your contract will be reviewed and negotiated during this period of extension." The initial contract was signed by the applicant and a Mr Murray, who would appear to have held the role of Director, Corporate Services. The second contract was signed by the applicant and Ms Burgess, HR Advisor. The third email was from Ms Alema Pilot who was performing a human resources role. It is the case that each contract was basically on the same terms and conditions, albeit the second written contract is much more expansive in its terms. There are three areas of contention in this application. Firstly, the respondent alleges that it was discovered following the termination of the applicant

(there is no evidence as to the time of this discovery) that the applicant misconducted herself by emailing the membership list of the respondent organisation to herself. The respondent contends that this is a fundamental breach of the respondent's internet policy [Exhibit R2] sufficient to warrant summary dismissal of the applicant. The applicant admits that she emailed the membership list [Exhibit A7] to herself. She says that she did this because she was at home on sick leave and needed to work on the list as part of her duties. I should add that it is part of the contentions of the respondent that at that time the respondent organisation was suffering difficulties in governance whereby the Board of the organisation was involved in a factional dispute. One of the factions of the Board was also in dispute with Ms Marion Kickett, and it sought in May 2003 to dismiss her from her position. Ultimately Ms Kickett was dismissed by the Board on 16 July 2003 and that is a matter that is said to be currently before the District Court.

3 The second point of contention goes to the question of the powers of the funds administrator, Mr Shane Devitt, who was appointed at the relevant time to assist with the administration of the respondent agency. Mr Devitt was appointed at the request of the then President of the Board, Mr Robert Isaacs, following concern on behalf of State and Federal Government departments about the state of administration of the respondent agency. I do not say more on the state of the agency, other than Ms Kickett gave evidence as to how the administrator came to be appointed and operated. I accept her evidence. The issue is really whether the funds administrator had complete control of the organisation such that no employment contract could be made without his authority.

4 The third point of contention is whether Ms Hills was offered a binding extension of her contract by Ms Marion Kickett on 16 July 2003. The extension is said by the applicant to run from 1 August 2003 to 31 July 2004. The extension of contract is said to be on the same terms and conditions which Ms Hills enjoyed up until that time. Whilst the respondent queries the discussion held between Ms Hills and Ms Kickett, the respondent led no evidence. It would appear that the challenge to the making of the contract has more to do with two limbs of an argument. Firstly, that Ms Kickett had no power to offer a contract as the organisation was under funds administration. Secondly, that the contract was not made and was not binding for various reasons which I will canvass later. In any event, the respondent maintains that the applicant's employment expired on 4 August 2003 by the effluxion of time.

5 Evidence was led on behalf of the applicant by Ms Hills, Ms Kickett and Ms Vanessa Davies. Ms Davies is currently the CEO of the respondent organisation. At the relevant time she was employed as a consultant to assist with the drafting of various policies for the organisation. She was due to finish her consultancy on 18 July 2003. No evidence was led on behalf of the respondent. I do not seek to repeat each aspect of the evidence on behalf of the witnesses. It is not necessary to do so. In my mind this is a straightforward matter. I accept the evidence of each of the witnesses and find each of them to be credible witnesses. Having said that, there are aspects of Ms Davies' evidence which must be weighed more carefully, not because of the question of credibility but there were several instances in answering questions in cross-examination where a general approach was adopted. These answers must be weighed more carefully as it is difficult to assess on what basis Ms Davies could provide such information without more specific detail being given. The respondent does not challenge the evidence of Ms Kickett. Counsel for the respondent simply submitted that Ms Kickett's evidence should be accepted over that of Ms Hills. It would appear to me that there are two real points of contention in the difference of evidence between Ms Kickett and Ms Hills. They are whether Ms Hills attended a meeting on 18 July 2003 of staff and committee members when she says she was away ill; and the extent of knowledge Ms Hills had about the workings of the administration and the Board. I accept Ms Kickett's evidence over that of Ms Hills. Her recall of matters, with the exception of some dates, appeared to be clearer and more precise. Ms Hills gave evidence that her knowledge of the funds administrator arose from discussion with Mr Murray and that the funds administrator was present simply to ensure the payment of a pile of bills which had been left unattended to. I consider it probable that Ms Hills knew that the administrator's role was greater than this. Ms Hills was responsible in part for compiling and sending some of Ms Kickett's correspondence. In this way she would be reasonably aware, at least, of the day to day exchanges that occurred between the CEO, the Board and the funds administrator. Some of the correspondence and the evidence of Ms Kickett and Ms Hills describe the role of the administrator more fulsomely.

6 The role of the administrator has previously been addressed in several decisions of the Commission in applications involving the respondent and Mrs Downs-Stoney (see: *Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service* 84 WAIG 2612, *Diana Elizabeth Downs-Stoney v Vanessa Davies, CEO Derbarl Yerrigan Health Service, and Walter McGuire President of the Board of Derbarl Yerrigan Health Service* 84 WAIG 3602). The question at that time was whether the then Board of the respondent had the power, given the appointment of the administrator, to enter into an employment contract with Mrs Downs-Stoney. I do not need to go to all aspects of those decisions but the Commission found that, on the evidence before the Commission at that time, the Board was able to make a binding employment agreement with Mrs Downs-Stoney. This application deals with the same period of funds administration and the employment contract is said to have been offered by the then CEO of the respondent. No further evidence was led in this matter on behalf of the respondent. In the *Downs-Stoney* matter Commissioner Smith found that, "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". In a later decision I concurred with the Commissioner and I characterised the funds administration as "a means of protecting the funds allocated and ensuring that they are spent on the purpose for which they are allocated". This is not the same control as exercised by an administrator or receiver in a corporate law sense. I do not have any further evidence to persuade me towards a different view. In that sense I do not consider that the then CEO was prevented from offering employment contracts on behalf of the respondent organisation; particularly the existing staff, within budget allocation.

7 This marries with the evidence of Ms Kickett. I do not have before me the letter referred to in the respondent's notice of answer and counterproposal, namely a letter of 9 July 2003 from the CEO to the Vice Chairman. The respondent relies instead on the evidence of Ms Kickett in cross-examination. The respondent's submission is also that the evidence of Ms Kickett is that following the meeting of 16 July 2003, when it was decided which employees would be offered new contracts, she delegated to someone the task of preparing the contracts for signature on 18 July 2003. Mr Stubbs on behalf of the respondent submits that this "assists in the conclusion that the funds administrator ….would have to be aware of what was going on there before one could put in place what is a new contract for a fixed term of 12 months." He submits that Ms Hills knew that such a substantial contract had to be agreed by the funds administrator and the funding bodies.

8 In relation to whether the contract was to be completed by someone other than Ms Kickett, I view the evidence of Ms Kickett as no more than the CEO delegating the task of preparing an employment contract to human resource personnel in the organisation. As for the evidence of Ms Kickett, in cross-examination she refers to a draft letter of 9 July 2003 which was never sent (Transcript p.130). In that letter it states:

> "At this point in time neither the board nor senior management have any delegation in authorising payment, directing payment, purchasing or incurring costs on behalf of the organisation."

Ms Kickett says that this was her understanding of Derbarl Yerrigan at that time. Ms Kickett's evidence is also that Ms Hills would have had a fairly in-depth knowledge of what was going on at Derbarl Yerrigan and what Ms Kickett was dealing with.

She says that Ms Hills was involved in getting the list of financial members together and making sure that notices went out to these members concerning a Special General Meeting of the respondent. She assisted in drafting changes to the respondent's constitution which were required as a result of correspondence from the Department of Consumer Protection, and which were to be put before the Special General Meeting. Ms Hills did this work along with Mr John Murray and Ms Kickett. Ms Kickett says importantly that the funds administrator approved new contracts and consultancies but existing or ongoing costs of employees were left to the day to day management of the organisation (Transcript p.124). She says that the funds existed in the budget to approve the ongoing contracts for staff that were considered at the meeting on 16 July 2003. She says that at that time the budget was in surplus and there was no concern that staff may be terminated so as to meet budget. Ms Kickett denies that she knew or was preparing to be sacked on 16 July 2003, or that she was preparing a petition in response to the likelihood of being sacked. She says that she was to give an explanation to the Board on 16 July 2003 concerning certain issues but she waited and was not called into the meeting. Later that night a letter of dismissal was delivered to her home which she did not read until the next day. In summary, I find that Ms Kickett had the authority to offer Ms Hills an employment contract without requiring the approval of the funds administrator.

9 The issue of the alleged misconduct is in my mind without merit. The respondent has simply not made out a convincing case as to why they perceive the breach of the email policy [Exhibit R2], if in fact it was a breach, as sufficiently serious to warrant summary dismissal. The respondent alleges that Ms Hills breached clause 2.4.2 of the policy which reads, "Proven improper use of E-Mail by employees may result in disciplinary action which may include dismissal". The breach is said to be an issue that the respondent became aware of following Ms Hills' dismissal, if in fact she was dismissed. The prime submission of the respondent being that Ms Hills' contract simply expired through the effluxion of time. Ms Hills admits that she emailed the respondent's membership database to her home computer so that she could work on or use the list whilst she was away due to illness. The evidence of Ms Hills and Ms Kickett was that Ms Hills was working on preparing material for a Special General Meeting of the membership of Derbarl Yerrigan at which time the respondent's constitution would be considered. There was a meeting of the membership on Saturday, 2 August 2003 which Ms Hills attended to assist with the organisation. In attendance also was Mr Murray. The respondent challenges that Ms Hills attended that meeting to do work. The respondent says that the meeting was not a properly constituted Special General Meeting. Ms Kickett says that it was a meeting of the membership and disputes that it was not a Special General Meeting (Transcript p.138). She later says that during the period 16 July to 4 August 2003 she did not receive notification that a Special General Meeting would take place to consider the respondent's constitution. It would appear that what was considered on 2 August 2003 was, at least in part, a petition drafted by Ms Kickett [Exhibit R3]. The evidence of Ms Kickett is that there was a staff meeting on 18 July 2003 and a staff and community meeting on 4 August 2003 which she was invited to attend. It is clear from her evidence that the later meeting was held on 2 August 2003 (see Transcript p.138). At that time Ms Kickett spoke with Ms Hills in relation to how she was following her dismissal.

10 The respondent says that because the meeting of 2 August 2003 was not sanctioned by Derbarl Yerrigan, because it arose from unrest about the respondent from members and staff, because Ms Hills knew of all of this, then her conduct in emailing the membership database to herself to seemingly assist with the organisation of the meeting amounted to misconduct warranting summary dismissal. Mr Stubbs for the respondent submits that in relation to the last point no clear evidence can be given as to what motive Ms Hills had in emailing the database. However, he submits that her evidence in relation to the extent of her knowledge of the workings of the respondent and the funds administrator cannot be relied upon. He then invites the Commission to impute some degree of "sinister motive". The offending component of [Exhibit R3] is seemingly clause 9 which calls for a no confidence vote in some of the respondent's then committee members. The evidence of Ms Kickett is that she drafted the document and Ms Hills assisted in collating it and distributing it (Transcript p.135). This occurred, on her evidence, whilst she was still CEO, and some of the document was drafted on 16 July 2003. So the charge then against Ms Hills is that she assisted somehow in fomenting unrest against some of the members of the committee and breached the email policy in doing so; the membership database being used seemingly to organise the 2 August 2003 meeting. I put the proposition in this way because that is what I understand the accusation by the respondent could be at its highest, without any evidence on behalf of the respondent.

11 The respondent says that it is not part of Ms Hills' employment to be part of or to service such a meeting where the politics and ructions of the organisation are being fought out. Therefore the respondent maintains that Ms Hills, by her misconduct, has repudiated her contract. The respondent submits that Ms Kickett under cross-examination conceded that Ms Hills' actions were not appropriate. To warrant summary dismissal the conduct of the employee must be purposeful and be of such a nature that it shows the employee "is repudiating the contract, or one of its essential conditions" (see *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 at 701). It is difficult to see how the actions of Ms Hills in emailing herself the database whilst she was on leave could be said to meet this test. On the evidence of Ms Kickett she drafted the petition with Ms Hills' assistance on 16 July 2003. Ms Hills was subject to the direction of the CEO. Ms Kickett says that Ms Hills distributed the document also whilst she was CEO. Ms Kickett says that this was part of Ms Hills work. It then requires a leap of logic, without further evidence, to suggest that Ms Hills by emailing the list to herself somehow transgressed the respondent's policies in such a severe manner as to warrant summary dismissal. Ms Hills says that she needed to do further work on the membership list and used it to check off names at the meeting on 2 August 2003. This would appear to be a role she had been working on and had been preparing for under the direction of Ms Kickett. Ms Kickett did accept the hypothetical suggestion that misuse of the membership database was wrong. But there is no substantive evidence that Ms Hills did misuse the database or did anything other than perform as directed and then work from home whilst ill. I should add that the evidence of Ms Hills is that she worked on 2 August 2003 in support of the meeting and this evidence in my view was not diminished. Ms Kickett does not concede that this was not a Special General Meeting. Mr Murray who was also senior to Ms Hills attended the meeting. He made no challenge to Ms Hills attending and working at the meeting. I do not accept that the actions of Ms Hills in emailing herself the database warrants summary dismissal or dismissal at all. I do not accept that her actions even amounted to a breach of the email policy. The respondent has not discharged its onus on this issue.

12 In respect of the respondent's third contention, Ms Hills gave evidence that during the period of her extension of contract to 1 August 2003 her contract would be reviewed and negotiated. She was confident of another contract because of her conversations with Ms Kickett. There were no complaints about her work. She was aware of the meeting of 16 July 2003 to review contracts of several staff members. She spoke to Ms Kickett after that meeting and asked "what about my contract" and Ms Kickett's reply was "Yes, you've got one for 12 months" (Transcript p.11). Ms Hills goes on to say, "And then we sort of went on just talking about this special general meeting that I had to get all the documentation ready for". She assumed the paperwork would follow as it had in the past with other contracts and she would then sign it. Ms Hills went on sick leave the next day through to 30 July 2003 [Exhibit A4]. She discussed this with Mr Murray, including two days annual leave covering 31 July and 1 August 2003, because she had exhausted her sick leave. During that conversation Mr Murray did not mention her contract.

13 Ms Hills says that she attended the Special General Meeting on 2 August 2003 which was the meeting which she had been preparing for. She says as follows:

"And I had compiled a members' list for - - for distribution on the day, and - - and that's where I had, sort of, emailed a copy of that to my home address, and I would have brought a tape in with it - - a disk in with it for distribution for the - - or for that evening or the afternoon of - - when the meeting was on, so we could check the members as they came in, because I had to tidy it up a bit.

…….

I was there most of the day, photocopying and compiling documents, and - - I was there all day. Saw John Murray, chatted to him, and he at no time mentioned anything about termination, so I was quite confident that - - I had no reason to believe otherwise." (Transcript pp.13, 14)

Ms Hills under cross-examination later had this exchange:

And the - - the situation was that you weren't directed by anyone at Derbarl to go to that meeting on the 2nd, were you?- --Well, I was. It was understood when I was last at work that I was working towards getting documentation for that meeting, and so therefore on the day, if I was well enough, that I would come and perform the administrative assistant duties and - - or - - PA - - (transcript p.58)

14 Ms Hills reiterated several times under challenge that she was there to lend administrative assistance and not to be involved in the politics of the meeting, and that Mr Murray never suggested that she should not be there or not assist. She assumes that Mr Murray told her of the meeting on 2 August 2003. I accept this evidence.

15 Ms Hills says that her email of 16 July 2003 to a Mr Williams [Exhibit R1] was designed to gently reject a proposal that she enrol in a $900 course. The email it would appear was sent prior to her discussion with Ms Kickett on her evidence.

16 Under cross-examination Ms Hills says of her work on 4 August 2003 as follows:

"Mm hm?---I wasn't told I wasn't the PA. So regardless of who was the CEO, I was expecting to fulfil those duties. And as far as I was concerned, I was conducting myself as normal: go there, do your job. If she was too busy to see me, I understood that. But I certainly don't - - didn't have to report to the HR officer, or anyone else, at the beginning or ending of any of those contracts, so I didn't see why I needed to do that sort of thing now, and I figured that I would just keep working and - -

You figured you'd just keep working?---Yes.

So you didn't go and check to see whether you - - where your new contract was?---Well - - well, why would I? I didn't need to. I had been off on sick leave. I just assumed it was one of those things that - - the paperwork, if they were going to bring it, it would eventually turn up, as they had done in the past. And considering the fact that there was this turmoil, maybe it had taken a back seat for somebody." (Transcript p.72)

17 Ms Hills says that on Monday 4 August 2003, at 4 to 4.30pm Mr Murray came into her office and handed her a letter [Exhibit A5]. The letter states:

"This is to formally advise you that your contract of employment, which was extended until Monday 4th August 2003, is not further extended. This means that your contract of employment with Derbarl Yerrigan Health Service ends today in accordance with the terms of the previous contract."

18 Ms Hills queried Mr Murray and he told her that she would have to see Ms Tobin as she had signed the letter. Ms Hills asked Ms Tobin about her contract and told her that Ms Kickett had offered her a contract. Ms Hills says that Ms Tobin replied that there was no record of that. Ms Hills left that day and started work in the Department of Justice the next day. She has continued working there since that time and has received less pay than with the respondent and does not have the salary sacrifice benefits. She estimated her difference in pay as $16,705 gross [Exhibit A6]. This evidence was later amended to include provision for the salary sacrifice.

19 Ms Hills says there were rumours of rivalries but she tried to keep out of the politics. She says that she was not aware on 16 July 2003 that Ms Kickett was going to be dismissed. She says that she understood that her contract and that of a number of other staff contracts were going to be discussed by managers on 16 July 2003. She compiled some papers in preparation for the meeting. Under cross-examination Ms Hills later says in relation to Exhibit R1:

"I was aware that the committee were - - they were having that - - problems, Marion and the factions, and that sort of thing, the - - the - - the difficulty in not paying the cheques, and stuff like that" (Transcript p.43).

She discovered on 17 July 2003 that Ms Kickett had been dismissed; Mr Murray told her.

20 Ms Davies gave evidence that she attended a meeting on 16 July 2003 with Ms Kickett, Ms Colleen Keen, the manager of clinical services, and Mr Murray. Mr Murray did not stay for long. The meeting lasted from 1.30 to approximately 3.00pm. She says they dealt with a list of staff [Exhibit A7] to consider whose contract needed to be extended and she marked 12 months against Ms Hills' name. Ms Davies says that it was known in the organisation that Ms Kickett's employment was likely to be terminated. She thought the meeting was strange in that she was due to leave the respondent on 18 July 2003, Mr Murray was keen to leave the meeting and other senior managers were not present. She referred to the meeting as an impromptu meeting. Ms Hills' contract was not the only contract to be extended. Ms Davies says the then Board of the respondent did not consider that the meeting of 2 August 2003 had any standing. Notices were sent out for the meeting. She says that the funds administrator used to sign off her cheque payments for her consultancy. At the conclusion of the meeting on 16 July 2003 the follow up action was to be done by Mr Murray or a human resources person.

21 Ms Kickettt's evidence is that Ms Hills did all the normal duties of a personal assistant and performed well. Ms Hills was given a commitment that her contract would be reviewed and Ms Kickett was keen to retain her services. Ms Alema Pilot compiled a list of staff for the 16 July 2003 meeting [Exhibit A7] and it was decided that certain staff would have their contracts extended. This included a 12 month extension for Ms Hills. She directed the other persons present to follow up with the contracts and she says that:

"And what would that entail, following up?---Most of the HR practices, particularly in relation to contracts, would have a form of contracts written on file that could have been printed out, and the conditions and entitlements.

Was that your job to do that - - ?---No. No.

- - to formalise the contracts?---No; it was Vanessa Davies, John Murray and Colleen Keen.

So, at the conclusion of the meeting you directed who to formalise and do the follow up that you just spoke of?---This meeting on the 16th was follow-up - - was supposed to have been followed up by a meeting on Friday, the 18th, with the contracts being brought back to me to sign off to - - for the extension of the 12 months' contract." (Transcript p.107)

22 Ms Kickett later saw Ms Hills and Ms Kickett says that:

> "Ms Hills was keen to find out how the meeting had went. I had relayed on to her that the meeting went well, that I was happy with her performance, and that the 12 months' contract would be extended.
>
> And what did Ms Hills say about that?---She was quite pleased about that. As you know, a lot of these organisations - - things aren't always followed through, but certainly in Ms Hills case the commitment was given, and she was quite happy with that." (Transcript p.109)

23 Mr Stubbs submits that the contract, following the meeting on 16 July 2003, was to be done either by Ms Keen, Ms Davies or Mr Murray and finalised on 18 July 2003. This was not dissimilar to previous contracts in terms of sign-off. Therefore there was no final agreement and no intention to be bound when Ms Kickett spoke to Ms Hills late on 16 July 2003. The conversation amounted only to an indication to Ms Hills that it was proposed to offer her a further contract, on the submission of the respondent. It was intended that a contract was to be signed off and this never occurred because Ms Kickett was dismissed. There was no further discussion about a contract after that meeting of 16 July 2003. There was no attempt by Ms Hills to communicate with the respondent about a contract, on the submission of Mr Stubbs. There was then an upheaval in the organisation and on 4 August 2003 when Ms Hills came to work she did not ask about her contract. Ms Farrant submitted that the conditions precedent to forming an enforceable contract were present from the discussion on 16 July 2003. Ms Kickett had the authority to offer a contract, clearly intended to do so, there was an offer and acceptance and there was consideration in so far as Ms Hills promised to work for a further 12 months.

24 The prerequisites for the formation of a valid contract are covered in Macken, O'Grady, Sappideen and Warburton's Law of Employment 5th Edition, Chapter 3. Clearly on the evidence of Ms Davies and Ms Kickett there was an intention to form a contract arising from the managers' meeting on 16 July 2003. This contract was to be committed to writing and finalised on 18 July 2003. The respondent does not challenge this except to say that the funds administrator had to give his approval (I have addressed this issue), and if one looks at how the previous contracts were made then the contract in question was not made as it was not formalised in writing. I do not accept this submission. Ms Hills had earlier commenced work, on verbal assurance, and then signed her first contract after commencement. The second contract was signed prior to its commencement date. The third contract was effectively verbal and confirmed by email to last until 1 August 2003, and before that time would be 'reviewed and negotiated'. It is then not surprising that Ms Hills might say that she attended work on 4 August, got on with work, kept her head down and expected the paperwork to come. She was proved to be wrong, but when she was dismissed she challenged this and told Ms Tobin about her discussion with Ms Kickett. The response was that there was no proof. However, this matter could have, and should have, been followed up. Ms Kickett, Ms Davies or Ms Keen should have been approached. Exhibit A7 would have provided a clear expression of the intention. The fact that the organisation experienced some turmoil does not mean that Ms Hills was to automatically lose her job.

25 In my mind there can be no real challenge to the fact that the discussion of 16 July 2003 between Ms Hills and Ms Kickett amounted to an offer and acceptance. It was not simply a discussion or reporting on progress. Ms Hills had the expectation that her contract would be discussed. She asked to know the result of the meeting. Ms Kickett told Ms Hills that her contract would be extended for 12 months. Ms Kickett says Ms Hills was given a commitment, which Ms Hills was happy with. Ms Kickett did not say that Ms Hills was to be offered a new contract for 12 months. The contract it must be assumed was to run concurrent with her then contract as had been the case with previous contracts. It was then to run for 12 months from 2 August 2003 as the last contract finished on 1 August 2003. Ms Hills thanked Ms Kickett for the extension. What happened thereafter was very unfortunate for Ms Hills. Ms Kickett was dismissed later that day and could no longer access the work premises. Ms Davies finished on 18 July 2003. Mr Murray was not called to give evidence and is no longer with the respondent. Ms Keen did not give evidence. However, it is clear that Ms Hills worked unchallenged on 2 and 4 August 2003. I do not accept the submission that she did not work on those two days. I accept the applicant's evidence and there is no evidence to the contrary. Mr Murray worked with Ms Hills on 2 August 2003. He did not say she should not be there either because she was no longer under contract or due to the nature of the meeting. Ms Hills worked again on 4 August 2003 and was then simply handed a letter to say her contract had ended. It is in fact correct that Ms Hills had commenced working under her new 12 months contract. The terms were unchanged except for the expiry date. Ms Kickett had the authority to do as she did and offer the contract to Ms Hills. I have no evidence as to whether the other staff listed in Exhibit A7 continued to work and were offered contracts. However, this does not alter Ms Hills' situation. I find that Ms Hills, at the time of her termination, was working under a valid contract that was then due to expire on 1 August 2004.

26 If I apply the principles in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385, it is clear then that Ms Hills' dismissal was harsh and unfair. It was executed on a wrong basis. There can be no consideration of reinstatement as the contract term has now ended. There can only be a consideration of compensation. Clearly Ms Hills mitigated her loss by starting a job the very next day.

27 The applicant was granted leave to re-open her case to give evidence about the salary sacrifice component of her earnings [Exhibit A11]. Ms Hills was paid $43,512.82 gross per annum [Exhibit A6] with the respondent. She earned $31,149.04 gross [Exhibit A11] with the Department of Justice for the period 1 August 2003 to 31 July 2004 which is the period of the contract from which she was dismissed. I will deal only with the evidence that I have from the applicant, even though my finding is that the contract was due to expire on 1 August 2004 not 31 July 2004. Therefore, but for any other factor the unchallenged evidence of Ms Hills is that she incurred a loss of $12,363.78 gross, which is less than six months of her salary with the respondent. However, Ms Hills says that the value of her salary sacrifice was $52,947. This is referred to as "adjusted reportable income" in a document headed "Preliminary Model". I take the figures reflected in the tendered documents as being accurate. There were other figures (or estimates) mentioned in oral evidence. Ms Hills took advice on salary sacrifice from a company named Paradigm. She signed an agreement with them which allowed her a higher net benefit in wages due to the concessional taxation status of the respondent (Transcript p.179). She also signed up to a novated lease for a motor vehicle and says that she has incurred an additional cost of $9,000 on that lease due to her termination. This benefit/loss is not claimed separately and is factored into the calculations made by Paradigm. Ms Hills says that the Paradigm figures are estimates of costs based on a brief budget which she provided to them (Transcript p.187). Ms Hills says that she signed the lease for the vehicle and the salary sacrifice agreement just prior to 16 July 2003 (Transcript p.185). She discussed the arrangement with Ms Kickett prior to signing up and was told that she would be fine concerning her wages (Transcript p.187).

28 Ms Margot Tobin, the Senior Manager, People Support with the respondent, gave evidence that Ms Hills saved 2% in effective taxation rate through her salary sacrifice arrangements. She says that any payment in compensation would be taxed as an eligible termination payment at the rate of 31.5%. There was some query as to Ms Hills' age and whether she was over 55 years which would have had an impact on taxation rates. This was clarified post hearing with the acknowledgement of the respondent. Ms Hills was born on 14 November 1952.

29 I am not satisfied by the evidence given by Ms Hills that I have a sufficient basis upon which I can make any reliable calculation of loss that incorporates the issue of salary sacrifice. This is separate to the question of whether the issue of salary sacrifice should in fact be considered given that it involves a treatment of the individual's taxation arrangements. I say nothing further on this point as it was not raised or queried in submissions. It is clear from Ms Hills' evidence that she has a limited

appreciation of the actual arrangements and that the figures referred to by Paradigm are notional figures. In that sense counsel for the respondent is right to submit that the Commission should be reluctant to entertain the Paradigm figures or lend much weight to Exhibit A11 in the absence of evidence from an employee of Paradigm who compiled the figures. It is the case that Ms Hills entered into these arrangements just prior to her dismissal. She did so after consulting her CEO and hence had an expectation that her employment would be secure enough to enter into the agreement. If her employment had not been terminated then seemingly the agreement would have continued. Ms Hills did give evidence (Transcript p.180) concerning the increase in payment for her novated lease once her employment terminated. The detriment she says that she suffered does not seemingly relate to the figure listed by Paradigm for a lease vehicle. In summary, I am not prepared to entertain the claim to incorporate the salary sacrifice figures into Ms Hills' calculation of loss based on the limited evidence before me. I therefore find that Ms Hills' loss is $12,363.78 gross. I would award this amount in compensation less any taxation payable to the Commissioner of Taxation; to be paid to the applicant within seven days of the date of the order.

2005 WAIRC 01372

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICIA ROSE HILLS
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE INC
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 28 APRIL 2005
FILE NO	APPL 1249 OF 2003
CITATION NO.	2005 WAIRC 01372

Result	Applicant dismissed harshly and unfairly; compensation ordered
Representation	
Applicant	Ms M Farrant of Counsel and Mr T McPhee of Counsel
Respondent	Mr G Stubbs of Counsel

Order

HAVING heard Ms M Farrant of Counsel and Mr T McPhee 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) DECLARES that the applicant, Patricia Rose Hills, was harshly and unfairly dismissed by the respondent on the 4th day of August 2003;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the said respondent do hereby pay within 7 days of this order, as and by way of compensation the amount of $12,363.78 to Patricia Rose Hills, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2005 WAIRC 01451

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KELLIE LAWSON
	APPLICANT
	-v-
	KUE HAIR DESIGN
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 6 MAY 2005
FILE NO.	APPL 284 OF 2005
CITATION NO.	2005 WAIRC 01451

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 – Acceptance of referral out of time granted – *Industrial Relations Act 1979* (WA) s 23A, s 29(1)(b)(i), (2)&(3)
Result	Application for application to be received out of time granted
Representation	
Applicant	Appeared on her own behalf
Respondent	Ms N Glossop-Melrose

Reasons for Decision

(Given extemporaneously and edited by the Commissioner)

1 The applicant seeks an extension of time in which to file the application claiming unfair dismissal. The date of termination of employment was 14 February 2005, and the date of lodgement of the application with the Registrar was 15 March 2005. Therefore, the application is one day out of time.

2 The Industrial Appeal Court, in *Malik v Paul Albert, Director General of the Department of Education* (2004) 84 WAIG 683 has set out the tests to be applied for whether an extension of time is to be granted in these sort of circumstances. It has referred to the decision in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 WAIG 298, and the tests include that it is not necessary for there to be special circumstances; what action the applicant has taken to contest the termination other than by applying under the Industrial Relations Act, 1979 ("the Act"); the prejudice to the respondent, including prejudice caused by the delay; and the mere absence of prejudice to the respondent is not sufficient to grant an extension of time. The merits of the substantive application may be taken into account in determining whether to grant an extension of time, and consideration of fairness between the applicant and other persons in a like position is a relevant consideration. I note that it is also a requirement that the Commission takes account of fairness not just to the applicant but also to the respondent.

3 I also note that the Act, in section 29(3) says that:

> "The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers it would be unfair not to do so."

4 In this particular case, the application is one day out of time. The applicant says that the reasons the application is out of time are due to her mother's need for care; she was seeking other employment, and that seems to be evidenced by the fact that within 10 days of her termination of employment she recommenced employment; she received news of the illness of her grandmother from Scotland; and it was a very stressful time.

5 The applicant did not contact her employer to challenge the termination of employment.

6 The applicant says that she would be prejudiced by the refusal to allow the application to be received on the basis that she has had a traumatic time and there have been other inconveniences to her. She does not seek reinstatement; she seeks 7 days' compensation for being out of work, and an apology.

7 The applicant is also upset by information she has received from someone, a client, it would appear, of the respondent, who says that some unnamed person made some comment which was unhelpful to her in respect of allegedly failing her exams.

8 The respondent has not argued that there would be any particular prejudice by allowing the application to proceed, but that is not the determining consideration that is required.

9 Prima facie, legislative time limits should be complied with, and an applicant seeking to pursue an application lodged out of time must persuade the Commission to exercise the discretion in his or her favour, and it is a question of whether it would be unfair not to extend time.

10 In this particular case, the application is one day out of time. The applicant has had family commitments which, it is quite reasonable to conclude, would have allowed time to escape. In these circumstances of the application being one day out of time, without there being prejudice to the respondent, and with there being some but limited prejudice to the applicant if the application were not to be received, I think it is appropriate to grant that extension.

11 Accordingly, an order shall issue for the application to be accepted out of time.

2005 WAIRC 01453

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KELLIE LAWSON
	APPLICANT
	-v-
	KUE HAIR DESIGN
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 6 MAY 2005
FILE NO	APPL 284 OF 2005
CITATION NO.	2005 WAIRC 01453

Result Application to accept referral of unfair dismissal claim

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Order

HAVING heard the applicant on her own behalf and Ms N Glossop-Melrose on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the referral of the claim for unfair dismissal be accepted out of time.

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

[L.S.]

2005 WAIRC 01159

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD LAWSON LILLEY
	APPLICANT
	-v-
	JIM MIDDLETON & TERRY STONE DIRECTORS OF ECTON PTY LTD (ABN 28082998258)
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY 12TH APRIL 2005
FILE NO.	APPL 726 OF 2004
CITATION NO.	2005 WAIRC 01159

CatchWords	**Termination of employment – unfair dismissal – on probation – authorities applied**
Result	Dismissed
Representation	
Applicant	Mr Richard Lilley appeared on his own behalf
Respondent	Mr S. Heathcote, of Counsel, appeared on behalf of the Respondent

Reasons for Decision
(Ex Tempore as edited by Senior Commissioner Gregor)

1 These are my reasons for decision. This was a matter which was filed in the Commission on 31st May 2004. Richard Lawson Lilley, (the Applicant), applies for orders pursuant to S.23A of the Industrial Relations Act 1979 (the Act) on the basis that he was dismissed from employment with Ecton Pty Ltd (Ecton) on or about the 7th of May 2004 and that dismissal was harsh, oppressive or unfair.

2 The Applicant seeks compensation for the loss he says he suffered as a result of that action by the employer. The short history is that the Applicant accepted an offer of a position as a store manager at the Worldwide Online Printing franchise in Subiaco, Western Australia (Exhibit H1). The contract was to commence on the 18th of February 2004.

3 This acceptance followed a letter on the 12th February 2004 from a Mr T.M. Stone, who signs as a director of Daniels Printing, in which he articulated in writing an offer from Ecton to the Applicant of a position as store manager with a salary commencing at $32,000 per annum paid fortnightly, plus superannuation plus a share of profits.

4 The question of the ultimate ownership of the store was mentioned in that communication. Even before the contract was entered into Mr Stone had flagged to the Applicant that the ultimate ownership of the store was 'still on the table'. The letter also indicates that the offer was the subject of a 3 month probationary period.

5 It came to pass that the Applicant started working with that knowledge. He agrees that on the 23rd of April he was told by Mr Stone there had been an expression of interest from another body to take over the store. It seems as though he may have been offered an option to take up that franchise himself if he had wanted to, but in the event he did not. The new owner was to take over on the 10th of May 2005.

6 Because the parties could not reach an accommodation about the Applicant buying the business, it is common ground that the relationship was brought to an end on the 7th of May. The Respondent says for the reason that the new owners wanted to run the business themselves. Therefore there was no position available for the Applicant. In any event, the employer was entitled to bring the relationship to an end because it was still within the probationary period. It is agreed the probation would expire on the 7th of May 2002.

7 The Applicant says that the treatment of him was unfair, and he submits two documents in support of his contentions. One of them (Exhibit L1), is interesting, because in a way it supports the contentions of the Respondent. It says in the second paragraph:

> "*It had always been the intention to develop the store and sell the business. Richard's tenure as the manager of the store progressed steadily and in early May an offer to buy the business was received. The offer was dependent on the potential owner being able to personally manage and assess the operation. As a consequence, Richard's services were no longer required and he was made redundant on the 7th May.*"

8 The Commission assumed because the Applicant has submitted this document as evidence that he accepts that it is a fair summation of the situation, that is, in line with the analysis that Mr Heathcote, of Counsel, makes in his submissions about the sequence of events. On the documentation before the Commission, the preponderance of it indicates that the business was to be sold and it was to be managed by the potential owner.

9 There is before the Commission a document (Exhibit L2) being a tax invoice which shows that Worldwide Online Printing, Subiaco, was operating under an ABN 082 998 258 which, according to this document, is the ABN of Ecton. I should say that the Exhibit L2 of itself does not establish that. In my view that evidence is not strong enough to indicate that Ecton continued to operate the business.

10 The evidence of the Applicant is he obtained Exhibit L2 in July of 2004, which is a considerable period after the events to which this application is directed. It does nothing to establish what may have been the situation at the time that the employment contract was brought to an end.

11 Even if some weight can be given to Exhibit L2, the preponderance of evidence in a documentary form before the Commission is in favour of the contention advanced by the Respondent that what has happened in this case is that there has been a genuine sale, the new owner wanted to manage the business themselves, and because of that, there was no room for the Applicant in the operation. In any event, there is clear evidence and admissions from the Applicant that he was on probation at the time. Probation period had not been completed.

12 The authorities cited by Mr Heathcote *East Kimberley Aboriginal Medical Service v ANF (2000)* 80 WAIG 3155 and *Little Muppets Child Care Centre v Hedley (2004)* 84 WAIG 224 are at point. The general state of the law as exposed in those

authorities is that probation is an extension of the interview period. The Applicant has the onus of proof to establish that his dismissal was harsh, oppressive, or unfair.

13 In those circumstances there could be no reasonable finding that there was harshness, oppression or unfairness. The onus of proof has not been discharged and application will have to be dismissed.

2005 WAIRC 01158

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD LAWSON LILLEY
	APPLICANT
	-v-
	JIM MIDDLETON & TERRY STONE DIRECTORS OF ECTON PTY LTD (ABN 28082998258)
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 12th APRIL, 2005
FILE NO/S	APPL 726 OF 2004
CITATION NO.	2005 WAIRC 01158

Result	Dismissed
Representation	
Applicant	Mr Richard Lilley appeared on his own behalf
Respondent	Mr S. Heathcote, of Counsel, appeared on behalf of the Respondent

Order

HAVING heard Mr Richard Lilley on his own behalf as the Applicant and Mr S. Heathcote (of Counsel) for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application is hereby dismissed.

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

2005 WAIRC 01312

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LI LIU
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF GOVERNMENT OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 22 APRIL 2005
FILE NO.	APPL 751 OF 2004
CITATION NO.	2005 WAIRC 01312

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Jurisdiction of Commission to hear application under general jurisdiction when Applicant a Government officer - Jurisdiction under s 29(1)(b)(i) ousted by jurisdication of Public Service Appeal Board - *Industrial Relations Act 1979* (WA) s 7, s 29(1)(b)(i), s 80C, s 80E, s 80I(1)(b) and (e), (2), s 80M; *Public Sector Management Act 1994* (WA) s 78(1); *Public Transport Authority Act 2003* (WA) s 6; *Government Railways Act 1904* (WA) s 73(4); *Salaries and Allowances Act 1975* (WA) s 6(1).
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr R Andretich (of counsel)

Reasons for Decision

1 Li Liu ("the Applicant") made an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively and unfairly dismissed on 3 June 2004 by the Public Transport Authority ("the Respondent").

2 The Respondent claims the Commission in its general jurisdiction has no power to hear and determine the application as it does not have jurisdiction to hear a claim by a "Government officer" that he or she has been unfairly dismissed. The Respondent says that the constituent authorities established under Division 2 of Part IIA of the Act, namely the Public Service Appeal Board or the Public Service Arbitrator have exclusive jurisdiction in respect of such a matter. The history of this

matter is that the Applicant's application was filed on the day her employment was terminated on 3 June 2004. A conference in respect of the matter was first convened by the Commission under s 32 of the Act on 13 July 2004. This matter was then listed for hearing on 7 October 2004. Prior to the date set for the hearing, the Applicant requested the hearing be adjourned, which was consented to by the Respondent. A further date for hearing was set for 9 December 2004. That date was also vacated by consent. The matter was then listed for hearing on 3 March 2005. That hearing did not proceed by consent. However, a conference under s 32 was convened by the Commission on that date and the matter was listed for hearing on 14 and 15 April 2005. A further conference between the parties took place on 1 April 2005. At the conference on 1 April 2005, an issue of jurisdiction was raised by the Respondent in these proceeding for the first time.

3 The Respondent's solicitor filed submissions in respect of jurisdiction on 8 April 2005. Whilst the jurisdictional argument has been raised at a late stage of the proceedings, it is clear that once an issue of jurisdiction had been raised that the issue must be determined by the Commission (see *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 721). At the hearing on 14 April 2005, counsel for the Respondent addressed the submissions and after hearing from the parties, I reached the conclusion that the application before the Commission under s 29(1)(b)(i) of the Act should be dismissed. The reasons why I reached this conclusion are as follows.

4 Pursuant to s 80I(1)(e) of the Act, the Public Service Appeal Board has jurisdiction to hear an appeal, other than an appeal under s 78(1) of the *Public Sector Management Act 1994* ("the PSM Act"), by any Government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer of that Government officer that the Government officer be dismissed.

5 A "Government officer" is defined in s 80C(1)(b) and (e) of the Act to mean every other person employed on the salaried staff of a public authority except a person who is a railway officer as defined in s 80M. In ascertaining whether the Applicant was a "Government officer" within the meaning of s 80C(1)(b), the first question to be determined is whether she was employed "of a public authority".

6 Section 7 of the Act defines a "public authority" to include a number of specified entities and "State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law". By s 6 of the *Public Transport Authority Act 2003* ("the PTA Act") the Respondent is an agent of the State. It is clear from s 6 and the provisions of the PTA Act as a whole that the Respondent can be characterised as a State agency and a public statutory body. Consequently, I am satisfied the Applicant was employed "of a public authority".

7 As to whether the Applicant can be said to have been "employed on the salaried staff" and was not a "railway officer" as defined in s 80M of the Act, the Applicant states in her application that she was employed as an accountant and was in receipt of an annual salary of $47,359 per annum. The Respondent says that the Applicant was employed as a Level 3 Accounting Assistant and the terms and conditions of her employment were covered by the provisions of the Public Transport (Railways) Salaried Officers Award of Western Australia 2003 ("the Award"), which is an award made by the Australian Industrial Relations Commission on 24 January 2003 (*Exhibit 1)*. Clauses 11 and 12 of the Award provide for salaries to be paid fortnightly and rates of pay are fixed from Level 1 to Level 9. In Schedule A of the Award, under the heading Finance Accounting and Supply Directorate, there is a classification described as an Assistant Financial Accountant under the classification of Level 3.

8 In *Fisher v The Totalisator Agency Board* (1997) 77 WAIG 619 at 622, the President, with whom George and Parks CC agreed, applied the meaning of the word "salary" considered by Barwick CJ in *Commissioner for Government Transport v Kesby* (1972) 127 CLR 374 ("Kesby"). In Kesby the Chief Justice observed at 378:

> "In the case of an officer in a classification which is remunerated by wages rather than salary, it might be convenient in applying the section to substitute the word "wages" for "salary". I think that course permissible in the circumstances. If the wage is set as a periodic rate, that is to say, a stated sum payable by the week or fortnight to officers in the classification, the section will operate, in my opinion, exactly as it would if a rate of salary were stipulated for the classification."

9 Further, Gibbs J, in Kesby said at 388:

> "The 'salary' therefore in my opinion means the full amount of wages payable, for the time being, to officers generally of the relevant classification and length of service for the work which such officers are regularly required to perform in the ordinary course of their employment."

10 Having regard to the statements made in the Applicant's application and to the provisions of the Award, I am satisfied that the Applicant was employed "on the salaried staff of a public authority".

11 It is clear that the Applicant cannot be said to have been a "railway officer" as defined in s 80M of the Act. Section 80M of the Act defines a "railway officer" to mean:

> "Any specified award employee (as defined the *Government Railways Act 1904* section 73) –
>
> (a) holding or acting in a salaried position; or
>
> (b) receiving a daily rate of pay as a temporary clerk in the service of the Public Transport Authority;"

12 A "specified award employee" is defined in s 73(4) of the *Government Railways Act 1904* to mean a person who was employed under s 73 immediately before it was amended by the PTA Act s 126 and, when that amendment took effect, became an employee of the Respondent but only if the person's employment was, before the amendment took effect, and continues to be, covered by –

(a) the Government Railways Locomotive Enginemen's Award 1973-1990 No. 13 of 1990; or

(b) the Railway Employees' Award No. 18 of 1969.

13 Clause 4 – Area and Scope of the Government Railways Locomotive Enginemen's Award 1973 - 1990 only applies to workers employed by the Respondent in and about the working of the State Railways. A "worker" is defined in clause 5(18) to mean a person employed as a driver, driver's assistant, fireman, locomotive trainee or permanent cleaner.

14 Clause 4 – Area and Scope of the Railway Employees' Award No. 18 of 1969 only applies to workers employed by the Respondent in and about the working and maintenance of the railways and road services operated by the Respondent, and in connection with railway refreshment services. Further, the Railway Employees' Award does not apply to special maintenance, reconstruction or construction works in the Permanent Way, and/or Structure Sections, where the estimated cost of which on account of wages exceeds $5,000 or part-time workers in positions of attendants, caretakers of sidings or caretakers of barracks.

15 It is clear that the Applicant cannot be described as a "specified award employee" for the purposes of s 80M of the Act, so as to be able to characterise her status as a "railway officer" within the meaning of that section.

16 I am also satisfied that the Applicant occupied a position that carried a salary lower than "the prescribed salary" within the meaning of s 80I(1)(e) of the Act. In s 80I(2) "prescribed salary" is defined to mean the lowest salary for the time being payable in respect of a position included in the Special Division of the Public Service for the purposes of s 6(1) of the *Salaries and Allowances Act 1975*.

17 The Respondent tended into evidence a determination by the Salaries and Allowances Tribunal made on 8 April 2004, in respect of holders of offices included in the Special Division of the Public Service and prescribed offices (*Exhibit 2*). It is clear from Exhibit 2 that the salary the Applicant was entitled to, was lower than the salary prescribed by the Salaries and Allowances Tribunal in the determination made on 8 April 2004.

18 In light of the foregoing I am satisfied that when the Applicant's employment terminated on 3 June 2004, the Applicant was entitled to challenge the decision of the Respondent to dismiss her by making an application to the Public Service Appeal Board, pursuant to s 80I of the Act.

19 The question then arises as to whether the Commission's general jurisdiction under s 29(1)(b)(i) of the Act is ousted by the jurisdiction of the Public Service Appeal Board under s 80I of the Act. As McHugh J in *Minister for Immigration and Multicultural Affairs v Wang* (2003) 77 ALJR 786 observed at [33] it is an elementary rule of statutory construction that powers conferred by general words (in this case s 29(1)(b)(i) of the Act) are not intended to overrule or supersede powers conferred in specific terms (in this case the right of appeal under s 80I of the Act). This rule was formulated in *Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, by Gavan Duffy CJ and Dixon J when their Honours observed at 7:

> "Extensive and unfettered as the authority of the Court of Conciliation and Arbitration to award preference in settlement of a dispute might have been in virtue of its general power, yet, when s 40 expressly gives a special power, subject to limitations and qualifications, surely it must be understood to mean that the Court shall not exercise an unqualified power to do the same thing. When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

20 This principle has often been applied by the Commission and was recently applied by the Industrial Appeal Court in *Food Preservers Union of Western Australia, Union of Workers v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australia Branch* (2001) 81 WAIG 1141.

21 When the principle enunciated in *Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia* (op cit) is applied to this matter it is clear that the general power in s 29(1)(b)(i) of the Act to bring an application cannot be exercised when there is a special power in s 80I to hear and to determine whether the decision to dismiss the Applicant's application should be adjusted.

22 In *Bellamy v Chairman, Public Service Board* (1986) 66 WAIG 1579, the same jurisdictional issue was raised in that appeal that is raised in this matter. Mr Bellamy was a Government officer who made an application under s 29(1)(b)(i) of the Act. The Commissioner hearing the matter at first instance dismissed the Applicant's claim on the basis that the Commission in its general jurisdiction had no power to hear and determine the matter as the Public Service Appeal Board had exclusive jurisdiction to hear and determine an appeal by a Government officer from a decision to dismiss. The Full Bench in that case upheld the decision of the Commission of first instance and dismissed the appeal.

23 Whilst it is not determinative of this matter I do not agree with the Respondent's submission that the Public Service Arbitrator also has jurisdiction to deal with this matter. When the principle enunciated in *Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia* (op cit) is applied to s 80E of the Act, it is clear that when a Government officer is dismissed that the jurisdiction of the Public Service Arbitrator under s 80E of the Act is ousted by the power vested in the Public Service Appeal Board under s 80I of the Act.

24 For the reasons set out above I will make an order dismissing the application.

2005 WAIRC 01313

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LI LIU
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF GOVERNMENT OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 22 APRIL 2005
FILE NO/S	APPL 751 OF 2004
CITATION NO.	2005 WAIRC 01313

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr R Andretich (of counsel)

Order

HAVING heard the Applicant and Mr Andretich 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 H SMITH,
Commissioner.

[L.S.]

2005 WAIRC 01213

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RODERICK ANGUS MACLEOD
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 15 APRIL 2005
FILE NO.	APPL 670 OF 2004
CITATION NO.	2005 WAIRC 01213

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) and (3)
Result	Application to accept applicant's claim which was lodged out of time granted
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr D Newman

Reasons for Decision

1 On 14 May 2004 Roderick Angus MacLeod ("the applicant") referred an application 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 7 April 2004 by the Director General of Education and Training ("the respondent").

2 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 14 May 2004 it is nine days out of the required timeframe for lodging a claim of this nature.

3 The matter was listed for hearing to allow the parties to put submissions and 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."

4 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 in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, 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."

5 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

6 It is not in dispute that the applicant commenced employment with the respondent as a secondary school teacher in January 1959 and that the applicant's service with the respondent was continuous until his termination on 7 April 2004. In January 2002 the applicant commenced sick leave and remained on approved sick leave until 7 April 2004.

7 On 9 January 2004 the respondent wrote to the applicant advising him that based on medical advice, the respondent was not of the view that the applicant's utilisation of paid sick leave should be further extended. This letter also stated the following:

> "In accordance with Clause 15 (termination) of the Agreement and Division 3 of Part VIA of the *Workplace Relations Act 1966*, I wish to advise that, effective from the close of business Wednesday, 28 January 2004, the employment contract shall be formally concluded and the Department will no longer require your services. You will be paid an amount equivalent to five weeks salary in lieu of the notice period. Should you have an entitlement to any accrued or pro rata leave, these shall be calculated and deposited into your usual bank account as soon as possible.
>
> I also make it clear that you are not required to report for duty at any school, a district office or the central office as from the date of receipt of this letter or as from the return from leave for teachers as at 29 January 2004.
>
> Your employment record with the Department will be endorsed as retired due to ill health. Additionally, I would advise that your authority to work and licence to teach will also be cancelled as at the date of retirement.

> However, prior to my giving effect to the above, I am providing you with an opportunity to furnish a written submission on relevant issues in relation to this matter for my final consideration. Should you wish to place any further matters before me, please ensure your submission is received no later than the close of business five (5) working days from the date of receipt of this letter. You are to address your submission, marked "Private and Confidential" to The Manager, Employee Relations, Department of Education and Training, 151 Royal Street, East Perth, WA 6004. In the event that no submission is received by this date, I will consider the matter as I have outlined above."
>
> (Exhibit A1)

8 After receiving this letter on 13 January 2004, the applicant responded on 18 January 2004 as to why he believed he should not be forced to retire on the grounds of ill health, he indicated that he had some further medical issues which should be finalised by the beginning of semester two, 2004 and that as he had further paid sick leave available to him it was his view that he should not be terminated (Exhibit A2).

9 The next contact the applicant had with the respondent was when he attended a meeting with the respondent on 7 April 2004. At this meeting the applicant was handed the following letter (formal parts omitted):

> "Thank you for your letter dated 18 January 2004. We apologise for the delay in responding, but this has been necessary so that careful consideration could be given to the many elements you raised. As a result of our research and discussion, I am now in a position to comment upon your status with the Department.
>
> The significant facts before me are:
>
> - departmental records indicate that you have been continuously absent from the workplace from Term 1, 2002 due to illness;
> - you hope to return to work in Semester 2, 2004;
> - you did not wish to retire at this time; however,
> - Dr Pearce, with the written support of your general practitioner, has recommended you retire on the grounds of ill health.
>
> In determining this matter, I am obliged to balance both the needs of yourself and the Department in terms of its community service obligations. In balancing this decision, I have noted your long and virtually unblemished service history since your commencement in 1959. You should be extremely proud of such a record.
>
> It is clear from your submission that it is your desire to be able to return to work at a school that is prepared to allow you to establish a 'specialist' sports program for ice hockey. It appears to be your intention to fully establish such a program from the level of conception to reality, prior to retirement.
>
> Your aspirations with regard to a return to work and the establishment of an ice hockey program are commendable. However, given the processes and commitment required to deliver such a program, combined with the everyday stresses and stressors of contemporary teaching, it is unlikely that it could be achievable within one or two years.
>
> Certainly, my sympathies are with you in relation to your apparent ongoing medical issues but, whilst these matters carry only little weight in my decision, your health is clearly a matter for which I must balance the 'duty of care' obligations owed towards you as an employee.
>
> In light of the above, I have determined that I will exercise my prerogative by retiring you on the grounds of ill health.
>
> Your retirement shall be effective immediately upon receipt of this letter. Instructions will be issued to the Personnel and Payroll officer to calculate all other entitlements owed to you, including pro rata access to long service leave and vacation leave as appropriate. You shall also be paid an amount equivalent to five weeks salary at your pay level, in lieu of the notice period. These funds will be deposited into your usual bank account as soon as possible.
>
> I must also make it clear that you are not required to report for duty at any school, district office or central office as from the date of receipt of this letter.
>
> Your employment record with the Department will be endorsed as retired due to ill health. Additionally, I would advise that your authority to work and license to teach will also be cancelled as at the date of receipt of this letter.
>
> You should not be disheartened by this outcome. Service as a teacher to the children of the state of Western Australia of 44 years is a remarkable achievement and truly a credit to you."
>
> (Exhibit A3)

10 When the applicant was terminated on 7 April 2004 he was given a payment of five weeks' pay in lieu of notice.

Applicant's evidence

11 The applicant stated that throughout his employment with the respondent his health was good and he only took limited sick leave prior to January 2002 and the applicant gave evidence that even though he was suffering from depression in early 2002, which was in part work related, he had fully recovered from this illness by January 2004. The applicant stated that he was upset when the issue of being retired on the grounds of ill health was first raised with him by the respondent as he believed his unblemished work history along with the fact that he felt capable of continuing as a teacher, should have been taken into account by the respondent.

12 The applicant stated that he was shocked when he was told on 7 April 2004 that he was to be terminated and the applicant stated that he did not accept the respondent's decision as he considered himself fit enough to eventually return to teaching. The applicant stated that as he was terminated without notice he was shocked, confused, devastated and angry and could not think straight at the time. He was also ashamed to tell his family that he had been terminated.

13 Soon after 7 April 2004 the applicant attended his General Practitioner (GP) and obtained a report on his health (Exhibit A4) which he understood was forwarded to the respondent and on 19 July 2004 he obtained another report from his GP declaring him fit to return to work (Exhibit A5). The applicant understood that this was also sent to the respondent's Doctor, Dr Pearce. On 7 September 2004 the applicant's psychiatrist also declared him fit to return to work (Exhibit A6).

14 The applicant stated that the delay in lodging this application was due to him requiring further medical treatment in April 2004 and the applicant also stated that even though he contacted a shopfront lawyer on 29 April 2004 he was unable to obtain an appointment until 7 May 2004. When the applicant attended this meeting he recalled a timeframe for lodging an unfair dismissal claim being mentioned but he was not given specific dates. The shopfront lawyer then gave the applicant Mr Trainer's telephone number. The applicant stated that the earliest appointment he was able to arrange with Mr Trainer was 13 May 2004 and that this application was lodged the day after meeting Mr Trainer.

15 Under cross-examination it was put to the applicant that prior to the beginning of 2004 his GP had declared him unfit to return to work and advised the respondent that he should be retired on the grounds of ill health. The applicant stated that he could not

recall Dr Pearce asking him to have his GP complete a report about his fitness for work prior to 2004 and the applicant maintained that the first time the issue of being retired on the grounds of ill health was raised with him was on 9 January 2004.

Submissions

16 The applicant submits that he was treated unfairly when he was terminated without notice, even though he was paid five weeks' pay in lieu of notice. The applicant argues that there was no reason for his termination, he was denied procedural fairness given the manner of his termination and he was treated unfairly when he was only given five working days in January 2004 to respond to the respondent's view that he should be terminated. The respondent did not consider alternatives to termination for the applicant and the applicant argues that it was inappropriate to terminate the applicant whilst he was on sick leave and when he had further sick leave available to him.

17 The applicant maintains that he had a reasonable explanation for the delay in lodging this application as the applicant was dealing with medical issues at the time of his termination and he had difficulty arranging appointments to obtain advice about his termination and as soon as the applicant was able to meet his representative this application was lodged the following day. The applicant maintains that there was no evidence that the respondent would suffer any prejudice or inconvenience as a result of the delay in lodging this application. The applicant also maintains that the respondent was aware that the applicant was unhappy being terminated on the grounds of ill health because he responded to the letter he received in January 2004 and the possibility of the applicant appealing his termination is mentioned in his GP's report dated on 19 April 2004. The applicant argues that there is a greater prejudice to him than the respondent in not allowing this application as he is fit to return to work and should be able to do so.

18 The respondent argues that the delay in lodging this application was excessive and argues that the applicant had sufficient time to lodge this claim notwithstanding his medical problems. The applicant was also advised by the shopfront lawyer that there was a timeframe for lodging this application.

19 The respondent maintains that the applicant was aware that the respondent was considering retiring him on the grounds of ill health prior to January 2004 and as a result the applicant was aware in April 2004 that his termination was being considered by the respondent. The respondent maintains that the applicant did not take reasonable steps to indicate that he was opposing his termination as the respondent was not aware that the applicant was contesting his termination until this application was served on it. The respondent claims that not only will it suffer the same prejudice suffered by an employer exposed to an unfair dismissal claim it would be penalised if the Commission allows this application as it followed a fair process in terminating the applicant and furthermore the applicant's medical issues remain unresolved. Health and safety issues will also arise if the applicant is reinstated.

Findings and conclusions

20 On the evidence currently before me it could well be the case that there is merit to the applicant's claim that he was unfairly terminated. The respondent tendered no evidence confirming the basis upon which it formed the view that the applicant was unfit to return to work at the time of his termination, nor was there any evidence that the applicant was suffering a long term illness when the applicant was terminated. On the contrary, evidence was tendered on behalf of the applicant from the applicant's GP and his psychiatrist certifying that the applicant was fit to return to work and that his illnesses were not of a long term nature. I am not convinced that the applicant was afforded procedural fairness given the summary manner of his termination. The applicant was terminated without notice and whilst he was on paid sick leave and discussions do not appear to have been held with the applicant about the reasons for his termination nor were alternatives to termination canvassed. It is therefore my view that the applicant may have an arguable case that he was unfairly terminated.

21 I find that the applicant has an acceptable reason for the delay in lodging this application which was lodged nine days out of the required timeframe. I accept that the applicant had to deal with medical issues in the period immediately after his termination and I also accept that the applicant sought assistance from a shopfront lawyer within a reasonable timeframe and that there were delays in making appointments with this lawyer and the representative that the applicant engaged to assist him with his application. Once a meeting was held with the applicant's representative on 13 May 2004 it is clear that the applicant then lodged this application the following day.

22 I accept that the applicant did not expressly indicate to the respondent that he intended to contest his termination, however the GP's letter to the respondent dated 19 April 2004, which the applicant gave evidence he believed was forwarded to the respondent, refers to the applicant planning to appeal his termination (Exhibit A4). I also take into account that after the applicant was advised that he was to be terminated on the grounds of ill health in January 2004 he took substantial and timely steps to put a case to the respondent as to why he should not be terminated.

23 Even though the respondent argues that the applicant's ongoing medical issues as well as health and safety issues will arise if the applicant was to be reinstated to his former position I do not give much weight to these arguments at this point as there is no evidence before me that these issues are currently relevant.

24 It is my view that the prejudice suffered by the applicant would be greater than that suffered by the respondent if this application was not allowed as it appears that the applicant has been fit to return to work for some time.

25 When balancing the above findings and taking into account the relevant factors to consider in an application of this nature I find that it would be unfair not to accept this application. In reaching this view I take into account that there was an acceptable reason for the delay in lodging this application and that there is sufficient to establish that the applicant has an arguable case. Further, it is my view that the respondent will not be prejudiced any more than usual in allowing this application even though the applicant did not expressly advise the respondent that he would be contesting this termination. I therefore find that in all of the circumstances 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.

2005 WAIRC 01260

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RODERICK ANGUS MACLEOD
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 APRIL 2005
FILE NO/S	APPL 670 OF 2004
CITATION NO.	2005 WAIRC 01260

Result	Application to accept applicant's claim which was lodged out of time granted

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr D Newman on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application to accept the application out of time be and is hereby granted.

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

2005 WAIRC 00963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ROSS MCLEOD
	APPLICANT
	-v-
	STOCK RD MARKET TAVERN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 6 APRIL 2005
FILE NO.	APPL 21 OF 2005
CITATION NO.	2005 WAIRC 00963

CatchWords	Application for adjournment - Within discretion of the Commission
Result	Application for adjournment granted
Representation	
Applicant	Mr G Slattery (of counsel)
Respondent	Ms S Howard (as agent)

Decision
(ex tempore)

1 The claim that Mr McLeod was unfairly dismissed by Stock Road Market Tavern is set down for hearing tomorrow, 7 April 2005. On 31 March 2005, Ms Howard as agent for Stock Road Market Tavern, wrote to the Commission seeking an adjournment of the hearing for two weeks.

2 On 5 April 2005, the Commission was advised by counsel for Mr McLeod that the application for adjournment of the hearing was opposed.

3 An application for an adjournment is within the discretion of the Commission. Where the refusal of an adjournment would result in a serious injustice to one-party an adjournment should be granted unless in turn this would mean serious injustice to the other party (*Myers v. Myers* [1969] WAR 19). I will not repeat the grounds set out in Stock Road Market Tavern's application for adjournment. They are a matter of record and exhibits before the Commission, as is Mr McLeod's opposition to the application.

4 In assessing whether the refusal of an application to grant an adjournment would create a serious injustice to Stock Road Market Tavern, I take into account that documentation considered by either party to be relevant to the substantive application to allow for proper defence of the claim ought be available. Of itself, a failure to provide a reasonable opportunity to present material, known to the respondent, in defence of a claim could result in a serious injustice to a party.

5 Further, the location of the documentation referred to in the application being, of itself, the subject of a police investigation, demonstrates to the Commission the apparent importance of the material to Stock Road Market Tavern. This is a factor that has been taken into account in assessing whether a serious injustice would be created by refusing to grant the adjournment.

6 It might also be suggested that if Stock Road Market Tavern were to locate the documents without an adjournment then it would not be provided with a proper opportunity to examine the documents.

7 The fact that Stock Road Market Tavern.did not file the application for adjournment until some seven days prior to the scheduled hearing of the substantive matter has not gone unnoticed. However, in considering this factor I have taken into account the seemingly tardy response by Mr McLeod, some three working days later.

8 In assessing whether the granting of an adjournment to Mr McLeod would create a serious injustice I have taken into account a number of factors.

9 Firstly, if the Commission were to grant the adjournment, witnesses who have arranged for time off work time off work to attend the hearing on 7 April , 2005, only to cancel the arrangements would cause inconvenience rather than serious prejudice. It would, however, be open to Mr McLeod in the hearing of the substantive matter to seek an order for costs, if any, for arranging alternative dates for attendance by witnesses in the Commission.

10 Secondly, matters which come before this Commission are to be dealt with promptly and the Commission understands that evidence is best taken from witnesses as close as possible to the events to which the application relates. This application is no exception and if an adjournment beyond two weeks was sought then the Commission's conclusion with respect to serious injustice may have been different.

11 Further, at the request of counsel for Mr McLeod two hearing dates have now been vacated. The first, a listing to hear application for further and better particulars was discontinued and the first day of hearing into the substantive matter was adjourned.

12 I conclude that to refuse the application for adjournment would mean serious injustice to the respondent. I therefore grant the adjournment for a two-week period, vacating the listing for the 7th April, 2005. A further listing for hearing will be fixed in consultation with counsel for Mr McLeod and agent for Stock Road Market Tavern.

13 I do not intend to issue a formal order reflecting this decision, unless either party requests that I do so within 48 hours.

2005 WAIRC 01413

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL WILLIAM MCQUEEN
	APPLICANT
	-v-
	ELLOISE PTY LTD TRADING AS REMAX PREFERRED
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 5 MAY 2005
FILE NO.	APPL 1525 OF 2004
CITATION NO.	2005 WAIRC 01413

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) and (3)
Result	Section 29(1)(b)(i) application dismissed
Representation	
Applicant	Mr G G Wells (of counsel)
Respondent	Mr M J Sicard (of counsel)

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 Michael McQueen ("the Applicant") that he has been harshly, oppressively or unfairly dismissed by Elloise Pty Ltd trading as Remax Preferred ("the Respondent") on 8 October 2004.

2 The Commission's file records that the Applicant filed his application on 22 November 2004, which was 45 days after his employment was terminated. The time for bringing an application under s 29(1)(b)(i) of the Act, expired on Friday, 5 November 2004. It follows, therefore, that the application was filed 17 days out of time.

3 The Applicant and the Respondent's witnesses gave their evidence on oath by affidavit and orally.

The Applicant's Evidence

4 The Applicant commenced employment with the Respondent on 15 June 2004. Before he was employed by the Respondent, the Applicant had worked in the real estate industry for a couple of years. Prior to joining the industry he was unemployed and had been in receipt of a Defence Forces Disability Support Pension. Immediately before commencing employment with the Respondent, the Applicant was employed by another Remax franchisee, Remax Realmark, whose principal is John Percudani.

5 The Applicant testified in his affidavit that whilst he was employed by Remax Realmark, he began negotiating with Lorna Gladwin, the principal of the Respondent, to join the Respondent's organisation. He says that at the time he was negotiating with Ms Gladwin, Mr Percudani was negotiating with Mr Duro Margaretic and Ms Dorina Margaretic who were employed by Ray White Sorrento to join Remax Realmark. Mr and Ms Margaretic were friends of the Applicant. About the same time Ms Gladwin was also negotiating with Mr and Ms Margaretic to join the Respondent. The Applicant says the end result of negotiations was that Mr and Ms Margaretic agreed to take up employment with the Respondent.

6 The Applicant says in his affidavit at paragraphs 9 and 10 that after he commenced work for the Respondent:

> "On 7 July 2004, Mr Piagno came to the Respondent's premises to complain to Mrs Gladwin about the Respondent poaching myself and the Margaretics from Remax Realmark. He said he was also investigating whether the Margaretics and I had been given a reduced fee on our desk well below Remax Australia's recommended schedule. The desk fee is a

fee paid monthly by each real estate sales representative employed by a Remax Australia franchisee. A portion of the fee is forwarded to that franchisee. The rest is paid to Remax Australia.

Mrs Gladwin then called myself and the Margaretics into the meeting. In front of the Margaretics and I, Mrs Gladwin falsely told Mr Piagno about the cost of the desk offered to the Margaretics and myself. She had attempted to conceal the true position from Mr Piagno by previously having each of the Margaretics and myself execute parallel employment contracts that contained different figures for remuneration."

7 The Applicant says that he and Mr and Ms Margaretic met with Ms Gladwin a week before they met with Mr Piagno and they were told not to say anything to Mr Piagno about desk fees. Further, that Ms Gladwin gave them two workplace agreements to sign. One was to give to Remax and the other she would keep in a safe. The Applicant says he declined to sign either agreement.

8 On 7 July 2004, the Applicant sent an email to the head of Remax Australia complaining about Mr Piagno. The Applicant testified that the contents of the email are an accurate summary of what transpired at that meeting. However, in that email the Applicant made no complaint about the matters set out in paragraphs 9 and 10 of his affidavit.

9 The Applicant was asked in examination in chief whether, prior to meeting with Mr Piagno, Ms Gladwin and Mr and Ms Margaretic, any issues were raised with him in a separate meeting with Mr Piagno and Ms Gladwin about his conduct whilst he was employed by Remax Realmark. In particular, he was asked whether any allegations of unprofessional conduct whilst he was employed by Remax Realmark were raised by Mr Piagno. The Applicant denied that any such matters had been raised with him. However, when cross-examined about this issue the Applicant reluctantly conceded that he did have a discussion with Mr Piagno about an incident when he had sworn at a lady on speaker phone whilst he was employed by Remax Realmark.

10 The Applicant says in paragraphs 12 to 16 of his affidavit that after 7 July 2004:

"I continued to appropriately carry out my duties with the Respondent from the time of that meeting until my services were terminated on 8 October 2004 by Mrs Gladwin, without prior warning.

At no stage during my employment with the Respondent did Mrs Gladwin or anyone else involved in the Respondent's management take me to task over my work performance, or warn me with a possible termination of my employment. In July, August and September 2004 I actually led the Respondent's sales team in the value of sales effected through the Respondent's agency. So far as I was concerned, there was nothing to criticise in my work performance.

On the 8 October 2004 I attended the Respondent's office and was filling a sales sheet with Lynn Douglas my Personal Assistant (PA) for a property I had sold the night before in Currambine.

Mrs Gladwin called me into the office and then asked Boyd Nesbitt the sales manager to join us as well.

Mrs Gladwin opened the conversation about email correspondence between Bill Keenan First National and I concerning a deal on property at Edgewater, which she claimed she had not previously seen."

11 The Applicant says in his affidavit that he provided Ms Gladwin with a copy of the email which he had sent to Mr Keenan on 20 September 2004, which made it clear that it had been sent following discussions he (the Applicant) had had with her about the matter. The Applicant says that after reading the copy of this email Ms Gladwin did not deny that they had previously been consulted and said, "Yes, okay". When cross-examined, however, he conceded that he had telephoned Mr Keenan a week before he (the Applicant) was dismissed which was after he sent the email. The Applicant goes on to say in his affidavit that he then brought up the issue of Mr Piagno's complaints about the Respondent poaching staff and Ms Gladwin simply said, "I am sick of it all and I am going to have to let you go".

12 In his affidavit he then says at paragraphs 19, 20, 21 and 24:

"I told Mrs Gladwin that the only reason for her terminating my services was the unrelenting pressure brought to bear on the Respondent by Mr Piagno over the poaching issue. Her only response was to hold up her hands in despair, with the words 'I just can't handle it any more'.

I explained to Mrs Gladwin that she needed a work-performance reason to sack some one. Her only response was to make vague references to my dealings with other agents.

I then told Mrs Gladwin that in every case I was always in the right and that I had never been investigated or had a complaint sent about me to either REBA (Real Estate and Business Agents Supervisory Board) or REIWA. She did not deny this and I told her that my dismissal was unfair and that I would go to the Commission for unfair dismissal. Her only response to this was 'do whatever you want'.

...

Upon my returning home that morning, I rang Mrs Gladwin and told her that if Remax Preferred was prepared to pay me my full entitlements, including compensation for unfair dismissal, I would refrain from going to this Commission. She then indicated that the Respondent was prepared to negotiate and pay me such compensation. Almost immediately after that phone call, I rang Mr Piagno at Remax WA's head office and told him of my dismissal and of my arrangements with Mrs Gladwin regarding compensation."

13 When cross-examined about what Ms Gladwin had said to him when she informed him that his employment was terminated, he said that she had called him into the office, dismissed him and then told him what he was going to be paid. He said that she told him she could not give him a reason why he was being dismissed other than to say, "She was sick of it". He conceded that he did not ask what she was "sick of" but he believed that she terminated his employment because of an alleged dispute between Mr Piagno and Mr Percudani. When cross-examined, the Applicant orally testified that he said to Ms Gladwin, "I won't go to the Industrial Relations Commission if you just pay me my entitlements." He had earlier been asked in cross-examination what he regarded as his "entitlements" and he said that it was all of his commissions. He later said he had an entitlement to expenses for items he had put into the business such as printing, advertising and telemarketing. When asked exactly what Ms Gladwin told him he said, "Lorna had said that I would be paid everything I was owed." He then said that she agreed to pay him his commission and expenses.

14 The Applicant says he spoke to Ms Gladwin about two weeks after his employment was terminated and that she informed him she would ask the Respondent's accountant, Jackie Jones, to calculate his expenses and commission and that he would be paid. The Applicant says that he did not hear from Ms Gladwin so he subsequently contacted Ms Jones.

15 In the Applicant's affidavit he says in paragraphs 25, 26 and 27:

"In the weeks that followed the termination of my employment, I was advised by Mrs Gladwin by phone that some key Realmax [sic] Preferred staff whose help was needed to calculate my commission and expenses were on leave or ill, and at one stage she also told me that the Respondent had terminated the services of its accountant Jackie Jones. Mrs Gladwin

assured me that though those problems were postponing the finalisation of the compensation package, the Respondent was still committed to that task. I relied on those repeated assurances to refrain from commencing unfair dismissal proceedings.

I telephoned the Respondent most work days to monitor developments and to press for finalisation of the issue. In all, I made 49 calls to her office from 8 October 2004 and 13 December 2004. During most of those calls, Mrs Gladwin continued to reassure me of the Respondent's intention was unchanged in wanting to finalise the compensation package. Annexed hereto marked "C" is my phone bill record of those calls, highlighted where relevant. Mrs Gladwin's office phone number is 9309 3911. Her mobile number is 0411 428 160; her sales manager's number is 0422 807 400. On one occasion I spoke to Accounts person Jackie Jones, who advised that Mrs Gladwin was on sick leave.

In late November 2004, Mrs Gladwin told me that provisional figures for the compensation package had been prepared and that she had sent them to a lawyer for his advice as to whether the Respondent should make the payout. Following that discussion I came to the conclusion that negotiations with the Respondent were not likely to be fruitful, and that it had become necessary to seek the intercession of the Commission. I then drafted the present application."

16 The Applicant's telephone records from early October 2004 until mid December 2004 are annexed to the Applicant's affidavit. In his oral evidence the Applicant testified that he spoke to Ms Gladwin about three or four times on the office telephone and three times he spoke to her on her mobile telephone. When further cross-examined, he said he spoke to her three or four times after he was dismissed (*Transcript page 36a*). The Applicant's mobile telephone records record that the Applicant spoke to Ms Gladwin on her mobile telephone on three occasions after his employment was terminated. The first occasion was on 16 October 2004 and the second was on 21 October 2004. The records also indicate that two days after he filed the application in the Commission on 22 November 2004, he spoke to her again on her mobile telephone.

17 When cross-examined about how many times he had spoken to Ms Gladwin after his employment was terminated about outstanding commission payments and expenses, he said that they only spoke about payment of commission. However, he maintains that about two weeks after he was terminated he sent to Ms Gladwin a document which set out the expenses he claims are owing. Attached to his application is a copy of a document titled "Expenses Start date 6 June 04 Finish date 8 October 04", in which the Applicant claims $5,575.75 for letterheads, cards, laser cartridges, personal assistant, website, flyers, MYOB, telemarketing, folders and distribution.

18 The Applicant maintained in his evidence that he should have been paid commission on each of the outstanding properties sold by him within 48 hours of their settlement. It was put to him in cross-examination that Remax's practice is to pay real estate agents their commissions on the 1st and 15th day of each month. The Applicant agreed that condition applied to employees but said that he was not an employee when he received the payments. The Applicant did not produce any evidence to support his contention that he should be paid within 48 hours of settlement. He conceded that at least one property had not settled prior to him filing the application in the Commission.

19 The Applicant maintained in his evidence that if Ms Gladwin had paid him all his entitlements he would not have filed his application and that would have been the end of the matter.

20 When asked when he obtained the Form 1 to file in the Commission, the Applicant said that he obtained the papers to file in the registry about two weeks after his employment was terminated but he did not read the documents because he expected, at that particular point in time, to be paid all his entitlements.

21 A number of complaints which had been made about the Applicant whilst he was employed by the Respondent were put to the Applicant in cross-examination. The Applicant said that in relation to each one of those matters he was not at fault. He agreed that he provided written explanations to Ms Gladwin in relation to those incidents. He also agreed that a few days after his employment was terminated, on 11 October 2004, he sent an email to Ms Gladwin in which he summarised a number of incidents in relation to conflicts he had with clients or other real estate representatives employed by other real estate firms. When cross-examined about the tenor of the email he made it plain that he regarded persons who work in the real estate industry very poorly.

22 The Applicant said that his experience in the real estate industry and the conduct of Ms Gladwin in dismissing him was the "last straw" and he had decided not to seek work in the industry. He is again in receipt of his war veteran pension for total and permanent incapacity. He said that he has had relapses of his post traumatic stress syndrome and he has problems with his heart. Consequently, he has been unable to seek alternative employment because of his health.

23 The Applicant says that he is not aware of any material prejudice to the Respondent if the time for filing an unfair dismissal claim is extended but on the other hand he says it would be unfair to him if he was precluded by the expiry of the time limit from bringing proceedings for unfair dismissal because he was lulled by Ms Gladwin's assurances into believing that negotiations between the parties would make such proceedings unnecessary. He says that bringing such proceedings while negotiations were continuing would have been counterproductive to an amicable settlement.

The Respondent's Evidence

24 Lorna Gladwin is the Respondent's principal and is a Director of the Respondent. She testified that the Applicant approached the Respondent's licensee, Linda Tripcher, to seek employment. She says that the engagement of Mr and Ms Margaretic was not connected to the decision to employ the Applicant as the negotiations with Mr and Ms Margaretic occurred some months prior to any discussion with the Applicant about employment.

25 Ms Gladwin says that shortly after the Applicant commenced employment with the Respondent, Mr Piagno, the Operations Manager of the franchise Remax Western Australia, had a meeting with her and the Applicant to discuss concerns Mr Piagno had about the Applicant's unprofessional behaviour when he was employed by his previous employer, Remax Realmark. She says that she had been unaware of any issues that had arisen in relation to the Applicant whilst employed by Remax Realmark prior to this meeting. Ms Gladwin testified that Mr Piagno told the Applicant that if he did not behave himself he would not be able to work for Remax anywhere. Ms Gladwin says that it was apparent from the meeting that there was significant aggravation between the Applicant and Mr Piagno and there was no acceptance by the Applicant in relation to any concerns expressed by Mr Piagno. Ms Gladwin testified that the Applicant did not respond to Mr Piagno's comments very well but he remained reasonably controlled.

26 Ms Gladwin says that she provided the Applicant with one copy of a workplace agreement to sign but he did not sign it. She said that he was not provided with more than one document.

27 Ms Gladwin testified that at the meeting with Mr Piagno, the Applicant, herself and Mr and Ms Margaretic, there was a discussion regarding the desk fees which were payable by real estate representatives employed by the Respondent. When cross-examined she maintained that the issue was raised but it was not a big issue because the Respondent was only required to pay the franchisor a flat fee from representatives' commissions. Further, that the setting of the desk fee by each franchisee is discretionary. She says that no part of the desk fee is payable to the franchisor. She conceded, however, that Mr Piagno was

concerned that she was undercutting other franchisees because she was charging a lesser amount for a desk fee than other franchisees. She says that the suggestion by the Applicant in his affidavit that Mr and Ms Margaretic and the Applicant were required to lie to Mr Piagno is refuted and is a mischievous attempt to attribute deceptive conduct to herself and the Respondent. In relation to the email the Applicant forwarded to Remax Australia, she said that this email was sent despite her request to the Applicant that he not take the matter any further. She also says in relation to that email it does not accurately represent the discussion between the parties at the meeting.

28 Ms Gladwin said in the months subsequent to the meeting in July 2004, it became apparent that the Applicant's aggressive, antagonistic and abusive approach was not consistent with the ethos of the Respondent nor the franchisor. Further, it was apparent to her that the concerns expressed by Mr Piagno had not been taken on board by the Applicant as his conduct did not improve.

29 Ms Gladwin referred in her affidavit to a number of complaints she received prior to his dismissal from real estate principals of other firms in relation to his conduct. She says on each occasion when she received a complaint she asked the Applicant to provide a written explanation. Annexed to her affidavit are copies of a number of statements by the Applicant in which the Applicant provided Ms Gladwin with explanations in relation to complaints received by her.

30 Ms Gladwin says that the Applicant was counselled in relation to his practice and approach almost daily by the Respondent's Sales Manager, Boyd Nesbitt, and by herself on numerous occasions. She said that the Applicant did not see himself as being in the wrong at any time and showed an unwillingness to follow directions in resolving disputes. Mr Keenan, the principal of First National Real Estate, telephoned her a couple of days prior to her dismissing the Applicant. She said that the Applicant had continued a dispute which had been running with First National Real Estate for a few months. Mr Keenan's complained that the Applicant had telephoned the office on numerous occasions and abused his receptionist. Mr Keenan also complained to Ms Gladwin that the vendor in relation to the disputed matter was terrified of the Applicant as he had been loud and abusive with her in her own house in the presence of a young child. After Ms Gladwin received this complaint from Mr Keenan, she says that she was left with no alternative but to terminate his employment with the Respondent as soon as possible.

31 Ms Gladwin testified that the Applicant was not terminated because of alleged "unrelenting pressure brought to bear on the Respondent by Mr Piagno over the poaching issue". She says there were no discussions about any poaching issue, as she had not "poached" the Applicant. She also denied that she had ever made any statement to the Applicant that she would be prepared to pay his full entitlements including compensation for unfair dismissal. She said that at no stage did she have any intention to make "any compensation to the Applicant". She says that he had done damage to her business and in her view his termination was not only justified but imperative.

32 Ms Gladwin also says there were no representations made by her organisation or herself that could in any way suggest to the Applicant that he would receive anything other than the share of commissions to which he was entitled and in fact he received. She said it was not her intention nor did she relay to the Applicant that he would receive anything other than his entitlements in that regard. Annexed to her affidavit is a copy of profit share statements which indicate that commission payments were made to the Applicant on 15 October 2004 and 1 December 2004. Ms Gladwin also testified that she made no arrangement with the Applicant to reimburse him for "expenses". She said it is a requirement of the REIWA code that unless there is an agreement in writing a real estate representative is not to be reimbursed for expenses. She said the first time she saw a claim for expenses by the Applicant is when she received a copy of his affidavit (application).

33 Ms Gladwin said the only occasion the Applicant spoke to her after his employment was terminated was when he sought her assistance in relation to providing a letter to assist him to obtain a pension. Annexed to her affidavit is a copy of a letter written by Ms Gladwin to the Department of Veteran Affairs dated 26 October 2004. When asked about the Applicant's mobile phone records which record that the Applicant telephoned her mobile telephone on 16 October 2004 and 21 October 2004, she said that she could only recall one conversation. Further, she says she did not recall speaking to the Applicant on 24 November 2004.

34 Mr Duro Margaretic is employed as a real estate representative by the Respondent. He testified that he was a friend of the Applicant until very recently. Mr Margaretic conceded that he had received numerous telephone calls from the Applicant since his employment was terminated about the progress of settlement of properties sold by the Applicant. Mr Margaretic works out of a home office. He said that when he received those telephone calls from the Applicant, he received them either on his landline at home or on his mobile telephone.

35 It is common ground that after the Applicant's employment was terminated Mr Margaretic took over the Applicant's sales. Their friendship came to an end sometime in early March 2005, after he received a copy of the affidavit filed by the Applicant in this matter. He telephoned the Applicant the next day about the affidavit and told the Applicant there were matters in his affidavit which he (Mr Margaretic) considered to be untrue and says that the Applicant responded by becoming abusive. Mr Margaretic says that he told the Applicant that he never wants to speak to him again and ended the call.

36 Mr Margaretic says that at the meeting that he and his wife attended with Ms Gladwin, Mr Piagno and the Applicant, whilst there was a discussion about the desk fee being below Remax Australia's recommended schedule, the misconduct attributed by the Applicant in his affidavit to Ms Gladwin did not occur and the matter was resolved with Mr Piagno agreeing that the reduced desk fee was appropriate. He, however, conceeded when cross-examined about that meeting, Mr Piagno was very aggressive. Mr Margaretic testified that Mr Piagno asked why Mark Whiteman, the Chief Executive Officer of Ray White Real Estate in WA, knew exactly what package he (Ms Margaretic) was on at Remax. Mr Margaretic said that he did not realise the terms of the remuneration package were confidential. Mr Margaretic then testified:

> "… Mr Whiteman, according to Mr Piagno, Mr Whiteman phoned Mr Piagno and he said to him along the lines, 'Oh, I believe, yes, the Margaretics have gone but I believe there's – –' and I remember these words, '– – competition from within'. That's the competition between the two Re/Max offices, Mr Percudani's and Ms Gladwin's as to which one was ultimately going to employ the services of my wife, Dorina, and myself." (*Transcript page 60*)

37 Mr Margaretic then went on to say that Mr Piagno was very offended that this information got out. Mr Margaretic, however, said that there were no issues raised at the meeting about "poaching" of staff as far as the Applicant was concerned.

38 Mr Margaretic testified that he is aware of "numerous problems" the Applicant had with clients and fellow real estate agents within the industry prior to his commencement of employment with the Respondent and during his employment with the Respondent.

Legal Principles

39 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."

40 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."

41 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

42 Having considered all the evidence, 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. Whilst special circumstances are not necessary, I am not 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 for the delay which makes it inequitable to so extend.

43 Whilst the Respondent concedes that the Applicant may be able to make out a case on the merits that he was unfairly dismissed, in my view it is clear by the criteria set out by Marshall J that the merits of a substantive application is only one factor that can be taken into account in determining whether to grant an extension of time.

44 It is common ground between the parties that there is no prejudice raised by the Respondent which is caused by the delay in filing the application.

45 Having heard the evidence, I am not satisfied the Applicant has provided an adequate explanation of his delay in making a claim as I did not find him to be a credible witness.

46 The Applicant's telephone records indicate that he contacted the Respondent's office on a number of occasions shortly before he filed his application in the Commission on Monday, 22 November 2004. The Applicant's telephone records reveal he telephoned Mr Nesbitt, the Respondent's sales manager, on nine occasions on his mobile telephone and the Respondent's office landline on 25 occasions. In particular, the records indicate that he telephoned the Respondent's office on Friday, 12 November 2004, Thursday, 18 November 2004, and at 12:14 pm Monday, 22 November 2004. The application was filed on 22 November 2004 at 1615 hrs. Although the Commission's records record the Applicant paid the filing fee at 1224 hrs. Prior to the filing of the application the Applicant's telephone records reveal that he telephoned Ms Gladwin twice on her mobile telephone, once on 16 October 2005 for 78 seconds, the other on 21 October 2005 for 1 minute and 50 seconds. The letter to the Department of Veteran Affairs was dated 26 October 2004. The Applicant gave no evidence about what he discussed with Mr Nesbitt on any occasion. The Applicant says that if he had been paid his commissions and expenses he would not have filed his application. However, he was paid his commissions following the settlement of properties on 15 October 2004 and on 1 December 2004. I did not find the Applicant's evidence about how many times he spoke to Ms Gladwin after his dismissal satisfactory. His evidence in relation to this issue in his affidavit was different from his oral evidence in chief and he departed from his evidence in chief when cross-examined. Also I did not find other aspects of evidence satisfactory. His version of the two meetings on 7 July 2004 in chief was inconsistent with the concession he reluctantly made in cross-examination. Further, his evidence in relation to both meetings is inconsistent with the contents of the email.

47 The evidence establishes that the Applicant received a blank Form 1 from the Western Australian Industrial Relations Commission within two weeks of his employment being terminated. The form makes it plain that generally claims alleging unfair dismissal must be lodged within 28 days of termination of employment and if the claim is filed more than 28 days after termination of employment the Commission requires further information to be provided to be satisfied that it would be unfair not to accept the claim outside that time frame. The Applicant says he did not read the Form 1 when he received the document. At the time he received the form time for bringing an application under s 29(1)(b)(i) had not expired.

48 The Applicant's evidence at the highest is that Ms Gladwin informed him on the telephone on the day he was terminated that she would pay him compensation for unfair dismissal. His evidence given in his affidavit is however inconsistent with his oral evidence on his point. Further, the evidence in his affidavit is inconsistent with his evidence that during the discussions he had with Ms Gladwin after his employment was terminated, he only spoke to her once about payment of expenses and on all other occasions he spoke to her about the payment of his commissions. Consequently, I have formed the opinion that there is no reliable evidence before this Commission that the Applicant was negotiating a settlement in relation to a claim for unfair dismissal after the date of the termination of his employment to anytime prior to filing the application. In any event, when

cross-examined about what was said by Ms Gladwin on the day his employment was terminated, he said that she agreed to pay him all his "entitlements", which meant to him all his outstanding commissions and expenses. The Applicant made no mention in cross-examination that in using the word "entitlements" Ms Gladwin had expressly agreed to pay him an amount in settlement of a claim for compensation for unfair dismissal. Nor did he orally testify that she expressly told him she would pay him his expenses and compensation for unfair dismissal. His oral evidence at the highest is that she agreed to pay him his "entitlements".

49 In addition there is no evidence before the Commission that the Applicant had an "entitlement" to all of the expenses he says he has an entitlement to. Pursuant to s 101 of the *Real Estate and Business Agents Act* and regulation 13 of the *Real Estate and Business Agents (General) Regulation 1979,* the Real Estate and Business Agents Supervisory Board is empowered to make a Code of Conduct for agents and sales representatives. Clauses 1 and 15(2) of the Code of Conduct prohibits a real estate representative seeking reimbursement of an expense incurred in respect of advertising, signboards, printed material and promotions unless:

(a) the principal has agreed in writing to pay the expenses;

(b) the agreement specifies a maximum amount which the agent may seek or retain by way of reimbursement; and

(c) the maximum amount is stated on the agreement and has been initialled by the principal.

50 For the reasons set out above I will make an order dismissing the Applicant's claim under s 29(1)(b)(i) of the Act.

2005 WAIRC 01185

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL WILLIAM MCQUEEN
	APPLICANT
	-v-
	ELOUSE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 12 APRIL 2005
FILE NO/S	APPL 1525 OF 2004
CITATION NO.	2005 WAIRC 01185

Result	Order made to substitute the Respondent's name.
Representation	
Applicant	Mr G G Wells (of counsel)
Respondent	Mr J Sicard (of counsel)

Order

Having heard Mr Wells of counsel on behalf of the Applicant and Mr Sicard 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 name of the Respondent be deleted and that be substituted therefor the name, Elloise Pty Ltd trading as Remax Preferred.

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

2005 WAIRC 01414

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL WILLIAM MCQUEEN
	APPLICANT
	-v-
	ELLOISE PTY LTD TRADING AS REMAX PREFERRED
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 5 MAY 2005
FILE NO/S	APPL 1525 OF 2004
CITATION NO.	2005 WAIRC 01414

Result	Section 29(1)(b)(i) application dismissed
Representation	
Applicant	Mr G G Wells (of counsel)
Respondent	Mr M J Sicard (of counsel)

Order

HAVING heard the Mr Wells, of counsel on behalf of the Applicant and Mr Sicard, 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 s 29(1)(b)(i) application be and is hereby dismissed.

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

2005 WAIRC 01168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARGARET MINOUGHAN
	APPLICANT
	-v-
	TYCO MOTION AND CONTROL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 12 APRIL 2005
FILE NO.	APPL 1679 OF 2004
CITATION NO.	2005 WAIRC 01168

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Date of termination - Application referred within 28 day time limit - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) (2) & (3)
Result	Application within 28 day time limit.
Representation	
Applicant	Mr T Pass (of counsel)
Respondent	Ms K Coroneos and Mr S Ronayne

Reasons for Decision

1 On 24 December 2004 Margaret Minoughan ("the applicant") referred an application to the Commission pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively and unfairly dismissed on 13 October 2004 by Tyco Motion and Control ("the respondent"), even though the applicant ceased employment with the respondent on 21 January 2005. The respondent argues that the applicant was terminated on 15 October 2004 and therefore opposes this application being accepted by the Commission.

Background

2 It was not in dispute that the applicant commenced employment with the respondent in January 2002 as a service coordinator and that the applicant's most recent written contract of employment was signed on or about 13 December 2002 (Exhibit A1).

3 On 14 October 2004 the respondent advised the applicant that her role was being restructured and replaced with a new position. The applicant was advised at the time that the respondent would retrain the applicant to work in the new position. As the applicant did not believe that she could be re-trained to meet the expectations of the new position the applicant declined the respondent's offer of training. As a result the respondent advised the applicant that she would be terminated from her position as a service coordinator as at 15 October 2004. The applicant and the respondent then agreed that the applicant would continue her employment with the respondent on a full-time casual basis for approximately four weeks, to train the employee who was employed in the new position. After this employee was found to be unsuitable the applicant commenced training another employee for the new position commencing on 7 December 2004. When the applicant ceased undertaking this role, and by agreement between the applicant and the respondent, the applicant was allocated other duties with the respondent. Throughout this period the applicant accessed regular outplacement assistance which was provided at the respondent's expense. The applicant stated that her relationship with the respondent deteriorated after the respondent became aware that this application was lodged and on 21 January 2005 the applicant resigned from her employment with the respondent.

4 In the first instance I am required to determine the date that the applicant ceased employment with the respondent. I find on the evidence before me that the employment relationship between the parties continued on an ongoing basis after 15 October 2004 by agreement between the applicant and the respondent until the applicant resigned on 21 January 2005. Even though the applicant's position with the respondent changed in October 2004, I find that at the time there was a consensual variation of the applicant's contract of employment with the respondent. It is therefore my view and I find that the applicant was not terminated on 15 October 2004 as she did not cease employment with the respondent until 21 January 2005. It follows that this application was not lodged outside of the required timeframe for lodging an application claiming unfair dismissal. In reaching this view I note that there is nothing in the Act which prevents an employee from lodging an application for unfair termination whilst remaining employed by the respondent to that application (see s29 of the Act).

5 If I am wrong in reaching this view (which I do not concede) I am required to determine whether or not it would be unfair not to allow this application under s29(3) of the Act.

6 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 24 December 2004 if the applicant was terminated on 15 October 2004 it is 44 days out of the required timeframe for lodging a claim of this nature.

7 The matter was listed for hearing to allow the parties to put submissions and 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."

8 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 in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, 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."

9 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.

Applicant's evidence

10 The applicant gave evidence that she was advised on 14 October 2004 that her position was being made redundant and that a new position was to be created involving significantly different skills and duties to her existing position. As the applicant did not believe that she could be retrained into this position she accepted that it was inappropriate for her to take on the new position and on this basis the applicant agreed to cease working in her existing position. The applicant stated that she trained the first person employed in the new position for approximately four weeks to undertake the same duties that she previously undertook and trained the next employee who commenced in the new position on 7 December 2004 in a similar manner. The applicant stated that after training the second employee for the new position for a period of two weeks she came to the view that the duties required of the new position were no different to the duties of her former position and she could not understand why she was not advised of this when she was offered training to take on the new position on 14 October 2004. As a result the applicant believed that she was unfairly treated by the respondent and therefore lodged this application. The applicant also claimed that an alternative position within the respondent's organisation as a receptionist became available after October 2004 and was not offered to her.

Respondent's evidence

11 The respondent's service manager Mr Stephen Marks commenced employment with the respondent on 1 November 2004. Mr Marks stated that the person currently in the position of service administrator is required to undertake a wider range of duties and additional tasks than the duties and tasks previously undertaken by the applicant and Mr Marks gave a number of examples of these additional duties and tasks. Mr Marks stated that the current role of the service administrator has changed over time and the duties required of the person employed in this position will change in the future.

Submissions

12 The applicant maintains that even though she resigned on 21 January 2005 she was constructively dismissed. If the Commission finds that the applicant was terminated on 15 October 2004 the applicant argues in the alternative that this application should be allowed. The applicant argues that her claim has merit as the duties required of the new position did not change after 15 October 2004 even though the respondent claimed a new position with different duties and tasks had been created and the applicant maintains that there was an acceptable reason for the delay in lodging this application as the applicant was unaware until the middle of December 2004 that the new position was no different to the applicant's previous position. The applicant also relies on the respondent's concession that it will suffer no disadvantage in allowing this application.

13 The respondent argues that the applicant was terminated on 15 October 2004 due to a genuine redundancy situation and the only reason the applicant was employed by the respondent after 15 October 2004 on a casual basis was to provide training to the two employees working in the new position in the tasks the applicant had undertaken. The applicant was also retained to assist her in finding other employment through an outplacement service however, the applicant resigned of her own accord on 21 January 2005. The respondent concedes that it will not suffer any disadvantage if the application proceeds.

Findings and conclusions

14 On the evidence currently before me it is my view that there could well be merit to the applicant's claim that she was treated unfairly when she ceased employment in her existing position in October 2004. I find that the manner in which the applicant was removed from the position of service coordinator could well be in breach of the requirements on the respondent under the *Minimum Conditions of Employment Act 1993*. Even though the applicant was offered retraining to take on the new position discussions about other alternatives to termination and measures that could be taken to ameliorate the impact of the redundancy on the applicant do not appear to have taken place. On the limited information currently before me and given that the applicant was the person training the new employees for the new position it could also be the case that there is merit to the applicant's claim that the duties required of the new position may not have been vastly different to the requirements of her previous position.

15 I find that the applicant has an acceptable reason for the delay in lodging the application as I accept that the applicant did not become aware until the middle of December 2004 that the duties of the restructured position were similar to the duties she previously undertook.

16 Even though the applicant did not contest being removed form her existing position as at 15 October 2004 I accept that at the time the applicant believed that she was unable to fulfil the requirements of the restructured position based on information given to her by the respondent.

17 As the respondent does not claim that it will suffer any prejudice if the Commission allows this application I therefore find that there is no prejudice to the respondent in allowing this application apart from the normal disadvantage associated with meeting a claim of unfair termination.

18 As I have found that there is an acceptable reason for the delay in lodging this application, there is sufficient to establish that the applicant has an arguable case and the respondent will not be prejudiced in allowing this application, it is my view that in all of the circumstances it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application**.**

19 In any event, as I have found that this application was lodged within the required time frame this application will now be dealt with in the usual manner.

20 A declaration will now issue to that effect.

2005 WAIRC 01227

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARGARET MINOUGHAN
	APPLICANT
	-v-
	TYCO MOTION AND CONTROL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 15 APRIL 2005
FILE NO.	APPL 1679 OF 2004
CITATION NO.	2005 WAIRC 01227

Result	Declaration issued

Declaration

HAVING HEARD Mr A W Pass of counsel on behalf of the applicant and Ms K Coroneos and Mr S Ronayne on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby declares:

THAT this application was lodged within the 28 day time limit.

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

2005 WAIRC 01399

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOE O'KEEFE
	APPLICANT
	-v-
	CITY OF ALBANY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 3 MAY 2005
FILE NO.	APPL 1086 OF 2004
CITATION NO.	2005 WAIRC 01399

Catchwords	Contractual benefit claim – Claim for a benefit arising under a provision in the *Local Government Act 1995* – Preliminary point **–** Jurisdiction to deal with claim – Jurisdiction found - Industrial Relations Act 1979 (WA) s 29(1)(b)(ii); Local Government Act 1995 Schedule 2.1
Result	Application is within jurisdiction in part
Representation	
Applicant	Mr J O'Keefe
Respondent	Mr D Jones (as agent)

Reasons for Decision

1 This is an application by Joe O'Keefe ("the applicant") against the City of Albany ("the respondent") claiming that he is owed benefits under his contract of employment with the respondent pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The respondent denies that the applicant is due any benefits under his contract of employment. The respondent also raises a preliminary issue that the Commission should not deal with this application as the Commission was functus officio in relation to the applicant's claim that he be re-instated and the respondent argues the Commission does not have jurisdiction to deal with the applicant's claim that he is owed $80,000.00.

2 As the issue of jurisdiction and the Commission's ability to deal with this application was raised by the respondent the parties were asked to file written submissions on this issue. After submissions were lodged a hearing took place to further clarify each party's position in relation to this application as the Commission was advised that the applicant had previously unsuccessfully

applied to the Commission in 1998 to be re-instated to his former position with the respondent (see *Joe O'Keefe v City of Albany* [2000] 80 WAIG 655 - "the previous matter").

The Claim

3 By way of background the applicant is claiming that he has been denied the benefit of being employed for a period of two years as a Senior Planner which was his former position with the respondent and is therefore seeking re-instatement to this position for a period of two years. In the alternative the applicant is claiming that the equivalent of two years wages as a Senior Planner ($80,000) is due to him. The applicant claims that he is due these entitlements arising from the *Local Government Act 1995* ("the LG Act") (specifically s11(4) of Schedule 2.1 of the LG Act) which the applicant claims was implied into his contract of employment at the time of his termination at the end of 1998.

Submissions

4 The respondent argues that as the issue of the applicant's re-instatement to his former position was dealt with by the Commission in the previous matter the Commission is therefore functus officio in relation to this aspect of the applicant's claim. The respondent claims that in the previous matter the Commission determined that it was inappropriate to order that the applicant be re-instated or that the applicant was due compensation for lost wages as a result of his termination as the Commission found that the applicant was subject to two fixed term contracts, the last of which ceased on 31 December 1998 and that at termination the applicant was paid up to the cessation of his last fixed term contract with the respondent. The respondent also argues that as the Commission found that the applicant's contract of employment with the respondent expired on 31 December 1998 in the previous matter (even though the applicant was terminated prior to this date) the applicant is unable to claim that he is due $80,000.00 by way of compensation.

5 The respondent claims that the applicant cannot rely on the provisions of Schedule 2.1 in the LG Act in support of his claims as there was no change to the applicant's contract of employment with the respondent brought about by the amalgamation of the two local government authorities in Albany in July 1998.

6 The respondent claims that in any event the Commission does not have the power to entertain the applicant's claim that he is owed $80,000 by virtue of s11(4) of Schedule 2.1 of the LG Act as the Commission has no power to enforce the provisions of this act nor is the Commission able to enforce the provisions of the *Local Government Officers' (Western Australia) Award 1988* ("the Award") which formed part of the applicant's terms and conditions of employment when he was employed by the respondent, as such functions can only be exercised by courts of competent jurisdiction. The respondent also argues that as the provisions of the Award and/or the LG Act did not form part of the applicant's express contract of employment then such provisions cannot be pursued as a benefit under s29(1)(b)(ii) of the Act (see *Byrne and Frew v Australian Airlines Ltd* [1995] 185 CLR 410).

7 The applicant maintains that the Commission has jurisdiction to deal with his application even though he is seeking reinstatement or in the alternative the equivalent of two years wages as a Senior Planner ($80,000) as s11(4) of Schedule 2.1 of the LG Act entitles him to these benefits. The applicant maintains that as his last contract of employment with the respondent was terminated after the Shire of Albany and the Town of Albany amalgamated on 1 July 1998 and because he was demoted as a result of this amalgamation then he is entitled to be paid the monies he is claiming.

8 The applicant also argues that as the issue of benefits due to him under his contract of employment with the respondent was not argued nor determined by the Commission in the previous matter then the Commission as currently constituted has the power to deal with his claim.

Findings and Conclusions

Does the Commission have the power to order that the applicant be reinstated to the position of Senior Planner with the respondent as a benefit due to him under his contract of employment?

9 On the information before me it is my view that the Commission does not have the power to deal with the applicant's claim for reinstatement to the position of Senior Planner with the respondent. When the applicant sought re-instatement to his former position in the previous matter the Commission determined that re-instating the applicant was not appropriate as the applicant was employed pursuant to an agreed fixed term contract of employment which was to cease on 31 December 1998. In my view nothing has been raised in this application to go behind this decision.

10 Furthermore, even if s11(4) of Schedule 2.1 of the LG Act is implied into the applicant's contract of employment, it does not provide for an employee to be re-instated to his or her former position if terminated due to an amalgamation of local government districts.

11 Section 11(4) of Schedule 2.1 of the LG Act, which outlines a number of provisions relevant to creating, changing boundaries and abolishing local government districts, is as follows:

> "(4) A contract of employment that a person has with a local government is not to be terminated or varied as a result (wholly or partly) of an order under section 2.1 so as to make it less favourable to that person unless –
>
> (a) compensation acceptable to the person is made; or
>
> (b) a period of at least 2 years has elapsed since the order had effect."

12 This section provides that an employee be compensated on the basis of an amount acceptable to the person concerned unless an employee has had the benefit of a period of two years employment after the amalgamation took effect (that is from July 1998 to July 2000). This section does not guarantee that an employee remain in his or her pre-existing position after an amalgamation has taken place and does not provide for an employee to be re-instated to his or her former position some years after being terminated. It provides that an employee of a local government is not to be terminated or their contract of employment varied unless a period of two years has elapsed since the amalgamation, which in this case was July 2000, or compensation acceptable to the person is made. In the circumstances I accept the respondent's argument that the Commission is unable to deal with the applicant's claim of re-instatement and that the Commission is effectively functus officio in relation to this part of the applicant's claim.

Does the Commission have jurisdiction to order that the applicant be paid $80,000 as a benefit due to him under s11(4) of Schedule 2.1 of the LG Act ?

13 As an alternative to re-instatement the applicant maintains that the Commission has jurisdiction to award him $80,000 which is due to him as an over award entitlement under his contract of employment by virtue of s11(4) of Schedule 2.1 of the LG Act being an implied term of his contract of employment with the respondent.

14 One of the intentions of the LG Act is to provide 'a framework for the administration and financial management of local governments and for the scrutiny of their affairs' (s1.3) and within this framework it provides for compensation of an amount

acceptable to a person if an employee's contract of employment is terminated or varied as a result (wholly or partly) of an order under s2.1.

15 Clearly jurisdiction is expressly conferred on this Commission to make orders for the payment of contractual benefits (see s23 and s29(1)(b)(ii) of the Act) and to deal with an entitlement to an implied term of an employee's contract of employment. The limitation on this is that the claim does not relate to a federal or state award or agreement entitlement, or an entitlement conferred by an Act (such as the *Minimum Conditions of Employment Act 1993*) over which the Industrial Magistrate's Court has exclusive jurisdiction. I understand that the applicant is not arguing that he be paid a benefit arising from a federal award or federal agreement which the Commission has no power to deal with in any event and I am unaware of any provision in the Award, which covered the applicant's employment when he was employed by the respondent, that incorporates the entitlement that the applicant is claiming. I am also unaware that the enforcement of the requirements of s11(4) of Schedule 2.1 of the LG Act can be exclusively dealt with by one court and there is no provision in the Act which enables the Industrial Magistrate's Court to enforce an implied or express provision of an employee's contract of employment arising from s11(4) of Schedule 2.1 of the LG Act.

16 It is therefore my view and I find that as the applicant is claiming a benefit arising under the LG Act which is not a benefit under a federal or state award or agreement then the Commission has jurisdiction to deal with this application. In reaching this view I also note that the provisions of an act can be implied into an employee's contract of employment (see *Garbett v Midland Brick Co Pty Ltd* [2003] 83 WAIG 893).

17 I note that in the previous matter the applicant was found by the Commission to be subject to two fixed term contracts, the last of which ceased on 31 December 1998. However, I do not have sufficient information before me to determine whether or not the applicant's employment with the respondent was not caught by the provisions of s11(4) of Schedule 2.1 of the LG Act given that the applicant was terminated after the Town of Albany and Shire of Albany amalgamated in July 1998 and nor is it clear on the information before me whether or not the applicant was demoted as a result of the amalgamation in July 1998.

18 As the respondent has not demonstrated that the Commission does not have jurisdiction to deal with the applicant's claim that he is due a payment of $80,000.00 under his contract of employment with the respondent pursuant to s29(1)(b)(ii) of the Act I will hear further from the parties in relation to this part of the applicant's claim.

19 An order will now issue in relation to the above matters.

2005 WAIRC 01481

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOE O'KEEFE
	APPLICANT
	-v-
	CITY OF ALBANY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 10 MAY 2005
FILE NO/S	APPL 1086 OF 2004
CITATION NO.	2005 WAIRC 01481

Result Application is within jurisdiction in part

Declaration

HAVING HEARD Mr J O'Keefe on his own behalf 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:

DECLARES THAT the application in so far as it relates to a claim for payment of a benefit under the *Local Government Act 1995* is within jurisdiction.

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

2005 WAIRC 00841

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN SCHARENGUIVEL
	APPLICANT
	-v-
	MOTORGUARD PTY LTD T/AS MIDAS CANNINGTON
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 5 APRIL 2005
FILE NO.	APPL 1088 OF 2004
CITATION NO.	2005 WAIRC 00841

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Procedural and substantive fairness - Applicant unfairly terminated - Compensation for loss ordered - *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 $3,548.40 net.
Representation	
Applicant	In person
Respondent	Mr G T Miller (as agent)

Reasons for Decision

1 Adrian Scharenguivel ("the Applicant") claims that he was harshly, oppressively and unfairly dismissed on 30 July 2004 by Motorguard Pty Ltd trading as Midas Cannington ("the Respondent"). The Applicant makes the claim under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). At all material times the Respondent owned two Midas franchises, one at Cannington and one at Welshpool.

2 The Applicant was employed as the Manager of the Respondent's Cannington shop on 29 March 2004. The Applicant had previously been employed by the franchisor Midas Australia as a store manager at Osborne Park. The Applicant was dismissed by Midas Australia on 19 March 2004 when he took unauthorised leave from 21 March 2004 until 25 March 2004. The Applicant had travelled to Adelaide after winning a prize for purchasing stock from a supplier. The Applicant disputed his dismissal. He says that he had been given authority to go on the trip by one of the State Managers. The Applicant brought a claim for unfair dismissal in relation to termination of his employment by Midas Australia and the matter was settled at a conference before this Commission.

3 Richard Rust, the Manager of the Respondent's Welshpool store, heard that the Applicant had left the employment of Midas Australia. He contacted the owner of the Respondent's business, Mr John Weatherall, and they decided to offer the Applicant the job of manager of the Respondent's Cannington shop because the Applicant had a reputation as a very good salesman. At all material times Mr Weatherall was located in Queensland. It is common ground that Mr Weatherall from time to time regularly visited Western Australia. Mr Weatherall came to Perth once a week or once a month and that the Applicant sent Mr Weatherall the daily sales figures for the Cannington shop each day by facsimile.

4 The Applicant says that whilst he was employed by the Respondent he got on well with all the Respondent's employees at the Cannington shop and with Mr Rust who was his immediate supervisor. The Applicant also says that Mr Weatherall was very happy with his performance. In particular his pay had been increased shortly prior to the termination of his employment and Mr Weatherall had paid him bonuses.

5 A few weeks before the Applicant's employment was terminated Mr Weatherall appointed his professional assistant, Ms Heather Gangell, to review the Respondent's operations at both the Cannington and Welshpool shops. The Applicant says that he had a clash of "personalities" with Ms Gangell which resulted in him being summarily dismissed on 30 July 2004.

6 The Respondent filed a very detailed Notice of Answer and Counter Proposal in which a number of allegations were set out as the reasons why the Applicant was dismissed. In the Notice of Answer the Respondent lists the Applicant's conduct, which it says justified his dismissal, as follows:

- Overcharging customers
- Abruptness and aggression towards customers
- Complaints from suppliers about the Applicant's aggression
- Complaints from other branch employees about the Applicant's aggression
- Failure to follow Midas paperwork procedures
- Doing "cash" jobs without going through company books
- Failure to issue receipts for cash jobs
- Using petty cash to purchase alcohol (against company directives)
- Communicating with Midas Head Office without going through proper channels
- Breaching an award by unlawfully sending an employee home without pay
- Refusing to personally carry out mechanical repairs
- Using the branch's motor vehicle "trade plates" unlawfully on a weekend.

7 The Respondent says the Applicant was warned about his behaviour on 29 April 2004, 25 May 2004 and 28 May 2004. The Respondent says that Ms Gangell terminated the Applicant's employment because he failed to follow Midas procedures, he bullied staff, he disregarded an industrial award and his behaviour as a manager was unprofessional because they had received a high number of complaints from customers.

8 After termination the Applicant was paid one week's pay in lieu of notice and one week's accrued annual leave. The Applicant was unemployed from 30 August 2004 until 1 October 2004 when he became self-employed.

The Applicant's Evidence

9 The Applicant is a mechanic by trade. He gave uncontradicted evidence that when he worked at the Osborne Park shop for over twelve months he achieved the best sales results ever for the store and achieved the best sales results of any Midas shop in Western Australia.

10 When the Applicant commenced employment with the Respondent he signed a letter of appointment which set out the terms and conditions of his employment. Pursuant to the express terms of the contract of employment he was to be paid $19.00 an hour and was required to work 38 hours a week plus reasonable overtime to an average of 44 hours a week. Pursuant to the terms of the contract of employment a review of his salary and performance was to be conducted after an initial three months' probationary period and then to be conducted on an annual basis on the first day of the month following the anniversary of the date of his commencement of employment. The Applicant tendered into evidence copies of his ANZ bank statements which show when he commenced employment he was paid $643.00 a week (being $19.00 per hour) until 6 July 2004 when his salary increased to $709.68 a week.

11 The Applicant's duties were to open and close the shop, deal with customers, complete documentation and maximise sales on each and every car. The shop provided mechanical repairs and specialised in selling exhaust systems. Apart from the Applicant three employees were employed at the Cannington shop. One was an exhaust fitter and the other two were mechanics.

12 The Applicant says that he had a good relationship with all of the employees except for Mr van Horen, the assistant manager of the Cannington shop, who had been the acting manager of the Cannington shop prior to his (the Applicant's) appointment. The Applicant says that Mr van Horen resented the Applicant becoming the Manager.

13 The Applicant testified that during his employment he obtained positive feedback from Mr Weatherall and Mr Rust about his performance. In particular he says he was told that the sales were doing well, he was doing a good job and he was paid cash bonuses of $50.00 and $100.00 by Mr Weatherall. The amount of $50.00 was given to him to buy drinks for the other employees and the $100.00 was for working back late on a stocktake. The Applicant also testified that he was paid an amount of $3,000.00 by the Respondent on 23 July 2004. His ANZ bank account shows this amount was paid to him on that date. He says that amount was paid to him as the result of an agreement he reached with Mr Weatherall to place a Midas logo on either side of the Applicant's new car together with a new exhaust system (which was promoted by the Respondent) on the vehicle which cost approximately $3,000.00.

14 About two weeks before his employment was terminated Ms Gangell suddenly appeared at the Cannington shop. He knew she was the mother of a woman that Mr Weatherall was dating in Western Australia. He was otherwise unaware of what role she had in the Respondent's business. Ms Gangell walked into the shop and told him that she was in charge of the Welshpool and the Cannington shops. Ms Gangell demanded that the mechanics record the parts that they used on each vehicle and to record the times that they worked on each vehicle. The Applicant said that the mechanics did not respond too well to the request as she came in with "all guns blazing". When he told her that she had handled it the wrong way she threatened him and said, "If you don't do what I say, I will rip your bloody head off." The Applicant says that the mechanics had enough work to carry out, in particular the customer vehicle inspection reports (the "VIRs") the mechanics were required to complete for each vehicle provided a comprehensive record of what work was required to be carried out on each vehicle. The Applicant said that they took her instructions on board and some of the employees started carrying out Ms Gangell's instructions and others did not. The Applicant was asked why there was resistance to the mechanics recording job times on a job card. He said that a record of this information was only necessary if they were being paid overtime. As a manager he says he was able to make a judgement as to how much time was spent working on a motor vehicle so a client could be charged appropriately.

15 Two weeks later Ms Gangell walked into the shop one afternoon and told the Applicant that she "did not want him" and terminated his employment. He asked what was going on. Ms Gangell told him that he was not doing the paperwork properly that she had introduced, that he was ripping off customers and they had had customer complaints. He asked her for evidence of the allegations and she produced nothing. He telephoned Mr Weatherall in Queensland, who told him that Ms Gangell was in charge and that he had to do what Ms Gangell said. Mr Rust then appeared, took the float and keys from the Applicant, told him to pack everything up and to leave. Before the Applicant left the building, locksmiths arrived and changed the locks.

16 The Applicant says that it was his opinion that he was terminated because he had a personality clash with Ms Gangell and Mr van Horen. When cross-examined the Applicant was asked whether he was aware that staff members had complained about his attitude and whether he knew that Mr Weatherall had met with employees from the Cannington branch prior to his employment being terminated. The Applicant said that he was not aware that a meeting had taken place until the day his employment was terminated. The Applicant denied that he had ever overcharged any customers or that he had purchased a motor vehicle from a person at an unrealistic low price telling the person it would cost too much to repair. He also denied repairing the vehicle at the Respondent's premises and on selling the vehicle for a profit without knowledge of approval of Mr Weatherall. The Applicant strongly maintained that Ms Gangell only spoke to him once about his inability to comply with her requirements in respect of accounting for parts and time and that was on the day that his employment was terminated. He says the only other time that she spoke to him about work was when they had argued two weeks prior to the day his employment was terminated.

17 When cross-examined the Applicant was asked whether he had received any verbal warnings from any person including Mr Rust about his performance whilst he was employed by the Respondent and the Applicant said that he did not. He said however that Mr Rust had told him that two customers had complained but he did not give him (the Applicant) a warning to indicate that he had done something wrong. No specific allegations were put to the Applicant in cross-examination about customer complaints. The Applicant was also asked whether there were any problems with his performance or whether he had received any "advice" from Ms Gangell. He said, "No."

18 It was put to the Applicant that on occasions he had pulled mechanics off the job before they were finished. He said that on most occasions each mechanic worked on a job until it was finished, but sometimes he did pull mechanics off jobs. However no other allegation was put to him to why this was perceived as a problem other than that this could raise a safety issue in that the mechanic would not recall how far the job had been completed. The Applicant denied that such a safety issue would arise.

19 The Applicant was also asked whether he did any "cash jobs" whilst he worked for the Respondent. He said he did not but that customers did pay in cash and when they did so he issued them with receipts.

20 In relation to the allegation in the Notice of Answer that the Applicant had used the Respondent's motor vehicle trade plates unlawfully on a weekend, the Respondent had an unlicensed Hi-Lux vehicle which was kept at the Cannington shop. The Applicant said that Mr Rust had telephoned him and informed him that two officers from the Department of Planning were coming to see him about the Hi-Lux being driven on a Sunday with dealer plates. The Applicant says he was told by Mr Rust not to say anything to the officers. The Applicant says he had no knowledge of the vehicle being using on a weekend. The Applicant was asked in cross-examination whether he had ever taken the Hi-Lux out of the shop outside working hours without permission. He said that he did not do so and that he had no reason to do so because he owned two cars one of which is a top of the range Land Cruiser. A facsimile was tendered into evidence sent to Mr Rust on 31 August 2005 from Mr Rob Morris of the Department of Planning and Infrastructure, Government of Western Australia, Compliance and Education - Vehicle Operations, Dealer Compliance Unit. The facsimile states that as a result of a query received by the Department, an officer attended at the Respondent's premises and interviewed Mr Weatherall in relation to possible improper use of a set of dealer plates which were sighted attached to a Toyota Surf (Hi-Lux) vehicle travelling on Tonkin Highway at approximately 1600 hours on 4 July 2004.

21 The Applicant was also asked whether he had used petty cash contrary to the Respondent's directives and he said that he had not. However, he conceded that he had used petty cash to purchase alcohol for consumption by employees but said that he had permission from Mr Weatherall to do so. The Applicant conceded that he had sent the employee, "Janko", home without pay on a couple of occasions but said that he was directed to do so by Mr Weatherall. He said that Mr Weatherall told him that if there was no work to be done to send employees home. The Applicant says that he believed at that time that it was lawful for an employee to volunteer to go home without pay.

22 The Applicant was out of work for seven weeks. During that period he sought alternative employment. He applied for work at Cannington Four Wheel Drive, Auto Masters and Ultra Tune. The Applicant was unsuccessful. He then commenced negotiations to purchase his own business and commenced work on 1 October 2004. The Applicant says that his gross weekly income in his business has been greater than the amount he was paid whilst he was employed by the Respondent.

23 Darren Bryant gave evidence on behalf of the Applicant. Mr Bryant was employed by the Respondent as a motor mechanic at the Cannington shop whilst the Applicant was employed as the manager. Mr Bryant testified that he witnessed an altercation between the Applicant and Ms Gangell two weeks prior to the Applicant's employment being terminated. Mr Bryant said he was working out the back about five metres away from where the Applicant and Ms Gangell stood. Mr Bryant said that Ms Gangell had screamed, ranted, raved and pointed her finger at the Applicant and threatened him. He could not recall the exact words that were used, but he recalled that she was very abusive. Mr Bryant says that during the altercation the Applicant's voice was a lot quieter than Ms Gangell.

24 Shortly after the Applicant's employment was terminated Mr Bryant was transferred to the Welshpool shop. Sometime later a decision was made to transfer him back to the Cannington shop because Mr Bryant had an extraordinary driver's licence and was not able to drive clients' vehicles. Mr Bryant, however, resigned and consequently did not take up the position at Cannington because Ms Gangell became the manager of the Respondent's shop at Cannington after the Applicant's employment was terminated. It is clear from the evidence given by Mr Bryant that he did not like Ms Gangell. He spoke of her in derogatory terms. In particular, he said that she went out her way to annoy him, disrupt the workplace and cause general grief.

25 Mr Bryant was present at a meeting with Mr Weatherall and other employees of the Cannington shop prior to the Applicant's employment being terminated. When cross-examined he was asked whether any complaints were made about the Applicant at that meeting. He said there were a couple of complaints. He said he made a complaint that he thought that the Applicant may have been using more expensive parts than they should have been, but the Applicant later informed him that the reason why they had not used cheaper parts is the cheaper parts did not come with both assemblies that were required and the genuine parts did. Mr Bryant was asked what was the outcome of the meeting. In response he said that Mr Weatherall talked to the Applicant. Mr Bryant did not indicate he was present at this meeting. Mr Bryant was also asked in cross-examination whether he knew anything about the purchase and repair and resale of a vehicle by the Applicant. He said that he was aware of the transaction but he did not know any of the particulars because it occurred prior to his commencing employment with the Respondent. Mr Bryant also said that he was not aware of any cash jobs being done on the premises nor was he aware of any overcharging. Mr Bryant was asked to look at a copy of a VIR which had been completed by Mr van Horen. He agreed the Manager was responsible to ensure the VIRs are filled out correctly and costings and charges are allocated correctly. It was Mr Bryant's opinion that the VIR had been filled out correctly.

26 Mr Bryant was also asked whether he thought the shop was overstocked whilst the Applicant was employed with products such as brake pads and oils and he said, "No." After the Applicant's employment was terminated the stock in the shop was reduced by about 50%. Mr Bryant said that consequently they had a lot less stock and they regularly had to wait for parts rather than having parts and stock available to place in a vehicle. Mr Bryant expressed an opinion that they should have had more parts on hand.

27 One of the Respondent's customers, Charles Smith, gave evidence on behalf of the Applicant. Mr Smith testified that he had known the Applicant for several years and that every time the Applicant had changed jobs he had followed him as a customer. In June 2004, Mr Smith took his mother's Corolla into the Cannington shop and had a conversation with Mr van Horen. Mr Smith says that Mr van Horen tried to deter him from bringing his mother's car in for repair. On another occasion in July 2004 Mr Smith went to the Respondent's premises and spoke to Mr van Horen and Ms Gangell. Whilst he was at the shop he overheard a conversation between Ms Gangell and Mr van Horen about a catalytic converter. He says he heard Mr van Horen say to Ms Gangell that the Applicant was "charging too much" and Ms Gangell said in reply, "Well, he's not here now. I'm in charge and when I'm here it's different." Mr Smith asked to see the Applicant and was told that he was not there.

Respondent's evidence

28 Mr Rust is the Manager of the Respondent's Welshpool shop. At the time of giving evidence he had been employed by the Respondent for 22 months. Mr Rust is a qualified mechanic who has been in the motor industry for over 40 years. Mr Rust testified that Mr van Horen was second in charge of the Cannington shop when Mr Weatherall took over the Cannington business and that Mr van Horen remained in that position. Mr Rust says that Mr van Horen was offered the position of Manager of the Cannington and Welshpool shops but he declined both of those positions.

29 Mr Rust first met the Applicant when he (Mr Rust) was the Manager of Midas North Fremantle branch. Mr Rust knew the Applicant was going to work at the Osborne Park shop. Mr Rust became aware that the Applicant's sales figures from the time that he commenced work at Osborne Park looked very good. When he heard the Applicant was leaving the Osborne Park shop he thought that he would try and employ him because he was a good salesman. Mr Rust did not have the authority to employ the Applicant as a manager so spoke to Mr Weatherall who agreed to offer the Applicant the position as manager of the Cannington shop.

30 Mr Rust says that he had only received one complaint from a customer in 22 months about work carried out at the Welshpool shop. He testified that he counselled the Applicant in relation to three customer complaints whilst the Applicant was employed by Respondent. Mr Rust produced a copy of his computer generated contact log in which he had recorded each occasion he counselled the Applicant. The log records that on 29 April 2004 Mr Rust received a complaint from head office about the Applicant's treatment of a Ms Santosh. The complaint was that the Applicant would not help her fix her car and he had abused her. Mr Rust testified that Ms Santosh had her car repaired by the Respondent prior to the Applicant commencing employment and that at the time the car was repaired it had not been explained to her that doing the head might cause the bottom end to fail. Ms Santosh brought the vehicle back to the Cannington shop and spoke to the Applicant. She told him that she wanted the vehicle repaired under warranty but the Applicant refused to do so and wanted to charge her approximately $2,000.00 for the work. Ms Santosh complained to head office of Midas (the franchisor) who contacted Mr Rust and told him to sort it out or they would take the car away and put a reconditioned engine in it. Mr Rust also recorded in his contact log that on 25 May 2004 he spoke to the Applicant about overcharging Newtown Toyota for a new muffler. Mr Rust said the price was extortionate for a trade customer. Mr Rust counselled the Applicant again after he had received a complaint from head office on 28 May 2004 about overcharging and abusing a customer. The customer paid $300.00 or $400.00 to have the brakes fixed on his car. After he picked the car up the brakes failed 300 metres from the Cannington shop. Apparently the master cylinder had failed. Ms Rust said that if the vehicle had been road tested properly the defective master cylinder probably would have been picked up. Further that the cost of replacing the master cylinder with a reconditioned one would have been half the cost that the Applicant tried to charge for the job. The customer also complained that the Applicant had been abusive to his (Mr Winter's) sister. Mr Rust testified that when he raised this with the Applicant, he said that they were lying. Mr Rust says that on 28 July 2004 he had cause to speak to the Applicant again about a complaint. It related to a Repco account which the

Applicant had failed to pass on to Mr Rust to pay. Although the Applicant was responsible for incurring accounts he was required to provide the accounts to Mr Rust to pay. Mr Rust recorded in his contact log that when he spoke to the Applicant he responded with foul language and told him (Mr Rust) it was not his responsibility to look after the accounts. When asked whether the Applicant ever became aggressive towards him Mr Rust said that "it was nothing that he could not handle", but the Applicant did get his hackles up occasionally.

31 Mr Rust also recorded in his contact log that he received a complaint from another customer, Ms Abbotts, on the day the Applicant was terminated on 30 July 2004. The complaint was that the Applicant had failed to repair her vehicle in a satisfactory manner and that she had witnessed an altercation between the Applicant and Mr van Horen. On that day he also received a complaint from a supplier, ATAP. It is apparent from the evidence given by Mr Rust that he did not raise these two complaints with the Applicant. It is, however, plain from the evidence given by Ms Gangell that as a result of the complaint from Ms Abbotts a decision was made to dismiss the Applicant.

32 Mr Rust testified that whilst the Applicant was employed Valvoline had made an offer to Midas stores that if a total package of goods to the value of $692.50 plus GST was purchased by May 2004 a Valvoline V8 super package would be provided which included, among other things, a one day pit pass to Barbagello Raceway for V8 Super Cars and other items of clothing such as a polo shirt. Mr Rust testified that this was an offer to each manager of the Midas shops but that it is Midas' policy that the items would have to be split between each employee at the shop and that the Applicant did not have authorisation to spend more than $250.00 on any one purchase. Mr Rust says the Applicant availed himself of this offer without authorisation to do so.

33 In relation to the allegation that the Applicant had used the branch's motor vehicle trade plates unlawfully on a weekend, Mr Rust said that the Department of Planning officers had visited him and informed him that the Hi-Lux had been seen on a Sunday afternoon on Brand Highway with dealer plates which was unlawful. Mr Rust said he had no idea who had driven the vehicle at the time but agreed he would try to find out. Mr Rust checked the security logs for the Cannington shop and ascertained that on the weekend in question the Applicant had opened and closed the shop on Saturday and opened the shop on the following Monday. Mr Rust did not, however, allege that the Applicant had driven the Hi-Lux on the Sunday. When cross-examined about this issue Mr Rust said that as the Applicant was the manager, he was responsible for the shop, the vehicle and the dealer plates being secure over the weekend.

34 After the Applicant's employment was terminated Mr Rust received an email from a Customer Service Officer employed by the Midas Head Office which stated that they had received four complaints in relation to the Cannington branch between the dates of 1 May and 31 July 2004. Of the four complaints referred to in the Customer Services Officer's report it is apparent that only one complaint was known to him at the time, which was the complaint by Mr Winter. In relation to the three other complaints the first complaint relates to a Ms Sandilands who complained about being overcharged. The second was a complaint by Mr Tony Sims that the Cannington shop tried to make him pay for warranty work. The third complaint relates to a complaint about poor workmanship.

35 Mr Rust says that most people use EFTPOS to pay their accounts rather than cash. He however testified that he does carry out cash jobs at Welshpool and receipts are issued for those and processed through the company books.

36 Mr Rust was asked to look at two VIRs. One was completed by a mechanic whose name is noted on the form as "Jono". The form was completed sometime after the Applicant's employment was terminated. Mr Rust said that this VIR was an example of a properly completed VIR. The second VIR was completed by Mr van Horen and is undated. Mr Rust testified that when looking at the information on the VIR he could not ascertain the reason why the vehicle would not go. Mr Rust testified that it is the manager's responsibility to make sure the VIRs are filled out correctly, that people are charged correctly and to ensure that customers are not undercharged or overcharged. Mr Rust conceded when cross-examined that when the Applicant was not present in the Cannington shop, Mr van Horen had the authority to act as the manager.

37 Mr Rust testified that Ms Gangell was employed by Motorguard Pty Ltd and she is "…the eyes and ears for Mr Weatherall in Western Australia". Mr Rust said that Ms Gangell introduced time sheets for not only for the Cannington shop but also for the Welshpool shop. He said that Mr Weatherall wanted time sheets filled out so that he could keep an eye on the mechanics' hours of work. The Respondent's mechanics work a 44 hour week and are rostered off with pay one Saturday a month. Mr Rust said the idea of time sheets was to keep track of the hours the mechanics worked so they could take their one day off a month. Mr Weatherall also wanted separate sheets to be completed to attach to the VIRs which would list the parts that were used on each vehicle.

38 Mr Rust said that whilst the Applicant was employed he obtained feedback from the employees at the Cannington branch that some of the employees were not happy with the Applicant. Mr Rust says that he spoke to the Applicant and told him to talk to the employees and "settle their differences". After that conversation Mr Rust continued to obtain feedback that the employees were still not happy. Mr Rust thought that the Applicant would be able to sort out the clash of personalities but it came to a head when Mr Weatherall came to Perth from Queensland and met with the employees. He produced minutes of the meeting on 15 July 2004 (Exhibit K). The minutes record that "John Weatherall, Richard Rust, Mick Benporath, Darren X, Janko, Heather Gaingel" were present at the meeting. The issues discussed were as follows:

"…

1. Excessive overcharging of customers
2. Alleged: Cash jobs being done, but not being put through company's jobs
3. Bullying staff
4. Car being purchased at low price, fixed on premises and being sold at commercial prices.
5. Not letting guys working on one car – changes them around and unable to complete jobs from start to finish.
6. John Weatherall's personal vehicle – Toyota Surf used after hours.
7. Job cards (VIRs) from Cannington are not being filled out correctly.
8. Refusing to follow Midas procedures and John Weatherall's requests.

Details

Point 1

Sent a job to Cannington from Newtown Toyota to work on a Toyota Coaster Bus. He overcharged on the cost of the muffler, and charged full labour costs with no trade discount.

Head office has received 6 complaints about over-charging, two of these have gone to Dept. Consumer Affairs.

Orders staff to do extra work that is not required in the mechanic's opinion (over-selling).

Point 2

Gentleman came in to get vehicle tuned, he was told the original cost and said he could not afford it. He was charged $20 – John Weatherall to follow up.

Second job, gentleman from Esperance, paid $10.00 – John Weatherall to follow up.

Point 3

Staff complain about attitude of Manager, treats them with contempt. Adrian will not allow them into the office to check what work has been booked in. Adrian will not let staff touch the computer. He takes phones off staff when they are booking in work, and finishes the booking.

Has threatened Michael (Mick) with physical violence from known associates.

Point 4:

Lady came in with car, quoted a price – was unable to pay, Adrian offered to buy the car off her for an extremely low price (approx $500) claiming it would cost too much to repair. Adrian then fixed the car on company premises and sold the car at $3000 – on Midas property. John Weatherall to contact customer.

Point 5

Vehicle repairs could be unsafe – items can be missed because mechanics starting jobs do not get to finish their work.

Point 6

John's car was seen on the road on Sunday, 4pm July 4 2004. The car had been taken out of the workshop by persons unknown, believed to be Adrian. He was last to lock up Cannington workshop the day before. Check with Security Company showed that Adrian was the last to leave Cannington on Saturday afternoon 3/07/04 and first to arrive on Monday morning 5/07/04.

Vehicle was positively identified by Dept. Planning and Infrastructure (dept transport) with a please explain notice sent to Company. Car was on the road with dealer plates.

Point 7

VIR's are not being filled correctly, there is no detail of the car, or customer.

Point 8

He argues every instruction given in the negative. He has difficulties following instructions from Management."

39 Mr Rust said that it was decided at the meeting that the employees would have to try to work with the Applicant to settle their differences and after two weeks the matter would be reviewed. Mr Rust also testified that after the meeting Mr Weatherall prepared a draft memorandum to the Applicant which set out a number of complaints and procedures that he wanted adhered to at the Cannington and Welshpool stores. Mr Rust made some changes to the draft and put it on Mr Weatherall's desk with another draft letter to the Applicant dated 18 July 2004 which referred to the Applicant's probationary period expiring on 30 June 2004 and contemplated informing the Applicant that his probationary period would be extended three months to 30 September 2004. Mr Weatherall did not return to the office as he had gone back to Queensland, so neither of those documents was provided to the Applicant.

40 When cross-examined Mr Rust was asked why was the Applicant's employment terminated less than two weeks after the meeting on 15 July 2004. Mr Rust said that he had been informed that the day before the dismissal that he (the Applicant) had had an argument with Mr van Horen in the workshop in front of a customer and used abusive language. Mr Rust conceded that he did not speak to the customer but after her complaint he (Mr Rust) wrote a letter of apology and offered the customer a free service. It is apparent from the evidence of Mr Rust that he did not speak to Mr van Horen about the incident nor did he speak to the Applicant about the incident.

41 Mr Rust was also asked in cross-examination whether he was aware that two weeks prior to the Applicant's dismissal that the Applicant had a heated argument with Ms Gangell. Mr Rust said that that had been reported to him. He was then asked whether Ms Gangell had ever threatened him (Mr Rust) and Mr Rust declined to answer that question. When re-examined that he said that Ms Gangell is what he (Mr Rust) would call a spitfire.

42 Ms Gangell gave evidence on behalf of the Respondent. At the time the Applicant's employment was terminated she was employed as a personal assistant to Mr Weatherall, however, after the Applicant's employment was terminated she became the manager of the Cannington shop. At the time of giving evidence she said the company was being restructured and that she would be replaced as the manager of Midas Cannington.

43 Shortly prior to the Applicant's employment being terminated Ms Gangell worked at the Welshpool shop with Mr Rust and looked into how the Welshpool and Cannington shops were running. As a result of her review she wanted to change a lot of practices at the Cannington shop. In particular she was not happy that the mechanics were not allowed into the office, or to use the computer or have contact with clients. Ms Gangell implemented three changes to procedures. Firstly, she directed that each mechanic complete a report on every vehicle that was repaired. Secondly, she required a stock control sheet to be completed for each car that was repaired. Thirdly, she wanted a daily book to be completed which recorded the vehicle details, client names, telephone numbers and addresses.

44 Ms Gangell also testified that the VIR that had been completed by Mr van Horen was not acceptable because it did not tell the person who was reading the form what was done on the car. Ms Gangell says that the Midas franchise agreement requires that VIRs be correctly completed and if they are not done so the franchisor can take action against the franchisee. She said that the mechanic's job was to fill out the VIR to ascertain what was wrong with the vehicle and it was then the manager's role to complete the form and provide a quote to the owner. The VIRs produced to the Commission do not contain any information in respect of the quote to be given to the client. Further, there does not appear to be any space on the form to note the information provided to the client.

45 Ms Gangell says that whilst the Applicant was employed she received information from the mechanics working at the Cannington shop that they had done work on vehicles for which no VIR was generated. She also said it was reported to her by the mechanics that cash jobs were being carried out at the Cannington shop for which no receipts were issued. Ms Gangell, however, maintained in her evidence that she did not accuse the Applicant directly of taking money. She said she knew that there was cash money coming out of the business and that Mr Weatherall was aware that cash was being used. Ms Gangell also testified that customers of the Cannington shop had reported to her that they were not allowed to pay by EFTPOS, that they could only pay by cash and that she was concerned about this practice.

46 Ms Gangell testified that the Applicant did not like the fact that she was looking at the business practices at Cannington. She says that on several occasions she told him what she wanted and Mr Weatherall wanted to be carried out, and that whilst she was present at Cannington he would carry out her instructions but would not do so when she was not there. She agreed that she had argued with the Applicant about this on one occasion in the workshop. She says that he lost his temper, yelled, screamed and abused her. She told him that if she was a man she would "knock his block off". Ms Gangell asserted that she informed the Applicant when they had the altercation on 28 July 2004 that he was not to buy alcohol for himself or staff on petty cash. She said that no one has authorisation to purchase alcohol through petty cash. His response was that he was not prepared to listen to anything she was prepared to say. Ms Gangell produced notes of an altercation she says she had with the Applicant on 28 July 2004. She stated in that note that:

> "Adrian then flew into a rage, yelling abuse at me using foul language, then came right up to me and repeatedly pointed his finger in my face. I then stepped back and told him not to speak to me in that manner or use that threatening behaviour. I then said 'if I was a man I would have decked you'. I also told him that if he had nothing to hide these procedures should not worry you, and that is the way Midas policy is and always has been."

When cross-examined by the Applicant, Ms Gangell said she could not recall if the Applicant had sworn at her.

47 Ms Gangell says she arranged the meeting on 15 July 2004 because the workshop employees were going to have a walk out in mass. In particular they were sick of the bullying, over-charging, customers coming in very upset, cash jobs going out and not being allowed into the office to use the telephone or the computer. Ms Gangell said the outcome of the meeting was that Mr Weatherall was not "really happy" but he said he would "look into it". She thought Mr Weatherall had words with the Applicant but that she did not know whether he did so (Transcript page 109).

48 Ms Gangell in her evidence referred to the receipt of a complaint from a customer the day before the Applicant's employment was terminated but did not say that the reason why the Applicant's employment was terminated was because of complaints. She simply said that Mr Rust, herself and Mr Weatherall decided it was time for the Applicant's employment to be terminated, so on 30 July 2004 she spoke to the Applicant and explained to him that his services were no longer required. She says that she told him that he was a good salesman but he was not suited for the job, he had a problem with anger management and he was therefore fired. She, however, produced in her evidence a type-written note she says was created on 30 July 2004 which records the reasons why he was terminated. Her notes record that:

> "1 failure to follow Midas procedures i.e. will not fill out VIRs. Day book not filled the required way.
>
> 2 Bullying of staff.
>
> 3 Disregard of Industrial awards i.e. sending a worker home with no pay.
>
> 4 Too many complaints from customers i.e. foul language in front of Ms Abbotts when having a disagreement with a fellow worker. Unprofessional behaviour for a manager.
>
> I also told him to seek help like Anger management classes. He only wanted to do things his way, not the way his employer wanted or Midas head office wanted."

49 Ms Gangell says that whilst the Applicant was employed he overstocked brake pads and oils. She said there were a lot of competitions and instead of buying small lots he bought in bulk which has resulted in Cannington shop carrying excessive stock. She said there are a number of brake pads which have not been able to be used on vehicles that are sitting in stock. As to the Applicant's attitude towards customers, she said that his philosophy was "Get them in the door. Sting them. Get them out. We don't want repeat business." Ms Gangell said his attitude was not appropriate as they rely on repeat business. She says they have slowly been able to rebuild their business since the Applicant's employment was terminated.

Legal Principles

50 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).

51 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."

52 In this matter it cannot be disputed that the Applicant was summarily dismissed.

53 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 (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

54 Kenner C in *Scott v Consolidated Paper Industries (WA) Pty Ltd* (1998) 78 WAIG 4940 made a clear statement of the law in respect of industrial fairness where poor performance of an employee is raised. In *Scott v Consolidated Paper Industries (WA) Pty Ltd* (op cit) Kenner C observed at 4943:

> "… that it is not for the Commission to assume the role of the manager in considering whether the dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty pursuant to s 26(1)(a) and (c) of the Act.
>
> Moreover, contemporary standards of industrial fairness require in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his of her performance or conduct does not improve as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated, unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances of the particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. It follows however, that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered."

Conclusion

55 Having heard the evidence given by the witnesses and observed each of them carefully, I prefer the evidence given by Mr Rust and Mr Bryant to the evidence given by the Applicant and Ms Gangell. However, where the evidence of the Applicant and Ms Gangell depart I prefer the evidence given by the Applicant. I also accept the evidence given by Mr Smith. His evidence was not substantially challenged by the Respondent. Almost all of the allegations Ms Gangell makes about the Applicant are unsupported by any direct evidence. The allegations she makes are all based upon matters she says were reported to her. The only allegations supported by any direct evidence is the evidence given by Mr Rust of the complaints he received from customers which were recorded contemporaneously in his contact log (Exhibit E) (see also Exhibit J). Despite being guarded in what he said about Ms Gangell, Mr Rust gave his evidence in a patently honest way.

56 It is apparent from the evidence given by Mr Rust that, whilst he counselled the Applicant about his conduct in relation to customer complaints on three occasions and that he also spoke to him about resolving issues with the employees at the Cannington shop, Mr Rust did not inform the Applicant that his continued employment was in jeopardy. There is no conclusive evidence before me that Mr Weatherall spoke to the Applicant after he met with employees on 15 July 2004. Further it appears that Mr Weatherall took no action in relation to the complaints made to him by the employees as the draft memorandum and the draft letter dated 18 July 2004 were not acted on. It also appears from the Applicant's bank records that the agreement he had with Mr Weatherall to contribute to signage and an exhaust system for the Applicant's new vehicle was acted on by the Respondent on 23 July 2004 when the amount of $3,000.00 was deposited into the Applicant's bank account. The Respondent did not call Mr van Horen to give evidence despite being afforded an opportunity to adjourn the proceedings for him to give evidence. Nor did the Respondent call Mr Weatherall to give evidence. Pursuant to the principles enunciated by the High Court in *Jones v Dunkel and Anor* (1959) 101 CLR 298, where there is one person who could have given evidence to refute the opposing parties' evidence and that person is not called by the other party, a court or tribunal is entitled to draw the inference that the person could not have assisted the other party's case. In this matter I draw that inference against the Respondent.

57 Whilst I accept that the Respondent had received complaints by customers which related to the Applicant's conduct and that the Respondent's owner and representatives had legitimate issues to raise with the Applicant about his performance, I am not satisfied that these issues were raised with the Applicant by anyone other than Mr Rust. A number of matters raised in the Respondent's evidence were not put to the Applicant or Mr Bryant. For example, the fact that the security surveillance for the Cannington shop shows that the Applicant closed the shop on Friday, 2 July 2004, opened and closed the shop on Saturday, 3 July 2004 and closed the shop on Monday, 5 July 2004 and that another employee, Mr van Horen, opened the shop on Monday, 5 July 2004 was referred to in the evidence of Mr Rust. However, this information was not put to the Applicant other than to put to him that each employee had their own security code to access the Respondent's premises at Cannington. It was never put to the Applicant that he had taken up the Valvoline offer or that he had not distributed amongst other employees at the shop or had not obtained authorisation to make a purchase of this package. When Mr Bryant was cross-examined no specific complaints about the Applicant were put to him (Mr Bryant). Nor were the notes of the minutes of the meeting (in which a number of complaints were said to have been made by Mr Bryant), other than a general allegation that there were a number of complaints discussed at that meeting.

58 There is no evidence before me that the Respondent investigated the complaint made by Ms Santosh the day before the Applicant's employment was terminated in that there is no evidence that Mr van Horen or the Applicant was asked about what had occurred. The Applicant was not afforded an opportunity to respond to this complaint, nor was he afforded an opportunity to improve his performance as a manager. He was given no notice that his employment was at risk. Having considered all of the evidence, I am not satisfied that any of the allegations (except the allegation that the Respondent had received complaints from customers and from a supplier) referred to in the Respondent's Notice of Answer and Counter Proposal have been made out by the Respondent. I am not satisfied that the Respondent has made out a case that the dismissal of the Applicant was justified. In all the circumstances I am satisfied that the Applicant was unfairly dismissed. It is common ground that reinstatement is impracticable. I am satisfied that the Applicant diligently sought to mitigate his loss and has done so. As the Applicant was paid one week's pay in lieu of notice and one week's pay as accrued leave I will make an order that the Respondent pay the Applicant five week's pay at the rate of $709.68 net per week which is an amount of $3,548.40 net.

2005 WAIRC 00852

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN SCHARENGUIVEL
	APPLICANT
	-v-
	MOTORGUARD PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 1 APRIL 2005
FILE NO/S	APPL 1088 OF 2004
CITATION NO.	2005 WAIRC 00852

Result	Order made to change the Respondent's name
Representation	
Applicant	In person
Respondent	Mr G T Miller (as agent)

Order

Having heard the Applicant in person and Mr Miller as agent on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the name of the Respondent be deleted and that be substituted therefor the name, MotorGuard Pty Ltd t/as Midas Cannington.

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

2005 WAIRC 01142

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN SCHARENGUIVEL
	APPLICANT
	-v-
	MOTORGUARD PTY LTD T/AS MIDAS CANNINGTON
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 11 APRIL 2005
FILE NO/S	APPL 1088 OF 2004
CITATION NO.	2005 WAIRC 01142

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant within 14 days $3,548.40 net.
Representation	
Applicant	In person
Respondent	Mr G T Miller (as agent)

Order

Having heard the Applicant in person and Mr Miller 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 unfairly dismissed by the Respondent;
2. ORDERS that the Respondent pay the Applicant within 14 days of the date of this Order the sum of $3,548.40 net; and
3. ORDERS that this application otherwise be, and is hereby dismissed.

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

2005 WAIRC 01195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER JOHN WHITCHER
	APPLICANT
	-v-
	MANDAY HOLDINGS PTY LTD T/AS LIL'S RETRAVISION
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 13 APRIL 2005
FILE NO.	APPL 201 OF 2005
CITATION NO.	2005 WAIRC 01195

CatchWords	**Termination of employment – Harsh, oppressive or unfair dismissal - Referral of application out of time – Relevant principles considered - Acceptance of referral out of time granted – Industrial Relations Act 1979 (WA) s 29(1)(b)(i), s 29(3)**
Result	Application out of time accepted
Representation	
Applicant	Mr P Whitcher
Respondent	Mr G Anagnostopoulos

Reasons for Decision

1 This is an application made pursuant to s29(1)(b)(i) of the Western Australian Industrial Relations Act 1979 (the Act) and lodged in the Commission on 23 February 2005. On its face the application is 5 days out of time. The parties were heard on 8 April 2005 as to whether it would be unfair not to accept a referral of the application out of time pursuant to s29(3) of the Act. The applicant, Mr Whitcher, and the proprietor of the business, Mr Anagnostopoulos, gave evidence. By consent the respondent named in the application was changed to Manday Holdings Pty Ltd t/as Lil's Retravision.

2 Both witnesses attested respectively to the material submitted as part of the application and the notice of answer and counterproposal. They agree that the dismissal occurred on 21 January 2005 following a disagreement between the two men over the assignment of an airconditioner. This makes the application 5 days out of time. Mr Whitcher says that immediately following his dismissal he went to Bali on a scheduled holiday, consulted a lawyer on his return and then filled out the application and posted it. The applicant and the respondent's business reside in South Hedland. An application must be lodged within time unless there is good reason otherwise. I accept the applicant's explanation for the delay as being reasonable.

3 It is the respondent's evidence that Mr Whitcher contested his dismissal on 21 January 2005 and advised that he would take the matter further. Mr Anagnostopoulos subsequently offered to re-employ Mr Whitcher if he would change his attitude. This offer was rejected. Mr Whitcher says that Mr Anagnostopoulos punched him in the mouth and then dismissed him. Mr Anagnostopoulos says that he waved his finger vigorously at Mr Whitcher because Mr Whitcher was screaming in the shop and customers could hear. Mr Anagnostopoulos wanted Mr Whitcher to be silent and he says he put his fingers to Mr Whitcher's lips. He then dismissed Mr Whitcher. Both witnesses say that Mr Whitcher was paid all his entitlements upon dismissal and it is clear also from their evidence that Mr Whitcher was not paid any notice or notice in lieu. On the evidence before me, I find that Mr Whitcher was dismissed summarily by Mr Anagnostopoulos on 21 January 2005. I am not able at this time to reach a finding as to whether Mr Whitcher was assaulted but it is clear that Mr Whitcher, if he were to be dismissed, should have been dismissed on notice. In that sense at least his termination could be said to be unfair. I make no finding in relation to the question of unfairness beyond that at this time. That being said the application has merit. The delay is acceptable. The dismissal was contested immediately and there is no prejudice to the respondent in the application now being accepted out of time. If I apply the reasoning in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51 I find that it would be unfair not to accept the referral of the application out of time and I would make a declaration to that effect.

2005 WAIRC 01194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER JOHN WHITCHER
	APPLICANT
	-v-
	MANDAY HOLDINGS PTY LTD T/AS LIL'S RETRAVISION
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 13 APRIL 2005
FILE NO	APPL 201 OF 2005
CITATION NO.	2005 WAIRC 01194

Result	Application out of time accepted
Representation	
Applicant	Mr P Whitcher
Respondent	Mr G Anagostopoulos

Order

HAVING heard the applicant on his own behalf and Mr Anagostopoulos on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby declares:

THAT it would be unfair not to accept the applicant's referral under s.29(1)(b)(i).

(Sgd.) S WOOD,
[L.S.] Commissioner.

2005 WAIRC 01128

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL WILLIAMS
	APPLICANT
	-v-
	SANDVIK MATERIALS HANDLING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 11 APRIL 2005
FILE NO.	APPL 197 OF 2004
CITATION NO.	2005 WAIRC 01128

Catchwords	Contractual benefits claim – Entitlements claimed under contract of employment – Principles – Application dismissed – *Industrial Relations Act 1979* WA s 29(1)(b)(ii)
Result	Application for contractual benefits dismissed
Representation	
Applicant	Mr D McLane (as agent)
Respondent	Ms J Auerbach (of counsel)

Reasons for Decision

1 This is an application by Paul Williams ("the applicant") pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant claims that he is owed $22,891.00 in redundancy entitlements by his former employer Sandvik Materials Handling ("the respondent"). The respondent denies that the applicant is owed the redundancy payment he is seeking.

Background

2 An agreed statement of facts was filed by the parties as follows:

"1 The Applicant was engaged by the Respondent on the 9th October 1989, pursuant to a contract of employment dated 10 October 1989.

2 The Applicant was terminated from his employment on the 4th November 2003.

3 The application (sic) was born on the 23rd November 1951.

4 As at the date of termination, the Applicant was employed by the Respondent in the position of Supply Chain Manager.

5 As at the date of termination, the Applicant was paid an annual salary of $78,128.

6 The Applicant worked for the Respondent for a period of 14.07 years.

7 The Applicant reported directly to the Respondent's Chief Financial Officer, Bruce Goulds.

8 The Respondent on or about the 4th November 2003 made the Applicant's position redundant.

9 The decision of the Respondent was confirmed in writing to the Applicant by letter dated the 4th October 2003 (meant to be dated 4 November) (see attached letter dated 4th October 2003).

10 The Applicant was paid at termination for severance (sic) the sum of $27,481.71.

11 The sum of $27,481.71 represents a payment of 1.3 weeks of salary for each completed year of service.

12 Two Senior Managers, Rob Sincich and Gary Rodd were also made redundant during 2003 and their severance payment represented 2 weeks of salary for each year of service.

13 Keith Gill, Finance Manager, was made redundant on 7 February 2003, and received 3 months severance pay for 3.577 years of service with the Respondent.

14 Following the termination the Applicant by email requested that his severance payment be reviewed by the Respondent in line with a payment of 2 weeks salary for each year of service (see attached emails between Applicant and John Goodall dated the 14th January 2004).

15 The Respondent replied to the Applicant's request and outlined the criteria upon which the severance calculation was based."

(Exhibit A1)

3 When the applicant was given notice of his termination on 4 November 2003 he was sent the following letter (formal parts omitted):

"The following confirms our discussions of today in that I regretfully advised that due to ongoing restructuring in our company your role has been made redundant with effect at close of business 4 October, 2003. (sic)

All monies owing to you including period of notice, redundancy etc will be deposited into your normal bank account.

Additionally, should you indicate an interest, the company is prepared to provide the facilities of an outplacement service for you to the value of $3,000.00. Should you wish to available (sic) yourself of this facility you will need to confirm that position with John Goodall our Human Resources Manager on 0417 613 399 by Friday 7 October 2003, (sic) who will work with you to make suitable arrangements.

This opportunity is also taken to extend my thanks for your efforts in the past and to wish you every success for the future during this difficult period."

(Exhibit A1)

4 A series of emails was sent between the applicant and the respondent's Human Resources Manager, Mr John Goodall in January 2004 and are as follows:

"I refer to my redundancy payment effective 4th November 2003, and in response to legal advise (sic) I wish to bring your attention to the following.

My redundancy was based on a 1.3 weeks payment for every year of service, and it was explained that this was the Sandvik standard for employees in redundancy situations where no fixed agreement was in place.

I currently have information that a precedent was set concerning the redundancy package of two Senior Managers earlier this year. Their redundancies were made effective around July 2003, and were based on a 2 week payment for each year served, this was awarded without a fixed or prior agreement.

In light of this precedent I would request a review of my redundancy calculations.

I would appreciate your immediate action concerning my redundancy re-calculation, and I would like to set a response cut-off time of 2 weeks for finalisation of this matter (January 23rd 2003).

If the matter has not been resolved within this period I will hand all relevant information onto my solicitor for further processing."

(Exhibit A1 email dated 8 January 2004)

"Thank you for your email. My apologies for the delay in getting back to you. Once the decision has been made to make a role redundant we then look at the person undertaking that role to calculate a fair redundancy package considering a number of factors, some being how long has the person been with the company, What (sic) seniority the role has in the company, What (sic) the current market place package would be, The (sic) likelyhood (sic) or otherwise of opportunity to pick up ongoing work at a similar level, general economic factors at the time etc etc (sic)

REdundancy (sic) packages can be different and may be influenced by any one or more of the above.

We have relooked at your package and are satisfied that in the circumstances you have been treated fairly."

(Exhibit A1 email dated 14 January 2004)

"Thanks for your reply. In reference to your response I can only base the facts of my redundancy package against the facts compared to the redundancy of two Managers made around June/July 2003.

The period of my employment within this organisation, would have been similar to the employment period of either Manager, and the role of the Supply Chain Manager would have been equal or greater in seniority, as the role of Supply Chain Manager was a Corporate and National position. The remaining factors of general economic conditions and availability of finding similar work, (sic) will be left to others with a greater knowledge than myself to decide.

I would conclude that I'm not satisfied with the answer from Sandvik, and if this situation cannot be finalised by the 23rd January, It (sic) is still my intention to pass all relevant information into legal hands for further processing."

(Exhibit A1 email dated 15 January 2004)

"Paul it makes me sad to hear that that remains your decision however it is of course your choice to consider whatever action you belive (sic) to (sic) appropriate.

Wishing you all the best (sic)"

(Exhibit A1 email dated 16 January 2004)

5 The applicant's representative tendered the following documents with the consent of the respondent:

1. The applicant's initial confirmation of his appointment with the respondent dated 9 October 1989 which is as follows (formal parts omitted):

"We have pleasure in confirming your appointment to Prok Group Limited as a Purchasing-Stores Controller effective from 9th October, 1989.

Your Annual salary will be $29,000 and will be paid monthly.

Subject to satisfactory service, you will be invited to join the Superannuation Fund at a date no later than 9th October, 1990.

Annual Leave and Sick Leave will be in accordance with Statutory Provisions as they apply from time to time.

Office hours are 8.30 a.m. to 12.00 noon, 12.30 p.m. to 4.30 p.m.

This appointment is terminable by one month's notice by either party.

Would you kindly sign one copy of this letter to signify your acceptance of these Conditions of Employment and return it to the undersigned.

We would like to take this opportunity of welcoming you to Prok Group Limited and look forward to a long and happy association with you."

(Exhibit A2 page 5)

2. An ETP Pre-Payment Statement for the applicant dated 14 November 2003 (Exhibit A2 page 7).
3. The applicant's termination calculation (Exhibit A2 page 9).
4. Termination quotations for two of the respondent's former employees Mr Robert Sincich and Mr Garry Rodd who were made redundant in June 2003 (Exhibit A2 pages 10 and 11).
5. A Chart of Redundancies of the respondent's former employees whose positions were made redundant after June 2003(Exhibit A4).
6. An email dated 29 September 2004 from Mr Goodall sent to Mike Hamer, Bruce Goulds, Kevin Hole and Chris Mitchell which reads as follows (formal parts omitted):

"Whilst historically there appears to have been some difference in approach when applying dollar outcomes in the circumstances mentioned above the following are the prime considerations when going through the sensitive issue of calculating Severance payment amounts for relevant employees from now:

Level	Consideration	Outplacement service (If offered[sic])
Managing Director	Up to 12 months salary	Up to $5000
Executive management	Up to 9 months salary	Up to $3000
Other management	Up to 6 months salary	Up to $2000
Other	Up to 3 months salary	Up to $1500

Other matters for consideration in this process:

Length of service

Level of remuneration

Seniority of role

Market expectation of finding alternative suitable employment

Age

Local Industrial Agreement conditions

Community expectations

There may be exceptions due to the length of service where the normal salary range could then flow to another level however this would not become the norm but the exception.

> Lower levels of salaried staff would normally be expected to be catered for via the Minimum Condition Act (sic) or appropriate federal award conditions which in the main would also fall under the "Other" section above.
>
> The above would cover most circumstances however with management having the flexibility to adjust as appropriate in any given situation.
>
> It is trusted that the above clarrifies (sic) our process"
>
> (Exhibit A3)

Applicant's evidence

6 The applicant was unavailable to attend the hearing and therefore did not give any oral evidence in support of his application.

Respondent's evidence

7 Mr Bruce Goulds is the respondent's Chief Financial Officer. Mr Goulds stated that there was no express entitlement under the applicant's contract of employment that he be given a redundancy payment when terminated due to a redundancy situation and that the respondent did not have a written policy guaranteeing that a redundancy payment would be given to employees who were terminated because their position had been made redundant. However, Mr Goulds stated that the respondent had an informal arrangement whereby employees whose positions were made redundant were given a termination payment which was calculated taking into consideration a range of factors. Mr Goulds stated that the factors the respondent took into account when deciding on an employee's termination payment included age, length of service, skills possessed, the seniority of the position occupied by the person being made redundant and market conditions relating to the employee's future alternative employment options. The respondent also took into account the employee's place of work. Mr Goulds said the respondent did not use a set payment of two weeks per year of service when calculating an employee's redundancy payment.

8 Mr Goulds gave evidence about eight employees who were terminated because their positions were made redundant by the respondent in the 18 months prior to the hearing and the basis on which their redundancy payment was calculated (see Exhibit A4). Mr Goulds stated that when Mr Sincich was terminated he was given a redundancy payment (which equated to two weeks per year of service) determined on the basis that Mr Sincich was in a senior management position with substantial responsibilities, Mr Sincich was in a specific role as he was in charge of selling specialised equipment to the mining industry and as Mr Sincich was based in Melbourne the respondent believed his future employment options were limited. Mr Rodd (who was also given a payment which equated to two weeks per year of service) held a position of similar responsibility to that of Mr Sincich, he had lengthy service with the respondent and his role was also specialised. Mr Goulds was unable to comment on Ms Alison Hurry as she worked in a different area of the respondent's business. Mr David Farmer (who was given a payment which equated to 2.1 weeks per year of service) had specialised expertise in the sales area, he lived in Newcastle and the respondent believed that he had a good chance of obtaining alternative employment and did so the day after ceasing employment with the respondent. Mr David Eckersley (who was given a payment equating to 7.6 weeks per year of service) was the respondent's operations manager, he was an expert in general management in a particular area of business and as he was well qualified the respondent believed he was well placed to obtain alternative employment. Mr Frank Huysmann (who was given a redundancy payment which equated to 3.13 weeks per year) was employed in a sales position which was based in Victoria and he mainly dealt with a specific line of products. Mr Keith Gill (who was given a payment which equated to 5.2 weeks per year of service) was only with the respondent a short time but as the respondent's national Financial Manager he was employed in a senior role and Mr Goulds believed that the opportunity for him to gain employment at this level again was limited.

9 Mr Goulds stated that when determining the redundancy payment due to the applicant the respondent took into account the applicant's age, his length of service with the respondent, the skills he possessed and the likelihood that he would obtain employment elsewhere. Mr Goulds stated that the applicant's redundancy payment was decided on the basis that the applicant was in a less senior position than that of Mr Sincich and that he worked in a support role to the general operations of the respondent's supply chain area. The respondent also took into account that as the supply chain industry was buoyant in Western Australia when the applicant was terminated the respondent believed that the applicant could readily obtain alternative employment. Mr Goulds re-iterated that the assessment of the applicant's termination payment was not based on a specific number of weeks per year of service as the respondent did not have a policy that a standard rate of two weeks per year of service would be paid in a redundancy situation.

10 Under cross-examination Mr Goulds stated that when determining a redundancy payment the respondent decided what was reasonable in all of the circumstances for each employee taking into account a range of factors. Mr Goulds stated that even though Mr Sincich and Mr Rodd were given a payment which equated to two weeks per year of service it was misleading to infer that the redundancy payment given to an employee would be based on a specific number of weeks per year of service. When Mr Goulds was asked why reference was made to both Mr Sincich and Mr Rodd being entitled to a 'standard two weeks per year of service' in their termination quotation documents Mr Goulds was unable to explain why this reference was on these documents (Exhibit A2 pages 10 and 11). Mr Goulds stated that over his twenty years of experience supplying equipment to the mining industry he had never come across the principle of a standard payment of two weeks per year of service when calculating a redundancy payment.

Submissions

11 The applicant maintains that the initial letter given to him by the respondent in 1989 does not constitute the full contractual agreement between the applicant and the respondent and that there were a number of other terms and policies which were implied into the applicant's contract of employment as at the date of the applicant's termination.

12 The applicant argues that Mr Goulds gave evidence confirming that the respondent had a policy to make redundancy payments to employees who were terminated when their positions were made redundant and the emails between Mr Goodall and the applicant in January 2004 confirm that such a policy existed. The existence of this policy is also confirmed by the payments made to eight employees whose positions were made redundant by the respondent in the 18 months prior to the hearing (Exhibit A4). On this basis the applicant claims that he has demonstrated that he was entitled to a redundancy entitlement when he was terminated under his contract of employment with the respondent.

13 The applicant submits that his position as Supply Chain Manager was a senior managerial position in the respondent's corporate structure and argues that he should have been paid a redundancy payment based on a reasonable amount for a person in a similar position in the marketplace. The applicant had a lengthy period of service with the respondent, he had a high level of remuneration and he was made redundant at a time when his age (52 years old) meant that it was difficult for him to obtain alternative employment. Given the redundancy payments made to other like employees in 2003, particularly Mr Sincich and Mr Rodd, the applicant argues that a reasonable redundancy package should have been calculated on a payment of at least two weeks' remuneration for each year of service. The applicant also maintains that a payment of two weeks per year of service was a standard payment adopted by the respondent as confirmed in the termination calculations given to Mr Sincich

and Mr Rodd. The applicant claims that he is therefore entitled to $22,891.00 which is the difference between what the applicant was paid as a redundancy entitlement and what he is claiming, based on a payment of two weeks per year of service.

14 The respondent argues that as the applicant did not have an express entitlement under his contract of employment with the respondent to be paid an amount for redundancy at termination the applicant's claim should therefore be dismissed.

15 In the alternative the respondent argues that if an entitlement to a redundancy payment was implied into the applicant's contract of employment the respondent maintains that there was never any agreement between the parties, either express or implied, that the applicant be paid two weeks per year of service on being terminated due to a redundancy situation. Even though the respondent has a policy to make a redundancy payment to salaried employees whose positions cease due to a redundancy situation this policy does not provide for a specific payment to be made based on two weeks' pay per year of service when deciding on an individual's termination payment. The quantum paid to an employee is determined by the respondent considering a range of factors. The respondent argues that it gave the applicant an appropriate termination payment which took into account that he had a less senior position than that of Mr Rodd and Mr Sincich and there were other factors which were peculiar to their employment and which were distinguishable from the applicant's situation.

16 As the applicant has not demonstrated that the applicant had an entitlement under his contract of employment to a redundancy payment of two weeks per year of service the respondent maintains that the applicant's claim should therefore fail.

Findings and Conclusions

Credibility

17 I take no issue with the evidence given by Mr Goulds. In my view he gave his evidence honestly and to the best of his recollection. However, I find it curious that Mr Goulds was unable to explain the reference to two weeks per year of service being the basis for the calculation of the termination payment for Mr Rodd and Mr Sincich on their termination calculation documents.

18 In an application for contractual benefits under s.29(1)(b)(ii) of the Act, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under his or her contract of employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).

19 Paragraphs 2, 3 and 4 set out the agreed background to this dispute and relevant documentation.

20 The issue before me is whether or not under his contract of employment with the respondent the applicant had an entitlement to a redundancy payment when he was terminated and if so whether the applicant should have been paid two weeks per year of service as a redundancy payment. On the evidence before me I find that it was an implied term of the applicant's contract of employment with the respondent that if he was terminated due to a redundancy situation he was entitled to receive a redundancy payment. It is clear the applicant's only written contract of employment with the respondent, which was signed in 1989, is very brief and does not refer to the applicant being entitled to a redundancy payment. However, it is the case that when a contract of employment is agreed between parties it is not always exhaustive of all of the terms and conditions of an employee's contract of employment with an employer and an employee's contract of employment will vary and change over time and these variations and changes may or may not be confirmed in writing. For example, the applicant' salary has altered since 1989 as well as his position yet these changes were not confirmed in a revised contract of employment. On this basis I find that the initial contract signed by the applicant with the respondent did not constitute the entire contract between the parties when the applicant was terminated. It is also my view that there was sufficient evidence before me to conclude that the applicant had implied into his contract of employment an entitlement to a redundancy payment if he was terminated due to a redundancy situation. Mr Goulds gave evidence confirming that the respondent had a policy to make a termination payment to salaried employees when their positions were made redundant and as the applicant was given a redundancy payment at termination this adds weight to a redundancy payment being implied into the applicant's contract of employment. Furthermore, the applicant's entitlement to this policy was confirmed in the email exchange between the applicant and Mr Goodall in January 2004 and the long term existence of this policy was confirmed in Mr Goodall's email to Mike Hamer, Bruce Goulds, Kevin Hole and Chris Mitchell dated 29 September 2004. I therefore find that the applicant's contract of employment with the respondent had an implied term that he be entitled to a redundancy payment if he was terminated due to a redundancy situation.

21 On the evidence before me however, I find that the applicant has not established that the respondent owed him a redundancy payment based on a payment of two weeks' pay for each year of service. There was no evidence confirming that there was ever an agreement between the applicant and the respondent that the applicant be given a redundancy payment based on two weeks per year of service nor do I find that the respondent had a policy that the applicant would be paid two weeks pay per year of service as a redundancy entitlement if he was made redundant. I accept the evidence of Mr Goulds that when the respondent decided on a redundancy payment to a salaried staff member a range of factors were considered when determining this amount and that these factors included an employee's length of service, level of remuneration, seniority of role, market expectation, the ability to find suitable alternative employment and age. I find that it is within this context that the respondent determined the amount to which each salaried employee including the applicant, was entitled. There was no evidence that when applying these factors that an employee would be automatically entitled to two weeks' pay per year of service and the basis of the calculations for a range of employees made redundant prior to and after the applicant demonstrate that two weeks per year of service was not a formula the respondent used when determining the quantum of a redundancy payment (see Exhibit A4 which demonstrates that of the eight employees who were made redundant in the 18 months prior to the hearing only three of those employees were paid at a rate of the equivalent of two weeks per year of service, the other five employees were variously given termination payments equating to 1.3, 2.1, 7.6, 3.13, and 5.2 weeks per year of service).

22 The applicant argues that his redundancy payment should have been calculated on the same rate as Mr Rodd and Mr Sincich as his position in the respondent's organisation and his circumstances were similar to that of Mr Rodd and Mr Sincich. Even though Mr Rodd and Mr Sincich were paid quantums that equated to two weeks per year of service and there is reference to this being the basis of the calculation of their redundancy payment on their redundancy calculation sheets, this does not demonstrate that the applicant automatically had an entitlement to a redundancy payment based on two weeks per year of service. It is my view that as the respondent had a policy to determine a redundancy payment on a case by case basis taking into account a range of factors it was open for the respondent to determine that the applicant was due the amount he received. Even though this resulted in the applicant being paid a lower amount per year of service than that paid to Mr Rodd and Mr Sincich I accept the evidence of Mr Goulds that Mr Rodd and Mr Sincich were in more senior positions to the applicant (they were both paid higher salaries than the applicant) and their individual circumstances varied from that of the applicant which led to the respondent determining that they be paid a different amount than that paid to the applicant.

23 In the circumstances I find that the applicant has failed to demonstrate the onus on him that under his contract of employment with the respondent he is due the additional redundancy entitlement he is claiming based on an entitlement of a payment calculated on two weeks' pay per year of service.

24 An order will now issue dismissing this application.

2005 WAIRC 01140

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR PAUL WILLIAMS
	APPLICANT
	-v-
	SANDVIK MATERIALS HANDLING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 11 APRIL 2005
FILE NO/S	APPL 197 OF 2004
CITATION NO.	2005 WAIRC 01140

Result Application for contractual benefits dismissed

Order

HAVING HEARD Mr D McLane as agent on behalf of the applicant and Ms J Auerbach of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Adolfo Esteban Chavez	Stoneage Ceramics (Aust) Pty Ltd	APPL 1225/2004	Commissioner J L Harrison	Discontinued
Al Ramon	Mclernon's Supply & Demand	APPL 327/2005	Commissioner J L Harrison	Discontinued
Alan Michael Cheeseman	Complan Resources Pty Ltd	APPL 129/2005	Commissioner S M Mayman	Discontinued
Alistair Carragher	Feral Brewing Co Pty Ltd	APPL 976/2004	Commissioner S J Kenner	Discontinued
Amber Clare Lochowicz	One World Backpackers	APPL 907/2004	Senior Commissioner J F Gregor	Discontinued
Austyn Jenae Campbell	National Jet Systems Pty Ltd	APPL 961/2004	Commissioner J L Harrison	Discontinued
Barnard Julian Gorringe	Port Hedland Indigenous Media Aboriginal Corp	APPL 1700/2004	Senior Commissioner J F Gregor	Discontinued
BradleyTriston	HIMA Australia Pty Ltd	APPL 1360/2004	Commissioner S Wood	Discontinued
Brian Kenneth Barnfield	Austral Engineering Supplies Pty Ltd	APPL 164/2004	Commissioner J L Harrison	Discontinued
Brian Stanley Greenhalgh	Super Cheap Auto Pty Ltd ABN 64 085 395 124 t/as Super Cheap Auto	APPL 1698/2004	Commissioner J L Harrison	Discontinued
Brody Edward McShane	Mario Peca and MPM Enterprises Pty Ltd	APPL 1008/2004	Commissioner S J Kenner	Discontinued
Bronwyn Falconer	SAS Realty	APPL 48/2005	Commissioner J L Harrison	Order Issued
Caroline P. Larbey	Auto Classic	APPL 134/2005	Commissioner S M Mayman	Discontinued

Parties		File Number	Commissioner	Result
Chad Anthony McShane	Mario Peca and MPM Enterprises Pty Ltd	APPL 1010/2004	Commissioner S J Kenner	Dismissed
Chantel Caruso	Oxford 130	APPL 91/2005	Commissioner J L Harrison	Discontinued
Charles Henry Green	Cranes Haulage (Daytona Holdings)	APPL 135/2005	Commissioner P E Scott	Discontinued
Christopher Gordon Darroch	Century West Transport	APPL 1472/2004	Commissioner P E Scott	Discontinued
Colin Leslie Beaumont	Coogee Chemicals Pty Ltd	APPL 1163/2004	Commissioner J L Harrison	Discontinued
Colin White	Shire of Carnarvon	APPL 1440/2004	Commissioner J H Smith	Discontinued
Constantinos Retsas	Mandangala Aboriginal Corporation	APPL 72/2004	Commissioner P E Scott	Discontinued
Corinne Anne Brown	Canning Healthcare Centre	APPL 271/2005	Commissioner J H Smith	Discontinued
Craig Birks	Fremantle Freight & Storage Pty Ltd	APPL 798/2004	Commissioner J H Smith	Discontinued
Craig Donald Cope	Mario Peca and MPM Enterprises P/L	APPL 1007/2004	Commissioner S J Kenner	Dismissed
Craig Weston	DMG Radio Perth Pty Ltd t/as Nova 93.7 FM (ABN - 51 099 052 481)	APPL 730/2004	Commissioner J L Harrison	Discontinued
Cvetan Mladenovski	Dampier Salt Limited	APPL 1521/2004	Commissioner S J Kenner	Discontinued
Dale Cornell	Paul Albert	APPL 1225/2004	Commissioner J L Harrison	Discontinued
Dale Rogers	Shire of Carnarvon	APPL 1439/2004	Commissioner J H Smith	Discontinued
Danae Jennings	South Metropoliton Youth Services	APPL 1627/2004	Commissioner S J Kenner	Discontinued
Darren Tony Fulford	Mercure Inn Continental	APPL 1021/2004	Commissioner J L Harrison	Discontinued
David James Riddell	Tam International Australia Pty Ltd	APPL 1015/2004	Commissioner J H Smith	Discontinued
David Jonathon Wrighton	Swan Veterinary Hospital	APPL 345/2005	Chief Commissioner A R Beech	Discontinued
Dawn Leanne Sewell	Interleasing (Australia) Limited	APPL 646/2004	Commissioner J H Smith	Discontinued
Dean Witcombe	Profile Injection Moulding Pty Ltd	APPL 1517/2004	Commissioner J H Smith	Discontinued
Denis Rodney Simpson	Gronbek Security	APPL 335/2005	Chief Commissioner A R Beech	Discontinued
Dianne Elizabeth Westdorp	HPA Pty Ltd	APPL 1655/2004	Commissioner S M Mayman	Discontinued
Donald Xavier Neville	Broadwater Hospitality Pty Ltd	APPL 1081/2004	Commissioner J L Harrison	Discontinued
Ellen Marie Chinnery	Albany and Districts Skills Training Commitee Incorporated	APPL 278/2005	Commissioner P E Scott	Discontinued
Emma Jade Congerton	Mainbase Holdings Pty Ltd trading as Supa Valu Morley	APPL 181/2005	Senior Commissioner J F Gregor	Discontinued
Evelyn Ruth Cook	The Country Women's Association of Western Australia (Inc)	APPL 231/2004	Commissioner P E Scott	Discontinued
Ferial Kadamani	Civilian Maimed Limbless Osboine Age Care	APPL 1618/2004	Commissioner P E Scott	Discontinued
Frank Monaco	Richard John Tregaskis trading as Pink Prop Formwork (ABN 24 383 018 185)	APPL 353/2004	Senior Commissioner J F Gregor	Dismissed
Gary Wayne Rothenbury	Derbarl Yerrigan Health Service Inc	APPL 1748/2004	Commissioner J L Harrison	Discontinued

Parties		File Number	Commissioner	Result
Glen Raymond Young	KMart Australia Ltd ACN 004 700 485	APPL 228/2003	Commissioner J L Harrison	Discontinued
Glenn Francis Baxter	Nembro Pty Ltd t/a LJ Hooker-Bentley	APPL 292/2004	Commissioner J H Smith	Dismissed
Gregory Edward Cowin	Wren Oil	APPL 214/2005	Commissioner J L Harrison	Order Issued
Hector Rodriguez	Perth Hospitality Professionals Pty Ltd t/a Australian School of Tourism and Hotel Management A.C.N. 009 369 767	APPL 941/2004	Senior Commissioner J F Gregor	Discontinued
Ivy Bilos	Aurion Gold Menzies Highway, Kalgoorlie	APPL 1991/2002	Senior Commissioner J F Gregor	Order (Arbitration)
Jacqueline Marion Bollam	Hills Enterprises Pty Ltd	APPL 1427/2004	Commissioner J H Smith	Discontinued
James Henry Chute	Carol & Michael Wauchope t/as Mandurah Ferry Cruises	APPL 1676/2004	Commissioner S Wood	Discontinued
Jan Marlene Gordon	Vogue Lighting Pty Ltd	APPL 1475/2004	Commissioner J L Harrison	Discontinued
Jennifer Anne Chapman	Shirley Richardson - Mediterranean Kitchen P/L	APPL 299/2005	Commissioner J H Smith	Discontinued
Jennifer Marie Glaccum	The Quality Hotel Lord Forrest	APPL 1401/2004	Commissioner J H Smith	Discontinued
Jenny Holten	Spinelle Resources Pty Ltd T/as The Earth Market	APPL 1286/2004	Commissioner J L Harrison	Discontinued
Jeremy Kuen-Heng Kok	Leighton Contractors Pty Ltd	APPL 1835/2003	Senior Commissioner J F Gregor	Discontinued
John North	Ultimate Distribution Pty Ltd	APPL 1286/2004	Commissioner J L Harrison	Discontinued
Jolene Elise Burnett	Lemen Pty Ltd, Kathryn Jane Langridge and Michael Christopher Flaherty t/as Glitterati	APPL 1431/2004	Commissioner J L Harrison	Discontinued
Katherine Louise Dean	Citrus Cafe	APPL 65/2005	Commissioner S M Mayman	Discontinued
Kenneth John McIntosh	Morning Star Fisheries	APPL 1227/2004	Senior Commissioner J F Gregor	Discontinued
Kerry Lee Hitchins	Emanual Education Group	APPL 1438/2004	Commissioner J L Harrison	Discontinued
Kleon Langdon	Camec Pty Ltd	APPL 1684/2003	Commissioner J H Smith	Discontinued
Laura Ann Walker	Posters Tavern	APPL 84/2005	Commissioner J L Harrison	Discontinued
Leonard Rowe	Barminco	APPL 1419/2004	Commissioner S J Kenner	Discontinued
Liza Jane Ugle	flagship Holdings Pty Ltd T/A Silks Restaurant	APPL 176/2005	Chief Commissioner A R Beech	Discontinued
Lynette Yvonne DeGrys	Mr Charles Vella	APPL 221/2005	Commissioner J L Harrison	Discontinued
Marie Joseph Phillip De Senneville	NRP Electrical Services	APPL 1498/2004	Commissioner J L Harrison	Discontinued
Marina Hatch	Uni-Medical Management Pty Ltd T/A University Medical Practice	APPL 1161/2003	Commissioner S J Kenner	Discontinued
Mark Joseph Dyer	Wridgway Removal	APPL 1004/2004	Commissioner J L Harrison	Dismissed
Mark Purvis	Alatact Pty Ltd as Trustee for the Philip Short Family Trust T/As Living Stone Paving Products	APPL 1526/2004	Commissioner J L Harrison	Discontinued

Parties		File Number	Commissioner	Result
Marthinus Gerhardus Slabber	T & H Walton Stores Pty Ltd ABN 52008686002 t/a Waltons Carnamah and Waltons Moora, Gorham Corporation Pty Ltd ABN 22009354554 t/a Waltons Geraldton	APPL 1639/2004	Senior Commissioner J F Gregor	Discontinued
Maurice Levy	The Impressions Furniture Gallery	APPL 869/2004	Commissioner J L Harrison	Discontinued
Megan Restall	Club Red C	APPL 1417/2004	Commissioner J L Harrison	Discontinued
Michael Alexander Addison	Phoenix Metalform Pty Ltd	APPL 1482/2004	Commissioner S Wood	Discontinued
Michael David Langoulant	Voucherbank.Com Pty Ltd	APPL 1539/2004	Commissioner S Wood	Discontinued
Michael Ferguson	Mario Peca and MPM Enterprises Pty Ltd	APPL 1009/2004	Commissioner S J Kenner	Dismissed
Miss Emma Renai Pearson	John Hughes Service Centre	APPL 1681/2004	Commissioner S M Mayman	Discontinued
Miss Jo-Lene Kashkooli-Ellat	Belmont Tavern-Silks	APPL 1682/2004	Commissioner S Wood	Dismissed
Mogens Magnussen	Australian Integration Management Services Corporation Pty Ltd (ABN 68 010 921 641)	APPL 1412/2004	Commissioner J H Smith	Discontinued
Mr Aaron James Robert Phillips	City Toyota	APPL 109/2005	Commissioner S M Mayman	Discontinued
Mr Alan Ross Aslan	Westpork Pty Ltd	APPL 1705/2004	Senior Commissioner J F Gregor	Discontinued
Mr Allan Bruce Munro	Placer Dome Kalgoorlie Limited	APPL 183/2005	Senior Commissioner J F Gregor	Discontinued
Mr Bradley John Boffey	Topic Caterers	APPL 1660/2004	Senior Commissioner J F Gregor	Discontinued
Mr Brett Charles Simm	Bailbro Pty Ltd t/as Southern Steelworks	APPL 1641/2004	Commissioner S Wood	Discontinued
Mr Brook Peter Rogers	Synergy Regional Pty Ltd	APPL 133/2005	Commissioner S M Mayman	Discontinued
Mr Chad Michael Dufall	Alpine Court T/As Port Kennedy Tavern	APPL 219/2005	Commissioner J H Smith	Dismissed
Mr Craig Landquist	The Rottnest Island Authority	APPL 179/2005	Commissioner J H Smith	Discontinued
Mr Craig Ward	Clyde-Apac	APPL 1673/2004	Commissioner S M Mayman	Discontinued
Mr Dominic Wild	Challenger TAFE	APPL 7/2005	Senior Commissioner J F Gregor	Discontinued
Mr Gary Tallis	Airmech Air Conditioning	APPL 74/2005	Senior Commissioner J F Gregor	Discontinued
Mr Glenn Edmond Phillips	Advanced Engineering	APPL 79/2005	Commissioner S M Mayman	Discontinued
Mr Jason Gerard Dornford	Brian Gardner Motors	APPL 124/2005	Commissioner S M Mayman	Discontinued
Mr John Mann	RCR Tomlinson Ltd	APPL 227/2005	Commissioner J H Smith	Discontinued
Mr Joshua Coniglio	Hill & Dale Removals	APPL 38/2005	Commissioner J L Harrison	Discontinued
Mr Kenneth Edward Robertson	ITQ Pty Ltd t/a Digilife and Another	APPL 34/2005	Senior Commissioner J F Gregor	Discontinued
Mr Kim Alan Bryan	Total Cabling Solutions WA Pty Ltd	APPL 50/2005	Commissioner S J Kenner	Discontinued

Parties		File Number	Commissioner	Result
Mr Marcus John Norton	Mias Bakery	APPL 69/2005	Commissioner P E Scott	Discontinued
Mr Mario Fontana	National Meat Association	APPL 62/2005	Commissioner S M Mayman	Discontinued
Mr Mark Anthony De Silva	Pine Lake Nursery	APPL 150/2005	Commissioner S M Mayman	Discontinued
Mr Michael John Del Borrello	Kimberley Distributors	APPL 1134/2004	Senior Commissioner J F Gregor	Discontinued
Mr Michael Peter Laycock	Harvey Norman Bolmont	APPL 1704/2004	Senior Commissioner J F Gregor	Discontinued
Mr Neil John MacIver	Budget Car & Truck Rentals t/a Busby Investments Pty Ltd	APPL 1693/2004	Senior Commissioner J F Gregor	Discontinued
Mr Noel James Acton	Amec Engineering	APPL 111/2005	Commissioner S M Mayman	Discontinued
Mr Paul Richard Skinner	ACM Installations Pty Ltd	APPL 76/2005	Commissioner S J Kenner	Discontinued
Mr Ritchie Beresford Rhodes	JFK Engineering Pty Ltd ACN 090 503 790	APPL 1686/2004	Senior Commissioner J F Gregor	Discontinued
Mr Steven Michael Tate	Rainstorm Pty Ltd	APPL 67/2005	Commissioner S M Mayman	Discontinued
Mr Terence Sanfead	Panto Pty Ltd t/as Drill Source	APPL 107/2005	Senior Commissioner J F Gregor	Discontinued
Mr Terry Polak	Grand Cinema's Joondalup	APPL 27/2005	Commissioner S M Mayman	Discontinued
Mr Thomas William Reid	Colourpress Pty Ltd	APPL 10/2005	Senior Commissioner J F Gregor	Discontinued
Mr Toby Estrada-Gray	Action Couriers Pty Ltd	APPL 142/2005	Senior Commissioner J F Gregor	Discontinued
Mrs Anna Dehaan	Rexel Australia	APPL 138/2005	Commissioner S M Mayman	Discontinued
Mrs Carol Alford	Geraldton Guardian Newspaper	APPL 137/2005	Senior Commissioner J F Gregor	Discontinued
Mrs De Lian Chen	Mr Onions	APPL 199/2005	Commissioner S M Mayman	Discontinued
Mrs Eunice Maud Ingrid Borges	CJ King & Co Printers	APPL 114/2005	Commissioner S M Mayman	Discontinued
Mrs Julie Gay Lockley	CFT Australia Pty Ltd	APPL 54/2005	Commissioner S M Mayman	Discontinued
Mrs Leigh Ilona Howe	Komatsu Australia	APPL 169/2005	Commissioner S J Kenner	Discontinued
Mrs Letitia June Heald	Hospitality Inn	APPL 242/2005	Senior Commissioner J F Gregor	Discontinued
Mrs Margot Regina Denkinger	Property Scene (WA) Pty Ltd	APPL 88/2005	Commissioner P E Scott	Discontinued
Mrs Mary T Baird	Foodlink FAL	APPL 1667/2004	Commissioner S J Kenner	Discontinued
Mrs Misa Hashimoto	Stay Healthy	APPL 66/2005	Chief Commissioner A R Beech	Discontinued
Mrs Rebekah Van Den Bussche	Precision Finance & Insurance Services Pty Ltd	APPL 1603/2004	Senior Commissioner J F Gregor	Discontinued
Ms Clarissa Rodriguez	OCS Quirk Pty Ltd	APPL 8/2005	Commissioner S M Mayman	Discontinued

Parties		File Number	Commissioner	Result
Ms Kim Nicole Crompton	Cannridge Pty Ltd t/as Albany City Motors	APPL 182/2005	Commissioner P E Scott	Discontinued
Ms Pauline Ann Pickering	Roy Weston Mandurah	APPL 39/2005	Commissioner J H Smith	Discontinued
Ms Sandra Lesley Beasley	N.H.Enterprises	APPL 17/2005	Commissioner P E Scott	Discontinued
Ms Sarah Dean	Citrus Cafe	APPL 64/2005	Commissioner S M Mayman	Discontinued
Ms Tamela Jean O'Loughlin	Carribean Hardware Trading As Home Hardware, Timber And Garden Supplies	APPL 191/2005	Commissioner S Wood	Discontinued
Ms Toni Jane Harris	State Forensic Mental Helath Service	APPL 1622/2004	Commissioner S M Mayman	Discontinued
Mustafa Kalkanci	Efes Bakery	APPL 347/2004	Commissioner J L Harrison	Discontinued
Nadia Bryce	Westpoint Finance Pty Ltd	APPL 1106/2004	Commissioner J L Harrison	Discontinued
Nathan William Johnson	Anthony & Sons Pty Ltd T/As Oceanic Cruises	APPL 53/2005	Senior Commissioner J F Gregor	Discontinued
Paul Harrison Galloway	Margaret River Glass	APPL 1697/2004	Commissioner J L Harrison	Discontinued
Paul Ison	Australian Electronics and Metals	APPL 1689/2004	Senior Commissioner J F Gregor	Discontinued
Paul Nolan	The President, Pemberton Visitor Centre	APPL 1670/2004	Commissioner J L Harrison	Discontinued
Peter John Shields	Wagner Spraytech Australia Pty Ltd	APPL 1621/2004	Senior Commissioner J F Gregor	Discontinued
Philip Martin Jones	IBM Australia Pty Ltd	APPL 1624/2004	Commissioner P E Scott	Discontinued
Rachel Natalie Beck	Coakley & Martin Pty Ltd	APPL 1464/2004	Commissioner S J Kenner	Discontinued
Ralph Silvio Scaffardi	Stephen Ford Cockburn Power Station	APPL 1581/2004	Commissioner J L Harrison	Discontinued
Ray Jose Patricio	Allstates Fruit & Veg Merchants	APPL 851/2004	Commissioner S J Kenner	Discontinued
Raymond John Sullivan	Co Pharmacy	APPL 1337/2004	Commissioner S Wood	Discontinued
Rebecca Anne Pattison	Ice Accessories P/L	APPL 152/2005	Commissioner J L Harrison	Discontinued
Robert William Pampling	Paterson Pedler Pty Ltd T/as Nexus Risk Services	APPL 1620/2004	Commissioner J H Smith	Discontinued
Rodney Ellis	Shire of Carnarvon	APPL 1441/2004	Commissioner J H Smith	Discontinued
Rosemary Brooks	The Greens (WA) Inc.	APPL 1379/2003	Commissioner J L Harrison	Discontinued
Russell Copley	Timothy Francis Mackintosh and Wemeltje t/as City Models	APPL 1093/2004	Commissioner P E Scott	Discontinued
Ruth Helen Thomas	A & L Moir Investments t/as Goldline Financial Management	APPL 1532/2004	Commissioner J H Smith	Discontinued
Shelley Orchard	Salvation Army Family Stores	APPL 1557/2004	Commissioner J L Harrison	Discontinued
Shelley Rae Croot	Envar Engineering	APPL 233/2005	Senior Commissioner J F Gregor	Discontinued
Stuart James McAdam Treloar	Rentsmart Pty Ltd	APPL 268/2005	Senior Commissioner J F Gregor	Discontinued
Stuart Paull	Garden Bay Holdings Pty Ltd ATF The Fitzgerald Unit Trust T/as G.T. Lean & Associates CPA's	APPL 249/2005	Commissioner P E Scott	Discontinued

Parties		File Number	Commissioner	Result
Susan Veronica Hall	Sbrana Pty Ltd t/a Malaga Tavern	APPL 1545/2004	Commissioner J L Harrison	Discontinued
Tanya Cooper	Fratelli's Coffee Lounge	APPL 1638/2004	Commissioner S J Kenner	Discontinued
Taryn Gianatti	Trench Health and Fitness	APPL 1359/2004	Senior Commissioner J F Gregor	Discontinued
Timothy Rogan	Premier Marble And Granite Pty Ltd	APPL 1230/2004	Commissioner J L Harrison	Discontinued
Tina Louise Bohen	DMG Regional Radio Pty Ltd	APPL 1111/2004	Senior Commissioner J F Gregor	Discontinued
Tony Mather	Fourmile Enterprises Pty Ltd t/a Telstra Licensed Shop Joondalup	APPL 1654/2004	Commissioner J L Harrison	Discontinued
Troy Burnet	The Highlife (Aust.) Pty Limited	APPL 70/2005	Commissioner J L Harrison	Discontinued
Vanda Noelene Belletty	Zamel's Pty Ltd	APPL 1066/2004	Senior Commissioner J F Gregor	Discontinued
Zana Maria Pearce	Koast Corporation Pty Ltd (Trading as Green Recycling)	APPL 351/2005	Commissioner J L Harrison	Order Issued

CONFERENCES—Matters arising out of—

2005 WAIRC 01522

DISPUTE REGARDING SAFETY PRACTICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS

APPLICANT

-v-

BHP BILLITON IRON ORE PTY LTD AND INTEGRATED GROUP LTD

RESPONDENTS

CORAM COMMISSIONER S WOOD
DATE THURSDAY, 12 MAY 2005
FILE NO. C 44 OF 2005
CITATION NO. 2005 WAIRC 01522

CatchWords Dispute re safety practices - Discovery of information - Bias – Abuse of process - Application dismissed - Industrial Relations Act 1979 (WA) s.44, s.27(1)(a)(iv)

Result Application dismissed
Representation
Applicant Mr D Schapper of Counsel
Respondent Mr R Lilburne of Counsel on behalf of BHP Billiton Iron Ore Pty Ltd
Mr N Ellery of Counsel on behalf of Integrated Group Ltd

Reasons for Decision

1 This is an application made pursuant to s.44 of the *Industrial Relations Act 1979* ("the Act"). This application was filed in the Commission at approximately 2 pm on 17 March 2005. The application was made in the following terms:

> "On 15 April 2004 a driver Ian Moore allegedly employed by the second respondent to work at the first respondent's rail system was involved in an incident.
>
> The incident was that Moore, driving a Hirail, attempted to cross the rail line other than at a crossing with the result that the Hirail became stranded across the line. This was done without the knowledge or authority of train control. Significant potential for a fatal accident and/or major property damage resulted from these events. Further, as a result of becoming stranded and/or as a result of attempting the free the Hirail the vehicle suffered significant damage. Having freed the vehicle Moore then drove it about 160 km to the Hedland yard. The incident and the damage to the vehicle was not reported by Moore at the time. Many serious breaches of the railway rules occurred in the course of these events.
>
> As a result of these matters the applicant understands that Moore was merely reprimanded.

These events, if true, raise serious questions concerning the competence of the first respondent's management and the genuineness of its alleged concern to ensure that the rail way is operated safely. Lack of management competence and absence of concern to ensure the railway is operated safely has significant potential to impact adversely on the applicant's members.

The applicant seeks a conference to discuss the matter."

2 The Commission received a letter from the second respondent dated 22 March 2005 identifying themselves properly as Integrated Group Ltd trading as Integrated Workforce. The letter states:

"Mr Moore has not been employed by Integrated in any capacity since 5th September 2004. Integrated has not been approached by the CFMEU or by any representative of the CFMEU seeking to discuss the alleged incident involving Mr Moore since the time of the incident.

Given these circumstances, we fail to see how this matter has any relevance to Integrated, and we consider that the Application is merely a fishing exercise to gather information for some other industrial purposes. We submit that there is no industrial matter between the CFMEU and Integrated in relation to this alleged incident."

3 On 23 March 2005 the first respondent contacted the Commission seeking a copy of the application which was provided. On 24 March 2005 Mr Schapper for the applicant by email advised the Commission that declaration of service in the above matter would be filed that afternoon and requested the matter be allocated and set down for conference. Mr Schapper by email on 31 March 2005 again requested the matter be set down for conference. A conference was convened on 4 April 2005 at which time Mr Schapper sought discovery of all documents in the possession of both respondents regarding the Hirail incident involving Mr Moore. The applicant complained that management had erred in that the seriousness of the event was not commensurate with how the incident was dealt with, and the penalty imposed on Mr Moore. The applicant advised that their understanding of the issue was not complete and hence required the documents to ensure that management did its job.

4 Mr Schapper advised that the incident was the same incident referred to in matter no. C 233 of 2004 which was before the Commission. That matter concerns the alleged discriminatory treatment in disciplinary matters between award and non-award drivers engaged by BHP Billiton Iron Ore Pty Ltd (BHPB). Mr Ellery for the second respondent submitted that there was no industrial matter involving Integrated and the application was a fishing expedition. Mr Lilburne for the first respondent at conference submitted that it was not clear what the industrial matter was, the matter was stale and the application was submitted three hours after the speaking to the minutes in matter no. C 233 of 2004. The applicant reiterated that they had serious concerns about the management's competence in managing the rail system as Mr Moore's incident was a serious one; he did not report the incident or the damage to the vehicle. Mr Moore was merely reprimanded and required to pay part of the cost of the damage.

5 The Commission advised the parties that the discovery as sought would not be granted. The Commission further advised that what was being sought was the same as the applicant sought in matter no. C 233 of 2004. That matter is currently in conciliation and there has been extensive argument concerning discovery. That argument has included whether BHPB should discover documents relating to the Moore incident as Mr Moore is not an employee of BHPB. The Commission put to the parties that nothing more would be done on the file. The applicant then reiterated that discovery was sought and that if the matter was not to proceed then it was up to the Commission to deal with the matter in some form; for example by way of peremptory order of dismissal. The conciliation conference was adjourned.

6 By email on 13 April 2005 Mr Schapper requested to be advised of the status of the matter. The parties were then advised on 15 April 2005 by letter from the Commission in the following terms:

"I refer to abovementioned matter. The Commission is considering exercising its discretion under s. 27(1)(a) of the *Industrial Relations Act 1979*.

The Commission wishes to give the parties an opportunity to be heard on the issue and has scheduled a hearing for this purpose. Please see the attached Notice of Hearing."

7 By email dated 19 April 2005 Mr Schapper sought in relation to this application and application C 233 of 2004, as follows:

"As both of the above matters involved Moore's incident and discovery of the documents connected with incident report 40754 I suggest that the hearings in both matters be heard together or at least consecutively on 29 April at 11 am."

Matter C 233 of 2004 was also listed for further hearing in respect of the applicant's request for discovery in relation to safety breaches involving contractors. The parties were advised that both matters would proceed separately as listed.

8 At hearing on 26 April 2005 the Commission confirmed that this application had been called on the Commission's own motion. Mr Schapper submitted that the Commission should disqualify himself as he had expressed a view in conference and had indicated that the matter should not proceed further. The applicant outlined the seriousness of the issue involving Mr Moore and the Hirail vehicle in April 2004. Mr Schapper for the applicant submitted that the matter is not trivial and is distinct from application C 233 of 2004 which concerns discriminatory treatment between award and non award drivers. This matter concerns the competence of management in managing the rail system in matters of safety. The allegation against management is that they failed to deal properly with safety issues on the railway. The applicant wishes to investigate how management dealt with the safety issue. The applicant understands Mr Moore was penalised by having to contribute 50% of the cost of damage to the vehicle. The Commission is empowered to deal with serious safety issues when a proper question is raised. The matter cannot be said not to be in the public interest as it deals with the serious issue of safety. The applicant's members work on the rail system and have a sufficient interest in the matter. There is no other reason why the matter should not proceed. The relevant incident was to be the subject of investigation in C 233 of 2004, but in that matter contractors have been excluded at this stage and the applicant does not know the outcome of further application to deal with discovery of documents involving contractors. The Commission having indicated at conference a largely concluded view should not now further consider and decide the matter. The matter must be decided by a fair and unprejudiced mind. Mr Schapper also referred to the Brandis matter, C 49 of 2005, and indicated that Mr Moore's incident would be an issue in that application in respect of alleged unfair treatment between the two persons. However, discovery must stand on its own and can be only used for the matter in question unless by leave of the Commission.

9 Mr Lilburne for BHPB submitted that the application was an abuse of process and was stale. The question the applicant allegedly raises is the competence of management to operate the railway system. This question is more appropriately addressed to the proper authority under the *Mines Safety and Inspection Act*. The incident occurred in April 2004 and has not been raised previously by the applicant. The applicant now in this application seeks discovery of the same documents which were sought and denied in matter C 233 of 2004. The applicant in fact sought for these two applications to be heard together and this highlights the point that both applications are directed at the same purpose, namely discovery of documents relating to the Moore incident. This application was filed shortly after the conclusion of the Speaking to the Minutes hearing in application C 233 of 2004. In this light, the application is an abuse of process. The application is also stale as Mr Moore has

not worked on the railway system for over 6 months and the matter has not been raised previously by the applicant. The passage of time has compromised a fair hearing of the issue.

10 Mr Ellery for Integrated supported and adopted the submission of BHPB. He submitted also that s.27(1)(a) of the Act provided that the Commission could dismiss a matter if it was determined to be not in the public interest, or to be trivial or for any other reason. Integrated are not a party to C 233 of 2004 and have no knowledge of this matter. This application is stale as Mr Moore has not worked for the respondent for many months and the issue has not been raised with Integrated previously by the applicant or anyone else. The purpose of the application is to seek discovery of documents for other purposes. It would be difficult and wrong to have to now locate Mr Moore and bring him to hearing. The question of competence to manage the railway system is one to be addressed, if need be, under the *Mines Safety and Inspection Act*. Mr Ellery submitted that there is no question of bias as there was no determination made by the Commission at conference.

11 Mr Schapper in reply submitted that the matter was most serious and the matter cannot be said to be trivial. The matter is not stale and was first raised prior to Christmas 2004 in matter C 233 of 2004. The applicant limited the investigation at that point in time. The question of management's competence to address safety issues on the railway system is one for the Commission and is an industrial matter. The fact that the issue has not been raised before does not preclude the applicant from now raising the issue in the Commission. Discovery of documents is the first step in investigating the issue. The treatment of this issue sits at odds with how management treated Mr Johncock, a rail driver employed by BHPB, for an unflattering reference to the Vice President, Rail. The Commission should not lightly dismiss peremptorily an application using its powers under s.27(i)(a), and certainly, not in these circumstances. The Commission should order discovery of the documents which the applicant seeks.

12 It is not clear to me whether the applicant's submission amounts to a submission of bias on the part of the Commission, but it would appear so. There is no submission from any party as to the provisions contained in ss.44(11) and (12) of the Act. Given what has transpired in this matter that is understandable. The High Court considered the grounds for disqualification for actual or ostensible bias in Vakauta v Kelly (1989) 87 ALR 633. In that decision Dawson J refers to the relevant principle as being:

> 'a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.'

13 There must be a logical identification of what is said to prevent the judge from deciding a case on its merits. In this matter Mr Schapper submits that the Commission expressed a concluded view in conference and hence cannot be seen to have a fair and open-mind on the application. This submission was made at the time of the hearing convened by the Commission to allow the parties to make submission as to whether the Commission should exercise its discretion under s.27(1)(a). It was not a concern raised at conference.

14 What the applicant sought at conference was discovery of documents relating to the Moore incident. What the applicant sought at hearing was the same. What the applicant sought in application C 233 of 2004, in part, was the same. Certainly what the applicant sought at the Speaking to the Minutes hearing on 17 March 2005, in relation to the order for discovery, was the same. Counsel for the applicant was plainly disgruntled on 17 March 2005 when the Commission did not accede to the request. I make that observation from what I saw in open court.

15 In my view this application, made a matter of hours after the Speaking to the Minutes hearing concluded, is transparently an application fashioned to seek discovery of documents denied in another application. The applicant is of course entitled to challenge the Commission's order in C 233 of 2004 by appeal under s.49 of the Act. The applicant has not done so. The applicant is entitled to continue to pursue matters to resolution in application C 233 of 2004 which remains in conciliation. The applicant has made further application in that matter. The applicant has again, in part, sought discovery of the documents relating to the Moore incident. I will of course deal with my reasons covering the issues raised in that application separately.

16 The Commission at conference on 4 April 2005 did conclude that discover as sought was not warranted. It was my view at the time that the application was designed to achieve an outcome for the applicant which the applicant had failed to achieve in another matter. Having now further heard the parties, nothing has been submitted that causes me to alter that view, in fact that view is reinforced. The timing of the application was very shortly after the parties were heard on 17 March 2005. The order or direction the applicant seeks is the same as was previously denied. The only difference being that now the actual company who used to employ Mr Moore is a party to this application. Mr Moore ceased to be employed by Integrated or work on the BHPB railway system several months prior to the application. Integrated advise without challenge that Mr Moore ceased employment about 5 September 2004. No other incident is mentioned by the applicant to challenge the competence of management to operate the railway system. This is said to be the matter in dispute. No issue was previously raised about the Moore incident except in the context of application C 233 of 2004 which remains live before the Commission. The issue of safety is indeed serious, but was not addressed at the time by the applicant on the submissions of the parties. The applicant at hearing of this matter refers to a comparison in disciplinary treatment with other employees or contractors at BHPB. The documents in relation to the Moore incident may or may not be relevant to the conciliation or hearing of those matters. However, references to those issues of differential treatment in this application leads also to a conclusion that the application is fashioned to achieve a result for another purpose. For all the reasons expressed I do not consider the dispute to be genuine. I consider that the application is an abuse of the Commission's processes.

17 As to the question of bias, I reject entirely the submission. It would be wrong in my mind to allow an application to proceed which is not designed to progress a genuine dispute between parties and which is an abuse of the Commission's processes. The Commission cannot be expected to shy away from properly dealing with such an application. An order will issue dismissing the application pursuant to s.27(1)(a)(iv).

2005 WAIRC 01521

DISPUTE REGARDING SAFETY PRACTICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING & ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	BHP BILLITON IRON ORE PTY LTD AND INTEGRATED GROUP LTD **RESPONDENTS**
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 12 MAY 2005
FILE NO	C 44 OF 2005
CITATION NO.	2005 WAIRC 01521

Result	Application dismissed
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Mr R Lilburne of Counsel on behalf of BHP Billiton Iron Ore Pty Ltd Mr N Ellery of Counsel on behalf of Integrated Group Ltd

Order

HAVING heard Mr D Schapper of Counsel on behalf of the applicant and Mr R Lilburne of Counsel on behalf of BHP Billiton Iron Ore Pty Ltd and Mr N Ellery of Counsel on behalf of Integrated Group Ltd, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2005 WAIRC 01266

DISPUTE REGARDING WORKING ON CHRISTMAS DAY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS – WESTERN AUSTRALIAN BRANCH COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH **APPLICANTS** **-v-** BHP BILLITON IRON ORE PTY LTD **RESPONDENT**
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 19 APRIL 2005
FILE NO	C 238 OF 2004
CITATION NO.	2005 WAIRC 01266

Result	Application for joinder granted
Representation	
Applicant	Mr Schapper of Counsel
Respondent	Mr Lilburne of Counsel

Order

WHEREAS an application was lodged in the Commission on 3 December 2004 pursuant to section 44 of the Industrial Relations Act 1979 between The Construction, Forestry, Mining and Energy Union of Workers (the CFMEU) and the respondent;

AND WHEREAS a further application made on 24 February 2005 for orders pursuant to section 27(1)(j) of the Industrial Relations Act 1979 to join four unions as applicants to the application;

AND WHEREAS Mr Schapper, of counsel, on behalf of all the unions named herein submitted that the matter also involves employees covered by the four unions other than the CFMEU;

AND WHEREAS Mr Lilburne of counsel, on behalf of the respondent, advised the Commission that the respondent does not object nor consent to the joinder;

AND HAVING HEARD Mr Schapper, of counsel, on behalf of the applicants and Mr Lilburne, of counsel, on behalf of the respondent, the Commission pursuant to the powers conferred on it under section 27(1)(j) of the Industrial Relations Act 1979, hereby orders -

THAT the following unions be joined as 2nd, 3rd, 4th and 5th applicants respectively to application C 238 of 2004:

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch.

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers.

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

(Sgd.) S WOOD,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2005 WAIRC 01276

EMPLOYEE REGRESSED FROM LEVEL FIVE TO LEVEL THREE FOLLOWING INCIDENT OF MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 21 APRIL 2005
FILE NO.	CR 22 OF 2005
CITATION NO.	2005 WAIRC 01276

CatchWords	Industrial dispute – Employee regressed from level 5 to level 3 following incident of misconduct – Whether express right or implied in employee's contract of employment to regress – Performance Management and Discipline Policy expressly or impliedly incorporated into the contract of employment – Penalty imposed lawful and not unjust, harsh or unreasonable – *Industrial Relations Act 1979* (WA) s 44, *Government Railways Act (WA) 1904* s 73, *Public Transport Authority Act (WA) 2003* s 126
Result	Order made
Representation	
Applicant	Mr G Ferguson
Respondent	Mr S Murphy (of counsel)

Reasons for Decision

1 On 24 February 2005, pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") the Commission referred the following matters for hearing and determination.

(1) On 25 January 2005, a member of The Australian Rail, Tram and Bus Industry Union of Employees West Australian Branch ("the Union") and an employee of the Public Transport Authority ("the PTA"), Mr Gary Bryan, was advised by a letter that following the incident of misconduct that his employment position would be regressed from a level 5 employee to a level 3 employee.

(2) The incident of misconduct was described by the PTA as "use of Public Transport Authority's email system contrary to policy" which occurred on Sunday, 20 January 2005, whilst the Union's member was on duty.

(3) The Union accepts that its member acted contrary to the PTA policy by using the email system but objects to the penalty imposed as being unlawful, unjust, harsh and unreasonable.

(4) The Union's member is employed under the terms of an Enterprise Agreement, AG 110 of 2004, in the classification of Transit Guard.

(5) The Union says:

(a) The Railway Employees Award ("the Award") underpins the Agreement AG 110 of 2004;

(b) Pursuant to clause 21(6) of the Award an employee can only be suspended from duty and shall not be kept under suspension in excess of six days;

(c) The Union's member has been suspended from his substantive position as a Transit Guard since 31 January 2005.

(d) Mr Bryan's contract of employment does not provide the PTA with a right to regress an employee found guilty of misconduct.

(6) The Union seeks the Commission to issue orders to the effect of:

(a) To immediately direct the PTA to act within the bounds of its employment contractual obligations to Mr Bryan, by placing Mr Bryan immediately back in employment as a Transit Guard; and

(b) That wages lost by Mr Bryan, as a result of the unlawful actions of the PTA be reinstated.

(7) The PTA says that Mr Bryan was regressed from 31 January 2005, and will be paid as an REA level 3 for a period of three months. Whilst regressed he will work in the Reserve Maintenance Crew. Following the expiration of three months, his pay will be restored to level 5 but he will not return to work as a Transit Guard until the expiration of nine months from 31 January 2005. Mr Bryan will be subject to a performance management plan, which will continue for six months after he returns to the position of Transit Guard.

(8) The PTA says that the power to regress the employee is contained within the PTA's Performance Management and Discipline Policy, which applies to Mr Bryan's contract of employment.

(9) The PTA says that its actions in relation to Mr Bryan were lawful and the application by the Union should be dismissed.

2 On 16 February 2005 the Commission convened a conference between the parties pursuant to s 44 of the Act. At the conference the Commission made the following interim order:

(1) Mr Bryan continue to work in the level 3 position in the Reserve Maintenance Crew until this matter is heard and determined by the Commission; and

(2) The PTA pay Mr Bryan the aggregated rate of pay specified for Transit Guards after 24 months in AG 110 of 2004, from 31 January 2005 until this matter is heard and determined by the Commission.

Issues

3 The fact that Mr Bryan committed a breach of discipline is not in dispute. The circumstances of the breach of discipline are that Mr Bryan sent an email whilst he was at work on Sunday, 16 January 2005 to another transit guard which was contrary to clause 1 of the PTA's Telecommunications Use Policy.

4 It is agreed between the parties that the statutory penalties for breach of discipline in s 73 of the *Government Railways Act 1904* ("the GR Act") do not apply as Mr Bryan cannot be said to be "specified award employee" within the meaning of s 73. Section 73 provides:

"(1) The Authority may suspend, dismiss, fine, transfer without payment of transfer expenses, or reduce to a lower class or grade, any specified award employee, and the Minister cannot give any direction as to the exercise of those powers except in the cases of such offices and services as are prescribed.

(2) The Authority may –

(a) in any case where a specified award employee has for any act or omission been suspended –

(i) fine;

(ii) reduce to a lower class or grade;

(iii) dismiss*;* or

(iv) transfer without payment of transfer expenses,

that employee, notwithstanding and in addition to such suspension*;* and

(b) in any case where the Authority considers the circumstances warrant, by way of punishment for an act or omission reduce a specified award employee to a lower class or grade and also transfer him without payment of transfer expenses,

but except as provided in this subsection the Authority shall not inflict on any specified award employee more than one form of punishment for the same offence:

Except that, if the act or omission involved the employee's driving of a motor vehicle and the employee was punished for it under the *Road Traffic Act 1974*, the Authority may inflict on that employee the punishment referred to in paragraph (a)(iii), or either or both of the punishments referred to in paragraph (a)(ii) and (iv), but not the punishment referred to in paragraph (a)(i).

(3) Notwithstanding anything in this section, to the extent that there is in the case of a specified award employee who is a member of the Senior Executive Service within the meaning of the *Public Sector Management Act 1994* an inconsistency between this Act and that Act that Act shall prevail.

(4) In this section –

"specified award employee" means a person who was employed under this section immediately before it was amended by the *Public Transport Authority Act 2003* section 126 and, when that amendment took effect, became an employee of the Authority but only if the person's employment was, before the amendment took effect, and continues to be, covered by –

(a) the *Government Railways Locomotive Enginemen's Award 1973-1990 No. 13 of 1990;* or

(b) the Railway Employees Award No. 18 of 1969."

5 It is common ground between the parties that the terms of the Railway Employees Award No. 18 of 1969 ("the Award") do not apply by operation of the terms of the Award as the classification of transit guard is not a classification contained within the terms of the Award. It is also common ground that at common law unless the terms of the contract allow there is no power to demote an employee. Consequently one of the central questions in this matter is whether the power to demote Mr Bryan formed part of the terms of his contract of employment.

6 Three issues are raised. Two issues go to whether the disciplinary penalty imposed on Mr Bryan was authorised by law. One issue is whether clause 21 of the Award applies to transit guards pursuant to the operation of clause 4.4 of the Public Transport Authority Railway Employees Enterprise Agreement 2004, AG 110 of 2004 ("AG 110 of 2004") and whether clause 21 constitutes a code of penalties that can be imposed upon Mr Bryan. Clause 21 does not refer to a penalty of demotion. The Union argues that clause 21 is incorporated into Mr Bryan's contract of employment by statute through the operation of AG 110 of 2004 and clause 21 makes it plain that the only options available to the PTA when an employee is found guilty of a disciplinary breach is that an employee may be dismissed, suspended for six days or fined.

7 Another issue is whether the PTA's Performance Management and Discipline Policy ("the Discipline Policy") is expressly incorporated by reference into Mr Bryan's contract of employment. The Respondent says that the Discipline Policy is incorporated by express reference and formed part of his appointment as a transit guard through a number of documents which were provided to Mr Bryan at his induction on the first day of his engagement as a transit guard and throughout the period of his employment. Pursuant to the terms of the Discipline Policy options for a breach of discipline include a written warning, demotion, fine, suspension or termination. The Union says that the PTA is unable to make out a case at law or in fact that the Discipline Policy is incorporated into Mr Bryan's contract of employment. The Union contends that even if the terms of the Discipline Policy are expressly or impliedly incorporated into Mr Bryan's contract of employment, the option of demotion has to be construed in light of the terms of the Discipline Policy which refers to the source of the power of demotion as the *Public Transport Authority Act 2003* ("the PTA Act"). Section 73 of the GR Act was amended by s 126 of the PTA Act. Prior to the amendment, s 73 of the GR Act provided that the authority may suspend, dismiss, fine, transfer without payment of transfer expenses, or reduce to a lower class or grade, any officer or servant. When the PTA Act came into force in 2003, s 73 of the GR Act was amended to delete "an officer or servant" and insert instead "a specified award employee". As set out above, a specified award employee is defined in s 73(4) of the GR Act to mean a person among others who is covered by the provisions of the Award. It is argued by the Union that the sanction of demotion under the Discipline Policy only applies to "specified award employees".

8 The final issue is if the Commission finds that the terms of the Discipline Policy are expressly or impliedly incorporated into Mr Bryan's contract of employment, whether in all of the circumstances the imposition of the penalty set out in paragraph [1](7) of these reasons for decision was unjust, harsh or unreasonable.

The Evidence

9 The Union did not call any evidence in the proceedings before the Commission other than to tender a bundle of documents. Mr Ferguson on behalf of the Union informed the Commission that the Union did not oppose or dispute the Respondent's record of the disciplinary action taken against Mr Bryan or dispute any of the matters contained within the documents contained on Mr Bryan's personnel file.

10 Four witnesses gave evidence on behalf of the Respondent. Ms Vanessa Clark, a Human Resources Officer, gave evidence about the documents provided to Mr Bryan at his induction. Transit Guard Managers, Mr John Kitis and Mr Trevor Greenham gave evidence about Mr Bryan's disciplinary record. Mr Cliff Gillam, the Respondent's Executive Director, People and Organisational Development, gave evidence about the penalty imposed on Mr Bryan in January 2005.

11 Mr Bryan commenced employment as a transit guard on 22 August 2002 on 6 months' probation. On the same day Mr Bryan signed an offer of appointment. Attached to the offer was a letter from Mr Brett Inchley, General Manager of Urban Passenger dated 8 April 2002 which set out the duties of the position of the transit guard. Also attached was a copy of the Transit Guard Job Description Form ("the JDF"). In the letter dated 8 April 2002 it stated that the duties and requirements of the transit guard position had been outlined in the JDF which formed part of the job application form.

12 Ms Vanessa Clark testified that sometime in year 2001 she drafted the WAGRC Induction Manual which was given to employees at their induction. Ms Clark conducted all individual and group inductions for employees of the PTA including inductions for all transit guards from 2001 until June 2004. Ms Clark referred in her evidence to *Exhibit B* pages 459 to 462 which is a copy of the PowerPoint presentation used by her when inducting transit guards and was used when Mr Bryan was appointed as a transit guard. The PowerPoint presentation indicates that transit guards undertaking the induction were informed of the PTA's Code of Ethics, the Code of Conduct, Grievance Procedures and Public Sector Standards. Transit guards were also provided with a copy of an Induction Manual (*Exhibit C*) and with a copy of the Transit Guard Operations Manual (*Exhibit D)*. Page 459 of *Exhibit B*, records that Mr Bryan completed the induction programme on date unknown. This document also records that he had signed the JDF. In the Induction Manual (*Exhibit C*) under the heading "Responsibilities and Expectations" employees of the PTA are informed about the Code of Ethics, the Code of Conduct and Equal Employment Opportunity. Under the heading "Code of Conduct" it is stated:

> "As an employee of WAGR you are required under the Public Sector Management Act, to comply with WAGR's Code of Conduct.
>
> In line with the Code of Ethics, the Code of Conduct establishes guidelines for appropriate conduct and behaviour for employees and the organisation as a whole."

13 Under the heading "Equal Employment Opportunity" it is stated:

> "WAGR is committed to provide a workplace which is free from discrimination and harassment, where employees are treated fairly, and where employment decisions are based on the individual merit of the employee. WAGR must also comply with the Equal Opportunity Act (1984).
>
> Harassment is defined as any unwelcome offensive comment or action concerning a person's race, colour, language, ethnic origin, sex, pregnancy, marital status, family responsibility or status, age disability, political or religious conviction. The behaviour can take the form of teasing, ridiculing or intimidating, which may embarrass and/or offend the person at whom it is aimed.
>
> …
>
> It is unlawful for you to harass or victimise a colleague or customer by racially abusing them or sexually harassing them."

14 Ms Clark said that the Discipline Policy can be accessed by all employees on the PTA's intranet.

15 Within its organisational structure the PTA has two transit guard managers. Mr John Kitis is one of those managers and has held that position since September 2002. Mr Kitis testified that every transit guard is provided with a copy of a Transit Guard Operations Manual (*Exhibit D)* and that transit guards usually keep the manual in their lockers or in their bags so that they can be accessed daily. *Exhibit A* at page 8 records that Mr Bryan was issued with copy 075 of the Transit Guard Operations Manual (*Exhibit D*). The Transit Guard Operations Manual tendered into evidence refers to the Western Australian Government Railways Commission ("WAGR"). Mr Kitis said that when the WAGR changed its name to the PTA, amendments to the manual were issued to all transit guards changing all references in the manual to the WAGR to the PTA.

16 In *Exhibit D*, Section 1: Introduction, it is stated under the heading "Our Values":

> "It is incumbent on all employees to act with integrity, ethics, and a professional manner and all are expected to demonstrate the following behaviour and practices in keeping with the Public Sector Code of Conduct at all times.
>
> Our values are that we:
>
> - value and respect all people
> - are committed to safety
> - encourage each other to reach full potential
> - hold honesty, integrity, openness and ethical behaviour
> - recognise and reward achievement, initiative and innovation
> - strive for continuous improvement; and
> - are environmentally responsible.
>
> These values have been established through extensive consultation among all staff. They are the principles against which we assess the quality of our own and each other's behaviour.
>
> We required you to adopt these same values."

17 In Section 6: On-The-Job Conduct of *Exhibit D* it is stated under the heading "Attitude":

> "While on duty, you must act with courtesy, honesty and integrity, and conduct yourself in a professional and dignified manner.
>
> As Train Guards you are the most important customer service representatives of the WAGR. The public's perception of the quality of the service provided by the WAGR in the main depends upon your appearance and the quality of the service you provide to our passengers."

18 In Section 8: Employee Policies & Procedures of *Exhibit D* under the heading "Human Resources" it is stated:

"You are responsible and accountable for the implementation of and adherence to WAGR's Human Resource Management policies as detailed in Human Resources Management Responsibilities and Authorities Manual."

19 In Section 8: Employee Policies & Procedures of *Exhibit D* under the heading "Code of Conduct" it is stated:

"It is extremely important that our clients and all employees believe in the integrity of WAGR. Customers, employers and all employees of WAGR must understand that we operate in an honest, fair and trustworthy way.

The purpose of the Code of Conduct is to promote and encourage the use of high ethical and professional standards when dealing with others. This Code provides guidelines for all employees in respect of appropriate behaviours and values when making decisions, dealing with customers and in dealing with each other.

It is your responsibility to understand and behave in accordance with our Code of Conduct.

You may obtain a complete copy of the Code of Conduct and related procedures from the Employee Relations Section of the Intranet.

All public sector bodies and employees under Section 9 of the Public Sector Management Act must comply with the Public Sector Management Act, the Public Sector Standards and Code of Ethics and WAGR's Code of Conduct.

The Code applies equally to all WAGR employees regardless of their level or whether they are employed on a full-time, part-time, or casual basis."

20 In Section 8: Employee Policies & Procedures of *Exhibit D* under the heading "Breaches of Discipline" it is stated:

"All WAGR employees are subject to:

- the provisions of the Western Australian Government Railways Act 1904 or its replacement;
- WAGR Code of Conduct;
- WAGR Code of Ethics;
- approved policies and procedures;
- any statutory applicable legislation."

21 From September 2002 until May 2003 one of Mr Kitis' duties was to conduct the disciplinary process when transit guards were disciplined.

22 It is common ground between the parties that Mr Bryan has a long disciplinary record. Prior to the completion of his six month probationary period Mr Bryan was disciplined on a number of occasions. On five occasions Mr Bryan had either reported to duty without complying with dress instructions or was late for work. On one occasion he was disciplined for leaving a line while carrying out delta vehicle duties without advising the shift supervisor.

23 Mr Bryan was placed on his first performance management plan on 5 December 2002. The performance plan required Mr Bryan to contact either Mr Kitis or Mr Kevin Smith by telephone at the commencement of each shift and in turn either Mr Kitis or Mr Smith was to immediately telephone back to confirm that Mr Bryan was at work.

24 On 31 January 2003 Mr Bryan was absent from work whilst on duty and he received a first and final warning on 18 February 2003.

25 Despite this history a recommendation was made that Mr Bryan's employment be confirmed and he was sent a letter on 19 March 2003 to that effect. After his appointment was confirmed Mr Bryan continued to report late for work and on occasions did not comply with the transit guard dress standards. On 10 April 2003 Mr Bryan attended a meeting with Mr Kitis and others at the conclusion of which it was agreed that Mr Bryan would be placed upon a more extensive performance management plan in which his practices in relation to punctuality and absences when on duty and the requirement to wear a uniform would be addressed. Mr Bryan signed the performance management plan (*Exhibit A* at page 47) and wrote "I have appreciated the help with my personal problems". At that time it is also noted by Mr Kitis on the plan that Mr Bryan had agreed to attend consultations with Prime counselling service and to telephone Mr Kitis on a daily basis.

26 Mr Trevor Greenham has been employed by the PTA as a transit guard manager since 2003 and became involved in the discipline of Mr Bryan from May 2003 when he took over the disciplinary portfolio for transit guards from Mr Kitis. Mr Bryan continued to be late for work after Mr Greenham became responsible for the disciplinary portfolio. A disciplinary hearing was convened on 22 October 2003 which was attended by Mr Bryan, his union representative Mr Brian Curran, Mr Greenham and Ms Judy Allen-Rana. At the meeting Mr Curran requested a copy of the Discipline Policy and Ms Allen-Rana advised Mr Curran that she would email copies of the Discipline Policy to him. The outcome of that disciplinary meeting was that on 26 November 2003 Mr Bryan was sent a formal second warning letter.

27 Despite receipt of a second warning letter for poor punctuality and his attitude towards work attendance, Mr Bryan's punctuality did not improve and he was required to attend another disciplinary hearing on 6 February 2004. At that meeting Mr Bryan was again represented by the Union, Mr Ferguson. The outcome of that disciplinary hearing was that Mr Bryan was issued with a third written warning on 11 February 2004.

28 After his third written warning Mr Bryan continued to be late for work and not to wear his uniform as required by PTA dress standards. A further disciplinary hearing was scheduled for 20 April 2004 but it did not proceed because Mr Bryan was seeking medical treatment. On 13 May 2004 medical reports were received by the PTA which reported that Mr Bryan was suffering from Attention Deficit Hyperactivity Disorder ("ADHD"). On 20 May 2004 Mr Bryan returned to work on alternative duties until further medical evidence was provided. On 24 May 2004 the PTA received a report from a psychiatrist, Dr Warwick Black, in which Mr Bryan's condition was detailed. In his report Dr Black stated that he seen Mr Bryan on 24 May 2004 and that he (Mr Bryan) had been compliant with his treatment programs and appointments, and that Mr Bryan was now fit for work without impediments. Dr Black in page 2 of his report stated:

"Garry is feeling much better in his mood, and more settled. He has been less impulsive and more able to organise his thoughts and behaviour. … I hope you will be pleasantly surprised at the improvement in his mental state and behaviour."

(*Exhibit 1*, document 17)

29 Dr Black then went on to state:

"I can concur with Dr Clarkson's view that Mr Bryan is fit to go back to work. He has experienced an improvement in his mood and sleep, and is feeling more relaxed and more focused since starting the new medication. He describes a significant improvement in his overall sense of wellbeing, and is finding that he can work through various difficulties more easily. He seems to be more organised and efficient in his thought processes, and correspondingly in his activities. He also feels that he can prioritise better. It is of note that others have noticed the improvement. For example, his

girlfriend reports that a significant change has been made and 'he is not always wandering off'. It would also appear that his time management skills have improved.

…

It would appear that Mr Bryan is responding well, and I hope that many of the difficulties experienced at work in the past, will be greatly attenuated."

30 It is common ground that from the time that Mr Bryan commenced on medication for ADHD that no further disciplinary matters arose until January 2005. In fact, he received commendations in relation to his work, including one commendation from Mr Greenham. He also received an Outstanding Achievement of the Month Award for August 2004 from the acting Chief Executive Officer of the PTA (*Exhibit 1*, documents 19 to 21). Further, prior to Mr Bryan obtaining treatment for ADHD he had received commendations for his work on five occasions (see *Exhibit 1*, documents 22 to 26).

31 On 16 January 2005 at 1.39 am, Mr Bryan sent an obscene and abusive email to transit guard A. The email was sent as a response to the transit guard A who had spoken to Mr Bryan about allegations of assault which had been made against him (transit guard A) from a female member of the public. Mr Bryan titled the email "Re: Incident Joondalup, Time, Date, (further) – unprofessional/over zealous actions by WAPOL Officer Selfmolester." The email named two transit guards who work for the PTA and an unnamed police officer.

32 Although Mr Bryan intended that the email not be seen by any other person it was forwarded to one of the supervising transit guards who was referred as a named transit guard in the email. It was also widely distributed amongst transit guards who work for the PTA.

33 The supervisor brought the email to the attention Mr Greenham, who referred it to Mr Gillam to deal with. On 18 January 2005 Mr Gillam sent a letter to Mr Bryan stating that:

"… the print-out is *prima facie* evidence of clear breaches of the PTA Telecommunications Policy, which prohibits (at Clause 1.1) the sending of materials of a 'pornographic, racist, inflammatory, hateful, obscene or abusive nature', and (at Clause 1.2) requires of PTA staff and contractors the conduct of telecommunications 'in a manner that promotes positive relations between both internal and external parties'."

(*Exhibit A* at page 173)

34 Mr Bryan was then required by Mr Gillam to submit a written explanation in relation to the email.

35 On 20 January 2005 Mr Bryan wrote to Mr Gillam and stated that it was never his intention to be obscene or abusive within the body of the text of the email (*Exhibit A* at pages 176-177). In particular he stated:

"The text was constructed using language in a satirical literary style that was intended to uplift an individual."

36 He also said in his response that the transit guard A, had informed him (Mr Bryan) that he neither found the text to be obscene or abusive. Further that his (Mr Bryan's) enquiries to other individuals who had seen the email had told him that they did not find the text of the email offensive or abusive. Mr Bryan then went on to say in his written response that he did understand the seriousness of the situation and he could assure PTA that such language would never be used again in using the PTA communications system. He also said that over the last three to four months he had been fully committed to his duties, he had been working towards demonstrating to PTA management, following the assessment of his medical condition, that he was dedicated to his task of providing security and customer service of the highest standard for patrons of PTA.

37 On 24 January 2005 Mr Bryan sent a email to the transit guard supervisor mentioned in the email sent on 16 January 2005 and stated that the offending email was sent to several other transit guards without his approval. Mr Bryan complained the other transit guards in transmitting the email had also breached the PTA's Telecommunications Use Policy. Mr Bryan said in this email that he had telephoned the supervising transit guard to apologise and to attempt to explain his actions at the request of a special constable. Mr Bryan then went on to complain that the offensive email had been given to Mr Greenham without first speaking to him (Mr Bryan).

38 Mr Greenham testified that, in his opinion, the offending email sent by Mr Bryan indicated a lack of judgement on his behalf. He said he had reached this opinion because as a transit guard, Mr Bryan is required to operate in the field in an autonomous manner and to exercise judgement in relation to applying the law. Mr Bryan is also expected to act cautiously and professionally.

39 When Mr Greenham was cross-examined he conceded that Mr Bryan was correct in saying that if other transit guards had forwarded the offending email they had also breached the PTA's Telecommunications Use Policy. Mr Greenham also agreed that since Mr Bryan has been on medication for ADHD there had been a marked improvement in his attitude towards his work.

40 Mr Kitis' and Mr Greenham's evidence in relation to the Mr Bryan's disciplinary record was not challenged in cross-examination. However, it was put to Mr Kitis in cross-examination whether any disciplinary issues had been raised with other employees of the PTA in respect of inappropriate emails being sent contrary to the PTA policies. Mr Kitis testified that he was aware that there was an incident which had been dealt with by the PTA which involved pornographic material but he had not dealt with the issue himself and did not know what action was taken against any PTA employees. Mr Greenham was also asked when cross-examined whether he was aware of other transit guards being investigated for disciplinary breaches in relation to viewing pornographic images. Mr Greenham said that he had investigated seven people for a potential breach of the PTA's Telecommunications Use Policy. He said that the investigations showed that three employees had breached the policy. When questioned further he said that the material that had been viewed on the internet was in the nature of "British newspapers, page 3 bare breasted women". He said the material that had been viewed could not be deemed to be pornographic. As a result of the investigation a contractor had their contract discontinued. Two employees were disciplined. One had their internet access removed for a period of time and another employee was cautioned. Mr Greenham testified that it was the first disciplinary offence for one of the transit guards and the second for the other.

41 Mr Cliff Gillam testified that after he received Mr Bryan's response dated 20 January 2005 he considered the contents of the email. It was his view that the email clearly breached clauses 1.1 and 1.3 of the Telecommunications Use Policy. He said that it was abusive and defamatory of the transit guard supervisor named in the email. In relation to the other transit guard named to in the email he said that the contents could be regarded as hateful towards that person. Mr Gillam also formed the opinion that the email could potentially create a degree of animosity which was not consistent with the ethos of the PTA or promote relationships with the Western Australian Police Service. He says the email is offensive and abusive to members of the Western Australian Police Force. The PTA relies upon a positive relationship with the Western Australian Police Service as transit guards work closely with police officers. Mr Gillam also says that the content of the email was offensive to clients of the PTA. In expressing his opinion Mr Gillam referred to Section 6 - 7 of the Transit Guard Operations Manual (*Exhibit D*) which directs transit guards to address clients of PTA in a polite manner.

42 Mr Gillam said that when he considered what disciplinary action should be taken against Mr Bryan he was of the opinion that the contents of the email potentially could do damage to relationships within and outside of the PTA. He was angered by Mr Bryan's lack of judgement, his degree of immaturity and the fact that the email portrayed inappropriate attitudes to police officers. He considered that the PTA requires transit guards to have the highest respect for their clients and to uphold the law.

43 Prior to making a decision as to an appropriate penalty, Mr Gillam discussed the matter with Mr Steven Furmedge, Manager of Customer and Security Services. Mr Furmedge informed him that it was his view that Mr Bryan should be dismissed. Mr Gillam reviewed Mr Bryan's disciplinary record and formed the view that despite the fact that he had previously received a third warning for disciplinary breaches that there were a number of commendations on Mr Bryan's file which showed that Mr Bryan was capable of performing in an exemplary manner. Mr Gillam had recently had discussions with Mr Bryan as a member of a joint consultative committee and had found Mr Bryan to be enthusiastic. Mr Gillam formed the view that Mr Bryan should be given one last chance to prove himself and he convinced Mr Furmedge that Mr Bryan should be demoted rather than dismissed. Mr Gillam says that Mr Furmedge only reluctantly agreed to this course of action. On 25 January 2005 Mr Bryan was informed that he would be removed from duty as a transit guard and demoted to REA level 3 effective from 31 January 2005. The Union then made representations to the PTA that the penalty to permanently demote Mr Bryan was too harsh. Mr Gillam considered the Union's submission and discussed the matter again with Mr Furmedge and others in the PTA's Transperth Rail Operations. Mr Gillam persuaded them that if Mr Bryan was capable of modifying his behaviour he should be able to return to transit guard ranks after he had showed he could perform well in his role as a transit guard. Consequently the decision was made to modify the penalty.

44 When cross-examined Mr Gillam was asked whether he was aware of any transit guards who were disciplined for storing pornographic material. Mr Gillam said that he was not aware of any disciplinary action taken against transit guards, but he was aware of another group of PTA employees who were found to have accessed pornographic material on the internet. He said that he did not see the material but he understood that they had logged on to adult websites which related to sexual activities. The material had not been stored on the PTA's computer. When asked why those persons were not regressed Mr Gillam said there was distinction between their actions and the actions of Mr Bryan.

45 Mr Gillam was asked whether any action was taken against any other transit guards who had transmitted Mr Bryan's offensive email. Mr Gillam said that two transit guards were being investigated but the investigation had not been completed. He said that it was a matter of resources and it was presently not a priority of his human resources staff to complete the investigation.

Conclusion

46 To determine whether the disciplinary action taken against Mr Bryan is an option open at law it is necessary to ascertain the terms of the contract so that obligations and the benefits of the contract can be ascertained.

47 In *Sargant v Lowndes Lambert Australia Pty Ltd* [2001] WAIRC 2603 at [67]; (2001) 81 WAIG 1149 at 1155, the President observed:

> "It is always necessary, if a contract is relied upon, to determine the terms of a contract (whether it is an employment contract or any other contract) (see *Re Transport Workers Union of Australia* (1993) 50 IR 171 at 196 per Munro J). A contract may be oral or in writing, partly oral and partly in writing, the contractual terms may be express or implied, there may be a series of contracts, and indeed the written terms of the contract may not reflect the substance of the agreement between the parties. There may be terms of the contract derived from custom and usage too (see Macken, McCarry & Sappideen *The Law of Employment*, 4th edition, at page 94)."

48 A contract of employment may incorporate by reference the terms and conditions in company manuals, handbooks and work rules containing company policies and procedures. In *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 an employee undertook to "abide by all company policies and practices currently in place, any alterations made to them, and any new ones introduced". This clause was held to bind the parties to comply with the policies as varied from time to time.

49 Where a transaction is carried out with the aid of unsigned documents, the terms contained in the unsigned documents are incorporated into the contract if reasonable notice is given of them prior to the formation of the contract (*The Balmain New Ferry Company Limited v Robertson* (1906) 4 CLR 379).

50 After the commencement of a contract of employment an employee may affirm the revised terms of the contract of employment by acquiescing to a change in employment conditions (*Carlton Henry & Ors v London General Transport Services* [2002] EWCA Civ 488 at [19] to [23]).

51 In this matter Mr Bryan signed a letter containing an offer of employment on the day he commenced work as a transit guard. The offer contemplated that Mr Bryan would receive training. Attached to the letter was an unaddressed memorandum dated 8 April 2002 which referred to an interview for the position and stated, "The duties and requirements of the Transit Guard position have been outlined in the JDF, which formed part of the Job Application Kit." The attached JDF stated under the heading "Corporate Responsibilities":

> "Responsible and accountable for the implementation of and adherence to WAGRC's Human Resources Management Policies to the level applicable to this position as detailed in the Human Resources Responsibilities and Authorities Manual."

52 Further under the heading "Responsibilities of this Position" in the JDF it is stated that transit guards are required to carry out their duties on trains in accordance with the requirements of the Transit Guards Operating Manual. As the memorandum and the JDF were attached to the letter of offer signed by Mr Bryan, I am satisfied that the memorandum and the JDF were expressly incorporated into the terms of Mr Bryan's contract of employment.

53 It is clear that the PTA's Induction Manual, Code of Conduct, and the Discipline Policy are Human Resources Management Policies. Consequently, I find that the Discipline Policy expressly formed part of Mr Bryan's terms and conditions of employment by being referred to in the JDF. If I am wrong in making this finding, having considered all of the evidence I am of the opinion that the Discipline Policy became an express term of Mr Bryan's contract of employment by the course of conduct between the parties. It is clear that the letter of offer signed by Mr Bryan on 22 August 2002, is not a contract complete on its face as it does not set out all of Mr Bryan's terms and conditions of employment. I accept the PTA's argument that through the induction process and working as a transit guard in accordance with the terms of the Transit Guard Operations Manual (*Exhibit D* at page 18), it can be inferred that Mr Bryan accepted the following documents formed part of the terms and conditions of his contract of employment:

- The PTA's Induction Manual;
- The Code of Conduct; and
- The Transit Guard Operations Manual.

54 I also accept that the Discipline Policy became a revised term of Mr Bryan's contract of employment as s 8 of the Transport Guards Operations Manual (*Exhibit D*) requires Mr Bryan to comply with the PTA's approved policies and procedures. Clearly, the Discipline Policy can be characterised as an approved policy. Further, Mr Bryan participated in two performance management plans whereby the process and outcome of the meetings were determined expressly by the provisions of the Discipline Policy. At no time has Mr Bryan communicated a rejection of this policy to the PTA.

55 In the alternative, if it can not be maintained at law that the terms of the Discipline Policy formed an express part of Mr Bryan's contract of employment then I am of the opinion that the Discipline Policy is an implied term of Mr Bryan's contract of employment.

56 In *Hawkins v Clayton* (1988) 164 CLR 539 Deane J at 571-572 after considering the five issue test in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 went on to say in relation to a contract that is not complete on its face:

> "Care must be taken to avoid an automatic or rigid application of the ordinary cumulative criteria for determining whether a term should be implied in a written contract to a case where the contract is oral or partly oral or where it is apparent that the parties have never attempted to reduce their agreement to complete written form (cf. *Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 CLR 41, at p 121). The cases in which those criteria were laid down or accepted as the cumulative ingredients of an overall test were concerned with the question whether a term should be implied in a formal contract which was complete upon its face (see, in particular, *B.P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council* (1977) 52 ALJR 20, at p 26; 16 ALR 363, at p 376; *Secured Income Real Estate (Australia) Ltd. v. St. Martins Investments Pty. Ltd.* (1979) 144 CLR 596; *Codelfa Construction Pty. Ltd. v. State Rail Authority of N.S.W.* (1982) 149 CLR 337). In such cases, the insertion of an additional term effectively involves an alteration to what the parties have formally accepted as the complete written record of the compact between them. As the judgment of Mason J. in *Codelfa* (at pp 345-347; Stephen and Wilson JJ. concurring with his Honour's comments on this aspect of the case) clearly indicates, the cumulative criteria formulated or accepted in such cases cannot be automatically applied to cases such as the present where the parties have not attempted to spell out all the terms of their contract but have left most or some of them to be inferred or implied. Where that is so, there is no question of effectively altering the terms in which the parties have seen fit to embody their agreement; the function of a court is, as Lord Wilberforce pointed out in *Liverpool City Council v. Irwin* (1977) AC 239, at p 254, 'simply ... to establish what the contract is, the parties not having themselves fully stated the terms.' In the performance of that function, considerations of what is 'reasonable', 'necessary to give business efficacy to the contract' and 'so obvious that "it goes without saying"' (*B.P. Refinery (Westernport) Pty. Ltd.*, at p 26; *The Moorcock* (1889) 14 PD 64, at p 68; *Shirlaw v. Southern Foundries (1926) Ltd.* (1939) 2 KB 206, at p 227) may be of assistance in ascertaining the terms which should properly be implied in the contract between the parties. There will not, however, be the need or the justification for the law to refuse to imply any imputed term which does not clearly satisfy all such requirements. This is particularly so where, as here, the contract has passed from the executory stage and has been executed by one or both parties." (Applied in *Larkin v Boral Construction Materials Group Ltd* (2003) 83 WAIG 929 and *Richardson Pacific Ltd v Miller-Smith* [2005] WAIRC 00539).

57 In *Wandsworth London Borough Council v D'Silva* [1988] IRLR 193 the Court of Appeal (Civil Division) approved of the following views of Mr Justice Hobhouse in *Alexander v Standard Telephones and Cables Ltd* (No 2) [1991] IRLR 286:

> "The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and the employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated in the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."

58 Having considered all of the evidence it is my opinion that the PTA's Induction Manual, the Code of Conduct, the Transit Guard Operations Manual and the Discipline Policy can be imputed as terms of Mr Bryan's employment as they can be said to be necessary for the reasonable or effective operation of the contract (see *Larkin v Boral Construction Materials Group Ltd* (op cit) at [53]-[56]. The nature of the role and duties of a transit guard are in part similar to that of a police officer in the sense that they are required to be a disciplined force. In addition, the role and duties of a transit guard require a focused, uniform and consistent customer service. Mr Bryan as a transit guard is required to carry out his daily duties in a highly accountable way. To achieve this, it is necessary that Mr Bryan's duties, functions and obligations, along with other transit guards, be set out in a detailed and prescriptive manner.

59 The Union contends that even if the Discipline Policy forms a term of Mr Bryan's employment, the penalty of demotion referred to clause 5.8. of the Discipline Policy must be the read subject to clause 4. which lists the PTA Act as the source of the power of demotion.

60 Clause 3.3. of the Discipline Policy provides:

> "3.3. Performance management and discipline processes apply to all employees, including the Chief Executive Officer, probationary employees and fixed term contract employees."

61 Clause 4. of the Discipline Policy provides under the heading "Relevant Legislation and Standards":

> "Public Transport Authority Act 2003
>
> Public Sector Management Act 1994 as it applies to the Public Sector Standards in HR management."

62 Clause 5. of the Discipline Policy provides under the heading "Policy Procedures":

> "5.1. Confidentiality
>
> 5.1.1 All information forming part of a Performance Management or Disciplinary process remains confidential. This information may only be released on a need to know basis.
>
> 5.2. Managers and Supervisors should provide regular feedback to all employees, reinforce desired behaviours and highlight areas for development or improvement as they arise.
>
> 5.3. When communicating expectations and performance problems it is essential that all parties have all the facts, meet to discuss the issue(s), jointly agree on what needs to be done to reach the acceptable measure and clarify

future good performance benchmarks. Discussions progressed through the use of clear unemotive language and direct examples focusing on behaviours not the person are most beneficial. Each party should listen to the other person's reactions and check their understanding through re statement.

5.4. Generally discussions clarify the circumstances and try to resolve the matter. Remedial action occurs only where a pattern of unsatisfactory performance or breach of discipline is developing or positive change is not evident. The natural power imbalance in the situation must be recognised. The process should engage the employee, conform to principles of natural justice, acknowledge any equity issues and be fair.

5.5. Employees have a right to:

5.5.1. know what is being discussed up front;

5.5.2. know what information is recorded about them;

5.5.3. sight and respond to that information; and

5.5.4. bring a friend or representative to meetings.

5.6. Records should be kept of who discussed what, where and when. All ideas and solutions canvassed and any agreements reached together with possible future action must be noted in a Record of Conversation (Annex D). The employee's signature simply records that they have been informed of the record.

5.7. Improvement should be managed through a structured performance plan (refer attachment). Consequences need to be clearly stated. Key elements of any plan are agreed measures, targets and time fames. Processes for review, support mechanisms and alternative arrangements should also be included. It is reasonable to use checklists, coaching sessions or training sessions.

5.8. Where resolution cannot be achieved options include:

5.8.1. escalation of the plan;

5.8.2. counselling;

5.8.3. formal disciplinary action; and

5.8.4. written warning, demotion, fine, suspension or termination.

5.9. Rights to review depend on the nature of the circumstances giving rise to the performance management or disciplinary action. Options include the:

5.9.1. relevant grievance procedure;

5.9.2. Railway Appeal Board;

5.9.3. relevant industrial tribunal;

5.9.4. Equal Opportunity Commission; or

5.9.5. Office of the Commissioner for Public Sector Standards Review.

5.10. The attached flow chard Annex A, Performance Management Plan (Annex C) and checklists (Annex B) can be used to guide you through the process. The People and Organisational Development (POD) Division can provide support and training on the process [not attached]."

63 I do not agree with the submission in relation to clauses 5.8. and 4. made on behalf of the Union. There is no statement in the Discipline Policy which expressly says that the penalties referred to in clause 5.8. have effect only where an employee is a "specified award employee" within the meaning of s 126 of the PTA Act which amended s 73 of the GR Act, so as to restrict the operation of the policy to "specified award employees" only. To the contrary clause 3.3. applies the Discipline Policy to all employees.

64 As to the argument whether the terms of AG 110 of 2004 incorporates clause 21 of the Award, clause 4.4 of AG 110 of 2004 relevantly provides:

> "This Agreement shall be read in conjunction with the Railways Employees Award No. 18 of 1969 and shall apply where there is inconsistency with the Award."

65 In relation to the meaning of the words "read in conjunction with" I was referred by counsel for the PTA to the conflicting decisions of St John J in *Simpson v Australian Telecommunications Commission* (1978) 22 ALR 434 and Keely J in *Briers v Australian Telecommunications Commission* (1979) 29 ALR 569. In both matters each Federal Court Judge was called upon to determine whether the words, "This Award shall be read in conjunction with the Telecommunications Act 1975 as may be amended from time to time, Regulations and By-laws made thereunder from time to time", manifested an intention to incorporate into the Award those relevant sections of the Act that dealt with matters relating to employment. In *Simpson v Australian Telecommunications Commission* (op cit) St John J after referring to the definition of "conjunction" in the *Shorter Oxford English Dictionary,* 3rd ed, as "The action of conjoining; the fact or condition of being cojoined; union, connexion, combination" held at 437 that the words "read in conjunction with" manifested an intention to incorporate the relevant sections of the Act that dealt with matters relating to employment. Keely J in *Briers v Australian Telecommunications Commission* (op cit) came to the opposite conclusion. At 571 to 572 his Honour held:

> "Firstly, the clause does not say that "the provisions of the Act are to be incorporated into the award" or are to be "read as one with" the provisions of the award.
>
> Secondly, cl 5 does not in terms refer to "the provisions of the Act" (or any particular provisions) but simply refers in a broad way to the Act. The words used seem inappropriate if the intention were to incorporate into the award each section of the Telecommunications Act, together with each regulation and each by-law made under the Telecommunications Act so that each section, each regulation and each by-law would have the same legal effect as if it were a clause of the award. One of those effects would be that each provision "incorporated" into the award would be enforceable by an action for a penalty under s 119 of the Act or by a prosecution for an offence against the Act consisting of wilfully making default in compliance with an award (s 122)."

66 I do not find either of those decisions helpful. Firstly, what is sought to be incorporated in this matter is another industrial instrument, and not an Act, regulation or by-law. Consequently the second matter considered by Keely J is not relevant. Secondly, clause 4.4 of AG 110 of 2004 also contains the words [This Agreement] "shall apply where there is an inconsistency with the Award". These words contemplate that the provisions of AG 110 of 2004 will render inoperative the provisions of the Award where an inconsistency arises. Whilst no inconsistency is said to arise in this matter, there is force in the argument raised by counsel on behalf of the PTA that the terms of the Award only apply where there is scope for it to apply. As it is

common ground that the Award does not apply to transit guards it follows that clause 21 cannot apply as there is no scope for the Award to apply.

67 Even if I am wrong and clause 21 can be said to be incorporated into AG 110 of 2004 and to apply to Mr Bryan's employment as an express or implied term, I do not accept the Union's submission that clause 21 of the Award outlaws the disciplinary penalty of demotion. Clause 21 of the Award provides:

> "(1) If, in the opinion of the officer-in-charge, any irregularity on the part of any worker should be reported, he will within seven days (or, if not at the main depot or station then within ten days) from this first knowledge of the occurrence notify such worker that he has been so reported.
>
> (2) When a charge has been made against any worker, the worker shall be supplied with a copy of such charge and a copy of any report other than reports to the head of the branch which is to be used in relation to such charge.
>
> (3) Each worker shall provide, when called upon, with the least possible delay, any report or statement which may be required by the officer-in-charge.
>
> (4) When a worker against whom a charge is pending has made a statement to an officer-in-charge, and which statement the officer-in-charge has taken down in writing, such worker shall either be furnished with a copy of such statement, or be allowed to take a copy of it.
>
> (5) If a final decision in any case in which a charge has been made against a worker be not given within three calendar months of the occurrence first coming to the knowledge of the head of the branch or within fourteen days of the final determination of any charge relating to the occurrence brought against the worker by any person other than the employer (whichever is the later), the charge in question shall lapse.
>
> (6) A worker who is suspended from duty for any reason shall not be kept under suspension in excess of six days (excluding Sundays or holidays) following the date on which the worker was suspended. Except in cases where dismissal follows suspension, a worker shall be paid for any time under suspension in excess of six days referred to, provided the worker has not delayed the submission of an explanation of the offence for which the worker was suspended.
>
> (7) Where a worker exercises a right of appeal no deduction shall be made from the worker's wages in respect of any fine until a final decision has been given.
>
> (8) Where a worker has been fined an amount exceeding one day's pay, the amount to be deducted from any fortnight's pay shall not be greater than one day's pay except with the consent of the worker concerned.
>
> (9) Where, owing to the absence from duty of a worker through leave or illness, it is not possible to notify the worker within the period prescribed in subclause (1) that such worker has been reported, the provision shall be regarded as having been complied with if the worker is so notified within seven days of resuming duty following such absence. In such cases, the period in which a final decision, as per subclause (5) may be made shall be extended to three calendar months from the date of the worker's resumption of duty following the absence."

68 Clause 21 plainly does not constitute a code. Clause 21 simply provides for the process to be followed when an employee is charged with a breach of discipline. It does not create the disciplinary measures. Further, where the Award applies to an employee who is a "specified award employee" clause 21 must be read together with s 73 of the GR Act.

69 As to the penalty of demotion imposed on Mr Bryan, when an employee has imposed on them a disciplinary penalty for breaching a policy it is my view the question to be considered by the Commission is whether the legal right of the Respondent to impose the disciplinary penalty has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose and 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 ("the *Undercliffe case*")).

70 The facts of the *Undercliffe case* concerned a breach of a hospital rule that staff should order their meals by a certain time each day by placing their name on a board provided for the purpose. The main reason for the rule was to have effective control over the distribution of food for a variety of sensible and realistic administrative requirements. A nursing assistant requested the cook to put some meat aside for her on a plate for a sandwich. The request was made after the time had passed for putting her name on the board. The cook put the meat aside as requested. The nursing assistant did not put her name on the board although she said in evidence that she intended to do so when she picked up the meat at her lunch break. The Industrial Appeal Court held that it was important that there was no suggestion that the nursing assistant and the cook intended to avoid payment. The Industrial Appeal Court found that although the rule was not trivial, the circumstances of the breach of the rule were trivial so as to amount to an abuse by the employer of its right to dismiss.

71 In this matter Mr Bryan was not dismissed but the legal right of the PTA was exercised to demote him for a period of time. Was that decision harsh, unfair or unreasonable? In my opinion no, having regard to the role and duties of a transit guard and the reasoning applied by the Industrial Appeal Court in the *Undercliffe case* it is plain that the breach of the Telecommunications Use Policy by Mr Bryan was not trivial. The email in question is patently obscene and abusive towards specific individuals and the Police Force generally. The email recited an event of a 14 year old girl with glasses and cerebral palsy who attempts to assault a transit guard. Words are used in relation to the girl which are words of a sexual nature and which are very derogatory. The email also not only refers to an unnamed investigating police officer as "Officer Selfmolester" but makes derogatory references to other named transit guards who work for the PTA and refers to the police officer and the named transit guards engaging in sexual practices in an extremely derogatory manner. In my opinion there is a distinction to be drawn between viewing material on the internet and creating offensive material. Mr Bryan created an email which is quite plainly obscene and abusive. It makes derogatory and obscene comments about specific individuals who are employed by the PTA and members of the Western Australian Police Service. The email reveals an attitude by Mr Bryan which is contrary to the ethos of the PTA and Mr Bryan's role as a transit guard. Plainly the PTA could not tolerate his conduct.

72 The email was not only "sent" by Mr Bryan, it was created by him. The content of the email is repugnant to the duties and responsibilities of his position as a transit guard, that is to uphold relevant provisions of the law in a professional manner and to provide a high level of customer service.

73 Even if Mr Bryan's prior disciplinary record is ignored in its entirety, in all the circumstances I am not satisfied that the Union has made out a case that the decision by the PTA to demote Mr Bryan temporarily as set out in paragraph [1](7) of these reasons for decision was harsh, unfair, unjust or unreasonable.

74 In light of these reasons I will make an order restoring the penalty that was imposed on Mr Bryan in the letter dated 10 February 2005 (*Exhibit A* page 181).

2005 WAIRC 01359

EMPLOYEE REGRESSED FROM LEVEL FIVE TO LEVEL THREE FOLLOWING INCIDENT OF MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 27 APRIL 2005
FILE NO/S	CR 22 OF 2005
CITATION NO.	2005 WAIRC 01359

Result	Order made
Representation	
Applicant	Mr G W Ferguson
Respondent	Mr S M Murphy (of counsel)

Order

HAVING heard Mr Ferguson on behalf of the Applicant and Mr Murphy, 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:

(1) Within seven (7) days of the date of this order, Mr Bryan be regressed to the REA Level 3 for a period of three (3) months;

(2) After the expiration of the period referred to in paragraph (1) of this order, Mr Bryan's pay is to be restored to REA Level 5 but Mr Bryan shall not be entitled to return to work as a Transit Guard until the expiration of a further six (6) months, or be paid the aggregated rate of pay specified for Transit Guards (until he does return); and

(3) Mr Bryan shall be subject to a performance management plan for 15 months from seven (7) days of the date of this order.

(4) THAT the application be and is hereby dismissed.

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

2005 WAIRC 01410

TERMINATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	GSL (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 4 MAY 2005
FILE NO.	CR 150 OF 2004
CITATION NO.	2005 WAIRC 01410

CatchWords	Termination of employment – Involuntary redundancy – Whether severance package should have been paid – Applicant alleges employees were unfairly targeted for redundancy - Whether employees validly chosen for involuntary redundancy – Whether selection process fair – Relevant principles considered – No opportunity to respond to assessments – Procedural unfairness found – No proof that affording procedural fairness would have resulted in a different outcome – Matter dismissed – *Industrial Relations Act 1979* (WA) s 44
Result	Matter dismissed
Representation	
Applicant	Mr M Swinbourn
Respondent	Mr M Stewart and with him Mr R Holding and later Mr A Smith

Reasons for Decision

1 The matter referred for hearing and determination pursuant to s.44 of the Industrial Relations Act 1979 is as follows:

"The respondent is a company engaged in the provision of immigration detention services. It employed Barbara Shackelford and Shirley Walker until their dismissals by reason of redundancy on 14 June 2004. Each employee was dismissed with one week's notice or payment in lieu thereof.

The union acknowledges that the respondent was obliged to make some employees redundant. However, it maintains that the dismissals of Ms Shackelford and Ms Walker were unfair because:

(1) Neither was offered the severance pay that was made available to employees who had earlier volunteered to be made redundant and who were made redundant.

(2) The process used to determine involuntarily redundancies was unfair because:

(a) The respondent claimed to have ranked 39 staff in order of merit and made the bottom four involuntarily redundant. Ms Shackelford and Ms Walker were said to be in the bottom four. Neither had received any warnings about their work performance during their six months of employment with the respondent. The union claims that both employees should have been assessed and warned about any performance issues before June 2004 and given an opportunity to address them. The union claims that in effect the respondent dismissed them for performance issues without giving them any opportunity to address them.

(b) The Manager of the Perth Immigration Detention Centre, Mr Stewart, when explaining Ms Shackelford's ranking made discriminatory comments during "feedback" meetings on 16 and 17 June 2004 which caused the union to suspect that the process of selecting her for involuntary redundancy involved discrimination against her for being an outspoken employee who had regularly participated in the Centre's Joint Consultative Committee of management and staff.

(c) The union states that the respondent claimed to have assessed Ms Walker against the criteria of a Detention Service Officer (DSO) but her employment with the respondent had actually been as a quality/training manager. Further, the respondent had immediately promoted Ms Walker after the completion of her training course and kept her in this higher position throughout the six months of her employment thus indicating the respondent had no serious misgivings about her work performance.

The union seeks orders that they be compensated for the loss or injury caused by their dismissals.

The respondent objects to and opposes the claim. The respondent states that it followed a fair procedure and abided by a recommendation from Lacy SDP given during proceedings in the AIRC on 1 June 2004 when the respondent first foreshadowed redundancies. The respondent states that Ms Shackelford and Ms Walker were not assessed as being unsuitable for their positions but rather that they performed at a lesser standard than all others assessed.

The respondent states that Ms Walker's position was Quality/Training Co-ordinator and not 'manager'; her tenure in this position was only temporary and she received the same salary as a DSO. The severance payments made to the employees who volunteered for redundancy were "above award" payments outside the terms of the certified agreement. The offer expired as noted in SDP Lacy's recommendation.

The respondent states that in each case the employees were offered re-deployment; Ms Walker was offered and accepted redeployment to Christmas Island and this was overtaken by her subsequent resignation. The respondent has placed Ms Shackelford on its casual employment list and she has been moved to the top of the list for offers of future permanent employment."

2 The respondent operates Immigration Detention Centres ("IDCs") in Western Australia, Christmas Island and South Australia, and formerly in Port Hedland. It has its headquarters in Canberra. It operates these IDCs on contract from the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA").

3 The respondent took over the contract for the operation of the IDCs from Australian Correctional Management ("ACM") at the end of 2003. There is conflicting evidence as to the actual date of the formal take-over. However, in October 2003 the respondent was in dispute with the applicant over the engagement of former ACM staff. As a result of that dispute the matter went before Senior Deputy President Lacy of the Australian Industrial Relations Commission ("AIRC"). The evidence indicates that Lacy SDP conducted a number of conferences and in the end issued a recommendation that the respondent, in choosing not to automatically engage all of ACM's former staff when taking over the contract, provide ACM staff with casual work and that ACM staff be given priority in engagements of permanent officers in the future.

4 The evidence also demonstrates that in December 2003 the respondent undertook a training course for a number of its staff of about 6 weeks' duration and other courses followed.

5 The respondent's staffing structure within the Perth IDC includes Michael Stewart, General Manager; Michael (Mick) Kelly, Operations Manager; and Araon Sun, Business Manager, who together constitute the senior executive. In addition there are a number of Duty Operations Co-ordinators ("DOCs") who are effectively the supervisors of the day-to-day operations of the IDC. They report to the Operations Manager. There are also a number of Detention Service Officers ("DSOs") who are responsible for the day-to-day supervision of the detainees, looking after their physical and mental wellbeing. A number of the officers undertake what were described as special duties. One officer mentioned in evidence was Shane Allen, Training Co-ordinator. In respect of Ms Walker there is a dispute as to whether she was substantively a DSO undertaking special duties or whether she was substantively Quality Assurance Co-ordinator or Manager and Transport and Escort Co-ordinator.

6 There was also evidence relating to a number of the respondent's officers not located in Western Australia, being Michael Miitze, the respondent's National Human Resources Manager, Petra Mulfait, its National Quality Co-ordinator, and Neil McDonald, General Manager of the Christmas Island IDC.

7 The respondent seems to have received advice some time in early May 2004 that the Federal Government was to close the Port Hedland IDC. It then realised that it was necessary to reduce its staff and determined that 9 positions would need to be abolished. On 21 May 2004, notice was sent to all Perth IDC staff in the following terms:

"**POTENTIAL REDUNDANCIES AT PERTH IDC**

Further to today's staff meetings, I am writing to advise you that the permanent staffing at Perth IDC is in excess of our current workload requirements. The closure of PHIRPC [Port Hedland Immigration Reception and Processing Centre] and the reduced requirement for secondments to CIIRPC [Christmas Island Immigration Reception and Processing Centre] means GSL will need to reduce the number of permanent DSO positions. Following detailed analysis and careful consideration, the permanent staffing requirement for Perth is currently 30 staff.

Permanent staff who wish to be considered for redeployment to another Centre should express their interest in writing to me by 12.00 noon next Wednesday, 26 May 2004. You should specify which Centre(s) you wish to be considered for, in priority order. You should also indicate if you are interested in being considered for other GSL operations within Australia.

Staff who are chosen for redeployment will receive the following financial assistance with their relocation:

- Removal costs — up to $4,000 for a family and $2,000 for a single.
- Two week "settling in" period at new location — accommodation provided and travel allowance ($71.50 per day) payable for the first two weeks.

If following consideration of redeployment nominations, there are still excess permanent staff, GSL will need to undertake a process to identify the surplus positions. We are currently working with the LHMU to determine the fairest and most appropriate process to achieve this. Michael Miitze, National HR Manager, will be at Perth IDC next Wednesday, 26 May to provide you with further details about the proposed process and answer any other questions. I will provide you with details of further staff meeting times over the next few days.

Mike Stewart

General Manager

Perth IDC"

(Exhibit A1)

8 An update was provided on 2 June 2004 addressed to "All Perth IDC Staff" in the following terms:

"**POTENTIAL REDUNDANCIES AT PERTH IDC**

Introduction

I am writing to provide you with an up-date on developments regarding the permanent staffing situation at Perth IDC. As previously advised in my letter of 21 May 2004, the current permanent staffing requirement for Perth IDC is 30 staff. This means that we need to reduce our current permanent staffing by nine positions.

As you would probably be aware, there are some areas of disagreement between the LHMU and GSL regarding how redundancies should be identified. These matters have been the subject of two recent Australian Industrial Relations Commission (AIRC) hearings before Senior Deputy President Lacy and extensive discussions between the union and GSL management.

Following the most recent AIRC hearing on 31 May 2004, SDP Lacy has made a recommendation regarding how the matter should be resolved. A copy of that recommendation is attached for your information. On the basis of SDP Lacy's recommendation, there are three options. They are:

- Option 1 - voluntary redundancies;
- Option 2 - redeployment; and
- Option 3 - involuntary redundancies.

Option 1 - Voluntary Redundancies

Permanent staff who wish to nominate for voluntary redundancy (including four weeks severance pay which is in addition to the provisions of the Certified Agreement) must notify me, in writing, by **12.00 noon on Monday, 7 June 2004**. Staff accepted for voluntary redundancy will be advised, in writing, by 5.00pm on Monday, 7 June and their last day of employment will be Wednesday, 9 June 2004.

Please note that the closing date described above is different to the date mentioned in SDP Lacy's recommendation. Due to delays in progressing this matter I have decided to extend the closing date to allow staff more time to properly consider their decision.

If Perth-based staff, currently on secondment to Christmas Island, are accepted for voluntary redundancy, their last day of employment will be the last day they are required for duty on the Island.

Option 2 - Redeployment

I have also extended the closing date for redeployment expressions of interest. Permanent staff who wish to be considered for permanent redeployment to another Centre must also notify me, in writing, by **12.00 noon on Monday, 7 June 2004**. I ask those who have already indicated an interest in redeployment to reconfirm their interest in writing. You should specify which Centre(s) you wish to be considered for, in priority order. You should also indicate if you are interested in being considered for other GSL operations within Australia.

As previously advised, staff who are chosen for redeployment will receive the following financial assistance with their relocation:

- Removal costs — up to $4,000 for a family and $2,000 for a single.
- Two week "settling in" period at new location — accommodation provided and travel allowance ($71.50) payable for the first two weeks.

It is my intention to effect redeployments as soon as practicable. If the number of nominations for voluntary redundancy and redeployment exceed the number of redundant positions we need to identify, GSL will determine who is accepted for voluntary redundancy and redeployment.

Option 3 - Involuntary Redundancies

If the number of nominations for voluntary redundancy and redeployment is less than the number of redundant positions required, GSL will undertake a merit-based assessment process to identify the remaining surplus positions. The process will involve ranking each permanent staff member in order of merit, using the DSO selection critieria (sic). The ranking process will be facilitated and managed by Michael Miitze, National HR Manager and will involve the Perth IDC management team (including the two recently appointed Operations Co-ordinators).

Staff identified as potentially surplus through this process will again be invited to nominate for redeployment to other Centres or other GSL operations. If these staff choose not to nominate for redeployment, they will be made redundant. Redundancy means in this case that they are no longer permanent but assume casual status. In accordance with the

attached SDP Lacy Recommendation, these ex permanents will have first refusal on any permanent vacancies that arise in the future in preference to the current "successful appellants".

Redundancy will be made in accordance with the terms and conditions of the Certified Agreement. Those made redundant will be given one week's notice (or payment in lieu of notice) on **Monday 7 June 2004** and paid for any recreation leave entitlements owing,

but will not receive any other severance payment.

Employee Assistance Program

As you would be aware, an Employee Assistance Program counselor (sic) from OSA Group was available at the Centre yesterday and will be here again tomorrow to talk individually with staff. You are encouraged to avail yourself of this opportunity. Staff wishing to see an OSA Group counselor (sic) off-site can ring 1300 361 008 to make an appointment.

Updates

I am aware of rumours and misinformation on this current situation. This is a time for clear heads and clear thinking. I would ask again that information not be passed on without checking facts first. I will continue to keep you up-to-date with this matter. In order to minimise rumours and misinformation, please do not hesitate to contact me, Araon Sun or Mick Kelly anytime, including after hours.

Mike Stewart

General Manager"

(Exhibit A2)

9 It is noted that the second memorandum to all staff refers to proceedings before the AIRC. Lacy SDP issued the following recommendation on 1 June 2004, formal parts omitted:

"RECOMMENDATION

[1] On 16 October 2003, the Liquor, Hospitality and Miscellaneous Union (LHMU) notified the Commission of an alleged industrial dispute between it and Group 4 Falck Global Solutions Pty Ltd (GSL). Other matters subsequently arose in the course of negotiations. Those matters concerned the selection process for staff to fill positions in the establishment of GSL. The parties agreed to a process for resolving the disputes and the process was implemented.

[2] Subsequent to the implementation of the process to resolve the disputed selection process GSL found it necessary to re-evaluate its establishment following upon closure of the Port Hedland Detention Centre. GSL needs to redeploy and/or retrench nine employees from Perth Detention Centre. A dispute has arisen in relation to staffing the Perth Detention Centre.

[3] GSL has made an offer for settlement of the current dispute. I have considered the offer in conference with the LHMU and GSL and, in my view, it is a fair means of resolving the dispute. The substantive terms of the offer are as follows:

- GSL will offer redeployment for up to nine employees from Perth;
- For any of the nine positions not vacated by redeployment GSL will call for volunteers for retrenchment;
- GSL will pay to any volunteer accepted for retrenchment four weeks severance pay;
- Individuals will have until 5.00 pm on 4 June to notify the Perth DC General Manager, Mike Stewart, in writing of their desire to avail themselves of the package;
- The option to accept voluntary severance lapses at 5.00 pm on 4 June 2004;
- Those individuals whose interest in voluntary severance is accepted by GSL will be notified by 5.00 pm on 5 June and their employment will cease at 5.00 pm on 7 June 2004;
- Employees who accept this offer of voluntary redundancy are entitled to reapply for employment with Perth IDC if vacancies are advertised in the future.
- If the number of staff accepting redeployment or the voluntary severance package exceed the number required GSL maintain the right to decide which redeployments and voluntary severances to facilitate.
- If insufficient staff opt for redeployment or voluntary severance GSL will decide which other staff are to be made redundant. This will be a merit based process conducted by GSL Perth senior and first line management assisted by a facilitator external to the centre. Any staff made redundant by this process, and who choose to remain with GSL as casual employees, will have first refusal to take up any permanent vacancies that arise in future. For the avoidance of any confusion this means they will take precedence over the successful appellants referred to in the AIRC recommendation (C2003/6033) dated 28 October 2003."

(Exhibit A2)

10 Four members of staff were retrenched effective 14 June 2004. They were R Bateman, Peter Easton, Barbara Shackelford and Shirley Walker (Exhibit A42).

11 The Commission has heard evidence from Barbara Anne Shackelford; Shirley Anne Walker; Terrance Collins, a DSO; Andrew Richard Lee, an organiser with the applicant since July 2002; Neil Whatcott, a DOC; Araon Sun, Business Manager for the Perth IDC; and Shane Robert Hofmeier, a DSO acting as Property Officer.

12 For the sake of setting out the circumstances of the merit selection process, I refer firstly to the evidence of Neil Whatcott, who was the only witness with direct involvement in that process.

13 According to Mr Whatcott's evidence the selection process was undertaken by a panel made up of Messrs Stewart, Kelly, Gomez, Allen and himself, facilitated by Mr Miitze. It took place over one lengthy day, at the conclusion of which the panel adjourned for a few days. On Monday 7 June 2004, the panel met again for a period of five hours to review its decision. According to Mr Whatcott, Mr Miitze and an administrative person were making notes and apparently taking minutes of the discussions of the panel.

14 The criteria used by the panel were the DSO selection criteria as follows:

"**Criteria for DSO (Permanent and Casual) — key discriminators**

1. Interaction with Detainees
    - Resolves detainee problems
    - Spends time getting to know detainees
    - Gathers intel and reports
    - Monitors detainee behaviour
    - Tolerance/Cultural sensitivity
    - Confident and compassionate
    - Actively involved in recreational activities inside and outside PIDC
2. Security
    - No significant lapses of security
    - Understands DSO tasks
    - Is alert (situationally (sic) aware)
    - Wears officer accoutrements automatically
    - Appropriately secures sensitive information
    - Radio procedure secure
3. Adherence to Code of Conduct
    - Act in an exemplary way — beyond reproach
    - Ensures that no false or misleading information is created or provided
    - Complies with direction
    - Supports and promotes a harmonious and stable work environment
    - Treat clients and colleagues with respect and courtesy
    - Personal presentation (dress)
    - Integrity/honesty
4. Organizational skills
    - Time management
    - Effectively co-ordinates tasks and resources
    - Delivers results under pressure
    - Manages competing priorities
5. Self Motivation
    - Willingness to learn
    - Enthusiasm
    - Good time efficiency (job done well and quickly)
    - Accepts responsibility
6. Teamwork
    - Flexible
    - Acts with minimal supervision
    - Strong initiative
    - Reliable
    - Accountable for actions
    - Follows through/up on tasks
    - Supportive of others
7. Positive Contribution to PIDC as an Individual
    - Objective decision-making
    - Good relationship building skills
    - Willingness to contribute to workplace and workplace improvement
    - Focus on detainees and DIMIA
8. Communication Skills
    - Verbal:
        - Logical thought process
        - Good negotiation skills
        - Active listener
    - Written:
        - Attention to detail is reasonable/good
        - logical thought process

9. Basic Computer Skills
   - Accesses email
   - Able to type reports / appropriate content
   - Accesses documentation from ISIS
   - Does not have regular problems with passwords

Methodology

Score range is 1 to 6, 6 being highest. In total, max score 54, lowest score 9.

Rate each individual against the 9 separate criteria. Each criteria (sic) has "elements".

Scoring:

1. does not meet criteria key elements
2. meets some criteria key elements
3. meets most criteria key elements
4. meets all criteria key elements
5. meets all criteria key elements and exceeds some
6. meets all criteria key elements and exceeds most/all"

(Exhibit R1)

15 Each member of the panel was required to allocate points out of six to each of the employees under consideration for each major criterion, being Interaction with Detainees, Security, etc., without consulting the other panel members. They were then to discuss their allocation of points with a view to reaching agreement amongst them for a particular mark for each individual for each criterion. According to Mr Whatcott, one was expected to substantiate one's views and where there was disagreement, the discussion would continue until agreement was reached amongst the group for a particular mark to be allocated. Mr Whatcott says that during the course of the panel discussions nobody dominated the discussion. He says that where a member of the panel was not familiar with a particular employee's work, no mark was allocated by that panel member and that panel member did not join the group in the discussion of the score to be allocated. He said that some members of the panel had greater knowledge of some staff than others.

16 Mr Whatcott gave evidence of his knowledge of Ms Walker, having worked on shift with her until March 2004, and he had undertaken escorts with her to Christmas Island and met with her in "morning prayers" (i.e. the senior staff briefing). He says that because Ms Walker's duties as Quality Assurance Co-ordinator and Transport/Escorts Co-ordinator meant she spent most of her time in the office, she would have had less opportunity to undertake some of the work that was being assessed including that she was not able to spend the same amount of time interacting with detainees and getting to know them. However, he says that notwithstanding her other duties, Ms Walker ought to have spent time getting to know the detainees, as it was necessary to know the detainees as part of her duties in transport and escort co-ordination. He believed she did not spend time getting to know the detainees. If Ms Walker was prepared to undertake escorts then she would need to know the detainees. He believed that it was fair to assess her on the "interaction with detainees" criterion. He says that as he does seven, 12 hour days per fortnight including night shift and Ms Walker did permanent day shift, there would have been a lot of the time where he had no contact with her. However, he says he was able to make a proper assessment of her from his knowledge of working with her.

17 Interestingly, Mr Whatcott's evidence indicates that he marked Ms Walker higher on average than the marks she was ultimately allocated. He thought he gave her a fair assessment. Mr Whatcott made a number of comments in respect of Ms Walker including that she always liked to be right and there were issues with her dress standard. He had observed her being advised not to take a mobile phone into the Detention Centre and noted that this was an issue discussed by the panel. Further he gave evidence of Ms Walker's attitude and that she was outspoken and did not mince her words.

18 In respect of Ms Shackelford, Mr Whatcott said that she was "upfront", would tell people if she thought they were doing the wrong thing and did not hide behind anyone. Mr Whatcott seemed to have no difficulty with either Ms Shackelford or Ms Walker being outspoken and thought that in fact this was an admirable quality when managed in the right way. However, he described Ms Walker putting Dragana Djuric, another officer, "in her place" during a training course.

19 In respect of Ms Shackelford having said during a JCC meeting that she would not undertake excursions outside the Centre, Mr Whatcott said that escorts are part of everyday life, part of the job.

20 In respect of the timing of his and Mr Carlos Gomez's appointments as DOCs and thus participation in the panel, Mr Whatcott says that in early 2004, the respondent invited expressions of interest from DSOs to become DOCs. A number of DSOs responded and then had an opportunity to act in those positions prior to being considered for them. According to Mr Whatcott, having undertaken a period of acting in the positions, he and Mr Gomez were appointed as DOCs on 5 May 2004.

21 The evidence of Ms Shackelford is that she had worked for ACM before being selected to work for the respondent when it took over the operation of the Perth IDC. She was employed as a DSO. When the respondent decided that it needed to reduce its staffing level at Perth IDC and undertook a merit selection process to choose those officers who were to be retrenched, Ms Shackelford was selected for retrenchment. Ms Shackelford said she had no input into the assessment of her performance. She was informed of her selection for retrenchment by Mr Stewart by telephone, and then in writing, by a letter dated 7 June 2004, in the following terms:

"Dear Barbara,

NOTICE OF REDUNDANCY

As you are aware, the closing date for nominations for redeployment and voluntary redundancy (including four weeks severance pay) was 12.00 noon today (Monday, 7 June 2004). You did not indicate to GSL, in writing, that you wish to be considered for redeployment or voluntary redundancy. Therefore, this letter is to formally advise you that your position is surplus to requirements at Perth IDC.

If you now wish to nominate for redeployment to another Centre you should do so by advising me, in writing, by 12.00 noon on Friday, 11 June 2004.

If you do not nominate for redeployment to another Centre, you will be made redundant. In accordance with clause 14.1.1 of the Certified Agreement you are given one week's notice (from the date of this letter) or you will be paid one

week's pay in lieu of notice. Your final entitlements (including any recreation leave owing) will be paid to you on pay day 16 June 2004.

As advised in my letter to all Perth IDC staff dated 2 June 2004, if the number of nominations for voluntary redundancy and redeployment is less than the number of redundant positions required, GSL would identify the remaining surplus positions by ranking each permanent staff member in order of merit, using the DSO selection critieria (sic). If you would like feedback on how you were rated in this process, please let me know and I will arrange a meeting ASAP.

If you are made redundant, you may request, in writing, to remain with Perth IDC as a casual employee. If you are retained as a casual employee you will have first refusal on any permanent vacancies that arise in the future.

Clause 14.4 of the Certified Agreement provides for an employee to take up to one day off without loss of pay, during their notice period, to seek other employment. Please let me know in advance if you wish to avail yourself of this opportunity.

Yours sincerely

Signed

Mike Stewart

General Manager"

(Exhibit A3)

22 Ms Shackelford took up the offer of feedback contained in the letter. She had two meetings with Mr Stewart of about two hours' duration in total in which he explained that he was not able to advise her of the points that had been allocated to her in the assessment and selection process but gave her a number of reasons why she had been marked low. They included that she was opinionated, inflexible and not a team player. In respect of her inflexibility, he referred to a shift handover where she had been asked to go straight down to the back of the Centre and relieve the permanent officer and she had challenged this. She was informed that in respect of the issue of her being opinionated, she had said that she would not undertake excursions when the subject was discussed during a Joint Consultative Committee ("JCC") meeting, and that she had been overheard expressing her opinion regarding the extended secondments and the process for selection of persons to participate in them.

23 Mr Stewart told her in this feedback interview that he did not want her to resign from the JCC because she provided good input. Ms Shackelford thought that this was ironic given the other views expressed to her as to the marks she had received in the assessment.

24 Ms Shackelford says there was no indication given to her that her responses to the feedback would have any effect upon the respondent's decision to retrench her.

25 Ms Shackelford says that she has had no feedback on her performance by Mr Stewart other than at the time of these two feedback discussions and has had no other complaints or warnings.

26 In her evidence, Ms Shackelford went through each of the criteria and scores allocated to her. She says that she was scored too low in most of the criteria, for a number of reasons. Overall, she says she would have ranked herself between 4 to 4.5 or even 5 instead of a score of 3.05556. Her own assessment of herself compared with others is that she should have been within the top third of staff because of her experience, presentation and work ethic. She found it hard to reconcile the probationary appraisal report which had been performed shortly after her appointment with GSL and the score she received.

27 Ms Shackelford denies not taking direction or being abrasive. She does not see any other way of putting complaints than very directly. She believes that it was not possible for the respondent to make an assessment of her performance after she had been an employee for a year. She said her loyalty was with ACM and she had not liked to see it lose the contract. However, she asserts that she was happy with either employer, and basically sees herself as employed by the DIMIA.

28 Ms Shackelford said she has no problems with Mr Stewart. She did an international escort to Christmas Island with Mr Stewart and others, but he had never worked with her on the floor.

29 Ms Shackelford had some concerns as to the make-up of the panel which selected those officers who were to be retrenched. She says that she hardly knew Mr Kelly. She had not worked with Mr Gomez and had only worked two to three weeks with Mr Whatcott. She believed that there were social relationships between members of the panel which might have affected their judgement.

30 After she was retrenched from her permanent position, Ms Shackelford did not seek redeployment to another Centre, i.e. Christmas Island or Baxter in South Australia, due to personal circumstances which she described. She continued with the respondent as a casual employee, while applying for other positions. She was re-appointed to permanent from casual a few weeks before the hearing of the matter commenced.

31 Ms Shackelford suffered loss as a result of the termination of her permanent employment in that in most fortnightly rosters she did not work as many hours as a casual as she would have had she been a permanent officer.

32 Shirley Anne Walker gave evidence that she commenced as a DSO with the respondent when it took over the contract from ACM on 25 October 2003. She received some training from Mr Stewart. She says that she was promoted to her position of Quality/Contract Compliance Manager and Transport/Escort Co-ordinator around January 2004. She says she has very little real contact with detainees in this role as it is mostly administrative. She was paid 8 hours overtime per fortnight on a confidential basis due to her additional responsibilities. Ms Walker says that as her position was not that of a DSO, she should not have been considered for retrenchment.

33 There were a number of issues associated with Ms Walker's performance and her relationship with Mr Stewart, which appears to have deteriorated over time. Part of the difficulty associated with that relationship arose when she wrote an open email to him, by which I understand she copied it to all members of staff. This was in response to an article in their staff newsletter written by Mr Stewart, in which he invited comment. Her email to him was as follows:

"Mr Stewart

Re: Drug Detection Unit - Risk Management

Visitors may innocently come into contact with substances when handling common articles such as coins etc. What about the detection of common household products e.g. chlorine? Where GSL does (sic) stand regarding informing the visitor of the detection of drugs on their person. Are GSL leaving themselves open to litigation processes? Does GSL have the appropriate authority to use such detection units at the IDC?

What is the rationale of not having an X-Ray machine and employing a detection unit? Is it more cost effective for the drug detection unit? Who will be supplying the appropriate training for staff?

Yours faithfully

Shirley A Walker (Mrs)

PEIDC"

(Exhibit A20)

34 Mr Stewart responded as follows:

"Shirley,

I am writing to you, prompted to do so because I am more than peeved by your letter emailed to all Perth users (but specifically addressed to me) concerning the purchase of a vacuum drug detection kit.

Here is my reply:

a) The decision to purchase a drug detection capability is seen as better value than an x-ray machine. As drugs are a serious issue at the PIDC, I feel my decision along with the other personnel above, is well justified. I am not going to justify my decision any further to you since you have made it a public issue. I would have been more than happy to talk to you out of the public arena if you had chosen that route.

b) Who are you to send an open letter questioning the purchase of the drug detection kit in lieu of the x-ray machine? Are you trying to question my, Mick Kelly's and Phil Lovering's decision to purchase this equipment? Don't you think we would have thought through those issues you have raised in your letter? Why an open letter? Why addressed to "Mr Stewart" (ie. why so formal?) when you know I actively encourage first names. My first thought was - is this an open power play? Are you grandstanding? What is it to you anyway? Why are you making it your concern?

c) I feel that you have made a serious error of judgment by sending the open letter. Talking about serious errors of judgement, I want to list my other areas of concern:

   (1) Taking so long (five months) to produce a Quality Plan when I had made it clear several times it was your highest priority. Sure you explained the plan to me, but it only goes out to July — hardly what I have been asking for;

   (2) Producing your mobile phone in the office on at least four occasions that I am aware of even after being told it was a "no go" item;

   (3) On your last day Friday 16 Apr, you just took the day off, went shopping and whilst you came in for a handover with me, you never asked me to take the day off. And then your damn mobile rang!! and

   (4) You do not complete tasks when requested/directed in a reasonably timely fashion. (eg. the room search matrix; updating the controlled key ledger which still remains out of date; a large batch of broken keys recently found on your shelves in an unsecured state; failure to fill out sick leave forms on more than one occasion and claiming hours that were not worked — this was beyond the 8 hrs pfn arrangement we have).

When I take all of the above into account, especially after the open letter, I think to myself, is Shirley taking me for granted? What is Shirley up to? Is she testing me? Is she going to push me and keep pushing me until I do something or say enough is enough? Well, Shirley, enough is enough. If I can forgive you for the earlier transgressions, now I cannot as I believe you have "crossed the line".

The thing I have noticed over the last four to six weeks, Shirley, is that your performance had gone South. So why is it so? Do you feel that comfortable that you think that you can do your own thing? I believe you are letting me down and yourself down. Ask yourself, are the above the actions of a team player? Are they reasonable?

So Shirley, where do we go from here? The ball is now in your court. There is no need for you to write a lengthy reply — a telephone call will suffice. Please ring my mobile: 0418 208 977.

Mike Stewart

28 Apr 04"

(Exhibit A21)

35 In her evidence, Ms Walker challenges the issues raised by Mr Stewart in his letter and has her explanations for them. However, she says that she did not speak to Mr Stewart about the matters raised in his communication to her as she was on secondment to Christmas Island and soon thereafter she was selected for retrenchment. She says she had no opportunity to respond to him. Ms Walker says she needed to discuss it in person and faxed Mr Stewart to say they needed to discuss the issues (transcript page 130).

36 On being advised that she was selected for retrenchment and offered redeployment on 7 June 2004, Ms Walker returned to Perth on 10 June 2004. Ms Walker nominated for redeployment to Christmas Island as a DSO. For a period of some time prior to 19 June 2004, when the respondent was attempting to finalise her redeployment, Ms Walker was unavailable and uncontactable in Albany. On 19 June 2004, she signed an agreement with the respondent to undertake redeployment under particular conditions (Exhibit R9).

37 Ms Walker says that she spoke with Neil McDonald, the General Manager at Christmas Island, regarding the position she was to undertake there. The position she was offered and initially accepted was that of a DSO. She spoke to him about the prospects of a DOC position and he said that it was unlikely. She then decided not to accept the redeployment to Christmas Island and thanked Mr McDonald and resigned. She informed him in writing, by email dated 20 July 2004, and telephoned him. She says she was not pressured into resigning. Exhibit R4 contains her resignation as follows:

"Dear Neil

Thank you for your email. I wish to inform you to tender my resignation from GSL effective from the 26th July, 2004. Unfortunately due to commitments in Perth I am unable to relocate to Christmas Island at this time. Pease (sic) accept my sincere apolizes (sic) if I have inconvenienced you in anyway (sic). I grateful (sic) for all the assistance you have given me and your kind offer of employment.

Kind regards
Shirley A Walker"

(Exhibit R4)

38 Accordingly, Ms Walker did not take up the respondent's offer, as Ms Shackelford had, of casual employment.

39 Interestingly, during examination in chief, Ms Walker said that she could not take up the position on Christmas Island because of her partner's transfer to the country, however, in cross-examination she said the position was not what she had wanted, being a DOC position instead of a DSO position, so she chose not to proceed with relocation. According to the retrenchment arrangements, Ms Walker was to be retrenched from 16 June 2004 from which time she had the option to be placed on a casual arrangement unless she opted for redeployment.

40 Her final pay of wages for the period up to 13 June 2004 was made on 17 June 2004. Her annual leave entitlements were finalised on 29 July 2004.

41 Ms Walker challenges her selection for retrenchment. She gave evidence of the positive responses she received from Petra Muhlfait, the respondent's National Quality Co-ordinator, in respect of the work she performed in her quality assurance role. She expressed concern that Ms Muhlfait was not consulted about her performance when consideration was given to her being retrenched.

42 Ms Walker challenges the make-up of the panel which selected employees for retrenchment. She suspects that the timing of Messrs Whatcott and Gomez being appointed as DOCs was designed to ensure that they participated in the panel and were safe from retrenchment themselves. She also says that she was told by another officer that Mr Whatcott had told a few of the staff members who was safe from retrenchment and who was not before the official announcement was made. Ms Walker said she had a good rapport with both Mr Whatcott and Mr Gomez.

43 Ms Walker also expressed concern at Mr Stewart's role in the selection panel given his recent attitude to her.

44 She was critical of Mr Allen's participation in the panel as she said that he had not had a great deal to do with her. She was also concerned at Mr Kelly's participation due to her views about Mr Kelly, that she had communication difficulties with him, and he was "a little bit of a bully" (transcript page 77).

45 Ms Walker also alleged that there were friendships amongst the panel members and she was concerned that this might have resulted in a lack of objectivity in the assessments.

46 In respect of the particular assessments made of her, Ms Walker says that she should have been scored higher.

47 Ms Walker says that had she not been retrenched, she would have started looking around for another job if the situation with Mr Stewart had not been resolved following his letter to her of 28 April 2004 (Exhibit A21).

48 Terrance Collins gave evidence about working with Ms Shackelford and her approach to work, her involvement in the JCC, her forthrightness and performance. He also gave his opinion of Ms Walker's work and attitude. Mr Collins also gave evidence that he was told by Mr Gomez that the selection process seemed targeted at "a list of people they wanted to get rid of" (transcript page 118). Mr Collins also expressed concerns about the make-up of the selection panel, particularly the inclusion of Shane Allen.

49 Mr Andrew Lee, the applicant's organiser, gave evidence that the union had been informed at the outset of the need for retrenchments and accepts and does not challenge that the respondent had the right to make redundancies nor does it object to the number of retrenchments made. However, it objected to the method used. Its main objection was to a merit process rather than the sole criterion which it believed appropriate, of length of service. On this basis the union did not accept Lacy SDP's recommendation of 1 June 2004 and declined the respondent's offer to be involved or consulted in respect of the process or criteria to be used in the merit selection process.

50 According to Mr Lee, Mr Holding (whose position with the respondent is unclear, but who appears to have been a representative) and Mr Miitze, the respondent's National Human Resources Manager, met with the union and advised that the respondent intended to undertake a process which Mr Lee described as a desk based review and rank the employees according to that review. The union stated that it believed that process was unfair. Mr Lee indicated that Lacy SDP said that the people who were unsuccessful in the process and were to be retrenched could bring their complaints of unfair dismissal to the Commission and he would expedite video conferences to deal with them. He recommended that they should also have the first option of any casual work and then to permanent employment should it become available. The union also objected to the recommendation on the basis that this new batch of casuals would override the priority given to casuals who were previously employed by ACM for permanent appointment pursuant to Lacy SDP's previous recommendation.

51 Mr Lee says that during the conference before the AIRC, the respondent explained the general basis of its merit selection process and accordingly, the union knew what was proposed and recommended by Lacy SDP. The union vehemently opposed the merit selection process, particularly opposing involuntary retrenchments. Mr Lee noted that the respondent invited the union to be consulted regarding the process and its design, but the union declined to be involved because it believed that being involved in the selection of its own members for retrenchment constituted a conflict of interest. Therefore, the union was not given the criteria to be used nor did it have input into the membership of the panel to undertake the merit assessment. Mr Lee also says that it was his understanding from the discussions that only DSO positions would be taken into account in the process.

52 Mr Lee described Lacy SDP's offer to expedite any claims of unfair dismissal with video conferencing commencing within one week of the employer's decision and the selection of those for retrenchment as a constructive offer. However, the union did not take up this offer but chose to take the case to this Commission because it believed that it would be to its advantage to do so.

53 The union was told that Mr Miitze would be the facilitator for the selection process. Mr Lee says that the union expressed concerns to Mr Miitze about Mr Stewart being on the panel because of complaints by members that he victimised members of staff. He says that Mr Miitze told him that he was aware of the sorts of complaints to which Mr Lee referred and that, as Mr Miitze was facilitating the selection panel's processes, he would ensure the neutrality and objectivity of the assessment and be aware of the union's concerns regarding Mr Stewart. Mr Lee said that he could not give details of any allegations of bullying by Mr Stewart but there was a common theme. He also says that Mr Stewart's attitude was exemplified during a meeting between himself, Mr Miitze, Mr Nicholas of the union and Mr Stewart, where Mr Nicholas made some comments and Mr Stewart responded "what goes around comes around" and Mr Nicholas said that such a comment was inappropriate.

54 Mr Sun, the respondent's Business Manager, gave evidence that he has known Ms Walker since approximately 1998. He knew her well as a colleague.

55 Mr Sun gave evidence that there were a number of difficulties associated with Ms Walker's timesheets and that she continued to complete timesheets in advance after this practice had been identified as being an issue soon after the respondent took over the contract from ACM. Other staff soon corrected the practice but Ms Walker did not and continued as before. Staff were also required to fill in forms when they were not working on public holidays so that they would be paid appropriately. However, according to Mr Sun, Ms Walker continued to have difficulty with this and Mr Sun reminded her on a number of occasions to fill in public holiday forms so that she would not be overpaid. While other people had similar problems, Ms Walker continued to have the same sorts of problems long after the other officers' problems were resolved. She took sick leave on a number of days where she did not fill in sick leave forms and had to be reminded to do so. On one occasion, when she was on a secondment to Christmas Island, he had to fill in the forms for her. Mr Sun says that Ms Walker was not the only person who regularly forgot public holiday forms but the other members of staff settled down soon after December 2003/January 2004 when matters were drawn to their attention. Ms Walker was not the only person with problems getting her sick leave forms in but her failings were 80% more than those of other people. He said that documents presented by him in evidence as her timesheets (Exhibit R7) did not represent the total of the problems he experienced with her recording of her work.

56 Shane Robert Hofmeier gave evidence about issues which arose in his dealings with Ms Walker relating to the allocation of officers to participate in escorts and regarding the preparation of a search matrix which set out a program of searches of the Centre.

57 Mr Hofmeier gave evidence that he had no concerns in respect of the make-up of the selection panel for the retrenchments except in regard of having Mr Allen participate. Mr Hofmeier believed that Mr Allen's knowledge of the members of staff was very limited in that Mr Allen had only seen staff during the course of training and he had not seen how they operated on the floor.

58 Mr Hofmeier also gave evidence about the overseas escort system and the policy of staff selection for escorts and the policy in respect to mobile phones being taken into the IDC. The presence of mobile phones in the Centre could constitute a security issue.

Assessment of Credibility

59 My assessment of Mr Whatcott is that he gave his evidence honestly and openly. There is no suggestion in his evidence that he was adversely inclined towards either Ms Shackelford or Ms Walker such as to be biased against them. Where there is conflict between Mr Whatcott's evidence and that of Ms Shackelford and Ms Walker, I have no hesitation in accepting Mr Whatcott's evidence. Likewise, I accept Mr Sun's evidence where there is conflict with other evidence. Mr Sun had no particular interest in giving his evidence and was an impartial observer of the matters about which he gave evidence.

60 Mr Lee gave his evidence in an open and straightforward manner, and I accept it as credible evidence. I also accept Mr Hofmeier's evidence as being reliable and credible.

61 In giving her evidence, Ms Shackelford did not always listen to and did not or chose not to understand some questions which she should have understood, she did not answer some of them but kept responding by saying what she wanted to say without regard to the question. She certainly struck me as being forthright in her views, whether they were correct or not.

62 Ms Walker also took an approach of saying what she wanted, whether it related to questions she was asked or not. I found Ms Walker's evidence to be quite unreliable in a range of areas. Like Ms Shackelford she was inclined to not listen to questions, she was defensive, and often did not answer with clarity.

Conclusions

63 The applicant's grounds for its claim are essentially that:

1. The severance payments to Ms Walker and Ms Shackelford should have been the same as those which applied to those who volunteered for retrenchment;
2. The employees had no opportunity to respond to the assessments made of them before the decision was made as to who would be retrenched;
3. Ms Walker should never have been considered for retrenchment as she was not a DSO, and further, she was assessed against criteria relevant to the DSO role, not to the role she performed; and
4. Ms Shackelford's selection for redundancy unfairly took account of her speaking out during JCC meetings.

64 Although those were the grounds cited in the referral for hearing and determination, during the course of the hearing, the applicant also alleged that:

1. The merit selection process was flawed, suggesting in submissions that it was not consulted during the process; and
2. There was a predetermined outcome to the selection process, i.e. to remove so-called troublemakers.

65 During their evidence, Ms Shackelford and Ms Walker expressed concerns over the make-up of the selection panel, suggesting that some members were not familiar with their work, others were not objective because of alleged friendships, and raising allegations relating to comments made to them by others.

66 One thing which cannot be stressed enough in the consideration of this matter is that Ms Shackelford and Ms Walker were not dismissed for poor performance, poor attitude or misconduct, or any other such consideration. There is no evidence that if the respondent had not needed to reduce its staff, they would have had their employment terminated. The respondent needed to reduce its permanent staff. The applicant accepts that fact. The respondent assessed its employees relative to one another to rank them according to what appear, on their face, to be objective and relevant criteria. Those with the lowest scores were to be offered relocation, to be made casual or to have their employment terminated. This is demonstrated by the fact that the respondent offered redeployments and, failing that, inclusion on the casual roster which could ultimately lead to re-engagement as a permanent employee. Ms Shackelford's situation exemplifies this. Had Ms Walker followed through with the redeployment she initially agreed to, her employment would not have terminated.

Non-Payment of the Severance Package

67 As to the first issue regarding the severance package, the respondent offered those employees who nominated for voluntary redundancy an amount of 4 weeks' pay in addition to their entitlements. This can clearly be seen as an incentive to employees to nominate for redundancy i.e. it was an incentive payment. There has been nothing put to the Commission which would justify those who did not volunteer for redundancy being given this incentive payment. The applicant does not claim that there was any contractual entitlement to the payment. While it might be arguable that the respondent, as a matter of fairness, could

have provided a severance package to all employees who were retrenched, it offered this one as an incentive to volunteers. It was therefore not unfair to not pay it to non-volunteers, particularly when those not volunteering were also offered redeployment and the possibility of casual work with a view to being re-engaged as permanent employees.

Lack of Opportunity to Respond

68 The second issue relates to the employees not having an opportunity to respond to issues which were considered in their assessments prior to the decision being made as to their ranking and ultimately their future employment or, in the case of Ms Shackelford and Ms Walker, the termination of their employment as permanent employees.

69 I conclude that there was an element of unfairness in this matter as identified in *Gilmore and Another v Cecil Bros and Others* (1996) 76 WAIG 4434 at page 4445 (FB) where His Honour, the President said:

> "However, allegations on which it is proposed that a person or persons shall be selected for redundancy, where a decision is to be made by accepting or rejecting a criticism of an employee, should be put to the employee. He/she must be given a chance to answer the criticism whatever be the reference point of criticism (see *Kennefick v Australian Submarine Corporation Pty Ltd* (No. 2) (1996) 65 AIR 336 at 371 – 372 (FCFC) per Ryan Beasley and North JJ)".

70 In this case the employees' performances were assessed, they were not provided with an opportunity to be made aware of the areas of criticism which resulted in particular scores being allocated to them, they were ranked and selections were made. The addition to the process of the opportunity for all employees to answer any criticism would have been necessary to ensure fairness to all, not merely to these two employees. The question is what would the result of that have been? There has been no evidence that had these two employees, Ms Shackelford and Ms Walker, been given the opportunity to answer any criticism, they would have satisfactorily answered that criticism and been given additional points. If they and the rest of the DSOs had been given such an opportunity and it had resulted in Ms Shackelford and Ms Walker being given additional points, it is unlikely that others would not also have been given additional points. However, that is not known. It is not known whether their relative positions in the ranking of employees would have changed. The Commission received no evidence which would demonstrate that the scores allocated to these two employees were too low relative to others.

71 The test is not simply whether Ms Shackelford and Ms Walker would have scored themselves higher. They may have been able to convince the respondent to score them higher, however, their positions in the ranking of employees was the important consideration. The applicant did not identify any other employees whom Ms Shackelford and Ms Walker should have overtaken in the ranking. Therefore, even if some of their scores were too low, or they were incorrectly assessed, it does not automatically follow that they would have remained in employment. In *Newcrest Mining Limited v AWU and Another* (1992) 73 WAIG 20 at 24 (FB) His Honour, the President noted:

> "Part of the equity, good conscience and substantial merits of the case are the interests of other persons who may not have been made redundant,
>
> …
>
> It was implicit in each case that if the employee in question was not to be sacked, then someone else would be. It seems to us that it is not only just and equitable, but patently obvious, that in a situation where there was a necessary reduction in the workforce the person who complains that he/she is selected must demonstrate that some other person should have been selected before him/her."

72 The Industrial Appeal Court, in dealing with the appeal against the decision of the Full Bench in *Newcrest Mining Limited v AWU* (supra) said per Rowland J:

> "Clearly, the Full Bench placed much reliance upon the fact, and it was a fact, that no evidence was led to indicate that there were others who should have been retrenched before any of the three who complained of unfair dismissal. In my view, it cannot be said that, in making that assessment, the Full Bench was wrong. Based on the earlier redundancy cases, and given the strictures contained in s.26(1)(c) of the Act, it would be difficult to envisage circumstances where this would not be an important and relevant, if not dominant consideration in a case of unfair dismissal."
>
> ((1993) 73 WAIG 969 at 973)

73 Accordingly, while there has been unfairness in the process, it has not been demonstrated that any different outcome may have arisen (See *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 (IAC)).

74 It is not my intention to go through each of the issues where the two officers have complained about the scores they were given. That would not resolve the matter unless an assessment was made of each of the issues for these employees and for all other employees as well. Given that the applicant has not identified whom Ms Walker and Ms Shackelford should have replaced in the ranking, and sought a comparison with them, that exercise would be futile.

Ms Walker's Inclusion as a DSO

75 As to Ms Walker's inclusion in the list of employees considered for retrenchment, the applicant says that consideration of retrenchment related only to DSOs, and Ms Walker was not a DSO, but the Quality Co-ordinator and the Transport and Escorts Co-ordinator. Ms Walker says that her position was the Quality Co-ordinator or Manager (transcript page 50).

76 The first of the two notices to all Perth IDC staff of 21 May 2004 (Exhibit A1) refers to the "need to reduce the number of permanent DSO positions".

77 The question is whether Ms Walker was a DSO or something else. The letter of 5 January 2004 sent to Mr Stewart by Petra Muhlfait, which advised him of Ms Walker's role as Co-ordinator in the area of quality assurance (Exhibit A15), formal parts omitted, states:

> "Following your recommendation, please note that Ms Shirley Walker has been selected to perform the Quality Coordinator function at Perth Immigration Detention Centre, starting from the day of opening of this centre.
>
> On the basis of her experience and previous training, Ms Walker is considered to be proficient in the auditing process and will not be required to undergo formally the three supervised audits as outlined in the site Quality Management System Manual. Ms Walker will, however, receive informal supervision and support as appropriate to her quality role.
>
> GSL (Australia) Detention Services is grateful that Ms Walker has agreed to undertake this important role. On a personal note, I look forward to working with her and trust that this opportunity will enrich and reward her and us.
>
> Please ensure that a copy of this letter is placed on Ms Walker's HR File."
>
> (Exhibit A15)

78 The letter refers to the function she was to perform as being "Quality Co-ordinator". Ms Walker referred to a position description for "Quality/Contract Compliance Manager (Site)" (Exhibit A16) which she says was the position she held but she says that it was "part of the administration manager's position really" (transcript page 52). That position of Quality/Contract Compliance Manager (Site) is accountable to a General Manager (Direct) and the National Quality Contract Compliance Manager (Indirect). The document describes the position as being "a centre senior management representative". Yet Ms Walker was not described in the evidence as being part of the senior management of the Perth IDC. Mr Sun described the "senior management team" as the General Manager, the Operations Manager and the Business Manager (transcript page 235). Ms Walker says she was excluded from senior management (transcript page 126).

79 The evidence is that Ms Walker received the rate of pay applicable to a DSO plus 4 hours overtime each week. She received an email from Mike Stewart to herself and others dated 23 December 2003 (Exhibit A17) which said, amongst other things:

> "I am concerned that I have been asking you to do extra tasks and performing at a level above and beyond DSO level and not recognising you for it. Besides which you are working longer hours anyway. I can see that to give you extra time off in lieu of time work is virtually impossible whilst we are establishing our procedures. …"

80 The other officers who received this email appear to be referred to in Mr Stewart's handwriting in the document headed "Perth IDC – Roster and Posting" (Exhibit A18). This document allocated Property Officers/Intelligence to Derrick Spooner, Training Officer to John Miralles, and Transport and Escort Co-ordinator to Shirley Walker. The Training Officer duties included Quality Co-ordinator, however this was moved to the Transport and Escort Co-ordinator roster. The fourth section of the roster was for DSO: M1 – M5 and notes "Their duties will be posted by the daily Detention Operation Co-ordinator in line with current post orders".

81 The names of Derrick Spooner, John Miralles and Shirley Walker are 3 of the 4 people to whom the email (Exhibit A17) of 23 December 2003 was sent, regarding them doing "extra tasks" and "performing at a level above and beyond DSO level and not recognising you for it".

82 On that basis Mr Stewart advised the officers concerned to put down 4 hours overtime for a week or 8 hours over each fortnight on a regular basis. He said that this recognised "the extra responsibility and hard work". He urged them to keep the arrangement confidential and that it was for a trial basis for 3 months after which time there would be a review of the situation.

83 At around the end of the three month period, by 7 April 2004, Ms Walker had agreed to a temporary secondment to Christmas Island as a DSO, and there is no evidence before the Commission of the trial arrangement being formalised.

84 The clear inference to be drawn from Mr Stewart's email is that those officers were DSOs who were performing "extra tasks" and "performing at a level above and beyond DSO level". However, he noted that "this does not make you a DOC" – i.e. it did not make them the next level above a DSO.

85 Ms Walker says that before she went to Christmas Island, Mr Stewart asked her to swap her Escort Coordinator role for the Training Coordinator role, however, this never eventuated because of the secondment and, ultimately, the termination of her employment.

86 Ms Walker went to Christmas Island in April 2004 on a temporary secondment as a DSO. Two days after arriving there, the Operations Manager offered her the position of Duty Coordinator, a DOC position. She also assisted with the quality assurance work there.

87 Ms Walker was on Christmas Island when the letter came through to all staff regarding redundancies. She believed that it did not apply to her although she did not to seek to clarify this with Mr Stewart, her line manager. Rather, she relied on advice from Petra Muhlfait who assured her that she would not be a part of the redundancies because she was not an officer.

88 Taking account of the structure of the Perth IDC, the applicable rate of pay, the extra overtime payment on account of "work above and beyond DSO level" and the documentation, and on the balance of probabilities, I find that Ms Walker held the position of DSO. I find that her role was not the position of Quality/Contract Compliance Manager (Site) set out in the job description to which she referred, but rather that she had additional responsibilities to those of her DSO position. Accordingly, I find that Ms Walker was subject to consideration along with all of the DSOs when redundancies were required for the Perth IDC.

89 As to whether Ms Walker was given proper consideration in the assessment, the applicant says she was judged against criteria which did not reflect her role. It is true that the assessment did not contain criteria specifically identified as relating to quality assurance or transport and escorts. According to Mr Whatcott, the criterion of interaction with detainees and familiarity with them was necessary for the satisfactory performance of the transport and escort co-ordination role. The remainder of the criteria all appear to be generic and not limited to any particular role.

90 It is true too that Petra Muhlfait to whom Ms Walker reported much of her quality assurance work appears not to have been consulted. However, the selection panel included Ms Walker's line manager and a DOC who had worked with her.

91 As to Mr Stewart's involvement in the process which selected Ms Walker for retrenchment, she was entitled to be concerned by his letter of 28 April 2004 (Exhibit A21). Mr Stewart's response to Ms Walker's letter identified a range of areas where he was unhappy with her performance. Those concerns may or may not have been justified. However, I must say that this is one of the most unprofessional communications I have seen from a general manager to a member of staff. It is petulant and contains at least hints of bullying and personal insecurity. It is quite an extraordinary letter. Exhibit R3, similarly, demonstrates a most petulant approach by Mr Stewart. If this is an example of his approach to staff it is unsurprising that the union felt the need to express concern to Mr Miitze about Mr Stewart's participation in the panel.

92 Interestingly, Ms Walker chose not to specifically respond to the letter even though Mr Stewart had invited her to do so by telephoning him. Rather, she says she sent him a fax saying they needed to discuss the issues. Nor did she make any complaint about the letter, according to the evidence. It was not for a further 6 weeks that the panel undertook its deliberations and these were facilitated by Mr Miitze who had assured the union that he was aware of complaints that Mr Stewart victimised staff members. There was no evidence of who those staff members were. I am unable to conclude whether Ms Walker was included or that Mr Stewart's attitude expressed to Ms Walker in his letter of 28 April 2004 was typical of his dealings with staff. Certainly, Mr Lee's evidence suggests a general bullying approach. Mr Miitze also assured the union that he would ensure the neutrality and objectivity of the process. The evidence of Mr Whatcott, which I accept, is that no one dominated the selection panel's deliberations. While there may be a suspicion that Mr Stewart was unfairly ill-disposed towards Ms Walker, there is no evidence that he was any more so than he was towards other employees, or that in the panel's discussions he exercised that ill disposition against Ms Walker disproportionately.

93 It needs to be borne in mind that in these assessments, a group of 5 people, only one of whom has given evidence, assessed Ms Walker and came up with an agreed rating. It must also be taken into account that hers was one of approximately 39

assessments. There is no evidence before me that any capacity to challenge or respond to these assessments would have changed Ms Walker's place in the rankings.

Ms Shackelford's "Outspokenness" in the JCC

94 Ms Shackelford says that in the feedback session, Mr Stewart said she was opinionated, inflexible and not a team player. In respect of her involvement on the JCC, Mr Stewart referred to her comment that she would not undertake excursions. Yet, Mr Stewart asked her to remain on the JCC because of her good input.

95 It is worthy of note that Mr Whatcott gave evidence that escorts were part of everyday life – part of the job. Mr Collins originally said that excursions were recruitment criteria for the DSO position and then changed his mind.

96 Mr Stewart's comments to Ms Shackelford as part of the feedback he gave to her does not indicate that it was her role on the JCC which counted against her. On the contrary, according to her evidence, Mr Stewart welcomed her participation. What he appears to have objected to, according to her evidence, was her manner in expressing her opinion about normal duties and whether she would perform them. That was more a reflection on her attitude and whether she was flexible and a "team player" than that she was discriminated against due to her participation on the JCC. If by saying that she would not undertake certain regular duties Ms Shackelford was being inflexible and not a team player, then it was appropriate to reflect that in her assessment.

97 Involvement in a JCC is a responsibility not to be taken lightly. It requires negotiation skills, discretion and a willingness to co-operate in problem solving. An employee who participates constructively is a valuable asset to his or her employer and an equally valuable representative of fellow employees. A dogmatic and insensitive or inflexible approach is unhelpful.

98 I do not find that Mr Stewart's feedback reflected unfair discrimination on the basis of Ms Shackelford's involvement on the JCC. Rather, it correctly related to her approach to team work and her general attitude, matters appropriate for assessment by the panel.

Other Matters

99 There were a series of allegations made by Ms Walker, Ms Shackelford and Mr Collins about matters of hearsay, such as that Mr Gomez had said to Ms Walker that the process was designed to get rid of troublemakers. There is no evidence to support these allegations beyond hearsay or reported rumour. It is not my intention to address them.

100 It was suggested that Mr Whatcott had reportedly commented to others about who was safe from retrenchment and who was not. Mr Whatcott was asked in examination-in-chief if he had discussed the outcomes of the assessment process with anyone prior to their formal announcement, and he said "No" (transcript page 198). He was not cross-examined on this issue. His denial must stand.

The Exclusion of the Union from the Process

101 According to Mr Lee's evidence, the applicant did not want a merit selection process, it wanted the sole criterion to be length of service. Accordingly, it rejected the AIRC's recommendation. Further, it declined to be involved in the compilation of the assessment criteria or the selection panel. It declined to participate in conciliation proceedings suggested by Lacy SDP which could have provided some review very soon after the selections.

102 Having chosen not to participate in that process, the applicant cannot reasonably be heard to complain that it was excluded. Nor can it reasonably complain when assessment criteria and a selection panel are not established according to its preferences.

103 It is the role of this Commission to deal with claims of unfair dismissal when they are brought. However, the applicant cannot justifiably, in effect, opt out, and then complain of its exclusion.

104 In any event, except for the issue of the employees not having an opportunity to respond to any issues considered in their assessments, there has been no demonstration of unfairness in the process applied by the respondent. As noted earlier, though, the actual consequences of the unfairness in that regard are not knowable without an evaluation of all of the employees based on a capacity for them all to have input. In other words, it is not known whether Ms Walker and Ms Shackelford would have been moved up the list by an opportunity for all employees to respond to their assessments, and further, they do not suggest any other employees who should have been retrenched in their places.

105 If I am wrong, and there was unfairness in the selection of Ms Shackelford, reinstatement as a remedy would result in her being paid for the net loss of wages she suffered by being casual for the period up to her reinstatement as a permanent DSO.

106 In Ms Walker's case, she did not mitigate her loss to the extent possible. I do not accept her evidence as to her reasons for declining redeployment as being related to her partner's possible country posting and promotion. Rather, it was because the Christmas Island redeployment she initially agreed to was at the substantive position of a DSO, not of a DOC. While Ms Walker made some efforts at mitigating her loss, she did so in a different location, in Albany, and in the field of quality assurance, not in the general field from which she had come. Further, she could have remained with the respondent as a casual officer, as did Ms Shackelford, with the real prospect of becoming permanent again, as did Ms Shackelford.

107 The matter will be dismissed.

2005 WAIRC 01411

TERMINATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	GSL (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 4 MAY 2005
FILE NO	CR 150 OF 2004
CITATION NO.	2005 WAIRC 01411

Result Matter dismissed

Order

HAVING heard Mr M Swinbourn on behalf of the applicant and Mr M Stewart and with him Mr R Holding and later Mr A Smith on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this matter be, and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Workers' Union, West Australian Branch, Industrial Union of Worker, The	Boodarie Iron Division BHP Billiton	Wood C C 37/2005	15/03/05	Dispute regarding Severance Payments	Concluded
Civil Service Association of Western Australia Incorporated, The	Director General, Department for Community Development	Scott C PSAC 9/2004	6/10/04	Employment conditions of union member	Concluded
ColourPress Pty Ltd	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Work	Wood C C 60/2004	19/3/04, 14/04/04, 2/6/04, 19/1/05, 12/4/05	Introduction of a new roster	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	West Australian Newspapers Ltd	Wood C C 52/2005	13/04/05	Dispute regarding voluntary redundancy	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	BHP Billiton Iron Ore	Wood C C 6/2004	N/A	Termination of Mr P Griffith	Discontinued
Construction, Forestry, Mining and Energy Union of Workers, The	Civmec Construction & Engineering Pty Ltd and Hamersley Iron Pty Ltd	Kenner C CR 175/2004	N/A	Dismissal Of A Union Member	Discontinued by leave
Hospital Salaried Officers Association of Western Australia (Union of Workers)	Director General of Health as Delegate of the Minister for Health in His Capacity as the WA Country Health Service, Kimberley Health Region	Scott C PSACR 2/2004	11/04/05	Dispute re: Classification level	Dismissed
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Department of Culture and the Arts	Scott C C 205/2004	10/12/04	Dispute regarding employment classification for union members	Concluded

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Hall and Prior	Scott C C 31/2005	N/A	Dispute regarding termination of employment of union member	Concluded
WA Police Union of Workers	Commissioner of Police	Scott C PSAC 13/2005	11/03/05	Dispute regarding a stand down order to a union member	Concluded
WA Police Union of Workers	Commissioner of Police	Scott C PSAC 45/2002	1/11/02, 18/11/02, 11/12/02, 18/12/02, 12/02/03, 3/09/03	Police staffing levels and deployment	Concluded
Western Australian Prison Officers' Union of Workers	The Hon. Attorney General C/- Department of Justice	Beech CC CR 58/2004	6/07/04 8/07/04	Classification of the Position of Canine Handler	Discontinued

CORRECTIONS—

2005 WAIRC 01150

BUILDING TRADES (CONSTRUCTION) AWARD 1987, NO. R 14 OF1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
APPLICANT

-v-

ADSIGNS PTY LTD, APOLLO CONSTRUCTION, ALL READY SURFACING CO PTY LTD
RESPONDENT

CORAM SENIOR COMMISSIONER J F GREGOR
DATE MONDAY, 11 APRIL 2005
FILE NO/S APPL 1550 OF 2004
CITATION NO. 2005 WAIRC 01150

Result Correcting Order

Correcting Order

WHEREAS on 14th March 2005 an order in this matter was deposited in the Office of the Registrar; and

WHEREAS the said order had an error in Clause 21 – Living Away from Home – Distant Work subclauses (3)(b), (4)(a)(iii), (7)(b); Clause 32 – Special Tools and Protective Clothing subclause (5)(b) and Clause 33 – Compensation for Clothes and Tools subclause (2)(a)

WHEREAS the order should have read:

5. Clause 21 – Living Away from Home – Distant Work

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

(3)(b) Pay an allowance of $348.10 per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or ending of employment on a distant job the allowance shall be $49.80 per day.

Provided that the foregoing allowances shall be increased if the employee satisfies the employer that he/she reasonably incurred a greater outlay than that prescribed. In the event of disagreement the matter may be referred to a Board of Reference for determination; or

B. Delete subclause (4) (a) (iii) of this clause and insert in lieu the following:

(4) (a) (iii) For any meals incurred while travelling at $10.20 per meal.

Provided that the employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues his/her employment within two weeks of commencing on the job and who does not forthwith return to his/her place of engagement.

C. Delete subclause (7) (b) of this clause and insert in lieu the following:

(7) (b) Camping Allowance: An employee living in a construction camp where free messing is not provided shall receive a camping allowance of $139.90 for every complete week he/she is available for work. If required to be in camp for less than a complete week he/she shall be paid $20.10 per day including any Saturday or Sunday if he/she is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday or Sunday.

6. Clause 32 – Special Tools and Protective Clothing

Delete subclause (5) (b) of this clause and insert in lieu the following:

(5) (b) The employer shall make available, during working hours, a suitable grindstone or wheel together with power (hand or mechanically driven) for turning it. If a grindstone or wheel is not made available the employer shall pay to each carpenter or joiner $4.99 per week in lieu of same.

7. Clause 33 – Compensation for Clothes and Tools

Delete subclause (2) (a) of this clause and insert in lieu the following:

(2) (a) An employee shall be reimbursed by his/her employer to a maximum of $1315.00 for loss of tools or clothes by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop or in a lock-up as provided in this award or if the tools are lost or stolen whilst being transported by the employee at the employer's direction, or if the tools are accidentally lost over water or if tools are lost or stolen during an employee's absence after leaving the job because of injury or illness.

Provided that an employee transporting his/her own tools shall take all reasonable care to protect those tools and prevent theft or loss.

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

THAT the order should be corrected to read:

5. Clause 21 – Living Away from Home – Distant Work

D. Delete subclause (3) (b) of this clause and insert in lieu the following:

(3)(b) Pay an allowance of $348.10 per week of seven days but such allowance shall not be wages.

In the case of broken parts of the week occurring at the beginning or ending of employment on a distant job the allowance shall be $49.80 per day.

Provided that the foregoing allowances shall be increased if the employee satisfies the employer that he/she reasonably incurred a greater outlay than that prescribed. In the event of disagreement the matter may be referred to a Board of Reference for determination; or

E. Delete subclause (4) (a) (iii) of this clause and insert in lieu the following:

(4) (a) (iii) For any meals incurred while travelling at $10.20 per meal.

Provided that the employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues his/her employment within two weeks of commencing on the job and who does not forthwith return to his/her place of engagement.

F. Delete subclause (7) (b) of this clause and insert in lieu the following:

(7) (b) Camping Allowance: An employee living in a construction camp where free messing is not provided shall receive a camping allowance of $139.90 for every complete week he/she is available for work. If required to be in camp for less than a complete week he/she shall be paid $20.10 per day including any Saturday or Sunday if he/she is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday or Sunday.

8. Clause 32 – Special Tools and Protective Clothing

a. Delete subclause (5) (b) of this clause and insert in lieu the following:

(5) (b) The employer shall make available, during working hours, a suitable grindstone or wheel together with power (hand or mechanically driven) for turning it. If a grindstone or wheel is not made available the employer shall pay to each carpenter or joiner $4.99 per week in lieu of same.

9. Clause 33 – Compensation for Clothes and Tools

a. Delete subclause (2) (a) of this clause and insert in lieu the following:

(2) (a) An employee shall be reimbursed by his/her employer to a maximum of $1315.00 for loss of tools or clothes by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop or in a lock-up as provided in this award or if the tools are lost or stolen whilst being transported by the employee at the employer's direction, or if the tools are accidentally lost over water or if tools are lost or stolen during an employee's absence after leaving the job because of injury or illness.

Provided that an employee transporting his/her own tools shall take all reasonable care to protect those tools and prevent theft or loss.

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

2005 WAIRC 01139

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY JOHN COCI
	APPLICANT
	-v-
	CH INVESTMENTS WA PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 APRIL 2005
FILE NO/S	APPL 1404 OF 2004
CITATION NO.	2005 WAIRC 01139

Result Correction Order

Correcting Order

WHEREAS on 11th March 2005 an order in this matter was deposited in the Office of the Registrar; and

WHEREAS the said order had an error naming the Respondent as Craig Hanrahan; and

WHEREAS for the reasons contained in the transcript of proceedings dated 8th March 2004 page 4 the Commission amended the name of the Respondent to CH Investments WA Pty Ltd; and

WHEREAS the order should have read CH Investments WA Pty Ltd;

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

THAT the name Craig Hanrahan be corrected to read CH Investments WA Pty Ltd as Respondent.

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

2005 WAIRC 01427

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICKI ANN HOARE
	APPLICANT
	-v-
	ALBANY TOURIST BUREAU AND ALBANY TRAVEL CENTRE T/A ALBANY VISITOR CENTRE AND TRAVEL CENTRE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 5 MAY 2005
FILE NO.	APPL 170 OF 2005
CITATION NO.	2005 WAIRC 01427

Result Correction Order Issued

Correction Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on the 2nd day of May 2005, an Order in this application was deposited in the office of the Registrar; and

WHEREAS on the 4th day of May 2005, the applicant advised the Commission that paragraph 3 of the memorandum attached to the Order contained an error and requested that the Commission issue an order to correct that error; and

WHEREAS on the 5th day of May 2005, the respondent did not object to such an order issuing;

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

THAT the Memorandum attached to the said Order be corrected in paragraph 3 by substituting 21 December 2004 with 20 December 2004.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2005 WAIRC 01495

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PHILIP ROSS COUPER

APPLICANT

-v-

BDO CHARTERED ACCOUNTANTS & ADVISERS

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 11 MAY 2005
FILE NO APPL 125 OF 2004
CITATION NO. 2005 WAIRC 01495

Result Direction issued
Representation
Applicant Ms P Giles of Counsel and with her Ms J Stevens of Counsel
Respondent Ms F Stanton of Counsel

Order

HAVING heard Ms P Giles of Counsel and with her Ms J Stevens of Counsel on behalf of the applicant and Ms F Stanton 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, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs:

(1) THAT the applicant is to file and serve on the respondent further particulars of the contractual benefits and compensation for unfair dismissal claims by 4:00 pm Wednesday, 11 May 2005;

(2) THAT the applicant file and serve a revised list of documents in their possession, custody and control which are relevant to the proceedings and an affidavit verifying the completeness of the list by 4:00 pm Thursday, 12 May 2005;

(3) THAT the applicant include as part of the documents to be relied upon any documents which relate to the applicant's endeavours to mitigate his loss and income earned since the time of dismissal;

(4) THAT the respondent file and serve a revised list of documents in their possession, custody and control which are relevant to the proceedings, and an affidavit verifying the completeness of the list by 4:00 pm Friday, 13 May 2005;

(5) THAT documents that are privileged are to be excluded from discovery;

(6) THAT the applicant is to file and serve written, dated and signed witness statements by 4:00 pm Monday, 16 May 2005;

(7) THAT the respondent is to file and serve written, dated and signed witness statements by 4:00 pm Thursday, 26 May 2005;

(8) THAT the parties are to provide to each other a list of documents that they seek to tender or rely on by 12:00 noon Friday, 27 May 2005.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2005 WAIRC 01305

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN RED CROSS BLOOD SERVICE, WESTERN AUSTRALIA

APPLICANT

-v-

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

RESPONDENT

CORAM COMMISSIONER P E SCOTT
DATE FRIDAY, 22 APRIL 2005
FILE NO APPL 972 OF 2004
CITATION NO. 2005 WAIRC 01305

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 42E of the Industrial Relations Act 1979; and

WHEREAS on the 6th, 12th, 16th, 19th, 20th and 27th days of August 2004 and the 23rd day of March 2005, the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS on the 20th day of April 2005, the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, 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.

2005 WAIRC 01308

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ANTHONY BUKTENICA; JOHN FRANCIS FOLEY
	APPLICANT
	-v-
	SEALANES (1985) PTY LTD; SEALANES (1985) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 APRIL 2005
FILE NO/S	APPL 1537 OF 2004, APPL 1538 OF 2004
CITATION NO.	2005 WAIRC 01308

Result Order issued

Order

WHEREAS these are applications pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"); and

WHEREAS on 20 April 2005 the Commission convened a conference for the purpose of dealing with programming issues and to consider the applicant's request that both applications should be listed for hearing at the same time; and

WHEREAS at the conference the applicant argued that applications 1537 of 2004 and 1538 of 2004 should be heard together as the respondent's Notices of Answer and Counter Proposals were identical for both applications, the respondent used the same processes and procedures to terminate both applicants, the applicants' witnesses will be the same in both matters and it would be expedient and less costly to have these applications heard at the same time; and

WHEREAS the respondent argued that the matters should not be heard at the same time as the applicants cited different issues as to why their terminations were unfair and the respondent would be disadvantaged if it had to meet what it understood were different claims during a single hearing and both applicants had different managers who were involved in their terminations as the applicants worked in different sections; and

WHEREAS after hearing from the parties and in deciding whether the Commission should exercise its discretion to grant the application to hear both matters at the same time, the Commission is of the view that it is appropriate in the circumstances that the matters to be heard at the same time for the following reasons:

(a) both applicants were terminated on the same date after the respondent applied the same redundancy policy to both employees;

(b) the decision to effect the applicants' terminations arose from a single decision of the respondent's senior management;

(c) there are a number of witnesses in common to both applications; and

(d) it is in the public interest that both matters are listed together as it will be less costly for all parties and the Commission and it will assist in meeting the requirement on the Commission to deal with applications expeditiously;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and in particular s27(1)(s), hereby orders:

THAT the application for applications 1537 of 2004 and 1538 of 2004 to be heard at the same time is hereby granted.

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

2005 WAIRC 01149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR TIM LAVENDER
	APPLICANT
	-v-
	KANOWNA BELLE GOLD MINES LTD T/AS PLACER DOME ASIA PACIFIC
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	MONDAY 11TH APRIL 2005
FILE NO/S	APPL 1616 OF 2004
CITATION NO.	2005 WAIRC 01149

Result Discovery & Directions Order

Order

WHEREAS on 1st April 2005 counsel for the Applicant applied to the Commission for discovery of documents and directions relating to the claim lodged by Mr Tim Lavender, the Applicant; and

WHEREAS a conference was convened between the parties on 6th April 2005 and later the parties advised the Commission that by consent they agreed to discovery of documents and directions.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission, by consent, hereby orders:

1. THAT within 14 days so the date of this order, the Applicant provide to the Respondent:
   - 1.1. All letters of offers of employment received by Mr. Lavender subsequently to the cessation of his employment with Placer Dome Kalgoorlie Ltd.
   - 1.2 All contracts of employment entered into by Mr. Lavender subsequently to the cessation of his employment with Placer Dome Kalgoorlie Limited.
   - 1.3 All documents associated with the contracts referred to in the foregoing paragraph.
   - 1.4 All pay slips or forms of pay advice howsoever described received by Mr. Lavender subsequent to the cessation of his employment with Placer dome Kalgoorlie Limited.
2. THAT within 14 days of the date of this order, the Respondent provide to the Applicant:
   - 2.1 A copy of the Applicant's personal file.
   - 2.2 A copy of the Applicant's contract of employment
   - 2.3 A copy of the policy and procedures of the Respondent applying to its staff and employees including safety policies.
   - 2.4 A copy of Tamara Frewen's complaint made against the Applicant.
   - 2.5 A copy of all investigative reports conducted by the Respondent into the sexual harassment alleged by Tamara Frewen.
   - 2.6 A copy of the investigative report conducted by Lucinda Lock for the Respondent.
3. THAT by way of directions as to the conduct of this matter:
   - 3.1 Within 28 days of the date of the hearing the Applicant and Respondent provide to each other a list of witnesses to be called, identifying the name of the witness and their title.
   - 3.2 The parties provide to each other a copy of all documents upon which they seek to rely at the hearing.

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

2005 WAIRC 01270

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GONZALO PORTILLA
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 20 APRIL 2005
FILE NO/S	APPL 1656 OF 2004
CITATION NO.	2005 WAIRC 01270

Result	Direction issued
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Mr R Kelly of Counsel

Order

HAVING heard Mr D Schapper of Counsel on behalf of the applicant and Mr R Kelly of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs:

(1) THAT the application will be listed for hearing in the South Hedland Court on 18, 19 and 20 May 2005.

(2) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the matter. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(3) THAT the applicant is to file and serve any signed witness statements upon which it intends to rely no later than Friday, 29 April 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.

(4) THAT the applicant include as part of the documents to be relied upon any documents which relate to the applicant's endeavours to mitigate his loss and income earned since the time of dismissal.

(5) THAT the respondent is to file and serve any signed witness statements upon which it intends to rely no later than Friday, 13 May 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.

(6) THAT the respondent provide to the applicant within 3 days of this order the information sought by the applicant in Mr Schapper's email of 29 March 2005 which relates to Mr Chomkhamsing.

(7) THAT the parties have liberty to apply at short notice.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2005 WAIRC 01285

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL HARRISON GALLOWAY
	APPLICANT
	-v-
	MARGARET RIVER GLASS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 20 APRIL 2005
FILE NO/S	APPL 1697 OF 2004
CITATION NO.	2005 WAIRC 01285

Result Application to adjourn hearing dismissed.

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act"); and

WHEREAS the application is set down for hearing and determination on 5 May 2005; and

WHEREAS by letter received in the Commission on 15 April 2005 the respondent requested a 30 day deferral of the hearing as the respondent stated it was unable to be present at the hearing; and

WHEREAS on 15 April 2005 the Commission wrote to the respondent's representative by way of facsimile and requested advice as to whether the respondent's request was a formal request to adjourn the hearing; and

WHEREAS on 19 April 2005 the respondent's representative advised the Commission that he no longer represented the respondent in this matter; and

WHEREAS on 19 April 2005 the Commission contacted the respondent by way of facsimile and requested that further details be provided to the Commission by no later than 4.00pm 20 April 2005 as to why it says the hearing scheduled for 5 May 2005 should be deferred to a later date; and

WHEREAS on 19 April 2005 the Commission contacted the application by telephone and advised him of the respondent's request to adjourn the hearing and requested he provide in writing his response to the request; and

WHEREAS by facsimile received on 19 April 2005 the respondent stated that the request to adjourn the hearing was on the basis that it was no longer represented and required time to seek further legal advice; and

WHEREAS by facsimile received on 20 April 2005 the applicant advised the Commission that he did not agree to the hearing being adjourned as this application had been ongoing for four months, he was financially and emotionally stressed and he wished the matter to be resolved as soon as possible; and

WHEREAS after hearing from the parties and in deciding whether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19), the Commission is of the view that an adjournment should not be granted on the following basis:

(a) as the parties were given notice on 12 April 2005 that the hearing date would be 5 May 2005 it is therefore the Commission's view that the respondent has had enough time to seek legal advice in order to deal with this application notwithstanding the relationship between the respondent and its previous representative ceasing on or about 19 April 2005;

(b) apart from the necessity to seek legal advice the respondent has not indicated to the Commission that it would suffer any disadvantage if the application to adjourn was refused;

(c) the applicant is entitled to and should have his application dealt with in a timely manner; and

(d) under the Act the Commission is required to deal with applications of this nature expeditiously;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s27(1), hereby orders:

THAT the application to adjourn the hearing scheduled for 5 May 2005 be and is hereby dismissed.

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

2005 WAIRC 01398

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICKI ANN HOARE
	APPLICANT
	-v-
	ALBANY TOURIST BUREAU AND ALBANY TRAVEL CENTRE T/A ALBANY VISITOR CENTRE AND TRAVEL CENTRE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 2 MAY 2005
FILE NO	APPL 170 OF 2005
CITATION NO.	2005 WAIRC 01398

Result Memorandum of Understanding issued

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on the 29th day of April 2005, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties reached agreement in respect of the application; and

WHEREAS the parties requested that the Commission issue a Memorandum setting out the terms of the agreement;

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

THAT the terms of the agreement between the parties set out in the attached memorandum reflect the final resolution of the matter in dispute between the parties.

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

MEMORANDUM OF UNDERSTANDING

1. The respondent shall provide the applicant with a reference. A draft reference shall be provided to the applicant by Ms Judy Little by 6 May 2005.
2. The applicant shall contact Ms Little to discuss any issues arising from the draft reference.
3. The respondent shall withdraw its Notice of Answer and Counter Proposal, including the letter dated 21 December 2004 and destroy all copies.
4. The respondent shall offer to the applicant at least 1 hour paid work per week commencing in the week commencing 2 May 2005 until 30 June 2005.
5. These matters resolve the applicant's claim.
6. The applicant shall file a Notice of Discontinuance upon the satisfactory resolution of the reference.

2005 WAIRC 01406

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATASHA BREE DUNCAN
	APPLICANT
	-v-
	DAVID GADGEIRO, CINDY O'CONNER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 3 MAY 2005
FILE NO	APPL 238 OF 2005
CITATION NO.	2005 WAIRC 01406

Result Order issued changing name of the Respondent
Representation
Applicant Ms N Duncan
Respondent Mr D Gadgeiro

Order

WHEREAS at a conference the held on 3 May 2005 it became clear that the respondent had been incorrectly named;

AND WHEREAS the parties agreed to amend the respondent's name;

AND WHEREAS the Commission has formed the view that it was appropriate to make the amendment;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the name David Gadgeiro and Others be deleted and replaced by Wood Dog Investments Pty Ltd

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2005 WAIRC 01257

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEREDITH HUGHES
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF HEALTH AND THE MINISTER FOR HEALTH, NORTH METROPOLITAN HEALTH SERVICES
	RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 19 APRIL 2005
FILE NO	APPL 391 OF 2005
CITATION NO.	2005 WAIRC 01257

Result Application for shortened time for answers granted

Order

WHEREAS this is an application made pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979 on the 13th day of April 2005; and

WHEREAS the applicant also seeks that the respondent file and serve its Notice of Answer and Counter Proposal within 7 days of the date service, in accordance with Regulation 78 of the Industrial Relations (General) Regulations 1997; and

WHEREAS the respondent has agreed to file the Notice of Answer and Counter Proposal within 7 days of the Notice of Application being served; and

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

THAT the respondent shall file with the Commission and serve upon the applicant its Notice of Answer and Counter Proposal within 7 days of the date of service.

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

2004 WAIRC 1089

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	CIVMEC CONSTRUCTION & ENGINEERING PTY LTD & OTHER
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 19 OCTOBER 2004
FILE NO.	CR 175 OF 2004
CITATION NO.	2004 WAIRC 13089

Result	Direction issued
Representation	
Applicant	Mr T Kucera of counsel
Respondents	Mr D Jones as agent on behalf of the first respondent and Mr S Harben of counsel on behalf of the second respondent

Direction

HAVING heard Mr T Kucera of counsel on behalf of the applicant, Mr D Jones as agent on behalf of the first respondent and Mr S Harben of counsel on behalf of the second 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 2 November 2004.
2. THAT inspection of documents shall be completed by 16 November 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 parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.
5. 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.
6. THAT the matter be listed for hearing for two days.
7. THAT the parties have liberty to apply on short notice.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Abenra Constructions / CFMEUW Industrial Agreement 2002-2005 AG 260/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Simtec Family Trust t/a Abenra Constructions	Coleman CC	Agreement Registered
Absolute Stone / CFMEUW Industrial Agreement 2002-2005 AG 46/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for the MKS Family Trust & The Trustee for the Carter Family Trust & The Trustee for the Blakeney Family Trust t/a Absolute Stone	Coleman CC	Agreement Registered
AGP Door Systems / CFMEUW Industrial Agreement 2002-2005 AG 170/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	AGP Door Systems Pty Ltd	Coleman CC	Agreement Registered
Allwest Ceilings Commercial Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 4/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Allwest Ceilings Commercial Pty Ltd	Coleman CC	Agreement Registered
Alpo Clad Australia / CFMEUW Industrial Agreement 2002-2005 AG 155/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Ceiling Systems & Partitions (2000) Pty Ltd t/a Alpo Clad Australia	Coleman CC	Agreement Registered
Aurora Marble & Granite / CFMEUW Industrial Agreement 2002-2005 AG 5/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Oral See Pty Ltd t/a Aurora Marble & Granite	Coleman CC	Agreement Registered
Australian Fire Door Company / CFMEUW Industrial Agreement 2002-2005 AG 171/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Australian Fire Door Company Pty Ltd	Coleman CC	Agreement Registered
Australian Red Cross Blood Service - Western Australia (ARCBS-WA) , Health Services Union, Western Australia (HSU-WA) Enterprise Agreement 2004 AG 70/2005	6/05/2005	Health Services Union of Western Australia (Union of Workers)	Australian Red Cross Blood Service - Western Australia	Scott C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Workers Union (Western Australian Public Sector) Waters and Rivers Commission Industrial Agreement 2004 AG 2/2005	22/04/2005	Chief Executive Officer of the Waters and Rivers Commission	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Smith C	Agreement Registered
Australian Workers Union (Western Australian Public Sector)Forest Products Commission Industrial Agreement 2004 AG 48/2005	4/05/2005	Forest Products Commission	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Gregor SC	Agreement Registered
Bluesteel Fire & Security Pty Ltd / CFMEUW Industrial Agreement2002-2005 AG 191/2003	27/04/2005	The Construction, Forestry, Mining and Energy Union of Workers	Bluesteel Fire & Security Pty Ltd	Gregor SC	Agreement Registered
Building Security Management Services Enterprise Bargain Agreement 2005 AG 67/2005	5/05/2005	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Building Security & Management Services	Gregor SC	Agreement Registered
Camotech / CFMEUW Industrial Agreement 2002-2005 AG 256/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Camotech Pty Ltd	Coleman CC	Agreement Registered
Caterlink / CFMEUW Industrial Agreement 2002-2005 AG 154/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Chrystal & Co Pty Ltd t/a Caterlink	Coleman CC	Agreement Registered
CBH Coatings / CFMEUW Industrial Agreement 2002-2005 AG 274/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Dunkeld Corporation Pty Ltd t/a CBH Coatings	Coleman CC	Agreement Registered
CDJ Carpentry and Ceiling Contractors / CFMEUW Industrial Agreement 2002-2005 AG 168/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Craig & Donna Allan t/a CDJ Carpentry & Ceiling Contractors	Coleman CC	Agreement Registered
CDR Contracting Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 255/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	CDR Contracting Pty Ltd	Coleman CC	Agreement Registered
Cochrane's Contracting Services Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 129/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Cochrane's Contracting Services Pty Ltd	Coleman CC	Agreement Registered
Compile Australia / CFMEUW Industrial Agreement 2002-2005 AG 151/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Compile (Australia) Pty Ltd	Coleman CC	Agreement Registered
Conspect Construction / CFMEUW Industrial Agreement 2002-2005 AG 166/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Conspect Construction Pty Ltd	Coleman CC	Agreement Registered
Construction Sales & Hire Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 249/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Construction Sales & Hire Pty Ltd	Coleman CC	Agreement Registered
Coolroom Building Systems / CFMEUW Industrial Agreement 2002-2005 AG 165/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Coolroom Building Systems Pty Ltd	Coleman CC	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Cornerstone Cartage Pty Ltd and Transport Workers Union Enterprise Agreement 2004 AG 280/2004	28/04/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Cornerstone Cartage Contractors	Smith C	Agreement Registered
Cottage Carpentry / CFMEUW Industrial Agreement 2002-2005 AG 6/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Duncan McCallum & Iolanda Doyle t/a Cottage Carpentry	Coleman CC	Agreement Registered
CUB North Fremantle Agreement 2004 AG 47/2005	27/04/2005	Matilda Bay Brewing Co Ltd	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, The Breweries and Bottleyards Employees' Industrial Union of Workers of Western	Kenner C	Agreement Registered
CUB North Fremantle Agreement 2004 AG 47/2005	10/05/2005	Matilda Bay Brewing Co Ltd	The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia & Others	Kenner C	Correction Order Issued
De Francesch Builders / CFMEUW Industrial Agreement 2002-2005 AG 250/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	De Francesch Builders Pty Ltd	Coleman CC	Agreement Registered
Delkey Holdings Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 204/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Delkey Holdings Pty Ltd	Coleman CC	Agreement Registered
Diamond Cut Concrete Sawing / CFMEUW Industrial Agreement 2002-2005 AG 140/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Hart Nominees (WA) Pty Ltd atf The Hart Family Trust t/a Diamond Cut Concrete Sawing	Coleman CC	Agreement Registered
Djooraminda Cottage Carers' Industrial Agreement 2004 AG 53/2005	15/04/2005	Centrecare Incorporated	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Scott C	Agreement Registered
Doina Engineering & Construction Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 200/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Doina Engineering & Construction Pty Ltd	Coleman CC	Agreement Registered
Dunmar Airconditioning & Sheetmetal / CFMEUW Industrial Agreement 2002-2005 AG 220/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Keith Martyka, Christopher Martyka & Heather Martyka t/a Dunmar Airconditioning & Sheetmetal	Coleman CC	Agreement Registered
Earthcare (Australia) Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 205/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Earthcare (Australia) Pty Ltd	Coleman CC	Agreement Registered
Edge Systems (WA) Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 190/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Edge Systems (WA) Pty Ltd	Beech CC	Agreement Registered
Elevatech / CFMEUW Industrial Agreement 2002-2005 AG 189/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Dwight Caspersz t/a Elevatech	Coleman CC	Agreement Registered
Ensign Customer Service Representative Enterprise Agreement2004-2006 AG 276/2004	22/04/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Ensign Services (Aust) Pty Ltd, The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Smith C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Entact Clough / CFMEUW Industrial Agreement 2002-2005 AG 177/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Entact Clough	Coleman CC	Agreement Registered
Evans Enterprises / CFMEUW Industrial Agreement 2002-2005 AG 183/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	The MKC Trust t/as George Evans Enterprises	Coleman CC	Agreement Registered
Fill-Crete WA / CFMEUW Industrial Agreement 2002-2005 AG 234/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Holtmeulen Pty Ltd t/a Fill-Crete WA	Coleman CC	Agreement Registered
Fire Systems WA Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 199/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Fire Systems (WA) Pty Ltd	Coleman CC	Agreement Registered
Fluffs Concreting / CFMEUW Industrial Agreement 2002-2005 AG 221/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Graeme Galloway & Noeline Galloway t/a Fluffs Concreting	Coleman CC	Agreement Registered
Fremantle Steel Fabrication / CFMEUW Industrial Agreement 2002-2005 AG 275/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Fremantle Steel Fabrication Co (WA) Pty Ltd	Coleman CC	Agreement Registered
Gemstate Scaffolding / CFMEUW Industrial Agreement 2002-2005 AG 178/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Gemstate Pty Ltd	Coleman CC	Agreement Registered
GFWA Contracting Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 157/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	GFWA Contracting Pty Ltd	Coleman CC	Agreement Registered
Glass Works (WA) Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 276/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Glass Works (WA) Pty Ltd	Coleman CC	Agreement Registered
GMF Contractors Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 164/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	GMF Contractors Pty Ltd	Coleman CC	Agreement Registered
Goldfields/Esperance Development Commission Agency Specific Agreement 2005 PSAAG 8/2005	19/04/2005	A/Chief Executive Officer, Goldfields Esperance Development Commission, The Civil Service Association of Western Australia Incorporated		Scott C	Agreement Registered
High Rise Painting Contractors / CFMEUW Industrial Agreement 2002-2005 AG 52/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	High Rise Painting Contractors Pty Ltd	Coleman CC	Agreement Registered
Hoist Hire Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 161/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Hoist Hire Pty Ltd	Coleman CC	Agreement Registered
Innaloo Plasterers / CFMEUW Industrial Agreement 2002-2005 AG 259/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Reparto Holdings Pty Ltd t/a Innaloo Plasterers	Coleman CC	Agreement Registered
Interstate Crane and Transport Hire / CFMEUW Industrial Agreement 2002 - 2005 AG 277/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Interstate Crane & Transport Hire Pty Ltd	Coleman CC	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
J & L Blakeney / CFMEUW Industrial Agreement 2002-2005 AG 47/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	JM Blakeney & LR Blakeney t/as J&L Blakeney	Coleman CC	Agreement Registered
Jako Industries Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 163/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Jako Industries Pty Ltd	Coleman CC	Agreement Registered
John Jeffries / CFMEUW Industrial Agreement 2002-2005 AG 16/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	John Jeffries	Coleman CC	Agreement Registered
Justzo Enterprises / CFMEUW Industrial Agreement 2002-2005 AG 253/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Justzo Enterprises Pty Ltd	Coleman CC	Agreement Registered
Ken Sparks Carpets / CFMEUW Industrial Agreement 2002-2005 AG 261/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Ken Sparks Pty Ltd	Coleman CC	Agreement Registered
Les Wainwright and Transport Workers Union Enterprise Agreement 2004 AG 192/2004	22/04/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Les Wainwright	Smith C	Agreement Registered
LG International Security Services Enterprise Bargain Agreement 2005 AG 56/2005	21/04/2005	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	LG International Security Services	Gregor SC	Agreement Registered
Linear Ceilings / CFMEUW Industrial Agreement 2002-2005 AG 130/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Linear Ceilings Pty Ltd	Coleman CC	Agreement Registered
Lotus Installations (WA) Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 150/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Lotus Installations (WA) Pty Ltd	Coleman CC	Agreement Registered
M & W Installations /CFMEUW Industrial Agreement 2002-2005 AG 212/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Carol Ward & Ronald Ward t/a M&W Installations	Coleman CC	Agreement Registered
M&G Crane Hire / CFMEUW Industrial Agreement 2002-2005 AG 142/2004	15/04/2005	The Construction, Forestry, Mining and Energy Union of Workers	M&G Crane Hire Pty Ltd	Gregor SC	Agreement Registered
Maldonado Tiling / CFMEUW Industrial Agreement 2002-2005 AG 53/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	JM Molina & RM Molina t/a Maldonado Tiling	Coleman CC	Agreement Registered
Marble & Granite Expo / CFMEUW Industrial Agreement 2002-2005 AG 141/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Marble & Granite Expo Pty Ltd	Coleman CC	Agreement Registered
MCW (On Site) / CFMEUW Industrial Agreement 2002-2005 AG 213/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Marble & Cement Work (WA) Pty Ltd	Coleman CC	Agreement Registered
MCW (On Site) / CFMEUW Industrial Agreement 2002-2005 AG 213/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Marble & Cement Work (WA) Pty Ltd	Coleman CC	Agreement Registered
Menchetti Group / CFMEUW Industrial Agreement 2002-2005 AG 291/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Carlos Menchetti & Nicholas Menchetti t/a Menchetti Group	Coleman CC	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Metropolitan Cemeteries Board Industrial Agreement 2004 AG 5/2005	22/04/2005	Chief Executive Officer, Metropolitan Cemeteries Board	Western Australian Shire Councils Municipal Roads Boards, Health Boards, Parks, Cemeteries and Racecourses, Public Authorities Water Boards Union	Smith C	Agreement Registered
Might Construction / CFMEUW Industrial Agreement 2002-2005 AG 197/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Might Construction Pty Ltd	Coleman CC	Agreement Registered
Mirage Industries Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 7/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Mirage Industries Pty Ltd	Coleman CC	Agreement Registered
Mirante Brickpaving / CFMEUW Industrial Agreement 2002-2005 AG 239/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Marcel Morete t/a Mirante Brickpaving & Landscaping	Coleman CC	Agreement Registered
Mirvac Constructions (WA) Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 241/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Mirvac Constructions (WA) Pty Ltd	Coleman CC	Agreement Registered
Mofflyn - LHMU, (State) Industrial Agreement 2004 AG 46/2005	6/05/2005	The Uniting Church in Australia Property Trust trading as Mofflyn	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Harrison C	Agreement Registered
Mone Interiors / CFMEUW Industrial Agreement 2002-2005 AG 222/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Cleverwest Pty Ltd t/a Mone Interiors	Coleman CC	Agreement Registered
Murphy Plant Hire & Demolition / CFMEUW Industrial Agreement 2002-2005 AG 142/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Mannor Holdings Pty Ltd t/a Murphy Plant Hire	Coleman CC	Agreement Registered
National Tiling Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 198/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	National Tiling Pty Ltd	Coleman CC	Agreement Registered
Naus Building Products / CFMEUW Industrial Agreement 2002-2005 AG 172/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Naus Fire Protection Pty Ltd t/a Naus Building Products	Coleman CC	Agreement Registered
New Era Flooring / CFMEUW Industrial Agreement 2002-2005 AG 8/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Jevina Pty Ltd ATF The Holmes Family Trust t/a New Era Flooring	Coleman CC	Agreement Registered
Nu-Tex Construction Services / CFMEUW Industrial Agreement 2002-2005 AG 179/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Skyway Construction Services Pty Ltd and The Skelton Family Trust t/a Nu-Tex Construction Services	Coleman CC	Agreement Registered
OCC Services / CFMEUW Industrial Agreement 2002-2005 AG 160/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	OCC Services Pty Ltd	Coleman CC	Agreement Registered
Ovair / CFMEUW Industrial Agreement 2002-2005 AG 138/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Michael Overton & Linda Overton t/a Ovair	Coleman CC	Agreement Registered
Pacific Industrial Company (WA) Pty Ltd Transport Workers Certified Agreement AG 281/2004	22/04/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Pacific Industrial Company (WA) Pty Ltd	Smith C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Paragon Precast Industries / CFMEUW Industrial Agreement 2002-2005 AG 180/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Paragon Precast Industries Pty Ltd	Coleman CC	Agreement Registered
Para-Quad Industries / CFMEUW Industrial Agreement 2002-2005 AG 235/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Paraplegic-Quadraplegic Association of WA (Inc) t/a Para-Quad Industries	Coleman CC	Agreement Registered
Perth Asbestos Removal Co Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 214/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Perth Asbestos Removal Co Pty Ltd	Coleman CC	Agreement Registered
Perth Concrete Cutting Services / CFMEUW Industrial Agreement 2002-2005 AG 201/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Dean Craig McKee trading as Perth Concrete Cutting Services	Coleman CC	Agreement Registered
Perth Precast / CFMEUW Industrial Agreement 2003-2006 AG 203/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Conspect Construction Pty Ltd trading as Perth Precast	Coleman CC	Agreement Registered
Precast Company Perth / CFMEUW Industrial Agreement 2002-2005 AG 186/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Precast Company (Perth) Pty Ltd	Coleman CC	Agreement Registered
Precast Prestressed Buildings Perth / CFMEUW Industrial Agreement 2003-2006 AG 143/2004	15/04/2005	The Construction, Forestry, Mining and Energy Union of Workers	Precast Prestressed Buildings Perth Pty Ltd	Gregor SC	Agreement Registered
Pre-formed Profiles / CFMEUW Industrial Agreement 2002-2005 AG 149/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	David McInnes & Patrick Fitzgerald t/a Pre-formed Profiles	Coleman CC	Agreement Registered
Pro Team Clean / CFMEUW Industrial Agreement 2002-2005 AG 188/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Newman Consulting Services Pty Ltd t/a Pro Team Clean	Coleman CC	Agreement Registered
Protech International Group Enterprise Bargaining Agreement 2004 AG 149/2004	12/04/2005	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Protech International Group	Gregor SC	Agreement Registered
Quake Holdings Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 187/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Quake Holdings Pty Ltd	Coleman CC	Agreement Registered
Read Bros Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 159/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Read Bros Pty Ltd	Coleman CC	Agreement Registered
Reeves Engineering / CFMEUW Industrial Agreement 2002-2005 AG 169/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Reeves Steel Fabrication Pty Ltd	Coleman CC	Agreement Registered
Roof Safe Pty Ltd / CFMEUW Industrials Agreement 2002-2005 AG 43/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Roof Safe Pty Ltd (Standard)	Coleman CC	Agreement Registered
Roof Safe Yard / CFMEUW Industrial Agreement 2002-2005 AG 42/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Roof Safe Pty Ltd (Scaffolding Yard)	Coleman CC	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
S & L Demolition / CFMEUW Industrial Agreement 2002-2005 AG 223/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Haystead Holdings t/a S & L Demolition	Coleman CC	Agreement Registered
Sandvik Materials Handling Pty Ltd Enterprise Bargaining Agreement 2004 to 2007 AG 50/2005	11/04/2005	Sandvik Materials Handling Pty Ltd	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Gregor SC	Agreement Registered
Scarborough Tiling / CFMEUW Industrial Agreement 2002-2005 AG 196/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	KB Anderson & JJ Baillie & SA Campbell & SJ Hudson & CC Kelly trading as Scarborough Tiling	Coleman CC	Agreement Registered
Simsmetal Limited (Production and Maintenance) Enterprise Bargaining Agreement AG 45/2005	11/04/2005	Simsmetal Limited	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Gregor SC	Agreement Registered
SJ Higgins Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 254/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	SJ Higgins Pty Ltd	Coleman CC	Agreement Registered
Slick Fix Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 238/2003	6/09/2005	The Construction, Forestry, Mining and Energy Union of Workers	Slick Fix Pty Ltd	Coleman CC	Agreement Registered
Specialty Installations / CFMEUW Industrial Agreement 2002-2005 AG 181/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Specialty Installations Pty Ltd	Coleman CC	Agreement Registered
Sprayforce / CFMEUW Industrial Agreement 2002-2005 AG 217/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Tudorstar Pty Ltd atf Brendon Kelly Trust t/a Sprayforce	Coleman CC	Agreement Registered
SS Scaffolding / CFMEUW Industrial Agreement 2002-2005 AG 15/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	SS Scaffolding Pty Ltd	Coleman CC	Agreement Registered
St John of God Health Care Murdoch AMA Medical Practitioners Industrial Agreement 2005 AG 57/2005	28/04/2005	Australian Medical Association (WA) Incorporated	St John of God Health Care Inc	Scott C	Agreement Registered
Stramit Industries (Maddington) Western Australia Enterprise Bargaining Agreement 2003 AG 193/2003	22/04/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Stramit Building Products (Maddington) Western Australia	Smith C	Agreement Registered
Subiaco Marble & Granite / CFMEUW Industrial Agreement 2002-2005 AG 167/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Subiaco Marble & Granite Pty Ltd	Coleman CC	Agreement Registered
Swire Cold Storage Pty Ltd Transport Workers Enterprise Agreement 2004 AG 147/2004	26/04/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Swire Cold Storage Pty Ltd	Smith C	Agreement Registered
T M S Electrical Pty Ltd Enterprise Bargaining Agreement2004-2006 AG 51/2005	11/04/2005	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	T M S Electrical Pty Ltd	Gregor SC	Agreement Registered
Tech Fab / CFMEUW Industrial Agreement 2002-2005 AG 251/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Linkman Holdings Pty Ltd trading as Tech Fab	Coleman CC	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Terrazzo Stone Marble Polishing Supplies / CFMEUW Industrial Agreement 2002-2005 AG 147/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Westworld Nominees Pty Ltd t/a Terrazzo Stone Marble Polishing Supplies	Coleman CC	Agreement Registered
Transport Workers South West Express Enterprise Agreement 2004 AG 279/2004	28/04/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	South West Express	Smith C	Agreement Registered
Truwood Fabrications / CFMEUW Industrial Agreement 2002-2005 AG 218/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Melvyn Meyers t/a Truwood Fabrications	Coleman CC	Agreement Registered
Ultra Speed Rigging & Construction / CFMEUW Industrial Agreement 2002-2005 AG 182/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Anthony Foreman & Michael Fisher t/a Ultra Speed Rigging & Construction	Coleman CC	Agreement Registered
United Crane Hire Enterprise Agreement 2003 AG 9/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	United Crane Hire Pty Ltd	Coleman CC	Agreement Registered
Vchenzo Tilers / CFMEUW Industrial Agreement 2002-2005 AG 49/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Vince Demarte t/a Vchenzo Tilers	Coleman CC	Agreement Registered
WA Flooring Installations / CFMEUW Industrial Agreement 2002-2005 AG 219/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	WA Flooring Installations Pty Ltd	Coleman CC	Agreement Registered
WA Partitioning Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 195/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	WA Partitioning Pty Ltd	Coleman CC	Agreement Registered
WA Project Carpenters / CFMEUW Industrial Agreement 2002-2005 AG 132/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Hennessey (WA) Pty Ltd t/a WA Project Carpenters	Coleman CC	Agreement Registered
WACI Wall and Ceiling Contractors / CFMEUW Industrial Agreement 2002-2005 AG 131/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Australasia Gypsum Pty Ltd t/a WACI Wall & Ceiling Contractors	Coleman CC	Agreement Registered
Wall to Wall Carpets / CFMEUW Industrial Agreement 2002-2005 AG 185/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for Wall to Wall Carpets Unit Trust t/a Wall to Wall Carpets W.A.	Coleman CC	Agreement Registered
Wearside Construction / CFMEUW Industrial Agreement 2002-2005 AG 10/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Wearside Construction	Coleman CC	Agreement Registered
West Coast Building Services Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 206/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	West Coast Building Services Pty Ltd	Coleman CC	Agreement Registered
Western Australian Greyhound Racing Association (Outside Workers) General Agreement 2004 AG 1/2005	22/04/2005	Chief Executive Officer, WA Greyhound Racing Authority	Western Australian Shire Councils Municipal Roads Boards, Health Boards, Parks, Cemeteries and Racecourses, Public Authorities Water Boards Union	Smith C	Agreement Registered
Western Australian Meat Marketing Co-Operative Limited Katanning Division Maintenance Employees Enterprise Agreement AG 262/2004	21/04/2005	Western Australian Meat Marketing Co-operative Limited.	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Smith C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Westpoint Constructions / CFMEUW Industrial Agreement 2002-2005 AG 252/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Westpoint Constructions Pty Ltd	Coleman CC	Agreement Registered
Westward Scaffolding Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 207/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Westward Scaffolding Pty Ltd	Coleman CC	Agreement Registered
Wildflora Landscapes / CFMEUW Industrial Agreement 2002-2005 AG 262/2003	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	WF Landscape Industries Pty Ltd t/a Wildflora Landscapes	Coleman CC	Agreement Registered
Zanatec Tiling / CFMEUW Industrial Agreement 2002-2005 AG 14/2004	6/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	Skylane Nominees Pty Ltd t/a Zanatec Tiling	Coleman CC	Agreement Registered

NOTICES—Cancellation of Awards/Agreements/ Respondents—under Section 47—

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, intends, by order, to cancel out the following award, namely the -

AWU UXO UNIT AWARD 1996
No. A 4 of 1996

on the grounds that there are no longer any persons employed under the provisions of the award.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Dated this 25th day of May 2005

(Sgd.) J.A. SPURLING,
Registrar.

[L.S.]

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, intends, by order, to cancel out the following award, namely the -

GOVERNMENT ENGINEERING AND BUILDING TRADES FOREMEN AND SUB FOREMEN AWARD NO 15 OF 1973

on the grounds that there are no longer any persons employed under the provisions of the award.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Dated this 25th day of May 2005

(Sgd.) J.A. SPURLING,
Registrar.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2005 WAIRC 01303

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHN AVENARIUS BORGER

APPELLANT

-v-

DEPARTMENT OF AGRICULTURE

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER P E SCOTT – CHAIRMAN
MR D HARTLEY – BOARD MEMBER
MR B HEWSON – BOARD MEMBER

DATE FRIDAY, 22 APRIL 2005

FILE NO PSAB 1 OF 2005

CITATION NO. 2005 WAIRC 01303

Result Name of Respondent Amended

Order

HAVING heard Ms C Crawford of counsel on behalf of the appellant and Mr D Matthews of counsel on behalf of the respondent and by consent, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the name of the Respondent be amended to Director General, Department of Agriculture.

(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 80 – 85 of 2003	Carolyn Haggarty and Others	Minister for Health in Right of the Metropolitan Health Service at South Metropolitan Health Service	Scott C.	Dismissed	26/04/05
PSA 38 – 40 of 2004	Cheryl McCoy and Others	WA Sports Centre Trust	Scott C.	Upheld	28/04/05
PSA 127 of 2004	James Thomson	Minister for Health in right of the Metropolitan Health Service – North Metropolitan Area Health Service	Scott C.	Granted	04/05/05

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2005 WAIRC 01175

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHN ANTHONY MOORE

APPELLANT

-v-

THE COMMISSIONER OF POLICE

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
COMMISSIONER P E SCOTT
COMMISSIONER J L HARRISON

DATE TUESDAY, 12 APRIL 2005

FILE NO/S APPL 1728 OF 2003

CITATION NO. 2005 WAIRC 01175

Result	Appeal discontinued
Representation	
Appellant	Mr J Moore on his own behalf
Respondent	Mr D Matthews (of counsel) on behalf of the respondent

Order

WHEREAS on 1 December 2003 the appellant lodged an appeal in the Western Australian Industrial Relations Commission pursuant to section 33P of the *Police Act 1892*;

AND WHEREAS a conference was convened before the Western Australian Industrial Relations Commission on 16 February 2004;

AND WHEREAS on 7 May 2004 the Commission by order adjourned the appeal for a period of 12 months;

AND WHEREAS a Notice of Discontinuance was filed in the Western Australian Industrial Relations Commission on 12 April 2005;

NOW THEREFORE the Western Australian Industrial Relations Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders –

THAT the appeal be and is hereby discontinued.

(Sgd.) A R BEECH,
Chief Commissioner.
On Behalf of the
[L.S.] Western Australian Industrial Relations Commission.