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

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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—General Matters—

SALARY CAP FOR LODGING CLAIMS OF UNFAIR DISMISSAL OR DENIAL OF CONTRACTUAL BENEFITS

Regulations 5 and 6 of the *Industrial Relations (General) Regulations 1997)* which relate to sections 29AA(3) or (4) of the Industrial Relations Act, determine a maximum salary beyond which persons are not permitted to lodge a claim alleging unfair dismissal or denial of contractual benefits. The amount is adjusted each July 1.

The current figure, applicable from 1 July 2005, has been calculated by the Registrar as being $104 800. The amount is a matter for the Commission to determine so that figure must be seen as a guide, until such time as the Commission may determine a different amount.

This limitation does not apply to persons covered by an Award, Industrial Agreement, Employer-Employee Agreement or other specific Order of the Commission.

GENERAL ORDERS—

2005 WAIRC 01871

RESCIND GENERAL ORDER NO 696 OF 2004 ON LOCATION ALLOWANCES AND ISSUE A NEW GENERAL ORDER PURSUANT TO SECTION 50 OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION) AUSTRALIAN MINES AND METALS ASSOCIATION (INCORPORATED), CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA (INC), HONOURABLE MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION, AND TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA
CORAM	COMMISSION IN COURT SESSION COMMISSIONER P E SCOTT COMMISSIONER S J KENNER COMMISSIONER S M MAYMAN
DATE	FRIDAY, 24 JUNE 2005
FILE NO	APPL 458 OF 2005
CITATION NO.	2005 WAIRC 01871

Result	General Order Issued

General Order

HAVING heard Mr R Gifford on behalf of the Australian Mines and Metals Association (Incorporated); Mr G Blyth on behalf of the Chamber of Commerce and Industry of Western Australia (Inc); Ms T Zeid and with her Mr P Wilding on behalf of the Honourable Minister for Consumer and Employment Protection; and Ms C Ozich on behalf of the Trades and Labor Council of Western Australia.

NOW THEREFORE, the Commission in Court Session, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders —

(1) THAT each award, industrial agreement or order cited in Schedule A of this General Order be varied by substituting for the location allowances provisions contained in each such award, industrial agreement or order the location allowance provisions in Schedule B of this General Order.

(2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the 1st day of July 2005.

(3) THAT this General Order replace the General Order in Matter No 696 of 2004 which thereby shall be rescinded.

[L.S.]

Sgd.) P.E. SCOTT,
Commissioner.
For and On Behalf Of The Commission In Court Session.

SCHEDULE A

Title of Award or Order	Clause No.
Aerated Water and Cordial Manufacturing Industry Award 1975	31
Aged and Disabled Persons Hostels Award, 1987	28
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
Artworkers Award	20
Bakers' (Country) Award No. 18 of 1977	20
Breadcarters (Country) Award 1976	27
Building Trades Award 1968	24
Building Trades (Construction) Award 1987	Appendix A
Child Care (Out of School Care - Playleaders) Award	10
Children's Services (Private) Award	12
Cleaners and Caretakers Award, 1969	21
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	22
Clerks' (Accountants' Employees) Award 1984	23
Clerks (Commercial Radio and Television Broadcasters) Award of 1970	27
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	27
Clerks' (Control Room Operators) Award 1984	25
Clerks' (Credit and Finance Establishments) Award	31
Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award	30
Clerks' (Hotels, Motels and Clubs) Award 1979	22
Clerks' (Taxi Services) Award of 1970	28
Clerks (Timber) Award	31
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	28
Clothing Trades Award 1973	22
Contract Cleaners Award, 1986	24
Contract Cleaners' (Ministry of Education) Award 1990	21
CSBP & Farmers Award 1990	23
Dental Technicians' and Attendant/Receptionists' Award, 1982	27
The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
Electrical Contracting Industry Award R 22 of 1978	22
Electrical Trades (Security Alarms Industry) Award 1980	19
Electronics Industry Award No. A 22 of 1985	24
Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973	25
Engine Drivers' (General) Award	20
Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	23
Foodland Associated Limited (Western Australia) Warehouse Award 1982	39
Foremen (Building Trades) Award 1991	15
Funeral Directors' Assistants' Award No. 18 of 1962	33
Furniture Trades Industry Award	46
Gate, Fence and Frames Manufacturing Award	21
Golf Link and Bowling Green Employees' Award, 1993	28
Hairdressers Award 1989	31
The Horticultural (Nursery) Industry Award, No. 30 of 1980	6
Hospital Salaried Officers (Good Samaritan Industries) Award 1990	29
Industrial Catering Workers' Award, 1977	40
Industrial Spraypainting and Sandblasting Award 1991	19

Title of Award or Order—*continued*	Clause No.
Independent Schools (Boarding House) Supervisory Staff Award	22
Independent Schools Administrative and Technical Officers Award 1993	22
Independent Schools Psychologists and Social Workers Award	21
Independent Schools' Teachers' Award 1976	18
Jenny Craig Employees Award, 1995	28
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Lift Industry (Electrical and Metal Trades) Award, 1973	20
Materials Testing Employees' Award, 1984	12
Meat Industry (State) Award, 2003	21
Metal Trades (General) Award 1966	22
Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Nurses' (Day Care Centres) Award 1976	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Permanent Building Societies (Administrative and Clerical Officers) Award, 1975	30
Pest Control Industry Award 1982	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award, 1979	42
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	24
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	39
Supermarkets and Chain Stores (Western Australia) Warehouse Award 1982	39
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003	8.4

Title of Industrial Agreements	Clause No.
Altone Continental and SDA Agreement 2002	32
Beverley Four Square Supermarket and SDA Agreement 2002	32
Bindoon General Store and SDA Agreement 2002	32
Bridgetown Mini Mart and SDA Agreement 2002	32
Broadwater Mini Mart and SDA Agreement 2002	32
Broadway Fresh and SDA Agreement 2003	31
Cadoux Traders and SDA Agreement 2002	32
Caversham Store and SDA Agreement 2002	32
Cherries Fine Food Super Mart and SDA Agreement 2002	32
Chicken Treat Dunsborough SDA Agreement 2001	34
Chicken Treat Employees, Narrogin SDA Enterprise Agreement 1998	34
Chicken Treat Katanning SDA Agreement 2001	34
Chicken Treat Narrogin SDA Agreement 2001	34
Chicken Treat Padbury SDA Agreement 2001	34
Chicken Treat Rockingham SDA Agreement 2001	34
Chidlow Growers Mart and SDA Agreement 2002	32
City Gems and SDA Agreement 2003	31
Coles Distribution Centre Enterprise Agreement 1994, No. AG 38 of 1995	38

Title of Industrial Agreements—*continued*	Clause No.
Congregation of the Presentation Sisters of WA Inc Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Cranberries and SDA Agreement 2002	32
Crisp's Corner Store & Newsagency and SDA Agreement 2002	32
Essentials Supermarket of South Perth and SDA Agreement 2002	32
Feeding Frenzy and SDA Agreement 2003	31
Fish Feast Canning Vale SDA Agreement 2003	33
Fish Feast Gosnells SDA Agreement 2002	33
Fish Feast Greenmount SDA Agreement 2002	33
Fish Feast Halls Head SDA Agreement 2003	33
Fish Feast Joondalup SDA Agreement 2002	33
Fish Feast Kardinya SDA Agreement 2002	33
Fish Feast Kelmscott SDA Agreement 2002	33
Fish Feast Lathlain SDA Agreement 2002	33
Fish Feast Malaga SDA Agreement 2003	33
Fish Feast Maylands SDA Agreement 2002	33
Foodland Amelia Heights and SDA Agreement 2002	32
Foodland Bayswater (Beechboro Road) and SDA Agreement 2002	32
Foodland Bayswater (Whatley Crescent) and SDA Agreement 2002	32
Foodland Bindoon and SDA Agreement 2002	32
Foodland Boddington and SDA Agreement 2002	32
Foodland Dowerin and SDA Agreement 2002	32
Foodland Lesmurdie and SDA Agreement 2002	32
Foodland Manning and SDA Agreement 2002	32
Foodland Merredin and SDA Agreement 2002	32
Foodland Mukinbudin and SDA Agreement 2002	32
Foodland Ravensthorp and SDA Agreement 2002	32
Foodland Tarcoola and SDA Agreement 2002	32
Foodland Toodyay and SDA Agreement 2002	32
Foodland Wagin and SDA Agreement 2002	32
Foodys Express and SDA Agreement 2002	32
Fresh Food Corner Supermarket and SDA Agreement 2002	32
Glen Forrest Supermarket and SDA Agreement 2002	32
Hall's Creek Caravan Park and SDA Agreement 2002	32
Hannan's Foodmart and SDA Agreement 2002	32
John XXIII College Council Inc Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
John's Food and Liquor and SDA Agreement 2002	32
Kam Food & News Centre and SDA Agreement 2002	32
Kebab Company – Joondalup Perth and SDA Agreement 2003	31
Kendenup Stores and SDA Agreement 2002	32
Kimberley Super Value and SDA Agreement 2002	32
Kirkwood Foodland & Delicatessen and SDA Agreement 2002	32
K-Mart Western Australia Distribution Centres Enterprise Agreement No. AG 16 of 1995	40
K-Mart Western Australia Distribution Centres Enterprise Agreement No. AG 100 of 1996	40
Laverton Stores and SDA Agreement 2002	32
Leighton Contractors Maintenance Personnel Agreement 2000	Schedule 1, Cl 6
Lionel St Markets and SDA Agreement 2002	32
Little Bucks Supermarket and SDA Agreement 2002	32
Mandurah Forum Takeaway and SDA Agreement 2003	31
Mariella's Continental Deli and SDA Agreement 2002	32
McDonald Wholesalers and SDA Agreement 2002	32
Midland Junction Fresh Markets and SDA Agreement 2002	32
MJ and VD Quinlan and SDA Agreement 2002	32
Muir's Fresh Food Supermarkets and SDA Agreement 2002	32
Murdoch Drive Continental Super Deli and SDA Agreement 2002	32
Noakes Store Denmark and SDA Agreement 2002	32
Norbertine Canons Incorporated Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
P.R. & B.M. Harrington and SDA Agreement 2002	32
Pemberton General Store and SDA Agreement 2002	32
Perenjori Supermarket and SDA Agreement 2002	32
Pioneer Store and SDA Agreement 2002	32

P & O Towage Services Small Craft Crews Agreement 1987	23
Port Hedland Truck Stop and SDA Agreement 2002	32
R & E General and SDA Agreement 2002	32
Retail Food Establishments Employees Agreement 1992	34
Retail Food Services Employees' Agreement 1991	39
River Rooster Australia, SDA Enterprise Agreement 2001	34
River Rooster Boulder, SDA Enterprise Agreement 2001	34
River Rooster Bridgetown, SDA Enterprise Agreement 2001	34
River Rooster Broome Agreement No. AG 271 of 1996	34
River Rooster Bunbury Agreement No. AG 264 of 1996	34
River Rooster Busselton/Dunsborough Agreement No. AG 285 of 1996	34
River Rooster Carnavorn Agreement No. AG 270 of 1996	34
River Rooster Coolbellup, SDA Enterprise Agreement 2001	34
River Rooster Harvey, SDA Enterprise Agreement 2001	34
River Rooster Maddington, SDA Enterprise Agreement 2001	34
River Rooster Mandurah, SDA Enterprise Agreement 2001	34
River Rooster Margaret River, SDA Enterprise Agreement 2001	34
River Rooster Merriwa Agreement No. AG 268 of 1996	34
River Rooster Narrogin Agreement No. AG 265 of 1996	34
River Rooster Pinjarra, SDA Enterprise Agreement 2001	34
River Rooster Stratton, SDA Enterprise Agreement 2001	34
River Rooster Warnbro, SDA Enterprise Agreement 2001	34
The Roman Catholic Bishop of Broome Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
The Roman Catholic Bishop of Bunbury Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Roman Catholic Bishop of Geraldton Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Royal Flying Doctor Services of Australia, RFDS Western Operations, Medical Practitioners Industrial Agreement	20
Servite College Council Inc Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Shop Distributive and Allied Employees' Association of Western Australia Pizza Hut Agreement 1998	22
Showbits Perth and SDA Agreement 2003	31
Sisters of the Holy Family of Nazareth Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Sisters of Mercy Perth (Amalgamated) Inc Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
The Sisters of Mercy West Perth Congregation Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Sisters of the Good Shepherd Inc Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
South Perth Food Mart and SDA Agreement 2002	32
Supa Valu Capel and SDA Agreement 2002	32
Supa Valu Dongara and SDA Agreement 2002	32
Supa Valu Hamilton Hill and SDA Agreement 2002	32
Supa Valu High Wycombe and SDA Agreement 2002	32
Supa Valu Huntingdale and SDA Agreement 2002	32
Supa Valu Innaloo and SDA Agreement 2002	32
Supa Valu Kelmscott and SDA Agreement 2002	32
Supa Valu Ocean Reef and SDA Agreement 2002	32
Supa Valu Stirling and SDA Agreement 2002	32
Supa Valu Willeton and SDA Agreement 2002	32
Three Springs General Store and SDA Agreement 2002	32
Top Valu Supermarket and SDA Agreement 2002	32
Trade Winds Supermarket and SDA Agreement 2002	32
Trustees of the Christian Brothers in WA Inc Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Trustees of the Marist Brothers Southern Province Non-Teaching Staff Enterprise Bargaining Agreement 2000	24
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 1 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 2 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 3 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 4 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 5 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 6 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 7 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 8 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 9 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 10 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 11 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 12 of 2004	13

Title of Industrial Agreements—*continued*	Clause No.
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 13 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 14 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 15 of 2004	13
Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 16 of 2004	13
WesTrac Equipment (Service Operations) Enterprise Agreement 2003	16
Wundowie One Stop and SDA Agreement 2002	32
Wyndham Supermarket and SDA Agreement 2002	32
York Mini Mart and SDA Agreement 2002	32

SCHEDULE B

(1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$17.30
Argyle	$45.60
Balladonia	$17.40
Barrow Island	$29.70
Boulder	$7.20
Broome	$27.70
Bullfinch	$8.20
Carnarvon	$14.20
Cockatoo Island	$30.40
Coolgardie	$7.20
Cue	$17.70
Dampier	$24.00
Denham	$14.20
Derby	$28.80
Esperance	$5.20
Eucla	$19.40
Exmouth	$25.00
Fitzroy Crossing	$34.80
Goldsworthy	$15.40
Halls Creek	$39.90
Kalbarri	$6.00
Kalgoorlie	$7.20
Kambalda	$7.20
Karratha	$28.60
Koolan Island	$30.40
Koolyanobbing	$8.20
Kununurra	$45.60
Laverton	$17.60
Learmonth	$25.00
Leinster	$17.30
Leonora	$17.60
Madura	$18.40
Marble Bar	$43.80
Meekatharra	$15.20
Mount Magnet	$19.00
Mundrabilla	$18.90
Newman	$16.60
Norseman	$14.90
Nullagine	$43.70
Onslow	$29.70
Pannawonica	$22.40
Paraburdoo	$22.30
Port Hedland	$23.90
Ravensthorpe	$9.20
Roebourne	$32.90
Sandstone	$17.30
Shark Bay	$14.20
Shay Gap	$15.40

TOWN—*continued*	PER WEEK
Southern Cross	$8.20
Telfer	$40.50
Teutonic Bore	$17.30
Tom Price	$22.30
Whim Creek	$28.40
Wickham	$27.60
Wiluna	$17.60
Wittenoom	$38.70
Wyndham	$42.90

(2) Except as provided in subclause (3) of this clause, an employee who has:

(a) a dependant shall be paid double the allowance prescribed in subclause (1) of this clause;

(b) a partial dependant shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.

(3) Where an employee:

(a) is provided with board and lodging by his/her employer, free of charge; or

(b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;

such employee shall be paid $66^2/_3$ per cent of the allowances prescribed in subclause (1) of this clause.

(4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

(5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or defacto partner; or

(ii) a child where there is no spouse or defacto partner;

who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.

(b) "Partial Dependant" shall mean a "dependant" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.

(8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.

(9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

FULL BENCH—Appeals against decision of Commission—

2005 WAIRC 01744

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANTHONY AND SONS PTY LTD T/A OCEANIC CRUISES

APPELLANT

-and-

PETER FOWLER

RESPONDENT

CORAM FULL BENCH
HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER S J KENNER
COMMISSIONER S M MAYMAN

DATE FRIDAY, 3 JUNE 2005

FILE NO. FBA 53 OF 2004

CITATION NO. 2005 WAIRC 01744

CatchWords	Industrial Law (WA) - appeal against decision of single Commissioner - denial of contractual benefits - casual employee - termination of employment - redundancy - procedural fairness - loss/injury - Industrial Relations Act 1979 (as amended), s29(1)(b)(i), s29(1)(b)(ii), s49.
Decision	Decision at first instance varied and appeal otherwise dismissed.
Appearances	
Appellant	Mr K Trainer, as agent
Respondent	Mr P Fowler

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal against the decision of the Commission, constituted by a single Commissioner, given on 30 November 2004 in application No 782 of 2004, and the appeal is against the whole of the decision.

2 A notice of appeal was filed on 20 December 2004. 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, formal parts omitted, as follows (see page 16 of the appeal book (hereinafter referred to as "AB") (2004) 84 WAIG 3855 at 3859.):-

> "DECLARES that the Applicant was unfairly dismissed by the Respondent;
>
> ORDERS that the Respondent pay the Applicant the sum of $676 (gross) and $3,000 (net) within seven (7) days of the date of this Order;
>
> ORDERS that the application is otherwise and is hereby dismissed."

GROUNDS OF APPEAL

3 The appellant now appeals against that decision on the following grounds (see page 2 (AB)):-

> "1. The Commission erred in finding that there was a dismissal of the Respondent on 19 May 2004. The Commission ought to have found that
>
> 1.1 There was no employer/employee relationship between the parties on 19 May 2004.
>
> 1.2 The employment relationship between the parties came to the completion of each period of duty.
>
> 1.3 Each period of duty stood alone.
>
> 1.4 The roster did not represent an engagement of the Respondent's services for any period.
>
> 2. The Commission erred in failing to give proper weight to its finding that the Appellant had a valid reason to downsizing its operations
>
> 2.1 The Appellant was entitled to reduce the number of skippers it employed.
>
> 2.2 The Respondent consequently could not have an expectation of further offers of employment
>
> 3. The Commission erred in finding that the Respondent was entitled to or ought to have been allowed to work on the 19 May 2004.
>
> 4. There was no basis for the Commissions conclusion that the Respondent suffered any loss of opportunity in the period from 19 May 2004 until the end of May.
>
> 5. The Commission erred in making an award for injury when
>
> 5.1 The Commission did not make any finding that the effects of the termination on the Respondent were any more than those ordinarily associated with a termination
>
> 5.2 There was no substantive evidence to support the findings
>
> 5.3 The amount ordered was arbitrary.
>
> 5.4 The amount ordered was punitive.
>
> 5.4 Alternatively, the amount ordered was excessive"

BACKGROUND

4 Mr Peter Francis Fowler, the above-named respondent, made application to the Commission claiming that he was harshly, oppressively and unfairly dismissed on 18 May 2004. That application was made by way of a claim under s29(1)(b)(i) of *the Act*, filed on 14 June 2004. There was also a claim by the same application, pursuant to s29(1)(b)(ii) that Mr Fowler had been denied a contractual benefit, not being a benefit under an award or industrial agreement, namely pay in lieu of leave for six months' service.

5 Mr Fowler was employed by the above-named appellant as a ferry captain or skipper. His employment was terminated when his name was removed from the weekly roster of the appellant on 16 May 2004. It is common ground that Mr Fowler commenced employment on 23 September 2002. He alleged that he was employed as a casual employee. However, at the commencement of the hearing, Mr Fowler contended that his engagement in law was permanent. He was paid a flat rate of pay for each hour he worked. It was the case for the appellant that Mr Fowler's employment was terminated because there was a downturn in trade which resulted in the appellant discontinuing one of its ferry services. Consequently, there was a need to reduce the number of skippers whom it employed.

6 Thus, Mr Fowler's name was removed from the roster because he was one of two skippers who drove the vessel which conducted the service that was to be discontinued. The appellant said that it made the decision that it would not roster Mr Fowler for future services and would retain the services of the other skipper on grounds of family responsibility.

7 The case for the appellant, who was the respondent at first instance, was that each time Mr Fowler reported for work to conduct a ferry service, it constituted a separate engagement so that no notice was required to terminate his casual contract of employment. Mr Fowler submitted that, even if he could be regarded as a casual employee, he had an ongoing expectation of work from week to week. He said that his dismissal was unfair and oppressive or harsh, since there was work for him to carry out, and, further, that his dismissal was effected without notice and without procedural fairness.

8 At all material times, Mr Fowler held a Master Class 5 Certificate and had held it since 1996. He had served for 25 years in the Royal Australian Navy, retiring from the Navy in 1993. During his working life, he had driven a number of different classes of vessels around the world in different types of waters from 42 metre patrol vessels to 30 metre tugs and fuel lighters, to passenger ferries. Since 1998, he had skippered various boats along the Swan River. His Master Class 5 Certificate restricts him to driving vessels no longer than 23.9 metres.

9 Before he was employed by the appellant, Mr Fowler worked for Boat Torque as a Senior Master. He was employed by Boat Torque for three years, and, for the most part, drove river boats along the Swan River. Boat Torque went into receivership and he was contacted by a director of the appellant, Mr Antonio Di Latte, who offered him a job working as skipper for the appellant. Mr Fowler said in evidence that Mr Di Latte told him that he wanted Mr Fowler to develop a wine cruise to the Swan Valley and was building the most luxurious boat, "Queen of the Valley", for that purpose. Whilst working for Boat Torque, Mr Fowler had driven vessels used for wine cruises, night cruises and special functions.

10 At the initial interview, Mr Fowler was told that he would not be paid annual leave. Mr Di Latte also informed Mr Fowler that, if he stayed with the company for 12 months, he would be paid two weeks' pay as a bonus. Mr Fowler said that he thought that the bonus was payment for holidays. He understood that he would not be paid sick leave, but he was informed by Mr Di Latte at the time he was engaged that he would be employed as a casual for a three month probationary period or for a three month trial. After considering the offer, he agreed to commence his employment with the appellant.

11 Mr Fowler, in evidence, maintained that, after the trial period, he expected that his status as an employee would change.

12 On 28 August 2002, he signed a tax declaration which records his employment as casual. He was paid $22.00 per hour for each hour he worked during the day and $23.00 per hour for each hour he worked at night, together with a uniform allowance of $2.50 per shift.

13 From the time he commenced employment until his dismissal, Mr Fowler was rostered to work on a weekly basis to drive river vessels. The rosters ran from Thursday to Wednesday of each week and the roster for the following week was usually posted on the Sunday evening before the commencement of the roster on the following Thursday. The rosters were set each week depending on the availability of the vessels and what cruises were proposed to run the following week. The rosters showed the cruises for that week, the hours actually worked by each skipper and any changes to the roster during the roster period.

14 Mr Fowler usually drove "Queen of the Valley". He also drove another vessel called "Classique" which was used for "coffee cruises" and functions. On occasions, he drove a vessel called the "River Cat". Most weeks, however, he was rostered to drive the "Queen of the Valley" and the "Classique". If cruises were cancelled before Mr Fowler or any other skipper reported for work, they were not paid. On occasions, a "coffee cruise" was cancelled at the last minute if there were no customers. If the proposed duration of a cruise was shortened, Mr Fowler was only paid for the hours worked.

15 The rosters showed that Mr Fowler was usually rostered to work five days per week with two rostered days off. Sometimes his rostered days off were consecutive and, on other occasions, they were spread throughout the week or weekend. When he was not available to work or asked for a day off, his practice was to leave a note for Mrs Gabrielle Di Latte who prepared the rosters. When he advised Mrs Di Latte that he did not wish to be rostered on a particular day his request was usually accommodated. Occasionally, a request by him not to be rostered on a particular day was not granted and he accepted that as he himself had in the past prepared rosters. He accepted that, whilst it was open to him to make a request not to be available for work on a particular occasion, it was common knowledge that, if any of the skippers accepted work elsewhere, they would be taken off the roster. Mr Fowler understood that his hours of work would be reduced in winter and when passenger numbers were down. He also said that Mr Di Latte had assured him that his company does not lay off people in winter and that Mr Di Latte had informed him that there would always be hours to do and that he, Mr Di Latte, would "look after" him.

16 When cross-examined, Mr Fowler admitted that, as a casual employee, the appellant did not have to offer him work each week and he could be rostered to work in any manner which the appellant chose. Nonetheless, he maintained that he was assured by Mr Di Latte that the work would be ongoing.

17 Mr Fowler gave evidence that it was common practice for the skippers to swap shifts among themselves. In cross-examination, he admitted that, if another skipper agreed to take on his shift, he would not be paid for the shift which he gave up since he would only be paid for the shifts which he actually worked and not for the shifts he was rostered to work.

18 Another skipper called Andrew telephoned Mr Fowler on 16 May 2004 and told him that he was not on the roster for the following weekend. Mr Fowler had worked that day, but was rostered off on 17 and 18 May 2004. He was rostered to work on Wednesday, 19 May 2004. He telephoned the appellant's office to ask for a copy of the roster to be faxed to him, which was the usual practice, and was informed that Mrs Di Latte had said that it should not be faxed to him, and that Mr Di Latte would ring him later. He then tried to telephone Mr Di Latte on a number of occasions but Mr Di Latte did not return his telephone calls. He later received a letter from Mr Di Latte dated 18 May 2004, which states (see exhibit E, page 56 (AB)):-

> "Dear Peter
>
> Refer: Employment
>
> Unfortunately, with the downturn in ferry trade and the general lack of tourists throughout winter, we are forced to reduce costs and overheads.
>
> From today and for the immediate future I'm advising that there is no requirement for your services as a skipper on our vessels.
>
> If this situation changes I will contact you. Thank you for your past efforts and we wish you well in the future.
>
> Regards"

19 Mr Fowler was not allowed to work on 19 May 2004. The roster for that week shows that his name was crossed off the roster for that day and Andrew's name was written in for the cruise which was to be undertaken by Mr Fowler on that day.

20 Mr Di Latte said in evidence that, at the beginning when he interviewed Mr Fowler, the words he would have used were that "I would try to maintain your level of work during the year".

21 Mrs Gabrielle Di Latte gave evidence that she is the appellant's office manager, having held that position since 1992 and prepared the weekly rosters.

FINDINGS AT FIRST INSTANCE

22 The words "casual employee" has no fixed meaning.

23 The Commissioner at first instance found as follows:-

a) The true nature of any employment relationship will depend on the facts and circumstances of each case (see *Doyle v Sydney Steel Company Limited* [1936] 56 CLR 545 at 551 and 565).

b) The nature of casual engagement has been set out in a number of decisions of this Commission (see *Serco (Australia) Pty Ltd v Moreno* (1996) 76 WAIG 937 at 939 (FB) and the cases cited therein, where the President observed:-

> "…. The concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration."

c) The parties cannot of course, by use of a label, render the nature of a contractual relationship something different to what it is (see *Stewart v Port Noarlunga Hotel Ltd* (1980) 47 SAIR 406 at 420 per Haese DPP).

d) In the Australian Industrial Relations Commission, it has been accepted that the status of "casual employment" is not necessarily inconsistent with the concept of an ongoing contract of employment (see *Ryde-Eastwood Leagues Club Limited v Taylor* (1994) 56 IR 385, applied in *Swan Yacht Club (Inc) v Bramwell* (1997) 78 WAIG 579 (FB)).

e) In this matter, Mr Fowler worked a substantial number of hours each week from 22 September 2002 to 18 May 2004, his hours varying between 20 hours per week on one occasion and 44 hours per week on another occasion. On average, he worked over 30 hours per week. It cannot be disputed that there was a reasonable mutual expectation of continuity of employment.

f) Mr Fowler had a continuing contract of service, even though it was a contract which could be described as a "casual" contract of employment which did not entitle him to be paid sick or annual leave.

g) By failing to roster him for work and not allowing him to work on 19 May 2004 which was the last day he was rostered to work, this constituted a dismissal.

h) The Commissioner preferred the evidence given by Mr Fowler to the evidence of Mr Di Latte, having heard the evidence of the witnesses and observed their demeanour, because Mr Fowler gave his evidence in an honest and open way and openly admitted matters when they were put to him.

i) Mr Di Latte was not an honest witness, in the Commissioner's opinion. He was argumentative, his evidence that Mr Fowler's last rostered cruise was cancelled was not truthful, and the roster clearly showed that it was Andrew's "River Cat" cruise that was cancelled on 19 May 2004.

j) The crossing of Mr Fowler's name off the roster on 19 May 2004 and the insertion of Andrew's name instead was contrary to practice because changes to the existing roster were made by arrangement between the skippers.

k) Mr Di Latte's evidence about the rostering of skippers was inconsistent with the evidence of Mrs Di Latte and was also inconsistent with her evidence about the information given to Mr Fowler by telephone on Monday, 17 May 2004.

l) Mrs Di Latte was a credible witness and her evidence was not inconsistent with Mr Fowler's evidence. Thus, the Commissioner preferred the evidence given by Mr Fowler and Mrs Di Latte.

m) That, as the appellant made the decision to reduce its number of river cruises from four to three, the Commissioner was satisfied that the appellant did have a valid reason for restructuring its business by reducing its number of skippers.

n) However, Mr Fowler should have been allowed to complete his shift on 19 May 2004 because he was rostered to work the "Queen of the Valley" cruise that day. On that day, the "Classique" was running and another skipper, Mr Mick Doyle, was rostered to skipper that vessel for two shifts. In the circumstances, there was no reason why Mr Fowler should not have been allowed to work the "Queen of the Valley" cruise on 19 May 2004.

o) Reinstatement was not practicable as the appellant had reduced the number of its cruises, and, in any event, Mr Fowler was not seeking an order for reinstatement.

p) An employee must demonstrate that they have suffered loss or injury caused by the unfair, harsh and oppressive dismissal.

q) The Commissioner accepted that there was a valid reason for downsizing the operation and that the appellant was entitled to reduce a number of its regular cruises and thus the number of its skippers.

r) Thus, Mr Fowler was unable to prove his contention, on the balance of probabilities, that the appellant had work for him to do beyond the end of May 2004.

s) The manner of dismissal was blatantly procedurally unfair.

t) The conduct in removing Mr Fowler's name from the roster and not taking any steps to advise him of the decision and reasons why until a letter was sent on 18 May 2004 was oppressive, callous and humiliating.

u) Mr Fowler should be paid compensation, being the loss of pay for eight hours' work at $22.00 per hour for the lost opportunity to work the cruise on 19 May 2004 and $500.00 per week to work until the last week of May 2004, whilst the "coffee cruise" continued to run. Thus, the only order for loss is one that the amount of $676.00 gross be paid to Mr Fowler.

v) The Commissioner was satisfied that Mr Fowler had suffered an injury and made an award of $3,000.00 for the injury.

ISSUES AND CONCLUSIONS

24 The appeal is on the following bases:-

a) That it was an error to find that it was a dismissal.

b) That the Commissioner did not give proper weight to its finding that the appellant had a valid reason to reduce its operation.

c) That the Commissioner erred in finding that Mr Fowler was entitled to or ought to have been allowed to work on 19 May 2004 and there was no basis for the Commissioner's conclusion that he suffered any loss of opportunity.

d) Further, the amount ordered by way of an award for injury was erroneous.

Ground 1

25 There was a major question to be answered in this matter. The question was whether there was a dismissal of Mr Fowler on 19 May 2004. That depended on allegations that the Commissioner at first instance ought to have found that there was no employer/employee relationship between the parties on 19 May 2004, because the employment relationship between the parties came to an end at the completion of each period of duty, and that therefore each period of duty stood alone, and that the roster did not represent an engagement of Mr Fowler's services for any period.

26 In other words, the case for the appellant was that Mr Fowler was not dismissed because he was a casual employee (ie) at common law, he was an employee who worked under a series of separate and distinct contracts of employment entered into for a fixed period rather than for a single and ongoing contract of indefinite duration.

27 Thus, so the submission went, he was dismissed at the conclusion of one of a series of separate and distinct contracts entered into for a fixed period as a casual employee. If instead his contract expired on 19 May 2004 and he was not dismissed, then there was no jurisdiction in the Commission to deal with the question of unfair dismissal, there not being any dismissal (see an example of expiration of a contract by effluxion of time, such as was alleged here, in *Gallotti v Argyle Diamonds Pty Ltd* (2003) 83 WAIG 919 (FB) and *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) 83 WAIG 3053 (IAC)).

28 I add, however, that a casual employee may clearly be dismissed (see *Serco (Australia) Pty Ltd v Moreno* (FB) (op cit) at page 939-940).

29 What is casual employment has been considered in a number of appeals by Full Benches of this Commission (see *Serco (Australia) Pty Ltd v Moreno* (FB) (op cit), and more recently *Swan Yacht Club (Inc) v Bramwell* (FB) (op cit) at 583).

30 Whether a person is a casual employee depends on the facts and circumstances of each case. The parties cannot, by the use of a label, render the nature of a contract of employment something which it is not. That has been decided in a number of cases over the years in this Commission and elsewhere (see, for example, the discussion by the High Court in *Doyle v Sydney Steel Company Limited* (op cit) at pages 551 and 565).

31 Certainly there may be indicia which are indicative of the nature of the contract, but, taken alone, they are not necessarily determinative of the nature of the contract. The indicia may include the classifying name given to an employee and mutually accepted by the parties, the provisions of the relevant award (if an award applies), the number of hours worked per week, whether the employment was regular, whether the employee worked in accordance with a roster prepared in advance, whether there was reasonable mutual expectation of continuity of employment, whether notice is required by an employee prior to the employee being absent on leave, whether the employee reasonably expected that work would be available, and whether the employer had a consistent starting time and finishing time for his/her employee.

32 The evidence in this matter was quite clear. The appellant employed Mr Fowler during a period from 23 September 2002 to 16 May 2004, a period of almost 20 months. He was "removed from the roster" on 16 May 2004 because one boat service was to be discontinued, and he was one of two skippers who drove the boat. The appellant's case was that the decision had been made not to "roster him for future services" and to retain the other skipper, Andrew, because of "family responsibilities".

33 The appellant's case was that each time he reported for work to "drive" a ferry, this constituted a separate engagement of Mr Fowler so that no notice was required to terminate his casual contract of employment, which, in fact, expired at the end of his time on duty, each time that he was on duty.

34 Mr Fowler was rostered weekly and usually drove one of two vessels. One was "Queen of the Valley", a wine cruise which went up into the Swan Valley, and the other was called "Classique", which was used to take persons for a trip during which they were able to drink coffee.

35 The other skipper, Andrew, worked in tandem with Mr Fowler.

36 Mr Fowler admitted in evidence that he was not entitled to leave and he was paid at a rate, it was said, which contained a casual employee loading. Mr Fowler was usually rostered five days a week with two rostered days off. That is, he was rostered to work five days a week with two rostered days off, not necessarily taken consecutively.

37 The busiest time of the year was from October to December, after which trade would quieten down. Then from the end of January it would pick up again until winter when it would quieten down again.

38 Mr Fowler was, however, rostered weekly throughout the time of his employment and for a week at a time, including his two days off. The roster was, however, it was accepted, subject to the cancellation of work for any particular day or days by the employer if there were not enough customers for a trip or trips on that day. The rosters were also subject to alteration if a skipper, including Mr Fowler, wanted a day off. Then he would leave a note for Mrs Di Latte who prepared the rosters. His request not to be rostered on a particular day was usually met, but it was not always accommodated and it was the right of the employer to accept that cancellation or not. Mr Fowler accepted that that was the arrangement.

39 It was common knowledge that if any of the skippers accepted work elsewhere that skipper would be taken off the roster.

40 However, the matter can be best described in the words of Mrs Di Latte, the wife of Mr Di Latte. It was her job to prepare the rosters. It was she who was notified if skippers wanted to take time off. As she said in evidence, and as coincides with the evidence of Mr Fowler, the roster is and was prepared according to the movements of the boats, and any changes which were to occur had to occur within the framework of the roster. This might occur due to break downs, insufficient customers, cancellations or if a skipper were unavailable. In other words, Ms Di Latte prepared the roster, from week to week, on the assumption that the skippers were available and would work as rostered. She did not check whether they were available before preparing and promulgating the roster.

41 It is to be noted that a skipper, including Mr Fowler, of course, was only paid for the hours which he actually worked. Thus, if he swapped shifts he was obviously not paid because he did not work. If he finished early or late he was paid only for the hours which he worked. Obviously if he worked more hours than he expected to on that day he would be paid more money.

42 The work which Mr Fowler did was labelled casual. There was no finding at first instance that any award applied to Mr Fowler's employment, nor was it suggested in this hearing that any such finding was made. There is no doubt that the employment was labelled "casual". The classification name given to Mr Fowler's job, namely "skipper" does not indicate the nature of his employment one way or the other. It was not established that any award applied. The number of hours which he worked per week were regular, depending on the seasons. However, there were fixed and regular rosters which were worked by the skippers and which it was expected would be worked by the skippers. The hours which Mr Fowler and other skippers worked were fixed in advance. Certainly, they were able to swap a shift at the change of skippers, or to seek to not work a shift, but that latter matter was one within the power of the employer to deal with. It was not a matter of right or a matter for the decision of the employee. There were fixed starting and finishing times set out in the roster. There was clearly a reasonable expectation of continuity of employment on the part of Mr Fowler, and, indeed, that expectation was met for a period of approximately 20 months until the employer terminated, all of a sudden, Mr Fowler's employment with little notice.

43 Mr Fowler also had a reasonable expectation that work would be available and would continue to be available, and that expectation was met whilst it continued for a period of almost 20 months without any indication that it would not continue. His expectation in that regard was clearly met. The arrangement might readily be found to be continuing and indefinite. He was in regular employment indefinitely for approximately 20 months and his employment had the nature of a permanent position.

44 That Mr Fowler was away for a week or so, and that he swapped shifts or gave notice of days when he was unable to work because he was ill or otherwise, does not at all detract from the regular, indefinite, continuing and permanent nature of his employment. I have already referred to that. That he worked to a roster prepared in advance with the expectation that he would comply with it also detracts from any suggestion that he was working a series of separate distinct contracts of employment entered into for a fixed period. That is the essence of casual employment and a finding that the employment was casual could not be made for that reason.

45 I would add that because working the rosters involved working for a single and ongoing contract of indefinite duration that also meant that the contract was not a casual one. That he agreed not to claim leave or an entitlement to leave is inconclusive because paid leave is often excluded if the parties or one of them is under the impression that the contract is not one which imposes an obligation upon the employer to pay annual leave, sick leave, or that other terms and conditions also or alternatively might apply. In any event, if the contract is one to which the *Minimum Conditions of Employment Act* 1993 applies, whether the parties or a party are of the view that annual or other leave should be paid, is not to the point because the obligation to pay for annual leave or sick leave is a condition of the contract implied pursuant to s5 of the *Minimum Conditions of Employment Act* 1993.

46 If Mr Fowler were a part-time permanent employee, which it was clearly open to find that he was, he may well be entitled to leave. Further, the fact that Mr Fowler was not paid for the hours which he did not work, and the fact that he had some extra time off for illness or otherwise did not mean that he was required to work as a casual employee. In other words, such an arrangement, which was not implemented often, was not incompatible at all with the contract being a single ongoing contract of indefinite duration and therefore not a casual contract. Further, swapping shifts is not incompatible either with such a finding.

47 I have already referred to rostered days off which constituted his regular days off each week. That sort of flexibility also arose because work could be cancelled even though rostered if there were insufficient customers for a trip or trips. There was a seasonal factor, too, but that did not detract from the ongoing nature of the contract. Sometimes the roster was altered by the employer.

48 The Commissioner at first instance was, for those reasons, too, entitled to and correct to find that there was a clear employer/employee relationship between the parties on 19 May 2004 and that the employment relationship between the parties did not come to an end upon the completion of each period of duty. For all of those reasons, the Commissioner was correct to find that the employment was not casual (see paragraphs 32 to 38 of the reasons for decision at first instance). Therefore, each period of duty on each rostered day or even on rostered days off did not mean the termination of the contract and the continuing rosters represented clearly an engagement of Mr Fowler's services for any period. It was open and was correct to find. The Commissioner was correct to find that the employment was not casual in that Mr Fowler did not work under a series of separate and distinct contracts of employment entered into for a fixed period, but rather that the contract between the parties was a single and ongoing contract of indefinite duration. That was the correct finding on a consideration of all of the facts and circumstances of the case.

49 Ground 1 is not made out for those reasons.

Ground 2

50 By this ground, it was alleged that the Commissioner at first instance erred in failing to give proper weight to its finding that the appellant had a valid reason for "downsizing" its operations, and therefore the appellant was entitled to reduce the number of skippers which it employed.

51 Further, the respondent, it was submitted, could not have any expectation of further offers of employment. That is not a submission of great merit. In my opinion, it was open to find that a week's notice was required to terminate the contract, so that the failure to give any notice at all was entirely unfair and Mr Fowler at least should and could have been allowed to work a shift that day, 19 May 2004, instead of Mr Mick Doyle or Andrew doing them.

52 The point of the finding was not that there was a valid reason for making Mr Fowler's job redundant. The Commissioner at first instance found that there was a valid reason.

53 Next, if, by further offers of employment in ground 2.2, it is meant that each day commenced with another offer of employment, then such a notion, for the reasons expressed above, is entirely mistaken.

54 Mr Fowler was employed on a continuing indefinite basis on weekly rosters. He was deprived of employment on a day for which he had or could have been rostered. He was therefore entitled to be paid for it. It was open to the Commissioner to so find.

55 Ground 2 fails for those reasons.

Ground 3

56 In relation to this ground, again, there is clear evidence that there was work available for Mr Fowler until the end of May 2004 because the coffee cruise was still continuing and he could have worked it. It was therefore open to find, and correct to find, that his loss was eight hours work at $22.00 per hour, namely $176.00 for the lost opportunity to work on 19 May 2004, on the cruise that day, and $500.00 per week until 31 May 2004.

57 For those reasons, ground 3 fails.

Ground 4

58 By that ground it is alleged that there was no basis for the Commissioner's finding that Mr Fowler suffered any loss of opportunity in the period from 19 May 2004 until 31 May 2004. There was no error there. If he had not been dismissed certainly he could have expected to and would more probably than not have worked during that period as it was open to find.

59 For those reasons, ground 4 fails.

Ground 5

60 This ground contains the complaint that the Commissioner at first instance erred in making an award for injury for five different reasons. First, the Commissioner made no finding that in the principles expressed in *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849 (FB), that the effects of the dismissal were any more than those ordinarily associated with a dismissal, it was alleged. I should add that the Commissioner found that the conduct of the appellant in removing Mr Fowler's name from the roster and not taking any steps to advise him of the dismissal and reasons why and then to send the letter of 18 May 2004 to Mr Fowler informing him his services were no longer required was blatantly procedurally unfair.

61 (I would add that it was not contested before the Full Bench that this was a dismissal and it was clearly a dismissal within the meaning of *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* 61 WAIG 611 (IAC), and see particularly in relation

to casual employment *Ryde-Eastwood Leagues Club Limited v Taylor* (op cit), applied by a Full Bench of this Commission in *Swan Yacht Club (Inc) v Bramwell* (FB) (op cit))).

62 The Commissioner also found that this conduct was oppressive, callous and humiliating.

63 The Commissioner went on to find, too, that Mr Fowler had suffered an injury as a result of the manner of his dismissal, emphasising that the callous way in which he was treated caused injury. It was not disputed that this was the fact.

64 The Commissioner was also satisfied, she said, that Mr Fowler suffered feelings of "shock" within the legal meaning of that word.

65 None of those findings were challenged. It is quite clear that those findings of fact clearly expressed the Commissioner's finding that the effects of the termination, both in the nature of the act of termination or acts, and the effect on Mr Fowler were more than those ordinarily associated with a dismissal.

66 There was also, contrary to the submission for the appellant, ample unshaken evidence from Mr Fowler of the effect of what occurred.

67 Next, the order was not punitive at all, nor was it arbitrary. That much is clear.

68 The Commissioner canvassed the nature of the injury which was an injury towards the lower end of the scale, and the evidence of the acts causing the injury, and the effect on Mr Fowler and made a judgment. It was not arbitrary and it was certainly not punitive. Indeed, nothing was said or submitted which would properly persuade me that it was punitive.

69 Speaking for myself, I would add this. There is something to be said for an opinion that awards in this Commission of compensation for injury are too low, and particularly in cases where there is medical and legal evidence of injury, but not solely. It might be said that Full Benches of this Commission should consider, if the parties submit it, whether the awards should be increased. However, that is a matter which it is not necessary to consider on this occasion and can await any submissions which are made another day before there is any consideration of it.

70 This award was not sufficiently judged as being at the lower end of the scale, which the injury was. I would reduce it therefore by one-third to reflect that it was at the lower end of the scale and award $2,000.00 not $3,000.00. The discretion, for those reasons, and in that respect alone, I am satisfied, is established to have been miscarried within the grounds laid down in *House v The King* [1936] 55 CLR 499 because the amount is manifestly outside what a fair exercise of discretion would be. The Full Bench is therefore entitled to substitute its decision for that of the Commissioner at first instance, on that point.

71 Ground 5 is therefore made out.

FINALLY

72 I would, for all of those reasons, find that the exercise of the discretion at first instance miscarried only in relation to the quantum of the award of compensation for injury and not in relation to loss. I would find ground 5.4, the second ground 5.4 that is, made out for that reason and uphold that ground.

73 I would otherwise find that there was no miscarriage of the exercise of the discretion at first instance and no appealable error established applying the principles in *House v The King* (op cit).

74 I would vary the order at first instance by substituting in the second paragraph for the figure "$3,000" the figure "$2,000".

75 I would otherwise dismiss the appeal. I would issue a minute accordingly.

COMMISSIONER S J KENNER:

76 The grounds of and background to this appeal are set out in the reasons for decision of the President which I have had the benefit of reading in draft form. I therefore do not repeat those matters. I only wish to deal specifically with ground 5, which challenges the learned Commissioner's finding and order to make an award of compensation for injury. The learned Commissioner in her reasons at first instance at par 40, was satisfied that the applicant had suffered an injury as a result of the manner of the termination of his employment. She concluded that the dismissal of the respondent was effected in a callous way and he had suffered shock accordingly. An award of $3,000 compensation for injury was made.

77 The appellant submitted that there was no substantive basis for the order of compensation for injury in this case. The thrust of the submission was that the evidence adduced at first instance as to the effect of the dismissal on the respondent, was no greater than that ordinarily associated with a termination of employment and did not warrant any award of compensation. Moreover, the appellant submitted that in any event, the quantum of compensation for injury awarded was arbitrary and the reasons expressed by the learned Commissioner for awarding compensation were inadequate.

78 It is undoubtedly the case that pursuant to s 23A(6) of the Industrial Relations Act 1979 ("the Act") the Commission, on a finding that an employee has been dismissed harshly, oppressively or unfairly, may make an order of compensation for injury as long as such an order for compensation, including any compensation for loss, does not exceed six months remuneration of the employee.

79 It is of course necessary, for the Commission to make an order of compensation for injury, for it to be satisfied and to find, that the injury was causally connected to the dismissal. That is, it must be the manner or act of the dismissal itself, which is causally connected to the injury suffered. It has been recognised that there is an element of distress connected with every termination of employment and that there must be evidence of particular circumstances to warrant an award of compensation for injury. For example, in *Burazin v Black Town City Guardian Pty Ltd* (1996) 142 ALR 144, the Industrial Relations Court of Australia had before it a case in which an allowance for distress was made in an order for compensation, in the case where an applicant was escorted from the employer's premises by police in the full view of other employees. (See also similar observations in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8; *Timms v Philips* (1989) 79 WAIG 1318: *Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986; *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849.

80 In this case, the evidence as to the effect on the respondent of the dismissal was brief. However, simply because the evidence was brief, does not mean that it may not support a finding of injury for the purposes of s 23A(6) of the Act. Where there is an allegation or claim of injury, then some caution should be exercised. Whilst not always necessary, it will be of assistance in assessing any such claim if there is independent oral or documentary evidence of the effect of a dismissal on an employee, by way of medical or other evidence to that effect. On the evidence at first instance, the injury found by the learned Commissioner was certainly at the lower end of the spectrum and would warrant a limited award of compensation. I agree that to this extent, the discretion of the Commission at first instance miscarried and it would be appropriate to reduce the award by 30% in this case, given the evidence and the findings made.

81 I do not agree with the appellant's submissions that the award of compensation for injury was arbitrary. Nor do I accept that the reasons for decision of the learned Commissioner in this respect were inadequate. There was evidence adduced and a finding made, albeit in brief terms. Brevity of reasons expressed does not mean however that those reasons are inadequate, as

long as the basis for the Commission's decision is apparent: *Ruane v Woodside Petroleum* (1990) 71 WAIG 913. I would therefore uphold this ground of appeal to this extent but otherwise dismiss the appeal.

COMMISSIONER S M MAYMAN:

82 I have had the advantage of reading the draft reasons for decision of His Honour, the President. I agree and have nothing further to add.

THE PRESIDENT:

83 For those reasons, the order at first instance is varied and the appeal is otherwise dismissed.

2005 WAIRC 01790

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY & SONS PTY LTD T/A OCEANIC CRUISES
	APPELLANT
	-and-
	PETER FOWLER
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 3 JUNE 2005
FILE NO/S	FBA 53 OF 2004
CITATION NO.	2005 WAIRC 01790

Decision	Order at first instance varied and appeal otherwise dismissed.
Appearances	
Appellant	Mr K Trainer, as agent
Respondent	Mr P Fowler

Order

This matter having come on for hearing before the Full Bench on the 28th day of April 2005, and having heard Mr K Trainer, as agent on behalf of the appellant, and Mr P Fowler, acting on his own behalf as the respondent, and the Full Bench having heard and determined the matter, and the reasons for decision having been delivered on the 3rd day of June 2005, it is this day, the 3rd day of June 2005, ordered as follows:-

(1) THAT appeal No FBA 53 of 2004 be and is hereby upheld insofar as it relates to ground 5 of the grounds of appeal.

(2) THAT the decision of the Commission in matter No 782 of 2004 made on 30 November 2004, citation No 2004 WAIRC 13466, be and is hereby varied by deleting Order 1, and substituting for Order 1 the following new Order 1:-

"ORDERS that the Respondent pay the Applicant the sum of $676 (gross) and $2,000 (net) within seven (7) days of the date of this Order;".

(3) THAT the appeal heard is hereby otherwise dismissed.

By the Full Bench

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

2005 WAIRC 01813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE
	APPELLANT
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER J F GREGOR
	COMMISSIONER S WOOD
DATE	TUESDAY, 14 JUNE 2005
FILE NO.	FBA 51 OF 2004
CITATION NO.	2005 WAIRC 01813

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPELLANT** **-and-** DIRECTOR GENERAL, DEPARTMENT OF JUSTICE **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER J F GREGOR COMMISSIONER S WOOD
DATE	TUESDAY, 14 JUNE 2005
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CITATION NO.	

CatchWords	Industrial Law (WA) - appeal against the decision of a single Commissioner sitting as the Public Service Arbitrator - procedural fairness - jurisdiction and judicial review - delegation of power - industrial matter - standards and conduct - codes of ethics - mandatoriness - statutory interpretation - *Equal Opportunity Act of Western Australia* 1984 - *Public Sector Standards in Human Resource Management* 2001 - *Public Sector Management Act* 1994, s3, s3(1), s5(1)(c), s7, s7(d), s8, s8(1)(a), s8(1)(c), s9, s9(a), s9(a)(i), s9(a)(ii), s9(a)(iii), s9(b), s9(c) s16(1), s21(1), s21(7), s21(9), s21(10)(a), s21(10)(b), s21(10)(c), s30, s33, s64, s64(1), s64(2), s64(3), s80, s93, s93(1), s97(1)(a) - *Public Sector Management (Examination and Review Procedures) Regulations* 2001 - *Western Australian Public Sector Code of Ethics* - *Interpretation Act* 1984, s42, s59, s59(1)(a) - *Industrial Relations Act* 1979 (as amended), s7, s26(1)(a), s26(1)(c), s44, s49, s49(6), s80E, s80E(1), s80E(5), s80E(7).
Decision	Appeal No FBA 51 of 2004 upheld and orders at first instance varied. Appeal No FBA 54 of 2004 dismissed.
Appearances	
Appellant/Respondent	Mr R Andretich (of Counsel), by leave, on behalf of The Director General of the Department of Justice
Respondent/Appellant	Mr B Cusack, as agent, on behalf of The Civil Service Association of Western Australia Incorporated

Reasons for Decision

THE PRESIDENT:

APPEAL NO FBA 51 OF 2004

INTRODUCTION

1 This is an appeal brought pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") by the above-named appellant, the Director General of the Department of Justice (hereinafter referred to as "the Director General"), by name Mr Alan Piper. The respondent, The Civil Service Association of Western Australia (Inc) (hereinafter referred to as "the CSA"), was, at all material times, an "organisation", as that term is defined in s7 of *the Act*, and, indeed, an organisation of employees.

2 The appeal is brought against the decision of the Commission, constituted by a single Commissioner, in fact sitting as a Public Service Arbitrator (hereinafter referred to as "the Arbitrator").

3 The decision appealed against is constituted by an order made and perfected on 3 December 2004 which, formal parts omitted, reads as follows:-

> "That Neville Jones be appointed to the status of a Level 7 employee within the respondent's operations with an effective date of 25 December 2002, within seven (7) days of the date of this order."

4 Mr Neville John Jones was a CSA member at the material times.

GROUNDS OF APPEAL

5 The Director General now appeals against that decision on the following grounds, as amended:-

> "1. The Commissioner in her capacity as the Public Service Arbitrator erred in law in finding she had jurisdiction to consider the Application and to order the appointment of Mr Jones to the status of a Level 7 employee.
>
> **PARTICULARS**
>
> (a) Section 80E(7) of the *Industrial Relations Act* provides an Arbitrator does not have jurisdiction to inquire into or deal with any matter in respect of which a procedure referred to in section 97(l)(a) of the Public Sector Management Act is or may be prescribed under that Act, such a procedure having been prescribed in the Public Sector Management (Examination and Review Procedures) Regulations in connection with Recruitment, Selection and Appointment to the Public Sector.
>
> 2. The Commissioner erred in law in finding in her capacity as the Public Service Arbitrator she had jurisdiction to judicially review the Respondent's decision not to appoint Mr Jones.
>
> **PARTICULARS**
>
> (a) The Public Service Arbitrator is not vested with jurisdiction either generally or specifically by section 80E(5) of the Industrial Relations Act to inquire into and deal with an industrial matter solely by way of judicial review.
>
> (b) The Public Service Arbitrator misapplied the decision of the Full Bench in Civil Service Association of Western Australia Incorporated v. Director General Department of Justice [2004] WAIG 869 in finding the Public Service Arbitrator had such jurisdiction, when the ratio of the decision was that

the Arbitrator could inquire into whether the statutory conditions for the exercise of a power had been complied with when the exercise of the power was itself an industrial matter.

(c) Appointment decisions made under Section 64 of the Public Sector Management Act are not amenable to judicial review.

3. The Commissioner in her capacity as Public Service Arbitrator erred in law in finding the actions of the Respondent and Mr R Harvey were unlawful.

PARTICULARS

(a) There is no legal obligation upon an employing authority to accord a person who applies for a public service position under the Public Sector Management Act procedural fairness or a hearing in connection with the determination of the application.

(b) The Respondent as employing authority was free to bring to the attention of the Selection Panel and his delegate Mr Harvey matters that concerned him in respect of Mr Jones' suitability for appointment.

(c) Section 7, 8 and 9 of the Public Sector Management Act are not mandatory in the sense that a breach produces a void or voidable act or decision.

4. If the Commissioner in her capacity as the Public Service Arbitrator had jurisdiction to judicially review the decision of the Respondent not to appoint Mr R Jones the only order she could make was to declare the decision void.

PARTICULARS

(a) In judicially reviewing a discretionary decision a Tribunal is unable to substitute its decision for that of the primary decision maker.

(b) In making an order to appoint Mr R Jones she exceeded her jurisdiction because section 80E(7) of the Industrial Relations Act provides an Arbitrator does not have jurisdiction to inquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act is or may be prescribed under that Act, such a procedure having been prescribed in the Public Sector Management (Examination and Review Procedures) Regulations, in connection with Recruitment, Selection and Appointment in the Public Sector.

5. The Commissioner in her capacity as the Public Arbitrator exceeded her jurisdiction in ordering the appointment of Mr Jones to the status of a Level 7 employee.

PARTICULARS

(a) Such an appointment is by section 64(1) and (2) required to be made in accordance with approved procedures and could not be so when ordered to be made.

(b) The Arbitrator has no power to make an appointment in place of the Appellant.

6. The Commissioner in her capacity as an Arbitrator if she has the jurisdiction to order the appointment of Mr Jones to the status of a Level 7 employee erred in the exercise of her discretion.

PARTICULARS

(a) Ordering the appointment when the position applied for has been abolished.

(b) Ordering the appointment when it was to no office requiring duties commensurate with those of a level 7 employee to be discharged.

(c) Ordering the appointment to be retrospective when Mr Jones had already been paid in accordance with the terms of his employment and rendered no service warranting payment at level 7.

(d) The order was unreasonable in all of the circumstances."

CROSS APPEAL – APPEAL NO FBA 54 OF 2004

6 The CSA cross appeals on the following grounds:-

"The Commissioner in her capacity as the Public Service Arbitrator erred in law in finding that the Director General was not precluded from exercising or performing the power to fill the Level 7 position in this instance, after having delegated the power to the Executive Director.

PARTICULARS

The Public Service Arbitrator misinterpreted the provisions of s.59(1)(a) of the Interpretation Act 1984 when she found that the Director General could exercise his power to appoint in this particular instance after the Executive Director had finalised his exercise of the delegated power in this particular instance."

7 However, the cross appeal seeks no order from the Full Bench.

BACKGROUND

8 The background to the matter is as follows, and is little in issue.

9 Mr Neville John Jones was, at all material times, a permanent Level 6 public sector officer employed by the Director General, and a member of the CSA. He had acted as a Level 7 officer at times. At all material times, the Director General was the Director General of a department of government called the Ministry of Justice.

10 The applicant at first instance, the CSA, applied to the Arbitrator for a conference pursuant to s44 and s80E of *the Act*.

11 The orders sought by the CSA at first instance were as follows:-

"a) Within seven (7) calendar days of the date of the issuing of this Order, the respondent is to complete the implementation of Mr Jones' promotion to the position of Principal Policy Officer Level 7 (position number P001035) so that Mr Jones is substantively confirmed in the position with effect from the date on which the position was advertised. Mr Jones is to be permitted to perform all of the position's duties and is to receive all benefits, entitlements, privileges, powers, authority, responsibility, amenities and status which should reasonably accompany the position.

b) Within seven (7) calendar days of the date of this Order the Director General is to e-mail a copy of these Orders and accompanying Reasons for Decision to all staff with email facilities within the respondent's employ. No

derogatory comments about Mr Jones are to be contained in the email or in any other written communications to staff. A copy of the email is to be given to staff without email facilities."

12 At first instance, the CSA, which was the applicant at first instance, contended that the following actions of the Director General were unlawful and should be declared void:-

(a) The actions of the Director General relating to the construction and forwarding of his memorandum dated 23 October 2002, concerning Mr Neville Jones, and the instructions to officers contained therein; and

(b) The actions of the Executive Director, selection panel members, human resources officers and any other officer, in direct response to the Director General's memorandum dated 23 October 2002, relating to Mr Jones

13 At all material times, the CSA's member, Mr Neville Jones, was a permanent Level 6 public service officer employed by the Director General. He applied for a Level 7 vacancy and position, position number P001035, as principal policy officer ("the position").

14 On 10 September 2002 he was duly interviewed by a selection panel which subsequently assessed Mr Jones as the recommended applicant.

15 On 26 September 2002 a recommendation of the appointment of Mr Jones was forwarded to the then Executive Director, Mr Robert Anthony Harvey, who had delegated authority from the Director General to appoint an officer to fill the subject vacancy.

16 On 7 October 2002 the Acting Executive Director, Community and Juvenile Justice, Mr Robert McKim Carter, approved the panel's recommendation to appoint Mr Jones to the advertised position and certified that the selection panel had followed the proper processes. Mr Carter said that he had no concerns about endorsing the recommendation as Acting Executive Director, and no concerns about the selection process.

17 On 11 October 2002 a letter was sent to Mr Jones by a recruitment officer from the Director General's department advising him that he was the successful applicant and that subject to any appeal pursuant to the Public Sector Standards, he would be appointed to the position. The deadline for the lodgement of appeals pursuant to the Public Sector Standards was 24 October 2002. No appeals were lodged.

18 On 24 October 2002 Mr Jones was advised by the Chairperson of the selection panel, Mr William Charles Cullen, that the Director General himself, Mr Piper, had forwarded a memorandum to Mr Cullen expressing concerns about Mr Jones' work performance and "requesting" that referee reports be obtained from specific persons chosen by the Director General himself.

19 Mr Jones received a letter dated 5 December 2002 from Ms Stephanie Margaret Withers, Director of Human Resources, in which she informed him that he would not be appointed to the advertised position. The letter further advised that the vacancy would not be filled, and that the Director General was "seriously considering abolishing this position".

20 The letter of 5 December 2002 also advised Mr Jones that not only would the position not be filled, but that this was as a result of referee reports which had been received and which the Executive Director thought revealed that Mr Jones was unable to meet the requirements of the vital aspects of the essential criteria.

21 Mr Jones had worked in the Director General's department for 23 years. His current position at the hearing was Level 6 Senior Policy Officer, Court Services Division. He had, on the evidence, acted in Level 7 positions with the Director General over the past ten years and had once acted as a Level 8 employee for seven weeks. It is to be noted that the panel did not seek references for Mr Jones because they knew him.

22 It is quite clear that when he received the letter of 11 October 2002 advising that he was being recommended for appointment to the position for which he applied, he understood that he would be appointed to the Level 7 position, subject to no complaints being lodged prior to 24 October 2002 alleging a breach of Public Sector Standards.

23 On 24 October 2002 Mr Cullen contacted Mr Jones and informed him that the Director General, Mr Alan Piper, had some concerns about his performance and as a result asked Mr Cullen to obtain referee reports concerning Mr Jones' suitability for the Level 7 position. "Referee reports" are something of a misnomer because the reports were not references obtained by Mr Jones to support his candidature. They were reports required by the Director General from his officers, and it would seem senior officers, because he was not satisfied that Mr Jones was the right person to be selected. This was so even though two of the persons concerned were nominated referees of Mr Jones. It is clear that Mr Piper did not agree with the selection panel's recommendation. Mr Jones was concerned about Mr Piper's actions and raised the matter with the CSA and with Ms Stephanie Withers, then the Director of Human Resources for the Director General. Mr Jones asked Ms Withers for a copy of the Director General's letter to Mr Cullen requesting that "referee reports" be obtained. She told Mr Jones that he would be given the opportunity to review the referee reports prior to any decision being made about filling the Level 7 position. Mr Jones confirmed that in early November 2002 his CSA representative sent correspondence to the Director General, Mr Piper, complaining about the requirement that "referee reports" be obtained and requesting that Mr Jones' appointment proceed. There was, however, no response.

24 The Director General's memorandum to Mr Cullen of 23 October 2002 reads, formal parts omitted, as follows:-

"**Re: Principal Policy Officer (Position No 001035) – Recruitment, Selection and Appointment Process**

Routinely I am advised of senior appointments within the Division. As such I have recently been advised of the recommended appointment of Mr Neville Jones to the position of Principal Policy Officer within the Community and Juvenile Justice Division.

It has previously come to my attention that there are some concerns in regards to Mr Jones' skills and abilities as per the following:

- Deficiency in his ability to engage and consult with stakeholders when developing policies/strategies.
- Deficiency in his ability to develop policies/strategies that meet the needs of the business area.
- Deficiency in his ability to complete projects satisfactorily.
- Deficiency in his ability to play a leadership role within the Department.
- Lacks the confidence of his colleagues to represent the Department at senior decision-making forums.

I have been informed that referee reports were not sought by the panel to clarify Mr Jones' suitability for the position. Although, I recognise that this is not a mandatory requirement, given the concerns I have outlined above, I request that the panel seek written referee reports from the following personnel.

- Mr Gary Thompson, Executive Director, Courts
- Mr Stephen Kay, Director Court Development

- Mr Alan Thompson, (Referee nominated by Mr Jones)
- Dr Bob Fitzgerald (Referee nominated by Mr Jones)

I have sought advice from the Human Resources Directorate, which has prepared the attached referee report to be completed by the referees. Based on the outcome of these referee reports and in consultation with Mr Terry Bransby, Manager HR (CJJ), I wish to be advised of your recommendation regarding Mr Jones' suitability for the position before any such appointment is confirmed."

25 That communication sets out previous information which Mr Piper had about Mr Jones' skills and abilities. Mr Piper also nominated the persons from whom "references" should be sought, two being referees nominated by Mr Jones.

26 On or about 11 December 2002 Mr Jones received the following letter from Ms Withers, dated 5 December 2002, which, formal parts omitted, reads as follows:-

"**P001035, PRINCIPAL POLICY OFFICER, LEVEL 7, POLICY & PLANNING, CJJ DIVISION**

Notwithstanding the letter of recommendation to the position of Principal Policy Officer P001035, dated 11 October 2002, we regret to advise a decision had been made not to proceed in filling this vacancy.

In conjunction with your application and interview, your nominated referees, plus two Departmental referees were contacted. Referee reports provided by Mr Thompson and Dr Kay indicate that there are issues around your appointment to this position. Drawing from this information Mr Harvey feels that you are unable to meet the requirements of the vital aspects of the essential criteria.

Also, Mr Harvey is currently looking at the organisational structure within Policy & Planning and is seriously considering abolishing this position, as he believes the structure is 'top heavy' and more resources need to be directed to lower level policy positions.

Appointments in the public sector are subject to the provisions of the Public Sector Management (Examinations and Review Procedures) Regulations 2001. Accordingly, as an applicant, it is open to you to make application for a review of this process, if you are of the opinion that the Recruitment, Selection and Appointment Standard (see reverse of page 2) has been breached.

In lodging your claim, specify which part of the Standard you believe has been breached and why, along with a brief explanation as to how the outcome of the selection process has adversely affected you.

Your claim must be received in this office by 5.00pm, 19 December 2002. Claims cannot be accepted after this date. Your claim should be forwarded either by email to humanres@justice.wa.gov.au, fax to (08) 9264 1273, post to The Recruitment Officer, GPO Box F317, Perth WA 6841, or hand delivered to the Human Resources Directorate, 11th Floor, 141 St Georges Terrace, Perth."

27 It was only after he received this letter, Mr Jones stated, that he was given access to the referee reports (except for Dr Fitzgerald's report which had previously been emailed to him).

28 Mr Jones said in evidence that Mr Piper had previously not made him aware of the performance issues raised in his letter to Mr Cullen. The last performance appraisal of Mr Jones was conducted in 1996 by the Director General. Mr Jones said that the Director General's allegations in his memorandum of 23 October 2002 were without substance.

29 Mr Jones spoke of the four referees, Dr Fitzgerald, Mr Alan Thompson, Ms Lesley McComish and Mr Gary Thompson, referring to their knowledge of his work, or their lack of such knowledge, whichever was the case. He said that as a result of not being appointed to the Level 7 position, he had suffered substantial economic loss. He also said that the Director General's opinions about him had become well known within the Director General's operations and this had had a negative impact on his future career prospects with the Director General. He said that he believed that he had become ineligible to take up a permanent Level 7 position within the Director General's operations as a result of the Director General's actions. He said that the dispute had had a negative impact on his health and that he was shattered by what had transpired after working for so many years with the Director General. Mr Jones stated that throughout 2003 he acted in a Level 7 position dealing with policy development and legislation and he was paid at the top level of the Level 7 salary range. He said also that, whilst in this position, he had not been criticised for his work, but had received only "positive responses".

30 Subsequently, Dr Kay had discussed with him the possibility of acting in Ms McComish's Level 7/8 position supervising a number of Level 7 employees, if her position became available. However, the position did not become available.

31 His evidence was that he understood that the Level 7 appointment would automatically proceed unless an application was lodged alleging a breach of Public Sector Standards. Mr Jones understood that the letter he received from Ms Wood dated 11 October 2002 formed part of the Director General's process of making a formal offer to an employee. He had not worked with the Director General's substantive Executive Director, Mr Robert Harvey, up to the time he was selected for the Level 7 position, and he understood that if he was appointed to the position he would work with Mr Harvey, but would report to him through Mr Cullen.

32 Mr Robert Carter, the Director General's Acting Executive Director, Community and Juvenile Justice ("CJJ"), in October and November 2002, who had a delegation from the Director General to do so, signed off on the selection panel's recommendation that Mr Jones be appointed to the Level 7 position and certified that the selection panel had followed proper processes. Mr Carter said that under the Director General's selection process a selection report is generated once a selection panel finalises its decision. The appointment process is then reviewed by the Director General's human resources section and the recommendation is then given to the Executive Director for endorsement. Mr Carter's evidence was that he had no concerns about the selection process used to fill the Level 7 position and that he had no concerns about endorsing the recommendation that Mr Jones be appointed to the Level 7 position.

33 Mr Cullen, who was the selection panel's chairperson for the Level 7 position, said that the decision was unanimous and that Mr Jones was the most competitive applicant. No reference reports were sought, he said, because the selection panel concluded that it was not necessary. Mr Cullen expected that Mr Jones be appointed to the Level 7 position and he was aware that Mr Carter had endorsed the selection panel's decision. Mr Cullen said that he was not asked to have Mr Jones comment on the referee reports, and that the selection panel did not reconvene to consider the reports because it relied on its previous decision to select Mr Jones on the basis of the information which it had at the time and because the selection panel believed that it had already made a correct decision to recommend Mr Jones for the Level 7 position. After obtaining the referee reports as requested, Mr Cullen submitted them to Mr Harvey, who had by this time returned to the Executive Director, CJJ, position in November 2002, for his attention.

34 Ms McComish confirmed that she was on the selection panel for the Level 7 position. She stated that Mr Jones was the most able applicant for the Level 7 position. She said that she had worked closely with Mr Jones and had been familiar with his work since early 2002.

35 Ms Withers gave evidence by way of a witness statement. At the time she gave evidence, she was the Acting Director, Business Management, Prisons Division, Department of Justice, having held that position since 23 February 2004. She was previously the Director General's Director Human Resources and dealt with the Level 7 position which was being filled. She said in her statement of evidence that the selection panel followed the recommended selection process which is based on the following:-

(a) Department of Justice Recruitment and Selection Policy, 1996;

(b) Public Sector Standards in Human Resource Management 2001;

(c) Public Sector Management Act, 1994 (hereinafter referred to as "*the PSM Act*");

(d) Public Sector Management (Examination & Review Procedures) Regulations, 2001; and

(e) Equal Opportunity Act of Western Australia, 1984

36 Ms Withers said that she understood that the selection panel chose not to obtain referee reports because he was well known to panel members and it is not an essential step in the selection process. She said that the letter sent to Mr Jones on 11 October 2002 was not a binding offer. She understood that on 23 October 2002 the Director General, Mr Piper, raised the issue of Mr Jones' suitability for the Level 7 position with Mr Cullen on the basis that he had previously been made aware of concerns about Mr Jones' skills and abilities. Mr Piper documented these deficiencies and requested that four "referee" reports be obtained from four persons nominated by him. After the reports were obtained, Mr Harvey dealt with Mr Piper's request. He had a delegation from the Director General to select and appoint persons for positions in his division.

37 On 3 December 2002 Mr Harvey wrote to Ms Withers as follows:-

> "**Re: Appointment Process – Principal Policy Officer P001035**
>
> I refer to the matter relating to the appointment of Mr Jones to the position of Principal Policy Officer within Community and Juvenile Justice.
>
> It is clear from the referee reports provided by Mr Gary Thompson and Dr Steven Kay that there are some issues around Mr Jones' appointment to the position of Principal Policy Officer.
>
> My personal belief is that Mr Jones' approach does not display a contemporary view of policy development. This view is that current technology provides policy officers access to vast amounts of knowledge and they are becoming more influencers and managers of stakeholders. The selection criteria "Relationship Building and Networking" pertaining to this position states that the successful applicant is to have the 'ability to communicate effectively with diverse audiences, using a variety of strategies, establishing relationships with stakeholders and represent and promote the agency". The above-mentioned referee reports question Neville's ability to do this.
>
> It is also apparent, within the current organisational structure of the Community & Juvenile Justice Division, that there is a preponderance of Level 7 positions and given this circumstance, serious consideration is being given to creating more operational levels with the Division and decreasing the number of Level 7 positions. The Principal Policy Officer position may as a consequence be abolished.
>
> All things considered I have decided not to proceed with filling the vacancy for Principal Policy Officer, P001035."

38 Ms Withers then wrote to Mr Jones after Mr Harvey decided not to proceed to fill the position advising him of this. She said that the referee reports requested by Mr Piper acknowledged Mr Jones' strengths and weaknesses. She also said that it was unusual for a delegated officer to re-visit a selection panel's decision after the selection panel's recommendation had previously been endorsed. Mr Harvey had the right to reject the selection panel's decision as long as he did not do so arbitrarily or capriciously, she said.

39 She told Mr Jones that he was unable to meet the requirements of vital aspects of the essential criteria, but, when she was asked which criteria in particular she was relying on, she referred to the reasons outlined in the memorandum from Mr Harvey which referred to the selection criterion "Relationship Building and Networking".

40 Mr Harvey also gave evidence in chief by way of a witness statement. He said that the review of the Level 7 position's appointment arose from the Director General's request to Mr Cullen that the selection panel review its decision. After Mr Cullen wrote to Mr Harvey advising that he did not wish to have anything further to do with the Level 7 position because the selection panel had already made its recommendation Mr Harvey then became involved.

41 The information contained in Mr Harvey's memorandum to Ms Withers of 3 December 2002 about Mr Jones not fulfilling the necessary requirements for the Level 7 position was based on Mr Gary Thompson and Dr Kay's references.

42 Mr Harvey said that the "Relationship Building and Networking" criterion was not the only criterion which he took into account when deciding not to appoint Mr Jones to the Level 7 position. He stated that other relevant skills that Mr Jones lacked included the ability to engage. He said that Mr Jones had a traditional style and lacked innovation which was inconsistent with the dynamic nature of the Level 7 position. Mr Harvey said that he also took into account that the Level 7 position came within his area of responsibility, he had certified the job description for this position, it was a job he had created and he had specific views about how he saw this position being undertaken.

43 On 16 January 2003, the position at Level 7 appointment to which Mr Jones applied for, was abolished by the Director General, as Ms Withers had forewarned.

FINDINGS

44 The Arbitrator found as follows, namely that:-

(a) All of the witnesses were honest and they gave evidence to the best of their recollection, but that Mr Harvey was tentative and unconvincing when giving evidence about the basis on which he determined that Mr Jones was unsuitable to be appointed to the Level 7 position.

(b) There is jurisdiction to deal with the application because the claim does not relate to a breach of Public Sector Standards, specifically the standard applying to recruitment, selection and appointment.

(c) The complaint is whether the Director General and Mr Harvey acted in a lawful manner when they became involved in the appointment process for the Level 7 position after the selection panel decided to recommend Mr Jones for appointment to this position and after this decision was endorsed by Mr Carter who, as the Director General's acting Executive Director CJJ, was delegated with the responsibility of filling the Level 7 position.

(d) Mr Jones is a government officer, that this issue concerned an industrial matter as defined in *the Act* as it related to Mr Jones' rights as an employee.

(e) The question to be determined was whether Mr Piper and Mr Harvey engaged in a valid exercise of power when Mr Piper became directly involved in the selection process for the Level 7 position.

(f) The Director General and his employees are required to adhere to the requirements of *the PSM Act* and the *Western Australian Public Sector Code of Ethics* (hereinafter referred to as "*the Code*") (see s30 of *the PSM Act*).

(g) It is also the case that public sector departments and agencies are subject to the general principles of administrative law when applying statutory rules, regulations and acts of Parliament.

(h) Mr Piper and Mr Harvey became involved in the Level 7 position's selection process resulting in the selection panel's recommendation that Mr Jones be appointed to the Level 7 position and Mr Carter's endorsement of the selection panel's decision effectively being overturned.

(i) Even though Mr Jones was unanimously chosen by the selection panel as its preferred candidate for the Level 7 position and the selection panel's decision had been ratified by the person delegated by the Director General to fill this position Mr Jones was not appointed to the Level 7 position.

(j) It is not an unfettered right on the part of the delegator to interfere in the selection process or to seek to take over the selection process unless the delegator him or herself exercises this power in accordance with proper procedures and processes applying in the public sector as well as the relevant statutes. The delegation was valid under s33 of *the PSM Act*.

(k) Mr Piper acted "inappropriately" and contrary to the statutory requirements on him by writing the memorandum to Mr Cullen on 23 October 2002 and initiating a review of the selection process for the Level 7 position because Mr Piper did not have the power to interfere in the selection process in the way in which he did.

(l) That in doing so Mr Piper's actions were contrary to a number of the provisions of *the PSM Act* and *the Code* and the requirement on him to adhere to the necessity to afford an employee the right to procedural fairness.

(m) The Arbitrator had regard to s7 and 9 of *the PSM Act* which deal with general principles of public administration and management and general principles of official conduct.

(n) There is a provision that all public sector employees are to act in an open and accountable manner, they must protect people's rights to due process, and they must treat employees courteously and with due consideration. Further, employees are to be informed about decisions and actions affecting them.

(o) The Arbitrator accepted that Mr Piper had the right to bring to the attention of the delegate and the selection panel relevant information that may not have been considered in filling the Level 7 position, but that Mr Piper was required to act in a fair and transparent manner.

(p) When Mr Piper re-opened the selection process for the Level 7 position his actions were contrary to the requirements on him under s7(d) and s9(a)(iii) and s9(c) of *the PSM Act* and those sections of *the Code* concerning the necessity to act in an open manner and at the same time protect a person's right to due process and afford employees the opportunity to be informed about any decision affecting them.

(q) Mr Piper did not act in an open and transparent manner towards Mr Jones by nominating two of the four referees who were required to write reports about him.

(r) The inference could be drawn that the two referees selected by Mr Piper were deliberately chosen to achieve a pre-determined outcome as Dr Kay and Mr Gary Thompson had a limited knowledge of Mr Jones' skills and abilities.

(s) Mr Gary Thompson initially refused to fill out this report due to his limited knowledge about Mr Jones.

(t) Mr Jones was denied procedural fairness when he was not given the opportunity to review the pro-forma referee report for the Level 7 position prior to it being sent to the referees nominated by Mr Piper.

(u) In unilaterally deciding on the structure of the referee report Mr Piper did not ensure Mr Jones' right to due process as provided for in *the Code*. He was denied due consideration and courtesy as provided for in *the Code* and s9(c) of *the PSM Act* when the process was re-opened.

(v) Mr Piper did not act in an open and accountable manner towards Mr Jones as required under *the Code*, nor was Mr Jones afforded procedural fairness since he was unable to respond to Mr Piper's personal views about his abilities.

(w) No opportunity was given to Mr Jones to be heard before he was adversely affected by the decision.

(x) He was treated unfairly and denied procedural fairness because he was not given an opportunity to, and Mr Piper did not ensure that he was able to, respond to the referees' views or otherwise prior to a decision being made about filling the Level 7 position.

(y) Thus, Mr Jones should be appointed to a substantive Level 7 position.

ISSUES AND CONCLUSIONS

Introduction

45 At first instance, counsel for the Director General submitted that there was no jurisdiction to hear and determine the matter in that to do so was to entertain a complaint of a breach of Public Sector Standards. That submission was rejected.

46 The Arbitrator found that public sector departments and agencies are subject to the general principles of administrative law when applying statutory rules, regulations and Acts of Parliament.

47 She went on to review the actions of the Director General and of his delegate, Mr Harvey.

48 She then, at paragraph 72, found that the Director General had "acted inappropriately" and contrary to the statutory requirements imposed upon him by writing to the chairman of the selection panel on 23 October 2002 and by initiating a review of the selection process. The Arbitrator found, also, that in doing so, the Director General's actions were contrary to a number of the provisions of *the PSM Act* and *the Code* in addition to the requirements "to adhere to the necessity to afford an employee the right to procedural fairness".

49 The particulars of the unlawful conduct found to have occurred appear at paragraphs 74-78 of the reasons for decision.

50 The Arbitrator also found that the Director General's involvement in the selection process for the Level 7 position was not a valid exercise of his powers and implicitly unlawful.

51 She also found that Mr Harvey's actions (see paragraph 79) denied him procedural fairness, was contrary to *the Code* because it was not open or transparent, nor was he afforded due consideration and courtesy when the decision not to appoint him was made.

52 Further, the Arbitrator concluded at paragraph 80 that Mr Harvey intervened because Mr Piper required him to and did not do so of his own volition. Thus, Mr Harvey had made no independent decision about the appointment.

53 At all material times, it was not in dispute that the Director General was an "employing authority" as defined in s3 of *the PSM Act*.

54 By the cross appeal in this matter, appeal No FBA 54 of 2004, it was alleged that the Arbitrator erred in law in finding that the Director General was not precluded from exercising or performing the power to fill the Level 7 position in this instance, after having delegated that power to the Executive Director, Mr Harvey. The Arbitrator had so found.

Delegation – The Cross Appeal

55 It was submitted that there was no obligation on the part of the employer or his delegate, Mr Harvey, to seek to influence the selection committee. Nor, it was submitted, was it improper for the Director General to seek to influence the committee without advising Mr Jones of his "concerns" and inviting him to be heard.

56 Mr Harvey, it was submitted, was entitled, when he came to make his decision, whether to appoint Mr Jones, to take into consideration any relevant material which came into his possession. It is quite clear that the Director General has the right to exercise or influence an appointment, even though that power in this case had been delegated to Mr Harvey.

57 S59(1)(a) of the *Interpretation Act* 1984 (as amended) (hereinafter referred to as "the *Interpretation Act*") reads as follows:-

> "(1) Where a written law confers power upon a person to delegate the exercise of any power or the performance of any duty conferred or imposed upon him under a written law —
>
> (a) such a delegation shall not preclude a person so delegating from exercising or performing at any time a power or duty so delegated;"

58 That provides that where a written law confers power on a person to delegate the exercise of any power or the performance of any duty conferred or imposed upon him under a written law, such delegation shall not preclude a person so delegating from exercising or performing at any time a power or duty so delegated. The words of the section are plain and unequivocal.

59 On a proper construction of s59(1)(a) of the *Interpretation* Act, within the context of the whole of the section and the whole of the Act, the delegation made pursuant to a written law, s33 of *the PSM Act*, could not prevent the Director General using his authority because s59 of the *Interpretation Act* enables a delegator of power or of reference of a duty to exercise a power or perform the duty, notwithstanding the delegation.

60 Mr Piper was exercising his own power conferred on him by *the PSM Act* and was not acting contrary to s7(d). Thus, the decision of the Director General to influence his delegate was permissible, since instead he was able to exercise the power to appoint or not appoint himself.

61 The decision not to appoint Mr Jones was always the Director General's if he chose to make that decision. Further, there was not, it was submitted, anything unfair or improper in actually exercising that power, as distinct from the manner of the exercise. Accordingly, as was properly submitted, the Arbitrator erred in finding otherwise. However, there is no real effect which that finding could have on the result of the application at first instance.

Jurisdiction and Judicial Review

S80E(5) of *the Act*

62 It was a major ground of the appeal that the Arbitrator had no jurisdiction to decide the matter because the remedy sought at first instance was by way of judicial review. This, it said, was the problems only of superior courts and in this State the Supreme Court. That, of course, is subject to the right of Parliament by statute to confer jurisdiction in judicial review on other courts or tribunals.

63 It was submitted on behalf of the Director General that no such jurisdiction had been conferred on the Commission, constituted by the Arbitrator or otherwise, and, in particular, not by s80E(5) of *the Act*. S80E(5) reads as follows:-

> "(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."

64 The meaning of that provision has been carefully considered by a Full Bench of this Commission in *CSA v Director General, Ministry of Justice* (2002) 82 WAIG 2858 ("*Bowles' Case*"). The Arbitrator has the very wide jurisdiction to review, modify or vary any act, matter or thing done by an employer. The Director General is an employer. The matter before the Arbitrator was an industrial matter.

65 I agree with the submission that the Commission is able to review, as part of its arbitral function, the exercise of a statutory power conferred in relation to an industrial matter. I do not agree that the Arbitrator cannot declare the exercise of the power by the Director General or his delegates or any Chief Executive Officer, unlawful, if it is necessary to review, modify or vary any act, matter or thing, and such a finding is necessary in concluding whether that ought to be done.

66 The words of S80E *the Act* are wide and entirely clear. Further, s80E is a remedial provision and should be construed generously. In any event, because of the width of the jurisdiction and power conferred by the section it is not even necessary to construe the provision generously because it speaks for itself in wide terms.

67 In *Bowles' Case* a Full Bench recognised this and in a case which is not distinguishable or restrictable. The principle was clearly enunciated. The principles apply in this case. The are expressed at pages 2862-2863 and properly explained there as follows:-

> "There was also a submission that there was no jurisdiction in the Commission to declare the transfer invalid because what was being sought was the judicial review of an administrative act. That, it was submitted, on behalf of the respondent, was outside the jurisdiction of the Commission constituted by the Arbitrator, which, so constituted is not a superior court. Jurisdiction in this matter was said to be conferred, as I have said, by s.80E of *the Act*.
>
> S.80E(1) of *the Act* reads as follows:-

> "(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally."

S.80E(5) of *the Act* prescribes what the Arbitrator may do in the exercise of his jurisdiction. S.80E(5) reads as follows:-

> "80E. Jurisdiction of Arbitrator:
>
> (5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."

The section seems to prevent the Arbitrator interfering with any employer's exercise of its/his/her duties under the section in relation to any government officer or office under the administration of the employer in relation to any matter within the jurisdiction of an Arbitrator.

However, it is clearly and unambiguously prescribed in s.80E(5) as follows, namely that:-

> "any act, matter or thing done by an employer in relation to any such matter ((ie) within the jurisdiction of an Arbitrator), is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him or his jurisdiction in respect of that matter under this Division."

It is quite clear, therefore, that the decision to transfer and the request or direction for transfer of Ms Bowles was within the jurisdiction of the Arbitrator. I say that for the reason which I express hereinafter.

The purported transfer of Ms Bowles was the act, matter or thing which was liable to be reviewed, nullified, modified or varied by the Arbitrator in this case. That is so because it was an act, matter or thing purported to be done or done by an employer as prescribed in the *PSM Act*, s.80(E)(5), in relation to a matter within the jurisdiction of the Arbitrator. The purported transfer was clearly a matter within the definition of "industrial matter" in s.7 of *the Act* because it affected or related to or pertained to the work privileges, rights or duties of both the employer and the employee in an "industry" as defined in s.7.

Accordingly, it was open to the Commission to find that it was unlawful, or ultra vires by way of the review, or to enable the Arbitrator to modify or vary the act of the respondent.

Most cogent in this case is the power which exists under s.80E(5) of *the Act* to nullify. To "nullify" means, in its most relevant definition "To render or declare legally void or inoperative: to nullify a contract" (see "*The Macquarie Dictionary" (3rd Edition*)).

There is also, therefore, expressly conferred on the Arbitrator the power to nullify ((ie) to render or declare void the decision and other acts matters or things done to effect or to attempt to effect) the transfer to Hakea Prison of Ms Bowles. Equally as cogent is the express power to review contained in s.80.E(5).

Since the express power and jurisdiction exists to nullify any act of the Chief Executive Officer, as an employer, it follows that the Arbitrator is not prevented from doing acts or giving orders or directions which are usually confined to the process of judicial review in a court in order to review, modify, vary or nullify such an act. If there was a restriction on that power, Parliament would have expressly said so. It did not. Further, the act sought to be reviewed clearly fits within the definition of an "industrial matter" as it appears in s.7 of *the Act* (see also s.80E(1)). I would therefore find that the power to nullify, modify or otherwise deal with the decision to transfer in accordance with *the Act* was within jurisdiction. I say that because the decision to transfer Ms Bowles and the purported transfer of Ms Bowles was an act which affected and directly related to the rights, duties and obligations of both an employer and an employee in an industry as defined. The act sought to be nullified, modified, reviewed or varied was and is an act, matter or thing done by an employer in relation to a matter within the jurisdiction of the Arbitrator namely an industrial matter relating to a government officer (see s.80E(1)). It is therefore within jurisdiction whether the act complained of is or was an administrative act or not.

There was, therefore, clearly, express jurisdiction to vary modify or indeed to render void by declaration all or any of the acts, matters or things done effected or attempted to be done or effected by the respondent.

In that this related to what was done or sought to be done pursuant to statutory power under the *PSM Act* there was clear jurisdiction to nullify, vary or modify what was done.

The *Ishmael Case* (op cit) is authority for a number of propositions. These include S80E(7) of *the Act* which deprives the Arbitrator of jurisdiction to enquire into or deal with or refer to the Commission in Court Session or the Full Bench any matter in which a procedure referred to in s.97(1)(a) of the *PSM Act* is or may be prescribed under that Act.

However, the question for the Arbitrator was not and could never be whether there was a breach of the prescribed standards, because the prescribed standards could only be applicable to an act of transfer or purported act of transfer which was lawful and/or within power, not one which was void. S.97(1)(a) of the *PSM Act* does not operate in its terms, it is trite to observe, to deprive the Arbitrator of jurisdiction to determine whether there is a valid exercise of power under s.65 of the *PSM Act*. Indeed, it confers it."

68 That excerpt from the reasons for decision in *Bowles' Case* adequately explains why the question of whether the Arbitrator has jurisdiction, inter alia, in what might be termed judicial review, given the wide jurisdiction conferred by S80E(5) of *the Act*, is irrelevant.

69 Further, the word "review", in particular, means what it says and may even be affected by a rehearing. Whether the "review" includes judicial review or not on the way to reaching its final decision, that jurisdiction, (ie) to unrestrictedly review a decision in every sense of the word "review", is explicitly conferred by the statute on the Commission, constituted by the Arbitrator.

70 As was submitted by the advocate for the CSA, Mr Cusack, the word "nullify" means to bring about or declare a matter legally void or inoperable. Alternatively, according to the *Concise Oxford Dictionary* "nullify" means to make null, neutralise or cancel. I mention that, although it is probably not necessary to mention it in any detail after the consideration of this matter in *Bowles Case* (op cit). Obviously, to nullify means to render void and of no effect (see *Director of Public Prosecutions v His Honour Judge Fricke* [1993] 1 VR 369).

71 Again, if it is necessary to add, the verb "to modify" means to limit, restrict, vary, extend, enlarge, assuage, reduce in severity or impose a more severe penalty (see *Stevens v General Steam Navigation Co Ltd* [1903] 1 KB 890, *Souter v Souter* [1921] NZLR 716, and *Wellington District Law Society v Cummins* [1998] 3 NZLR 363, and see also *Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 and *Motor Accidents Authority (NSW) v Australian Associated Motor Insurers Ltd* [1993] 18 MVR 211).

72 The word "vary", of course, means "to make different, to modify or to diversify".

73 It is implicit in the wide powers conferred and within the meaning of the words used to confer the jurisdiction and powers which s80E(5) confers, that the Arbitrator is able to substitute for the employer's opinion or act his own, and not merely to strike down a void decision or declare void or voidable the act of an employer.

74 If it were necessary to do so, some assistance can be derived from the fact that the Arbitrator's jurisdiction deals with the employers in the public sector, and the employment of public sector employees is substantively and procedurally governed by *the PSM Act* and regulations made under it but the remedies available to parties are prescribed by *the Act*.

75 It would bring about an absurdity in the construction of *the Act* if the Arbitrator was found not to have jurisdiction to review the acts and directions of employers governed by *the Act* or regulations when there is an express and specific conferral of jurisdiction to do so.

Public Sector Standards

76 It is noteworthy, too, that this is, by implication, recognised by the exclusion from the jurisdiction of the Arbitrator of matters arising under Public Sector Standards or which should arise under Public Sector Standards (see s93(1) of *the PSM Act*) and the discussion of this express and specific exclusion in s93 of *the PSM Act*. Nothing else is excluded (see *Managing Director of the South Metropolitan College of TAFE v CSA* (1999) 80 WAIG 7 ("*Ishmael's Case*")).

77 This was obviously not a matter which related in any way to any Public Sector Standards, at least in the manner and in the way in which it came before and was required to be considered by the Arbitrator.

78 *Bowles Case* (op cit) is authority for the clear proposition that such a wide and general power is conferred under *the PSM Act*, s80E(5) of *the Act*, and includes powers which encompass the powers conferred on a court by judicial review.

79 The Arbitrator did not misapply the decision in *Bowles Case* (op cit) which expresses clearly, and unequivocally recognises, the jurisdiction conferred on the Arbitrator by s80E(1) and (5) to modify, nullify, vary or review (which includes all forms of review, judicial or otherwise) by express statutory conferral of jurisdiction. My additional observations above expand upon and explain that further.

80 For those reasons, it is quite clear that the Arbitrator had and has jurisdiction to review, modify, nullify or vary the decision not to appoint Mr Jones, as she did. That jurisdiction included the power to substitute the Arbitrator's decision for that taken by the Director General at first instance.

S64 of *the PSM Act*

81 It was also submitted that appointments, which includes promotions of public service officers, such as Mr Jones, under s64 of *the PSM Act*, are not subject to judicial review. It is not clear to me that that is so, but accepting for the purpose of the argument that it is, it makes no inroad upon the wide jurisdiction and power, including the jurisdiction in judicial review conferred by or upon the Arbitrator by s80E(5) of *the Act* in express terms.

82 That construction arises too from giving the words of the subsection their natural meaning read in the context of the whole of the section, and the whole of *the Act* (see also s6(a), (c) and (ca) of *the Act*, objects of *the Act*).

83 Moreover, on a reading of the plain words of s64 of *the PSM Act*, s64 purports to make no such inroad and the wide jurisdiction and powers remain intact.

84 The power of appointment conferred on the Director General whether to a position or upon promotion is conferred on the Director General by s64 of *the PSM Act*. S64 reads, inter alia, as follows:-

> (1) Subject to this section and to any binding award, order or industrial agreement under the *Industrial Relations Act 1979* or employer–employee agreement under Part VID of the *Industrial Relations Act 1979*, the employing authority of a department or organisation may in accordance with approved procedures appoint for and on behalf of the Crown a person as a public service officer (otherwise than as an executive officer) on a full-time or part-time basis —
>
> (a) for an indefinite period as a permanent officer; or
>
> (b) for such term not exceeding 5 years as is specified in the instrument of his or her appointment.
>
> (2) An appointment under subsection (1) shall be to such level of classification and remuneration as is determined by the relevant employing authority —
>
> (a) in accordance with approved procedures; and
>
> (b) as being appropriate to the functions to be performed by the person so appointed.
>
> (3) The employing authority of a department or organisation shall —
>
> (a) in accordance with approved procedures; and
>
> (b) at the time of the appointment of a person under subsection (1) or, if that employing authority considers it impracticable to make the appointment concerned at that time, at a later time,
>
> appoint the person to fill a vacancy in an office, post or position in the department or organisation.
>
> (4) Subject to subsection (5), a person appointed under subsection (1)(b) cannot apply for an appointment under subsection (1)(a) unless the relevant vacancy has first been advertised in public service notices or in a daily newspaper circulating throughout the State.
>
> (5) Subsection (4) does not apply to a person —
>
> (a) appointed under subsection (1)(b); and
>
> (b) having, or occupying an office, post or position having, the lowest level of classification at which persons of the same prescribed class as that person are at the relevant time recruited into the Public Service.
>
> (6) The employing authority of an organisation shall not make an appointment under subsection (1) unless the written law under which the organisation is established or continued authorises or requires the appointment or employment of public service officers for the purposes of that organisation.

(7) Nothing in this section prevents a public service officer who holds an office, post or position in one department or organisation from being appointed, whether by way of promotion or otherwise, to an office, post or position in another department or organisation."

85 Any appointment is required to be made and Mr Jones' appointment, if it was to be made, was required to be made in compliance with s64 of *the PSM Act* and any binding award, order or agreement and the approved procedures. (An appointment is defined by virtue of s3(1) of *the PSM Act* by definition includes a "promotion", as this was).

86 The question of any legitimate expectation by Mr Jones may arise or it may not.

87 I am of opinion, however, that because the failure to reveal the contents of the so called references to Mr Jones and allow him to defend himself was unfair, that such a matter was within the jurisdiction of *the PSM Act*, notwithstanding the principle expressed in *Ishmael's Case* (op cit).

The Recommendation for Appointment and the Rejection of it

88 It was certainly not in issue that Mr Jones was the unanimous choice for recommendation for the subject position by the selection committee and that he was to be appointed by the Director General's delegate.

S7, S8 and S9 of *the PSM Act*

89 I now turn to s7, s8 and s9 of *the PSM Act*. It was submitted that the Arbitrator applied these provisions as if they were mandatory in nature rather than directory. To do so, it was submitted, was contrary to the language used in the sections and the nature of the obligations intended to be imposed by the sections, and therefore erroneous.

90 S7 of *the PSM Act* reads as follows:-

"**General principles of public administration and management**

The principles of public administration and management to be observed in and in relation to the Public Sector are that —

(a) the Public Sector is to be administered in a manner which emphasises the importance of service to the community;

(b) the Public Sector is to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities;

(c) public sector bodies are to be so structured and administered as to enable decisions to be made, and action taken, without excessive formality and with a minimum of delay;

(d) administrative responsibilities are to be clearly defined and authority is to be delegated sufficiently to ensure that those to whom responsibilities are assigned have adequate authority to deal expeditiously with questions that arise in the course of discharging those responsibilities;

(e) public sector bodies should have as their goal a continued improvement in the efficiency and effectiveness of their performance and should be administered with that goal always in view;

(f) resources are to be deployed so as to ensure their most efficient and effective use;

(g) proper standards of financial management and accounting are to be maintained at all times; and

(h) proper standards are to be maintained at all times in the creation, management, maintenance and retention of records."

91 This section is not one which has relevance to what occurs in these proceedings, being directed to efficiency and standards of efficiency of administration more than anything else.

92 S.8 of *the PSM Act* reads as follows:-

"**General principles of human resource management**

(1) The principles of human resource management that are to be observed in and in relation to the Public Sector are that —

(a) all selection processes are to be directed towards, and based on, a proper assessment of merit and equity;

(b) no power with regard to human resource management is to be exercised on the basis of nepotism or patronage;

(c) employees are to be treated fairly and consistently and are not to be subjected to arbitrary or capricious administrative acts;

(d) there is to be no unlawful discrimination against employees or persons seeking employment in the Public Sector on a ground referred to in the *Equal Opportunity Act 1984* or any other ground; and

(e) employees are to be provided with safe and healthy working conditions in accordance with the *Occupational Safety and Health Act 1984*.

(2) In matters relating to —

(a) the selection, appointment, transfer, secondment, classification, remuneration, redeployment, redundancy or termination of employment of an individual employee; or

(b) the classification of a particular office, post or position,

in its department or organisation, an employing authority is not subject to any direction given, whether under any written law or otherwise, by the Minister of the Crown responsible for the department or organisation, but shall, subject to this Act, act independently."

93 That section is very relevant to what occurred in this matter.

94 S.9 of *the PSM Act* reads as follows:-

"**General principles of official conduct**

The principles of conduct that are to be observed by all public sector bodies and employees are that they —

(a) are to comply with the provisions of —

(i) this Act and any other Act governing their conduct;

(ii) public sector standards and codes of ethics; and

(iii) any code of conduct applicable to the public sector body or employee concerned;

(b) are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and

(c) are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees."

95 That section is very relevant to what occurred in this matter.

96 S80 of *the PSM Act* is also relevant and provides:-

"**Breaches of discipline**

An employee who —

(a) disobeys or disregards a lawful order;

(b) contravenes —

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics;

(c) commits an act of misconduct;

(d) is negligent or careless in the performance of his or her functions; or

(e) commits an act of victimisation within the meaning of section 15 of the *Public Interest Disclosure Act 2003*,

commits a breach of discipline."

97 A "code of ethics" is defined in s3 of *the PSM Act* to mean "code of ethics established under s21(1)".

Appellant Bound By s7, 8 and 9 of *the PSM Act*

98 An "employee" "means person (sic) employed in the Public Sector by or under an employing authority" (see s3 of *the PSM Act*).

99 An "employing authority" as defined in s5(1)(c) of *the PSM Act* means "a department or organisation or an employee (other than a chief executive officer or chief employee) employed in a department or organisation".

100 The "employing authority" of a Chief Executive Officer, such as the Director General, is the Minister of the Crown to whom the administration of *the PSM Act* is for the time being committed by the Governor, but a Chief Executive Officer is still an employee bound by s7, s8 and s9 of *the PSM Act*. That is, he is an employee as defined s3 of *the PSM Act*. Thus, a Chief Executive Officer is an "employee", for the purposes of *the PSM Act*, and indeed, s80 of it. She/he is therefore subject to disciplinary action for contravening any provision of *the PSM Act* applicable to that employee or any code of ethics.

101 The sections should be read with s21(1) of *the PSM Act* because they confer duties relating to standards and conduct.

102 It was submitted on behalf of the Director General that the monitoring and reporting function of the Public Sector Standards Commission, which is intended to be the mechanism by which non-compliance with these sections, the standards and the codes is to be dealt with, is the remedy provided in relation to breaches of these matters by *the PSM Act*. Implicit in this, so the submissions went, is that actions and decisions which do not comply with s7, s8 and s.9 are not void but are to be dealt with as a managerial rather than a "judicial" issue. That submission is completely answered by what I have said above in relation to the very wide jurisdiction conferred on the Arbitrator by s80E of *the PSM Act*. The power conferred by the section includes not just a power to review but a power to nullify, (ie) to render void an act of an employer.

103 Only Public Sector Standards and their breaches are excluded from the jurisdiction of the Arbitrator. The other matters are all clearly relevant to the exercise of the jurisdiction of the Arbitrator and within jurisdiction because they are relevant to the conduct of employers and employees, and the disciplining of employees (see s80 of *the PSM Act*).

104 The existence of Part 7 of *the PSM Act* is not fatal to such a view being valid.

Nature of Acts

105 The question is not whether judicial review is available, but whether the employer's act should be modified, nullified, varied or reviewed, etc.

106 This is not a matter of statutorily prescribed relief under the regulations for breach of standards, but an act which was in breach of the prescribed duties cast upon Mr Harvey and the Director General by the regulations. It is wrong to submit that these matters are managerial matters when *the Act* confers jurisdiction to review, vary, nullify or modify the acts of an employer, including obviously acts of an employee committed in breach of the employer's statutory duties.

107 Compliance is obligatory where there is no middle course, (ie) either the procedure has been followed or it has not. The principal guide in determining whether a provision imposes a duty or is merely facilitative is to examine the effect of interpreting the provision one way or the other. If the court is satisfied that the aim of *the Act* would be defeated if the task were not carried out by a person or body, it will rule that the provision is obligatory and the possessor of the power has no discretion to refuse to exercise it (see *In Re M v Registrar of Births* (1924) 26 WALR 115 and see also *Pearce and Geddes "Statutory Interpretation in Australia"*, 5th Edition, pages 273-274).

108 Subject to the context in which the word appears the use of the word "shall" or "must" to entrust a function is taken prima facie to impose an obligation to exercise that function (see *Grunwick Processing Laboratories Ltd v Advisory Conciliation and Arbitration Service* [1978] AC 655 (HL) and [1978] 1 All ER 338).

109 Whilst I can find no judicial definition of "are to", and no dictionary definition either, "are to" in common parlance means that persons are required to do something and have no option but to do it.

110 The words "are to" which mean the same as "must" or "shall" are mandatory. Further, it is perfectly clear from *the PSM Act* and the requirement that the provisions of s7, s8 and s9 of *the PSM Act* are to be complied with, particularly appearing in s9 of *the PSM Act*, that the duty imposed to comply with them and with the instruments referred to in them is not merely facilitative, but that compliance is obligatory and there is no middle course. (my emphasis)

111 It is also quite clear because of the obligations thrust upon employees who are also like the appellant, employers, that the aim of *the PSM Act* would be defeated if the tasks were not carried out by the persons concerned or if they did not comply with what s7, s8 and s9 requires them to comply with. Those provisions, therefore, are entirely obligatory and mandatory.

112 In the cases of s7, s8 and s9 of *the PSM* there are prescribed principles of public administration and management to be observed in, and in relation to, the public sector, general principles of human resource management (to use that Orwellian term), and general principles of official conduct. These are to be complied with as obligations (see *Ayling v Wade* [1961]

2 All ER 399 at 402 (CA) per Danckwerts LJ). In other words, these are not merely expressed as aims or objects of *the PSM Act*.

113 Applying the principles of statutory interpretation to which I have referred above, and for the reasons which I have set out above, including that breaches may attract disciplinary action, the sections and the instruments referred to in them and *the PSM* and *the Code* are required to be complied with as an obligation. There is no middle course. These include statutory prescriptions for the conduct of employees under *the PSM Act* which are required in the words of the section to be complied with as obligations. Therefore, they are mandatory and not merely directory as I have found. That they are not directory and are mandatory means that non-compliance with them will render an act which does not comply with the requirements of those sections void or voidable and declarable as such by the Arbitrator.

Acts of Appellant or Delegates and Other Employees on His Behalf Void

114 The next question is whether the acts which were indubitably beyond power were necessarily as a result, invalid and of no effect.

115 The applicable test was laid down by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc and Others v Australian Broadcasting Authority* [1998] 194 CLR 355 at 388-390:-

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."

116 It was submitted by the appellant that the fact that a provision regulates the exercise of functions already conferred on a body, rather than imposing essential preliminaries to the exercise of functions strongly indicates that it was not the purpose of *the Act* that a breach of the section was intended to invalidate any act done in breach of that section (see *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (op cit) at page 391).

117 The nature of the obligations imposed is relevant. In the matter at hand it was noted by the majority that not every obligation imposed by the section had a rule like quality which could be easily identified (see *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (op cit) at page 391).

118 It was submitted that that was the nature of obligations imposed by s7, s8 and s9 of *the PSM Act* so that the acts of public sector bodies which are in breach of the sections were not intended to be void, nor to provide a basis for review except as provided in *the PSM Act*.

119 I turn to s21(1) of *the PSM Act*. That confers on the Commissioner for Public Sector Standards the office created by s16(1) of *the PSM Act* specific functions in relation to s7, s8 and s9 of *the PSM Act* which includes establishing public sector standards, setting out minimum standards of merit, equity and policy to be complied with in the public sector in various expressed areas.

120 Most relevantly, by s21(1)(b), the Commissioner is prescribed to have a function "having regard to the principles set out in sections 7, 8 and 9 … to establish codes of ethics setting out minimum standards of conduct and integrity to be complied with by public sector bodies and employees, and monitor compliance with those codes".

121 S42 of the *Interpretation Act* 1984 (as amended) applies to *the Code*, of course, and it is then to be treated as if *the Code* were regulations within the meaning of s42 of the *Interpretation Act* 1984 (as amended).

122 It also has the force of law as if enacted as a part of *the PSM Act* (see s21(7) and (9) of *the PSM Act*). Therefore, *the Code* has the force of regulations and has the force of law as if enacted as part of *the PSM Act*.

123 Generally speaking, a court is empowered to inquire into the validity of a code of ethics or the Public Sector Standards (see s21(10)(a), (b) and (c) of *the PSM Act*).

124 That codes of ethics have the force of sections of *the PSM Act*, and that their validity can be inquired into or challenged means, quite clearly, that acts to which they apply can be inquired into and decided to be valid or invalid. The powers are conferred on the Commissioner for Public Sector Standards to monitor compliance with the codes of ethics, Public Sector Standards, and his or her ability to report to each House of Parliament, but that does not detract from the fact that mandatory compliance exists and that an act by an employer may be nullified, varied or modified by an Arbitrator as invalid for non-compliance with the mandatory provisions of s7, s8 and s9 of *the PSM Act*, if the acts are invalid or if they are contrary to the equity, good conscience and the substantial merits of the case alone or both. The failure to comply would usually mean that the person who failed to comply did not act according to equity, good conscience and the substantial merits of the case.

125 For those reasons, it is abundantly clear that, having regard to the mandatory provisions requiring obedience to the obligations prescribed in s7, s8 and s9 of *the PSM Act* and the nature of the wide regulation of conduct contained in those sections, *the PSM Act* read with s80E of *the Act* confers a power to invalidate the acts which do not comply, and it was a purpose of the legislation as *Blue Sky Inc and Others v Australian Broadcasting Authority* (op cit) described it, that an act done in breach of those provisions and expressly *the Code*, which has the force of law as if it were part of *the PSM Act*, should be rendered invalid where there is no compliance with them.

126 It is quite clear that the Director General, as Chief Executive Officer, has the power and the duty to reject the recommendation of a person for promotion or to otherwise fill a position in the department. In any event, that was not disputed (see, too, the definition in s3 and s5 of *the PSM Act*). He and Mr Harvey, too, as "employees" as defined were mandatorily bound to comply with *the Code* and otherwise by s7, s8 and s9 of *the PSM Act*. If they did not, their acts might be declared invalid by the Arbitrator. In particular in this case there were no s7 requirements, but other obligations were to be complied with, and these were:-

(a) To conduct and ensure that the selection process of Mr Jones was to be directed towards and based on a proper assessment of merit and equity (see s8(1)(a) of *the PSM Act*).

(b) To treat Mr Jones fairly and consistently and not subject him or let him be subjected to arbitrary or capricious administrative acts (see s8(1)(c) of *the PSM Act*).

(c) To comply with *the PSM Act* which governs their conduct by s7, s8 and s9, and, which requires obedience to *the PSM Act* and the Public Standards specifically in s9(a)(i).

(d) To comply with *the Code* which has the force of law and of a provision of *the PSM Act* and the same status as regulations (see s9(a)(ii)).

(e) To act with integrity in the performance of their duties in this matter which was absolutely "official" (see s9(b)).

(f) To exercise proper courtesy, consideration and sensitivity in their dealings with Mr Jones as an employee (see s9(c)).

(g) In relation to *the Code* the Director General and his responsible officers were, in relation to Mr Jones, required to:-

(i) Use fairness and equity (see page 8)

(ii) Uphold the relevant provisions, particularly s7, s8 and s9 of *the PSM Act* (see page 9).

(iii) Practise fairness and protect Mr Jones' rights to "due process", equal opportunity and an equitable outcome (see page 9).

(iv) Be open about the decisions and actions taken and the reasons for the decisions and actions (see page 11).

(v) Respect Mr Jones' right to courtesy, consideration and sensitivity in their dealings with him (see page 11).

(vi) To hear his complaints and respond promptly (see page 11).

(vii) To behave in a consistently ethical, competent and reliable manner (see page 11).

(viii) To do good to and not harm to Mr Jones (see page 13).

(ix) Treating Mr Jones as they would like to be treated (see page 12).

127 It was open to find, and would be correct to find that both the refusal to appoint Mr Jones and the abolition of the Level 7 position applied for were unlawful acts and void because there was a breach or a failure to comply with the mandatory requirements of s8 and s9 of *the PSM Act* by the Director General, whose delegate was Mr Harvey, and by other employees, in particular, Ms Withers, in that:-

(a) In obtaining "references" and using them to the detriment of Mr Jones without his knowledge or consent they rendered the selection process one conducted without a proper assessment of merit and equity.

(b) In stopping the process and refusing to implement the decision having obtained unfavourable references, Mr Jones was not treated fairly by the Director General and was subjected to an arbitrary or capricious assessment (see s8(1)(c) of *the PSM Act*).

(c) In not allowing Mr Jones to see the references, answer the criticisms and defend himself against the adverse references, and to put further favourable references forward before his selection was revoked, particularly given that there were no references before the selection committee, Mr Jones was treated unfairly, arbitrarily and without a proper assessment of merit and equity.

(d) To abolish the position because Mr Jones complained about his treatment and to abolish it to prevent him obtaining the position was again based on no proper assessment of merit and equity, and amounted to treating Mr Jones unfairly and subjecting him to an arbitrary or capricious administrative act contrary to s8 of *the PSM Act*.

(e) Further, to do so amounted to a failure to comply with *the PSM Act* (see s9), and was contrary to s9(a)(i) of *the PSM Act*.

(f) Furthermore, to do so amounted to the Director General, Mr Harvey and Ms Withers acting without integrity in the performance of their duties (see s9(b)).

(g) Further, to do so amounted to a failure to comply with s9(a)(ii) in that there was a failure to comply with *the Code*.

(h) Furthermore, to do so amounted to a failure to exercise proper courtesy, consideration or sensitivity in dealing with an employee contrary to s9(c).

(i) Furthermore, abolishing the Level 7 position amounted to the following breaches of or failure to comply with *the Code*, that is, the Director General and/or Ms Withers and/or Mr Harvey failed to comply with the law in that they:-

(i) Did not practice fairness and equity to Mr Jones.

(ii) Did not act impartially to serve the common good by the arbitrary and unjustified abolition of the position to which Mr Jones was recommended to be appointed, and, indeed, by the arbitrary refusal to accept the committee's recommendation of his position.

(iii) Failed to practice fairness and failed to protect Mr Jones' rights to due process, (ie) procedural fairness, and failed to afford him an equal opportunity to obtain the position and an equitable outcome, and, in fact, acted to the contrary.

(iv) Failed to develop and maintain an environment that was "open and accountable and impartial".

(v) Failed to behave honestly in all of their dealings with him.

(vi) Was/were not open about the decisions and actions which they took and the reasons therefor.

(vii) Failed to respect Mr Jones' right to courtesy, consideration and sensitivity in the dealings with him.

(viii) Did not hear and/or respond to his complaint properly or at all.

(ix) Failed to impartially carry out their duties.

(x) Did not behave in a consistently ethical manner.

(xi) Did harm to Mr Jones.

(xii) Did not treat Mr Jones as he would like to have been treated.

(xiii) Did not consider the potential impact of decisions on colleagues, clients and the community.

(xiv) Failed to ensure that an administrative procedure was consistent with the ethical codes and behaviour specified *the Code*.

(xv) Breached the principles of justice, responsible care and respect for persons thereby.

128 In fact, there were multiple acts of the Director General, Mr Harvey and/or Ms Withers that were done contrary to *the PSM Act* and *the Code*, both of which had statutory status, and, as a result, the acts were void or invalid and should have been declared so and remedied by the Arbitrator, having regard to s26(1)(a) and (c) of *the Act*. It will be clear from what I have found that the Arbitrator was correct to find as she did that the acts abolishing the Level 7 position and the act of rejecting Mr Jones' application and the procedures surrounding it were void and unfair, for those reasons.

129 For those reasons, it is open to find and correct to find that the Arbitrator had jurisdiction to hear and determine the application at first instance and to order the appointment of Mr Jones to the status of a Level 7 employee. Further, for the reasons which I have expressed above, that is the case.

Ground 5

130 I now turn to the allegation in ground 5 that the Commissioner, as the Arbitrator, exceeded her jurisdiction in ordering the appointment of a Level 7 position to Mr Jones because he could only be placed in that position in accordance with approved procedures and that could not be ordered, and also because the Arbitrator had no power to make an appointment in the first place.

131 It is to be noted that s64(1) of *the PSM Act* provides that the employing authority of a department or organisation may in accordance with approved procedures appoint for and on behalf of the Crown a person as a public service officer.

132 However, very importantly, such appointment can be made only subject to s64, "and (subject) to any binding award, order or industrial agreement under the *Industrial Relations Act 1979* …". All other things being equal, the Arbitrator ordered Mr Jones, by a "binding order" within the meaning of s64(1), to be placed in a Level 7 position. That means, of course, that if the order dispenses with or does not require approved procedures to be complied with, then they do not have to be. Further, even though s64(3) requires appointments to be made to fill a vacancy in an office, post or position in the department or organisation, an order of the Arbitrator can dispense with such a requirement or if it does not, can require the creation of a vacancy to be filled.

133 In any event, relevant procedures for the filling of the position such as determining the classification level and advertising the vacancy in the media were already complied with. In addition, for the reasons which I will express hereinafter, the order abolishing the position was made solely to prevent Mr Jones getting the position, and, for that reason, should have been rendered void as a misuse of power.

134 In this case, too, it was open to make an order that Mr Jones be employed on the terms and conditions of employment which would put him as a matter of equity, good conscience and the substantial merits of the case back in the position in which he should have been if the Director General, his delegates and servants had not acted contrary to law in not appointing him and abolishing the position for which they themselves had called applications.

135 It is quite clear, too, and it would have been open and correct to find, that since the position to which he should have been appointed was abolished, that it was done only to prevent Mr Jones' appointment to Level 7, and not because the position was surplus to the employer's requirements. In my opinion, there was ample evidence to establish that the abolition of the Level 7 position was a device availed of purely to prevent the Commission or anyone else appointing Mr Jones to the position to which he was recommended to be appointed. I say that because of these facts:-

(a) It happened simultaneously with Mr Jones objecting to the recommendation not being implemented.

(b) Mr Harvey's evidence was that the committee's recommendation was unquestionably to be implemented by him until the Chief Executive Officer intervened.

(c) Mr Harvey only took action because of and after the intervention of Mr Piper.

(d) Mr Harvey committed a complete volte-face allegedly on what he knew of Mr Jones and on the four "reference" reports that Mr Jones was not suitable for the position.

(e) If that were genuine, of course, somebody else should have been appointed to the position after the committee had been reconvened and advertisements and the other necessary steps taken. This was not done. All that occurred was that Mr Jones was not appointed as recommended by the selection committee and the position to which he was to be appointed was abolished on the unlikely reason that it was a redundant position.

136 In the end, not only was the recommendation for his selection rejected by the Director General, but the position was threatened to be abolished, too, and then abolished.

137 Accordingly, there was nothing to prevent the order which the Arbitrator made being made within jurisdiction and power. However, an order should have been sought to have been made, and, in fact, made striking down the abolition of the position for the same reason as the order to employ him as a Level 7 was made.

138 That ground fails for those reasons.

Ground 6

139 I now turn to ground 6(a), (b) and (c).

140 By those grounds, it is alleged that the Arbitrator erred in the exercise of her discretion:-

(a) Because she ordered the appointment of Mr Jones when the position applied for had been abolished.

(b) Because the appointment was made to no office requiring duties commensurate with those of a Level 7 employee to be discharged.

(c) Because the appointment was retrospective when Mr Jones had already been paid in accordance with the terms of his employment and rendered no service warranting payment at Level 7.

(d) Further, there was a further complaint that the order was unreasonable in all of the circumstances

141 In my opinion, the Arbitrator did not err in the exercise of her discretion because she ordered the appointment after the position was abolished. She did so by way of modification or nullification of the order of abolition or by variation, even though she did not express it that way. Because the abolition was clearly used as an added obstacle to Mr Jones being appointed, the Arbitrator was right impliedly to see the abolition as void and to order his employment in the Level 7 position, particularly since it was open to find, and she should have found, that the abolition was merely a device to prevent his appointment as recommended.

142 There was an error in not ordering Mr Jones to occupy an office with the same or commensurate duties which was the way to deal with the matter on the merits. However, that is not fatal, and, in my opinion, such an order can be made by this Full Bench (see s49(6) of *the Act*).

143 There was no error at all in ordering a retrospective appointment to ensure that Mr Jones did not miss out, that is if the appointment was retrospective. However, so that he would not enjoy any double benefit, it should have been ordered that any amount paid to him in another position during the time when he should have occupied the Level 7 position should be deducted from his entitlement in the new Level 7 position ordered to be filled by him.

144 It is more probable than not that the position was and is still required, and that is the position to which Mr Jones should have been appointed. It was not unreasonable to make those orders, particularly because Mr Jones was deprived by a void and unlawful failure to appoint him to the position and a void abolition of the position of a permanent Level 7 promotion.

145 The only way as a matter of equity, good conscience and the substantial merits of the case to remedy the wrong done to Mr Jones was by the orders made, otherwise he would have been left with no remedy. I would also add that the orders made should be varied and I will refer to that later in my reasons for decision.

146 According to exhibit A1.15, the position was abolished and made redundant in January 2003, and the Arbitrator's decision is based on the Director General's actions after 7 October 2002, which involved an invalid exercise of power that time by the Director General. In any event, if the order is to take effect after the unlawful acts and before the date of abolition and as if the abolition had not happened, then it is not retroactive. In any event, if there is retroactivity it does not extend beyond the date

of the final rejection of the recommendation for Mr Jones' selection. It seeks to remedy the wrong after the event and after the notification of it to Mr Jones, and no exception can be taken to it on the grounds alleged in ground 6 of the grounds of appeal.

147 I would add that in order to remedy the wrong suffered by Mr Jones that he should be paid any monies which he should have been paid had he occupied the position to which he should have been appointed, that is the Level 7 policy position. This should be done in accordance with s26(1)(a) of *the Act*, and the fact that he has not worked in the position as such is not a bar to his being restored to what he should have been entitled to had he not been treated unfairly, unjustly and unlawfully.

148 For those reasons, ground 6 is not made out.

FINALLY

149 For all of those reasons, I find that the exercise of the discretion miscarried in some of the respects alleged in ground 6 in accordance with the principles laid down in *House v The King* [1936] 55 CLR 499. I would therefore decide to exercise the discretion of the Full Bench in those respects by way of substitution for the discretion exercised at first instance, making the findings which I say should have been made at first instance. I would find the appeal upheld in those respects. I would, however, find that generally otherwise, there was no miscarriage of the exercise of the discretion at first instance, and that the orders were made within jurisdiction.

150 I would find that the cross appeal was made out, however, it has no real effect on the matter, save and except to support the view to which the Arbitrator came, and I would therefore dismiss it.

151 I would vary the orders made at first instance in FBA 51 of 2004 as follows and make the following orders:-

(a) That the abolition of the Level 7 position applied for by Mr Neville John Jones be and is hereby declared void.

(b) That Mr Jones be appointed immediately to that Level 7 policy officer position or to another Level 7 policy officer position with commensurate salary to and the same duties as that position as and from 22 December 2004.

(c) That he be paid any amount of the salary which he should have been paid as and from 22 December 2004 as a Level 7 officer, which has not been paid to him from that date to the date of his occupation of the Level 7 position pursuant to this order.

152 I would otherwise dismiss that appeal.

SENIOR COMMISSIONER J F GREGOR:

153 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 S WOOD:

154 I have had the benefit of reading the reasons for decision of the Hon. President and I would say as follows. This matter concerns the non-appointment (promotion) of Mr Jones, pursuant to s.64 of the Public Sector Management Act 1984 (PSMA) to a Level 7 position in the Department of Justice. Mr Jones was the successful candidate after the selection committee had completed their selection process. Mr Carter, who was the delegate of the Director-General (the employing authority under the PSMA), had endorsed the appointment. Mr Jones had been advised by letter that he was the preferred candidate for promotion subject to appeal for breach of standards.

155 It was the evidence of Ms Withers, Acting Director, Business Management, Business Division in the Department of Justice that the letter sent to Mr Jones on 11 October 2004 was not a binding offer by the respondent to Mr Jones for him to be appointed to the Level 7 position. It was her evidence uncontradicted and accepted by the Arbitrator, that recommendations for promotion can be withdrawn at any stage for a number of reasons prior to the written confirmation of an appointment. These reasons include organisational restructures, redeployee referral or if a breach of process occurred. Ms Withers stated that promotion is not considered final until the recommended applicant is provided with a written "offer of promotion" outlining the relevant employment conditions and the recommended applicant accepts, signs and returns the offer to the respondent's human resources director. Mr Jones understood from his letter that he would be appointed to the Level 7 position subject to no complaints prior to 24 October 2002 alleging a breach of the Public Sector Standard.

156 The Director General of the Department, Mr Alan Piper, wrote to the head of the section panel, Mr Bill Cullen on 23 October 2002 informing him that he had concerns about Mr Jones' performance and asked Mr Cullen to obtain referee reports concerning Mr Jones' suitability for the Level 7 position. At a later date Mr Harvey, the then delegate dealt with Mr Piper's request. Mr Harvey decided that Mr Jones was not suitable for promotion to the position and the position was shortly thereafter abolished.

157 The Arbitrator found at paragraph 71 and 72 as follows:

> "It is my view however that there is not an unfettered right on the part of the delegator to interfere in the selection process or to seek to take over the selection process unless the delegator him or herself exercises this power in accordance with proper procedures and processes applying in the public sector as well as the relevant statutes."

and

> "It is my view that Mr Piper did not have the power to interfere in the selection process in the way he did. I find that in doing so Mr Piper's actions were contrary to a number of the provisions of the PSM Act and the Code and the requirement on him to adhere to the necessity to afford an employee the right to procedural fairness."

I endorse these comments and indeed I consider it strange, in the face of the terms of the PSMA, for the appellant to submit that procedural fairness is not required; or in fact not required in any event. Mr Jones was certainly not afforded procedural fairness for the reasons as found by the Arbitrator.

158 The question was raised as to whether the Director General had the right to interfere in the selection process and the manner in which he did. Section 59(1)(a) of the Interpretation Act 1984 states:

> "(1) Where a written law confers power upon a person to delegate the exercise of any power or the performance of any duty conferred or imposed upon him under a written law —
>
> (a) such a delegation shall not preclude a person so delegating from exercising or performing at any time a power or duty so delegated;"

I understand this to mean that the Director General, even though he had delegated the duty to Mr Carter, still preserved the power to make the decision in respect of the appointment himself; or in fact to cease the appointment process. Put simply, as the delegator he could have resumed his right to make the decision and taken it out of the hands of the delegate; the process not having reached finality, albeit the delegate had made a decision. The difficulty I have is whether the Director General had the right to direct that a different process be undertaken once the selection process had been completed by the selection panel and once the delegate had made his decision. This is a separate issue from bringing to the attention of the delegate, information

that he may consider in reaching his decision. I do not consider that the manner in which Mr Piper intervened in the selection was a proper exercise of the power conferred on him under the PSMA. It would appear transparent, and the Arbitrator's decision is correct, that the non-appointment of Mr Jones was due to Mr Piper's intervention. This point is separate to the question of whether Mr Piper complied with the principles expressed in sections 7 to 9 of the PSMA and whether he afforded Mr Jones any procedural fairness.

159 I note also that the Arbitrator found correctly as follows:

> "Mr Harvey did not decide to review the recommendation that Mr Jones be appointed to the Level 7 position of his own volition and only did so as a result of Mr Piper's intervention, nor did Mr Harvey's review of the filling of the Level 7 position arise as a result of any proposed restructure."

The question in my mind is whether the Director General properly exercised his powers under the PSMA by the manner in which he acted toward the delegate, given that the delegate had made a decision. This is not a matter contained within the Public Sector Standard. It is a matter to do with how the powers of the employing authority operate under the Act.

160 The Arbitrator also considered the powers of the Arbitrator pursuant to s.80E of the *Industrial Relations Act 1979*. The Arbitrator found that she was within jurisdiction as the matter did not relate to a Public Sector Standard. The Arbitrator further concluded that:

> "Mr Piper's action in becoming involved in the selection process for the Level 7 position was not a valid exercise of his powers and as a result it is my view that Mr Piper's intervention in the Level 7 position's selection process should be nullified and declared void. It follows and I find that the subsequent review of Mr Jones' appointment to the Level 7 position by Mr Harvey should not have taken place as Mr Harvey only became involved in a review of the Level 7 selection process as a result of Mr Piper's intervention."(Paragraph 77)

For the reasons expressed by the Hon. President and expressed fully in the *Bowles Case* I construe the powers afforded to the Arbitrator pursuant to s.80E(5) to be broad. The Arbitrator has acted within jurisdiction.

161 The respondent submitted that the delegate, that is the person with the power to appoint, was somehow functus officio, or that Mr Jones had a legitimate expectation having been advised that he would be appointed to the position subject to the normal procedures being completed. I do not accept either of these submissions as it is clear from the evidence of Ms Withers that the process of appointment was not complete, at that stage, and could be thwarted due to a number of circumstances.

162 The appellant raises the issue of whether ss.7, 8 and 9 of the PSMA are mandatory or directory in nature. The appellant submitted that the wording used in those sections, taken together with s.21 of the PSMA, mean that the divisions are "not intended to provide individuals affected by non-compliance with a cause of action by way of judicial review or otherwise. The sections are intended to set a standard of general conduct desired by public sector bodies in each of the areas of administration mentioned." I note the language of ss.7, 8 and 9 deal with principles "to be observed". The word 'observed' has the normal meaning of 'to take notice of' or 'to be conscious of'. These principles are made plain by s.21 of the PSMA through the publication of the Public Sector Standards or Codes. These standards have force as if they were regulations. The language of these standards is "to be complied with" and hence is mandatory. This sits in contrast to the language in ss.7, 8, and 9 which are in the nature of guiding principles rather than mandatory prescriptions. This does not absent Mr Piper from acting fairly and in accordance with ss.8 and 9. It does not alter the obligations upon the Arbitrator to decide whether he has acted fairly. The Director General has not acted fairly towards Mr Jones and the Arbitrator was right to so find.

163 The Arbitrator indicated that she accepted that the Level 7 position had been abolished for over 18 months and it would be inappropriate in the circumstances to require the respondent to reinstate this position. This was based on the arguments of both parties. She then ordered Mr Jones be appointed to a Level 7 position. Fashioning an order in this way was an appropriate means of dealing with the industrial matter before her, having considered the circumstances of the case. The Arbitrator considered whether Mr Jones could otherwise have received a satisfactory remedy given what had transpired. To simply return the matter to a new selection process would not have been adequate.

164 For the reasons expressed I would dismiss the appeal.

THE PRESIDENT:

165 For those reasons, I would uphold appeal No FBA 51 of 2004 and vary the orders, made at first instance and I would dismiss appeal No FBA 54 of 2004.

Order accordingly

2005 WAIRC 01864

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE
	APPELLANT
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER J F GREGOR
	COMMISSIONER S WOOD
DATE	TUESDAY, 14 JUNE 2005
FILE NO/S	FBA 51 OF 2004
CITATION NO.	2005 WAIRC 01864
PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCOROPRATED
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT

CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER J F GREGOR COMMISSIONER S WOOD
DATE	TUESDAY, 14 JUNE 2005
FILE NO/S	FBA 54 OF 2004
CITATION NO.	

Decision	Appeal No FBA 51 of 2004 upheld and orders at first instance varied. Appeal No FBA 54 of 2004 dismissed.
Appearances	
Appellant/Respondent	Mr R Andretich (of Counsel), by leave, on behalf of The Director General of the Department of Justice
Respondent/Appellant	Mr B Cusack, as agent, on behalf of The Civil Service Association of Western Australia Incorporated

Order

This matter having come on for hearing before the Full Bench on the 4th day of April 2005, and having heard Mr R Andretich (of Counsel), by leave, on behalf of The Director General of the Department of Justice, and Mr B Cusack, as agent, on behalf of The Civil Service Association of Western Australia Incorporated, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on the 14th day of June 2005, and there having been a speaking to the minutes in the Full Bench on the 23rd day of June 2005 and the Full Bench having decided under the slip rule to substitute in the orders 1(b) and 1(c) hereof for the figures 22nd and 2004, the figures 25th and 2002 respectively, it is this day, the 14th day of June 2005, ordered and declared as follows:-

(1) THAT in appeal No FBA 51 of 2004 the decision of the Commission in matter No PSACR 51 of 2002 made on the 3rd day of December 2004 be and is hereby varied as follows:-

(a) THAT the abolition of the Level 7 position applied for by Mr Neville John Jones be and is hereby declared void.

(b) THAT Mr Neville John Jones be appointed immediately to that Level 7 policy officer position, or to another Level 7 position with commensurate salary with and the same duties as that position, as and from the 25th day of December 2002.

(c) THAT Mr Neville John Jones be paid the amount of the salary which he should have been paid as and from the 25th day of December 2002 as a Level 7 officer, which has not been paid to him from that date to the date of his occupation of the Level 7 position pursuant to this order.

(2) THAT appeal No FBA 51 of 2004 be and is hereby otherwise dismissed.

(3) THAT appeal No FBA 54 of 2004 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2005 WAIRC 00689

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPELLANT** **-and-** BHP BILLITON IRON ORE PTY LTD, INTERGRATED GROUP LTD T/AS INTERGRATED WORKFORCE **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DATE	TUESDAY, 15 MARCH 2005
FILE NO/S	FBA 36 OF 2004
CITATION NO.	2005 WAIRC 00689

Decision	Application to adduce fresh evidence dismissed
Appearances	
Appellant	Mr D Schapper (of Counsel), by leave
Respondent	Mr H J Dixon (of Counsel), by leave Mr N Ellery (of Counsel), by leave
Intervener	Mr A D Lucev

Order

An application by the above named first respondent for leave to adduce fresh evidence having come on for hearing before the Full Bench on the 15th day of March 2005, and having heard Mr D Schapper (of Counsel), by leave, on behalf of the appellant and Mr H J Dixon (of Counsel), by leave, on behalf of the first named respondent and Mr N Ellery (of Counsel), by leave, on behalf of the second named respondent and Mr A D Lucev (of Counsel), by leave, on behalf of the intervener, the Full Bench having determined the matter and determined that its reasons for decision will issue at a future date, it is this day, the 15th day of March 2005, ordered as follows:-

THAT the application by the above named first respondent to adduce fresh evidence filed on the 14th day of March 2005 herein be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2005 WAIRC 01797

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPELLANT** **-and-** BHP BILLITON IRON ORE PTY LTD **FIRST RESPONDENT** INTEGRATED GROUP LTD T/AS INTERGRATED WORKFORCE **SECOND RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DATE	FRIDAY, 10 JUNE 2005
FILE NO.	FBA 36 OF 2004
CITATION NO.	2005 WAIRC 01797

CatchWords	Industrial Law (WA) – Joint employment – Refusal to employ – Alleged ostensible/apprehended bias – Doctrine of necessity – Application to intervene in appeal – Notice to Attorneys General – Application to adduce fresh evidence – Australian Workplace Agreement operation and effect – Labour hire agreement – Contract of employment – Implied contract – Control – Casual employment – Temporary employment – Abandonment/tacit agreement to terminate employment – Mutuality of obligation – Validity of any orders – *Industrial Relations Act* 1979 (as amended), s7, s17, s26, s26(1)(a), s30, s44, s49 – *Industrial Relations Commission Regulations* 1985, regulations 29(2) and 92 – *Commonwealth of Australia Constitution Act*, s109 – *Judiciary Act* 1903 (Cth), s78B - *Australian Workplace Relations Act* 1996 (Cth), s170VQ(4), Part VID – *Mines Safety and Inspection Act* 1994 (as amended) – *Mines Safety and Inspection Act Regulations* 1995 (as amended) – *Minimum Conditions of Employment Act* 1993, s5
Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
First Respondent	Mr H J Dixon (of Counsel), by leave, and with him Mr F M Gaffney (of Counsel), by leave
Second Respondent	Mr N D Ellery (of Counsel), by leave, and with him Ms L D'Ascanio
Intervener	Mr A D Lucev (of Counsel), by leave, and with him Ms W Endebrock-Brown (of Counsel), by leave

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Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal by the above-named appellant, The Construction, Forestry, Mining and Energy Union of Workers (hereinafter referred to as "the CFMEU"), against the whole of the decision of the Commission at first instance, constituted by a single Commissioner, given on 13 September 2004 in application No CR 128 of 2004.

2 By that decision, the application of the CFMEU at first instance was dismissed.

GROUNDS OF APPEAL

3 The CFMEU now appeals against that decision on the following grounds, as amended on appeal (see tab 1 of the appeal book (hereinafter referred to as "AB"), volume 1):-

> "1. The Commission erred in holding that there was not a contract of employment between Brandis and the first respondent. The Commission ought to have held that there was such a contract either jointly with the first and second respondents; alternatively, with the first respondent.
>
> 2. Having erred as set out in paragraph 1, the Commission further erred in not then requiring the first respondent to employ Brandis on the award.

3. The Commission erred in holding that the refusal of the first respondent to employ Brandis was not unfair in that:

   3.1 the Commission applied the wrong test by asking whether the decision not to employ Brandis was reasonably open. The test that should have been applied was whether the refusal to employ Brandis was unfair in all the circumstances, including whether the basis on which the decision to refuse to employ had been made was sound.

   3.2 the Commission failed to examine the basis on which the decision to refuse to employ Brandis had been made

   3.3 the Commission failed to determine whether the basis on which the decision to refuse to employ Brandis had been made was sound, which it was not

   3.4 the Commission erred in holding that the decision not to employ Brandis was reasonably open when the basis on which the decision was made was demonstrated to be wholly or largely unsound or otherwise insufficient

   3.5 the Commission erred in failing to find that, in view of Brandis' continuous and continuing *de jure* or *de facto* employment at BHP for 3 years, the refusal to employ him was unfair in the absence of some compelling reason not to do so"

4 The appeal is brought under s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). At all material times, the appellant was an "organisation" of employees, as that term is defined in s7 of *the Act*.

5 The above-named first respondent, BHP Billiton Iron Ore Pty Ltd (hereinafter referred to as "BHPB"), was, at all material times, an employer; and the above-named second respondent, Integrated Group Ltd trading as Integrated Workforce (hereinafter referred to as "IW"), was a labour hire agency.

6 At all material times, as is well known in this Commission, BHPB conducted and continues to conduct huge mining operations in the Pilbara region of this State. At all material times, the CFMEU has represented locomotive engine drivers who worked for BHPB and represented Mr Brandis in this case.

7 At all material times, as part of its mining operations, BHPB operated a very busy railway system with very large, heavily laden trains, carting iron ore from the mines at Newman and other locations to Port Hedland for shipping.

8 The decision appealed against was made after a hearing where the application was opposed by the above-named respondents.

BACKGROUND

The Application

9 The CFMEU brought an application in the Commission, filing it on 10 June 2004, seeking a s44 conference on the grounds that "the respondent unreasonably refuses to employ Greg Brandis as an engine driver". Mr Brandis had previously worked as an engine driver for BHPB for some years and, more recently and currently, for over three years, initially at least through IW. Mr Brandis had recently applied for direct employment with the respondent which refuses to employ him.

10 A conference was sought and held and no agreement was reached, as a result of which the Commissioner issued a memorandum of matters for hearing and determination dated 20 July 2004 which appears in the appeal book behind tab 2.

11 The memorandum of dispute recites that the CFMEU alleged that:-

> "1. During the time that Mr Brandis has been employed by IW to work at BHPB he has also been employed jointly by BHPB. This is by reason of the fact that throughout that time Mr Brandis has, in all material respects, been directed and supervised by BHPB; and
>
> 2. BHPB have unreasonably refused to employ Mr Brandis."

12 The memorandum recites that the CFMEU claims:-

> "1. a declaration that Mr Brandis has been and is employed by BHPB as an engine driver; and
>
> 2. an order that BHPB employ Mr Brandis on the award."

13 The memorandum also recites that the respondents refuted the CFMEU's claim, denied that the Commission had jurisdiction to make the declaration or order sought by the CFMEU, and objected to the relief sought.

Evidence and Facts

14 Evidence in chief was given at first instance by way of written witness statements. These included for the CFMEU Mr Gregory James Brandis and Mr Warren Ronald Johncock, a locomotive engine driver employed by BHPB. For IW, Mr Craig Bruce Hudson, that company's National Manager, Mining and Resources, gave evidence. For BHPB, Ms Rochelle Marie Rayner, Human Resources Adviser, Mr Geoffrey Charles Jolly, Superintendent - Railroad Operations, Mr Colin John Gibbons, Rail Transport Supervisor, Mr Anthony Holland, Superintendent - Rules and Accreditation, and Mr Michael Ian Hoare, BHPB's Senior Human Resources Adviser, all of them BHPB's employees.

15 Mr Brandis is an engine driver with almost 30 years of experience driving locomotives, primarily on the BHPB network during that time. During that time, too, his service as an employee and engine driver would have to be judged at least as competent, and perhaps higher than that. This was partly borne out, the Commissioner at first instance found, by the fact that BHPB would not leave an incompetent driver in charge of a train on their rail network for safety and potential cost reasons alone.

16 He was assessed by his supervisor, Mr Zanders, as follows "Greg performed his work as an engine driver in a competent manner". He was therefore acceptable or adequate as an engine driver.

17 He was assessed by his foreman as a very conscientious employee in May 1999 when he resigned from his employment upon accepting voluntarily that his position had been made redundant.

18 Mr Zanders, his supervisor, also said that Mr Brandis was suitable for rehire in the same capacity as an engine driver, and the then Employee Relations Manager of BHPB, Mr Keith Glenn Ritchie, also indicated that Mr Brandis was suitable for rehire.

19 Two years later in June 2001, having been engaged by IW, he returned to drive "on hire" on the BHPB rail network. There is no evidence of any written agreement between Mr Brandis and IW having been entered into at that time or between IW and BHPB. The terms of any oral agreements or any other agreements evidenced in writing were not in evidence. Before being so "hired", he was inducted and assessed as competent to operate trains by a Rail Transport Supervisor, Mr Gibbons, and was reassessed at six month intervals, also by BHPB. He was assessed and passed out to drive the new and most modern locomotives and it can be assumed on the evidence that he has been driving for the last three and more years without incident except for a breach of safety rules and regulations in August 2002. There were some other minor incidents mentioned in Mr Jolly's statement, but nothing seemingly serious and nothing which required further action.

20 The investigation which took place on 6 and 7 August 2002 after a train driven by Mr Brandis passed node 3 which was at stop on Monday, 5 August 2002, found that he:-

(a) Overrode the ATP on 10 occasions without authority

(b) Went past node 3 whilst it was set at stop.

(c) Knowingly breached operating procedures by his own admission.

21 This was found by the Commission to be a very serious breach of BHPB rules, operating procedures and operating notices. However, based on his previous good record and frank admission about what occurred on this occasion, Mr John Ireland, Superintendent of Forward-Planning, in his memorandum to Mr Craig Hudson dated 9 August 2002, said that he believed that a formal warning and a suspension of his next tour from 16 September 2002 to 27 September 2002 would be an adequate consequence.

22 He was penalised with suspension for the period of one tour of duty only. He was not dismissed or advised that his continued engagement was in jeopardy. Mr John Ireland rightly took account of his honesty and his previous good record and did not require Mr Brandis' dismissal. However, he was not sent for further training.

23 There was a minor incident in May 2002 when he caused some damage to a platform ramp, but he was not disciplined for this. There was, therefore, the Commissioner at first instance found, little challenge to his competence as a driver and his ability to continue to drive on the BHPB network.

24 The CFMEU's complaint was that in January 2004 BHPB advertised for applications to be made to it for employment as rail transport technicians to drive locomotives on its railways in the Pilbara. Mr Brandis applied for one of these positions and underwent pre-employment interviews, psychological testing and "reference" checks. His application for employment was refused, as was a subsequent one. He continued to drive locomotives for BHPB after August 2002 and after his application for so-called permanent employment as a locomotive driver in 2004 was rejected.

25 There was a great deal of discussion of the terms of two written agreements, one between BHPB and IW, and the other, an Australian Workplace Agreement (hereinafter referred to as an "AWA") between Mr Brandis and IW, which were dated 11 June 2001 and 7 October 2002 respectively. The AWA came into being and was accepted and registered under the *Australian Workplace Relations Act* 1996 (Cth) (hereinafter referred to as *"the WR Act"*). I will refer to these agreements in detail later in these reasons.

26 I would also add that the operation of the BHP Pilbara Railway System and the application of rules and regulations to it in relation to safe working have been considered by Full Benches of this Commission in *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* (2004) 84 WAIG 1033 (FB) ("Rudland's Case"); *BHP Billiton Iron Ore Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* (2004) 84 WAIG 3769 (FB) ("Cupak's Case"); and *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* (2004) 84 WAIG 3456 (FB) ("Hellmrich's Case").

FINDINGS OF THE COMMISSIONER AT FIRST INSTANCE

27 The Commissioner at first instance found that to make a case for refusal to employ then the applicant has to pass a relatively high hurdle to warrant the intervention of the Commission. He found that Mr Brandis was a competent driver of long standing, and should, of course, be found to be suitable. However, he found that any driver who operates on the BHPB network, who is re-assessed and passed as competent, should not necessarily be offered a permanent position. The company is entitled to structure its workforce according to its needs, he found, and also pursuant to s26 of *the Act* and its general powers that the Commission should not interfere, on balance, unless it is necessary to rectify or prevent an unfairness or injustice. The Commissioner held that he was unable to reach that conclusion in this matter of Mr Brandis' non-selection for a permanent position with BHPB as an engine driver.

28 The order sought by the applicant was that BHPB employ Mr Brandis on the award. It was submitted on behalf of BHPB that there was a distinction between a refusal to employ and a decision not to employ, and that there was no refusal in this matter. The selection panel considered the matter, interviewed employees, including Mr Brandis, and, on the evidence of Ms Rayner, Mr Holland or Mr Jolly they did not consider him a candidate who ought to be employed.

29 The Commissioner found that the selection process itself was fair, and it necessarily involves value judgments. The Commissioner concluded that on the evidence before them the panel was not wrong to draw the conclusions which they did. There was new information before the Commissioner in the context of a diminishing of the importance of Mr Hudson's referee comments. Further, Mr Gibbons' statements and the psychologist's report were not matters which the Commissioner thought that he ought to behind. The Commissioner found that he did not consider that the panel could not have come to the conclusion which they did or that they were biased in their approach.

30 As to the question of joint employment, the appellant asserted that Mr Brandis was jointly employed by BHPB and by IW.

31 The Commissioner held that there was no attempt by Mr Brandis and BHPB by their conduct to establish the necessary mutuality of obligation, and thus that he did not consider that a declaration of joint employment if possible was at all necessary or desirable or proven.

ISSUES AND CONCLUSIONS

Submission of Apprehended Bias

32 The Full Bench in these proceedings was constituted by Chief Commissioner Beech, Commissioner Kenner and myself as President. I had presided over an earlier appeal to the Full Bench against the decision of the Commission at first instance, which was a decision in favour of an application by the CFMEU involving the dismissal of an engine driver employed by BHPB, namely Mr J Cupak (see Cupak's Case (op cit)). In that case, BHPB appealed against the decision of the Commission at first instance which found that BHPB had harshly, oppressively or unfairly dismissed Mr Cupak.

33 In that case, the Full Bench, it was submitted by Mr Schapper (of Counsel) on behalf of the CFMEU, which was the appellant in those proceedings as it is here, that Mr Cupak was unfairly dismissed, in part, because his treatment was inconsistent with the manner in which other employees of BHPB, mainly engine drivers but also a train controller, were treated in relation to breaches of the BHPB Pilbara Railway Rules. Amongst these other drivers was Mr Brandis and his disciplining, by being suspended without pay for one tour, was submitted to be inconsistent with the treatment of Mr Cupak, by Mr Schapper.

34 This submission, of course, related to BHPB's disciplining for misconduct in the incident of August 2002, which has been referred to above. In that incident, Mr Brandis overrode the ATP ten times on the Yarrie Line. That incident was clearly part of the basis for BHPB later "refusing to employ him" which is a matter the subject of this appeal.

35 At paragraph 133 in the joint reasons for decision of the Chief Commissioner and myself in the report of Cupak's Case (op cit), we held that Mr Brandis and a Mr Yap, another driver, had been treated with "unaccountable leniency" compared to

Mr Cupak. We also held that those two employees simply did not merit the lenient treatment which they received. These findings, it was submitted by Mr Schapper, led to the proper inference that I (and the Chief Commissioner) had decided that Mr Brandis ought to have been dismissed, or if he should not be dismissed, that his suspension for two tours was far too lenient.

36 The Full Bench found, of course, that his suspension for one tour was far too lenient. However, Mr Schapper went on to submit that a problem arose because the CFMEU case on this appeal was that Mr Brandis should be employed on a permanent basis, whilst the implication from my reasons for decision was that I had said that he should not be employed as and from August 2002 by BHPB. Therefore, so the submission went, what prospects were there in persuading me, not only that Mr Brandis should have not been dismissed in August 2002, or furthermore that he should now be employed on a permanent basis? The submission went further. It was that there was actual bias in me on the authorities.

37 Next, it was submitted that, if there was not actual bias, then there was ostensible or apprehended bias. Thus, the appellant submitted that I should disqualify myself from hearing the appeal and allow the constitution of a Full Bench without me.

38 I have already held in *Carter and Others v Drake and Others* 72 WAIG 736 (FB) that the doctrine of necessity applies to the Commission where it is constituted by the President alone or sitting with other members of the Commission.

39 It was submitted that I should disqualify myself and that s17 of *the Act* would enable the Governor to appoint an Acting President because I would be unable to attend to my duties. Thus, within the meaning of s17, since I would be "unable to attend to (my) duties under this Act, whether on account of illness or otherwise," the Governor could then appoint a person to be an Acting President; and a new Full Bench could and should be constituted.

40 I am not at all persuaded that what I said in *Carter and Others v Drake and Others* (FB) (op cit) is wrong. What I said there drew on the principle expressed in *Laws v Australian Broadcasting Tribunal* [1990] 170 CLR 70 (see also *R v Cawthorne; Ex parte Public Service Association of South Australia Incorporated* (1977) 17 SASR 321 (FC)). What I said was that on a proper construction of the clear words of s17 of *the Act*, the President is not unable to carry out his duties within the meaning of s17 of *the Act* unless he is absent from the Commission or physically or mentally unable to discharge his duties under *the Act*. The doctrine of necessity applies because the President cannot refuse to hear a matter while he is not on leave or whilst he is physically or mentally able to discharge his duties. An Acting President is not a Deputy President.

41 It is improbable that the Commission requires a Deputy President and that is a matter which has been canvassed in the past, but that is not a matter germane to these reasons.

42 *The Act* clearly requires that the President constitute the Commission in accordance with *the Act*, except in those narrow circumstances prescribed by s17 to which I have referred. The doctrine of necessity permits a member of a court who has some interest in the subject matter of the litigation to sit in a case if no judge without such an interest is available to sit.

43 The doctrine of necessity gives "expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it", and that "must prevail over and displace the application of the rules of natural justice" (see *Laws v Australian Broadcasting Tribunal* (HC) (op cit) at pages 89-90). Deane J agreed with the general statement of the rule, but at page 96, said that there were two prima facie qualifications.

44 In any event, the rules of natural justice would only require my disqualification if a reasonable bystander would entertain a reasonable fear that I would not bring an unprejudiced mind to the appeal. A reasonable bystander does not entertain a reasonable fear that a decision maker will bring an unfair or prejudiced mind to an enquiry merely because he/she has formed a conclusion about an issue involved in an inquiry (see *R v Australian Stevedoring Industry Board and Another; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] 88 CLR 100 at 116; and *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* [1969] 122 CLR 546 at 554-555; and *Justice Lusink of The Family Court of Australia and Shaw; Ex parte Shaw* (1980) 55 ALJR 12 at 14-15; see also *Laws v Australian Broadcasting Tribunal* (HC) (op cit) at pages 99-100 per Gaudron and McHugh JJ).

45 Such a doctrine, as I have held and as was held in *Laws v Australian Broadcasting Tribunal* (HC) (op cit) at pages 88-89, applies to a statutory tribunal as well as a court (per Mason CJ and Brennan J).

46 When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision maker, what must be firmly established is a reasonable fear that the decision maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion, irrespective of the evidence or arguments presented to him or her. I refer to the discussion of prejudgment and of ostensible bias by a Full Bench of this Commission in *McCarthy v Sir Charles Gardiner Hospital* (2004) 84 WAIG 1304 (FB).

47 *Justice Lusink of The Family Court of Australia and Shaw; Ex parte Shaw* (op cit) and *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (HC) (op cit) are examples of views expressed by judges or tribunal members not being regarded as grounds for disqualification. In *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (HC) (op cit), the High Court rejected the notion that a fair and unprejudiced mind was "necessarily a mind which has not given thought to the subject matter or one which, having given thought to it, has not formed any views or inclination of mind upon or with respect to it" (see *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group*(HC) (op cit) at page 554); see also *Re JRL; Ex parte CJL* [1986] 161 CLR 342 at 352 per Mason J as follows:-

> "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": *Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*(29); *Watson*(30); *Re Lusink; Ex parte Shaw*(31). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

48 In this case, it cannot be found as a fact that there is any bias, actual or ostensible, in the President because of what was decided by me in Cupak's Case (op cit). I so hold because:-

(a) The parties in both cases are the same and the question of Mr Brandis' conduct was raised for decision by the appellant in this case, who was the respondent in Cupak's Case (op cit).

(b) It is not reasonably inferable that I found that Mr Brandis should be dismissed. It is clear from the reasons for decision of the Chief Commissioner and myself that we assessed his conduct as serious and found that the small penalty visited upon him was unaccountably lenient compared to that imposed upon Mr Cupak. The Chief Commissioner and I made the same observation about Mr Yap as well. I did not say, nor could it be reasonably inferred, that I thought that he should be dismissed, on a fair reading of the reasons.

(c) It was not in dispute in that case that Mr Brandis had been guilty of serious misconduct on the case put by the appellant, CFMEU itself.

(d) I was not called upon in Cupak's Case (op cit) to reach any finding adverse to Mr Brandis' claim to be employed or to continue to be employed, nor was the evidence available at first instance before me to reach such a conclusion which, of course, would involve consideration of a number of factors including his competence and his record as an employee, to name only two, other than the mere incident for which he was disciplined. Thus, I reached no conclusion and it could not be inferred that I reached any conclusion or any irreversible conclusion about whether he should continue to be employed or be employed on any permanent basis or other basis by BHPB after his disciplining for the incident of August 2002.

(e) It has not been established as a fact that I am biased, actually or ostensibly, such that my duty is to disqualify myself.

(f) In particular, it has not been so established, for the reasons which I have expressed above, that I will approach the issues upon appeal otherwise than with an impartial and unprejudiced mind or that my previous decision in Cupak's Case (op cit) has provided any acceptable basis for inferring that there is a reasonable apprehension that I would approach the issues with a prejudiced mind or a partial mind.

49 There was no submission that my colleagues disqualify themselves.

50 Thus, I dismissed the application that I disqualify myself from sitting to hear and determine this appeal as part of a Full Bench, primarily because the doctrine of necessity prevents me doing so, and in the alternative, because I would not be properly able to find as a fact that I was actually or ostensibly biased for the reasons which I have expressed.

Intervention by the Commonwealth Minister for Employment

51 The Commonwealth Minister for Employment sought to intervene in this appeal, even though he had not sought to do so or done so at first instance.

52 The principles relating to such interventions were considered by the Full Bench of this Commission in *CFMEU v Sanwell Pty Ltd and Another* (2004) 84 WAIG 727 (FB). S30(2) of *the Act* enables the Minister of the Commonwealth, administering the Department of the Commonwealth which has the administration of the Commonwealth Act, to give notice to the Registrar of his intention to intervene on behalf of the Commonwealth in any proceedings before this Commission in which the Commonwealth has an interest. The Commission can then give the Minister leave to intervene.

53 Mr Lucev (of Counsel) appeared on behalf of the Minister to make that application. It was not in issue that the Minister was the Minister, within the meaning of s30(2) of *the Act* and he certainly gave notice to the Registrar in writing of his intention to intervene, as required by s30(2).

54 Counsel for the Minister sought, as required by s30(2) of *the Act*, to establish that the Minister should be given leave by the Commission, constituted by the Full Bench, to intervene in this appeal because these were proceedings in which the Commonwealth had an interest.

55 It was submitted that the question of the joint employment doctrine had been raised and that any such doctrine was not part of the common law of Australia or applied in a single case in Australia. This was important, it was submitted, because, in this case, an order was sought that a State award applied to Mr Brandis' employment in the face of the existence of an AWA and in the face of such provisions as s170VQ(4) of *the WR Act*.

56 The relations of State and Federal industrial instruments, it was submitted, would be affected if the joint employment doctrine were found by this Full Bench to be part of the common law of employment. The adoption of such a doctrine, it was submitted, would have wide and important implications for Federal and State governments and employers and employees, superannuation, and questions of vicarious liability and other questions, throughout this country.

57 There was also raised the question of the operation of s170VQ(4) of *the WR Act* which provides that an AWA operates to the exclusion of any State award. It was also submitted that the term "definition of employer" in the Commonwealth Act has no provision for joint employment.

58 Even, more importantly, it was submitted, a consideration of the effect of s170VQ(4) of *the WR Act* gave rise to a necessity to consider s109 of *The Constitution* when the operation of a State award in the face of an existing AWA arose, as it did in this appeal.

59 The Minister sought to intervene in a limited way relating only to grounds 1 and 2.

60 The application for leave to intervene was not opposed by the respondents but was by the appellant.

61 In my opinion, the issues referred to were likely to come up, and the implications from them could be as Mr Lucev submitted. In particular, the interaction of State awards and AWA's and their operation was certain to arise. That constituted sufficient interest for the Minister to be given leave, limited to grounds 1 and 2 in this appeal. For those reasons, I agreed with my colleagues to grant leave to the Minister to intervene, represented by Mr Lucev.

The Judiciary Act 1903 - S78B

62 The matter arising under *The Constitution* was correctly submitted to arise under s109 and arose because, if there was joint employment found, the operation of s170VQ(4), vis a vis State awards, fell to be considered and I have already found that that was so.

63 The question of whether notices should be given under s78B of the *Judiciary Act* 1903 was argued. After the first two days hearing of the appeal, notices were given but no Attorney General, Commonwealth or State, sought to be heard in these proceedings. In my opinion, it is quite clear that the Commission is a court of a State, when constituted by the Full Bench, for the reasons which I expressed in *Helm v Hansley Holdings Pty Ltd (under Administration)* (1998) 79 WAIG 23 (FB).

64 That opinion is supported by the dicta of Carr J in *BGC Contracting Pty Ltd v CFMEU* (2004) FCA 272. As a result, it is necessary to say that the reasons for decision expressed in *Eatts v General Manager, Aboriginal Hostels Ltd* (1990) 70 WAIG 2877 and *Lang v Telecom Australia* (1989) 70 WAIG 186 per Fielding C do not represent the law in this Commission.

65 Thus, s78B of the *Judiciary Act* applies to proceedings in Full Benches of this Commission.

Fresh Evidence

66 The first respondent, BHPB, made application to the Full Bench to adduce fresh evidence, an application by which the appellant reserved the right to cross-examine Mr Keith Glenn Ritchie. The application was not opposed by the second respondent. The evidence was admitted subject to the appellant's right to cross examine Mr Ritchie. The evidence sought to be adduced was contained in the affidavit of Mr Ritchie, sworn on 14 March 2005. At the time of swearing, Mr Ritchie was BHPB's Manager of Employee Relations.

67 His evidence was that, on or about 15 February 2005, IW ceased providing Mr Brandis' services to BHP pursuant to its contract with BHPB and further that, as and from 8 March 2005, Mr Brandis was no longer employed by IW. This evidence was sought to be adduced after the first two days' hearing of the appeal in December 2004, and when the Full Bench reconvened on 15 March 2005 to complete the hearing of the appeal. This was an attempt to adduce evidence of matters which occurred after the trial.

68 Evidence, (ie) new evidence, of matters that occurred after trial is received more readily than evidence about matters before the trial. It is a matter of discretion and degree whether that evidence is admitted.

69 New evidence should not be admitted going to areas of uncertainty where the trial judge has already made assessments. Conversely, further evidence may be accepted where assumptions common to the parties of the trial are falsified by subsequent events. Similarly, further evidence is receivable where, to exclude it, would be an affront to commonsense (see *Radnedge v Government Insurance Office of NSW* (1987) 9 NSWLR 235 (CA), following *Mulholland v Mitchell* [1971] 1 All ER 307 (HL).

70 Notwithstanding the width of the discretion to receive further evidence, an appeal court reserves its decision to accept evidence to exceptional cases (see *Radnedge v Government Insurance Office of NSW* (op cit) at page 252 per Mahoney J; see also *Doherty v Liverpool District Hospital* (1991) 22 NSWLR 284 at 296-297).

71 The evidence sought to be adduced was evidence that both the "hiring" of Mr Brandis to BHPB by IW and the alleged employment contract between IW and Mr Brandis were terminated by IW months after the alleged refusal to employ him occurred. The evidence is merely more evidence of acts by the respondents purporting to be authorised by the contracts which they say exist and existed. At first instance, the Commissioner was required to determine whether there was a contract of employment between BHPB and Mr Brandis or between IW and Mr Brandis.

72 Unilateral acts by IW after the matter was determined at first instance and sought to be used by the respondents in affirmation of their cases now is not a matter going to the merit of the proceedings at first instance on this appeal. These events do not in any way falsify or affect the correctness or otherwise of the Commissioner's finding at first instance. Further, the evidence is not relevant to the question of remedy. This case was not such an exceptional case within the test expressed in *Radnedge v Government Insurance Office of NSW* (CA) (op cit), as to require the Full Bench to admit Mr Ritchie's affidavit as evidence.

73 For those reasons, I agreed with my colleagues to dismiss the application to adduce that evidence.

Grounds of Appeal Do Not Comply with the Regulations

74 It was submitted on behalf of the respondents that grounds 1 and 2 do not comply with the regulation 29(2) of the *Industrial Relations Commission Regulations* 1985 (hereinafter referred to as *"the Regulations"*). They do not in fact do that, in that they do not specify the particulars of why it is alleged the decision is wrong in law.

75 However, the matter was well advanced at the time that this submission was made. The appellant had filed its written submissions and provided copies to the other parties. There was never any request made for particulars before the application to strike out was made orally on 13 March 2005, nor was anything done earlier to deal with the problem. The parties and intervener were represented by experienced and competent counsel and the outlines of submissions for the appellant, supported by the actual submissions, contained more than sufficient detail to apprise the parties and intervener of the appellant's case, as they were required to answer it. I might add that no disadvantage seemed to be suffered by the respondents in replying to the case for the appellant.

76 For those reasons, pursuant to regulation 92 of *the Regulations*, I agreed with my colleagues to exempt the appellant from compliance with *the Regulations* in respect of grounds 1 and 2 of the grounds of appeal.

Ground 1

77 By ground 1, it is alleged that the Commissioner erred in holding that there was not a contract of employment between Mr Brandis and BHPB. It is alleged that there was such a contract, either jointly with the first and second respondents or, alternatively, with the first respondent. It was not in issue that, at all material times, Mr Brandis was an employee of some person or persons and was an "employee", as defined in part (a) of the definition of employee in s7 of *the Act*.

78 First, it is necessary to consider the relevant facts in some more detail as they relate to this specific ground.

79 Mr Brandis worked for BHPB for about a year in 2001 – 2002 before he entered into any written agreement with IW by way of an AWA.

80 Mr Brandis entered into a written hire agreement with IW to provide his services as an engine driver to BHPB. He entered into no written contract of employment with BHPB and, indeed, it is not submitted that he entered into any express contract of employment with BHPB. BHPB entered into a written agreement with IW for the supply of workers on hire, as it was alleged. There was no written contract, nor was there any oral evidence of any contract between BHPB and Mr Brandis at any material time.

The AWA

81 There is in the appeal book a copy of an AWA (see tab 7, pages 66-74 (AB), volume 3) dated 7 October 2002. That AWA expresses the intent that it covers the terms and conditions of employment of IW's employees, "whilst on assignment with" BHPB. The AWA provides in its express terms that it is to expire on the termination of IW's contract with BHPB, "or on 31 July 2005, whichever is the sooner". However, it is also provided that the agreement was to continue after the date of its expiry.

82 That means that the AWA, unless otherwise terminated, was extant as at the time and date of the hearing and determination of the proceedings at first instance (see clause 2.1.2). By an express term, upon the expiry of the AWA, the AWA continued to apply until a replacement AWA was finalised.

83 Mr Brandis also agreed that he was employed by IW on a casual basis in the AWA. Of course, labelling employment as "casual employment" does not mean that it is casual employment if the reality is otherwise (see *Serco (Australia) Pty Ltd v Moreno* (1996) 76 WAIG 937 (FB)).

84 BHPB has the right under the agreement to terminate the assignment of Mr Brandis on four hours' notice (see clause 3.2). By the AWA, too, Mr Brandis acknowledged that he was not being offered ongoing employment and that his employment was terminable upon one hour's notice (see clause 3.3). He also acknowledged that he was not entitled to paid leave.

85 He also bound himself to complete the specified or minimum period of employment on assignment and, whilst on assignment, to work in accordance with his roster and associated duties (see clauses 3.5 and 3.6 respectively). He also bound himself to perform all work required of him in a safe and proficient manner (see also clause 3.6).

86 For its part, IW bound itself to pay the employee, Mr Brandis, wages on a weekly basis, but only on receipt of a BHPB timesheet correctly completed and with the appropriate authorisation by an approved supervisor of BHPB. IW undertook to pay wages by electronic funds transfer to a bank account nominated by Mr Brandis.

87 The "assignment" required the employee, Mr Brandis, to travel to the worksite.

88 Mr Brandis bound himself to notify IW and BHPB's supervisor at least one hour before normal start time on any day when he was unable to attend work for any period of the assignment. Mr Brandis also undertook to preserve the confidential nature of information which he acquired about IW and BHPB, and to return any documents to them when his assignment ended.

89 As the putative employee, Mr Brandis agreed by clause 4 (see tab 7, page 68 (AB), volume 3) to do as follows:-

> "**4. – Employee Undertakings**
>
> The Employee agrees,
>
> (a) To perform all work and associated functions in the safest possible manner.
>
> (b) To comply with applicable legislation and the BHP Iron Ore Pilbara District Rail Road Rules and Regulations, as amended from time to time.
>
> (c) To comply with all local site rules and requirements that are in place, and which may be introduced or varied from time to time;
>
> (d) To adhere strictly to all Standard Operating Procedures and Safe Systems of work laid down for particular equipment or tasks and to correctly use all personal protective clothing and equipment in the appropriate circumstances.
>
> (e) While on assignment with the Client that requires a licence, ticket or certification of any type whatsoever, (including, but without limiting the type of licence required, a valid drivers licence of any class), the Employee agrees to ensure that those licences, are current and valid during the period of the assignment. The Employee agrees to notify a Company representative immediately if such licence, ticket or permit expires or is revoked."

90 His actual hours of work and the nature of rosters to be worked were prescribed by BHPB. However, IW agreed with Mr Brandis that he would not be rostered to work more than twelve hours per shift. Mr Brandis was required to work on the job at a location nominated by BHPB (see clause 5.8). Clause 6 prescribed the rates of pay payable by IW to Mr Brandis. His duties were clearly prescribed to be those of a locomotive driver and associated duties (see clause 7 (tab 7, page 69 (AB), volume 3)).

91 By clause 8, IW bound itself to supply Mr Brandis as the employee with three pairs of pants, presumably trousers, three shirts, one pair of work boots, three pairs of safety glasses, one hard hat and one safety vest. These items were replaceable on a "wear and tear" basis during the term of the assignment by IW. Mr Brandis was required by the same clause to wear protective and personal protective equipment at all times whilst working.

92 By clause 9, IW undertook to make superannuation contributions on behalf of Mr Brandis in accordance with the *Superannuation Guarantee Administration Act* 1992 (Cth) and, by clause 10, to maintain statutory workers' compensation insurance in relation to "the employment", and also to maintain insurance in relation to employer or employee common law liability.

93 Travel to and from the airport was prescribed to be at Mr Brandis' own cost, and travel from the site accommodation to work, was prescribed to be in his own time (see clause 11). IW undertook to provide accommodation at any of the locations, Port Hedland, Newman, Redmont, Yandi or Yarrie, and to arrange for messing materials and the provision of meals with the exception of mid shift.

94 There were also policies which applied (see tab 7, page 74B (AB), volume 3). For example, the drug and alcohol policy.

Agreement – BHPB and IW

95 The only other agreement in writing and an important document is the document entitled "Contract No P7825 for Provision of Locomotive Engine Drivers between BHP Iron Ore Pty Ltd and Integrated Workforce Ltd" (tab 8 (AB), volume 3)) signed on 5 and 11 June 2001 by IW and BHPB respectively (hereinafter referred to as "the contract"). In the contract, BHPB is called "the company" and IW is "the contractor".

96 The special conditions of the contract are important. Clause SC1 refers to the provision of "temporary" locomotive engine drivers and the provision of professional and competent driving services as required by BHPB. Clause SC1 reads as follows:-

> "**SC-1 STATEMENT OF WORK**
>
> The Contractor shall be responsible for the provision of temporary locomotive engine drivers ("drivers") and the provision of professional and competent locomotive driving services as required by the Company (hereinafter "work under the Contract").
>
> The Contractor shall ensure that all drivers have previously been a fully qualified locomotive engine driver on the Company's Newman to Hedland railroad, and must hold a current A class motor vehicle license. Drivers shall be required to satisfactorily complete theoretical and practical tests as part of the re-familiarisation with the Company's railroad systems and facilities.
>
> The Contractor warrants that the drivers provided shall hold the necessary qualifications to drive locomotives of the types operated by the Company and that, without limiting General conditions clause 18.1, the Contractor shall at all times comply with the Mines Safety and Inspection Act 1994 as amended and the Mines Safety and Inspection Act Regulations 1995 as amended."

97 The contract recites that:-

> "It is expected that drivers shall be required for variable periods through to 30th June 2001".

98 Significantly, the contract also provides:-

"The Company reserves the right to extend the term of the Contract, giving the contractor 30 days (sic) written notice of any such intention" (see clause SC2).

99 There is no evidence of any written notice of any intention to extend the term of the contract.

100 IW bound itself to comply and to ensure that its "drivers and sub-contractors" complied with the safety requirements of all company sites. IW expressly subjected all of its drivers to random drug and alcohol testing, as directed by BHPB, before commencing work on site (see clause SC5 and SC6 respectively).

101 All flights between Perth and the company sites at the commencement and completion of the roster periods of putative employees were to be arranged and provided for by BHPB, as was accommodation and messing other than the midday shift meal (see clause SC8). There was not conferred upon IW, pursuant to the contract, the right to provide all "temporary" locomotive drivers to BHPB. BHPB was given the discretion to "source" alternate labour (see clause SC9).

102 Importantly, by clause SC10, it is prescribed that neither the contractor nor the drivers appointed by the contractor, (ie) IW, were agents or employees of BHPB for any purpose. BHPB agreed to pay to IW a rate per hour for drivers which were provided by IW to BHPB to work, at a rate fixed at $71.00 per hour and any additional costs (provided the Contractor had sought the Company's prior approval and agreement). That rate, of course, was a different rate from the rate payable by IW to Mr Brandis, which was $50.25 per hour.

103 Annexure A to the contract, the safety conditions of the contract, prescribed minimum safety requirements for the performance of work under the contract. It required that a safety management plan be submitted by IW which was required to apply and ensure that its personnel were supplied with appropriate protective clothing, hard hats, eye protection and steel capped safety footwear. (Clause 2.8 applies to safety equipment and clothes.)

104 Other responsibilities were cast upon IW which do not necessarily pertain to employees, for example, clauses 2.11, 2.12, 2.13 and 2.14. The contractor, namely IW, was also required to clearly define the roles and responsibilities of all key personnel involved in the work under the contract (see clause 2.2). There was no evidence that any of those requirements were met and, indeed, the conditions seem to be designed more for an independent contractor doing work on site by way of construction or otherwise with his own equipment than for a labour hire company. The general conditions of the contract between BHPB and IW again seem directed to a contractor who contracts with BHPB to do work for it and uses sub-contractors or employees.

105 However, the contractor is bound pursuant to the contract to indemnify and keep indemnified BHPB against loss or damage to BHPB's property. Significantly, this does not include locomotives or rolling stock or claims by any person in respect of personal injury (see clause 21).

106 By virtue of clause 22, workers' compensation insurance and employer's liability insurance are the responsibility of IW.

107 IW is required to employ only persons who are careful, skilled and experienced in their trades or callings (see clause 25). Clause 25 also confers on BHPB the right to direct IW to have removed from the site any sub-contractor or employee employed in connection with the work under the contract if, in BHPB's representatives' opinion, he is negligent, guilty of misconduct or whose involvement the company's representative considers not to be in the best interests of the project.

108 The relevant part of that clause reads as follows:-

"**25. CONTROL OF CONTRACTOR'S EMPLOYEES, SUBCONTRACTORS AND SUBCONTRACTORS' EMPLOYEES**

The Contractor shall employ, and ensure that its subcontractors employ, for the work under the Contract, only such persons who are careful, skilled, experienced, and competent in their respective trades and callings.

The Company's Representative may direct the Contractor to have removed from the Site, or from any activity connected with the work under the Contract, within such time as the Company's Representative directs, any subcontractor or person employed in connection with the work under the Contract who, in the Company's Representative's opinion, is incompetent, negligent, guilty of misconduct or whose involvement the Company's Representative considers not to be in the best interest of the project. (my emphasis) At no cost or expense to the Company, the Contractor shall immediately comply with the direction of the Company's Representative and the Contractor shall not re-employ or permit any such person so dismissed to be re-employed in or in connection with the performance of the work under the Contract without the prior approval of the Company's Representative."

109 The contractor, (ie) IW, is given responsibility for industrial relations with the contractor's, that is, IW's personnel (see clause 26.6(a)). However, very significantly, clauses 26.6(b), (c), (d), (e), (f) and (g) read as follows:-

(b) Right to Advise

The Company reserves the right to advise on industrial and personnel policies that concern the Contractor in the performance of the work under the Contract and the Contractor shall comply with the Company's Representative's industrial relations directions.

(c) Industrial Agreement

The Contractor shall not enter into any industrial agreement with respect to the Site with any union without the prior approval of the Company's Representative.

(d) Meetings

The Contractor shall attend meetings at the Site called by the Company's Representative for the purpose of discussing industrial matters.

(e) Industrial Disputes

The Contractor shall keep the Company's Representative fully informed of any dispute with any of the Contractor's personnel, any trade unions, or any demands for wages and/or conditions in excess of or outside the scope of current industrial agreements and awards affecting the Site.

(f) Demarcation Problems

The Company's Representative shall be immediately informed of demarcation problems or disputes that may arise between the Contractor's personnel and the personnel of any other company represented on Site.

(g) Termination of subcontract

If industrial relations difficulties concerning any subcontract develop and are deemed by the Company's Representative to be detrimental to the progress of the work under the Contract, the Contractor shall at the request of the Company's Representative immediately terminate that subcontract without any cost to the Company and make other arrangements to perform its obligations under this Agreement."

110 What those sub-clauses do is to place industrial relations on the site and in relation to employees of contractors and, in this case, IW, clearly in the hands of BHPB. IW has to comply with BHPB's industrial relations directions. Further, it cannot enter into any industrial agreement by virtue of that provision, without the prior approval of BHPB and, presumably, cannot terminate it without that permission.

111 Moreover, IW must advise BHPB of all disputes with IW's own personnel which includes employees or unions and/or demands for wages and conditions in excess of or outside the scope of current industrial agreements and awards. IW is also required by the contract to inform BHPB immediately of demarcation problems or disputes which may arise between IW's personnel and any other company's personnel represented on site.

112 The contract also conferred possession of the site or use and control of the site, sufficient to enable the contractor to execute the work which the contractor contracted to do, upon the contract (Clause 27). But, of course, there was no such requirement practicably upon IW in relation to Mr Brandis who drove a locomotive.

113 By clause 28.1, it was provided that work was to commence as determined by BHPB's representative but no completion date is or was prescribed. There are a lot of clauses relating to effective workmanship and warranties about the standard of workmanship and materials and the like which have simply no relevance to an alleged contract to supply the labour of an employee (see clause 30).

114 Again, there is provision for payment, but it is a provision for payment of IW by BHPB. However, it applies to work carried out by the contractor. Clause 37 makes provision for the payment of a contractor's employee. Clause 37 reads as follows:-

> "**37. PAYMENT OF SUBCONTRACTORS AND WORKERS**
>
> The Company's Representative may require the Contractor to provide, as a condition precedent to the Company making any payment to the Contractor, a statutory declaration, or sufficient evidence, that:
>
> (a) all workers who have at any time been engaged on work under the Contract, whether by the Contractor or a subcontractor, have been paid all moneys payable to them in connection with their employment on the work under the Contract;
>
> (b) all subcontractors have been paid all moneys payable to them in respect of the work under the Contract.
>
> At the request of the Contractor and out of moneys payable to the Contractor, the company may on behalf of the Contractor make payments directly to a worker or subcontractor.
>
> Upon termination for default, insolvency or for convenience, in the event that the Company has no reasonable alternative for industrial relations or commercial reasons than to make payment to workers, or to subcontractors who have been engaged at any time on the work under the Contract (which amounts were included in a progress payment to the Contractor but which have not been paid to those persons by the Contractor), then the Company may make the payments and may set-off or otherwise recover from the Contractor the amounts so paid."

115 Clause 40.2 refers to the defaults by the contractor, in this case IW. The definition refers to "work under the Contract" which means all of the work which the contractor is or may be required to do. Again, the wording was a little unrelated to a purported labour hire contract.

116 Clause 25 was drawn to the attention of the Full Bench as significant.

117 I have considered the above documents in some detail in these reasons because of the reliance to a greater or lesser extent by the parties on them.

Australian Workplace Agreements – Their Operation and Effect

118 For the time that he worked for BHPB after October 2002, whether he was actually employed by that company some of the time or not, Mr Brandis was a party to the AWA with IW to which I have referred above. It was a major submission on behalf of the respondents that the AWA constituted a contract of employment which prevented the appellant asserting or the Full Bench finding that there was any contract of employment between Mr Brandis and BHPB during the term of operation of the AWA.

119 It is the law that an AWA operates during its term to the exclusion of any State award which includes an order or industrial agreement (s170VQ(4) of *the WR Act*). It does not expunge the State award or prevent one issuing (see the Full Bench's discussion of this in *Hanssen Pty Ltd v CFMEU* (2004) 84 WAIG 694 (FB)).

120 I now examine the nature of an AWA. It is a written agreement which "deals with matters pertaining to the relationship between an employer and an employee" (see s170VF(1) of *the WR Act*), and it may be made before the commencement of the employment. It is also to be noted that s170VQ(4) expressly recognises in prescribing that an AWA operates to the exclusion of any State award or agreement, that this is so. The words used are important and exclude the operation of any State award or agreement "that would otherwise apply to the employee's employment". Giving those words their natural and plain meaning, an AWA does not expunge, invalidate, or exclude from operation the contract of employment. Further, there is nothing in *the WR Act* which prescribes that.

121 I apply the same reasoning as was applied to awards in *Byrne and Frew v Australian Airlines Ltd* [1995] 185 CLR 410. Thus, the existence of the AWA could not and does not purport to prevent the contract of employment, (ie) the employment relationship, coming to an end by mutual agreement, by repudiation, by dismissal or by any other lawful means.

122 The AWA exists and regulates those terms and conditions of employment which it purports to do because there is, or will be, an employment relationship between the parties to the AWA. When the employment relationship ends, the AWA can have no effect because, by the words of the statute which prevents the operation of the State award or agreement, etc, there is no employment relationship to which it applies and the AWA has effect only because there is such a relationship. Thus, it does not require a formal act of termination of the AWA because the AWA only exists because there is an employment relationship usually itself arising because there is an employment contract.

123 No question of the operation of s109 of *The Constitution* of the Commonwealth of Australia arises for the reasons expressed in *Hanssen Pty Ltd v CFMEU* (FB) (op cit). Alternatively, even if that was wrong, there is nothing to prevent the application of a State award or agreement when the AWA ceased to operate (see *Hanssen Pty Ltd v CFMEU* (FB) (op cit)). In this case, if the contract of employment between IW and Mr Brandis terminated at a material time, then the AWA could not continue to operate as and from the time when the contract of employment terminated.

124 Importantly, however, one can turn to the question of who the parties to any contract of employment were without the existence of the AWA muddying the waters.

Contract of Employment

125 It was not in dispute that Mr Brandis was, at all material times, an employee. Unlike a number of reported labour hire cases, the question was not whether he was an independent contractor. The question was whether he was an employee of IW or of BHPB at the material times.

Was there a contract of employment between BHPB and Mr Brandis? – Relevant Facts and Matters

126 There were a number of facts or matters which are relevant to the determination of this question. They are these:-

(a) Mr Brandis entered into an AWA on 7 October 2002 with IW which purports to characterise him as an employee whilst on "assignment" with BHP Iron Ore Pty Ltd and due to expire on 31 July 2005 or when IW's contract with BHPB expired, whichever was the sooner. (It is to be noted that, when the assignment ended, he was no longer an employee of IW.)

(b) Mr Brandis was described as a casual employee in the AWA but, in fact, he worked on rosters prepared by BHPB and according to those requirements, on a continuing basis for about three years and was continuing to so work as at the date of the hearing at first instance on 25 August 2004, concluding on 8 September 2004.

(c) His employment was described as casual, but BHPB could terminate his assignment on four hours' notice and his employment, which was said to be not ongoing permanent employment, was terminable by only one hour's notice (see clause 3.0).

(d) By the AWA, Mr Brandis acknowledged that, as a "casual employee", he was not entitled to any paid leave. It follows that, if he was not a casual employee, he was so entitled.

(e) If he elected not to complete the assignment, he was required to complete the minimum period of the assignment and to inform IW immediately of this fact.

(f) It was IW's duty to pay him for the work done on assignment, that is his wages, on a weekly basis by electronic funds transfer into his bank account.

(g) He was required to notify IW if he was unable to travel to the work site.

(h) He agreed to keep confidential, information which he obtained from IW and from BHPB and to return confidential material to them.

(i) IW undertook that employees would not be rostered on assignment for more than 12 hours per day, subject to exceptions.

(j) However, when and where they worked was a matter to be prescribed by BHPB by the rosters which Mr Brandis was required to work.

(k) The hourly rate payable was $50.25 gross per hour, with a casual loading said to be included in it, payable by IW and not by BHPB, although BHPB reserved to itself the right to pay direct.

(l) A different rate per hour of $71.00 was payable by BHPB to IW.

(m) BHPB agreed to and did pay accommodation at various locations in the Pilbara and organised Mr Brandis' travel and paid for it to and from Perth to the Pilbara, as well as his messing.

(n) A resolution of disputes clause, whereby the parties undertook to accept as final and binding the decision of the Australian Industrial Relations Commission was contained in the IW agreement (clause 14) and a dispute mechanism in relation to matters of discrimination also appears.

(o) There is no other relevant written or express oral agreement between IW and Mr Brandis or BHPB and Mr Brandis.

(p) The contract between BHPB and IW is ambiguous in that it contains clauses which relate to a contractor doing work, particularly work of a construction or excavatory type, rather than to the provision of a "temporary" locomotive driver and his labour.

(q) IW undertook to provide competent and qualified locomotive drivers. (Nonetheless BHPB, as a matter of fact, inducted them and tested them for competence (see clause SC1) and has the right to refuse to use them.)

(r) In its last paragraph, clause SC1 clearly provides that IW warrants that it would comply with the *Mines Safety and Inspection Act* 1994 (as amended) and the *Mines Safety and Inspection Act Regulations* 1995 (as amended). How it could possibly achieve that, when it was not supervising Mr Brandis on site, is another matter.

(s) (i) The BHPB/IW agreement clearly provides that IW's duty is to provide "temporary" drivers when required for variable periods until 30 June 2001, the agreement being dated 11 June 2001. The agreement is for a very short period and there is no evidence that that agreement was extended.

(ii) I say that because BHPB reserves the right to extend the term of the contract, "giving the Contractor 30 days (sic) written notice of any such intention". There is no evidence of any such written notice or any such notice being given and, therefore, there is no evidence that the contract was at all extended.

(t) That assignments were only short term is borne out by the reference to the requirement for variable periods through until 30 June 2001 which is 19 days after the contract between BHPB and IW was signed.

(u) The words "temporary employee" has been judicially defined to some extent in *Williams v Macharg* [1908] 7 CLR 213, although there are many statutory definitions. It seems to me that employment is not a temporary and finite assignment under the agreement between IW and BHPB, if Mr Brandis were engaged in regular and continuous work and not temporary assignment and if his position became a position not created to meet a temporary emergency and not merely casual and one which was necessary to the ordinary working of locomotives by the respondents which was palpably the case in this matter.

(v) That he was also deemed to be a casual employee, rightly or wrongly, supports such a conclusion, namely that he was not, after he ceased to be a casual employee, if he ceased to be a casual employee, engaged pursuant to any contract between IW and BHPB.

(w) Whilst IW was required to ensure that all of its workers performing work under the contract completed the necessary site and area inductions as directed by BHPB before commencing work on site, there was still a necessary induction by BHPB. Indeed, it is doubtful that IW could arrange for inductions because, firstly, it was not its site, and secondly, there was no expertise in IW in the running of railways or the supervision of locomotive drivers.

(x) It was not in dispute that IW knew nothing about running railways and supervising training or assessing the work ability of locomotive drivers (clause SC5).

(y) IW was required to have the drivers comply with BHPB's safety requirements at all company sites and to immediately notify BHPB of any death or injury to any person or any loss or damage to company property. Again, there was no evidence that this burden was carried out. It was unlikely that IW, which did not have the knowledge to supervise locomotive engine drivers, could possibly have drivers comply with BHPB's safety requirements.

(z) IW acknowledged that "all of its drivers" performing work under the contract on site were subject to random drug and alcohol testing as directed by BHPB.

(aa) IW was also required to ensure that all of its drivers performing work under the contract completed all necessary inductions as directed by BHPB (see clause SC7).

(bb) BHPB agreed to provide all flights necessary to transport drivers between Perth and the company sites at the commencement of and the completion of rostered periods which is what occurred in fact, and I have already noted that accommodation and messing were provided by BHPB too (see clause SC8).

(cc) BHPB also undertook to provide all safety clothing and equipment in accordance with site requirements.

(dd) Significantly, the agreement expressly provided that neither IW nor its drivers would be agents or employees, for any purpose, of BHPB (see clause SC10).

(ee) IW agreed to provide drivers to BHPB and BHPB agreed to pay a rate of $71.00 per hour, exclusive of GST, to IW, for the labour of each such driver.

(ff) BHPB required under its safety conditions of the contract that there be nil accidents, nil incidents, nil injuries, nil property damage, and that the conditions be read in conjunction with the *Mines Safety and Inspection Act* 1994 (as amended) and the *Mines Safety and Inspection Act Regulations* 1995 (as amended), "all other applicable legislation, statutory regulations and standards and all further Company safety requirements". These, of course, included the BHP Pilbara Railway Rules referred to by the Full Bench in other appeals, and which are comprehensive rules for the conduct of railways including the performance of locomotive drivers.

(gg) The general conditions of contract services in the BHPB/IW agreement, many of which are inapplicable for the reasons which I have expressed above, however, do contain some relevant provisions.

(hh) An example of why much of this agreement is inapplicable is the definition of "work under the contract", which defines "all of the work which the Contractor is or may be required to execute under the Contract and includes the work more particularly described in the specification and variations and remedial work". As I observe, those terms deal with a contractor who is actually performing work such as construction or excavation at the BHPB mine sites.

(ii) IW indemnifies BHPB against loss or damage to property, but significantly, not to locomotives or laden or unladen rolling stock (my emphasis), and other claims arising out of or in connection with IW, its agents, employees or subcontractors carrying out the work under the contract (clause 21). In other words, the putative employee's acts of damage, if any, to BHPB locomotives or rolling stock do not result in vicarious liability for IW.

(jj) IW binds itself by the contract to maintain its own insurance to cover IW's employees in respect of death or injury, both by way of workers' compensation insurance and common law liability. Significantly, the suitable policies maintained must be approved in writing by BHPB (clause 22). Again, IW cannot enter into an insurance policy or policies of its own selection.

(kk) IW is required to employ and ensure that its subcontractors employed to perform the work under the contract are only such persons who are careful, skilled, experienced and competent in their respective trades and callings (clause 25). However, BHPB has a right to choose who works as a locomotive driver and does so. IW cannot and could not judge the real competence of a locomotive driver.

(ll) Importantly, BHPB's representative has the right and discretion to direct IW to have a worker removed from the site or from any activity connected with the work under the contract within such time as BHPB's representative directs that this occur. That is, even if the worker is IW's employee, BHPB can make a judgment about the employee, the standard of his work and terminate his work for BHPB with no notice to or without the consent of IW.

(mm) IW is required to comply with BHPB's site management requirements, procedures and directions and those prevailed over its own (clause 26.3), as well as BHPB's safety directions in the same manner (clause 26.5). That means of course that the workers who come to the site through IW are entirely subject to BHPB's direction in safety and other matters because, as a matter of fact, IW does not, did not and cannot direct locomotive drivers.

(nn) Clause 26.6, which deals with the subject of industrial relations is, as I have expressed it above, a very important clause. By that clause, IW bound itself to be responsible for industrial relations with IW's "personnel". However, that is diluted to almost nothing by the same clause by which BHPB expressly reserved to itself the right to advise on industrial and personnel policies that concern IW in the performance of work under the contract and IW is mandatorily required "to comply with the BHPB's representative's industrial relations directions".

Thus, all matters of an industrial relations nature which would include terms and conditions of employment, management, dismissals, what industrial instruments IW could enter into or terminate, and a large number of other such matters, are matters which are finally determinable by BHPB.

In particular, IW is expressly prohibited by the clause from entering into any industrial agreement "with respect to the site" with any union without the prior approval of BHPB's representative.

It is compulsory, too, that IW attend meetings at the site called by BHPB's representatives for the purpose of discussing industrial matters. Again, also IW is compulsorily required to keep BHPB's representative fully informed of any dispute with any of IW's personnel, any trade unions or any demands for wages and/or conditions in excess of or outside the scope of current industrial agreements and awards affecting the site.

Further, IW binds itself to inform BHPB's representatives if any demarcation problems or dispute may arise between IW's personnel and the personnel of any company represented on site. The ultimate arbiter of terms and conditions of employment or variation of terms and conditions of employment of IW's "employees" is unquestionably BHPB.

Thus, the terms and conditions of employment and all of the control of employees in all industrial relations matters, including relations with IW's employees and unions are ultimately and finally in the hands of BHPB and not IW.

(oo) The time for commencement and completion of the contract are merely as determined by BHPB's representative with no express completion date. However, one looks to the AWA to see that.

(pp) Whilst IW is required to pay all workers engaged to work, whether employees, subcontractors or subcontractors' employees, and provide proof that it has done so, if required, BHPB may, if requested by IW, make direct payments

to a worker. Again, BHPB can, with little trouble, become the actual payer of the employees and take that obligation upon itself.

(qq) Mr Brandis was not employed temporarily or casually but was employed on a continuing and ongoing basis as an engine driver at or by BHPB on its "premises" from 7 October 2002 until the date of hearing and he remains so employed.

(rr) During that time, he was not dismissed or suspended, nor was his employment terminated, nor did either IW or BHPB purport to terminate his employment. He was employed there as a locomotive driver as at 2004, having commenced work in or about June 2001 and continued to be employed at the time of the hearing of the proceedings at first instance. Notably, he was employed for some fifteen months before he signed the AWA. It is not at all clear on what basis he was employed at that time.

(ss) At all material times, Mr Brandis was directed, controlled and rostered whilst working as a locomotive driver, albeit an experienced one. He worked where and when he was told to by BHPB.

(tt) There was no contract being physically and actually carried out on site by IW.

(uu) Mr Brandis complied with all safety regulations and all of the relevant regulations and this was a matter within the actual control of BHPB.

(vv) He was required to comply with directions being given by BHPB, for example, a minor direction was that he check the filing cabinet every day before commencing work to see what directions might be there in writing from BHPB so that he would be apprised of them.

(ww) There was no day to day control of him exercised by IW, nor since there was no evidence that IW was anything but a labour hire company, was IW capable of exercising any such control or giving him any such direction as to how to drive a locomotive, safe practices and the levels of competence and safety required at any time. There was no evidence that IW had the ultimate right to control him after the assignment terminated.

(xx) His direction and supervision from day to day, on all of the evidence, was by BHPB and carried out in the same manner as was the direction and control of persons actually designated as BHPB employees. It is difficult to see how that could not be, given what the work of a locomotive driver is.

(yy) At all material times, IW paid Mr Brandis' wages, and at all material times, BHPB paid the amount it was required to pay under the original contract.

(zz) At all material times, IW maintained insurance relating to workers' compensation and common law employer's liability and made superannuation contributions in respect of Mr Brandis in accordance with its contractual obligations.

(aaa) In August 2002, when Mr Brandis was charged by his employer with a breach of the safe working rules, which he admitted, the investigation was entirely conducted by BHPB and the decision about the discipline to be imposed on him was imposed in accordance with BHPB's rules. Having decided the penalty, BHPB seems to have really adopted the approach of asking IW to confirm it to him.

(bbb) There is no evidence about who had the right to dismiss Mr Brandis under the contract, but it would be implicit in the contract, if there was a contract of employment with BHPB, that BHPB would have the right to terminate it, as Mr Brandis would have the right to terminate it.

(ccc) Mr Brandis did apply for a permanent position as an engine driver with BHPB and applied as if he were not an employee.

(ddd) When BHPB directly tried to force Mr Brandis to take a reduction in pay, he objected to it and had discussions with both IW and BHPB about it before, no agreement having been reached, he referred it to the employment advocate who resolved it.

(eee) At all material times, BHPB had a statutory duty to ensure that employees carried out their duties in accordance with all of the relevant statutory and regulatory rules about safety and the working of locomotives. Further, they had this duty in relation to independent contractors.

127 At all material times. BHPB had the right to control Mr Brandis' work and all related matters. It exercised actual or relevant control, and there was no evidence that he was not integrated into the workforce, at least for all practical purposes, and into the BHPB railway organisation. That is because:-

(a) Supervision was and could only be provided by BHPB and no-one else when he was at work and on the track.

(b) His role and the performance of his functions was to all intents and purposes no different from an employee.

(c) His roster was drawn up and maintained by BHPB which therefore determined when he started and finished work and what work he would do and where he would do it.

(d) BHPB directed him, and directs him, to take breaks and when he is to bring his crib to work.

(e) BHPB directs him how to drive the train in order to conserve fuel.

(f) BHPB directs him where to reside when on tour and provides accommodation and mess facilities.

(g) On signing on for work, he is required to check the filing cabinet for memos from BHPB.

(h) There is no significant difference between IW drivers and BHPB drivers.

(i) He was invited to meetings along with all other drivers, as if he were an employee.

(j) He was, at one time, required to wear BHPB clothing with the BHPB logo on it.

(k) He was invited to participate with BHPB employees in the BHPB Healthy Lifestyle Program.

(l) He was engaged on a long term basis, indeed an indefinite basis as part of the BHPB railway organisation from June 2001 for three years and continuing as at the time of the hearing.

(m) BHPB arranged and bore the expense of travel to and from Perth to the Pilbara and BHPB, at all material times, provided all safety gear, not IW, notwithstanding the terms of the IW contract with Mr Brandis.

(n) BHPB provided all necessary training and supervision and disciplined Mr Brandis and did so without requiring the consent of IW.

An Implied Contract

128 I would make these observations preliminary to a consideration of this ground.

129 The principles for consideration of the issues raised by this ground are well settled by *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21 and *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* [1985-1986] 160 CLR 16, as well as the other authorities which I have cited. In particular, considering what is a contract of service or whether there is a contract of service between parties in any particular circumstances, the jurisprudential ground has been ploughed, scarified and harrowed so thoroughly as to require little further attention from me.

130 I respectfully apply what Lord Loreburn LC said in *McCartan v Belfast Harbour Commissioners* [1911] 2 Irish Reports 143 at 145:-

> "Decisions are valuable for the purpose of ascertaining a rule of law. No doubt they are also useful as enabling us to see how eminent Judges regard facts and deal with them, and great numbers of recorded precedents are useful in no other way. But it is an endless and unprofitable task to compare the details of one case with the details of another, in order to establish that the conclusion from the evidence in the one must be adopted in the other also. Given the rule of law, the facts of each case must be independently considered, in order to see whether they bring it within the rule or not."

131 The first question to be determined is whether there was in existence, at the material times, a contract of employment between BHPB and Mr Brandis. It was argued strongly on behalf of the CFMEU that there was, at all material times, a contract of employment between Mr Brandis and BHPB, a submission just as strongly opposed by counsel for both of the respondents.

132 There is no doubt that a contract of employment can arise by implication, just as any other contract can between parties. Indeed, it is one which suggests that, given that contracts are quite often not reduced to writing or evidenced by writing, or are the subject of inexact oral evidence, likely to be the case (see, for example, *Matthews v Cool or Cosy Pty Ltd* (2003) 84 WAIG 199 at 218-220 (FB) and see in that case the discussion of implied contracts). In determining disputes concerning the existence of employment arrangements, the proof of "paper documentation" is relevant, but not determinative (see *Pitcher v Langford* (1991) 23 NSWLR 142 (CA); see also *Matthews v Cool or Cosy Pty Ltd* (FB) (op cit) at page 218).

133 Importantly, the facts may ground an inference of an implied contract of service, even though the parties thereto may not be conscious of what they have done, so that the law will spell out a contract from their dealings (see *Matthews v Cool or Cosy Pty Ltd* (FB) (op cit) at page 218 and *Swift Placements Pty Ltd v Workcover Authority of NSW* (Inspector May) (2000) 96 IR 69 at 84-88 (IRC NSW in Court Session). Whether a contract of employment can be implied depends on a whole number of circumstances and the totality of them.

134 In some circumstances, it will not be possible to identify any particular act by one party which constitutes an offer, or by the other which amounts to an act of acceptance. Yet, if the parties have conducted themselves on the basis that a contract exists between them, a court would readily infer that such a contract has been brought into being. There is no need in such cases to have recourse to analysis in terms of offer and acceptance. What is important is usually to decide not whether the contract has come into existence but rather to determine when that occurred (see *Greig and Davis "The Law of Contract"* at page 249; and *The Farmers' Mercantile Union and Chaff Mills Limited v Coade and Another* [1921] 30 CLR 113).

135 The court, or in this case the Commission, is entitled to consider the reality of the purported contractual arrangements and may do so, even though it was not argued that the agreement was a sham (see *Dalgety Farmers Ltd t/a Grazcos v Bruce and Another* (1995) 12 NSWCCR 36).

136 In implied contracts, agreement is not a mental state but an act, and an inference from conduct (see *Chitty on Contract*, 29th Edition (paragraph 8)).

137 Implicit in the submission of Mr Schapper for the appellant, although he did not expressly raise the question, was that, at some stage, the contract between IW and Mr Brandis was terminated by tacit agreement or abandonment. It is clear that, informally but effectively, parties can act in relation to each other so as to abandon or abrogate a contract (see *Summers and Another v The Commonwealth* [1918] 25 CLR 144 and *Mathews v Mathews* [1941] SASR 250 at 255 per Napier JJ (as he then was)).

138 The question, in this class of case, was whether the conduct of the parties, BHPB and Mr Brandis, viewed in the light of the surrounding circumstances, showed a tacit understanding or agreement. The conduct of the understanding or agreement between BHPB and Mr Brandis is important in that regard (see *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 (CA) per Heydon J at page 177, quoting what McHugh JA, Hope and Mahoney JA concurring, said in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117-11,118:-

> "It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of 'offer', 'acceptance', 'consideration' and 'intention to create a legal relationship' which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship….
>
> Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed."

139 Whether limited or not, recognition has been given to an ability to find contracts implied, even though it is not easy to find an offer or acceptance.

140 However, as Marshall J said in *Damevski v Guidice, President of the Australian Industrial Relations Commission and Others* 202 ALR 494 (FCFC), contracts are not to be implied lightly.

141 The conduct of the parties must show all the essential elements of the contract, an intention to enter into legal relations by the parties, mutual obligation or consideration, and an offer by one party and acceptance by the other. Further, the test of an intention to effect legal relations is an objective one (see per Wilcox J and Marshall J in *Damevski v Guidice* (op cit) at page 510). The labels used of course are not necessarily determinative of the nature of the relationship or whether there is a legal relationship by way of contract of service.

142 It may be that the promisor never anticipated that the promise would give rise to any legal obligations but, if a reasonable person would consider that there was an intention to contract, then the promisor will be bound (see *Damevski v Guidice* (op cit)). At page 511, Marshall J said:-

> "it is in my opinion of more assistance to ask whether actual or subjective intention to contract plays a part in determining whether there is a binding contract, and (if it does) what part it plays. The proper view is, in my opinion, that the existence of a contract is a consequence which the law imposes upon, or sees as a result of, what

> the parties have said and done. Actual subjective intention to contract is a factor which the law takes into account in determining whether a contract exists but it is not, or not always, the determining factor."

143 In determining whether a contract of service has been entered into and, if so, with whom, the commission or a court will look at the whole of the circumstances of the engagement, ascertain who was offering employment and whether the employee accepted the offer. The right of control is significant but not the sole determinant of what then ensued, a careful look at the whole of the relationship being essential.

144 The court may imply a contract by concluding that the parties intended to create contractual relations after examining extrinsic evidence including what the parties said and did. The court or commission looks at the totality of the relationship (see *Dalgety Farmers Ltd t/a Grazcos v Bruce and Another* (op cit) at pages 46-48; and see also *Matthews v Cool or Cosy Pty Ltd* (FB) (op cit) at page 218).

145 I agree that, in general, the courts have held that the imposition of a labour hiring agency between its "clients" and the workers it hires out to them does not result in an employer/employee relationship between the client and the worker (see the discussions of these matters in *Brook Street Bureau (UK) Ltd v Dacas* (2004) EWCA Civ 217 (CA) and *Forstaff Pty Ltd and Others v Chief Commissioner of State Revenue* [2004] NSWSC 573 which are cases dealing with such a question).

146 It is quite clear that, in the beginning, there was in this case a written agreement between Mr Brandis and IW on the one hand to employ Mr Brandis and an express written agreement between IW and BHPB whereby IW contracted to provide locomotive drivers to work for BHPB on a temporary basis under a contract which was due to expire, unless extended, on 30 June 2002.

147 I put aside for the present the determination of the question whether BHPB and IW were, pursuant to those contracts and/or later, joint employers of Mr Brandis. I will deal with that question later in these reasons.

148 In determining whether there is a contract of employment or was a contract of employment at the material time for the purposes of the proceedings at first instance between BHPB and Mr Brandis, I apply the principles laid down in *Hollis v Vabu Pty Ltd* (HC) (op cit) and *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (HC) (op cit) at 29 (see also *Matthews v Cool or Cosy Pty Ltd* (FB) (op cit) where *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (HC) (op cit) and *Hollis v Vabu Pty Ltd* (HC) (op cit) are cited and applied at page 218).

149 These authorities were followed by the Full Benches of this Commission in *United Construction Pty Ltd v Birighitti* (2002) 82 WAIG 2409 (FB) and *Augustyn v Vistadale Pty Ltd as trustee for the Ranger Family Trust t/a Ranger Contracting* (2002) 82 WAIG 939 (FB) and by the Industrial Appeal Court in *Tricord Personnel v CFMEU* (2004) 85 WAIG 5 (IAC) and *United Construction Pty Ltd v Birighitti* (2003) 83 WAIG 434 (IAC) (see also *Matthews v Cool or Cosy Pty Ltd* (FB) (op cit)).

150 In *Hollis v Vabu Pty Ltd* (op cit) at page 41 per Gleeson CJ, Gaudron, Gummow, Kirby and McHugh JJ quoted with approval what Mason J said in *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (op cit) at pages 28-29. I quote the whole of the passage from the judgment of Mason J at pages 28-29:-

> "The traditional formulation, though attended with some complications in its application to a diverse range of factual circumstances (*Federal Commissioner of Taxation v Barrett*), nevertheless has had a long history of judicial acceptance. True it is that criticisms have been made of it. It is said that a test which places emphasis on control is more suited to the social conditions of earlier times in which a person engaging another to perform work could and did exercise closer and more direct supervision than is possible today. And it is said that in modern post-industrial society, technological developments have meant that a person so engaged often exercises a degree of skill and expertise inconsistent with the retention of effective control by the person who engages him. All this may be readily acknowledged, but the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters": *Zuijs v Wirth Bros. Pty. Ltd.*. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.
>
> The finding that both Gray and Stevens were independent contractors disposes not only of the argument that Brodribb is vicariously liable for Gray's negligence by virtue of a relationship of employment, but also of the argument that Brodribb is personally liable to Stevens for breach of the duty of care owed by an employer to an employee."

151 Their Honours referred to *Zuijs v Wirth Bros Pty Ltd* [1955] 93 CLR 561 at 571. Furthermore, control is not now regarded as the only relevant factor. "Rather it is the totality of the relationship between the parties which must be considered". Their Honours then said:-

> "So it is that, in the present case, guidance for the outcome is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability. These include, but are not confined to, what now is considered "control"."

152 In other words, one looks at the totality of the relationship between the parties to determine whether there was a contract which was a "contract of employment". As I have already observed, the question of whether Mr Brandis was an independent contractor did not arise at any time.

The Abandonment or Tacit Agreement to Terminate any IW/Brandis Contract of Employment

153 It is necessary to consider whether, even if there was a contract of employment with IW by Mr Brandis, such a contract ended and was replaced with a contract of employment between Mr Brandis and BHPB, at any time.

154 If one looks at the actual intention of Mr Brandis and BHPB as expressed in the contracts and the intention of IW similarly expressed, it is quite clear that after the expiry of the IW/BHPB agreement, he continued employment with BHPB. There was no written agreement binding him with IW or with BHPB.

155 The employment was not subject to any written agreement, in fact, until Mr Brandis signed the AWA. At no time before or after he signed it was he a "temporary employee" in accordance with the agreement. He became a permanent or continuing employee in that he was employed for over three years on a regular basis on a weekly roster, as was the evidence at first instance, and as a locomotive driver for BHPB remaining so employed as at the time the matter was heard at first instance, which was in August/September 2004.

156 The hire agreement, as alleged, in written form did not apply to him therefore because he was not a temporary employee or on brief finite assignment up until 30 June 2001, or at all. He was not either within the meaning of the authorities a casual employee and that is because he became an employee who was long term and indefinitely and continuously employed, not employed on finite discrete assignments, which was the case by way of clear distinction in *Forstaff Pty Ltd and Others v Chief Commissioner of State Revenue* (op cit). Further, the Forstaff case is distinguishable because the employees in that matter, it was never alleged, were anything but temporary in accordance with the written contract.

157 That Mr Brandis was so employed, if it were necessary to say so, is further borne out by the fact that when he took himself off a tour at Christmas time 2003 after giving notice that he was going on leave, he had to deal with BHPB.

158 At no time after some months (I am not able to exactly quantify the number of months) was Mr Brandis a casual employee of anyone. His contract as a casual employee and the contract of hire ceased, as I have said above, because the basis of it, that he was a temporary or casual employee, ended. That is because the parties had not labelled that relationship a casual one, only his temporary employment which had ended. Further, the parties could not attempt to use a label in any event to render the continuing and ongoing relationship between BHPB and IW as something different, or for that matter, even though IW and BHPB attempted by reference to the IW/BHPB documents, to do so.

159 In this case, there were a number of indicia pointing to the fact that Mr Brandis was not a casual employee. That is obvious for the following reasons. He had an expectation, which was met, that he would be, and was, employed on a long term basis, and he was so employed with no written contract applying. He was rostered continuously for over three years to work for BHPB and this roster continued weekly, being published by BHPB in advance. He regularly worked rostered hours per week, his employment was regular and there was a long term continuing and well met mutual expectation of continuity of employment of him by BHPB. He had prescribed starting and finishing times, prescribed by BHPB for the shifts which he was rostered to work, and worked. He was required to give notice if he was not going to work (see the incident at Christmas 2003 as an example).

160 In short, after the expiry of the fixed term of any contract of service with IW or period of hire with BHPB, the concept of casual employment, which was not submitted to be the subject of any award prescription in this case, connotes clearly and certainly that Mr Brandis was an employee who did not work under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of the employer. There was in existence a single and ongoing contract of employment of Mr Brandis by BHPB of indefinite duration. That was a contract of totally different character from any contract initially entered into by Mr Brandis with IW or anyone else. The new contract was so different in character as to constitute evidence by itself that a new contract had been entered into.

161 The contract of employment commenced with BHPB was not contemplated by IW, Mr Brandis or by BHPB and IW in their earlier written agreements. The written agreements did not contemplate or provide for a single ongoing contract of indefinite duration, within the meaning of the ratio in *Serco (Australia) Pty Ltd v Moreno* (FB) (op cit) and the authorities cited therein.

162 He was not a casual worker as that term was defined by a Full Bench of this Commission in *Serco (Australia) Pty Ltd v Moreno* (FB) (op cit). He was, to all intents and purposes, and was, in fact, employed on a continuing permanent indefinite basis which was completely contrary to the terms of the BHPB/IW contract and the Brandis/IW contract and their bases which was that he was a temporary employee on a discrete assignment.

163 Further, the term of assignment had expired, as had the hire contract, without any written notice of intention to continue it. In my opinion, it was open to find that the written contract ended between BHPB after it terminated by its express terms on 30 June 2001. It followed that the AWA which was signed purported to regulate a relationship which did not exist because it was signed on 7 October 2002. In any event the hiring contract in relation to Mr Brandis also ended.

164 The contract between IW and Mr Brandis was of a completely different type from that which took its place with BHPB. The change in the nature of the contract is evidence of the abandonment of the contract between IW and BHPB and of that between Mr Brandis and IW. Further and in the alternative, it is evidence of a tacit consent to the termination of Mr Brandis' employment by IW and BHPB's hiring of his services from IW. There was therefore a new contract on different terms although it is not clear in their entirety what they were.

165 That was the evidence that the contract of employment with BHPB was terminated or varied. In addition, Mr Brandis was subject to the actual control of BHPB when he worked, where he worked and what work he did by rostering him. IW therefore had no control, actual or real, over him and no actual or real control in the sense that it could not say when he was to cease his employment because that right was conferred on it by the written agreements which ended when they were abandoned or ended by tacit mutual consent after his employment ceased to be by finite discreet assignment.

166 The only right of control and the only actual control was as a matter of evidence vested in BHPB which exercised that control in most facets of Mr Brandis' day to day working life. That was very significant. Organisationally he was for approximately three years part of BHPB's organisation and thoroughly integrated in it. He was fed, accommodated, his fares were paid, and he was trained and disciplined by BHPB and included in meetings and BHPB's services such as the full life program in the same manner as employees.

167 He drove his train and did his work, supervised and directed throughout the day by BHPB, which was the only entity involved in this matter capable through knowledge and experience of so doing. He was disciplined by BHPB. In reality, the investigation of alleged disciplinary breaches was conducted solely by BHPB and the penalty fixed by BHPB. There was no evidence that IW prescribed any safety standards or in any way ensured that he worked safely as its agreement required. The judge of what safety standards he had breached and the imposer of safety standards was, at all material times, BHPB. There was no evidence that any of this was done by IW. It was submitted that BHPB had a statutory duty to ensure that its employees and independent contractors and sub-contractor employees complied with the *Mines Safety and Inspection Act* 1994 (as amended) and the *Mines Safety and Inspection Act Regulations* 1995 (as amended) and the BHPB rules and any other rules or regulations. That, of course, is indisputably the case. However, that he was required to comply was not, as a fact by itself, an indication that he was an employee. Further, it was not an indication that he was not an employee. However, that he was being overseen and supervised in safety matters by BHPB and that the right to so supervise him and ensure safe working formerly vested in his putative employer, IW, was vested under the new contract in BHPB was entirely compatible, along with all other matters, in his being an employee of BHPB. I have already pointed out the disciplinary proceedings which are a manifestation of that.

168 That IW merely rubber stamped the penalty, which BHPB decided in regard to Mr Brandis' August 2002 safety breach, and communicated to Mr Brandis what that penalty was, was evidence that IW was only a mere conduit between BHPB and Mr Brandis or a mere agent of BHPB. After June/July 2001 or at some time after, but at a material time, the vestiges of obligations and duties resting in IW again showed it to be a mere conduit between BHPB and Mr Brandis.

169 It was accordingly open to find also, along with the other evidence, that Mr Brandis was required by BHPB to act in accordance with the rules because he was an employee and disciplined by BHPB as an employee. It is to be noted that it was no party's case that he was an independent contractor. He was an employee of someone. That also was strong evidence of actual control and the right to control him.

170 It is also significant that not only did IW in no way supervise or have any part in Mr Brandis' safe working, or his work at all, but they had no knowledge or ability to do so. IW had no knowledge of running railways or supervising and assessing locomotive drivers' abilities.

171 His wage remained as it was under the IW contract, as agreed between IW and Mr Brandis, but that was consistent only with BHPB and he adopting that wage, and, of course, IW then said that he was entitled to be paid in accordance with the AWA. However, that is contrary to the reality because he was no longer an employee of IW at the time the dispute arose. It was consistent with BHPB being the arbiter of his remuneration that BHPB told him that his remuneration was to be unilaterally reduced. Mr Brandis then had discussions with both IW and BHPB. However, IW purported to act as if it had the power to resolve the matter and as if the AWA still operated.

172 Admittedly there was no evidence of who had the right to dismiss him, but if there were otherwise a contract impliable it would be clear that as a term of the contract that BHPB had the right to dismiss him. Some evidence of that can be gleaned from the fact that BHPB took it upon itself to discipline him and investigated the alleged breach of safety rules in August 2002.

173 There was no evidence that he was given leave, paid or not. However, that is something of a neutral fact because it may not have been paid to him because he was not regarded as an employee, even though he were an employee. In any event, as an employee the leave provisions of the *Minimum Conditions of Employment Act* 1993 would apply to him if no others did, as would sick leave, redundancy and other provisions, since they would become terms of his contract of employment with BHPB by virtue of s5 of the *Minimum Conditions of Employment Act* 1993, although that matter was not argued before us.

174 For the reasons which I have expressed above, BHPB, the provider of Mr Brandis' safety gear, his messing, his accommodation and travel was, on that evidence also, in an employer/employee relationship with him. All of the work equipment quite obviously was provided, it consisting of locomotives. He used no IW equipment and could not. His operation of that said work equipment down to the use of fuel was controlled by BHPB. There is no evidence of BHPB deducting any income or other tax. His competence for the work was effectively tested and approved by BHPB, not IW. He was employed on BHPB references. Very significantly, the standard of his work was and could only be measured and supervised at all times by BHPB. IW did remain responsible for and paid his wages, superannuation and maintained the relevant workers' compensation and common law insurance policies, but that is not determinative of the relationship on its own. Further and alternatively, his economic dependency, which is of a great of importance, and his organisational integration were to and in the BHPB Railways and nowhere else.

175 The fact that the obligations were contained in express contracts made between Mr Brandis and BHPB does not prevent their being read across the triangular arrangements or otherwise. Thus, there was an implied contract to take effect as implied obligations between Mr Brandis and BHPB conferring, for example, a right to dismiss.

176 Quite clearly there was no discrete temporary assignment on any basis as provided in *Forstaff and Others v Chief Commissioner of State Revenue* (op cit) in that the temporary employment agreement, which was the basis of that case, where temporariness was prescribed and emphasised as it was not here. *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIR Comm 13 is also distinguishable because it referred to short term and discrete hire contracts. Similarly, *Building Workers Industrial Union of Australian v Odco Pty Ltd* (1991) 29 FCR 104 is distinguishable on that basis. There were a number of authorities from England and elsewhere which were persuasive only and I prefer the reasoning which I have adopted in this case, for the reasons which I have expressed. Alternatively, a right to dismiss by a triangular agreement was vested in IW by the agreement between BHPB and IW as part of the distribution between them as employers of rights and obligations.

177 I have already observed that *Forstaff and Others v Chief Commissioner of State Revenue* (op cit) is distinguishable because that was not a case where employees were contemplated as being any more than temporary employees unlike this case where there was an ongoing continuing contract of employment with clear control, actual control and the right to control being vested in BHPB, and/or alternatively a distribution of rights and obligations between the two employer parties.

178 IW had long surrendered the right to actual control over Mr Brandis.

179 As against those indicia, the following indicia require consideration. IW continued and were continuing as at the date of hearing at first instance to pay the hourly remuneration required to be paid to Mr Brandis under their AWA. IW was still paid as at the date of that hearing $71.00 per hour by BHPB being the original hourly rate contracted to be paid by BHPB which was, of course, different from the $50.25 an hour remuneration paid by IW to Mr Brandis. However, that that occurred in the face of the preponderance of evidence against the proposition is only evidence of the payment of remuneration by IW to Mr Brandis and of a fee to IW by BHPB. There is, for example, no evidence that IW in any way reserved any right to deal with industrial relations as far as it involved Mr Brandis. That is entirely incompatible with an employment relationship. I have already dealt with IW's role in merely informing Mr Brandis as a conduit of the penalty actually imposed by BHPB after its own investigation, in relation to the incident of August 2002. The payment by IW of his agreed wage to Mr Brandis was not, for the reasons expressed above, paid as anything but a conduit by IW.

180 In any event, the fact that one person pays the monies concerned in a contract of employment does not necessarily mean that that person is the employer. The maintenance and insurance policies and payment of superannuation by IW were also more consistent with IW being an employer. In the absence of actual control, however, or the evidence of the right to control, that evidence was too flimsy to evidence a contract of employment between IW and Mr Brandis or the continuation of one, at any relevant or material time. In any event, the insurance policies to be maintained were only maintainable with the approval of their effectiveness by BHPB, which is entirely incompatible with IW being the employer. Further, the provision of safety gear, airfares, messing, accommodation and all equipment by BHPB counterbalanced those factors also.

181 That Mr Brandis sought to apply for a job with BHPB is not evidence that he was an employee, in the face of all of the other evidence, if the label applied to the relationship between BHPB and Mr Brandis, and IW and Mr Brandis, was false or not borne out by the totality of the circumstances surrounding both. That BHPB unilaterally attempted to reduce Mr Brandis' wage and that he entered discussions with both IW and BHPB, culminating in his seeking that the Employment Advocate tell him what his real entitlement was under the AWA, is also not a determinative factor on its own. It is not a determinative factor because he discussed the matter with both parties, more as if they were joint employers rather than if they were separate employers. In any event, if he had recourse to the AWA and it was no longer operative, that matter is not at all of significance. Further, it is also reduced in any significance if the label applied to the contracts was wrong, and if the contract of employment, at all material times, was between BHPB and Mr Brandis, as I have explained that it was above.

182 On a consideration of the totality of the relationship between BHPB and Mr Brandis, as well as having regard to the other criteria to which I have referred above, at all material times, Mr Brandis was integrated in and worked in the BHPB railway system, was treated in the same manner and was, to all intents and purposes, subject to the actual and relevant control of BHPB whose employee he had become. That he became so was brought about by a similar mechanism as brings about transfers, pro hac vice, in the doctrine applicable to matters of vicarious liability (see my discussion of the principles discussed by Ashley J in *Deutz Australia Pty Ltd v Skilled Engineering Ltd and Another* (2001) 162 FLR 173).

183 It was open and correct to find that BHPB was required at all times to pay Mr Brandis' remuneration and that he was integrated into the BHPB railways organisation and the BHP Pilbara Railway System. Further, he was economically dependent on BHPB.

184 Next, although control is not a single determinative factor any more, the existence of actual control and the right to control was vested only in BHPB as a significant criterion of the existence of a contract of employment. That control was exercised and maintained daily in great detail. There is, and was, a complex mosaic of control, supervision, disciplining and the right to measure his work standards by BHPB. There are also the other matters, including at least for some time, the provision of uniforms to which I have referred above, which make that control a significant fact. All of those matters, including the provision of equipment, fares, accommodation, messing etc. lead to the conclusion that Mr Brandis was controlled by BHPB and that nobody else had the right to control him. That is a significant factor, but there are as well all the other factors to which I have referred above.

185 As was said, however, in *Dalgety Farmers Ltd t/a Grazcos v Bruce and Another* (op cit) and as is consistent with what was said in *Hollis v Vabu Pty Ltd* (op cit), whilst there is a consideration which has helped to shift the focus away from a simple inquiry as to control or right of control, as that is the changing nature of employment in Australian society today, these considerations are not reasons for ignoring the right or actuality of control or the search for the "essence" or "totality" of the relationship, properly understood. The essence and totality of the relationship, having regard to all of the evidence to which I have referred above, and all the indicia to which I have referred above, for the reasons which I have expressed, lead to the conclusion and I would so find that Mr Brandis was, at all material times, an employee of BHPB.

186 Indeed, this matter can be summed up to some extent as Wilson and Dawson JJ put it in *Brodribb Sawmilling Co Pty Ltd* (op cit) at page 37:-

> "Having said that, we should point out that any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance. (my emphasis)"

187 In this case, that question can be answered for the reasons advanced by me, but after the end of June 2001, on all of the evidence to which I have referred above, Mr Brandis was acting as an employee of another, and that other was unequivocally and exclusively BHPB, he was not acting on his own behalf, and he was not acting on behalf of IW, notwithstanding that vestiges of the original expired contract between BHPB and IW, and the original terms of the AWA, conferred some obligations which were obligations on IW and remained only as vestiges of the original contracts. They did not, however, mean that IW, in the face of all of the other evidence and indicia, was anything more than a conduit for BHPB or an agent for BHPB.

188 Ultimately and conclusively, the preponderance of the evidence could lead to only one conclusion. That was and is that, at all material times, Mr Brandis acted as the servant of BHPB and not on his own behalf, and the answer to the question raised in *Brodribb Sawmilling Co Pty Ltd* (op cit) at page 37 as quoted above, was indicated in ways which might have a different significance from other cases, but in this case lead to the above conclusion.

Intention to Enter Legal Relations, Consideration or Mutuality of Obligation and Offer and Acceptance

189 I now turn to the question of intention. There is evidence of an actual intention to engage IW in the matter on the part of BHPB, IW and Mr Brandis, but that intention died when the discrete temporary assignments or assignment of Mr Brandis ended. In any event, it is only peripheral and consistent with the vestiges of IW's role under the IW contracts surviving and meant only that IW was a conduit, it having no responsibilities or liabilities except of a mechanical nature. Further, the payment of Mr Brandis' wage by IW does not of itself indicate that IW was his employer; nor does the payment of superannuation and workers' compensation and the maintenance of those policies, particularly given that the policies could not be maintained unless they were maintained in a form approved by BHPB.

190 True it is that IW intervened and invoked the AWA at Mr Brandis' behest, but that was only after he was unable to reach agreement with either of them, and, in the end, both of them paid the monies which he had been wrongly deprived of when there was a dispute over the rate of pay to which he was entitled, but it is to be noted that primarily the dispute was with BHPB not with IW.

191 On all of the evidence, there is insufficient to establish, as I have explained it above, that there was an intention to continue with the contract between BHPB and IW and IW and Mr Brandis and that they therefore ended by abandonment or mutual tacit consent.

192 Next, I come to the question of mutuality of obligation. There is no doubt that Mr Brandis agreed to work as a locomotive driver on a long term basis and did so and BHPB agreed to remunerate him for so doing, and did so, albeit that it used an existing mechanism from the expired contract.

193 Mr Brandis, too, clearly applied for the position of engine driver with BHPB. This was said to be evidence both of intent and otherwise that he was an employee of IW and not BHPB. However, Mr Brandis thought that he was a casual employee and not a permanent employee when he applied, when he was not, and he also though he was not an employee of BHPB, which, on the evidence, and on an objective consideration of the written documents and all of the circumstances he clearly was. That expression of intent was too equivocal in the face of all of the other objective evidence to attach any significance to it. The real unmistakeable impliable intent from the totality of the facts, for the reasons which I have expressed, was that Mr Brandis entered into a contract of employment with BHPB, that there was a mutuality of obligation in that he worked for BHPB by way of a contract of service and, by way of the same contract of service, BHPB undertook to pay him albeit by the medium of IW. I reinforce the implication of a contract from these facts later in these reasons, and especially by reference to *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit).

194 I find that, at all material times, Mr Brandis was employed by BHPB.

Joint Employment – Employment by BHPB or BHPB and IW Jointly

195 The ultimate question, as I have observed, to be decided is whether Mr Brandis was acting as an employee of another, (ie) BHPB, and the answer to that question is indicated in the ways which I have canvassed above, and clearly indicates that his employer was, at all material times, BHPB. Further, it is quite clear that, having regard to the actual intention of the parties, that was so.

196 There is another line of reasoning which supports such a finding, even though it overlaps somewhat with what I have discussed above, and that is that line of reasoning which appears in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit), a Court of Appeal of England judgment. Mummery LJ in that case observed that the:-

> "development of "complex employment relationships", which flourish on the theoretical freedom of the people in the labour market to make contracts of their choice has added to the difficulty of deciding whether an individual, doing paid work for another, does so under a contract of service and, if so, from whom."

197 The question in this case is, of course, "from whom"?

198 The common law notion of a contract of service has to be applied by the courts or this Commission in the employment rights context to constantly changing conditions in and outside the workplace. The general principles of the law of contract are sufficiently flexible to cope with many changes; but sometimes only legislation can supply the solution that the common law is unable to deliver.

199 Further, if in the manner of schemes to avoid tax liability, and this is my own observation, agreements are struck which have the end result of avoiding the obligations otherwise thrust on the parties by awards or other industrial instruments, then these should be carefully scrutinised by this Commission so that there is no avoidance which can be effected by stratagems and devices.

200 In parenthesis I observe that it is arguable that a contract or contracts which enable a party or parties to avoid legitimate liability might offend s114 of *the Act*, even if there are separate contracts. I take that matter no further for the moment.

201 As His Lordship observed, a particular problem in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit), and as in this case, arises from a triangular set up for work applied to casuals, which is not necessarily temporary from the point of view of the employment industry, although in this case it was expressed to be. This case is stronger than *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit) because, after a while in this case, there was no longer any casual or temporary employment, but the continuing ongoing employment of Mr Brandis by BHPB. However, within the triangular sides of a case such as this or *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit), various contractual relationships are expressly created and documented in detail in connection with the organisation of the work to be done by individual workers (ie) type, place and hours of work, rates of pay, dismissal, and so on. The rights and obligations normally found in employment relationships are, however, distributed differently in the contractual documents thereby creating an initial impression of functional dislocation. That is what purports to be created here. This, as the case for the respondents is, is that Mr Brandis not only found work through the agency, but the agency paid for the work done for the end user, BHPB, the other two parties being hirer and worker (see the discussion of these matters by Mummery LJ in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit) and see his reference to Professor Freedland's work "The Personal Contract of Employment", 2nd Edition, (2003) at page 55).

202 The specific legal question which arises in this approach to employment in this case is whether the appellant worker is under a contract of service express or implied when the worker has entered into a written agreement expressed to be a contract for services and not a contract of service with an employment agency, and the employer has entered into a express contract with his client (ie) the end user of work done by the worker, for the provision of "agency staff" including the worker, but no formal contract of any kind has been entered into between the worker and the end user, in this case BHPB.

203 That is, of course, the contractual situation as the respondents submit it to exist in this case, save and except that the question of whether Mr Brandis was an independent contractor does not arise. He was, it is quite clear, and it was not argued otherwise, someone's employee. The respondents submitted that he was IW's.

204 This is a case again like *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit) where the worker has done work and not done it temporarily at the end user's premises; or, to put it properly in the context of this case, at the end users, BHPB's mine site, and under the control of BHPB, the end user, which has indirectly paid the appellant worker for the work done by means of regular payments to the labour hire agency calculated according to timesheets of work done for the end user, and provided by the end user. It is fair also, however, to say in this case that it may well have been, and probably was the case, that at the expiry of the written agreement between IW and BHPB that there was not any purported hiring contract between Mr Brandis and IW or BHPB and IW in existence, for the reasons I have already discussed.

205 There is a main difficulty in tracking down a relevant contract of service under which Mr Brandis worked if one follows the line of reasoning in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit), which Mr Schapper urged us to follow. Without a contract of service as required by the statutory definition of employee in England or, in this case, for the purposes of the appellant's case, without a contract of service at common law, the claim rests alone on the alleged unfair refusal to employ Mr Brandis. It is clear that paid work was done by Mr Brandis. No-one disputes that, but it was said that it was done by a contract of service with IW not BHPB. There is no doubt that BHPB and IW are entitled to arrange their affairs in the manner in which they have purported to do so. However, as Mummery LJ in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit):-

> "As in other areas of law, however, they must be prepared if and when the matter is contested, to meet the challenge of general interpretative principles that the legal nature and effect of connected or associated transactions and the documents evidencing them are not ascertained by considering them in isolation from each other or by divorcing them from their context. It is legitimate to have regard to the fact, if it be the case, that a series or number of transactions are intended to operate in combination with one another or are ingredients of a wider transaction intended as a whole."

206 It will be apparent that I have applied that reasoning in my earlier discussion of these matters under this head.

207 However, therefore, in ascertaining the overall legal effect of the triangular arrangements on the status of Mr Brandis, the Commissioner at first instance was not required to concentrate so intently on the express terms of the written contracts entered into by IW because of that principle expressed by Mummery LJ and which I have just quoted. More importantly he was required not to do so, so that he was deflected from considering and finding facts relevant to a possible implied contract of service between BHPB and Mr Brandis in respect of the work actually done by the latter exclusively for BHPB at BHPB's premises, under its control and which he remained doing, and which he performed at BHPB's actual expense. I respectfully adopt that reasoning which I have in part directly quoted from the judgement of Mummery LJ, and in part have extracted, as reasoning from his judgment. I am therefore of the opinion that that reasoning supports the finding that there was an implied contract of service at all material times between BHPB and Mr Brandis. That reasoning also provides a basis for a finding that there was in the alternative a trilateral contract of service, that is a simple contract of service in which one side's obligations, in this case BHPB and IW, were divided or shared between the two parties, BHPB and IW. That is that in the alternative they were joint employers of Mr Brandis at all material times.

208 If that be wrong, then the question arises whether Mr Brandis was an employee of BHPB by virtue of the two written agreements. That is because there is no reason why one employee cannot be employed by two or more persons, natural or corporate (see, for example, *Matthews v Cool or Cosy Pty Ltd* (FB) (op cit)). *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit) is authority for that proposition, too, or at least that such a probability exists.

209 However, there is also strong authority in Australia which arises in the law of torts in relation to vicarious liability, but owes itself to the law of contract, that there can be two employers of an employee, or more than two.

210 This question has been thoroughly canvassed in that context by Ashley J in *Deutz Australia Pty Ltd v Skilled Engineering Ltd and Another* (op cit), where His Honour recognised that an employee could be transferred pro hac vice to the employment of another provided, of course, that the employee consented, which was clearly the case here (see per Ashley J (op cit) at pages 187-190).

211 Such a transfer, notwithstanding the documents in this case, can be discerned:-

(a) In a case where the general employer does not provide man and machine, as was the case here.

(b) Such a transfer may be discerned where the alleged hired worker, despite a machine being hired out, is bound to work the machine according to the orders and under the entire and absolute control of the hirer.

(c) The contract made between general and temporary employers so called cannot determine whether there has been a change of masters for the purposes under discussion.

(d) Circumstances in which a transfer may be discerned are as follows:-

(i) Where the hirer can direct not only what the worker is to do, but how he is to do it.

(ii) Where the hirer is entitled to tell the employee the way in which he is to do the work.

(iii) Where the complete dominion and custody over the servant is passed from one to the other.

(iv) Where by an agreement the employer vests in the third party complete or substantially complete control of the employee so that he is not only entitled to direct the employee what he is to do but how he is to do it.

(v) Where it can be said that the hirer has such authority to control the manner in which the worker does his work that it can be said that the worker is serving the hirer, not merely serving the interests of the hirer.

(vi) Where it cannot be said that the reason that the worker subjected himself to the control of the so called temporary employer as to what he did and how he did it was that his general employer told him to do so.

(vii) Where it can be said that the servant was transferred not merely for the use and benefit of his work.

212 In this case, a transfer of a permanent nature occurred because almost all of those criteria were met. The transfer was certainly continuous, ongoing and indefinite. Alternatively, IW and BHPB were and remained joint employers from the beginning until the hearing at first instance and perhaps thereafter.

213 Every case must, of course, be considered on its merits, but I would suggest by analogy that there is a substantial burden resting on IW in this case, in that respect.

214 Some assistance can be derived from some of the authorities cited by His Honour, namely the well known case of *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1, and the dictum of Brennan J in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* [1985-1986] 160 CLR 626 at 668 where His Honour said:-

> "The rule to be derived from *Mersey Docks and McDonald* is not that two persons cannot be vicariously liable for the same damage or that an employee cannot be the servant of two masters, but that two employers of the same servant who negligently causes damage will not both be liable for the damage if one rather than the other has what Jordan C.J. called "the relevant control."

215 *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (op cit), as Ashley J observed, has little to say about questions whether a worker is pro hac vice the servant of an asserted temporary employer. Those authorities deal with the case where one person was allowed by an employer to work for another pro hac vice, that is temporarily. That is, of course, what is alleged was the case here. However, the relevant control referred to by Jordan CJ in *McDonald v Commonwealth* (1945) 46 SR (NSW) 129 and by Brennan J in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (op cit) at page 668 specifically identifies the features of a joint contract of employment of a triangular nature of the type discussed by Mummery LJ, with whom Sedley LJ agreed in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit). All of those is borne out by the same evidence to which I have referred above, which includes evidence of the right to control and actual control.

216 Put another way, too, there is nothing to prevent one employer acting as agent in employment for both employers. This was recognised by a Full Bench of this Commission in *Matthews v Cool or Cosy Pty Ltd* (FB) (op cit)).

217 The written agreements which purport to recite that Mr Brandis can never be an employee of BHPB and the labels applied to both relationships by the agreements are only one factor to consider. As Mummery LJ said in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit) an entire industry for the supply of workers has been established and is, in practice, conducted on the basis for which there is support in the cases that an individual is not employed under a contract of service if the end user who exercises day to day control over the work is not contractually bound to pay remuneration to the worker. That doctrine is wrecked on the reef of joint employment under the common law of Australia which I have explained above. I would emphasise clearly that, for the same reasons expressed above, there was an intention to enter into such an impliable contract. I add that there was impliable too, in this case, the performance of mutual obligations and an intention to enter into and actually exercise legal rights, as well as a clear offer by the employer BHPB and acceptance by the employee, Mr Brandis.

218 As His Lordship observed, too, the development of "complex employment relationships" which flourish on the theoretical freedom of people in the labour market to make contracts of their choice has added to the difficulty of deciding whether an individual doing paid work for another does so under a contract of service, and, if so, for whom.

219 In this case, on the authority of *Deutz Australia Pty Ltd v Skilled Engineering Ltd and Another* (op cit) and *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit), it was open to find and the Commissioner should have found, if the written agreements bound Mr Brandis and IW and BHPB, that the clear intention and mutuality of obligation to be extracted from the agreements was that Mr Brandis was, at all material times, working for BHPB or both of them and they had an obligation, or BHPB did on its own, to remunerate him. That is because the agreements provided and the evidence was that, at all material times, Mr Brandis was under the actual control of BHPB. Further, it is because there was no evidence that IW exercised any right to control him but, on the evidence, surrendered that right to BHPB. IW did not even produce, nor was it capable of so doing, a safety plan for the operation of any locomotive which Mr Brandis was driving, which is incompatible with his being an employee of IW.

220 In any event, the safety requirements were those which BHPB approved, even if IW produced a safety plan, which it did not. How that, in any event, could be done in the face of the statutory requirement for and approval of the BHP Pilbara Railway Rules is difficult to see.

221 Again, an unconditional power to remove Mr Brandis from the site if his work was unsatisfactory in the judgment of BHPB was vested in BHPB in the terms of clause 25 of the relevant agreement. That meant an unconditional power of dismissal. I have already referred to relevant provisions of these agreements in detail, including the right of selection of employees by BHPB, to their induction by BHPB, and the right to supervise their induction, and to the integration of employees such as Mr Brandis in the organisation of BHPB's railway system. The reserving of control and its actuality is exemplified by BHPB

controlling all industrial relations matters which would include, by definition, dismissals, demarcation disputes, terms and conditions of employment, terms and conditions of industrial instruments, what industrial instruments should be entered into, and the almost limitless range of matters which can be described under the heading of "industrial relations".

222 Further, there was a number of other matters such as the provision of accommodation, airfares, messing and the like which were the obligation of BHPB under the agreement. There would be the coverage of Mr Brandis' rates of pay pursuant to any industrial agreement. Even the insurance to be maintained by IW was, by policy, approved of by BHPB. On a reading of the whole of the documents and their terms, and read together, the intentions are clear. At all material times, Mr Brandis was to be an employee of BHPB. IW had little or no say in anything which occurred. Even its entry into an AWA with Mr Brandis was an act which BHPB was required to approve.

223 Within the concept of a triangular agreement between the three parties, as discussed in *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit) above, and for those express reasons, Mr Brandis was, at all material times, the employee of BHPB. Further and alternatively, if that was not so, the terms of the written agreements, dealt with in the manner in which *Brook Street Bureau (UK) Ltd v Dacas* (CA) (op cit) suggests they might be dealt with, clearly give rise to a finding that BHPB and IW entered into a clear agreement to jointly employ Mr Brandis as their employee with the right to control vested in both, and actual control vested in BHPB. Mr Brandis in turn entered into a contract of employment with them as joint employers and an AWA entered into on their joint behalf by IW as the agent of the two of them. As a result, various rights and obligations were exercised by and undertaken by both BHPB and IW as employers, as I have explained the evidence above. This was in relation to each other as joint employers and in relation to Mr Brandis as their employee. All the parties also derived benefits from the contract of employment. Further, joint employment could not necessarily be an obstacle to an order or declaration that any award which Mr Brandis could be employed under covered him.

224 In any event, whether there was joint employment or mere employment by BHPB of Mr Brandis, it is clear that, at all material times, Mr Brandis was an employee of BHPB so that it was entirely unnecessary for him to apply for employment with BHPB and go through the selection process about which he complained at first instance. I would so find and I would also find that the Commissioner erred in not so finding.

225 For those reasons, too, I find that, at all material times, Mr Brandis was employed by BHPB, or alternatively jointly by IW and BHPB.

The American Doctrine of Common Employment

226 Alternatively, the American doctrine of common employment can be applied within the common law of Western Australia, as I explained in *Tricord Personnel v CFMEU* 84 WAIG 1275 (FB), and should be so applied. In that case, I said this:-

> "I want to add that there is scope, in my opinion, within the existing industrial jurisprudence of this State, for the application of a doctrine called the "joint employment doctrine". Such a doctrine was discussed in *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152 at 175 where a Full Bench of the Australian Industrial Relations Commission said:-
>
> > "… we would incline to the view that no substantial barrier should exist to accepting that a joint employment relationship might be found and given effect for certain purposes under the [Workplace Relations Act]". (See per Munro J, Coleman DP and Gay C).
>
> (See also a paper delivered on 6 May 2002 by Munro J "*Industrial Tribunals: Challenges and Opportunities*", page 3 of 15)
>
> At the core of that doctrine, as I understand it, is the notion that, where the user of the labour, and the employer who rents out the labour, jointly exercise effective control over enough incidence of the employment, both are held to be employers for the purpose of their duties under *the United States National Labour Relations Act*. (The application of such a doctrine was canvassed by McKenna C in *Oanh Nguyen and A-N-T Contract Packers Pty Ltd v Thiess Services* [2003] NSWIR Comm 1006 (unreported 3 March 2003) and *AFMEPKIU v Waycon Services Pty Ltd* (2002) 120 IR 134).
>
> Some notion of joint employment in a different context was clearly approved by a Full Bench of this Commission in *Matthews v Cool or Cosy* (2004) 84 WAIG 199 (FB). (I refer also to a paper by Mr R Cullen "*A Servant and Two Masters? – The Doctrine of Joint Employment in Australia*" (2003) 16 Australian Journal of Labour Law 359).
>
> It seems quite obvious to me that where there is a power to hire and dismiss or have dismissed an employee, where there is a right to supervise, improve and inspect work, where there is the control of the workers work schedule and other conditions of employment, where there is involvement in a bargaining process for employees; the ability to discipline workers, the handling of dispute resolution, and whether the worker may refuse to work for the company and other factors; then there may be joint employment. (See *Texas World Service Co Inc d/b/a World Service Company v National Labor Relations Board* (1991) 928 Federal Reporter 2nd Series 1426 (United States Court of Appeals Fifth Circuit) and also *North American Soccer League and Others v National Labour Relations Board* (1980) 613 Federal Reporter 1379 at 1381-3 (United States Court of Appeals 5th Circuit)).
>
> In other words, the doctrine would apply where multiple employers "share or co-determine those matters governing essential terms and conditions of employment". It depends on the control one employer exercises potentially over the labour relations policy of another (see *Matthews v Cool or Cosy* (FB) (op cit)). In any event, I see no obstacle to an employee entering into a contract with two employers where the service which he renders to one is to serve the other. That involves, inter alia, a contract where with the consent of the employee, the labour hire agency employer delegates, as it plainly did here, its right to control the daily work and attendance at work and behaviour at work to a limited extent of the employee. Whether there was sufficient evidence of joint employment on the criteria to which I have referred above, is not a matter which it falls to me to determine in this case."

227 That is the basis upon which the American doctrine of common employment can form a basis for the application of a doctrine of joint employment within the common law of Western Australia.

228 For those reasons, too, in the alternative, I would find that Mr Brandis was jointly employed, at all material times, by BHPB and IW.

The Effect of the AWA

229 I turn to the submissions relating to the effect of the AWA. As I have already explained, an AWA is not a contract of employment. It is a statutorily created industrial instrument which is not part of the contract of employment, nor are any of its terms and conditions (see *Byrne and Frew v Australian Airlines* (HC) (op cit)). Its existence cannot vitiate the existence of a joint contract between IW and BHPB, particularly where BHPB controls all aspects of industrial relations between Mr Brandis and IW because BHPB can veto anything done, including insurance policies of which it does not approve, Mr Brandis' right to

remain on site, and every aspect of industrial relations, including what agreements can be entered into or terminated between the parties. IW is, at best, a conduit and something of a cipher.

230 Within the meaning of s170VQ(4) of *the WR Act* there is nothing to prevent one party undertaking the obligations to the employee which both parties contemplate, particularly given that BHPB must have approved of the agreement and had to be informed of its terms before it was entered into.

Validity Of Any Orders

231 Further, insofar as it is necessary to consider the validity of any order requiring that Mr Brandis be employed on a State award for the reasons which I have advised above, the AWA is no longer valid since there is no employment relationship to support it. Secondly, I would not see any obstacle, if the employers were joint employers, to the ordering of BHPB to invoke the agreement with IW to terminate the AWA.

232 Further, there is nothing to prevent Mr Brandis terminating the AWA himself if an order that he be employed on award terms was made. Moreover it is not to the point to submit that a finding of joint employment should not be made because such a finding might have effects which are difficult to deal with, as the submission was made. That has been and could not be an obstacle to the development of the common law of labour hire contracts and for the same reason if joint contracts are part of the common law, as I am prepared to find that they are.

Conclusion

233 Thus, I would find that grounds 1 and 2 should be made out, and conclude that Mr Brandis was, at all material times, an employee of BHPB by virtue of an implied contract between them. Alternatively, he was, at all times, an employee jointly of BHPB and IW, with both parties responsible for the discharge of some obligations to him and to each other and the enjoyment of certain benefits due to the contract between them. Thus, because that was so, he was not required to apply for permanent employment, being already a permanent or continual employee, he remained an employee on a continuing and permanent basis, and, indeed, had no need to make any application for any permanent position, since he already enjoyed one.

234 I would add as something of a postscript that there is no merit in the submission by Mr Schapper that there was de facto employment of Mr Brandis by BHPB. It is a concept simply not known to law and cannot be supported on the flimsy foundation of s26(1)(a) of *the Act*.

Ground 3

235 This was an appeal against the finding that the refusal to employ Mr Brandis was not unfair in all of the circumstances. This was a matter which was required to be judged according to s26(1)(a) of *the Act*, according to the equity, good conscience and the substantial merits of the case, and having regard to the interests of all those directly and indirectly interested (see s26(1)(c)).

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

237 It is for the appellant, if it is to succeed on appeal, to establish according to the principles laid down in *House v The King* [1936] 55 CLR 499 and in *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC) that the exercise of the discretion at first instance miscarried. Unless the appellant establishes that, there is no warrant in the Full Bench to interfere with the exercise of the discretion at first instance, and certainly no warrant to substitute the exercise of its discretion for that of the Commissioner at first instance.

238 There was some question of credibility about the selection process. *Fox v Percy* (2003) 214 CLR 118 is authority for the proposition that *Jones v Hyde* (1989) 85 ALR 23 at 27 (HC), *Abalos v Australian Postal Commission* [1990] 171 CLR 167 at 179 and *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 at 479, 482-483, are a reminder of the limits which typically operate when appeal courts or tribunals are considering the findings of trial judges or tribunals. *Devries and Another v Australian National Railways Commission and Another* (HC) (op cit) has been followed in many appeals by Full Benches of this Commission.

239 However, *Fox v Percy* (HC) (op cit) is also authority for the proposition that the instruction contained in those cases cannot derogate from the obligation of the Full Bench in accordance with *the Act*, to perform the appellate function established by Parliament. If, in making proper allowances for the advantages enjoyed by the trial judge, a court or this Full Bench concludes that an error has been shown, then it is authorised and obliged to discharge its appellate duty. If there are incontrovertible facts or uncontested testimony which demonstrate that the conclusions of the Commission at first instance are erroneous, even when they appear to be or are based on credibility findings, then a Full Bench is required to perform the functions conferred on it by *the Act* (see Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (HC) (op cit) at pages 128-129).

240 The rule in *Warren v Coombes and Another* [1978-1979] 142 CLR 531, as Their Honours also said in *Fox v Percy* (HC) (op cit), is "not only sound in law but, beneficial in ….. operation". That rule is expressed at page 551 as follows:-

> "…. in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."

241 The substance of the submissions for the appellant was that Mr Brandis had an expectation of employment and that expectation was legitimate.

242 I agree with the submission by Mr Schapper that the process of a selection may be unfair, even though the selection process might have been fair. It follows, too, that the refusal to employ may be unfair. However, it is not of much assistance to make that distinction. The decision was either unfair or it was not, whatever the reason therefor might be.

243 Mr Brandis, as I have said, was one of a number of applicants for the position of permanent locomotive driver, some of whom in the end were selected for interview, and some of whom were not. He was selected for interview. He was interviewed. He was not selected for the position after he was interviewed, for three reasons. First, it was because he had a poor safety record. Second, it was because of his referees or poor or ambiguous opinions of him given by them. Third, he underwent a psychometric test and the result was an unfavourable one for him.

244 As it was submitted, and as was the undisputed fact, he was a very competent driver with over 25 years experience. He had driven for BHPB for many years. He returned after some time through IW. Mr Gibbons said that he was one of the best operators whom Mr Gibbons had seen. Mr Gibbons' pass out assessment of him, that is after the induction, was very good too. Neither Mr Gibbons nor any other BHPB employee had anything but praise for Mr Brandis, on the evidence. When he returned through IW to work for BHPB, there was nothing then suggested which would bar him from employment.

245 What was raised in his references occurred well after the event and as justification for his not being employed on a permanent basis. Of course, in considering this question, I put aside the fact that he was employed on a permanent basis.

246 The reference which Mr Holland provided for IW was that Mr Brandis' job skills were excellent and that his overall performance was very good. All of these references were provided before his application for the job at BHPB.

247 The August 2002 incident was, as I have said, a serious incident, but it was not regarded by BHPB as serious enough to warrant dismissal, only suspension for two tours. He continued to drive trains without any evidence of any other incident after that, and, indeed, to train other drivers who were selected and granted employment by the process which denied him employment. He was still employed driving trains with BHPB at the date of the hearing and continuing. There was no evidence that there was any intention to terminate his employment.

248 On Mr Jolly's own evidence, BHPB has to and does apply the highest safety standards and it only employs people who are fit and confident to operate this machinery in a safe way. It is clear in these cases that such a driver is often in charge of several locomotives and thousands of tonnes of load and up to 300 units of rolling stock.

249 The only people whom BHPB employs to operate its machines are people of the standard to which I have just referred. Mr Jolly said unequivocally that if BHPB had any concerns at all that a person was a danger and not able to meet the company's high standards, then the company would have to remove that person from operating these trains. Sometimes the person might be removed and retrained. It clearly follows that other persons might be removed altogether. It clearly follows, too, that Mr Brandis did meet BHPB's high standards because apart from the serious incident in August 2002 he was a driver of high standard on the comments about him, to which I have referred above, and must have, after that incident, continued to be. Thus, he was accepted by BHPB as an entirely safe and skilled driver, notwithstanding the incident of August 2002.

250 Further, his safety record was sufficient to enable him to be employed for over three years, allegedly through IW, so that there was no real obstacle from that point of view to his being directly employed by BHPB. It was therefore unfair to allow him to work for two years after a serious "incident" and then to say that he was unfit for employment on the basis of his safety record, when he was employed, in any event, on a long term basis, and, indeed, employed in training the new employees. Such evidence is, as Mr Schapper submitted, neither logical, nor is it credible.

251 The Commissioner at first instance found that it was not logical to approach the matter on the basis that, because he was an experienced and competent driver and therefore an experienced driver he ought to be employed (see paragraph 40 of the reasons for decision at first instance).

252 I agree that there is some flaw in that reasoning. There are, of course, many reasons why a "contractor" may fairly not be offered employment which may not have anything to do with his competence or incompetence.

253 Next, it is, I agree, not an answer to say that Mr Brandis was fairly refused employment because otherwise there were a number of others who might make the same claim. There was, however, in any event, no evidence that there were any such persons. The only evidence was that he was a person, an experienced and generally highly commended driver.

254 It was submitted that the argument was that a decision not to employ based on the safety record was unfair because of his lack of substantial record of unsafe work, and because he was continuing in employment without any unsafe conduct. Further, there was no suggestion that he should not be employed.

255 What is, of course, most to the point is that there is no evidence that there was any driver more competent or more experienced or of the same or higher standard as an operator as Mr Brandis' references whom I have mentioned above described. Not the least was the reference I have mentioned from Mr Gibbons.

256 There was no credible or valid basis to refuse his application for those reasons. It was accordingly not fair to refuse it for such a specious reason.

257 There were two referees, Mr Hudson and Mr Gibbons.

258 Mr Craig Hudson of IW gave a verbal "reference" to Ms Rayner about Mr Brandis. Mr Brandis' safety record was impugned again only on the basis of the August 2002 incident, and on no other basis. Mr Hudson also, somewhat belatedly, described Mr Brandis as abrasive and said that he was not a team player. To condemn him in the reference because of that was simply not a tenable approach for the reasons which I have expressed above. It is not a basis which is fair or valid for refusing to employ him.

259 Mr Hudson also gave him a poor reference because (see pages 62-74 of the transcript at first instance) BHPB directed IW unilaterally and without consulting Mr Brandis to reduce his rate of pay if he were working on work trains, and Mr Brandis protested about it.

260 Mr Brandis objected and was engaged in various discussions about this issue with BHPB and IW both. Because no agreement was reached, Mr Brandis took the matter to the Employment Advocate who ruled that Mr Brandis was correct. He was then back paid the amount which he claimed should have been paid to him, an amount contributed half and half by BHPB and IW. It was correctly submitted that Mr Hudson gave Mr Brandis a poor reference based on this incident, in particular because the other drivers accepted the reduction unilaterally forced upon them and he did not. It was submitted entirely correctly that Mr Brandis was entitled to dispute the unilateral reduction of his pay. There should not have been a unilateral reduction. What he did was to pursue it properly through discussions with both BHPB and IW and then when the matter could not be resolved by such discussions took it to the Employment Advocate who resolved it in his favour.

261 Mr Brandis dealt with the matter properly and was right. If he had not done so he would have wrongfully been deprived of his proper entitlement to wages. That Mr Hudson presented a reference which used that incident to criticise and condemn him for asserting his rights and having them vindicated is extraordinary and entirely unfair. It should not have been at all advanced as a basis to reject his application for permanent employment because he stood up for his rights and was right. In giving such a reference Mr Hudson acted unfairly, and in acting on it BHPB was wrong and manifestly unfair. In all of the circumstances, BHPB could not, in all fairness, refuse to employ him because he did not except a unilateral reduction of his pay, which was wrong. That they did so constituted serious unfairness.

262 The next criticism of him was that he had refused to work on a tour over Christmas. It was not controverted in evidence that he informed BHPB in about September/October 2003 that he intended to take unpaid leave at Christmas time because he had made arrangements to meet family members coming from South Africa. He assumed that that was an end of the matter and made his arrangements accordingly.

263 In November 2003, BHPB attempted to compel him to work during that period. He refused because he had made arrangements with his family to be with them when they came to Australia, explaining that he had given plenty of notice. He offered to work three shifts because he could not work a full tour, but this offer was rejected. This episode contained nothing which should justify a poor reference. It was one simple isolated episode and all it constituted was an admission that BHPB regarded it as a matter in relation to which it should unilaterally deal with him without any reference to IW, and that was

consistent with it being his employer. However, it was entirely unfair because he had acted correctly by giving more than adequate notice and was then put under pressure to work when he should not have been. To use this against him was also unfair.

264 Another criticism was expressed by Mr Gibbons in his reference, and it was a verbal reference given to Ms Rayner. Mr Gibbons referred back to 1998 to an incident which merited no action at the time, and was not raised as any objection to his employment, nor was he disciplined or dismissed for it. Mr Gibbons himself commended Mr Brandis when he returned to work, allegedly via IW, and he did not use it as any element to fail him in his induction. As to the incident itself, there was an inspector, or loco crew foreman, present at the time who made no mention of the alleged poor train handling causing a braking of the train. Mr Gibbons' evidence, in the face of his unreserved condemnation of Mr Brandis earlier as one of the best operators whom he had seen and that his greatest strength included his operating skills, was simply not credible. There was no evidence either to support Mr Gibbons' allegation that in 1998 Mr Brandis told him that he, Mr Brandis, had overridden an ATP for an entire journey from Newman to Nelson. All of these events occurred, in any event, seven years before. Mr Gibbons, if it did occur, never reported it. Mr Brandis denied it, and it also was not raised at the time of his re-engagement in June 2001. Again, this is simply not credible in the light of the earlier evidence and Mr Gibbons' view of his capacity.

265 None of these references were credible or reliable, not the least because Mr Brandis remained working for BHPB at the time of the hearing, and there was no suggestion by any of the witnesses that they wished him removed for negligence, incompetence or any other omission, or that it was intended to dismiss him. There was no indication either that they intended to remove him pursuant to any alleged rights to remove employees of IW.

266 It was wrong and unfair of BHPB to rely on these references as bases for a refusal to employ Mr Brandis.

267 Again, there is an element of deceit in this because Mr Brandis named these persons as referees, and yet they did not forewarn him when had asked them to be his referees that their references would be detrimental to him. Had he known that, no doubt, he could have decided whether he wished to pursue their references to assist him in his application.

268 Again, also, the situation is quite peculiar. Mr Brandis was, at all times during his employment by BHPB and after 2001, purportedly when employed by IW, never dismissed for incompetence and/or unsafe working, never disciplined except for the August 2002 event, and remained working at BHPB and after the time of the "refusal of employment" by BHPB. Mr Brandis was "retained" by Mr Hudson, who condemned him, as IW's "employee" with BHPB, even though Mr Hudson gave him an adverse reference. Furthermore, Mr Brandis was hired by IW on the basis of Mr Holland's references, praised by Mr Gibbons, subject to Mr Holland's comment that his job skills were excellent and his overall performance was very good, lightly disciplined by BHPB years ago with reference, inter alia, to his honesty in admitting that he had done wrong, by Mr Holland and Mr Ireland, in relation to an incident investigated by Mr Holland.

269 Further, Mr Gibbons passed him as competent and had no complaint about his engagement in 2001 and never complained about him at any other time on the record. Quite the contrary.

270 All of the evidence of the referees was entirely unsatisfactory and in part self-contradictory and no basis for any fair refusal to employ a man who was deemed safe and satisfactory to employ with all others. The references simply lacked credibility. To rely on them was unfair given that they are not in accordance either with the objective facts.

271 The next basis of the refusal to employ Mr Brandis was the result of a psychometric test conducted by a psychologist (see tab 2 (AB), volume 2, RMR6). There is no evidence that the psychologist knew that Mr Brandis had been an engine driver for many years or of what, if any, personal engagement the psychologist had with Mr Brandis before making the assessment. The conclusion to the report was that "Mr Brandis is not recommended for employment in the position of Rail Transport Technician given he does not have an appropriate level of problem solving and learning capacity and will find that his decisions are rules (sic) more by his emotions and training than the evidence at hand".

272 That assessment was entirely wrong because Mr Brandis has successfully operated the trains for BHPB on the railways for many years, and was doing so at the time of the report and after it. Curiously the report had no effect on his purported employment with IW because he continued to drive locomotives, even after it was received, and it seems to have been used against him only in relation to his application for permanent employment so called. He was continuing to drive locomotives at the time of the hearing at first instance.

273 In June 2001 he had been assessed as very competent and his references before the references relating to his application for a job were laudatory.

274 It is difficult to understand how a competent engine driver who had driven locomotives for many years and who remained in employment training the newly selected officers and who had inferably and inevitably, one would suggest, dealt with changes in plant, machinery and procedures over that period, could have been so erroneously assessed as he was.

275 Ms Rayner and other members of the selection panel did not query this assessment, notwithstanding their knowledge of the man's experience and notwithstanding that Mr Jolly, in particular, was high in his praise of him before these events. They all knew his capacity or ought to have known of it, and they all ought to have known that such a psychometric assessment was palpably wrong. It is very difficult to understand how this occurred. The selection process was unfair in that it allowed a psychometric assessment to overrule the objective facts and to constitute part of the reasons for refusing to employ him.

276 I now make some observations directed to the submissions for the respondent on this ground. In this case, Commissioner Wood did apply the wrong test in that he held that, to make a case for refusal to employ, "then the applicant has to pass a relatively high hurdle to warrant the intervention of the Commission so as to order the employer to recruit a particular person" (paragraph 40 of his reasons). The selection process was comprehensive and the selection panel of three members made the decision. The Commissioner found that he did not detect any sense of bias in the selection process which was described as a multi-faceted selection process.

277 The Commissioner was required to determine the matter in accordance with s26(1)(a) of *the Act*, and not to raise a higher hurdle than that, and he found that the panel agreed on the ratings of each short-listed applicant of whom Mr Brandis was one, on each of the components of the multi-faceted selection. One component alone did not determine the outcome, the Commissioner found and, in particular, not the psychometric test. All of the components of the selection process were taken into account, he found. It was submitted, too, that there was no evidence to justify going behind the score given to Mr Brandis or to understand it better. It was also submitted that, because of his low comparative score from his first interview, he may have been excluded properly from the process but he was treated fairly in that he was still, notwithstanding the low score, taken through the whole selection process.

278 The panel, who were cross-examined, Ms Rayner, Mr Jolly and Mr Holland, gave evidence that the testing was confirmatory, at least in part, of impressions which they had formed of Mr Brandis. Mr Gibbons, a rail transport supervisor, also gave evidence. His evidence was that, inter alia, he had told Ms Rayner that he would employ Mr Brandis as a driver subject to conditions and his evidence in that regard was not shaken, the Commissioner found. However, his earlier description of

Mr Brandis' ability in glowing terms and his silence when Mr Brandis returned to work for BHPB in 2001 about any flaws in Mr Brandis' work performance of which he later complained in his "reference", were in contradiction of what he said to Ms Rayner.

279 Whilst the selection panel was entitled to take account of the comments of the referees, Mr Holland and Mr Jolly knew Mr Brandis' ability and continued to use him or allow him to be used to train new driver recruits who were selected instead of him. Further, they continued to employ Mr Brandis with no talk of his being dismissed after the selection process was completed. Thus, the comments could not, in fairness, be taken at face value and should not have been by the panel. Further, Mr Hudson's report should not have been, in fairness, taken at face value, the Commissioner having found that Mr Hudson's criticism was inappropriate. It was not only inappropriate, and the Commissioner should have so found, it was inaccurate. The selection panel should have gone behind that also.

280 There was reference to Mr Brandis' performance at interview in relation to which he was given low scores. However, I think that of little consequence in the light of his experience and good performance over a number of years which was well known to at least two members of the panel, or ought to have been. In my opinion, in this case, the Commission misused its advantage in finding that the rejection of Mr Brandis' application was not established to be unfair. It was open to find and it should have been found that the selection panel acted incorrectly and unfairly in assessing Mr Brandis as they did and acted unfairly in relying on the "references", so called, and on the psychiatric report. The Commissioner placed credence in their evidence when he should not have.

281 There was an error in that the Commissioner made these findings and that these findings flew in the face of objective, uncontroverted and, in part, uncontested evidence of Mr Jolly's own knowledge of Mr Brandis and his commendatory remarks about his ability, Mr Gibbons' fulsome commendation of him previously, Mr Brandis' good safety record except for the isolated incident of August 2002, his selection by the very people who did not select him, or at least one of them, to train the successful candidates for employment, his lengthy employment by BHPB over years, and his own years of experience. Further, there was the incontrovertible fact that he was deemed "suitable for employment" for three years in BHPB's system and remained in such employment even after he was not selected by the interview panel for the job which he mistakenly applied for.

282 The Commissioner at first instance did err in holding that it was reasonably open to BHPB to come to the decision not to employ Mr Brandis, because the reasons for refusing to employ him, an experienced driver, were quite without merit. The selection system was unfair because Mr Brandis' application was rejected on invalid and implausible or improbable grounds. The result achieved was entirely unfair. Further, that he had worked on a continuing basis and not as a casual for three years, or the best part of three years, and was deemed suitable to continue to work and to demonstrate the system to those were selected instead of him is proof of a thorough unfairness of the process as a result. The Commissioner erred in failing to so find.

283 The decision not to employ Mr Brandis was one, I must infer, because of those facts, made ineptly or unfairly and an injustice was done to him. Alternatively, it was made with ill will for Mr Brandis, perhaps relating to his propensity to stand up for his rights, if one were to infer the worst against BHPB. The Commissioner misused his advantage in seeing the witnesses. I would find, and it should have been found, that Mr Brandis was, applying s26(1)(a) of *the Act* and, having regard to s26(1)(c), treated thoroughly unfairly and it is his interest which must prevail over that of BHPB or IW, and that such unfairness must be remedied as he seeks that it be done.

284 The exercise of the discretion miscarried because the Commissioner mistook the facts, for the reasons which I have expressed, and allowed some irrelevant matters to guide him whilst not taking account of some relevant matters. As a result, the exercise of the discretion referred to in ground 3 miscarried and the Full Bench is enabled to substitute the exercise of its own discretion for the exercise of the discretion at first instance. I would do so, relying on the findings which I say should have been made at first instance, as well as any other relevant unchallenged findings.

285 Further and alternatively, Mr Brandis was, at all material times, an employee of BHPB. He patently therefore did not have to apply for a job which he already held, and the selection process was simply invalid and irrelevant to his employment situation.

FINALLY

286 For all of those reasons, the appellant has established that the exercise of the discretion at first instance miscarried. Further, the submission that no appealable error was established within the principles laid down in *House v The King* (HC) (op cit) is not made out. Next and alternatively, the selection process was invalid and Mr Brandis should never have been required to apply for a position which he already held, namely an ongoing and continuous position as a locomotive driver and an employee of BHPB.

287 Accordingly, I would make the findings which I say above should have been made. I find that the Full Bench should exercise its discretion to order that Mr Brandis continue to be employed as and from 7 May 2004, and declare that the award applied to Mr Brandis' employment at all material times (7 May 2004 was the date when Mr Brandis' application for employment was refused (see tab 6, page 102 (AB), volume 1)). I am not persuaded that this Commission, in the circumstances of this case, has the power or perhaps the jurisdiction, in the face of the *Workplace Relations* Act 1996 (Cth), Part VID, to order that Mr Brandis be employed subject to any award, or, indeed, any AWA. I would also, in the alternative, order that Mr Brandis be employed by BHPB as and from 7 May 2004. I am not of the opinion that *RRIA v AWU* (1987) 67 WAIG 320 prevents a declaration in isolation being made. Brinsden J says so, but Kennedy J says otherwise and the Full Bench has decided otherwise in a number of cases. In this case, however, an isolated declaration is not sought but a declaration or declarations are sought or necessary to accompany a substantive order or orders.

288 I would therefore, in making such declaration and orders, uphold the appeal and vary the orders made at first instance accordingly.

289 I would issue a Minute of Proposed Order to reflect the reasons for decision of the Full Bench.

CHIEF COMMISSIONER A R BEECH:

290 By the first ground of appeal it is alleged the Commission erred in holding that there was not a contract of employment between Mr Brandis and BHPB. The Appellant urges the Full Bench to find there was such an employment relationship either between Mr Brandis and BHPB or between Mr Brandis and both BHPB and IW.

291 The Commission is being increasingly asked to deal with claims relating to employees who obtain their work through an employment agency. There may be many different forms of engagement between the employee and the employment agency. In some cases an employment agency may merely introduce a prospective employee to a prospective employer. In other cases the agency may enter into an agreement with the worker and arrange to hire out their services to a third party, the client. There also may well be a contract between the agency and the client. So it is here.

292 The facts of the matter, and the findings of the Commission at first instance have been set out in the Reasons for Decision of His Honour the President and there is no need to repeat them here. Of those facts, as correctly found by the Commission at first instance, Mr Brandis was party to an AWA with IW which identified them as employer and employee. Relevantly, Special Condition 9 of the contract between IW and BHPB provides that neither IW, nor the drivers supplied by IW shall be employees of BHPB for any purpose.

293 I pause to note, as His Honour has observed, that the contract between IW and BHPB had expired. This was not the subject of any submissions and was not a matter raised before the Commission at first instance. The matter at first instance, and this appeal, have both been argued on the implicit basis that the contract between IW and BHPB continued in existence. When parties make an express contract to last for a fixed term and continue to act as though the contract still bound them after the term has expired it is open to the Commission to infer that the parties have agreed to renew the express contract for another term: Chitty on Contracts, Sweet & Maxwell, London, 29th edition, Volume 2, paragraph 1-066.

294 I consider that inference duly arises on the facts in this case. The evidence suggests that IW and BHPB merely continued as though it was still in existence, for example the evidence of Mr Hudson (AB2 tab 1 at [19]) is of a meeting in June 2004 between him and BHPB to discuss "various ongoing operational matters"; further the fact that BHPB continued to pay IW the payment due under that agreement is strongly supportive of that inference.

295 It was not submitted that the contract between Mr Brandis and IW is a sham. I find that it was not a sham as that word was considered by Merkel J in *Damevski v Giudice* (2003) 202 ALR 494 at [139]. Nevertheless the designation in the AWA of Mr Brandis as an employee and IW as the employer, and SC 9 just referred to in the special conditions of contract between IW and BHPB, are not determinative of whether Mr Brandis was in law an employee of BHPB. Where the parties have defined their relationship by a clause in a contract made between them that clause will be given weight (if it is not a sham) although it will not be determinative (*Personnel Contracting Pty Ltd t/as Tricord Personnel v CFMEU* ("Tricord") (2004) 85 WAIG 5 per Steytler J at [24]; it is the substance of the relationship not its form, still less declarations or labels which the parties themselves may attempt to place on their relationship, which is determinative: per EM Heenan J at [52]; the language of the contract is relevant in determining what rights and obligations the parties created for themselves: per Simmonds J at [139]).

296 The question whether Mr Brandis was an employee of BHPB is not wholly answered by saying that he was employed by IW. The decision of the United Kingdom Court of Appeal in *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217 considered the situation where a cleaner who worked for some years in a Council-owned mental health hostel was engaged through an employment agency. While the circumstances of that appeal meant that the question whether there was an employment relationship between the cleaner and the Council was not able to be directly considered, Mummery and Selby LJJ considered that the evidence pointed to the conclusion that the cleaner worked under an implied contract of service with the Council; Munby LJ considered that facts could not lead to such a conclusion in law because there can only be an employment relationship if the Council is responsible for the payment of the remuneration to the cleaner.

297 The triangular or trilateral nature of the relationship was recognised by all the members of the Court of Appeal. Significantly, all three members expressed the view that when an employment tribunal deals with cases where a person has a contract with a labour hire agency to work in the premises of the client of that agency the tribunal should not determine the status of the person without also considering the possibility of an implied contract of service between the person and the client and making findings of fact relevant to that issue. I respectfully endorse that view for matters of this nature which come before this Commission; although the decision in *Brook Street* is not part of Australian law it applies the common law to the complex issues arising from the engagement of labour through a labour hire agency. The tripartite nature of such situations has been recognised in by the Federal Court in *Damevski v. Giudice* op. cit. per Merkel J at [147] where, on the facts in that case, an employment relationship between the worker and the client of the labour hire agency was determined to exist.

298 In my view, when an employment situation comes before the Commission involving a worker engaged (to use a neutral term) by a labour hire agency to perform work in the premises of a client of the agency, the Commission should consider the possibility of an implied contract of service between the worker and the client and make findings of fact relevant to that issue.

299 Whether there was a contract of service between Mr Brandis and BHPB as alleged in the first ground of appeal will therefore necessitate a consideration of all the circumstances. Dealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are capable of generating an implied contractual relationship (*Franks v Reuters* [2003] IRLR 424). Express and implied contracts are both contracts in the true sense of the term for they both arise from the agreement of the parties although in one case the agreement is manifested in words and in the other case by conduct (Chitty on Contracts, *supra*). It is necessary to properly apply established principles of contract law and address, after considering all of the relevant evidence, whether there was a contract which could be implied based upon the conduct of the parties: *Damevski v Giudice* (2003) 202 ALR 494 *op.cit.* per Marshall J at [81].

300 In this matter there is no documentary evidence of an agreement between Mr Brandis and BHPB. However, a contract may be implied by concluding after examining extrinsic evidence, including what the parties said and did, that the parties intended to create contractual relations (ibid). On that authority, documentary evidence of an offer from BHPB to re-employ Mr Brandis, and a signed acceptance by him of it, is unnecessary. Marshall J noted (at [84] and following) the authorities that an agreement may be inferred from conduct alone. The issue therefore will be whether the conduct of the parties, viewed in the light of the surrounding circumstances, shows the necessary tacit understanding or agreement capable of proving all of the essential elements of contract.

301 When Mr Brandis returned to work at BHPB in 2001 he did so after having applied for work at IW because he knew they were supplying contract drivers to BHPB (AB1, tab 6, paragraph 4). The offer to work on BHPB's site was made by IW; the work performed by Mr Brandis on BHPB's site was not as a result of any separate offer from BHPB to Mr Brandis (c.f. *Swift Placements Pty Ltd v Workcover Authority of NSW* (2000) 96 IR 69 at [38], [44]).

302 His evidence is that he attended a BHPB training course in Perth and was flown by BHPB to Newman for a site induction for various tests. However Mr Hudson's statement is that the training course was an IW course and IW paid Mr Brandis's wages. IW enlisted the services of BHPB staff to deliver some of the training at the course. I note also the evidence of Mr Jolly that BHPB does provide IW drivers with training and that BHPB reviews the list of drivers provided by IW and makes selections of those who seem best suited in terms of training and experience. The evidence of this initial contact shows that Mr Brandis was dealing more with IW than with BHPB.

303 IW then put Mr Brandis's name forward to BHPB as a suitable driver. In my view the selection of Mr Brandis by BHPB, which implicitly carries the right of BHPB to reject a driver offered by IW, is conduct which, objectively, evinces an intention by BHPB to have a direct relationship with that driver: not just with any driver supplied by IW, but with the particular driver concerned. Its evident intention to maintain control over who operate its trains on its railway and the manner in which a particular driver will observe its operating rules and procedures, including the detail of how the driver will drive its locomotive to conserve fuel, and having the power to have the driver disciplined for transgressing its operating rules and procedures, and

in turn Mr Brandis's working under that level of BHPB's control, is all conduct strongly suggestive of a relationship directly between BHPB and Mr Brandis.

304 The extent to which BHPB exercised control over the work of Mr Brandis, including its actual exercise and the right of BHPB to exercise it was emphasised by Mr Schapper and properly so. Mr Brandis was integrated into the operations of BHPB: AB1 Tab 6, page 35, and the evidence of Mr Jolly at TFI 148 and of Mr Hudson at TFI 52, 53. The only visible difference to his employment appears to be that in the latter stages of the continuity of his employment, he wore a uniform supplied by IW and bearing its logo; in the early stages he wore a BHPB uniform.

305 When the issue to be determined is whether the contract between a worker and a putative employer is a contract of service or a contract for services, control remains a prominent factor: *Tricord*, citing *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 at 24. As the Reasons for Decision of His Honour the President have pointed out in great detail, BHPB exercised significant control over Mr Brandis' work. It is noteworthy that not only did BHPB set the rosters he worked it also required him to drive the locomotive in a certain manner to maximise the potential to conserve fuel and even to put the locomotive into idle during a downpour. BHPB not only exercised that level of control, it had the right to exercise that level of control: Special Condition 1 in the contract between BHPB and IW made IW responsible for the provision of competent locomotive driving services as required by BHPB; in turn, the AWA between Mr Brandis and IW obliged Mr Brandis to observe BHPB's operating rules and conditions.

306 The degree of that control was a term of the employment relationship with IW. BHPB would exercise the day-to-day control over Mr Brandis and, conversely, IW would exercise little, if any day-to-day control over him and his work. IW regards day-to-day supervision as part of the "operational matters for which BHPB is responsible (Evidence of Mr Hudson, AB2 tab 1 at [20]). Even though IW has its own occupational health and safety policy and Mr Brandis was trained on this as part of his induction that evidence does not show that IW exercised, or could exercise, day-to-day control over Mr Brandis when he worked on BHPB's railway.

307 The facts of this case reveal a greater degree of control of Mr Brandis by BHPB than merely the work to be done and the manner it was to be performed. The areas where this occurred have been set out in the Reasons for Decision of His Honour and I do not repeat them here. It is significant, in my view, that BHPB believed it could reduce the wage paid by IW to Mr Brandis for operating work trains; IW considered its role was merely as a conduit between BHPB and Mr Brandis (TFI 67-67a); he was invited along with other BHPB drivers to participate with them in the healthy lifestyle programme and to attend meetings with BHPB with other staff drivers; BHPB, and not IW, not only investigated the incident in 2002 but BHPB managers solely determined the discipline to be administered to Mr Brandis and told him he would be suspended. IW formally notified Mr Brandis of this however this latter point is to be considered in the context that there was little else IW could do given the obligation arising from Clause 26.6 of the General Conditions of Contract between IW and BHPB (that IW shall comply with BHPB's industrial relations directions) and IW's view that such matters are "operational matters" which come within the authority of BHPB (TFI p.53).

308 It is also relevant to note that Mr Brandis worked solely at the premises of BHPB. This is not a case where the agency worker works at a number of different premises. Thus, Mr Brandis was subject to this degree of control continuously between June 2001 and September 2004. Although the length of the employment period is not of itself a factor of great significance, where the engagement is for a long or indefinite period the application of the control test to a vicarious employment relationship is more likely to lead to the conclusion that whatever the terms of the agreement between the temporary employee and the agency, the hirer of the labour would be held to be the true employer (The Law of Employment, Macken et al., Law Book Company, 5th edition 2002 at page 51).

309 The "ultimate" control to terminate the employment of Mr Brandis with one hour's notice (AWA Clause 3.3) was with IW. BHPB did not have the right to dismiss Mr Brandis. In Clause 25 of the General Conditions of Contract BHPB may direct IW to have removed from site or from any activity connected with the work under the contract any subcontractor or person employed in connection with the work under the contract and the contractor is to immediately comply with the direction and "shall not re-employ or commit any such person so dismissed to be re-employed in or in connection with the performance of the work under the contract without the prior approval of BHPB". BHPB also had the right at any time, for any reason, to terminate by written notice any part, or the whole, of the work under the contract (Clause 41 of the General Conditions of Contract). This would then oblige IW to cease the work and comply with any directions by BHPB including demobilizing from the site IW's personnel.

310 BHPB therefore had the means to effectively dismiss, but not lawfully dismiss, Mr Brandis. It had the right to effectively dismiss him because the contract between Mr Brandis and IW is for work on BHPB's sites; upon BHPB obliging IW to remove him from site there is no obligation on IW to place Mr Brandis in any other paid employment. In effect, BHPB will have caused Mr Brandis's dismissal. BHPB argues that in such a situation it does not follow that BHPB is terminating a contractual arrangement between it and Mr Brandis. However, that begs the question of whether there was, or was not, a contractual arrangement between BHPB and Mr Brandis.

311 BHPB submitted that it had an obligation to direct Mr Brandis in his work by virtue of the *Mines Safety and Inspection Act, 1994*. However, it is difficult to see how the control exercised by BHPB in relation to, for example, driving a locomotive according to a certain roster or in a certain manner so as to conserve fuel, or returning the locomotive to idle during a downpour, is an example of control exercised by BHPB over the work of Mr Brandis arising by virtue of that legislation.

312 The issue of control has been held not to be determinative in cases where there is a triangular relationship between a worker, a labour hire agency and its client, as McDougall J observed in *Forstaff & Ors v The Chief Commissioner of State Revenue* [2004] NSWSC 573 at [114]. Control is still only one issue to be considered. Nevertheless, if ground 1 was to be resolved only on the basis of the proper application of the control test I would conclude that if there was a contract between them, the conduct of Mr Brandis and BHPB resulted in the contract being one of service and not for services.

313 However, the issue is really whether there was an implied contract at all between Mr Brandis and BHPB. Whether there was an implied contract between Mr Brandis and BHPB based upon the conduct of the parties proving all of the essential elements of the contract cannot overlook the evidence that Mr Brandis applied to be employed by BHPB. That is conduct on his part which is directly contrary to any implication of a contract existing between them. Correspondingly, the evidence is that BHPB refused him employment and that, in turn, is conduct which is directly contrary to any objective implication that a contract existed between it and Mr Brandis.

314 While the conduct of Mr Brandis on the one part, and of BHPB on the other, is not determinative, it is a factor which the law takes into account in determining whether a contract exists. It is evidence of what they said and did about whether they had created contractual relations. Admissions may provide material from which a court may find a question of law, a question of fact, or a question being a conclusion from a mixture of fact or law: *Pitcher v Langford* (1991) 23 NSWLR at 160. It is

difficult to imply from the conduct of Mr Brandis and BHPB that a contract existed between them when on that central point their conduct was the exact opposite of the implication that there was. It is upon that evidence that this ground must fail.

315 I note too the conclusion of the Commission at first instance that there was no mutuality of obligation necessary for the implication of a contract of service between Mr Brandis and BHPB. I consider he was quite correct to so hold. He referred to Mr Brandis' evidence that his salary was paid by IW. This accords with IW's statutory obligation under the AWA between Mr Brandis and IW and also the agreement between IW and BHPB. The remuneration also includes IW having paid, and having the obligation to pay, superannuation and workers compensation entitlements. The rate of remuneration is specified in the AWA. The evidence is that IW was obliged to pay Mr Brandis for all hours worked subject only to IW receiving a BHPB timesheet correctly completed and with the appropriate authorisation by an approved supervisor; IW paying Mr Brandis was not dependant upon BHPB first paying IW.

316 Conversely, there is no evidence that BHPB made any payments to Mr Brandis. The most that can be said is the reservation in BHPB in the General Conditions of Contract Clause 37 to make payments to workers or to subcontractors upon termination for default, insolvency, or for convenience in the event that the company has no reasonable alternative for industrial relations or commercial reasons to make those payments. In those circumstances the payment is set-off or otherwise recovered from the contractor.

317 It was submitted by Mr Schapper that BHPB had the power under Clause 26.6 of the General conditions of Contract to direct IW to request BHPB to pay Mr Brandis's wages to him directly. Clause 26.6(b) does not speak in those terms; it does oblige IW to comply with BHPB's industrial relations directions although there is no suggestion that BHPB ever paid Mr Brandis's wages directly and the evidence is that Mr Brandis's wages were only paid by IW.

318 He also submitted that the fact that IW paid Mr Brandis's wages necessarily neither makes IW the employer nor does it mean that BHPB is not the employer. As I understand the law the payment of wages by a third party, or intermediary, is not fatal to the existence of a contract of employment between a worker and a presumptive employer; the essential enquiry is whether the presumptive employer remains liable to pay the worker if the third party or intermediary fails to do so (*Building Workers' Industrial Union of Australia v. Odco Pty Ltd* (1991) 37 IR 380 at 392)("*Odco*"). Where the employer contracts out a payroll service it does so by having the payroll service pay the employee from the employer's money; the employer remains liable to pay the wages in the event that the payroll service fails to pay it. There is no contract between the employee and the payroll service and the payroll service's obligation to pay depends upon the employer making the funds available to the payroll service.

319 Embarking upon that enquiry here, the AWA in clause 6 obliges IW to pay Mr Brandis the rate of pay specified for all hours worked. IW remains liable for that payment. IW and Mr Brandis agreed on the rate of wage and what it did, or did not comprehend within it. There is nothing to support a conclusion that BHPB remains liable to pay Mr Brandis if IW fails to do so.

320 Conversely, and as was submitted on behalf of BHPB, there was no promise of payment to Mr Brandis by BHPB; no agreement between BHPB and Mr Brandis as to what sum was to be paid (indeed, I observe that on one occasion regarding work trains there was a disagreement on the part of BHPB and Mr Brandis as to what sum was to be paid) and only an entitlement on the part of Mr Brandis to receive payment from IW.

321 By clause 37 of the General Conditions of Contract BHPB may have withheld further payment to IW subject to proof that Mr Brandis's wages had been paid by IW but that is not the same as giving BHPB the right to pay Mr Brandis's wages or, conversely the right to Mr Brandis to claim payment from BHPB (c.f *Forstaff* op. cit. at [99]), this being the factor which led the Commission at first instance to conclude that there was not a necessary mutuality of obligations between Mr Brandis and BHPB.

322 Here the submission was that IW is merely a conduit between Mr Brandis and BHPB. In *Odco* the Full Court considered whether the labour hire agency in that case may have been acting as the agent for the principal in procuring the services of the workers, or as agents for the workers in finding work. Of significance was the finding of the Full Court (at 37 IR 392) that the chief objection to that analysis arose from the evidence that it was the agency which fixed, and adjusted from time to time, the remuneration to which the worker was entitled and that this was done apparently without reference to the client who was only concerned to know the gross amount which he was obliged to pay the agency in respect of workers made available by it. In this case BHPB is directly involved in the rate that IW pays to Mr Brandis. However, in common with the facts in *Odco*, IW was liable to pay remuneration at the agreed rate to Mr Brandis whether or not it was itself paid by BHPB.

323 Ground 1 also raises the argument that in law Mr Brandis was employed jointly by BHPB and IW. As stated in *Brook Street* at [19] and [78], it is a possible result of the triangular relationship that there will be more than one entity exercising the functions of an employer, namely the employment agency and the end user jointly. The recognition in Australia that joint employment is possible is not yet settled (Labour Law, Creighton B and Stewart A, The Federation Press, 2005 at p.283; and see *Construction Forestry Mining and Energy Union v Personnel Contracting Pty Ltd t/a Tricord Personnel* (FB) (2004) 84 WAIG 1275 per Sharkey P at 1292; *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152 at 175). I consider in common with His Honour, and too, with the Full Bench of the AIRC in *Morgan v Kittochside* that there appears to be no substantive reason why the common law of employment in Australia cannot recognise a situation can exist where, in the words of Mummery LJ, there will be more than one entity exercising the functions of an employer, namely the employment agency and the end user jointly.

324 I note that His Honour the President reaches the conclusion in this matter that Mr Brandis was jointly employed by BHPB and IW. I regret that I am unable to reach the same conclusion. For the reasons I have given, I do not consider the facts permit the implication of a contract between Mr Brandis and BHPB and that conclusion necessarily leads me to the conclusion that BHPB was not an employer of Mr Brandis even jointly with IW.

325 I am unable to conclude that the Commission at first instance erred in holding that Mr Brandis was not employed by BHPB and accordingly I do not consider that ground 1 is made out. It is therefore not necessary to deal with ground 2.

Ground 3

326 I have had the advantage of reading in draft form the Reasons for Decision of His Honour in relation to this ground. I agree with the order proposed and I do not wish to add anything.

COMMISSIONER S J KENNER:

327 I have had the benefit of reading in draft form the reasons for decision of the President in this appeal. I gratefully adopt his detailed setting out of the background, findings of the Commission at first instance and issues to be determined on this appeal.

Ground 1

328 This ground of appeal asserts that the Commission at first instance erred in holding that Mr Brandis was not an employee of BHP Billiton Iron Ore Pty Ltd ("BHPB") or alternatively, jointly an employee of BHPB and Integrated Group Ltd trading as Integrated Workforce ("IW"). It was not in contention between the parties, that Mr Brandis was an employee and was not engaged under some other form of contract. Counsel for the appellant Mr Schapper, in summary, argued that Mr Brandis was at all material times an employee of BHPB because the lawful authority to and actual control of Mr Brandis was all pervasive. The appellant submitted that on the facts of this case, the relationship between BHPB and IW was peripheral to the relationship that really existed between BHPB and Mr Brandis and in essence, the only role played by IW was that of a "paymaster". For all intents and purposes, IW played no real role at all in relation to the "employment" of Mr Brandis by BHPB, according to the appellant.

329 Alternatively, in reliance upon the decision of the Court of Appeal in *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA, it was submitted that Mr Brandis was party to a contract of service with both BHPB and IW. Further alternatively, Mr Schapper submitted that for payroll purposes, in effect, IW was BHPB's agent in its dealings with Mr Brandis.

330 On behalf of BHPB, Mr Dixon SC, submitted that at all material times, Mr Brandis was an employee of IW pursuant to a contract of service attached to which, was an Australian Workplace Agreement ("AWA") registered pursuant to the relevant provisions of the Workplace Relations Act (1996) (Cth) ("the WRA"). Mr Dixon submitted that on the evidence at first instance, it was clear that Mr Brandis applied for and was offered and he accepted a contract of employment with IW on the terms as set out in the relevant AWA's in evidence. Counsel submitted that objectively determined, there was no intention on the part of BHPB and Mr Brandis, to enter into a contract of service at any time. There were further submissions by Mr Dixon in relation to the nature of the relationship between Mr Brandis and BHPB, the thrust of which was to the effect that the work performed by Mr Brandis, and the various obligations imposed by the contractual arrangements, had as their source Mr Brandis's contract of employment with IW pursuant to the AWA, and not to any express or implied contract of service, with BHPB.

331 Furthermore, as to control, and in particular occupational health and safety obligations, Mr Dixon submitted that the obligations imposed upon Mr Brandis were, by reason of the nature of the employment at the railroad operations of BHPB, derived from and imposed by State health and safety legislation and the various railroad rules and regulations made by BHPB, that apply to all persons in or about those operations.

332 Counsel for BHPB also submitted that there was no principle of joint employment recognised in Australian law.

333 Counsel for IW, Mr Ellery, generally adopted the submissions of counsel for BHPB, and further said that in Australian law, there was no such thing as a "doctrine of joint employment". Furthermore, he submitted that on the evidence adduced at first instance, there was insufficient to establish the requisite elements for a contract of employment between Mr Brandis and BHPB, at any time. He also submitted that a finding by the Full Bench of joint employment, would introduce undue complexity and confusion between employers and employees. This was also the submission of Mr Lucev, counsel for the Commonwealth Minister for Workplace Relations, as intervenor. I must say at this juncture, that I do not find submissions as to complexity or confusion arising from any such findings, as persuasive. That may well be a consequence of any finding by a court or tribunal, but a court or tribunal, properly addressing itself to the relevant facts and the law, should not shrink from its duty to determine matters properly before them, merely because of the consequences of so doing.

334 At the outset in dealing with this limb of the appeal, it was never the submission either at first instance or to the Full Bench on this appeal, that the various contractual arrangements entered into between BHPB and IW, and between IW and Mr Brandis, were for the purposes of avoiding any obligations which might arise between either BHPB and Mr Brandis, alternatively between IW and Mr Brandis, or either of them. That is, there was no suggestion that the arrangements were in any sense "sham" transactions and therefore not binding as executed: *Sharrment Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 per Lockhart J at 454. Furthermore, there was no suggestion either at first instance or on this appeal, that at the time the respective parties entered into the agreements that they did, they did not understand what they were doing, in the sense of any plea of non-est factum: *Saunders v Anglia Building Society* [1971] AC 1004. I therefore proceed on the basis that at the material times the various transactions were entered into, the parties intended to make the bargains that they did. It is also the case in this matter that the contractual documents between the respective parties were clear and unambiguous: cf *Damevski v Giudice* (2003) 202 ALR 494.

335 Before considering the contract issue, there were also submissions made by counsel for the respondents and the intervenor about the effect of the relevant AWA by reason of, in particular, s 170VQ(4) of the WRA. These matters were dealt with by the Full Bench in *Hanssen Pty Ltd v CFMEU* (2004) 84 WAIG 694. In short, in *Hanssen*, it was held that the terms of s 170VQ(4) of the WRA do not and could not, extinguish this Commission's jurisdiction and power to make an award whilst an AWA was extant. Whether the Commission should do so is a discretionary judgment to be made. Additionally, an AWA only displaces an award whilst the AWA is in operation, which award would be revived once the AWA ceased to have any effect. There is no issue of inconsistency that arises for the purposes of s 109 of the Commonwealth Constitution, in this state of affairs. Nothing was put to the Full Bench on this appeal that causes me to alter the views I expressed in *Hanssen* and I expressly adhere to them for present purposes.

336 For the appellant to succeed in establishing a contract of employment between BHPB and Mr Brandis, two steps are required to be satisfied. The first step is to establish that there existed between BHPB and Mr Brandis, at the material times, a contract. The second step, having established the existence of a contractual relationship, is then to establish that that relationship had the character of employment and not some other character.

337 Many authorities were referred to by counsel in the course of their respective submissions. I do not intend to refer to all of them for present purposes, however in terms of the first step that is the establishment of a contract, an essential ingredient is the necessity for there to be mutuality of obligation between the parties to it. This is in essence no more than the requirement that there be consideration passing between the promisee and promisor, in the formation of any contract in contract law parlance. This requirement for there to be mutuality of obligation has been long recognised. In the context of employment relations, and the particular difficulties arising in cases where there are labour hire agencies interposed between the end user and the worker, these matters have assumed particular significance. For example, in *Building Workers Industrial Union of Australia and Others v Odco Pty Ltd* (1991) 29 FCR 104, the Full Court of the Federal Court (Wilcox, Burchett and Ryan JJ) at 114 said:

> "*The element of consideration which is essential to a contract of employment is the promise by the presumptive employer to pay for service as and when the service is rendered. Thus Dixon J observed in Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435 at 465:*

> *"A contract for the establishment of the relation of master and servant falls in the same general category of agreements to pay in respect of the consideration when and so often as it is executed, and is, therefore, commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act.*
>
> *It is, of course, possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service. Indeed that is, in effect, what the Duke of Westminster persuaded the majority of the House of Lords he had done in Inland Revenue Commissioners v Duke of Westminster [1936] AC 1. But, to say the least, it is not usual. The common understand of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stands by his contract and declines to treat it as discharged by breach"*
>
> *In this case, on the evidence, there was no promise of payment of periodical sums by the builder to the worker, and no argument between the builder and the worker as to what those sums should be. The builder's only obligation was to pay Troubleshooters. The worker's only entitlement was against Troubleshooters, and in accordance with a different measure."*

338 In the UK line of cases, this principle has been referred to as the "irreducible minimum of mutual obligation necessary to create a contract of service": *Carmichael v National Power PLC* [1999] WLR 2042 per Lord Irvine at 2047. These principles were dealt with at some length, in *Brook Street*, a judgement referred to extensively by counsel in the present appeal. In that case, Mrs Dacas was engaged under a contract for services by a labour hire agency Brook Street, to supply her services to a local council as a cleaner. The relationship endured for some years. An issue arising in those proceedings was whether Mrs Dacas had a contract with the local council, and if so, whether it was a contract of service. Lord Justice Mummery at par 49 (with whom Lord Justice Sedley was in general agreement), recognised the requirement of the "irreducible minimum of mutual obligation necessary for a contract of service" but however, in the context of the facts of that case, went on to postulate that it may be possible to find the existence of a contract of service between the local council and Mrs Dacas, not by express agreement, but by implication as a result of the conduct of the parties. Without deciding the matter, the majority in *Brook Street* also recognised the possibility of an employment relationship between Mrs Dacas and both Brook Street and the local council concerned, by "reading across the triangular arrangements into an implied contract and taking effect as implied mutual obligations as between Mrs Dacas and the Council": per Lord Justice Mummery at par 53.

339 Mr Justice Munby, dissenting, whilst recognising the possibility of a contract between a worker and an end user in labour hire cases, was not satisfied that a contract existed between the local council and Mrs Dacas. In discussing the relevant authorities, Justice Munby referred to *Carmichael* and observed at par 86:

> *"The principle which emerges from that line of authority is most simply formulated in the statement by Longmore LJ at para [46] that:*
>
> > *"Whatever other developments this branch of law may have seen over the years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment."*
>
> *As Elias J pointed out in Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471 at para [11]:*
>
> > *"The significance of mutuality is that it determines whether there is a contract in existence at all. The significant of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract."*
>
> *I respectfully agree."*

340 Additionally, Justice Munby also referred to the observations of the Court of Appeal in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 where MacKenna J said at 515:

> *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*
>
> *… As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind."*

341 Having regard to the essential requirement of mutuality of obligation, and in particular the obligation on BHPB to provide consideration in the form of remuneration paid to Mr Brandis for his services rendered, I am not satisfied that BHPB and Mr Brandis were in a contractual relationship. The requirement of consideration is one that was essential and there was no obligation as between BHPB and Mr Brandis, as opposed to the relationship between BHPB and IW, for BHPB to pay to Mr Brandis his remuneration for services he provided to it. Put another way, whilst there existed in the general conditions of contract between BHPB and IW (AB 3 tab 8) at clause 37, an ability for BHPB to pay Mr Brandis directly, in the case of default, insolvency or for convenience and there being no reasonable alternative, or on request of IW, such a provision was not one enforceable by Mr Brandis, he not being a party to the contract between BHPB and IW. In my view, it is essential to establish a contractual relationship between BHPB and Mr Brandis, to point to an enforceable legal right to payment of wages for work performed, as between Mr Brandis and BHPB.

342 In this case, it seems clear enough, that when a dispute arose as to Mr Brandis's rate of pay, following the unilateral reduction in rates for locomotive drivers purported to be imposed by BHPB, it was to the terms of the contract between Mr Brandis and IW that Mr Brandis turned. The issue was resolved ultimately, in Mr Brandis's favour, because of his contractual relationship with IW pursuant to the relevant AWA, which prescribed the rate of pay that was ultimately enforced and not any contract, express or implied, between Mr Brandis and BHPB. It was also clear from the terms of the AWA's entered into between Mr Brandis and IW (AB2 tab 1: AB 3 tab 7) and the evidence, that the obligation on IW to pay Mr Brandis's hourly rate of pay for work he performed for BHPB, was not conditional upon BHPB paying to IW the agreed rate for the provision of Mr Brandis's locomotive driving services. The obligation on IW to pay Mr Brandis stood alone, subject to IW's satisfaction that Mr Brandis had rendered the contracted locomotive driving services to BHPB.

343 In terms of the detailed contract documents between BHPB and IW, and between IW and Mr Brandis, it is of course the case that one cannot be confined to the terms of the various agreements, but rather, the relationships between the parties to the agreements must be considered in their totality. A mere label cannot be put on an arrangement to disguise its true character. It is also the case that a contractual relationship may be implied from the conduct of parties, viewed objectively and such a conclusion is not dependent upon the subjective intentions of the parties. Generally speaking, however, "contracts are not to be lightly implied" and the courts must be able "to conclude with confidence that … the parties intended to create contractual relations: *Blackpool and Fylde Aero Club v Blackpool B.C.* [1990] 1 WLR 1195 at 1202.

344 In this case it was uncontroversial that the extent of control exercised over Mr Brandis during the course of the work he performed whilst on the BHPB rail road was extensive. However that of itself does not signify a contract of employment between both parties. It is also important to examine the source of those obligations as they arise, as established by the various contractual arrangements. In particular, by clause 4 - Employee Undertakings, of Mr Brandis's most recent AWA at AB 3 at 68, he agreed with IW, to comply with all applicable legislation, rules regulations and requirements imposed by BHP in connection with the performance of the locomotive driving services. Additionally of course, independent of any contractual obligation, there existed statutory obligations imposed on not just employees, but contractors and sub contractors and other persons, under the Mines Safety and Inspection Act 1994 and associated Regulations. There were also substantial conditions imposed on IW by BHPB, as set out in Annexure A - Safety Conditions in the Special Conditions of Contract set out at AB 3.

345 It is also apparent from the contract documents in evidence that IW's obligation was to identify, recruit and source for BHPB, suitably qualified locomotive drivers. The only requirement imposed by BHPB, under the Special Conditions of Contract, was that drivers had previously been qualified on the company's Newman to Hedland railroad, hold the required licences and have completed appropriate tests. There was also evidence at first instance that IW arranged for Mr Brandis to attend induction and other pre-employment courses, although BHPB officers were involved in presentation of material at these programs. Additionally, I also note that whilst a copy of BHPB's drug and alcohol policy was annexed to the Special Conditions of Contract, by the AWA's entered into between Mr Brandis and IW, Mr Brandis agreed to accept various policies, including those relating to remote site mining and drugs and alcohol, which were policies of IW.

346 Given all of the evidence at first instance, and in particular the detailed contractual arrangements entered into between the parties which were plainly bona fide, in my view, it was not necessary in the circumstances of this case, to imply the existence of any contract, let alone a contract of service, between Mr Brandis and BHPB. Consistent with the view of Justice Munby in *Brook Street*, what BHPB was paying for in the contract with IW, was for the recruitment and supply of suitably qualified and experienced, locomotive drivers, who had driven locomotives for BHPB before. The recruitment and administration arrangements, payroll, insurance, including workers compensation and superannuation, and other matters were the responsibility of IW.

347 I also think it relevant to observe that on the evidence at first instance, at no stage did Mr Brandis seem to consider himself an employee of BHPB. At all material times, he clearly considered himself an employee of IW, but self evidently, wished to become a BHPB employee once again, by making successive job applications for BHPB locomotive driver positions. In the context of the existence of any implied contractual relationship of employment with BHPB, Mr Brandis's own conduct was inconsistent with such a contract.

348 For the foregoing reasons in my view, there was no contract of service on foot between BHPB and Mr Brandis. As to the existence of a "doctrine of joint employment", so described, I do not consider it necessary to explore that issue in the context of this appeal. That matter can await another day.

349 I would therefore not uphold this ground of appeal.

Ground 2

350 Having concluded that ground one is not made out, it is not necessary to deal with ground two.

Ground 3

351 This ground of appeal complains, on a number of bases, that the learned Commissioner erred in holding that the refusal of BHPB to employ Mr Brandis was, given all of the circumstances, unfair. At the outset, I agree with the submissions of Mr Schapper, that the learned Commissioner misdirected himself as to the proper question to be asked in relation to this issue. It is not whether on the facts as found, the decision to not employ Mr Brandis was reasonably open, nor was there any necessity for a "relatively high hurdle" to be surmounted to persuade the Commission in favour of the appellant's claim. What was required, was a consideration of whether, in all of the circumstances of the case, as a matter of equity, good conscience and the substantial merits of the case under s 26(1)(a) of the Industrial Relations Act 1979 ("the Act"), it was industrially unfair for BHPB to refuse to employ Mr Brandis.

352 As to this ground, I agree with the reasons expressed by the President, that in all of the circumstances of this case, it was unfair for BHPB to refuse to employ Mr Brandis. In particular, with due respect, I found the evidence as to the psychologist's report, as a result of a psychometric test undertaken by Mr Brandis, to be somewhat startling. Whilst it is the case that this evidence was not solely relied upon by BHPB in its decision to not offer employment to Mr Brandis, it is in my view, disturbing that the psychological assessment was undertaken, in the apparent absence of any knowledge or consideration by the person undertaking it, that Mr Brandis had in fact, operated locomotives at BHPB operations for about 20 years, successfully, prior to his application for employment on that particular occasion.

353 I do not wish to say anything further as to this ground of appeal save that it should be upheld. I agree with the declaration and orders proposed.

THE PRESIDENT:

354 For those reasons, the appeal is upheld and the decision at first instance varied.

Order accordingly

2005 WAIRC 01916

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPELLANT** **-and-** BHP BILLITON IRON ORE PTY LTD **FIRST RESPONDENT** INTEGRATED GROUP LTD T/AS INTEGRATED WORKFORCE **SECOND RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DATE	TUESDAY, 28 JUNE 2005
FILE NO.	FBA 36 OF 2004
CITATION NO.	2005 WAIRC 01916

Catchwords	Industrial Law (WA) – Speaking to Minutes of Proposed Order – Intervener no right to speak to minutes – Speaking to minutes principles – Jurisdiction of Full Bench – Adducing fresh evidence and reopening - Merit of submissions – Order amended – *Industrial Relations Act* 1979 (as amended), s34, s34(4), s35, s35(1) and (3), s49(4), (5) and (6), s90
Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
First Respondent	Mr M G Lundberg (of Counsel), by leave, and with him Mr F M Gaffney (of Counsel), by leave
Second Respondent	Mr N D Ellery (of Counsel), by leave
Intervener	Mr A D Lucev (of Counsel), by leave

Supplementary Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 At the request of the solicitors for the first respondent, BHP Billiton Iron Ore Pty Ltd (hereinafter referred to as "BHPB"), these proceedings were listed for a speaking to the minutes of proposed orders before a Full Bench of this Commission on 22 June 2005.

2 All of the parties were represented, as was the intervener.

No Rights in Intervener

3 As was correctly acknowledged by Mr Lucev of Counsel for the intervener, the intervener whom he represented, and no intervener, has any right to be heard on a speaking to the minutes (see s35(1) and (3) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*")).

4 Indeed, the decision of the Commission is not required to be handed down to anyone but the parties (see s35(1) of *the Act*; see also Brinsden J in *Australian Bank Employees Union v Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch* (1990) 70 WAIG 2086 at 2091 (IAC)).

Amended Minute - Text

5 The Full Bench had issued a minute of proposed order which it subsequently amended and handed to the parties, as amended, on 22 June 2005. It was that minute, as amended, to which the parties addressed themselves on the speaking to the minutes.

6 For convenience, I reproduce hereunder the order and declarations contained in that amended minute as issued by the Full Bench to reflect its reasons for decision:-

> "…that the order made at first instance by the Commission in application No CR 128 of 2004 on the 13th day of September 2004 be and is hereby varied as follows:-
>
> 1. By deleting the order to dismiss the said application.
>
> 2. By substituting therefor the following declaration and order:-
>
> "(1) THAT the above-named first respondent, BHP Billiton Iron Ore Pty Ltd, did unfairly refuse to employ Gregory James Brandis as a locomotive driver on a continuing and indefinite basis as and from the 7th day of May 2004.
>
> (2) THAT the above-named first respondent, BHP Billiton Iron Ore Pty Ltd, do employ the said Gregory James Brandis as and from the 7th day of May 2004.""

BHPB's Proposed Amendment

7 The order proposed by BHPB was proposed in a minute of amendment to the amended minute of proposed orders and was in the following terms:-

> "1. THAT the above-named first respondent, BHP Billiton Iron Ore Pty Ltd, did unfairly refuse to employ Gregory James Brandis as a locomotive driver as and from 7 May 2004.
>
> 2. THAT the matter be remitted to Commissioner Wood for further hearing and determination."

Speaking to Minutes Principles - s35 - s34 Also

8 It is as well to recall, however trite it may be to do so, what the purpose of a speaking to the minutes is. I say that because there was a great deal of unnecessary misapprehension on this speaking to the minutes about what a speaking to the minutes is. What must be clearly said is that submissions on a speaking to the minutes are not permissible and should not be made if, generally speaking, they are for any other purpose than to speak to the minutes. Of course, some competent applications arising from the matter may be entertained apart from, and generally and more properly, instead of a speaking to the minutes.

9 Amongst other authorities which would prescribe what a speaking to the minutes is are *McCorry v Como Investments Pty Ltd* (1989) 69 WAIG 1000 (IAC) (generally), but more particularly, amongst others, *Gek Lian Tan v Paris and Chrissie Kafetzis t/as Gabriel's Café* (1999) 79 WAIG 2990 (FB). The definitive prescription of what a speaking to the minutes is is contained in the dictum of Dwyer P in *CSA v Public Service Commissioner of WA* (1937) 17 WAIG 22 and the cases referred to therein, where Dwyer P said:-

> "The minutes represent the decision of the Court and the points which we have to discuss are first of all anomalies and then mistakes that are likely to occur and then if there is anything the Court has omitted there is no reason why it should not be pointed out and attention paid to it before the award is issued. When the minutes are being discussed, it is not a question of fresh evidence. It is then too late. If one side was allowed to bring fresh evidence the other side would have to be and we should never have an end of the matter." (my emphasis)

(See also per Burnside J in *Printing Trades' Award* (1925) 4 WAIG 150 and Dwyer P in *Minister for Works v Geraldton Lumpers' Union* (1927) 6 WAIG 332; see also the remarks of Dunphy P in *CSA v Public Service Commissioner of WA* (1937) 17 WAIG 22.)

10 I respectfully apply and follow what His Honour said, as a Full Bench did, in *Gek Lian Tan v Paris and Chrissie Kafetzis t/as Gabriel's Café* ((op cit) (see also *Sheahan v SSTUWA* (1989) 69 WAIG 2966 (P)):-

> "The object of drawing up the decision of the Commission in the form of minutes is to give the representatives of the parties an opportunity to point out any of the provisions of the award which may have been inserted inadvertently or by mistake and which, if allowed to remain would be inconsistent or unworkable or would, in some way render the award or order less perfect than the Commission intended it to be. The parties should, therefore, when speaking to the minutes, confine their attention to alterations which will have the effect of making the award, or order or declaration more workable, rather than to alter its substance."

11 I also add, of course, that apart from conducting a speaking to the minutes and in the absence of a competent application to reopen the proceedings, generally speaking the Full Bench is functus officio once it has issued the minutes of proposed order.

ISSUES AND CONCLUSIONS

Submissions

12 The crux of the submissions of BHPB upon this speaking to the minutes was that the Full Bench should delete order 2(2) from the amended minutes of proposed orders and substitute for it an order that the matter be remitted to Commissioner Wood for further hearing and determination, as I have said above.

13 I would add that such an order would, in any event, be incompetent because s49(5) of *the Act* does not confer jurisdiction on a Full Bench to quash an order and to also simultaneously remit the matter, the provisions of s49(5) being separated by a disjunctive preposition, namely "or".

14 However, the rationale of this proposed amendment was that the Full Bench, having found that there was a miscarriage of the exercise of the discretion of the Commission at first instance, was now in the position as if the relevant decision had never been made, and that the Full Bench could substitute its own decision or remit the case to the Commission at first instance in accordance with the Full Bench's decision and in "light of the changed circumstances since the decision at first instance".

15 All of this was submitted against the assurances of counsel for BHPB that his client was not cavilling at the decision of the Commission at first instance in making these submissions.

16 Clearly, what BHPB wished to do, as a basis for the matter being remitted, was to rely on evidence of events involving Mr Gregory James Brandis which occurred in December 2004 and February 2005, allegedly, after the date of the events which were the subject of the hearing at first instance, after the date of the order appealed against, and after the first two days of the hearing of the appeal in the Full Bench. The decision made at first instance was made on 13 September 2004, and the events of December 2004 and February 2005 sought to be adduced in evidence occurred about three and five months, respectively, after that.

17 The evidence sought to be relied on was contained in an affidavit sworn by Mr Keith Glenn Ritchie on 14 March 2005 relating and related, inter alia, to Integrated Workforce purporting to cease to provide Mr Brandis' services to BHPB after about 15 February 2005, so it was alleged.

Same Evidence Rejected on 15 March 2005 by Full Bench

18 It is an unsatisfactory feature of BHPB's submissions that the above-mentioned evidence was sought to be adduced by BHPB during the hearing of the appeal by the Full Bench, and is now sought to be adduced again. The Full Bench rejected the evidence of Mr Ritchie upon the hearing of the appeal and it was not admitted and was not evidence on the record or considered, nor could it be, by the Full Bench in deciding the appeal. Not only did the Full Bench so decide, but reasons were given for so deciding (see the reasons for decision dated 10 June 2005 in paragraphs 66 to 73, per Sharkey P, Beech CC and Kenner C agreeing).

19 Thus, those submissions were not submissions which should have been made on a speaking to the minutes. They were an attempt to have evidence admitted which had in fact been rejected and reasons for the rejection expressed. The orders sought were quite contrary to the expressed reasons and findings of the Commissioner.

20 The submissions also represented an application to have the Full Bench reverse a decision which it had made, after hearing the parties and given reasons therefor, the Full Bench's decision being constituted by a declaration of unfairness and a decision to vary the decision at first instance.

21 Since Mr Schapper, for the appellant, indicated that he would not object to an application to reopen on the part of the appellant and to adduce that evidence, an application was orally made on behalf of BHPB in the course of Mr Lundberg's reply to Mr Schapper, to do so. Again, this was not an application to reopen but an application to the Full Bench to reverse what it had decided, namely that the evidence of Mr Ritchie was not to be admitted.

22 The submission that Mr Ritchie's affidavit was still on the Commission file I do not understand, since that evidence was not admitted in any of the proceedings on appeal or at first instance in this matter.

23 The Full Bench had decided this matter, as it was required to do, on the evidence of matters before the Commission at first instance, pursuant to s49(4) of *the Act*, having decided not to admit fresh or new evidence, and gave reasons accordingly. The minute reflected those reasons entirely.

24 There was nothing to decide or be decided by the Commission at first instance in any event, given what the Full Bench decided and why it decided it. To so decide was in accordance with the Full Bench's duty under s49(6) of *the Act*.

Another Matter

25 The submissions made by BHPB include a submission that proposed order 2(2) be amended, which was not competent because it was not a matter to be raised on a speaking to the minutes, as prescribed (see s35 of *the Act*). Further, in that the submissions made represented a calling into question of part of the decision made by the Commission, other than under s90 of *the Act*, they were contrary to s34(4) of *the Act*, or they were otherwise incompetent as an attempt to achieve a calling into question of a decision of the Commission expressed in a minute in accordance with the reasons given. Those submissions were therefore incompetent.

26 Further, insofar as there was an attempt to adduce evidence already rejected, that was incompetent. Further, the evidence sought to be adduced has been rejected in part for irrelevance and should not be before the Commission for that reason.

27 I would also observe that, for all of those reasons, *Allesch v Maunz* [2000] 203 CLR 172, is not an applicable authority. It will also be clear, from what I have said above, that there is no question of denial of natural justice. Full opportunity was given at all times to BHPB to put its case and it put its case, which has been decided upon.

28 The minutes, as amended, were in accordance with and reflect the reasons expressed by the Full Bench and the order in that respect cannot and should not be amended for those reasons.

Other Submission

29 There was one other submission made about the amendment of the minutes, made on behalf of the intervener, that proposed order 2 should be amended to reflect the evidence that BHPB refused to offer Mr Brandis employment in position No V56084 Rail Transport Technician. It was submitted that he should, and the order should be amended to state that Mr Brandis be employed on the same conditions as the successful applicants for those positions were in May 2004, namely on an Australian Workplace Agreement ("AWA").

30 I would make this observation, too. The submission for the intervener that an AWA was applicable to Mr Brandis' terms and conditions of employment was incompetent and not allowable because it was a submission made on behalf of an intervener who had no right to be heard on a speaking to the minutes. I would add that no such submission was made at first instance and the question of whether an AWA should apply was a matter to be determined by the parties themselves, given that an AWA is not a compulsory instrument. Such an order should not be made for that reason. To make such a submission now is incompetent and not allowable on a speaking to the minutes and also because the submission was not previously made.

31 The submission proper did not have merit either. That is because the submission insofar as it went to the jurisdiction of the Commission to make the declaration which it made had nothing to do with the minutes, nothing to do with the reasons for decision of the Commission and was never the subject of any submission at first instance and cannot now be considered. It was like other submissions, an attempt to re-argue submissions made or to use submissions not made at first instance.

32 Again, evidence of who employed Mr Brandis was not admitted in the Full Bench, was not therefore before it and should not have been referred to on this speaking to the minutes. A similar observation should be made about Mr Schapper's submissions which were sympathetic to BHPB's, but included a submission that the Full Bench order payment of wages from a specific date.

33 For all of those reasons, save and except for an amendment to the order to add the words identifying the position for which Mr Brandis applied, I would issue the order in the terms of the minute of amended order issued by the Commission to the parties.

CHIEF COMMISSIONER A R BEECH:

34 The purpose of a Speaking to the Minutes is well set out in the authorities referred to by His Honour. The decision of the Full Bench is expressed in paragraphs [287]-[288] of the Reasons for Decision. The Speaking to the Minutes is to allow BHPB to "draw attention to alterations which will have the effect of making the order or declaration more workable rather than to alter its substance" (to use the words of Dwyer P in *CSA v Public Service Commissioner of WA* (1937) 17 WAIG 22 which have been subsequently cited with approval).

35 The submissions made on behalf of BHPB at the Speaking to the Minutes were in support of its proposition that, the Full Bench having upheld the appeal on the basis that BHPB unfairly refused to employ Mr Brandis as and from 7 May 2004, the matter should be remitted to Commissioner Wood for further hearing and determination "in light of the fact that additional evidence is to be led in this matter".

36 The Full Bench has found that BHPB unfairly refused to employ Mr Brandis as a locomotive driver as and from 7 May 2004. By s.49(5)(b), in the exercise of its jurisdiction the Full Bench may uphold the appeal and, subject to subsection (6), vary it in such manner as the Full Bench considers it appropriate; in such a case a decision so varied shall be in terms which could have been awarded by the Commission at first instance: s.49(6).

37 Alternatively, by s.49(5)(c) the Full Bench may suspend the operation of the Decision and remit the case to the Commission for further hearing and determination; in such a case the Full Bench is not to remit a case unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

38 The Full Bench has decided to exercise its power under s.49(5)(b) and uphold and vary the decision by ordering "that Mr Brandis be employed by BHPB as and from 7 May 2004" (Reasons for Decision at [287]). The decision of the Full Bench was to not to suspend and remit the decision. Accordingly, apart from one matter, what was submitted was outside the purpose of a Speaking to the Minutes and thus, in my view, asked the Full Bench to do what it does not have the power to do in the absence of a re-opening of the matter.

39 I also do not understand what is meant by the reference to "additional evidence is to be lead in this matter". It is not. When BHPB sought to adduce fresh evidence during the hearing of the appeal, the fresh evidence it sought to adduce related to an event, or events, said to have occurred in December 2004 and February 2005 whilst Mr Brandis was operating locomotives on BHPB's railroad. The matter before the Commission at first instance, and thus before this Full Bench on appeal, related to events which occurred well before December 2004 and February 2005. In my view, the reason why I joined with my colleagues in refusing leave to submit that fresh evidence rests upon that simple statement.

40 I have considerable difficulty seeing how alleged events in December 2004 or February 2005 could be relevant to whether or not BHPB should be now required to employ Mr Brandis from 7 May 2004. The Order does not oblige BHPB to employ him today, or at the date the Order in this matter issues, but as and from 7 May 2004. What may happen to that employment

relationship after 7 May 2004 is not before this Full Bench. Presumably, and I say this only for the purposes of illustration, if BHPB considers that events occurred subsequent to 7 May 2004 that warrant BHPB terminating Mr Brandis's employment, they will do so from the date they make that decision and advise him accordingly. However that cannot be a reason for this Full Bench not to order the relief sought for the unfairness which occurred on 7 May 2004.

41 In my view the one matter that was properly drawn to our attention related to the identification of the position in which Mr Brandis is to be employed. It can, in my view, be only the position for which he applied and which was refused and no other position. I would alter the Order to issue to specify that position.

COMMISSIONER S J KENNER:

42 The Full Bench published its reasons for decision and minute of proposed order in respect of this appeal on 10 June 2005. As it is entitled to do, the first respondent by letter dated 14 June 2005 requested, pursuant to s 35(3) of the Industrial Relations Act 1979 ("the Act"), a speaking to the minutes so issued. No other party sought a speaking to the minutes of the proposed order and the intervenor has no standing to do so: *Australian Bank Employees Union v Federated Clerks Union of Australia, WA Branch* (1990) 70 WAIG 2086 at 2091.

43 The matter was listed for a speaking to the minutes as requested by the first respondent. Whilst it should be unnecessary to do so, given the settled law in relation to such proceedings, it perhaps needs to be restated that the purpose of a speaking to the minutes under s 35(3) of the Act, is a very limited one. Its purpose is to afford a party to the proposed order, who wishes to be heard, to make any submissions they may wish to, in order to ensure that the terms of the order to issue are workable and that there is no inadvertent omission of matters that ought be included, conversely no inclusion of matters which ought be omitted, so that the Commission's reasons for decision are given full effect and the order to issue is consistent with those reasons. It is not for parties on a speaking to the minutes, to put submissions the purpose of which is to alter the substance of a proposed order: *Printing Trades Award* (1925) 4 WAIG 150; *Civil Service Association v Public Service Commissioner* (1937) 17 WAIG 22. It is also the case of course, that a speaking to the minutes is not an opportunity for a party to attempt to re-argue its case or to adduce fresh evidence. That time has past.

44 The issues raised by the first respondent have been set out in some detail in the reasons of the President which I have had the benefit of reading in draft and with which I am in general agreement.

45 No party contended that the minute of proposed orders did not properly reflect the reasons for decision of the Full Bench. There was no submission put as to how the minute of proposed orders could be made more workable or otherwise amended, to fully give effect to the reasons for decision of the Full Bench.

46 The submission as to changed circumstances and the principles discussed in *Allesch v Maunz* (2000) 203 CLR 172, have no application in the present context. The parties have been fully heard on all issues they wished to ventilate during the hearing of the appeal, including the first respondent's application to adduce fresh evidence, which application was refused by the Full Bench. Furthermore, the parties were heard fully on the issue of remedy, including that as to whether, in the event the appeal were to be upheld wholly or in part, the decision of the Commission at first instance should be suspended and the matter remitted for further hearing and determination. In that respect, I simply note that s 49(6a) of the Act appears to be a reasonably strong statement of parliamentary intention, that the Full Bench not remit a matter to a Commissioner unless the requirements of that sub-section are met. In my opinion, s 49(6a) goes further than being merely permissive, as is the case with many rules of court applicable to appellate proceedings.

47 At the end of the day, the Full Bench was required to hear the appeal on the evidence and matters raised in the proceedings before the Commission at first instance, which it did: s 49(4) Act. With the application by the first respondent to adduce fresh evidence during the course of the hearing of the appeal being refused by the Full Bench, it is now too late to re-agitate these issues once again.

48 I agree however, that the minor variation sought to be made to the proposed order, to identify the position that Mr Brandis applied for at the first respondent, should be made

THE PRESIDENT:

49 For all of those reasons, the appeal is upheld and the decision at first instance varied.

Order accordingly

2005 WAIRC 01915

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPELLANT** **-and-** BHP BILLITON IRON ORE PTY LTD **FIRST RESPONDENT** INTEGRATED GROUP LTD T/AS INTERGRATED WORKFORCE **SECOND RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DATE	FRIDAY, 10 JUNE 2005
FILE NO/S	FBA 36 OF 2004
CITATION NO.	2005 WAIRC 01915

Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
First Respondent	Mr H J Dixon (of Counsel), by leave, and with him Mr F M Gaffney (of Counsel), by leave, and Mr M G Lundberg (of Counsel), by leave
Second Respondent	Mr N D Ellery (of Counsel), by leave, and with him Ms L D'Ascanio
Intervener	Mr A D Lucev (of Counsel), by leave, and with him Ms W Endebrock-Brown (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 13th and 14th days of December 2004 and the 15th and 16th days of March 2005, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant, Mr H J Dixon (of Counsel), by leave, and with him Mr F M Gaffney (of Counsel), by leave, on behalf of the first-named respondent, and on the speaking to the minutes for the first-named respondent Mr M G Lundberg (of Counsel), by leave, and Mr F M Gaffney (of Counsel), by leave, Mr N D Ellery (of Counsel), by leave, and with him Ms L D'Ascanio on behalf of the second-named respondent, and Mr A D Lucev (of Counsel), by leave, and with him Ms W Endebrock-Brown (of Counsel), by leave, on behalf of the intervener, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on the 10th day of June 2005, and there having been a speaking to the minutes in the Full Bench on the 22nd day of June 2005, and the supplementary reasons for decision having been delivered on the 28th day of June 2005, it is this day, the 10th day of June 2005, ordered and declared that the order made at first instance by the Commission in application No CR 128 of 2004 on the 13th day of September 2004 be and is hereby varied as follows:-

(1) By deleting the order to dismiss the said application.

(2) By substituting therefor the following declaration and order:-

"(1) THAT the above-named first respondent, BHP Billiton Iron Ore Pty Ltd, did unfairly refuse to employ Gregory James Brandis as a locomotive driver on a continuing and indefinite basis in position No V56084 Rail Transport Technician, as and from the 7th day of May 2004.

(2) THAT the above-named first respondent, BHP Billiton Iron Ore Pty Ltd, do employ the said Gregory James Brandis in position No V56084 Rail Transport Technician as and from the 7th day of May 2004."

By the Full Bench

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

FULL BENCH—Unions—Application for Alteration of Rules—

2005 WAIRC 01532

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IN THE MATTER OF AN APPLICATION BY THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS PURSUANT TO S62(2) OF *THE ACT*
	APPLICANT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
DATE	THURSDAY, 12 MAY 2005
FILE NO.	FBM 1 OF 2005
CITATION NO.	2005 WAIRC 01532

CatchWords	Industrial Law (WA) – application to alter name rule of organisation – no objection to application – application authorised in accordance with rules of organisation – statutory and rule requirements complied with – merits with applicant – application granted. - *Industrial Relations Act* 1979 (as amended), s7, s53(3), s55, s55(1), s55(4)(a), s55(4)(b), s55(4)(c), s55(4)(d), s55(4)(e), s55(5), s56, s56(1), s56(2), s58(3), s59, s62(2), s71 - *Industrial Relations Commission Regulations* 1985 (as amended).
Decision	Application granted.
Appearances	
Applicant	Mr S Millman (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

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

2 This is an application by the above-named applicant organisation (hereinafter called "the ISSOA"), brought pursuant to s62(2) of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*"). The application is an application to alter Rule 1, the Name rule, and to change the name of the organisation from "Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers" to "Independent Education Union of Western Australia, Union of Employees".

3 At all material times, the ISSOA was an "organisation" as that term is defined in s7 of *the Act*, and, in fact, it is and was an organisation of employees.

4 The application, since it is brought under s62(2) of *the Act*, attracts the operation of s55, s56, s58(3) and s59 of *the Act* with such modifications as are necessary.

THE APPLICATION, STATUTORY COMPLIANCE AND THE ALTERATION OF RULES

5 There was no objection to this application by any member of the ISSOA or any other person. The application was signed by the secretary.

6 All of the relevant regulations contained in the *Industrial Relations Commission Regulations* 1985 (as amended), and pertaining to the filing of the application and all necessary documents, were complied with, and we would so find.

7 The Alteration of Rules rule of the ISSOA rules is Rule 18 and reads as follows:-

> "(1) No application to the Commission for the amendment, addition to, variation, rescission, or substitution, of these Rules shall be made by the Union unless all of the members:
>
> (a) have been informed of the proposal for alteration and the reasons therefore by notice to each member of the Union at the address appearing on the Register of Members; and
>
> (b) have been informed that the members or any of them may object to the proposed alteration, by forwarding a written objection to the Registrar, within twenty-eight (28) days of the issuing of notice to members.
>
> (2) Any alteration to these Rules shall not be effective until the Registrar has given to the Union a certificate that the alteration has been registered.
>
> (3) Any proposal to amend any or all of these Rules shall:
>
> (a) be moved and seconded by any two (2) members of the Executive;
>
> (b) be forwarded to each member of the Executive not less than fourteen (14) days prior to the Executive meeting at which the resolution is to be considered; and
>
> (c) require a two thirds majority of the voting members of the Executive to be passed."

8 We have already observed that in accordance with the Alteration of Rules rule it is sought to change the name of the ISSOA and Rule 1 in the terms sought above.

9 At the meeting of the Executive held on 16 February 2005, which was quorate, there was a resolution that there be an application made to the Commission for authorisation to alter the rules in the terms which the application seeks, and which we have referred to above.

10 The resolution was passed unanimously, which means that a two thirds majority of the voting members of the Executive passed it as required by Rule 18(3)(c). In addition, the motion was moved and seconded by two members of the Executive, one being the President, Mr Kenneth Maguire, and one an ordinary member, Ms Delerine Murray. In addition, the proposed alteration to be put to the next meeting of the Executive was forwarded to each member of the Executive by letter dated 2 February 2005, not less than 14 days before the Executive meeting on 16 February 2005 at which the resolution was to be considered, and adequate notice was thereby given to them.

11 In accordance with the requirements of Rule 18, all of the members were informed of the proposal for alteration and the reasons therefor by notice posted to each member of the ISSOA, whose name then appeared on the register of members of the ISSOA, at the address appearing on the register of members on 17 February 2005.

12 Further, those members were informed that any of them might object to the proposed alterations by forwarding a written objection to the Registrar within 28 days of the issuing of notice to members. That notice was given on 17 February 2005, after the meeting of 16 February 2005 of the Executive.

13 There is no s71 certificate affecting the ISSOA.

14 S55(1) of *the Act* has been complied with.

15 The requisite notice pursuant to s55(3) of *the Act* appeared in the Western Australian Industrial Gazette ((2005) 85 WAIG 1004). The notice was dated 4 March 2005. There is only one error in it in that in the twelfth line the word "Western Australian" is a printing error and it should read "Western Australia". That is not any insurmountable obstacle to the success of this application.

16 The matter was not listed for hearing until 2 May 2005, which is more than 30 days after the notice appeared in the gazette. We are satisfied and find that s55(3) of *the Act* was complied with.

17 Because of the steps to which we have referred to above, and the steps taken by way of notices to members, we are able to find that the application has been authorised in accordance with the rules of the ISSOA and that reasonable steps have been taken to adequately inform the members of the intention to apply for the registration of the alteration, and, further, that reasonable steps have been taken to adequately inform the members of their right of objection to the Registrar under s55(4)(a) and (b) of *the Act*.

18 In particular, we should observe that the reasons given for the alteration to the rules are as follows:-

> "1. To align the name of the union with the objectives found in its Rules.
>
> 2. To reflect the role of the organisation among eligible employees.
>
> 3. To improve community recognition of the principal union in the private education sector.
>
> 4. The Industrial Relations Act requires that the registered name shall clearly indicate whether the organisation is an organisation of employers or employees."

19 We are therefore satisfied and find that those provisions have been complied with.

20 We are also satisfied under s55 of *the Act* and find that, having regard to the structure of the organisation, and in all of the circumstances before me, the members have been afforded a reasonable opportunity to make an objection (see s55(4) of *the Act*).

21 We are also satisfied that s55(4)(c) of *the Act* has been complied with and so find, there being no objection to the making of the application or this alteration by any member of the ISSOA or any other person.

22 We are also satisfied that s55(4)(d) and (e) of *the Act* have been complied with.

23 We are satisfied that s55(5) of *the Act* is not an obstacle to the registration, and simply could not be, having regard to the nature of the application to alter the rules which relates to a change of name only.

24 The relevant requirements of s56(1) and (2) of *the Act* are really not relevant in this case since the ISSOA rules already comply with those provisions.

25 S59 of *the Act* has been complied with, as we find, there being no evidence that the name is identical to or that it resembles any other registered organisation under *the Act*, nor is there any evidence, in our opinion, in the name itself or otherwise, that, for any reason, the name is likely to deceive or mislead any person. We are satisfied and so find.

26 Further, the name sought to be registered clearly indicates whether the organisation is an organisation of employers or an organisation of employees. It clearly indicates the latter.

FINALLY

27 For the reasons expressed in the notice to members and adopted in the submissions, the equity, good conscience and substantial merits of the case lie with the application being granted, and to do so is in the interests, too, of the members and the organisation, and we so find.

28 We therefore agreed, for all of those reasons, to authorise the Registrar to delete the existing Rule 1 of the applicant organisation's rules and substitute the new Rule 1, both of which we have referred to above. Further, we agreed to authorise the alteration to Rule 1 of the applicant organisation's rules which we have referred to herein, and to change the name to the Independent Education Union of Western Australia, Union of Employees, the name approved by the Executive of the ISSOA at its meeting on 16 February 2005.

COMMISSIONER S M MAYMAN:

29 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:

30 For those reasons, the application is granted.

2005 WAIRC 01395

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IN THE MATTER OF AN APPLICATION BY THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS PURSUANT TO S62(2) OF *THE ACT*
	APPLICANT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
DATE	MONDAY, 2 MAY 2005
FILE NO/S	FBM 1 OF 2005
CITATION NO.	2005 WAIRC 01395

Decision	Application granted
Appearances	
Applicant	Mr S Millman (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 2nd day of May 2005, and having heard Mr S Millman (of Counsel), by leave, on behalf of the applicant organisation, and the Full Bench having heard and determined the matter, and the Full Bench having determined that reasons for decision will issue at a future date, and the applicant herein having waived its rights pursuant to s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 2nd day of May 2005, ordered as follows:-

THAT the Registrar be and is hereby authorised to register the following alteration to the rules of the above-named applicant:-

That the existing Rule 1 – Name be deleted and there be substituted therefor the following new Rule 1 – Name:-

"This Society (hereinafter termed "the Union") shall be known as "Independent Education Union of Western Australia, Union of Employees".

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2005 WAIRC 00088

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL FREDERICK WILLIAMS
	APPLICANT
	-and-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	TUESDAY, 18 JANUARY 2005
FILE NO/S	PRES 10 OF 2004
CITATION NO.	2005 WAIRC 00088

Decision	Orders and directions
Appearances	
Applicant	Mr M F Williams, on his own behalf
Respondent	Ms S Burke (of Counsel), by leave

Orders and Directions

This matter having come on for hearing before me on the 18th day of January 2005, and having heard Mr M F Williams, on his own behalf, and Ms S Burke (of Counsel), by leave, on behalf of the respondent, and I having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having waived their rights pursuant to s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 18th day of January 2005, ordered and directed as follows:-

(1) THAT application No PRES 10 of 2004 be and is hereby adjourned for hearing and determination to 10.00am on Monday, the 14th day of January 2005.

(2) THAT within 14 (fourteen) days of today's date the respondent give discovery and there be inspection of all relevant documents and records and in particular the minutes of any meeting of the respondent adopting rule 8(d) in its present form.

(3) THAT the applicant give discovery and that there be inspection within 14 (fourteen) days of today's date by the respondent of all documents upon which the applicant intends to rely at the hearing of the application.

(4) THAT there be leave to the respondent to file and serve a request for any further particulars of the application herein within 7 (seven) days of today's date and that an answer to that request be filed and served within 10 (ten) days after the expiration of that said period of 7 (seven) days.

(Sgd.) P J SHARKEY,
President.

[L.S.]

2005 WAIRC 00097

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL FREDERICK WILLIAMS
	APPLICANT
	-and-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	WEDNESDAY, 19 JANUARY 2005
FILE NO/S	PRES 10 OF 2004
CITATION NO.	2005 WAIRC 00097

Result	Orders and directions
Representation	
Applicant	Mr M F Williams, on his own behalf
Respondent	Ms S Burke (of Counsel), by leave

Corrected Orders and Directions

I order this 19th day of January 2005 that the order which issued herein dated the 18th day of January 2005 be and is hereby corrected and will now read as follows:-

"This matter having come on for hearing before me on the 18th day of January 2005, and having heard Mr M F Williams, on his own behalf, and Ms S Burke (of Counsel), by leave, on behalf of the respondent, and I having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having waived their rights pursuant to s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 18th day of January 2005, ordered and directed as follows:-

(1) THAT application No PRES 10 of 2004 be and is hereby adjourned for hearing and determination to 10.00am on Monday, the 14th day of February 2005.

(2) THAT within 14 (fourteen) days of today's date the respondent give discovery and there be inspection of all relevant documents and records and in particular the minutes of any meeting of the respondent adopting rule 8(d) in its present form.

(3) THAT the applicant give discovery and that there be inspection within 14 (fourteen) days of today's date by the respondent of all documents upon which the applicant intends to rely at the hearing of the application.

(4) THAT there be leave to the respondent to file and serve a request for any further particulars of the application herein within 7 (seven) days of today's date and that an answer to that request be filed and served within 10 (ten) days after the expiration of that said period of 7 (seven) days."

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

2005 WAIRC 00194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL FREDERICK WILLIAMS
	APPLICANT
	-and-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	WEDNESDAY, 2 FEBRUARY 2005
FILE NO/S	PRES 10 OF 2004
CITATION NO.	2005 WAIRC 00194

Decision	Orders and directions
Appearances	
Applicant	Mr M F Williams, on his own behalf
Respondent	Ms S Burke (of Counsel), by leave

Orders and Directions

This matter having come on for hearing before me on the 2nd day of February 2005, and having heard Mr M F Williams, on his own behalf, and Ms S Burke (of Counsel), by leave, on behalf of the respondent, and I having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having waived their rights pursuant to s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 2nd day of February 2005, ordered and directed as follows:-

(1) THAT the respondent within 2 (two) days of the date hereof do serve upon all elected officers of the respondent copies of the application and answer, and other documents filed herein together with a copy of this order.

(2) THAT the respondent do within 4 (four) days of the date hereof file a statutory declaration proving compliance with order 1.

(3) THAT on 14 February 2005 the Commission will hear and determine the matters raised in the application and minute of proposed orders sought and filed herein, save and except the matters raised by proposed order 2 in the said minute of proposed orders.

(4) THAT the matters raised by the said order 2 be and are to be heard and determined on a date to be fixed after the hearing of 14 February 2005.

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

2005 WAIRC 00854

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL FREDERICK WILLIAMS
	APPLICANT
	-and-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	FRIDAY, 1 APRIL 2005
FILE NO.	PRES 10 OF 2004
CITATION NO.	2005 WAIRC 00854

CatchWords	Industrial Law (WA) - discrimination - rights of organisations to decide rules - nomination of officers - interpretation of rules of organisations - tyrannical or oppressive rules - Conciliation and Arbitration Act 1904 - Industrial Relations Act 1979 (as amended), s6(e), s6(f), s7, s26(1)(c), s29, s61, s66, s66(2)(a), s66(2)(a)(ii), s66(2)(a)(iv), s66(2)(a)(v), s110, s110(1) - Equal Opportunity Act 1984, s53(1), s53(1)(2), s54, s54(1).
Decision	Application proven and rule disallowed.
Appearances	
Applicant	Mr M F Williams, on his own behalf
Respondent	Ms S Burke (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an application by the above-named applicant, Mr Michael Frederick Williams, pursuant to s66 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 At all material times, Mr Williams was a financial member of the respondent organisation, (hereinafter referred to as "the SDEA"). He was also employed as a store worker.

3 At all material times, the respondent organisation was an organisation registered as such pursuant to *the Act* and therefore an "organisation", as defined in s7 of *the Act.* Thus, I had jurisdiction to hear and determine this application.

THE ACT – RELEVANT SECTIONS

4 Pursuant to s61 of *the Act*, upon and after registration, the SDEA, as an organisation as defined, is subject to the jurisdiction of the Industrial Appeal Court and the Commission and to *the Act*, which includes s66. Further, pursuant to s61, all of the organisation's members are bound by the rules of the organisation during the continuance of their membership.

5 It is also relevant to point out that s110(1) of *the Act*, which reads as follows, applies:-

> "**110. Disputes between organisation or association and its members**
>
> (1) Every dispute between an organisation and any of its members, or between an association and any organisation represented therein, shall, subject to section 66, be decided in the manner directed by the rules of the organisation, or, as the case may be, by the rules of the association."

6 S7 of *the Act* defines "office" and "officer" as follows:-

> ""**office"** in relation to an organisation means —
>
> (a) the office of a member of the committee of management of the organisation;
>
> (b) the office of president, vice president, secretary, assistant secretary, or other executive office by whatever name called of the organisation;
>
> (c) the office of a person holding, whether as trustee or otherwise, property of the organisation, or property in which the organisation has any beneficial interest;
>
> (d) an office within the organisation for the filling of which an election is conducted within the organisation; and
>
> (e) any other office, all or any of the functions of which are declared by the Full Bench pursuant to section 68 to be those of an office in the organisation,
>
> but does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation;
>
> **"officer"** means a person who carries out, or whose duty is or includes the carrying out of, the whole or part of the functions of an office in an organisation;"

7 S66(2)(a) of *the Act* confers jurisdiction on the Commission, constituted by the President, and the power to:-

> "disallow any rule which, in the opinion of the President —
>
> (i) is contrary to or inconsistent with any Act or law, or an award, industrial agreement, order or direction made, registered or given under this Act;
>
> (ii) is tyrannical or oppressive;
>
> (iii) prevents or hinders any member of the organisation from observing the law or the provisions of an award, industrial agreement, order or direction made, registered or given under this Act;

(iv) imposes unreasonable conditions upon the membership of a member or upon an applicant for membership; or

(v) is inconsistent with the democratic control of the organisation by its members;"

RULES

8 Sub rule 8(d) of the SDEA's rules, reads as follows:-

"**8 – NOMINATION OF OFFICERS**

…..

(d) No known communist may nominate for, or hold, any office in the Union."

9 There are other sub rules which prohibit persons from eligibility to be a candidate for office and/or to hold any office in the SDEA. They are sub rules 8(c), (l), (m) and (n) and they read as follows:-

"(c) Only those persons shall be eligible to nominate as a member of the Board or Organiser or Officer of a Branch who are members of the Union and financial and with at least one (1) years' continuous membership prior to the date of nomination; but branch officials for new branches may be new members.

(l) A person shall not be eligible to be a candidate for any full time paid officer's position if at the date set for the closing of nominations he is sixty five years of age or more and every candidate for such position shall sign and lodge with his nomination a declaration that he is eligible under the provision of Rule 8 (1).

(m) A person shall not be eligible to be a candidate for any office in the union or a branch if there is reasonable ground for believing that –

(i) within twelve months prior to the date of his nomination, he was a member of any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organised government; or

(ii) he himself advocates or encourages, or has, within twelve months prior to the date of his nomination, advocated or encouraged the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organised government.

(n) A person shall not be eligible to hold or continue to hold office in the union or a branch if there is reasonable ground for believing that –

(i) He is a member of any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organised government; or

(ii) he himself advocates or encourages, or has, within twelve months prior to the date of his election, advocated or encouraged the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organised government."

10 The application is made, as I have said, in the first place, for the President to disallow the sub rule 8(d).

11 The assertion in the particulars of the claims is that the application is made on the following grounds:-

1. Sub rule 8(d) is contrary to or inconsistent with any Act or law.
2. Is tyrannical and oppressive.
3. Imposes unreasonable conditions upon the membership of a member.
4. The rule is inconsistent with the *Equal Opportunity Act* 1984 (as amended) (hereinafter referred to as the "*EO Act*"), in that:-
   (a) It is unlawful for an employer to discriminate against a person on the ground of a person's religious or political conviction:
      (i) In the arrangements made for the purposes of determining who should be offered employment.
      (ii) In determining who should be offered employment.

12 In short, the grounds relied on in order to seek a disallowance of sub rule 8(d) are those expressed in s66(2)(a)(i), (ii) and (iv) of *the Act*.

13 By the particulars, the applicant also sought an order that the Secretary of the SDEA declare vacant any office of the SDEA, subject to the rule and hold fresh elections for all such positions. The application was opposed on a number of grounds.

BACKGROUND

14 I should first observe that it was not in issue and indeed it is quite clear from its words that sub rule 8(d) prohibits any "known communist" from being nominated as a candidate to hold office in the SDEA and also prohibits a "known communist" from holding office in the SDEA.

15 The sub rule, rule 8(d), was inserted in the rules of the SDEA by direction of the Registrar of the Arbitration Court of Western Australia, a forerunner of this Commission, by virtue of a resolution of the Board of Management of 10 March 1952. It was then registered as sub rule 8(f) of the rules of the Western Australian Shop Assistants and Warehouse Employees Industrial Union of Workers, Perth on 21 August 1952 by the Registrar.

16 The amendment emanated from a resolution of the rules committee of the abovementioned union which, for the purposes of these proceedings, was accepted to be the respondent or its forerunner.

17 1952, it should be remembered, was the height of the Cold War, with Australia at war in Korea, and with the two major communist powers, the USSR and the People's Republic of China regarded as the enemies of and at war, albeit a cold war, with Western nations, including Australia. Since then, with the exception of China, however, many countries have eschewed communism of the Marxist/Leninist type, including Russia and States which were its former vassals, and China to some extent, de facto. In particular, the Cold War ended about 1990.

18 I take judicial notice of these matters and a number of other similar matters referred to later in these reasons according to the approach taken by the High Court in the Communist Party Dissolution Bill case – *The Australian Communist Party and Others v The Commonwealth and Others* 83 CLR 1 to which I refer hereinafter. That case, of course, turned on whether a Bill which purported to effect the dissolution of the appellant Australian Communist Party was constitutionally valid, relying on the defence power contained in *the Constitution.* There was a specific proscription in it, and I put it in broad terms, of Marxist/Leninist communism. It is not relevant to the substantive legal principles which fall to be considered in this case. However, matters of judicial notice and matters of communism and the relevant history thereof in this country are discussed by the High Court in that case.

19 I note that no communist, known or otherwise, is prohibited from membership of the SDEA. In fact, there is no prohibition in the rules upon membership of the SDEA for any similar reason.

20 There was also no evidence that any communist is a member of the SDEA or that any communist was ever prohibited from a nomination for candidature for office in the SDEA. There was no evidence that any communist was ever removed from office in the SDEA. That is not to say, of course, that the prohibition in sub rule 8(d) has not prevented a "known communist" from seeking office in the SDEA. There is, however, no evidence of that fact.

21 The SDEA in Western Australia, at the time of the making of the application, namely 21 December 2004, had a financial membership of 21,196.

22 Mr Joseph Warrington Bullock, the General Secretary, who was called to give evidence by the applicant, informed the Commission that he was unaware of any known communists among the membership. The last elections for office in the SDEA were conducted in August 2004 and the nominees for each office were declared by the Returning Officer to have been elected unopposed. The elections were purported to be held pursuant to rules 8 and 9 of the rules.

23 Mr Williams was not nominated and did not stand for election to office in those elections because he was not eligible, not having been a member of the SDEA for a period of no less than 1 year's continuous membership as required by sub rule 8(c).

24 No person was refused nomination for election and none has been refused nomination for election at the 2004 elections under sub rule 8(d), within the knowledge of Mr Bullock, going back in this State to 1970. That evidence was not contradicted.

25 On 23 February 2004, Mr Williams, an employee of Coles Myer retailers, agreed in writing to become a member of the SDEA and pledged himself to comply with the rules of the SDEA and with any amendments or additions made to those rules from time to time. He was not given any information concerning what the rules were then or subsequently. Mr Bullock said that he first became aware of these proceedings when the application was served on the SDEA. Before that, he was unaware of any query or complaint by any person concerning sub rule 8(d).

26 Mr Williams, who was called on behalf of the respondent, made it clear in his evidence in chief that he filed the application on 21 December 2004 because he was concerned about the operation of sub rule 8(d). In addition, he made the decision to make the application in December 2004 and then made it on 21 December 2004.

27 His evidence was that he had become aware of sub rule 8(d) in approximately October 2004, when he found the rules of the SDEA on this Commission's website. As a result of his concern about "other matters through the workplace", he searched through the website. He read most of the rules, he said. He was concerned that an election for President had occurred. He said that he was also concerned that the President, who is an "officer", as defined in s7 of *the Act*, was elected to office, subject to sub rule 8(d). He looked at sub rule 8(d), he said, because he might choose to stand later for office, that is at some future election. He is and was concerned because of sub rule 8(d) about future elections.

28 The manner in which he looked at the rule, he said, was as follows:-

> "Well, I was looking at it as what I thought was a rule out of the McCarthy era that I thought wasn't appropriate to the unions? of a democratic union prohibiting people from standing for their political persuasion."

29 Some weeks later, Mr Williams wrote to the Registrar and asked whether these rules were consistent with the statutory provisions which he identified. This was on 23 November 2004. He did not contact Mr Bullock about sub rule 8(d) between October 2004 and the commencement of the proceedings on 21 December 2004. He took no other steps to have the rule amended, varied or deleted. There was no reason why he did not take any steps other than this application to have the rule dealt with or considered, he said.

30 Mr Williams said in evidence that his complaint was that the rule singled out and identified a group of people and prevented them from standing for the election, a democratic process in the union. He made it clear in evidence that he had not nominated for office in the August 2004 election. He also said that the rule would not have affected his candidature had he nominated for office in August 2004. It could, he said, affect his candidature in the future if he became a "known communist". He said that the rule smacks of "McCarthyism". He would object, he said, if it identified anybody by political connection (for example, a Nazi). In this case, the words "known communist" cause him offence. He said that he is concerned, too, that persons would be branded communists or Nazis for example when they were not. What concerned him about the election, he said, was simply that there had been an election held and future elections would be held under this rule.

31 It is fair to say that elections have been held under this rule since 1952.

32 Mr Williams will have twelve months' continuous membership by 23 February 2005 which would make him, after that date, eligible to stand for election for office in the SDEA. He was, however, he said, unaware of any imminent elections in the SDEA. He explained that he sought an order for a new election because it seemed to be the logical consequence of "creating" new rules for the SDEA.

33 If this application were successful, Mr Williams would then be eligible for candidature in a new election provided that he was a financial member, and was otherwise eligible in that he complied with sub rules 8(d), (l), (m) and (n); that is, if a fresh election were ordered in this matter by the Commission, constituted by the President. It was not suggested by anyone that he would be ineligible to nominate for the candidature for office at any future election.

ISSUES AND CONCLUSIONS

34 First, it is necessary to observe that, insofar as the rules require interpretation, the principles which I am bound to apply and have always applied are as follows:-

> "Generally speaking the correct approach to the interpretation of a union rule is to interpret it in the same manner as any otherr (sic) document. It must be remembered however that union rules are not necessarily drafted by skilled draftsmen. It is therefore necessary I think in construing a union rule not to place too literal adherence to the strict technical meaning of words but to view the matter broadly in an endeavour to give it a meaning consistent with the intention of the draftsman of the rule."

(See *HSOA v Honourable Minister for Health* (1981) 61 WAIG 616(IAC) at 618 per Brinsden J, with whom Smith J agreed; see also *R v Aird; Ex parte AWU* [1973] 129 CLR 654 at 659.)

35 It is, of course, necessary to and I interpret the sub rule, in the context of the whole of the rules and in the context of the whole of rule 8.

36 I have not been able to find a relevant judicial definition of the word "known". However, its ordinary natural meaning derived from the *Macquarie Dictionary* (3rd edition) is given it by defining it as the past participle of "know". "Know", in its most apposite definition there supplied is:-

> "**6.** to be cognisant or aware, as of some fact, circumstances, or occurrence; have information, as about something."

37 I should preface these observations, too, by referring to definitions of "communism" and "communist" in the *Macquarie Dictionary* (3rd edition). I drew these definitions to the attention of the parties during the proceedings in order to give them an opportunity to comment on them.

38 The following definitions appear and I quote the most apposite definitions:-

> "Communism **1.** a theory or system of social organisation based on the holding of all property in common, actual ownership being ascribed to the community as a whole or to the state. **2.** a system of social organisation in which all economic activity is conducted by a totalitarian state dominated by a single and self-perpetuating political party. **3.** →**communalism**."

39 In turn, "communalism" is defined to mean:-

> "a theory or system of government according to which each commune is virtually an independent state, and the nation merely a federation of such states."

40 A "communist" is defined to be:-

> "**1.** an advocate of communism. **2.** (*often cap*) a person who belongs to a communist party. **3.** (a term of abuse applied to one who is relatively less conservative than the speaker). - *adjective* **- 4.** relating to communists or communism."

41 "Communist Party" means:-

> "a political party professing the principles of communism."

42 There was a discussion of communists and communism by the High Court in the Communist Party Dissolution Bill case – *The Australian Communist Party and Others v The Commonwealth and Others* (HC) (op cit). Discussions of what a "communist" is appear in the judgment of some of the judges, for the purposes of deciding the validity of the Communist Party Dissolution Bill (see pages 177-178 per Dixon J:-

> "The required support may take the form of the advocacy or support by the body either of the objectives the policies the teachings or the practices of communism. The communism must be as expounded by Marx and Lenin. Theoretically there may be a difficulty in saying how the provision applies if the body subscribes to some but not to all of the objectives, policies, teachings or practices, but probably it has no practical importance."

and at page 196-197, where His Honour says:-

> "It is needless to enter into a discussion of the avowed principles of communism, whether in earlier stages of development or in their present state. In a political theory based upon the supposed irreconcilable antagonisms inherent in a capitalistic system, the inevitability of its decomposition, the necessity of a period of revolutionary transformation from a capitalist to a communist society, the struggle between bourgeoisie and proletariat, the dictatorship of the proletariat during a longer or shorter period of further evolution, the progressive extension of the revolutionary process over the earth and the need to assist and expedite its spread not merely that its supposed benefits may be more widely enjoyed but for the protection of existing systems of communism from counter action and the revolutionary process of development from delay and temporary defeat; in such a political theory there are beliefs calculated to produce action and the interpretation which a parliamentary government places upon events domestic and foreign will be affected by the complexion it gives to the tenets and precepts of the adherents of the philosophy. That complexion need not be the same as the adherents themselves would claim for their doctrines. A harsher or more sinister interpretation may be placed upon some of the sentiments than communists themselves may say is correct. But that is beside the point. The significance of such things must be judged by the Government in the light of all the circumstances of which it is informed.
>
> If it is unnecessary to discuss the principles of communism, it is even less necessary to examine notorious international events. The communist seizure of Czecho-Slovakia, the Brussels Pact of Western Union, the blockade of Berlin and the airlift, the Atlantic Pact, the passing of China into communist control, the events in reference to the problem of Formosa, the entry of the North Korean forces into South Korea and the consequent course of action adopted by the United Nations, and the sustained diplomatic conflict between communist powers and the Anglo-American countries and other western powers at meetings of the Security Council and the General Assembly are all too recent. So far as the internal affairs of this country enter into the question whether events had extended the operation of the defence power, it is enough to refer to the serious dislocations of industry that have occurred – a matter the significance of which it would be within the province of the Government to judge, availing itself of its sources of information."

43 At page 208, McTiernan J said this:-

> "The Communist Party is the name of a world-wide movement which is organized as a political party in many countries and is the major and dominant party in the Union of Socialist Soviet Republics; the Australian Communist Party, like the communist parties in other countries, is a political party formed in accordance with Lenin's conception of a world-wide political movement which would strive to establish a proletarian dictatorship and to impose Marxism everywhere; and by reason of these circumstances the Australian Communist Party manifests strong sympathy with the foreign and domestic policy of the government of the Union of Socialist Soviet Republics. It follows that if war occurred in which that State was the enemy or there was imminent danger of such a war, the Commonwealth could take preventive measures against communists and communist bodies just as it could against alien enemies resident in this country. But I cannot agree with the view that at the time this Act was passed there was a situation which provided a constitutional foundation for this Act."

44 One ordinary natural meaning applicable to "communist" in sub rule 8(d) is without doubt a person who is an advocate of and/or who belongs to a communist party which espouses the second abovementioned definition of communism, namely a system of social organisation in which all economic activities are conducted by a totalitarian state dominated by a single and self-perpetuating political party.

45 Such a philosophy, if translated to the SDEA, by a communist, so defined, would mean that the democratic government of the organisation, an object of *the Act*, was something in which that person did not believe. However, a communist can also be a person who espouses a theory or system of social organisation based on the holding of all property in common, actual ownership being ascribed to the community as a whole or to the State. If that person or party does not espouse violent revolution or subversion to achieve such an aim, then he or she is a very different person from a communist, as defined, in definition 2 above. He or she would not hold views incompatible with the welfare of the other members of the organisation or of the organisation as a democratic institution. The same can be said about a communist who is a "communalist", as defined.

46 There is some doubt, and indeed some uncertainty about what a communist is in sub rule 8(d). People have assumed, and there was some assumption in these proceedings, that communist means plainly and only "one who believes in or seeks to achieve by violence (or subversion) a system of social organisation in which all economic activity is conducted by a totalitarian state dominated by a single and self-perpetuating political party". It seemed accepted, to some extent, but not entirely, that sub rule 8(d) had its genesis in the Cold War and the only communists subject to its prohibition were Marxist/Leninist communists, as defined in the dictionary definition 2 (supra). However, I did not understand that that definition was alone accepted by the applicant. There was also insufficient extrinsic evidence to resolve any ambiguity, if ambiguity exists in sub rule 8(d).

47 I would therefore look to the definitions referred to above and construe "communist" as being a person who espouses any of the three forms of communism referred to in the definition above.

48 It is certainly, as in all s66 matters, for the applicant to establish its case, that is to establish that the rule should be disallowed for the reasons alleged (see *Doyle v AWU* (1986) 68 ALR 591 (FCFC) at 599). The standard of proof cast upon the applicant for establishing his case is according to the balance of probabilities.

49 The first matter to observe is that the principles to be applied in matters such as this were laid down in *Doyle v AWU* (FC) (op cit) and other cases considered and applied by this Commission, constituted by the President in *Veenstra v WALEDFCU* 77 WAIG 3202.

50 It is a primary principle that organisations, as defined, choose their own rules and that the rules are evidence of a contract between members (see *Doyle v AWU* (FC) (op cit) at page 599).

51 It is trite to observe that the mere imposition of a condition or restriction on the right to nominate is not, ipso facto, tyrannical or oppressive or otherwise exceptionable within the meaning of s66 of *the Act*. Indeed, restrictions on rights to nominate candidates do not of themselves vitiate a direct voting system (see *Municipal Officers' Association of Australia v Lancaster and Another* (1981) 37 ALR 559 (FCFC) and *Lovell v FLAIEU* [1978] 35 FLR 72).

52 Neither the right to be a member of an organisation nor the right to vote carries with it the right to stand for election (*Doyle v AWU* (FC) (op cit) at pages 595-596; *Leveridge v SDAEA* (1977) 31 FLR 385 and *Lovell v FLAIEU* (op cit).

53 A union is entitled to give its own weight to policy matters in deciding upon its rules and it is not for a court to substitute its views for those of the union (see *Doyle v AWU* (FC) (op cit) at page 600 and *Wiseman v PREIU* (1978) 20 ALR 545 (FCFC) at 561).

54 A rule is not liable to be struck down merely because it is thought to be unwise (see *Rule v AWU* (1985) 70 ALR 754 per Wilcox J) or undesirable (see *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit) at 589).

55 The matter for decision by the Commission is not "what would, in the view of the court, constitute the most desirable provisions to be contained in the rules of the organisation". The matter is whether the Commission, constituted by the President, is persuaded that the conditions, obligations or restrictions imposed by the actual rules of the organisation upon applications for membership or members are "oppressive, unreasonable or unjust, within the meaning of those words", or, for the purposes of *the Act*, s66(2)(a), "tyrannical or oppressive" (see *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit) generally and the cases cited therein). I would add that, as Deane J said in *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit) at 589, quoting various authorities including *Wiseman v PREIU* (FCFC) (op cit) at 561:-

> "The constraints and restrictions imposed, by positive and negative requirement of the Act and Regulations, upon the freedom of the members of an organisation to select, for themselves, the rules which they consider appropriate for their particular organisation, are real and significant. It cannot, however, be too strongly stressed that, subject to those constraints and restrictions, the content of the rules of a registered organisation is primarily a matter for the members …
>
> This court has no authority generally to supervise the content of the rules or to require that the rules comply with what those constituting the court might see as preferable, desirable or ideal. To put the matter differently, it is for the members, or those entrusted by the members in that regard, to decide the content of the rules. The function of this court is to determine, in accordance with ordinary judicial procedure, whether some provision or provisions of the rules adopted by, or on behalf of, the members can properly be described not merely as undesirable but as oppressive, unreasonable or unjust."

56 I respectfully adopt that point of view for the purposes of the application of s66 of *the Act*.

57 It was submitted to the Commission in this case that these were all cases where the applicant was not alleging actual or identifiable oppressions.

Is the Rule Tyrannical or Oppressive?

58 The federal test for many years has been whether a rule is "oppressive, unreasonable or unjust". In *Cameron v AWU* [1959] 2 FLR 45, the Commonwealth Industrial Court held that it is doubtful whether the words "oppressive" and "unjust" have any independent significance.

59 The equivalent in *the Act* is s66(2)(a)(ii), which empowers the President to and confers on him the jurisdiction to disallow any rule for a number of reasons and, in particular, if it is "tyrannical or oppressive". Those were the words used in the old federal legislation and particularly under the *Conciliation and Arbitration Act* 1904 (Cth).

60 The Commission in this matter is exercising a judicial power and is not at liberty to substitute its modes of thought for those of an organisation (see *Wiseman v PREIU* (op cit)). Further, the Commission does not look merely to the object of *the Act* to determine whether the rule specifically is contrary to one or more of the objects of *the Act*. It is necessary for the Commission to have regard to all of the circumstances in the light of those objects and the purposes of registration (see *Cameron v AWU* (op cit) at pages 50-51 and *Wiseman v PREIU* (op cit) and also *Cassidy v APWU* [1967] 11 FLR 124). However, the Commission can look to the objects of *the Act*. (Unlike the Federal Court, it is not required to have regard to

the objects by statute.) That, in this matter, cannot refer to all of s6(f) which is, to some extent, absorbed by s66(2)(a)(v) and which would therefore require to be pleaded as a ground of the application.

61 However, s6(e) and the underlined part of s6(f) hereunder, of *the Act* are of assistance and read as follows:-

> "(e) to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations;
>
> (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;"

62 The words "tyrannical or oppressive" appeared in the *Conciliation and Arbitration Act* 1904, but that did not define or sufficiently define the words "tyrannical or oppressive".

63 I do not think "tyrannical or oppressive" are words which should be separated any more than should, for example, the words "harsh, oppressive or unfair" in s29 of *the Act*. Those two words are used objectively in the subsection and each of them is to be given its strong ordinary meaning.

64 In my opinion, too, the word "or" in the phrase "tyrannical or oppressive" is conjunctive, not disjunctive. The words "tyrannical" and "oppressive" are, to a great degree, synonymous. They are also almost synonymous with the words used in the federal Act, but not quite. "Oppressive", in its most relevant sense, is defined to mean (see the *Macquarie Dictionary* (3rd edition)):-

> "**1.** burdensome, unjustly harsh or tyrannical, as a king, taxes, measures etc."

Perhaps most helpful is Deane J's definition of "oppressive" in *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit), where, at page 589, His Honour said:-

> "To be oppressive, a condition, obligation or restriction must be burdensome, harsh and wrongful. (see, for example, *Scottish Co-operative Wholesale Society v Meyer* (1959) AC 324 at 342; *Re Jermyn St Turkish Baths Ltd* [1971] 3 All ER 184 at 199; and *Allen v Townsend* (1977) 16 ALR 301 at 337)."

"Tyrannical" means:-

> "arbitrary or despotic; despotically cruel or harsh; severely oppressive."

(See the *Macquarie Dictionary* (3rd edition).)

> "Plainly, their meanings overlap and definition is liable to adulterate the strength which the words possess"

(See per Deane J in *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit) at pages 589-590.)

65 The rule by which a union or organisation of employees determines who may run for office is not, on its face, tyrannical or oppressive. Such provisions are common, it was submitted, and in fact they are. However, none of the examples cited in cases dealt with a person's political convictions as a qualification for, or disqualification from, standing for office in an organisation.

66 These cases deal with things like the minimum years of membership which must be served before a person is qualified to stand for office, or good character and repute (see *McKay v AWU* (1968) 12 FLR 182 at 186) and other similar qualifications, all different from this disqualification here or even the qualifying requirement that one not be a know communist, which is the reverse of sub rule 8(d).

67 Thus, it was submitted that the limitation on candidacy imposed by sub rule 8(d) is a proper limitation and the mere fact that the limitation operates to exclude persons who espouse a set of beliefs is not a sufficient ground for a finding that the rule is either tyrannical or oppressive.

68 Of course, Mr Williams' submission was that the rule was tyrannical or oppressive because members who hold a particular set of political beliefs are disqualified from being nominated for office and therefore from holding office.

69 The SDEA's answer to that was that communism, as defined and as generally understood, is well known to be antithetical to the principles of democracy and trade unionism. They were referring to the communism of Marx and Lenin. My attention in that context was drawn by Mr Rogers of Counsel for the SDEA to the suppression of trade unions in Eastern Europe and China under communism, the absence of any free electoral systems in such regimes, and the limitations on free speech in the communist regimes. To that may be added the existence of the gulags, the absence of independent courts and the free press, the apparatus as in Nazi Germany and other states of totalitarianism. One should also add that French and Italian communism, by contrast, form parties which engage themselves in the democratic government of those countries.

70 It was therefore submitted that, if Mr Williams wished to rely on this ground, that he must establish that the nature of communism is not such as to allow for the retention of the rule. The rule does not obviously prevent membership by persons who are "known communists". It does not prevent membership obviously by persons who are not "known communists"' but who are communists.

71 It is a rule, I observe, which is obviously designed to prevent communists being engaged in, or becoming the government of, the SDEA as an organisation of employees and thus exercising control of it.

72 In my opinion, it is, on the evidence, tyrannical or oppressive to prevent a person who is a communist and who is a member of the SDEA being eligible to be nominated for office, given that he or she is entitled to become a member. There is a further safeguard in that that person still has to be elected to office. There is a distinguishing factor from Nazism or from a person who believes in a terrorist ideology, in that there are various shades of communism and the Cold War which involved conflict between Western countries and totalitarian communist countries has ended.

73 In a democracy such as this, one must be careful that persons do not suffer disadvantage because they hold political beliefs which are different from the mainstream. S66 of *the Act* can be used in that respect. Certainly aggressive Marxist/Leninist communism, as defined, is totalitarian, undemocratic and inimical to the objects of *the Act*, particularly s6(f). However, that is only one type of communism.

74 In any event, sub rules 8(m) and (n) prevent any person being eligible for office in the SDEA or holding or continuing to hold office when such a person is a member of bodies or is a person who advocates or encourages the overthrow by violence of the Commonwealth or a State of Australia or any other civilised country or of organised government. The same prohibition applies to any person who himself advocates or encourages such overthrow by force of any such government.

75 That, of course, prevents a person who espouses revolutionary communism personally and/or by belonging to such a communist party from nominating for election to any office in the SDEA. Those are rules which are not attacked in these proceedings and I do not think that they could be successfully challenged under *the Act*. Sub rule 8(d) bars a person from

nomination who is a communist who does not espouse the overthrow of lawful governments by violence, as much as it does a communist who does do so.

76 The rule is "tyrannical or oppressive" and has been established to be so because it is, on those words, tyrannical or oppressive, which on the authorities, overlap and, as defined, arbitrary or oppressive, burdensome and harsh, tyrannical, harsh and wrongful. It has been so established by the applicant, in all of the circumstances of the case, because:-

(a) Persons who are communists are, whilst permitted to be members on the one hand, are prohibited on the other hand from participating fully and freely in the SDEA and its government by seeking office or by holding office.

(b) Their fellow members, by such a rule, are prevented from voting for a person who is a communist.

(c) Given the ending of the Cold War and the real threat posed to Australia and other countries by it, and the fact that most former Marxist/Leninist communist countries now do not espouse Marxist/Leninist communism, or are not threats because of it, proponents of that philosophy are not capable of doing such harm by subversion or violence as they once were capable of doing. However, the real vice is that persons who do not believe in achieving a communist system by violence or by the overthrow of governments in this country or other democratic governments by subversion or violence are excluded from being elected by their fellow members to office, although they are eligible for membership.

(d) That the sub rule is wrong because it is tyrannical and oppressive, and it is tyrannical and oppressive because it singles out persons not singled out for exclusion from membership because of their political beliefs, when their political beliefs, however different, might be consonant nonetheless with their duties as citizens in a democratic society.

(e) Sub rule 8(d), on a fair reading, prohibits all communists in any event, including those as defined above, who do not espouse and/or advocate the creation of a totalitarian communist state by violence, subversion or at all, from holding office in the organisation or seeking office. (Two of the definitions of communism above are examples of that.)

(f) Persons who advocate violence themselves or as members of parties for the overthrow of governments in Australia and elsewhere, are correctly and unequivocally prohibited from nominating for election to office or holding office within the SDEA by other sub rules of rule 8, as I have explained above.

(g) An unwarranted penalty in the circumstances of the 21st century is imposed on persons for their political beliefs in a democracy.

(h) Further, the sub rule fails to encourage and indeed actually prevents the full participation by members of an organisation in the affairs of an organisation, namely the SDEA.

I would add that a rule or sub rule which prevented a person from membership and/or from holding office because he or she was a communist or a person advocating, by him or herself and/or through membership of any political group or party, that governments in this country should be overthrown by violence or subversion or that democratic governments in other countries should be overthrown by violence or subversion, would not be a rule which could properly be adjudged to be tyrannical or oppressive.

Imposition of Unreasonable Conditions Upon the Membership of A Member

77 In relation to the allegation that sub rule 8(d) imposes unreasonable conditions upon the membership, to be unreasonable the conditions must be harsh and immoderate (see in *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit) per Deane J at page 589).

78 The sub rule imposes no condition at all on membership of the organisation, qua member, but it imposes a harsh and immoderate condition upon its members by excluding persons from the right to hold office when they would otherwise have been able to stand for office, merely because of their political beliefs, without identifying the sort of political beliefs and/or advocated actions, which might properly require their exclusion from office. It imposes a disqualification on a member standing for office who is a "known communist". For that reason, the ground is made out.

S54 of the *Equal Opportunity Act* – Alleged Contravention

79 It was submitted by Mr Williams that sub rule 8(d) was contrary to law and, in fact, contrary to s54 of the *EO Act*. That subsection, s54(1), reads as follows:-

> "**54. Discrimination against applicants and employees**
>
> (1) It is unlawful for an employer to discriminate against a person on the ground of the person's religious or political conviction —
>
> (a) in the arrangements made for the purpose of determining who should be offered employment;
>
> (b) in determining who should be offered employment; or
>
> (c) in the terms or conditions on which employment is offered."

80 The rule does not have anything to do with employment, as referred to in s54(1), or at all. What the rule does is deal with the nomination of persons to stand for offices if they are "known communists". "Office" and "officer", respectively, are defined in s7 of *the Act* as follows:-

> ""**office"** in relation to an organisation means —
>
> (a) the office of a member of the committee of management of the organisation;
>
> (b) the office of president, vice president, secretary, assistant secretary, or other executive office by whatever name called of the organisation;
>
> (c) the office of a person holding, whether as trustee or otherwise, property of the organisation, or property in which the organisation has any beneficial interest;
>
> (d) an office within the organisation for the filling of which an election is conducted within the organisation; and
>
> (e) any other office, all or any of the functions of which are declared by the Full Bench pursuant to section 68 to be those of an office in the organisation,
>
> but does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation;

> **"officer"** means a person who carries out, or whose duty is or includes the carrying out of, the whole or part of the functions of an office in an organisation;"

This rule has no effect upon and has nothing to do with employees. It deals with "officers", as defined in *the Act*, and how they are elected to office. That ground fails.

81 In that context, I would add that the admitted failure to elect organisers when the rules provide that they are officers might mean that their appointments are void because they have not been elected (see sub rule 8(h) and sub rule 9(b)), such appointments may themselves be a breach of the rules. However, that is not a matter for me to determine in these proceedings and I make no final judgment about it.

THE EQUAL OPPORTUNITY ACT 1984

82 The more relevant sections are contained in s53(1) and (2) of the *EO Act*, which read as follows:-

> **53. Discrimination on ground of religious or political conviction**
>
> (1) For the purposes of this Act, a person (in this subsection referred to as the **"discriminator"**) discriminates against another person (in this subsection referred to as the **"aggrieved person"**) on the ground of religious or political conviction if, on the ground of —
>
> (a) the religious or political conviction of the aggrieved person;
>
> (b) a characteristic that appertains generally to persons of the religious or political conviction of the aggrieved person; or
>
> (c) a characteristic that is generally imputed to persons of the religious or political conviction of the aggrieved person,
>
> the discriminator treats the aggrieved person less favourably than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person of a different religious or political conviction.
>
> (2) For the purposes of this Act, a person (in this subsection referred to as the **"discriminator"**) discriminates against another person (in this subsection referred to as the **"aggrieved person"**) on the ground of religious or political conviction if the discriminator requires the aggrieved person to comply with a requirement or condition —
>
> (a) with which a substantially higher proportion of persons who are of a different religious or political conviction comply or are able to comply;
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply."

83 In this case, the SDEA is discriminating against a "known communist" because the SDEA requires such a person to comply with the requirement which a substantially higher proportion of persons of different political conviction are able to comply with. There is also a breach of s53(1) of the *EO Act*, potentially, for similar reasons.

84 However, sub rule 8(d) is not contrary to law, in this case the *EO Act*, because there must be a proven discrimination against a person. There is no evidence of that in this case occurring or having ever occurred. Mr Williams does not and did not aver or give evidence that he is a communist of any description or that he is or will be discriminated against. He did mention that he had some fear but it is not certain why that was. There is no, or no sufficient evidence, that the rule is operating in breach of the *EO Act*. It is correct, as was submitted on behalf of the SDEA, that the *EO Act* operates only where actual discrimination is proven. It contains no power in anybody to strike down a rule such as is sought here. There has certainly been no actual discrimination proven, and no contravention of the *EO Act* therefore proven.

EXERCISE OF POWER

85 Next, it was submitted that, even if the case for the applicant were otherwise established, then the application should not be acceded to. This, it was submitted, was because the application "appears" not to be bona fide.

86 This, it was also submitted, it was open to find on the facts because Mr Williams is not a communist or alleged communist, because he is unaware of any person who has been adversely affected by the rule, that none has been affected by it since 1970 at least, that he was ineligible to stand for office at the last elections, that he took no steps to canvass the SDEA's opinion before bringing this application and that he commenced proceedings without any warning to the SDEA.

87 I should also add that s110 of *the Act*, subject to the exercise of jurisdiction under s66, requires matters of dispute to be decided in accordance with the rules of the organisation concerned where there is a dispute between a member and the organisation. *The Act* was not complied with in that respect. However, given the fact that there is no evidence that the matter would have been dealt with in accordance with the rules, I do not regard that as of any weight as a relevant factor in these proceedings. In particular, there was no suggestion that the matter should be adjourned to be dealt with in accordance with the rules by either side. I therefore infer that the SDEA's position is and was not negotiable, even if the matter were dealt with in accordance with the rules. Thus, I see no reason for my dealing with this matter.

88 It is not of consequence either, or of significance, that Mr Williams seeks to strike down the results of the election held in August 2004. As he put it, it just seemed to follow logically on from what he sought as his primary remedy.

89 None of these matters, on Mr Williams' evidence, were evidence of lack of bona fides.

90 There was some reference by Mr Rogers to other cases where rules disqualified persons from holding or nominating for or being elected to office within organisations on various grounds and those rules were disallowed. That, he submitted, was only in circumstances where the facts, as I understood the claim, supported the conclusion in the sense that there was an actual instance proving the oppressive or other exceptionable nature of the rule.

91 However, I do not read *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit) as being an example of that, nor do I see it to be a requirement that there be an actual incident or set of facts proven relating to the rule before one can determine that the provisions of s66(2)(a) of *the Act* can be enlivened and jurisdiction exercised.

92 I have regard to all of the circumstances of the matter, including *the Act*, s6(e), which encourages the formation of representative organisations controlled by their members and the full participation of members in an organisation's affairs (see s6(e) and (f) which I have quoted above). I have regard clearly to the right of members to decide what rules govern their organisation, subject to *the Act*, and the law generally.

> "A basic principle of democratic control is that if a person has the right to vote in elections, then subject to special provisions which may apply to a collegiate system and to sectional representation, has the right to nominate as a candidate for office for which he is entitled to vote. Democracy has not been reduced to the stage where the right to nominate for election to an office can be made conditional upon the candidate satisfying standards of eligibility, fitness or experience let alone dependent upon a period of inactive membership of the electorate. Of necessity, democracy permits the electorate to elect to office persons who may not be the most suited to perform duties of that office."

(See *Municipal Officers' Association of Australia v Lancaster and Another* (FCFC) (op cit) at 573.)

93 I am persuaded that being a known communist, without further disqualifying prescription on other grounds as I have explained this above is, of itself, in this democracy at this time not a disqualifying factor which can exist as a rule of an organisation consonant with *the Act*, in the terms in which sub rule 8(d) currently exists.

94 It is therefore, in the interests of the members and the organisation (s26(1)(c) of *the Act*) that I disallow the sub rule, it having been established that the sub rule is tyrannical or oppressive, according to the power of the words of s66(2). The sub rule is also contrary to the objects of *the Act* and should be disallowed for that reason, in all of the circumstances. Further, the equity, good conscience and substantial merits of the case require that I make an order, for the reasons which I have expressed above.

95 I will hear the parties on the question of whether I should make an order to disallow the sub rule under s66(2)(a) of *the Act* or direct the SDEA to alter the rule within a specified time.

96 For all of those reasons, I find the application proven and will make orders disallowing the rule. I will issue a minute of proposed order accordingly.

2005 WAIRC 00892

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL FREDERICK WILLIAMS **APPLICANT** **-and-** THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA **RESPONDENT**
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	TUESDAY 5 APRIL 2005
FILE NO/S	PRES 10 OF 2004
CITATION NO.	2005 WAIRC 00892

Decision	Application proven and rule disallowed.
Appearances	
Applicant	Mr M F Williams, on his own behalf
Respondent	Mr A Rogers (of Counsel), by leave and with him Ms S Burke (of Counsel), by leave

Order and Directions

This matter having come in for hearing before me on the 14th day of February 2005, and having heard Mr M F Williams on his own behalf as applicant and Mr A Rogers, (of Counsel), by leave and with him Ms S Burke, (of Counsel), by leave, on behalf of the respondent organisation, and the reasons for decision being delivered on the 1st day of April 2005, it is this day, the 5th day of April 2005, ordered and declared as follows:-

(1) THAT sub rule 8(d) of the rules of the respondent organisation is tyrannical and oppressive within the meaning of s66(2)(a)(ii) of the *Industrial Relations Act* 1979 (as amended).

(2) THAT the said sub rule imposes unreasonable conditions upon the membership of the respondent organisation in that:-

a. The said sub rule prevents a member being nominated for membership who is a "known communist";

b. A member is precluded from nominating for office merely because he/she is a "known communist" without further definition of that term and/or without any further prescribed excluding condition;

c. The membership is prevented from electing a "known communist" who is eligible for membership even though that person may not advocate or espouse the violent or subversive overthrow of a government or governments in this country or democratic governments elsewhere.

(3) THAT the respondent organisation herein be and is hereby ordered and directed to alter sub rule 8(d) in accordance with these reasons for decision on or before the 30th day of April 2005.

(4) THAT if the respondent does not alter sub rule 8(d) by the 30th day of April 2005 the aforementioned rule will be hereby disallowed in its entirety, by the operation of this Order.

(Sgd.) P J SHARKEY,
President.

[L.S.]

2005 WAIRC 01761

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL FREDERICK WILLIAMS
	APPLICANT
	-and-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	TUESDAY, 7 JUNE 2005
FILE NO.	PRES 10 OF 2004
CITATION NO.	2005 WAIRC 01761

CatchWords	Industrial Law (WA) – Application to adjourn hearing – Jurisdiction of President – Meaning of "irregularity" – Disallow rule – Whether rule was void ab initio – Powers of Commission under s66 – No irregularity – *Industrial Relations Act* 1979 (as amended), s7, s66, s66(2)(a), (b), (c), (ca), (e), (f), s66(6)
Decision	Application dismissed
Appearances	
Applicant	Mr M F Williams, on his own behalf
Respondent	Mr A Rogers (of Counsel), by leave, and with him Ms S Burke (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This was the hearing and determination of the adjourned part of the application made herein pursuant to s66 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") by the above-named applicant, Michael Frederick Williams, that part having been adjourned for hearing and determination by order of the Commission made on 2 February 2005.

2 The question which was required to be heard and determined was whether the President should order in accordance with the order sought by the applicant that "the Secretary of the Union ((ie) the respondent) to declare vacant any office of the union subject to the rule and to hold fresh elections for all such positions".

3 The order sought amended the application of the applicant and was necessitated in part by the fact that the secretary has no power under the rules to declare vacant any office of the union subject to the rule, and has no power to hold fresh elections for all such positions.

4 The amendments sought by Mr Williams of the orders sought and granted were this:-

> "That the election of all officers held in 2004, inter alia, subject to rule 8(d), be declared null and void, such elections not having been free and fair.
>
> That new elections for officers in the respondent organisation be held forthwith.
>
> That these orders are sought pursuant to s66(2)(e) and (f) of *the Act*."

5 It became necessary to decide this question because I made an order disallowing sub-rule (d) of rule 8 – Nomination of Officers, the order disallowing such rule having come into effect in the absence of the same being altered, on 1 May 2005.

6 Orders (3) and (4) made by me on 5 April 2005 are the relevant orders, and they read as follows:-

> "(3) THAT the respondent organisation herein be and is hereby ordered and directed to alter sub rule 8(d) in accordance with these reasons for decision on or before the 30th day of April 2005.
>
> (4) THAT if the respondent does not alter sub rule 8(d) by the 30th day of April 2005 the aforementioned rule will be hereby disallowed in its entirety, by the operation of this Order."

7 When the second part of the application came on for hearing and determination on 24 May 2005 Mr Rogers (of Counsel), who appeared for the respondent, applied to adjourn the proceedings because the order of 5 April 2005, to which I have referred, was the subject of an appeal to the Industrial Appeal Court, that appeal being listed for hearing on 1 July 2005.

8 Mr Williams opposed the application to adjourn.

9 I dismissed that application in order to deal with arguments about the question of jurisdiction which were put to me.

10 It was the applicant's case, as Mr Williams informed me, that he did not know whether there were any known communists who were affected by rule 8(d) as it was at the time when elections for office were held in the respondent organisation in 2004.

11 I invited submissions on the question whether rule 8(d) was void ab initio. That was because it might be said that if the rule were not void ab initio, then the elections were held pursuant to a rule which became null and void only after and as a result of my order of 5 April 2005.

12 S66(6) of *the Act*, of course, provides that "A rule disallowed pursuant to subsection (2)(a) or (c) is void".

13 For the respondent, it was also submitted that the existence of a bad rule, even a bad rule prescribing for nominations for office, cannot constitute an "irregularity" within the meaning of *the Act*. An "irregularity" within the meaning of *the Act* is defined in s7 as follows:-

> "**"irregularity"**, in relation to an election for an office, includes a breach of the rules of an organisation, and any act, omission, or other means by which the full and free recording of votes, by persons entitled to record votes, and

> by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered;"

14 It is, of course, the law that the jurisdiction of the Commission pursuant to s66(2)(e) and (f) of *the Act* depends on whether there has been an irregularity in, or in connection with, an election for office in the organisation.

15 As Brennan J (as he then was) said in the *R v Gray and Others; Ex parte Marsh and Another* [1985] 157 CLR 351 at 381:-

> "The jurisdiction to inquire thus depends on whether an applicant claims the occurrence of what amounts to an irregularity. If he makes such a claim the court has jurisdiction to inquire; if he does not, the court lacks jurisdiction to inquire. If, on the face of the application, what the applicant claims to have occurred does not amount to an irregularity for the purposes of Pt IX, a defect in jurisdiction appears."

16 Mr Williams' allegation was that rule 8(d) was oppressive and tyrannical because it prevented persons who were known communists from nominating for election for office, and so there may have been known communists who were so deterred. However, as he admitted, he knew of no person who was prevented or deterred and it was submitted on behalf of the respondent that therefore those allegations do not constitute allegations of irregularity within the meaning of the definition of "irregularity" in s7 of *the Act.*

17 The law is that such a fact as relied on by Mr Williams does not constitute an irregularity as defined in the previous Federal Act, and, indeed, in *the Act*. That is because, notwithstanding the existence of a bad rule, and notwithstanding that people might mistakenly assume that the rule wrongly excludes their nominations, the irregularity only arises upon nomination and rejection by the returning officer. In other words, until the nomination is rejected there can be no irregularity claimable.

18 The authority for that proposition is the judgment of Smithers J in Re Inquiry Into Elections in the Vehicle Builders Employees' Federation of Australia; Ex parte Allen (1978) 34 FLR 294.

19 However, it is still not an irregularity if people are affected even if no-one nominates, or rather attempt to nominate and are not rejected (see *Re Keely and Another; Ex parte Kingham and Others* (1995) 129 ALR 255 per Wilcox CJ, Spender and Ryan JJ agreeing and see also *Re Federated Liquor and Allied Employees Union of Australia (Tasmanian Branch); Ex parte Huxtable and Others* (1979) 30 ALR 15 per Northrop J).

20 In my opinion, those authorities are applicable to the definition of irregularity in s7 of *the Act*, there being no material difference between that definition and the definition of irregularity in the relevant Federal Acts referred to in those cases.

21 Further, there was no irregularity established in that it was not established or asserted that any person was excluded from nomination for the 2004 elections by the operation of the now disallowed rule 8(d) of the respondent's rules. Thus, there was not established, nor could be there be, any actual breach of the rules of the organisation as they stood at the time, or any act, omission, or otherwise by which the full and fair recording of votes by persons entitled to record votes was or was attempted to be, prevented or hindered.

22 There was, therefore, no irregularity established even if rule 8(d) were void ab initio and void at the time of the elections in 2004.

23 Another question arises further and alternatively. That is whether the undoubted fact that the sub-rule became void when it was disallowed, on 1 May 2005, rendered rule 8(d) void ab initio. Of course, if it were void ab initio, as I have already explained, there was no irregularity claimed and no jurisdiction even though the rule was void. If, however, rule 8(d) was valid as at the time of the elections in 2004, and was not rendered void until the order disallowing rule 8(d) made on 5 April 2005 came into effect on 1 May 2005, then, as at the date and time of the election in 2004, no irregularity as claimed could have been committed if a nomination by a known communist were rejected, because no irregularity exists where a rule is complied with, only where there is a breach (see the definition of "irregularity" in s7 of *the Act*). That is if rule 8(d) resulted in the rejection of nomination for election to office a known communist in 2004, then there was no irregularity because such a rejection was required by rule 8(d) which was not then void.

24 In any event, there is no evidence of non-compliance or compliance with the rule, as I have already explained.

25 The matter does not end there, however. The Commission, constituted by the President, may disallow a rule under s66(2)(a) of *the Act*. In lieu of so doing the President may direct the organisation concerned to alter that rule within a specified time and in such manner as the President may direct (see s66(2)(b)). The President so directed in this matter. At that time the rule was not disallowed and was not void.

26 If that alteration is not then made the President may disallow the rule (see s66(2)(c)). In this case, no alteration was made and the rule was disallowed.

27 Clearly and importantly, once a rule is disallowed pursuant to s66(2)(a) or (c), it is void. S66(6) says exactly that. If one reads the whole of s66 and reads it in the context of *the Act*, it is quite clear that the President has no jurisdiction or power to declare a rule void retroactively, nor is it void ab initio ((ie) from the time it became a rule of an organisation).

28 I say that because there are various orders or directions which can be made or given if the rule is disallowable as tyrannical or oppressive or for any reason prescribed in s66(2)(a) of *the Act.* First, the rule may be disallowed in which case it is void from the date of the disallowance, there being no provision for retroactive disallowance, and an express provision that the rule becomes void only when disallowed. Second, instead of the rule being disallowed the President may direct the alteration of that rule within a specified time and in the manner directed, in which case, since it is not disallowed, the rule or sub-rule is not void. The offending rule is instead replaced by an altered rule, if that is done as directed within a specified time. Third, of course, once the rule or sub-rule is disallowed, either because the Commission decides that it should not allow it to be altered, or, alternatively, because a direction to alter it has not been complied with, the fact of its disallowance again renders the rule void as and from the date of the disallowance. In other words, a rule only becomes void because it is disallowed. S66(6) of *the Act* simply and clearly so prescribes. In this case, the rule was disallowed on 1 May 2005 after no alteration was made as directed by the President on 5 April 2005, pursuant to s66(2)(c). The rule was not and could not therefore be rendered void ab initio for those reasons.

29 Significantly, there is no provision which by expression or implication provides otherwise in *the Act*. Thus, rule 8(d) having been disallowed and been rendered void as at 1 May 2005, there was no breach of that sub-rule in 2004 and sub-rule 8(d) remained a valid rule, and no irregularity could be claimed because the rule was valid, but was, in any event, neither complied with nor not complied with on the facts. In any event, compliance with rule 8(d) which was not void at that time could not constitute an irregularity. The fact is, of course, that there is no evidence that the rule became at all relevant to the process of the 2004 elections. The question of whether I could disallow the rule as at the date of elections in 2004 did not arise, in any event. I doubt, having regard to the section as I have analysed it, that I could.

30 S66(2)(ca) of *the Act* does not assist because no direction was sought and because in this case nothing was done contrary to or pursuant to the disallowed rule which required the exercise of my powers under s66(2)(a) of *the Act*.

31 For all of those reasons, no "irregularity" within the meaning of s7 of *the Act* was alleged, and there was no jurisdiction to entertain that second part of the application. I therefore dismissed the balance of the application herein, for those reasons.

2005 WAIRC 01659

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MICHAEL FREDERICK WILLIAMS

APPLICANT

-and-

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

RESPONDENT

CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DATE	TUESDAY, 24 MAY 2005
FILE NO/S	PRES 10 OF 2004
CITATION NO.	2005 WAIRC 01659

Decision	Application dismissed
Appearances	
Applicant	Mr M F Williams, on his own behalf
Respondent	Mr A Rogers (of Counsel), by leave, and with him Ms S Burke (of Counsel), by leave

Order

This matter having come on for hearing before me on the 24th day of May 2005, and having heard Mr M F Williams on his own behalf as applicant, and Mr A Rogers (of Counsel), by leave, and with him Ms S Burke (of Counsel), by leave, on behalf of the respondent, and having determined that reasons for decision will issue at a future date, it is this day, the 24th day of May 2005, ordered:-

(1) THAT the adjourned application in the terms of paragraph 2 of the orders sought, dated the 13th day of January 2005, by the applicant, and amended by leave, in application No PRES 10 of 2004 be and is hereby dismissed.

(2) THAT the application to adjourn the above-mentioned part of the hearing in application No PRES 10 of 2004 be and is hereby dismissed.

(Sgd.) P J SHARKEY,
President.

[L.S.]

AWARDS/AGREEMENTS—Variation of—

2005 WAIRC 01564

CLERKS' (RACING INDUSTRY - BETTING) AWARD 1978 NO. R22 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, WESTERN AUSTRALIAN CLERICAL AND ADMINISTRATION BRANCH

APPLICANT

-v-

TOTALISATOR AGENCY BOARD OF WESTERN AUSTRALIA & OTHERS

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 16 MAY 2005
FILE NO/S	APPL 1692 OF 2004
CITATION NO.	2005 WAIRC 01564

Result	Award varied. Order issued.
Representation	
Applicant	Mr S Bibby
Respondent	Mr R Heaperman

Order

HAVING heard Mr S Bibby on behalf of the applicant and Mr R Heaperman on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

ORDERS that the Clerks' (Racing Industry - Betting) Award 1978 No. R22 of 1977 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after 5 May 2005.

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

SCHEDULE

1. Delete the existing Schedule C and replace in its entirety the following:

Schedule C

Enterprise Agreement

Racing & Wagering Western Australia

1. APPLICATION

(a) The provisions of this Schedule shall apply only to Racing & Wagering Western Australia ("RWWA") and its employees.

(b) The provisions of this Schedule shall be read in conjunction with the provisions of this Award. Where these provisions are inconsistent with, or different from the provisions of the Award, the provisions of this Schedule shall prevail.

2. RATES OF PAY

(a) The minimum hourly base rates of pay payable to the employees classified hereunder shall be:

	RWWA Base Rate prior to ratification of EBA	3.8% increase to the Base Rate – on ratification of EBA and backdated to 1/11/04.	3.6% increase to the Base Rate – on 1/11/05	Increase to the Base Rate – 1/11/06
Agreement Base Rate of Pay (for calculation purposes)	$18.85	*$19.57	*$20.28	*$TBA

*The above rates contain a loading of 38.16% in lieu of annual leave, annual leave loading, sick leave, Public Holidays, evenings, Saturdays and a total of 52 Sunday Race Days

(b) Proposed increase for the third year of the Agreement (2006/07) will be reflective of the increase applied to the GOSAC General Agreement rates of pay but in any event is not to be greater than the general movement in wages approved by the RWWA Board for application to RWWA employees.

(c) All increases effective from the first pay period after 1 November of the relevant year. Increases for 2004/05 will be effective from 1 November 2004.

(d) The following rates of pay apply to casual employees within the operational areas of RWWA:

(i) Customer Service Centre / Control Centre / Managed Agencies – receive a base rate of pay as outlined in Attachment A.

(ii) This base rate of pay includes a loading of 38.16% in lieu of annual leave, annual leave loading, sick leave, Public Holidays, evenings, Saturdays and Sunday race days.

(iii) Call Centre – receive a rate of pay based on the Agreement base rate of pay in 2 (a) and then adjusted to allow for a Monday to Saturday rate and a loading for hours worked on Sunday (20%) or Public Holiday (25%) as outlined in Attachment B.

(e) An additional payment of either 10% or 20% above the Agreement base rate of pay as outlined in (2) (a) of this Agreement will be applied to employees employed as Customer Service Representatives in the Customer Service Centre; Casual employees employed in the Control Centre or Casual employees employed within RWWA Managed Agencies depending on their specific skill level and competencies as assessed from time to time. These rates recognise the additional responsibilities associated with these three operational areas and the individual employees' competencies and are set out in Attachment A to this Agreement.

(f) Trainee Rate - a trainee rate being 90% of the Call Centre base rate of pay, shall apply to all new employees in the Call Centre for a period of six (6) months subject to the provisions of Clause 7 (b).

(g) Given the different wage structure between operational areas, as defined in Clause (2) (c) (i) and (ii), the following payment conditions apply to cover the movement of employees from the Call Centre to either the Customer Service Centre or the Control Centre:

(i) Permanent Transfer – where a Call Centre employee is permanently transferred to the Customer Service Centre or the Control Centre, that employee will be paid on the same basis as other employees in that operational area depending on the employee's individual skills and competencies as outlined in Attachment A to this Agreement.

(ii) Temporary Transfer - where a Call Centre employee undertakes a shift or number of shifts in the Customer Service Centre or Control Centre on a temporary or relief basis, the rate of pay applied will be in line with the existing wages framework within the Call Centre i.e. Call Centre base rate of pay Monday to Saturday, plus Sunday and Public Holiday penalties for the respective area.

(iii) This temporary rate will also be dependant on the employee's individual skills and competencies as assessed from time to time and as outlined in Attachment A to this Agreement.

(h) The loading and penalties referred to in (2) (d) (ii) in relation to work performed on Sundays is based on the requirement that employees can be required to be rostered to work 52 Sundays in any one year.

3. CALL CENTRE - STAFFING ARRANGEMENTS

(a) Shift rosters will be prepared taking into account business needs, skill levels required to handle the business offering and where possible employee preferences in line with established processes.

(b) Whilst the Contract of Employment requires Customer Service Representatives to make themselves available to work rostered hours as requested by RWWA, including Sunday race days, it is recognised that employees will require some flexibility within the rostering system to cater for personal needs.

(c) The following rules are incorporated into the rostering and shift swapping process for RWWA's Call Centre. Any changes to Call Centre staffing arrangements, as outlined in this Agreement, will only be introduced after consultation with employees and union delegates.

3.1 Shift Swapping

(a) Whilst each employee is responsible for working shifts as rostered, employees are able to swap the following number of shifts per month without prior approval of their Team Leader:

All Timers – 5 shifts

Other Call Centre Employees –3 shifts.

(b) Once a shift swap is agreed between the parties, the Team Leader must be advised to arrange rostering amendments.

(c) Employees seeking additional shift swaps are to consult with their immediate Team Leader for prior approval. Each request for additional shift swaps are to be assessed on an individual needs basis.

(d) It is the responsibility of all employees to check the roster for approved shift swaps.

(e) Each employee who accepts a shift swap is ultimately responsible to ensure that the rostered shift is performed.

(f) Where possible, an employee should attempt to swap within their designated availability or Team within their allocated skill group as defined from time to time to meet operational purposes (eg multilingual, sportsbet, racing and racing general) to meet the business offering.

(g) The shift swap must be agreed by both employees involved in the swap.

(h) Shift swaps are to be arranged via the process developed and implemented by the organisation from time to time to assist both employees and Team Leaders in managing the process.

(i) Where practicable double shifts (as approved) must have a minimum 30 minutes break between shifts where the overall shift time exceeds 8 hours.

3.2 Employee Rostering

(a) Where possible, employee rosters are to be published 4 weeks in advance.

(b) It is expected that all employees will be available to work as per their nominated availability. Where employees anticipate having another appointment during the forthcoming roster period they are required to advise their Team Leader of their unavailability prior to the roster being finalised.

(c) There is a requirement for all employees to advise management of their available times for rostering purposes as required. Any subsequent changes are to be in writing.

3.3. Extra Shifts

(a) Where a shift becomes available during a rostering period where possible the additional available hours will be offered to employees who have had their hours "reduced" during that rostering period due to unforeseen circumstances (e.g. racing schedules affected by bad weather), in line with their nominated availability and within the allocated skills required to meet the business offering.

(b) Where the shift is unable to be re-allocated based on the above criteria it will be filled on a cyclical basis from the nominated availability list. Employees will periodically be invited to nominate for the list.

3.4 Sunday Shifts

(a) Sunday work continues to be an extra shift.

(b) The Sunday rosters are to be filled on a cyclical rostering arrangement.

(c) Where a rostered Sunday shift is not required by the employee, the shift may be "swapped" for another shift or given away to another employee within their allocated skill group to meet the business offering.

3.5 Public Holidays

(a) Public Holiday rosters are to be filled on a cyclical rostering arrangement.

(b) Where a Public Holiday shift is not required by the employee, the shift may be "swapped" for another shift or given away to another employee within their allocated skill group to meet the business offering.

3.6 Christmas Day and Good Friday

1 Racing does not currently occur on Christmas Day or Good Friday, however, should racing be contemplated on these days and RWWA decides to offer a service to its customers, RWWA will consult with its employees to ensure that employees with proven religious conviction or special circumstances are considered in rostering requirements.

2 Management will attempt to fill rosters on a voluntary basis first.

4. CONTROL CENTRE / CUSTOMER SERVICE CENTRE – STAFFING ARRANGEMENTS

(a) Employees shall be available to be rostered to work on Sundays as required in addition to their Monday to Saturday rostered shifts.

(b) Sunday shifts in the Customer Service Centre will be rostered on a cyclical basis in line with the employee's competencies. In the case of the Customer Service Centre, Sundays will be considered to be an extra shift.

(c) Employees are able to swap shifts with other employees. Once a shift swap is agreed between the parties, the Supervisor or Team Leader must be advised to arrange rostering amendments.

(d) Where an employee is unable to perform a rostered shift, the employee may seek to arrange a suitable swap with another employee or give the shift away.

(e) Each employee who accepts a shift swap is ultimately responsible to ensure that the rostered shift is performed.

5. MINIMUM ENGAGEMENT

(a) An employee who is engaged for a work period and who commences such shift, shall be paid for a minimum of two (2) hours work, except where the employee is ill or requests to leave for personal reasons before completing two hours work in which case payment will be made for actual time worked.

(b) Where an employee is engaged for a work period and having commenced such work period has their shift concluded by the instigation of the employer, due to business requirements, the employee shall be paid for a minimum of three (3) hours work.

6. BREAKS CHANGES

6.1 Saturday

Shift Duration	Meal Break	Rest Break	Total Break Time
Up to 4 hours	15 minutes	2 x 5	25 mins
4 to 6 hours	20 minutes	3 x 5	35 mins
Over 6 hours	20 minutes	4 x 5	40 mins
Over 8 hours	30 minutes	4 x 5	50 mins

6.2 Monday to Friday and Sunday

Shift Duration	Meal Break	Other Breaks
Up to 4 hours	15 minutes	Non-scheduled breaks to be provided on a required basis subject to business demands. Such breaks to be not less than those applying to the schedule of Saturday breaks.
Over 4 hours	20 minutes	

(a) Shift scheduled breaks for employees will be posted before the commencement of Saturday and Public Holiday shifts.

(b) Employees will monitor the progress of races on television screens and computer terminals and are to use common sense in taking breaks and communicate with the shift Team Leader/ Supervisor at the time.

(c) Employees will not take a break if a race is about to jump or there are calls waiting to be answered. However, it is recognised than on occasion due to an unanticipated demand it may not be practical to wait until there are no calls waiting to be answered before taking a rostered or additional rest break.

7. TRAINING

(a) It is the aim of RWWA to maintain and where appropriate further develop their workforce to meet both business requirements and the needs of customers.

(b) New trainees will remain on the Trainee rate for a period of six (6) months or until they are assessed as being fully competent.

(c) Where employees are identified as not meeting the required operational standards the emphasis will continue to be on coaching and re-training to assist employees in improving their skill level to meet the needs of the customer and the organisation.

(d) Retraining of existing employees is to be undertaken by the Training Officer and/or Team Leaders and can, by agreement, involve some of the more experienced employees.

(e) RWWA will include the continued provision of comprehensive level of training in line with the current training and retraining processes and programs including specific training for new products and marketing initiatives.

(f) Where the training is required to meet specific marketing campaigns, employees will either be called on a voluntary basis to meet the demand. Where a specific skill level is required to undertake the role, employees will be advised of this aspect when nominations are called for.

8. BEREAVEMENT LEAVE

(a) The employer will grant a maximum equivalent to two (2) days (either consecutive or non-consecutive) paid leave to an employee who applies for bereavement leave. In extenuating circumstances the employee may negotiate an appropriate extension of this period with no payment applying.

(b) For the purposes of this clause "bereavement" will mean death of a partner, child, stepchild, parent, stepparent, guardian, sibling, stepsibling, grandparent, other relative or close personal friend.

(c) Bereavement leave may also be used for the purpose of attending funerals of family, relatives and close personal friends.

(d) The employer may request reasonable proof before paying bereavement leave.

(e) Payment for bereavement leave will be the equivalent of the shift that the employee was rostered to work.

(f) Applications for bereavement leave must be made through the Team Leader/Supervisor or line manager.

9. LONG SERVICE LEAVE

(a) Employees are entitled to Long Service Leave conditions in accordance with Clause 15 of the Clerks (Racing Industry – Betting) Award 1978.

(b) Long service leave taken within the above entitlement may be taken in periods of one (1) week.

10. TERMINATION PAYMENT

(a) A termination payment will be made if either of the following actions occurs:

(i) RWWA is privatised or sold and employees are not offered suitable alternative employment with the new employer; or

(ii) RWWA introduces significant operational or technological change that will have a significant impact on the longer term scheduling of employees.

(b) To be eligible for a termination payment, employees must have completed one (1) year of continuous employment with RWWA.

(c) Continuous employment for the purposes of this clause shall be as in the Long Service Leave conditions in accordance with Clause 15 of the Clerks (Racing Industry – Betting) Award 1978.

(d) Termination payments will be calculated on the following basis:

Period of continuous service	**Termination payment**
Less than 1 year	Nil
For each year of service after 1 year	2.5 weeks for each year of completed service (up to a maximum total of 52 weeks)

(e) Termination payments will be based on the employee's average hours worked over the previous 12 month period prior to the actual date of termination at the applicable rate of pay being received (i.e. average hours worked and average hourly rate of pay received for Call Centre, CSC and Control Centre employees).

(f) This clause will only be given effect if RWWA undergoes either of the actions described in (i) and (ii) and employees are not offered suitable alternative employment.

(g) This clause does not intend that casual employees are permanent employees for the purposes of any other employment provisions (for example sick leave, public holidays or annual leave) applicable to other categories of RWWA employees.

11. ONGOING CONSULTATION PROCESSES BETWEEN RWWA MANAGEMENT AND EMPLOYEES

(a) The parties recognise the need for effective communication to improve the business/operational performance and working environment. The parties acknowledge that decisions will continue to be made by the employer, who is responsible and accountable to the RWWA Board and all stakeholders for the effective and efficient operation of the organisation.

(b) The parties agree that:

(i) Where the employer proposes to make changes likely to affect existing practices, working conditions or employment prospects of the employees, the employees affected shall be notified by the employer as early as possible; and

(iii) For the purposes of such discussion, the employer shall provide to the employees concerned relevant information about the changes, including the nature of the changes and potential impact on the employees, provided that the employer shall not be required to disclose any confidential information.

12. UNION REPRESENTATIVES

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

(b) The employer recognises that, under the union's rules, union representatives are members of an Electorate Delegates Committee representing members within a union electorate. A union electorate may cover more than one workplace.

(c) The employer will recognise union representatives in the workplace and will allow them to carry out their role and functions.

(d) The union will advise the employer in writing of the names of the union representatives in the workplace.

(e) The employer recognises the authorisation of each union representative in the workplace and will provide them with the following:

(i) As agreed from time to time, paid time off from normal duties to perform their function as a union representative such as involvement in and attending negotiation meetings, representing specific issues raised by members and participation in working groups.

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

(iii) A notice board for the display of union materials.

(iv) Access to periods of leave of absence for the purpose of attending union training courses.

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

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

(vii) Access to information on matters affecting employees in accordance with this Agreement.

(viii) The names of any Equal Employment Opportunity and Occupational Safety and Health representatives.

(f) The employer recognises the need to ensure that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.

(g) Both the Union and the elected union representatives understand the importance of working closely with supervisors and management in the resolution of workplace issues with the aim of minimising any direct impact on the effective operations of the organisation.

13. DURATION OF SCHEDULE:

(a) This Schedule shall operate from the date of registration and shall remain in force for a period of thirty six (36) months.

(b) The parties are committed to commencing negotiations for a replacement agreement six (6) months prior to the expiry of this agreement.

(c) The parties agree to no further claims during the period of this EBA.

14. SIGNATURES TO AGREEMENT

84 Signed for and on behalf of the Australian Services Union, West Australian Clerical & Services Branch

_____ _____

P Burlinson Date

Branch Secretary

85 Signed for and on behalf of Racing and Wagering Western Australia

_____ _____

R B Bennett Date

Chief Executive Officer

ATTACHMENT A

Rates of Pay for employees employed in Control Centre / Customer Service Centre / RWWA Managed Agencies based on rates of pay as at 1 November 2004.

Position	Rate per Hour
CONTROL CENTRE	
Casual - Fully Competent Able to work any shift in the Control Centre including Loading & Checking & Events Monitoring with minimal supervision and direction.	$23.51 - [+20%] *
Casual – Events Monitoring Fully competent and able to work any shifts with minimal supervision.	$21.54 - [+10%]*
Casual - Entry Rate Utilised whilst the employee is learning the Events Monitoring function and reaches a standard where they are able to be rostered on any shift (approx 6 weeks)	$20.55 - [+5%]*
CUSTOMER SERVICE CENTRE	
Casual – Fully Competent Able to undertake all functions in the Customer Service Centre with minimal supervision and direction.	$23.51 - [+20%]*
Casual CSC Undertaking and learning a range of Customer Service Centre functions but not assessed at Fully Competent.	$21.54 - [+10%] *
Casual - Entry Rate Utilised whilst the employee is learning a basic range of CSC functions	$20.55 - [+5%]*
MANAGED AGENCIES	
Managed Agency Casual Managing the Agency or working alone.	$23.51 - [+20%] *
Agency Casual	$19.58

[* - % above Agreement Base Rate of Pay]

ATTACHMENT B

Agreement Rates of Pay

Amend 1.11.06 figures to reflect agreed amount

	Current	Increase to	3.80% 1.11.04	3.60% 1.11.05	TBA% 1.11.06
Call Centre					
Mon-Sat	$18.36	$18.37	$19.07	$19.76	
Sun+20% loading	$21.64	$21.65	$22.47	$23.28	
P/Hol+25% loading	$22.54	$22.55	$23.41	$24.25	
Trainee 90%	$16.52	$16.53	$17.16	$17.78	
Customer Service Centre					
Base Rate	$18.85	$18.86	$19.58	$20.28	
Fully Competent +20%	$22.64	$22.65	$23.51	$24.36	
Casual +10%	$20.74	$20.75	$21.54	$22.31	
Entry Rate +5%	$19.79	$19.80	$20.55	$21.29	
Control					
Base Rate	$18.85	$18.86	$19.58	$20.28	
Fully Competent +20%	$22.64	$22.65	$23.51	$24.36	
Casual +10%	$20.74	$20.75	$21.54	$22.31	
Entry Rate +5%	$19.79	$19.80	$20.55	$21.29	
Managed Agencies					
Agency casual	$18.85	$18.86	$19.58	$20.28	
Working alone +20%	$22.64	$22.65	$23.51	$24.36	

2005 WAIRC 01821

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN SERVICES UNION, WESTERN AUSTRALIAN CLERICAL AND SERVICES BRANCH

APPLICANT

-v-

TOTALISATOR AGENCY BOARD OF WESTERN AUSTRALIA & OTHERS

RESPONDENTS

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 16 JUNE 2005
FILE NO/S APPL 1692 OF 2004
CITATION NO. 2005 WAIRC 01821

Result Award varied. Order issued.
Representation
Applicant Mr S Bibby
Respondents Mr R Heaperman

Correction Order

HAVING heard Mr S Bibby on behalf of the applicant and Mr R Heaperman on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

ORDERS that the Clerks' (Racing Industry - Betting) Award 1978 No. R22 of 1977 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after 5 May 2005.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

SCHEDULE

ATTACHMENT B

Agreement Rates of Pay

Amend 1.11.06 figures to reflect agreed amount

	Current	**Increase to 38.16% loading**	3.80% 1.11.04	3.60% 1.11.05	TBA% 1.11.06
Call Centre					
Mon-Sat	$18.36	$18.37	$19.07	$19.76	
Sun+20% loading	$21.64	$21.65	$22.47	$23.28	
P/Hol+25% loading	$22.54	$22.55	$23.41	$24.25	
Trainee 90%	$16.52	$16.53	$17.16	$17.78	
Customer Service Centre					
Base Rate	$18.85	$18.86	$19.58	$20.28	
Fully Competent +20%	$22.64	$22.65	$23.51	$24.36	
Casual +10%	$20.74	$20.75	$21.54	$22.31	
Entry Rate +5%	$19.79	$19.80	$20.55	$21.29	
Control					
Base Rate	$18.85	$18.86	$19.58	$20.28	
Fully Competent +20%	$22.64	$22.65	$23.51	$24.36	
Casual +10%	$20.74	$20.75	$21.54	$22.31	
Entry Rate +5%	$19.79	$19.80	$20.55	$21.29	
Managed Agencies					
Agency casual	$18.85	$18.86	$19.58	$20.28	
Working alone +20%	$22.64	$22.65	$23.51	$24.36	

2005 WAIRC 01923

GOLD MINING ENGINEERING AND MAINTENANCE AWARD NO. 26 OF 1947

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH & OTHERS

APPLICANTS

-v-

WMC RESOURCES LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 29 JUNE 2005
FILE NO/S APPL 1301 OF 2004
CITATION NO. 2005 WAIRC 01923

Result Award varied. Order issued.
Representation
Applicant Mr L Edmonds as agent
Respondent Mr R Gifford as agent

Order

HAVING heard Mr L Edmonds as agent on behalf of the applicant and Mr R Gifford as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

(1) ORDERS that the Gold Mining Engineering and Maintenance Award No. 26 of 1947 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date hereof.

(2) RECORDS by consent of the parties, the following:

(a) The meal allowances at Clause 8(6) and 9(6) of the Award have been adjusted by consent for movements in CPI from March 1992 up to and including March 2005. The index used was CPI: Food: Meals out and Take-away Foods.

(b) The clauses were varied on the basis of the following calculation:

CPI Cat. 6401.0 Table 7 – Food: Meals Out and Takeaway Foods:

163.8 (Figure for March 2005) – 111.1 (Figure for March 1992)

= 52.7 / 100

= 47.43%

Amount from O/N 1948(C) of 1990 (72 WAIG 1580 at 1583) effective from 18 June 1992 = $4.60

New Allowance Rate = $4.60 + 47.43% = $6.78 rounded to $6.80

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

SCHEDULE

1. Clause 5. - Classification Structure And Rates Of Pay: Delete subclauses (3), (4) and (7) of this Clause and insert in lieu thereof the following:

(3) Industry Allowance:

(a) Each employee shall be paid an allowance of **$90.70** per week.

(b) The allowance recognises, and is in payment for, all aspects of work in the industry including the location and nature of individual operation within it.

(c) The allowance shall be paid in addition to the weekly wage rates contained in subclause (1) of this clause and shall be paid for all purposes of the award.

(4) Leading Hands:

In addition to the weekly wage prescribed for an employee's classification, a Leading Hand shall be paid the following:

		$
(a)	If in charge of not less than three and not more than ten other employees	19.70
(b)	If in charge of more than ten and not more than 20 employees	29.60
(c)	If in charge of more than 20 employees	38.40

(7) Tool Allowance:

(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 work as a tradesperson or as an apprentice the employer shall pay a tool allowance of -

(i) **$11.80** per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of **$11.80**, being the percentage which appears against the year of apprenticeship in subclause (5) of this clause, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

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

(c) An employer shall provide for the use of 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 his employer if lost through the employees negligence.

2. Clause 8. – Overtime (Other Than Continuous Shift Employees): Delete subclause (6) of this Clause and insert in lieu thereof the following:

(6) When an employee without being notifed on the previous day, is required to continue working after the usual knock-off time for more than one hour, or (in the case of a day employee) after 5.30pm, whichever is the later, such employee shall be provided with any meal required or be paid **$6.80** in lieu thereof.

3. Clause 9. – Continuous Shift Employees: Delete subclause (6) of this Clause and insert in lieu thereof the following:

(6) When an employee without being notifed on the previous day, is required to continue working after the usual knock-off time for more than one hour, or (in the case of a day employee) after 5.30pm, whichever is the later, such employee shall be provided with any meal required or be paid **$6.80** in lieu thereof.

4. Clause 14. - Shifts: Delete subclauses (2) of this Clause and insert in lieu thereof the following:

(2) In addition to his/her ordinary rate, a shift worker shall bepaid per shift of eight hours at the rate of **$10.90** when on afternoon or night shift.

5. Clause 19. - Special Rates & Provisions: Delete subclauses (1), (3), (4), (6), (7), (8), (10) and (11) and insert in lieu thereof the following:

(1) **Height Money:**

Tradespersons and welders engaged on the surface in the erection, repair and/or maintenance of steel frame buildings, smoke stacks, bridges or similar structures at a height of 15.5 metres or more above the nearest horizontal plane, shall be paid at the rate of **$2.15** per shift extra.

(3) **Dirt Money:**

Employees employed on dirty work or in wet places shall be paid **44 cents** per hour extra.

(4) A fitter or other tradesperson, not specially employed as a welder, who, in addition to being employed in the employees classification is also required to do welding, shall be entitled to receive **33 cents** per day extra whilst so engaged.

(6) **Heat Money:**

(a) Employees employed for more than one hour in the shade where the artificial temperature is between 46.1° and 51.6° Celsius shall be paid **44 cents** per hour extra.

(b) Employees employed for more than one hour where the artificial temperature exceeds 51.6° Celsius shall be paid **53 cents** per hour extra. Where work continues for more than two hours in temperatures exceeding 51.6° Celsius, employees shall be entitled to 20 minutes rest after every two hours, without deduction of pay.

(7) **Confined Space:**

Employees employed in confined spaces as hereinafter defined shall be paid **53 cents** per hour extra.

"Confined Space" means a working space, the dimensions of which necessitate working continuously in a stooped or otherwise cramped position, or without proper ventilation, or where confinement within a limited space is productive of unusual discomfort.

(8) **Fumes:**

Employees engaged on repair work to the roasters under circumstances subjecting them to serious inconvenience from fumes shall be entitled to payment of **27 cents** per hour extra, with a minimum of **54 cents**, while so engaged.

(10) Any person appointed by the employer to perform first aid duties shall be paid an allowance of **$1.95** per day or shift (flat).

(11) A tradesperson who holds and, in the course of employment may be required to use a current "A" or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945, shall be paid an allowance of **$18.10** per week.

6. Schedule I - District Allowances: Delete this Clause and insert in lieu thereof the following:

SCHEDULE I - DISTRICT ALLOWANCES

(1) In addition to the wages prescribed in clause 5. - Classification Structure and Rates of Pay of this award, the following allowances shall be paid for five days per week to workers employed in the districts which are hereinafter respectively described, with the exception of districts contained therein which are situated within a radius of ten miles of Kalgoorlie, Coolgardie and Southern Cross, viz:

(a) First District:

Lying south of Kalgoorlie and comprised within lines starting from Kalgoorlie, then West-South-West to Woolgangie, thence South-East to Dundas, thence North-East to a point ten miles east of Karonie on the Trans-Australian line, and thence back to Kalgoorlie, at the rate of **73 cents** per week extra for those mines within ten miles of the railway and **$1.02** per week for those outside.

(b) Second District:

Starting from Kalgoorlie West-South-West to Woolgangie, thence North-Nor-West to the intersection of the 120 E. meridian with the 30 S. parallel of latitude, thence North-East by East to Kookynie, thence back to the point 10 miles East of Karonie on the Trans-Australian line, and thence back to Kalgoorlie; at the rate of **99 cents** per week extra for those mines within ten miles of the railway and **$1.15** per week for those outside.

(c) Third District:

Starting from and including Kookynie, then North by West to Kurrajong thence North-East to Stone's Soak, thence South-East to and including Burtville, thence South-West through Pindinnie to Kookynie, at the rate of **97 cents** per week extra for those mines within ten miles of the railway and **$1.17** per week for those outside.

(d) Fourth District:

Surrounding Southern Cross within a radius of thirty miles - for those mines outside a radius of ten miles from Southern Cross, including Westonia and Bullfinch, at the rate of **35 cents** per week.

(e) Fifth District:

Comprising all mines not specifically defined in the foregoing boundaries, but within the area comprised within the 24th and 26th parallels of latitude at the rate of **$1.69** per week.

(2) Notwithstanding anything herein contained, the following allowances shall be paid in the districts or mines mentioned hereunder:-

	Per Week $
Ora Banda and Waverley Districts	0.99
Yalgoo District	0.99
Meekatharra, Mt. Magnet and Cue Districts	1.18
Wiluna District	1.41
Youanmi District	1.41
Cox's Find Gold Mine	1.26
Corduroy Gold Mine and Mines within ten miles radius therefrom	1.69
Lallah Rooke Gold Mine, Halley's Comet Gold Mine, Prophecy Gold Mine, and mines within ten miles radius therefrom	2.11
Mayfield District	0.99
Evanston District	1.41

With regard to the Meekatharra, Mt. Magnet, Cue, Yalgoo and Wiluna Districts, an additional allowances at the rate of **21 cents** per week shall be paid to workers employed at mines situated five miles from a Government railway.

With regard to the Big Bell Gold Mine, the Triton Gold Mine, and Cox's Find Gold Mine, the sum of **21 cents** per week may be deducted from the district allowance which would otherwise be paid.

(3) In the case of any mine or district within the area to which this award applies which is not dealt with under the provisions of this Schedule, the union may apply to the Court at any time for the purpose of having an allowance prescribed upon serving upon the employer concerned fourteen days' notice thereof prior to the date of such application, the service of such notice shall be made pursuant to the provisions relating thereto prescribed by the regulations under the Industrial Arbitration Act, 1979.

7. APPENDIX 1 - Kalgoorlie Consolidated Gold Mines Pty. Ltd.:

A. Clause 6. - Allowances: Delete this Clause and insert in lieu thereof the following:

6. - ALLOWANCES

In lieu of the allowances otherwise expressed in Clause 5. - Wages, Clause 8. - Overtime, Clause 9. - Continuous Shift Workers, Clause 14. - Shifts, Clause 20. - Special Rates and Provisions, the following allowances shall be paid:

	$
Clause 5. - Wages:	
Subclause (2) - Leading Hand Allowance	
(i)	19.70
(ii)	29.60
(iii)	38.40
Subclause (5)(a) - Tool Allowance	
(i)	11.80
(ii)	11.80
Clause 8. - Overtime:	
Subclause (6) - Meal Allowance	6.80
Clause 9. - Continuous Shift Workers:	
Subclause (6) - Meal Allowance	6.80
Clause 14. - Shifts:	
Subclause (2) - Shift Allowance	10.90
Clause 19. - Special Rates and Provisions	
Subclause (1) - Height Money	2.15
Subclause (3) - Dirt Money	0.44
Subclause (4) - Welding Money	0.33
Subclause (6) - Heat Money	
(a)	0.44
(b)	0.53
Subclause (7) - Confined Space Money	0.53
Subclause (8) - Fumes Money	0.54

B. Clause 7. - Additional Payment: Delete this Clause and insert in lieu thereof the following:

7. - ADDITIONAL PAYMENT

In addition to the wage rates set out in Clause 5 hereof, an amount of **$90.70** per week shall be payable for all purposes of the award.

2005 WAIRC 00585

HOSPITAL WORKERS (CLEANING CONTRACTORS - PRIVATE HOSPITALS) AWARD 1978 NO. R 2 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	POWERCLEAN
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 11 MARCH 2005
FILE NO/S	APPL 622 OF 2003
CITATION NO.	2005 WAIRC 00585

Result	Award varied
Representation	
Applicant	Ms C. Kazakoff
Respondent	Mr P. Robertson (as agent)

Order

HAVING heard Ms C. Kazakoff on behalf of the applicant and Mr P. Robertson (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 *Hospital Workers (Cleaning Contractors - Private Hospitals) Award 1978* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 11th day of March 2005.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

SCHEDULE

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

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost, or shall be paid the sum of $8.30 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 13. – Special Rates and Conditions: Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) Toilets: Workers engaged in any week for the major portion of their time cleaning lavatories shall be paid an extra $1.28 per week.

(6) Broken Shift: Where a worker is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than four hours an allowance of $0.95 cents per day shall be paid.

3. Clause 18. – Laundry: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Where the uniform of any worker cannot be laundered at the hospital an allowance of $1.47 per week shall be paid to the worker.

4. Clause 19. – Height Money: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) Where it is necessary to go wholly outside a building to clean windows an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $1.93 per day.

(3) Where an employee is required to clean windows from a swinging scaffold or similar device, he/she shall be paid 32 cents per hour extra for every hour or part thereof so worked.

5. Clause 23. – Fares, Travelling Time and Transport: Delete subclauses (2)(c) and (2)(d) of this clause and insert the following in lieu thereof:

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

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc & 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	75.3	65.3	57.9
South West Land Division	77.4	67.2	59.7
North of 23.5° South Latitude	84.9	74.0	65.9
Rest of the State	80.0	69.4	61.6

Schedule 2 - Motor Cycle Allowance

Distance travelled during a year on Official Business	Rate per Kilometre (Cents)
All areas of the State	26.1

Motor vehicles with rotary engines are to be included in the 1600 – 2600cc.

(d) The rates specified in paragraph (c) applied from the beginning of the first pay period commencing on or after the ---------- 2004, and are calculated by applying the percentage movement in the Consumer Price Index (Private Motoring Perth) between September 2002 and December 2004. This is calculated as:

$$\text{December 2003} \quad \frac{144.7}{\text{September 2002} \quad 137.6} \times 100 = 5.16\%$$

6. Clause 32. – Wages: Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(2) General Conditions:

(a) Leading Hands: In addition to the rates herein prescribed a leading hand shall be paid per week –

		$
(i)	If placed in charge of not less than three and not more than 10 other workers	19.55
(ii)	If placed in charge of more than 10 and not more than 20 other workers	29.40
(iii)	If placed in charge of more than 20 other workers	39.25

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Cleaner Third Year of Employment.
2. For Work Related Allowances – the percentage increase in:
   - Clause 13. – Special Rates and Conditions
   - Clause 19. – Height Money
   - Clause 32. - Wages

is derived from $17 divided by $484.30 equals 3.51% (2003) and $19 divided by $501.30 equals 3.78% (2004) as prescribed by Principle 5. Adjustment of Allowances and Service Increments of the State Wage Case.

> "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase … the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

- Clause 10. – Meal Money has been varied for the CPI Take Away Food for the period September 2002 to December 2004 giving the percentage of 3.65%.

December 2004	161.5	x	100	=	7.10%
September 2002	150.8		1		

CPI Meals out and Take Away Foods – Perth

- Clause 18. – Laundry has been varied for the CPI Clothing Services and Shoe Repair – Perth for the period September 2002 to December 2004 giving the percentage 7.25%.

December 2004	172.9	x	100	=	9.92%
September 2002	157.3		1		

CPI Clothing Services and Shoe repair – Perth

- Clause 23. – Fares, Travelling Time and Transport has been varied for the CPI Private Motoring – Perth for the period September 2002 to December 2004 giving the percentage 1.31%.

4. Clause 23. – Fares, Travelling Time and Transport have been varied for the CPI Private Motoring for the period September 2002 to December 2004 giving the percentage 1.31%

December 2004	144.7	x	100	=	5.16%
September 2002	137.6		1		

CPI Private Motoring – Motor Vehicles – Perth

Catalogue No. 6455.0.40.001

For all allowances (except Fares and Travelling) previous rates are identified in Column A of the attached spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – CLEANER THIRD YEAR OF EMPLOYMENT

Clause		A	B	C
Clause 13. – Special Rates and Conditions	(5)	$1.19	$1.28	
	(6)	$0.89	$0.95	
Clause 19. – Height Money	(2)	$1.80	$1.86	
	(3)	$0.30	$0.31	
Clause 32. - Wages		$18.20	$19.56	$19.55
		$27.40	$29.42	$29.40
		$36.50	$39.23	$39.25

EXPENSE RELATED ALLOWANCES

CPI Take Away Food – Perth

Clause	A	B	C
Clause 10. – Overtime	$7.75	$8.30	

CPI Clothing Services and Shoe Repair – Perth

Clause	A	B	C
Clause 18. – Laundry	$1.34	$1.47	

2005 WAIRC 01911

MINERAL SANDS INDUSTRY AWARD 1991 NO. A3 OF 1991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	CABLE SANDS (WA) PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 28 JUNE 2005
FILE NO	APPL 204 OF 2005
CITATION NO.	2005 WAIRC 01911

Result	Award varied
Representation	
Applicant	Mr L Edmonds on behalf of AWU, CEEEIPPU and AFMEPKIU
Respondents	Mr R Gifford on behalf of BeMax (Cable Sands) Pty Ltd

Order

HAVING heard Mr L Edmonds on behalf of the AWU, CEEEIPPU and AFMEPKIU and Mr R Gifford on behalf of BeMax (Cable Sands) Pty Ltd, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Mineral Sands Industry Award 1991 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 8. – Overtime: Delete paragraph (e) of subclause (3) and insert in lieu thereof the following:

(e) An employee who without notification on the prior day or shift is required to work overtime shall be entitled to be supplied with a meal (or **$8.60** in lieu) when that employee works more than six consecutive hours from the commencement of the overtime or from the previous meal break.

2. Clause 9. – Shift Work : Delete subclause (2) of this Clause and insert in lieu thereof the following:

(2) A shift employee, in addition to the employee's ordinary rate, shall be paid an additional flat payment of **$1.12** per rostered ordinary hour or part thereof worked when on rostered afternoon or night shift.

3. Clause 13. - Wages: Delete subclauses (5), (6) and (7) of this Clause and insert in lieu thereof the following:

(5) (a) Leading Hand - General

A leading hand is an employee who receives some supervision and in turn, assists and co-ordinates the work of other employees, who is appointed as such and who can exercise a limited discretion in making decisions, conducting of work, and matters affecting safety. Rate per week - **$20.60.**

(b) Leading Hand - Shift Supervisor (Westralian Sands Only)

Is fully responsible for plant and site operations and who ensures compliance with safety standard rules as required in the Mine Safety and Inspection Act 1994 (as amended) and/or by the Quarry or Registered Mine Manager in the absence of salaried staff. Rate per week **$67.40.**

(6) Tool Allowance

(i) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson the employer shall pay a tool allowance of **$11.80** per week to such tradesperson for the purpose of such tradesperson supplying, maintaining and insuring tools ordinarily required in the performance of the employee's work as a tradesperson.

(ii) The list of basic tools tradespersons are required to supply is as agreed at an enterprise level. Any additional tools shall be supplied by the employer.

(b) (i) The employer shall supply an apprentice with a basic apprentice tool kit upon engagement in lieu of a tool allowance being paid during the apprentice's first year of employment.

(ii) The basic apprentice tool kit supplied to an apprentice shall be appropriate to the trade(s) of the apprentice and the content shall be agreed at an enterprise level.

(iii) An apprentice who has completed one full year of employment shall be paid an allowance in the employee's second and subsequent years of employment. The allowance paid to an apprentice shall be a percentage of the rate paid to a tradesperson being the percentage which appears against the employee's year of apprenticeship in subclause (3) of this clause.

(iv) The allowance paid to an apprentice is for the purpose of the apprentice supplementing, maintaining, and insuring tools ordinarily required in the performance of the employee's work as an apprentice.

(7) Construction Allowance Per Week

The amount of **$20.20** to be paid to an employee when engaged on any work directly related to major capital expenditure in connection with the construction/demolition of plant. This allowance is paid in recognition of special disabilities and conditions that are not normally associated with plant maintenance and operations. Such construction work will be as agreed between the employer and the union or unions concerned or, in the event of disagreement, the Western Australian Industrial Relations Commission declares to be construction work for the purpose of this award.

4. Clause 15. – Special Rates and Provisions: Delete subclause (1) of this Clause and insert in lieu thereof the following:

(1) Special Rates

(a) Electrical Licence

(i) An employee who is required to hold, and in the course of the employee's duties may be required to use during the course of employment, current "A" or "B" Grade Electrical Workers' Licences issued pursuant to the relevant regulation in force under the Electricity Act 1945, shall be paid an allowance of **$16.80** (flat) per week.

(ii) An electrical tradesperson who holds a licence as prescribed in subparagraph (i) where such licence is endorsed for both fitting and installing work shall, in addition to the allowance prescribed in subparagraph (i), be paid an additional allowance at the rate of **$16.80** (flat) per week.

(b) Travel Allowance

(i) If transport to and from the job is not provided by the employer, a travelling allowance of **$1.70** per day shall be paid when an employee's home is more than eight kilometres from the job by the shortest practicable route.

(ii) The allowance specified in this clause shall be paid to an employee to compensate for excess travelling expenses from the employee's home to the employee's place of work and return.

(c) Clothing Allowance

(i) (aa) Each full-time or part-time employee shall be paid an allowance of **$2.20** per week for the purpose of purchasing and replacement of appropriate work clothing; or

(bb) Each full-time or part-time employee shall be provided with two sets of appropriate work clothing each year.

(ii) Working conditions vary from site to site and as a result the method and timing of provision of appropriate clothing will be determined at an enterprise level.

Provided that only one of the options specified in placitum (aa) or (bb) of subparagraph (i) shall be available.

(iii) The laundering and repairs of all clothing is the responsibility of the employee.

(iv) A casual employee shall be paid an allowance of **$2.20** per week.

(d) Spray Painting - Painters

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

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

(iii) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of **$0.65** per day.

(e) First Aid

(i) The employer shall at each main place of employment provide a suitable first aid outfit.

(ii) Each employee being the holder of a current St. John's First Aid Certificate shall be paid an allowance of **$4.30** per week.

2005 WAIRC 00559

THEATRICAL EMPLOYEES (PERTH THEATRE TRUST) AWARD NO. 9 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF CULTURE AND THE ARTS
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 11 MARCH 2005
FILE NO/S	APPL 1082 OF 2004
CITATION NO.	2005 WAIRC 00559

Result Award varied
Representation
Applicant Mr P Woodward
Respondent Ms K Tyers

Order

Having heard Mr P Woodward on behalf of the Applicant and Ms K Tyers on behalf of the Respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Theatrical Employees (Perth Theatre Trust) Award No 9 of 1983 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 22 November 2004.

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

SCHEDULE

1. Clause 5. – Rates of Pay: Delete this clause and insert the following in lieu thereof:

5. – RATES OF PAY

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

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

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

The minimum weekly award rate of pay to be paid to an employee shall be as follows –

			MINIMUM RATE	SUPPLE-MENTARY PAYMENT	ASNA	TOTAL MINIMUM AWARD RATE
			$	$	$	$
(1)	Stage Management Section					
	(a)	Technical Stage Manager	500.40	8.00	142.00	650.40
	(b)	Stage Manager	472.40	8.00	144.00	624.40
	(c)	Assistant Stage Manager	390.00	8.00	142.00	540.00
(2)	Mechanical Department					
	(a)	Workshop				
		(i) Head carpenter	460.40	8.00	144.00	612.40
		(ii) Carpenter	406.30	8.00	142.00	556.30
		(iii) Carpenter's assistant	357.50	8.00	142.00	507.50
	(b)	Stage				
		(i) Head mechanist/head road manager	460.40	8.00	144.00	612.40
		(ii) Mechanist/head flyman/road manager	406.30	8.00	142.00	556.30
		(iii) Stage hand/flyman	357.50	8.00	142.00	507.50
	Loading for stage hands in charge of side/revolve truck: 8 per cent.					
(3)	Electrical/Lighting Department					
	(a)	Head electrician	460.40	8.00	144.00	612.40
	(b)	Electrician/main switchboard operator	406.30	8.00	142.00	556.30
	(c)	Electrical hand	357.50	8.00	142.00	507.50
	Loading for electrical hand who is required to operate spots/auxiliary switchboard/visual effects: 8 per cent.					
(4)	Audio Department					
	(a)	Head audio technician	460.40	8.00	144.00	612.40
	(b)	Audio operator	406.30	8.00	142.00	556.30
	(c)	Audio hand	357.50	8.00	142.00	507.50
	N.B. Where there is no separate audio department the audio operator/hand shall be classified under (3) Electrical/Lighting Department.					

			MINIMUM RATE	SUPPLE-MENTARY PAYMENT	ASNA	TOTAL MINIMUM AWARD RATE
			$	$	$	$
(5)	Wardrobe Section					
	(a) Workshop					
	(i)	Head of wardrobe	460.40	8.00	144.00	612.40
	(ii)	Cutter/tailor/ wigmaker/milliner	406.30	8.00	142.00	556.30
	(iii)	Seamstress/maintenance hand/buyer/costume jeweller	357.50	8.00	142.00	507.50
	(b) Stage					
	(i)	Head of department	460.40	8.00	144.00	612.40
	(ii)	Wardrobe hand/dresser/valet	406.30	8.00	142.00	556.30
(6)	Property Department					
	(a) Workshop					
	(i)	Property master/mistress	460.40	8.00	144.00	612.40
	(ii)	Property maker	406.30	8.00	142.00	556.30
	(iii)	Property hand	357.50	8.00	142.00	507.50
	(b) Stage					
	(i)	Property master/mistress	460.40	8.00	144.00	612.40
	(ii)	Property hand	357.50	8.00	142.00	507.50
(7)	Art Department					
	(a)	Scenic Artist	460.40	8.00	144.00	612.40
	(b)	Assistant scenic artist	406.30	8.00	142.00	556.30
	(c)	Artist's labourer	357.50	8.00	142.00	507.50
(8)	Services					
	(a)	Receptionist/telephonist (enquiry clerk)	348.30	8.00	142.00	498.30
	(b)	Firefighter	342.10	8.00	142.00	492.10
	(c)	Utility person	349.40	8.00	142.00	499.40
	(d)	Stage Door Keeper	342.10	8.00	142.00	492.10
(9)	Cleaners					
	(a)	Head cleaner	371.50	8.00	142.00	521.50
	(b)	Cleaner	364.10	8.00	142.00	514.10
	Engaged by the hour (with a minimum payment as of three and a half hours).					
			$			
	8.00 a.m. to 6.00 p.m.		15.42			
	6.00 p.m. to midnight		23.13			
	midnight to 8.00 a.m.		30.84			
(10)	Skilled labour not classified elsewhere		460.40	8.00	144.00	612.40
(11)	Unskilled labour not classified elsewhere		342.10	8.00	142.00	492.10

(12) Additional Rates

Persons employed as casuals in the following classifications shall be paid the specified hourly amounts in addition to the wage provided elsewhere:

		MINIMUM RATE	SUPPLE-MENTARY PAYMENT	ASNA	TOTAL MINIMUM AWARD RATE
		$	$	$	$
Main switchboard operator		1.70			
Head flyman		1.52			
Person in charge of side		0.70			
(13)	Front of House	$	$	$	$
(a)	Senior Booking Office Supervisor	498.80	8.00	144.00	650.80
(b)	Head Booking Clerk (i.e. one who supervises the staff)	467.00	8.00	144.00	619.00
(c)	Booking Clerk (including party bookings)	438.90	8.00	142.00	588.90
(d)	Ticket Seller	384.30	8.00	142.00	534.30
(e)	Programme/concession sellers/ushers/ticket takers/cloakroom attendant	348.30	8.00	142.00	498.30

Booking clerks and ticket sellers shall not be held responsible for cash shortages when they are instructed to allow another employee (including the manager of the venue) access to their cash or tickets during a selling period

2. Clause 7. – Contract of Service: Delete subclause (10) of this clause and insert the following in lieu thereof:

(10) Casual employees not required to work a performance shall be paid at the following hourly rates which include loading for casual work, with a minimum payment for three and one half hours-

	$
8.00 a.m. to 6 p.m.	16.12
6.00 p.m. to midnight	22.07
midnight to 8.00 a.m.	28.01

(Edit Note: ASNA added to the above rates: ASNA calculated by dividing ASNA increase by 40 hours then adding 20%)

3. Clause 29. – Definitions: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) "Association" means the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees).

4. Clause 32. – Parties: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The union party to this award is the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees).

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

2005 WAIRC 01979

CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982 NO. A 34 OF 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE MINISTER FOR PRIMARY INDUSTRY, THE MINISTER FOR HEALTH, THE MINISTER FOR EDUCATION AND THE EDUCATION DEPARTMENT

RESPONDENTS

CORAM CHIEF COMMISSIONER A R BEECH
DATE WEDNESDAY, 6 JULY 2005
FILE NO/S APPL 1793 OF 1999
CITATION NO. 2005 WAIRC 01979

Result Application discontinued
Representation
Applicant No appearance
Respondents No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to s.40 of the *Industrial Relations Act 1979* to vary the *Catering Employees and Tea Attendants (Government) Award 1982* regarding the provision of a salary and classification structure;

AND WHEREAS the applicant subsequently advised the Commission that it wished to discontinue the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2005 WAIRC 01981

ENROLLED NURSES & NURSING ASSISTANTS (GOVERNMENT) AWARD NO. R 7 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

SIR CHARLES GAIRDNER HOSPITAL BOARD, ALBANY REGIONAL HOSPITAL AND BENTLEY HOSPITAL

RESPONDENTS

CORAM CHIEF COMMISSIONER A R BEECH
DATE WEDNESDAY, 6 JULY 2005
FILE NO/S APPL 1247 OF 1994
CITATION NO. 2005 WAIRC 01981

Result	Application discontinued
Representation	
Applicant	No appearance
Respondents	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to s.40 of the *Industrial Relations Act 1979* to vary the *Enrolled Nurses & Nursing Assistants (Government) Award* regarding increase in wages;

AND WHEREAS the applicant subsequently advised the Commission that it wished to discontinue the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2005 WAIRC 01973

ENROLLED NURSES & NURSING ASSISTANTS (GOVERNMENT) AWARD NO. R 7 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** ROYAL PERTH HOSPITAL, BUNBURY REGIONAL HOSPITAL AND ALBANY REGIONAL HOSPITAL **RESPONDENTS**
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 6 JULY 2005
FILE NO/S	APPL 1300 OF 1995
CITATION NO.	2005 WAIRC 01973

Result	Application discontinued
Representation	
Applicant	No appearance
Respondents	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to s.40 of the *Industrial Relations Act 1979* to vary the *Enrolled Nurses & Nursing Assistants (Government) Award* to remunerate enrolled nurses who perform anaesthetic technician duties;

AND WHEREAS the applicant subsequently advised the Commission that it wished to discontinue the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2005 WAIRC 01980

ENROLLED NURSES & NURSING ASSISTANTS (PRIVATE) AWARD NO. 8 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** ST JOHN OF GOD HOSPITAL, SPASTIC WELFARE ASSOCIATION OF WESTERN AUSTRALIA AND HOMES OF PEACE INC **RESPONDENTS**
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 6 JULY 2005
FILE NO/S	APPL 1248 OF 1994
CITATION NO.	2005 WAIRC 01980

Result	Application discontinued
Representation	
Applicant	No appearance
Respondents	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to s.40 of the *Industrial Relations Act 1979* to vary the *Enrolled Nurses & Nursing Assistants (Private) Award* regarding increase in wages;

AND WHEREAS the applicant subsequently advised the Commission that it wished to discontinue the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2005 WAIRC 01846

MISCELLANEOUS GOVERNMENT CONDITIONS AND ALLOWANCES AWARD NO A 4 OF 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE BOARD OF MANAGEMENT ALBANY REGIONAL HOSPITAL AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 21 JUNE 2005
FILE NO/S	APPL 1296 OF 2004
CITATION NO.	2005 WAIRC 01846

Result	Discontinued
Representation	
Applicant	Ms C Kazakoff
Respondents	Ms K Berger and Ms E McQueen (as agents)

Order

WHEREAS this is an application to vary the Miscellaneous Government Conditions and Allowances Award No A4 of 1992 pursuant to s 40B of the *Industrial Relations Act 1979;*

AND WHEREAS on the 13 June 2005, the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT the application be and is hereby discontinued by leave

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

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 518 of 2005

APPLICATION FOR VARIATION OF AN AWARD

ENTITLED " BREADCARTERS (METROPOLITAN) AWARD" NO. 35 OF 1963

NOTICE is given that an application has been made to the Commission by the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch to vary the above Award..

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

1.3 SCOPE

This Award shall apply to all employees employed in the vocations referred to in Clause 4.3 – Classifications who are eligible for membership in the applicant Union and who are employed in or in connection with the delivery or conveyance of bread and/or associated products.

1.4 AREA

This Award shall operate over the State of Western Australia.

4.3 CLASSIFICATIONS

4.3.1 Grade 1
Loader
Yardperson

4.3.2 Grade 2
Breadcarter in charge of rigid vehicle up to 4.5 tonnes Gross Vehicle Mass (GVM) or Gross Combination Mass (GCM)
Loader in charge of automatic slicing and wrapping machine.

4.3.3 Grade 3
Breadcarter in charge of rigid vehicle 4.5 to 13.9 tonnes GVM or GCM.

4.3.4 Grade 4
Breadcarter in charge of rigid vehicle over 13.9 tonnes GVM or GCM up to 13 tonnes capacity.

4.3.5 Grade 5
Breadcarter in charge of rigid vehicle and trailer up to 22.4 tonnes GCM over 10 and up to 15 tonnes capacity.

4.3.6 Grade 6
Breadcarter in charge of articulated vehicle 3 or more axles over 22.4 tonnesr GCM over 22 and up to 39 tonnes capacity.

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

5 July 2005

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 93 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "CARRINGTON'S (WA) PTY LTD TRADING AS CARRINGTONS TRAFFIC SERVICE NEW METRO RAIL SOUTHERN SUBURBS RAIL PROJECT, STRUCTURAL PROJECT AGREEMENT 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 3 PARTIES BOUND

This Agreement shall be binding upon:

- Carrington's (WA) Pty Ltd trading as Carringtons Traffic Service who shall be henceforth referred to as the Company,
- Employees of the Company who are engaged on the New Metro Rail Southern Suburbs Rail Project in the classifications detailed in Section 3 of this Agreement (the Employees); and
- The Construction, Forestry, Mining and Energy Union of Workers who shall be henceforth referred to as the Union.
- There is approximately 8 employees covered by this Agreement.

1.4 AREA AND SCOPE

This Agreement shall cover all concrete, structural, demolition and bridgework work on the New Metro Rail Project Southern Suburbs Rail Project that is undertaken by the Employees engaged by the Company in the classifications detailed in Section 3 of this Agreement.

1.5 PERIOD OF OPERATION

This Agreement shall operate from the date of signing and shall continue in force until July 1, 2006.

This agreement shall be read and interpreted in conjunction with the Building Trades (Construction) Award 1987 (the award). In the event of any inconsistency between the Award and an express provision of this Project Agreement, the terms of this Agreement will prevail to the extent of any inconsistency.

SECTION 3 WAGE RATES AND ALLOWANCES

3.1 EMPLOYMENT CLASSIFICATIONS

CE1

Tasks undertaken:

- general construction labouring and cleaning duties;

- assists employees at higher classification levels, including tradesmen;
- duties in a tool or materials store, including the receiving, despatching, distributing, sorting, checking, documenting and recording of goods, materials and components which may involve the use of forklifts, hand trolleys and similar lifting equipment;
- operates hand-controlled roller.

CE2

Tasks undertaken:

- operates machinery and equipment requiring the exercise of skill and knowledge beyond that of an employee at CE1;
- non destructive testing technical assistant;
- structural work on concrete operations, including assisting tradesmen fixing form work, placing concrete and finishing placed concrete;
- powder monkey;

CE3

Tasks undertaken:

- operates machinery and equipment requiring the exercise of skill and knowledge beyond that of an employee at CE2;
- certified rigger, not holding an advanced certificate;
- duties of a dogman;
- pipe layers and drainers work;
- operates mobile cranes with lifting capacity of up to 20 tonnes;
- operates articulated on-site vehicles;
- concrete pump operator;
- concrete agitator truck driver;
- certified scaffolder;
- steel fixer.

CE4

Tasks undertaken:

- operates machinery and equipment requiring the exercise of skill and knowledge beyond that of an employee at CE4;
- operates a mobile crane with lifting capacity in excess of 20 tonnes and up to 80 tonnes;
- carpenter;
- bricklayer;
- painter;
- plasterer;
- certified rigger, holding an advanced level of certificate.

CE5

Tasks undertaken:

- operates a mobile crane with lifting capacity in excess of 80 tonnes and up to 180 tonnes;
- tower crane operator.

CE6

Tasks undertaken:

- mobile crane operator (180 to 250 tonnes).

CE7

Tasks undertaken:

- crane operator (over 250 tonnes).

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

16 June 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 564 of 2005

APPLICATION FOR JOINDER OF PARTIES TO THE METAL TRADES (GENERAL) AWARD 1966 NO. 13 OF 1965

NOTICE is given that an application has been made to the Commission by Adecco Industrial Pty Ltd, Kelly Services (Australia) Ltd, Manpower Services (Australia) PTY LTD and Ready Workforce PTY Limited under the Industrial Relations Act 1979 to join them as named parties to the above Award in the following manner:

In the Second Schedule List of Respondents add:

LABOUR HIRE INDUSTRY

Adecco PTY Limited
57 Havelock Street,
West Perth WA 6005

Kelly Services (Australia) Ltd
Level 1, Quayside, 2 Mill Street
Perth WA 6000

Manpower Services (Australia) PTY LTD
28 The Esplanade Perth
WA 6000

Ready Workforce PTY Limited
247 James Street
Northbridge
WA 6003

The Application may be inspected at my office at 111 St. Georges Terrace, Perth by any interested person without charge and any such person may, by giving written notice of objection to the Commission and to the applicant within 28 days of this notice, appear and be heard on the hearing of this application.

J. SPURLING,
Registrar.

5 July 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 623 of 2005

APPLICATION FOR VARIATION OF AN AWARD

ENTITLED " WIRE MANUFACTURING (AUSTRALIAN WIRE INDUSTRIES PTY LTD) AWARD NO 24 OF 1970"

NOTICE is given that an application has been made to the Commission by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch to vary the above Award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

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

3. – AREA AND SCOPE

This Award relates to the wire manufacturing, processing and fabricating industry and applies to employees employed in the callings mentioned in Clause 25. – Wages, of this Award in the area occupied and controlled by the respondent.

2. Schedule A – Applicant: Delete this Schedule and insert in lieu thereof the following:

SCHEDULE A – NAMED PARTIES TO THE AWARD

Unions Party to the Award

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch, U24/257 Balcatta Road, BALCATTA WA 6021

Employee Party to the Award

Onesteel, 310 Selby Street, Osborne Park WA 6017

J. SPURLING,
Registrar.

11 July 2005

INDUSTRIAL MAGISTRATE—Complaints before—

2005 WAIRC 01891

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	CLAIMANT
	-v-
	CITY OF WANNEROO
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE R.H. BURTON
DATE	TUESDAY, 7 JUNE 2005
CLAIM NO.	M 198 OF 2003
CITATION NO.	2005 WAIRC 01891

Representation	
CLAIMANT	Ms J Boots (of Counsel) of *Boots & Co Lawyers*
RESPONDENT	Ms L Gibbs (of Counsel) of *CCI Legal Pty Ltd*

Supplementary Reasons for Decision

BACKGROUND

1. In this matter I was required to determine whether the work of Mr Michael Van Der Waarden, an employee of the Respondent came within the definition of "Officer or Employee" as set out in clause 3.9 of the ***Local Government Officers (Western Australia) Award 1999*** (the Award) as contended by the Claimant or, alternatively, whether it came within the definition of "Community Services Officer (Welfare and ancillary services)" as set out in clause 3.4 of the Award as contended by the Respondent.

2. In my Reasons for Decision published on 25 August 2004 I found that the employee was a Patrol Officer and, as such, came within the definition of "Officer or Employee". The outcome lead to a finding that the employee had been underpaid. The amount, of underpayment was not before me to resolve.

3. At the time of publishing my Reasons I made orders to the effect that the Respondent was liable for the underpayment and gave the parties an opportunity to consult concerning quantum. The parties have attempted without success to resolve quantum. The issue continues to remain live between them. I also at that time ordered that pre-judgment interest was to be paid to the employee calculated at the rate of 6% on the quantum payable and that such amount was to be fixed in accordance with section 179A(1)(b) of the ***Workplace Relations Act 1996***. I also ordered that disbursements of $40.00 were to be paid by the Respondent to the Claimant. Finally I ordered that the Respondent should not suffer any penalty for its breach.

4. The unresolved issue of quantum of the underpayment came back before me because the Respondent, which on 15 September 2004 instituted an appeal against my decision in the Federal Court of Australia, cannot have the same determined until I make final orders with respect to this matter. Accordingly on 16 May 2005 I further heard from the parties with respect to the outstanding issues. I informed them that I would give further written reasons with respect to those issues and that such reasons would be delivered to them by post.

FURTHER DETERMINATION

5. I am asked to determine the correct fortnightly wage of the said employee given my finding that he was a Patrol Officer within the meaning of the Award. It is axiomatic that the difficulty posed in calculating quantum arises from the fact that I was asked to make the calculations based upon one single representative fortnightly period as opposed to calculating quantum over a full year or, alternatively, over the full period of the employee's employment in that classification.

6. Ms Boots for the Claimant submitted that the correct figure was $656.02 based on her contention that overtime became payable after 76 hours. Clause 5 of the Employment Contract (Exhibit E) however provides that employees usual hours of work were to average 80 hours per fortnight.

7. Ms Gibbs for the Respondent argues that the employer is entitled to average out the hours of work over a four week period in accordance with clause 19.1.2 of the Award and I find that to be the case because looking at one fortnightly period alone can distort the position relating to time worked. Any given fortnightly period may not correctly reflect the average hours worked over 28 days. In fact the target fortnightly period reflects a disproportionate amount of overtime worked and thus is not necessarily reflective of a usual fortnightly pay period.

8. I find that there should not be set-off for any more than two pay periods given clause 5 of the Employment Contract. It follows that with set-off applying the amount underpaid for the period in issue is $438.99, as contended by the Respondent.

9. There will be orders accordingly.

RH Burton
Industrial Magistrate

2005 WAIRC 01898

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	THE COMMUNITY AND PUBLIC SECTOR UNION (SPSF GROUP) (WA BRANCH)
	CLAIMANT
	-v-
	VICE CHANCELLOR, MURDOCH UNIVERSITY
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	WEDNESDAY, 22 JUNE 2005
CLAIM NO.	M 19 OF 2005
CITATION NO.	2005 WAIRC 01898

REPRESENTATION	
CLAIMANT	MR. M FINNEGAN, INDUSTRIAL ADVOCATE
RESPONDENT	MR. D HOWLETT (OF COUNSEL)

REASONS FOR DECISION

Background

1. On 25 February 2005 "The Community and Public Sector Union (SPSF Group)(WA Branch)" filed its claim in this Court alleging a failure on the part of (the) "Vice Chancellor, Murdoch University", to comply with an award, agreement or order. By way of relief the Claimant sought the imposition of a penalty.
2. The originating *Claim Form* had attached to it a document entitled "*Statement of Claim*" in which the Claimant set out its claim. Within that document reference was made to "*The Community and Public Sector Union*" and "*Murdoch University*" as being the parties to the subject agreement known as the "***Murdoch University (General Staff) Enterprise Agreement 2000 (AG 790559)***" (the agreement) registered pursuant to the provisions of the ***Workplace Relations Act 1996*** (the WPRA). It will be obvious from what I have said that there is an apparent inconsistency in that the named parties to the agreement referred to in the *Statement of Claim* are not the same as the named parties on the *Claim Form*.
3. On 28 February 2005 John Dasey, on behalf of the Respondent, filed a response denying the claim. On 5 April 2005 Mr Howlett filed a Notice of Appointment of Solicitor advising the Court and the Claimant that he had been appointed to act for the Respondent. On the same day the Respondent filed an amended response with an annexed document entitled "*Respondent's Amended Response*". In essence the Respondent contended therein that the Claimant was not an organisation registered pursuant to the provisions of the WPRA and therefore lacked standing to make the claim. Further, it was asserted that the Respondent was not a party to the agreement.
4. On 6 April 2005 the Clerk of the Court held a pre-trial conference with respect to this matter. Following the pre-trial conference the Clerk issued programming directions requiring, inter alia, that the Claimant file and serve further and better particulars of the claim and an outline of its case by 18 May 2005.
5. On 16 May 2005 the Claimant filed a Notice of Discontinuance of Action. The Notice, on its face, cited the parties to the claim to be "*CPSU – the Community and Public Sector Union*" and "*Murdoch University*". Attached to the Notice of Discontinuance was a letter dated 13 May 2005, which bore the logos of the CPSU and the CSA. It also stated the names of the Community and Public Sector Union SPSF Group WA Branch and Civil Service Association of WA Inc. The letter written by Mr Finnegan addressed to the Clerk of the Court stated:

   Dear Sir,

   RE: Claim No M19 of 2005

   (1) CPSU v Murdoch University

   In light of the recent pre-trial conference on this matter, the CPSU has decided to discontinue this particular claim. The relevant form will be filed with the Registry.

   Notwithstanding the above, a fresh claim will be filed with the Registry in the near future.

   Yours sincerely
6. It is common ground that the Claimant subsequently filed another claim in this Court. Mr Dasey says in his affidavit made 24 May 2005 (paragraph 32) that claim M 59 of 2005 correctly names the parties who are also parties to the agreement. He expresses the view (paragraph 34) that the Claimant discontinued the claim in this matter (M 19 of 2005) because of "*defects in the identity of the Claimant and Respondent and defects in the Statement of Claim*".
7. On 26 May 2005 the Respondent filed an interlocutory application seeking the following:

   "*An order for the costs of application M19/2005 to be paid by the Respondent to the Claimant* (sic)."
8. The interlocutory application was supported by the affidavit of Mr Dasey affirmed on 24 May 2005 to which I have already referred.
9. On 3 June 2005 the Claimant filed an interlocutory application seeking further and better particulars of the Respondent's interlocutory application for costs. It suffices to say that when that application came before me it was dismissed. I reserved the issue of costs arising from the dismissal of that application.
10. On 13 June 2005 the Respondent filed the supplementary affidavit of John Dasey, affirmed the same day, to further support its claim.
11. The Claimant has not filed any affidavit in response to the application, nor has it sought to lead viva voce evidence with respect to the application. Indeed the only affidavit filed was that of Mr Finnegan which is undated but filed on 3 June 2005 which supported the application for particulars but did not otherwise address the matters raised by Mr Dasey in his supporting affidavits.

12. It is worthy of note that, in each of the documents filed by the Respondent with respect to the application for costs, the Respondent is named as follows:

13. "*Murdoch University or alternatively Vice Chancellor, Murdoch University.*"

Determination

14. The Respondent's application for costs arises by virtue of section 347 of the WPRA, which provides:

> ***347 Costs only where proceeding instituted vexatiously etc.***
>
> *(1) A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 170CP) shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.*
>
> *(2) In subsection (1):*
>
> *(a) **costs** includes all legal and professional costs and disbursements and expenses of witnesses.*

15. In Mr Dasey's supporting affidavit affirmed 24 May 2005 he says at paragraph 36 that:

"*Murdoch now wishes to recover the costs of defending and dealing with Claim M19/05 on the grounds that Claim M19/05 was instituted frivolously and vexatiously.*"

16. It seems from what he says that there is no real practical distinction to be drawn between the Vice Chancellor and the University itself in the defence of this proceeding other than the obvious technical variance in name.

17. The term "*frivolously*" is not contained within section 347 of the WPRA. Indeed the terminology expressed by Mr Dasey hereinbefore referred to is more in keeping with State provisions relating to costs found in the ***Industrial Relations Act 1979*** and the ***Industrial Magistrates' Court (General Jurisdiction) Regulations 2000*** (the Regulations) which refer to proceedings "*frivolously or vexatiously instituted or defended*".

18. It is obvious that the Respondent in making the application proceeded on the basis that this proceeding had been frivolously or vexatiously instituted. The premise for that was that the Claimant had instituted proceedings in which it had no reasonable prospect of success. It is quite apparent that the notion of the proceedings having been instituted "*without reasonable cause*" was not specifically considered until such time as I alerted the parties to the particular wording of section 347 during the hearing of the Claimant's application for further and better particulars on 8 June 2005. The Claimant accordingly argues that this Court should not entertain an argument based on the element of "*without reasonable cause*". To do so would allow the Respondent to shift the goal posts and cause the Claimant to argue against something totally new.

19. I respectfully disagree with the Claimant because it is apparent from reading Mr Dasey's affidavit made 24 May 2005 that he impliedly asserts, amongst other things, that this proceeding was instituted without reasonable cause. That is so despite the fact that he does not express it in that way. It is quite apparent that Mr Dasey has rolled together the distinct concept of "frivolous or vexatious" with that of "without reasonable cause" and labelled the same as "frivolous and vexatious". In the circumstances the Claimant cannot claim surprise.

20. The Claimant also takes issue with Mr Dasey's affidavit affirmed 24 May 2005 because paragraphs 14 to 22 inclusive thereof are said to offend regulation 32 of the Regulations, which state:

> ***21. Status of things said or done at a pre-trial conference***
>
> *(1) Anything said or done during a pre-trial conference is not to be used as evidence or referred to in a submission in the trial of the action or in any other legal proceedings as defined in section 3 of the Evidence Act 1906.*
>
> *(2) Nothing in subregulation (1) prevents evidence of anything said or done at a pre-trial conference from being used –*
>
> *(a) in support of an interlocutory application for default judgment or for the dismissal of a claim; or*
>
> *(b) on the trial of a person for an offence committed at the pre-trial conference.*

22. Given that the application before me is not a matter contemplated by regulation 32(2) it would follow that regulation 32(1) would apply if the matter before me were a legal proceeding as defined in section 3 of the ***Evidence Act 1906***.

23. "*Legal proceeding*" or "*proceeding*" is defined in section 3 of the ***Evidence Act 1906*** to mean:

24. **"legal proceeding"** or **"proceeding"** includes any action, trial, inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given, and includes an arbitration;

25. The matter before me is a legal proceeding within that definition and accordingly any evidence given containing what was said at the pre-trial conference offends regulation 32 and ought to be excluded. It is self-evident that paragraphs 14 to 22 of Mr Dasey's affidavit offends regulation 32 and therefore must be struck out. The offending paragraphs are accordingly struck out. The effect of striking out those paragraphs is that it removes the foundation for Mr Dasey's belief expressed at paragraph 34 of his affidavit, and considerably weakens the basis of this application.

26. To properly determine this matter I must consider why, as a matter of fact, the Claimant chose to discontinue this claim and institute a fresh claim. Although the Claimant has had the opportunity of advising the Court as to why that occurred, it has chosen not to. No adverse inference should be drawn from the failure to call evidence. There is no particular reason to apply the rule in ***Jones v Dunkel (1959) 101 CLR 298***. The Claimant, in responding to this application, does not bear any onus. The onus remains throughout upon the Respondent to make out its application based on the evidentiary material, which it can produce to substantiate its application. The drawing of any adverse inference, in the circumstances, is tantamount to reversing the onus resting with the Respondent.

27. Mr Finnegan, from the bar table, asserts that the Claimant may have adopted the course of action for any number of reasons and that it would not be appropriate for the Court to speculate as to the reason why. Further he says that, if the Court were to find that the claim was discontinued because of some technical defect relating to the naming of the parties, such would not amount to a proceeding having been instituted vexatiously or without reasonable cause.

28. In my view it is open to infer on the balance of probabilities that this claim was discontinued because it had been incompetently drafted, which resulted in the wrong entity having been named as Claimant. The Claimant was not a named party to the agreement and therefore lacked standing. That conclusion is easily reached if one has regard to the patent inconsistency apparent between the *Claim Form* and the *Statement of Claim* annexed thereto. Further such

conclusion is supported by the Claimant's letter to the Clerk of the Court, annexed to the Notice of Discontinuance, and also by what Mr Dasey said at paragraph 32 of his affidavit made 24 May 2005 in which he states:

"*The parties to the Agreement are correctly stated in Claim M59/05.*"

29. It is quite apparent that rather than attempt to correct the error made, which could have been easily achieved by virtue of regulation 17 of the Regulations, the Claimant decided to discontinue this claim and start again.

30. Relevantly regulation 17 provides:

> ***Amending a document***
>
> *(1) A court may, on an interlocutory application by a party to an action, allow the party to amend a document filed in relation to the action at any time before the court makes its final orders in relation to the action.*
>
> *(2) A court may, of its own motion, amend any defect or error in a document filed in relation to an action at any time before the court makes its final orders in relation to the action.*

31. It seems that the CSPU in starting again not only corrected the misnomers but also took the opportunity to change its claim. Such is apparent from what Mr Dasey said in his affidavit of the 24 May 2005 in which he said at paragraph 33:

"*The Statement of Claim in M59/05 is significantly different from the Statement of Claim in M19/05.*"

32. That assertion remains uncontradicted. Having said that however, it will be apparent that Mr Dasey's statement imports a subjective assessment. I have not seen the Statement of Claim in M 59 of 2005 and therefore am not in a position to ascertain the extent of the difference between it and the Statement of Claim in this matter. I proceed on the basis that the primary reason for the Claimant discontinuing this claim was because it named the wrong parties and rather than correct the defect it opted to discontinue and start again. The costs application must be considered against that setting.

33. The policy thrown up by section 347 of the WPRA and its predecessor, being the now repealed provision in section 197A of the ***Conciliation and Arbitration Act 1904*** has been considered in ***Heidt v Chrysler Australia Ltd (1976) 26 FLR 257***. At page 272 Northrop J said:

The policy of s.197A of the Act is clear. It is designed to free parties from the risk of having to pay the costs of an opposing party. At the same time the section provides a protection to parties defending proceedings which have been instituted vexatiously or without reasonable cause. This protection is in the form of conferring a power in the court to order costs against a party who, in substance, institutes proceedings which in other jurisdictions may constitute an abuse of the process of a court.

34. In ***Neville William Thompson and Others v Eroll Hodder and Others (1989) 29 IR 339*** their Honours Keely, Gray and Ryan JJ of the Federal Court of Australia Industrial Division said in their joint judgment at paragraph 12:

"*It is apparent from these authorities that an applicant who has the benefit of the protection of s.347 will only rarely be ordered to pay the costs of a proceeding in exceptional circumstances.*"

35. The Respondent argues that this claim was vexatious or without reasonable cause because upon the facts apparent to the Claimant at the time of instituting the proceeding, there was no prospect of success. The Claimant could not have succeeded on any view because of its lack of standing.

36. The meaning of "*without reasonable cause*" has been the subject of judicial consideration. In ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Nestlé Australia Ltd [2005] FCA 717*** delivered 3 June 2005 His Honour Marshall J reviewed the relevant authorities relating to the meaning thereof. At paragraphs 3 to 7 he said:

> *3 Nestlé contended that the Union instituted the proceeding without reasonable cause. It submitted that, when issued, the application had no prospect of success. It submitted that the success of the application did not depend on any seriously disputed question of fact or the resolution of any arguable point of law.*
>
> *4 As a Full Court said in Spotless Services Australia Ltd v Marsh [2004] FCAFC 155 at [13]:*
>
> *(1) "Whether a proceeding has been commenced without reasonable cause is relevantly established as a matter of objective fact."*
>
> *5 In Spotless the Full Court considered that the application for prerogative relief was bound to fail. It ordered costs against the unsuccessful applicant. The expression "bound to fail" is similar to expressions such as "so obviously untenable that it cannot possibly succeed", "manifestly groundless" and "bad beyond argument" as referred to by von Doussa J in Hatchett v Bowater Tutt Industries Pty Ltd (1991) 28 FCR 324 at 327. Earlier, at 327, von Doussa J said:*
>
> *(2) "The test imposed by the expression "vexatiously or without reasonable cause" is similar to the one applied by a court on an application for the exercise of summary power to stay or strike out proceedings: see Heidt v Chrysler Australia Ltd (1976) 26 FLR 257 at 272 to 273 and Geneff v Peterson (1986) 19 IR 40 at 87 to 88."*
>
> *6 As Gibbs J said in R v Moore; Ex parte Federated Miscellaneous Workers' Union (1978) 140 CLR 470 at 473, in respect of a predecessor provision to s 347(1):*
>
> *(3) "In my opinion a party cannot be said to have commenced a proceeding "without reasonable cause", within the meaning of that section, simply because his argument proves unsuccessful."*
>
> *7 Further, as Gray J said in Geneff v Peterson (1986) 19 IR 40 at 88:*
>
> *(4) "...the focus of the section is on the institution of the proceedings, and the court should not allow itself to be influenced unduly by the actual result."*

37. The Respondent says that if the Court views the Claimant's claim as being untenable at institution then the Respondent ought to recover its costs. In that regard I am asked to follow what His Honour Wilcox J said at pages 264 and 265 in ***Joseph Michael Kanan v Australian Postal and Telecommunications Union 43 IR 257***:

It seems to me that one way of testing whether a proceeding is instituted "without reasonable cause" is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being "without reasonable cause". But where it appears that, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause. That is the situation in the present case. The qualification of s.347 applies. The Court has power to order costs against the applicant.

I see no discretionary reason to withhold such an order. It is not a matter of the applicant's motives but, that he has put the respondent to the expense of resisting a claim which was always doomed to failure. There is no question of punishing the applicant for his unreasonable course of action. The rationale for making a costs order is that a measure of indemnity should be conferred upon the respondent for the costs it has been obliged to incur in responding to the unreasonably instituted proceeding. I propose to order that the principal proceeding be dismissed with costs. The costs of the motion will be costs in the principal proceeding and so covered by that order.

38. The review of authorities reveals that costs will only be awarded in exceptional circumstances if the party seeking costs can establish that the claim, on its merits, was utterly hopeless and doomed to failure.

39. Was the claim in this matter doomed to failure? The answer is clearly no. I say that because the apparent misnomers were something, which was correctable by virtue of regulation 17. If the Claimant had sought to correct such error which it no doubt would have succeeded in doing then the proceeding could have continued to be determined on its substantial merits. Accordingly it cannot be said that the proceedings were brought without reasonable cause. The cause was there; it is just that the Claimant got it wrong in naming the parties. It is not uncommon in this jurisdiction that parties are incorrectly named, particularly in circumstances where those not having legal training draft claims. As His Honour Wolff CJ said at page 22 in ***Williams v Berini 1960 WAR 21***:

> *"I think the law has long ceased to be a catch-as-catch-can business …"*

40. The correctable error was not fatal to the claim if corrected. That is what should have occurred rather than to discontinue and start again.

41. The rationale for making a costs order is that a measure of indemnity should be conferred upon the Respondent given that it has been obliged to respond to unreasonably instituted proceedings. The Claimant's claim however continues, albeit in a different action and other than a technical sense it involves the same parties. I fail to see in those circumstances how it can be said that the Respondent has incurred unnecessary costs. If any unnecessary costs have been incurred, they have resulted from bringing this application for costs.

42. In so far as the claim for costs is based on the proceeding having been instituted vexatiously, that too must fail. Vexatiousness imports more that omission. There was omission in this matter constituted by the failure to correctly name the parties. As His Honour North J said in ***Margaret Nilsen v Loyal Orange Trust (1997) 76 IR 180*** at pages 181 and 182:

> *". . . A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage: see Attorney General v Wentworth (1988) 14 NSWLR 481 at 491. The approach of the High Court in an application for a permanent stay of criminal proceedings on the ground of abuse of process constituted by improper purpose is instructive. In Williams v Spautz (1992) 174 CLR 509, at 522, Mason CJ, Dawson, Toohey and McHugh JJ said:*
>
> *(1) "Bridge LJ identified one difficulty when he said ([1977] 1 WLR, at p 503; [1977] 2 All ER, at p 586):*
>
> *(2) 'What if a litigant with a genuine cause of action, which he would wish to pursue in any event, **can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it**.' (Emphasis added.)*
>
> *(3) So would we. But his Lordship, by implication, evidently sees no difficulty with the case in which the plaintiff does not wish to pursue his or her cause of action to a conclusion because he or she intends to use the proceedings for a collateral and improper purpose."*

43. Vexatiousness imports an act of commission and/or intent to harass or embarrass or gain a collateral advantage. It amounts to an abuse of process. There is not one scintilla of evidence that would support a finding that the claim was instituted vexatiously.

Result

44. It follows, for the reasons given that the Respondent's claim for costs on the substantive claim and on the interlocutory application relating to costs should be dismissed.

G. Cicchini
Industrial Magistrate

2005 WAIRC 01894

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	CLAIMANT
	-v-
	MORAN HEALTHCARE GROUP (WA) PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	WEDNESDAY, 15 JUNE 2005
CLAIM NO.	M 9 OF 2005
CITATION NO.	2005 WAIRC 01894

REPRESENTATION:	
CLAIMANT	MR M SWINBOURN , AGENT
RESPONDENT	MR D JOHNSTON , AGENT

Catchwords:

Christmas, Boxing Day, New Year's Day public holidays – "day observed in lieu thereof".

Legislation

Workplace Relations Act 1996 - sections 177A, 178(1) and 178(6);

Industrial Relations Act 1979 - section 81;

Public and Bank Holidays Act 1972 - sections 3, 5, 8, 9 and Second Schedule;

Nursing Assistant's Award 2002.

Cases referred to in decision

The Australian Nursing Federation Industrial Union of Workers Perth v Silver Chain Nursing Association Inc **2003 WAIRC 07861**

REASONS FOR DECISION

Background

1. The Claimant is an organisation of employees registered under Schedule 1B of the ***Workplace Relations Act 1996***. The Respondent is a corporation carrying on business in Western Australia. The ***Nursing Assistants Award 2002*** (the Award) binds both parties. The Respondent at the material time employed Ms Melissa Banfield as a second year Nursing Assistant being a classification contained in the Award. Ms Banfield is a member of the Claimant union.

2. It is not in dispute that on 27 and 28 December 2004 Ms Banfield worked between 3.00 pm and 9.00 pm. She also worked between the same times on 3 January 2005. The Claimant contends that each of those days were observed as public holidays for Christmas Day, Boxing Day and New Year's Day respectively, as established by section 5 of the ***Public and Bank Holiday Act 1972*** (the State Act) and listed in the Second Schedule thereto. The Respondent takes issue with such contention.

3. The Claimant alleges that the Respondent failed to pay Ms Banfield her correct rate of pay for those days as prescribed by clause 27.1 of the Award. The Claimant seeks to recover the total alleged underpayment of $87.87 together with interest thereon. The Claimant further seeks the imposition of a penalty for the Respondent's alleged failure to comply with the Award. It also seeks costs.

Determination

4. Relevantly clause 27 of the Award states:

> ***PUBLIC HOLIDAYS***
>
> *27. An employee who works on any public holiday herein or day observed in lieu thereof, shall be paid a loading of 50% of the ordinary wage for the time worked in ordinary hours on that day.*
>
> *28. For the purposes of this clause the following days shall be public holidays: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.*

5. The Respondent says that the loading prescribed by clause 27.1 of the Award does not apply to work on 27 December 2004, 28 December 2004 or 3 January 2005 because clause 27.2 stipulates the days which shall be public holidays for the purpose of clause 27 which are respectively Christmas Day (25 December), Boxing Day (26 December) and New Year's Day (1 January).

6. In the alternative the Respondent argues that the Second Schedule of the State Act recognises Christmas Day (25 December), Boxing Day (26 December) and New Year's Day (1 January) as public holidays. However it also provides that when New Year's Day or Christmas Day falls on a Saturday or Sunday the next following Monday is also a public holiday and when Boxing Day falls on a Sunday or Monday the next following Tuesday is also a public holiday. It is the case therefore that the State Act provides for holidays in addition to the Christmas Day and New Year's Day holidays when the holidays fall on a weekend and for a holiday in addition to Boxing Day when that holiday falls on a weekend or on a Monday. The Respondent contends that given that the State Act does not provide for holidays "*in lieu*" of the Christmas Day, Boxing Day and New Year's Day holidays, clause 27.1 of the Award has no application to holidays under the State Act falling on 27 December 2004, 28 December 2004 and 3 January 2005. Accordingly the Respondent argues that the words "*or day observed in lieu thereof*" contained in clause 27.1 of the Award are necessarily repugnant and of no effect. The Respondent argues that the words remain as a vestige of the former state award that has no application in the context of its current state as a federal award.

7. The Claimant on the other hand submits that this matter is on all fours with the matter in ***The Australian Nursing Federation Industrial Union of Workers Perth v Silver Chain Nursing Association Inc 2003 WAIRC 07861*** reported at ***83 WAIG 508*** (Silver Chain). In that matter I held that the employer failed to pay its employees penalties for working on days observed in lieu of Christmas Day, Boxing Day and New Year's Day. In that regard the Respondent says that the Silver Chain decision ought to be distinguished on account of the differing provisions within the instruments considered. With respect, I disagree. In my view the provisions are very similar, albeit not identical. The relevant provision of the Agreement considered in Silver Chain provided:

> ***22. – PUBLIC HOLIDAYS***
>
> *For the purposes of this agreement the following days, or the days observed in lieu of those days, shall be observed as public holidays without deduction of pay:*
>
> *1. New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.*

8. The factual and legal context in which Silver Chain was decided is, in my view, on all fours with this matter. I accept the Claimant's argument in that regard. I do not consider that Silver Chain was decided incorrectly or should otherwise be distinguished. I adopt my reasons in Silver Chain as having equal application in this matter. I therefore do not intend to restate those reasons here except to say that the provisions in clause 27 have the same effect as the provision considered in Silver Chain. Clause 27.1 must be given meaning and effect. To ignore the words "*or day observed in lieu thereof*" within that clause as suggested by the Respondent would be totally inappropriate. The words should not be excised. The Court should, where possible, give meaning and effect to provisions. Clause 27.1 is no different.

9. In my view, in order to give effect to clause 27.1 it must be read together with clause 27.2. They should not be regarded distinctly, as the Respondent suggests. Clause 27 is a public holiday provision, which recognises that on occasions certain public holidays will be observed on a day other than the actual day on which the actual feast day falls. Such is suggested by the words "*or day observed in lieu thereof*".

10. I accept the evidence given by Ms Banfield that in 2004 the public holiday observed for Christmas Day was, in fact, observed on 27 December 2004; that the public holiday observed for Boxing Day was, in fact, observed on 28 December 2004 and that the public holiday observed for New Year's Day was, in fact, observed on 3 January 2005.

11. The fact is that, by virtue of the State Act, Christmas Day 2004, Boxing Day 2004 and New Year's Day 2005 were all observed as holidays on days other than the actual day on which they fell. It is obvious that clause 27.1, when read in conjunction with clause 27.2 as applied by virtue of the State Act, is intended to enable employees to celebrate a public holiday on a week day for any Christmas, Boxing or New Year's feast day occurring on a Saturday or Sunday. Such approach will give meaning and effect to the words contained in clause 27.1. The clause, in my view, is demonstrative of a substitution clause, which recognises that the public holiday associated with the feast day is sometimes observed on a day other than the feast day. That does not derogate from the actual observance of the feast day, but rather augments the feast day by enabling its celebration on a weekday rather than a weekend.

12. For the reasons stated I find that the claim is proved.

13. I will now hear the parties with respect to the appropriate orders to be made.

G Cicchini
Industrial Magistrate

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2005 WAIRC 01833

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW MARK HOSKING
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J G GREGOR
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 17 JUNE 2005
FILE NO/S	APPL 453 OF 2005
CITATION NO.	2005 WAIRC 01833

Result	Appeal adjourned
Representation	
Appellant	No appearance
Respondent	No appearance

Order

WHEREAS an appeal was lodged in the Commission pursuant to s.33P of the *Police Act 1892*;

AND WHEREAS the appellant has advised that the reasons for his removal include matters of a criminal nature which are presently before the District Court and yet to receive a trial date;

AND WHEREAS the appellant has applied under s.33T of the *Police Act 1892* for the appeal to be adjourned for 12 months*;*

AND WHEREAS s.33T of the *Police Act 1892* obliges the Commission to grant the adjournment;

AND WHEREAS the respondent was advised that an order adjourning the matter would therefore issue unless the respondent contacted the Commission within a specified period of time;

AND WHEREAS that period of time has lapsed and the respondent has not contacted the Commission;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s.33T of the *Police Act 1892*, hereby orders -

THAT the appeal be adjourned for 12 months from the date of this order.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2004 WAIRC 13359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE RUSSELL MCGRATH
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	MONDAY, 22 NOVEMBER 2004
FILE NO.	APPL 718 OF 2004
CITATION NO.	2004 WAIRC 13359

Result	Application for adjournment granted
Catchwords	Appeal pursuant to Police Act 1892 listed for hearing – Request for adjournment – Tests – Adjournment granted - Police Act 1892 s 33S; Industrial Relations Act 1979 s 27(1)(f) Application for adjournment granted
Representation	
Applicant	Mr W.R. McGrath on his own behalf by way of written and oral submission
Respondent	Mr R. Andretich (of counsel) by way of oral submission

Reasons for Decision

1 The appeal by Wayne McGrath against the decision of the Commissioner of Police to recommend to the Minister for Police that she approve his removal from the police service pursuant to s.8 of the *Police Act 1892* was listed for hearing before the Commission on 17 November 2004. On the morning of the appeal the Commission received an e-mail from Mr McGrath, who is resident in Bunbury, apologising for not contacting the Commission earlier and advising he will not be able to attend the hearing. He states:

> "I do wish to advise however that I wish to proceed with the appeal and formally request for the matter to be adjourned for a period of time."

2 At the direction of the Commission, Mr McGrath was telephoned to ascertain the reasons why he was seeking an adjournment. He advised that he is at this stage unable to afford legal representation. He stated he is uncertain how long an adjournment he seeks as it will depend upon when he is able to finance further legal representation. He stated he would advise when he was ready to proceed.

3 At the direction of the Commission, the Commissioner of Police was notified of this information and asked to advise the Commission of his response. The Commission has been informed that the Commissioner of Police does not object to the matter being adjourned for one month but that it should be listed at the first available date after that time.

4 Taking the respective positions of the parties into account, the Commission decided to grant the adjournment. This was done with some hesitation because Mr McGrath did not notify the Commission of his non-attendance until the day of the hearing and then only because he had been contacted the day before the hearing by the Commission to remind him of the need to attend. Further, he did not advise any reasons for seeking such a late adjournment. Indeed, the only reason the Commission is aware of his grounds for asking for an adjournment is because the Commission itself contacted him. These circumstances rendered it more likely that his appeal would simply be dismissed rather than adjourned.

5 Where the refusal of an adjournment would result in 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). An appeal such as the one lodged by Mr McGrath is a serious matter and to refuse the adjournment he requests would result in his appeal being struck out. That would result in a serious injustice to him in circumstances where the appeal was listed with 12 days' notice to the parties. Further, the conciliation conference in this matter was held on 25 August 2004 and it was not until 20 September 2004 that the Commissioner of Police advised there was no change to its position as a result of the conference. The Commission is prepared to accept that the relatively short notice of the listing date to an unrepresented party who wishes to engage legal representation may strengthen the granting of the adjournment.

6 Correspondingly, the Commission does not consider that the Commissioner of Police will suffer any serious injustice if the appeal is adjourned particularly if it is adjourned for a period as suggested by the Commissioner of Police. It is not appropriate to simply adjourn the appeal indefinitely. Both the Commissioner of Police and Mr McGrath have their interests in the outcome of the appeal and the timing of the appeal will take into account both parties' interests and not merely the interest of Mr McGrath. Accordingly, the adjournment is granted.

7 An adjournment of one month brings the time for re-listing close to the Christmas and New Year period. Taking that into account and balancing on the one hand the need of Mr McGrath to finance further legal representation with the corresponding need on the other hand to have his appeal dealt with in as timely a manner as possible, and taking account of the inevitable difficulties arising over the Christmas and New Year period, the Commission will re-list the appeal for 18 January 2005. We consider the length of that listing time means that it is unlikely a further adjournment will be given.

2005 WAIRC 00843

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE RUSSELL MCGRATH
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	FRIDAY, 1 APRIL 2005
FILE NO.	APPL 718 OF 2004
CITATION NO.	2005 WAIRC 00843

Result	Leave to tender new evidence granted in part
Catchwords	New evidence sought to be tendered – consent of Commissioner of Police – *Police Act 1892* s.33R(3) and (4)
Representation	
Appellant	Mr W.R. McGrath on his own behalf by way of written and oral submission
Respondent	Mr R. Andretich (of counsel) by way of oral submission

Reasons for Decision – Application to tender new evidence

1 THE COMMISSION: At the conclusion of Mr McGrath's submissions he requested leave to amend the grounds of his appeal and also to tender new evidence. The Commission, not without some hesitation, directed Mr McGrath to put in writing the amendments he wished to make, provide a copy of the new evidence that he sought to tender and provide a copy to Mr Andretich. The hesitation was because it is quite unusual for such leave to be sought almost at the end of the case, and which necessarily meant that the appeal came to a temporary halt whilst the issue is then dealt with. However, the Commission took into account that Mr McGrath is unrepresented and is endeavouring to prosecute his appeal to the best of his ability. As Mr Andretich properly observed, Mr McGrath has been unrepresented for some period of time and had received the appeal book late in the day.

2 Mr McGrath complied with the direction and Mr Andretich, on behalf of the Commissioner of Police, has advised that the Commissioner consents to both the amendments sought and the new evidence produced.

3 Against that background, the Commission has to consider Mr McGrath's two requests: merely because the Commissioner of Police consents does not remove the obligation on the Commission to decide whether to grant the requests. Section 33R(3) states:

> "(3) The WAIRC may grant the appellant leave to tender new evidence if —
>
> (a) the Commissioner of Police consents; or
>
> (b) the Commission is satisfied that —
>
> (i) the appellant is likely to be able to show that the Commissioner of Police has acted upon wrong or mistaken information;
>
> (ii) the new evidence might materially have affected the Commissioner of Police's decision to take removal action; or
>
> (iii) it is in the interests of justice to do so."

4 Section 33R(4) states:

> "(4) In the exercise of its discretion under subsection (3) the Commission shall have regard to —
>
> (a) whether or not the appellant was aware of the substance of the new evidence; and
>
> (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access,
>
> before his or her removal from office."

5 The requirement in s.33R(4) for the Commission to have regard to whether or not Mr McGrath was aware of the substance of the new evidence, and whether or not it was contained in a document to which he had reasonable access before his or her removal from office applied to the whole of s.33R(3). That is, the Commission is obliged to have regard to those things even when the Commissioner of Police consents to Mr McGrath's requests.

6 We therefore now do so.

7 (1) Mr McGrath seeks to add a new ground 8. This is to the effect that the decision to dismiss was not made within the range of reasonable responses available to the Commissioner of Police and his judgment in part was influenced by the manner in which the media portrayed the officers as guilty and that the sacking of Mr McGrath was imminent; the media portrayal occurred one month prior to the Commissioner of Police's decision to remove him and left the Commissioner no other option than dismissal.

8 The Commission considers new ground 8 merely re-states ground 6 of Mr McGrath's grounds of appeal which is to the effect that he considers it harsh, oppressive and unfair to dismiss Mr McGrath due to adverse publicity which was generated by the Commissioner of Police in circumstances where the same conduct would not have resulted in Mr McGrath's removal if the publicity had not been received. We therefore are unwilling to allow the amendment sought: it does not add anything of substance to the existing ground.

9 Mr McGrath seeks to tender as part of new ground 8 as "new evidence" a newspaper article of 11 January 2004. Having regard to s.33R(4) it is apparent to the Commission that the newspaper article was a document which it is

likely Mr McGrath was aware of before 15 April 2004 when he was removed from office. Had it not been for the consent of the Commissioner of Police it is unlikely we would have granted leave to tender it. However, we do so and given that the newspaper article relates, it appears, to the existing ground 6, the Commission will grant leave to Mr McGrath to tender the article as part of ground 6 and make any further submissions he wishes to make in relation to it.

10 (2) Mr McGrath seeks to submit a newspaper article dated 22 April 2004 with the intention of showing that the idea of the "prank" came from the driver of the car and not himself and that he had only been a reluctant participant who had been swept up in the joke at the time and made a "finger" gesture.

11 We have approached this matter is a similar vein to the matter above. We note that the existing ground 1 is that Mr McGrath's dismissal was unfair on the basis that he should not be held equally accountable with the driver as Mr McGrath was a passive participant. Given that the newspaper article is dated 22 April 2004, being a date after Mr McGrath's removal from office on 15 April 2004, we consider that the newspaper article is "new evidence" and grant leave for it to be tendered. To the extent that in submitting the article Mr McGrath also seeks to amend the grounds of appeal, we do not consider the amendment is necessary in the circumstances and leave to do so is refused. Leave is granted to Mr McGrath to tender the article as part of ground 1 and he may make any submissions he wishes to make in relation to that article.

12 (3) Mr McGrath seeks to submit as "new evidence" copies of newspaper articles and extracts from the "Police Gazette" to show that his dismissal was harsh and that an alternative to his removal was available under s.23 of the Police Regulations. For the purposes of s.33R(4), it is convenient to group the "new evidence" which Mr McGrath seeks to tender.

13 The first group is a series of newspaper articles from September 1993 to August 1994. These articles are documents to which we consider Mr McGrath had reasonable access before his removal from office on 15 April 2004 and we consider it likely therefore that he was aware of the substance of the new evidence. Notwithstanding the consent of the Commissioner of Police we do not grant leave to admit these newspaper articles.

14 The second group is a newspaper article of 28 June 2001. For similar reasons, we decline to grant leave to Mr McGrath to tender the article.

15 The third group is extracts from the Police Gazette between the period July 2001 and October 2002. For similar reasons, we decline to grant leave to Mr McGrath to tender these extracts.

16 The final group is newspaper articles of May 2004 and January 2005. We consider that leave should be granted to Mr McGrath to admit those documents as they are documents which post-date Mr McGrath's removal and to do so as part of ground 4 of his appeal.

17 In summary therefore Mr McGrath is given leave to tender "new evidence" being -

(a) the newspaper article from the "Bunbury Herald" of 11 January 2004 and to place further submissions before the Commission in relation to that article as it relates to ground 6 of his appeal.

(b) the newspaper article from the "South Western Times" of 22 April 2004, and to place further submissions before the Commission in relation to that article as it relates to ground 1 of his appeal;

(c) the newspaper articles of May 2004 and January 2005 and to make further submissions in relation to those articles as they relate to ground 4 of his appeal.

18 In all other respects leave is refused.

19 In accordance with s.33R(6) the Commissioner of Police is now given a reasonable opportunity to consider the new evidence. We will contact the parties to confirm a convenient re-listing date allowing that to occur and suiting the convenience of the parties and the Commission in order to finalise this appeal.

2005 WAIRC 01989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE RUSSELL MCGRATH
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	FRIDAY, 8 JULY 2005
FILE NO.	APPL 718 OF 2004
CITATION NO.	2005 WAIRC 01989

Result	Appeal dismissed
Representation	
Appellant	Mr W. McGrath
Respondent	Mr R. Andretich (of counsel)

Reasons for Decision

1 This is an appeal by Mr McGrath against his removal from the WA Police Force pursuant to s.8 of the *Police Act 1892* on 28 April 2004. The reasons for the Commissioner of Police making the decision are set out in the letter to the Minister for Police

and Emergency Services of 15 April 2004 which in turn was approved by the Minister on 28 April 2004 (AB 5). This followed an investigation commenced by the South West District Police after information was received from Senior Constable Frank Castle involving himself and Mr McGrath who was then a Senior Constable attached to the Bunbury Traffic Office.

The Commissioner of Police's Reasons

2 The Commissioner of Police noted that on 1 August 2001 both officers were on duty involved in traffic patrol in a marked police vehicle. They agreed, for their own amusement, to activate a multanova in Blair Street, Bunbury. They therefore both returned to the Bunbury traffic office to deposit the marked car and to drive an unmarked car from which they removed the rear number plate and obscured the front number plate with a piece of paper on which the words "F… you" had been printed with a computer in the Bunbury office. Both men then fashioned hoods out of material, either cloth or paper towel, which they placed over their heads and uniform for the purpose of avoiding detection.

3 Senior Constable Castle then drove the unmarked vehicle accompanied by Mr McGrath as passenger to Blair Street where the vehicle was monitored and photographed passing the multanova at 8:55pm at a speed of 126km per hour, 66kms above the speed limit at the point on Blair Street. Mr McGrath admits that when the vehicle passed the multanova he held up one of his fingers in a gesture of defiance which was captured by the multanova's photograph. Mr McGrath admitted that he knew it was necessary to exceed the speed limit to trigger the multanova, that he was a willing party to the commission of the offence and that the measures taken in respect of the vehicle used and the hoods was for the purpose of avoiding detection. The officers then drove back to the traffic office where the unmarked vehicle was restored to its original condition and they continued with their duty.

4 The Commissioner of Police noted that Mr McGrath's summary of response commenced with a complete admission except for the material used to fashion the hood. Mr McGrath stated he could not recall being responsible for producing the sheet of paper which was used to obscure the front number plate. The Commissioner of Police noted that Mr McGrath described the conduct as "nothing more than a foolish attempt of humour, then serving as a catalyst to a form of stress relief". The Commissioner of Police provided extracts from Mr McGrath's summary of response to provide some insight why the behaviour was engaged in. Mr McGrath acknowledged that the incident was exposed in November 2003 only after differences arose between himself and Senior Constable Castle. The Commissioner of Police stated that it seemed Mr McGrath regretted the behaviour having been exposed rather than having engaged in it at all. The Commissioner of Police believed that Mr McGrath lacked an appreciation of the seriousness of the conduct he had engaged in.

5 The incident generated a large amount of publicity and concern in the Bunbury area. When it became known that officers acting in the course of their duty were responsible for the commission of an offence it was unsurprising that there were calls for the removal of both officers. The Commissioner of Police stated that it is fundamental that an on-duty police officer who deliberately engages in the commission of an offence which he or she is on duty to detect or prevent demonstrates a complete incapacity for service as a police officer.

6 The Commissioner of Police noted that everyone at some time does something foolish particularly when acting impulsively without thinking carefully about implications and consequences. Provided the resulting actions are not so serious as to prohibit such a cause, isolated errors of judgement do not end an individual's career, even for police officers from whom the community expects high standards.

7 The Commissioner of Police noted he had carefully weighed all the information before him to consider whether this was such an occasion. He had carefully considered whether a disciplinary charge, demotion and resulting substantial drop in salary would meet community expectations; this certainly would have been open if the officers had been off duty, using a privately owned car and the incident was an impulsive prank undertaken in a moment of foolishness. The Commissioner of Police noted that, however, this was a well planned, carefully thought-out sustained series of steps based on deceit which culminated only after they had restored the unmarked police vehicle to its original condition. Worse, it occurred whilst they were on duty and tasked with traffic enforcement: in essence they swapped roles and became offenders in an area of police enforcement for which they were being employed to prevent and detect.

8 In doing so they breached the trust the public places in every officer and acted in defiance of their oath of service. As a law enforcement agency their actions struck at the heart of the Police Service's efforts in road traffic enforcement and ultimately denigrated its mission of making a safer and more secure community. The behaviour of both clearly amounted to serious improper conduct inconsistent with the behaviour expected of members of the police service. The Commissioner of Police was therefore of the view that the matter could not be adequately dealt with under the internal discipline system and believed that the most appropriate resolution for the matter was by way of s.8 of the *Police Act 1892*.

9 The Commissioner of Police stated that he evaluated Mr McGrath's conduct and integrity and did not consider he met the high standard required and expected of a member of the Police Service and accordingly he lost confidence in Mr McGrath's suitability to remain as a member of it.

Mr McGrath's appeal

10 Mr McGrath's appeal is on the following grounds. He said that it is wrong to hold him equally responsible for the incident which occurred because he was a passenger and essentially passive. Further, the incident was meant to be a practical joke and that it is an excessively harsh penalty to be dismissed when taking into account his 16 years of dedicated and disciplined service and his personal efforts to educate himself for the benefit of his career in the police service. He is progressing towards an undergraduate university degree in justice studies. His removal has caused him significant financial detriment; he stated that his financial loss was $25,000 to date.

11 He stated that it is harsh that he was removed when the alternative option was to deal with his conduct by way of a disciplinary charge where a reduction in rank and or transfer from the district would have been a fair and adequate penalty. The effect of such a penalty would result in a substantial drop in salary of $9,000 per year which would satisfy public expectations. He also submitted that it was harsh, oppressive and unfair to be dismissed due to adverse publicity which was generated by the respondent in circumstances where the same conduct would not have resulted in his removal if the publicity had not occurred. Finally, Mr McGrath submitted that since his removal the former Senior Constable Castle has made public comments to the media that should be taken into account as new evidence and information which might have caused disciplinary proceedings rather than removal proceedings to have occurred.

12 At the conclusion of his case Mr McGrath sought leave to tender new evidence. This was not opposed by the Commissioner of Police. For the Reasons set out in a decision which issued on 1 April 2005 (2005 WAIRC 00843), leave was granted to Mr McGrath to tender some, but not all, of the new evidence he sought to tender; the new evidence which was not allowed was that which was not permitted under the legislation largely because it was not new at all but had been known at the time he made his appeal: s.33R(4). The hearing then re-convened on 13 June 2005 to receive further submissions on the new evidence which was tendered.

13 In his initial submissions to the WAIRC, Mr McGrath stated that while he did not dispute that he was the passenger in the vehicle, he played a minor and reluctant role. He only reluctantly agreed to Mr Castle's suggestion regarding the joke. He recognised in hindsight that the incident was very serious but it had not been his idea. In the re-convened hearing, Mr McGrath went further: he stated that the whole idea had been Mr Castle's idea. Mr McGrath said that he did not remove the number plates of the vehicle used and he did not produce the paper to cover the number plate; his own involvement had been only as a "reluctant, stupid passenger". He had not said this at the time he had been interviewed because he had not wanted to "drop in" a fellow officer.

14 In his submissions Mr McGrath acknowledged that he did not stop the incident or even try to stop the incident. He stated that his holding up his finger was not an act of defiance at all, it was actually only ever meant to be a joke. In response to a question from the WAIRC, he also said that holding up his finger did not show someone who was a reluctant participant. Mr McGrath submitted that he did not know the speed of the vehicle at the time it triggered the multanova. He asked the WAIRC to note that it could have been triggered by driving at 62km per hour and there is no evidence that he knew the actual speed of the vehicle because he had not been the driver.

15 Mr McGrath also referred to the details of his personal history as contained in his summary of response to the Commissioner of Police and the references in support of him. He drew the WAIRC's attention to the many distressing and dangerous situations he had encountered as a police officer and of his present personal circumstances. He apologised to the WAIRC, his friends, family and former colleagues and stated that he would certainly be a far better police officer now than he had been at that time.

16 He informed the WAIRC that it was conduct that cannot be condoned and he regretted engaging in the incident at all. He acknowledged that it was conduct unbecoming a police officer although he acknowledged that at the time he was laughing pretty hard about the incident.

17 In his further submissions Mr McGrath submitted that newspaper articles showed that his removal was pre-determined. He stated that a newspaper article on 13 January 2004 stated that the two Bunbury police officers "will not be charged but are likely to be sacked"; this could possibly have influenced the decision of the Commissioner of Police. Another newspaper article of 22 April 2004 contained a report of Mr Castle's motives. The newspaper article stated that Mr Castle had played the prank because he was frustrated at the way the police hierarchy treated him after complaints about his conduct at a Southwest festival. Mr McGrath stated that his circumstances were different: Mr McGrath did not have "an axe to grind"; he was studying and attempting to better himself and he had plans for promotion. He had therefore no reason to have done what he did, he just got "caught up in it all".

18 Mr McGrath also referred to a press report regarding an incident where nine off-duty police officers apparently taunted and humiliated American students from the University of Notre Dame. Mr McGrath referred to reports that only one of the accused officers had been dismissed and submitted that his conduct compared with the six who had not been dismissed showed that his dismissal had been too severe a penalty. Mr McGrath maintained that his conduct should have been dealt with under s.23 of the *Police Act 1892*.

The Response of the Commissioner of Police

19 The Commissioner of Police submitted that the first newspaper article referred to was prior to the decision of the Commissioner of Police and did not show any pre-judgement on the part of the Commissioner. The second article had not been relied upon by Mr McGrath at the time that was most relevant to him, that is in his reply to the Commissioner of Police. As to the comparative treatment of Mr McGrath compared to the incident at the Notre Dame University, the reason why the Commissioner of Police exercises his power under s.8 of the *Police Act 1892* does not depend upon how misconduct is dealt with in other circumstances, it depends upon the assessment of the Commissioner of Police whether an officer is suitable to remain an officer.

20 The Commissioner of Police also pointed out that it is only on this appeal that Mr McGrath has stated that he was an unwilling participant; when he had been interviewed, Mr McGrath stated that he could not remember who had initiated the idea or who had printed-off the notice to cover the front number plate. The relevant issue is what both officers had agreed to do and what they participated in.

Conclusions

21 Although from the point of view of Mr McGrath his removal from the Police Service pursuant to s.8 has the same effect as if he had been dismissed under that Act, he has in fact not been dismissed. The removal of a Police Officer under s.8 is not a dismissal even if the consequence is the same for the officer concerned. The essential difference between a dismissal and the removal of the officer is seen in the reason why each is done: a dismissal is the ultimate penalty in a scale of penalties for conduct unbecoming or misconduct; a removal is where the Commissioner of Police, having regard to the officer's conduct and integrity, loses confidence in the officer's suitability to remain an officer.

22 That essential difference means that when an officer challenges his or her removal, the focus is not whether the penalty was too severe for the conduct or misconduct which occurred; it is whether the fact that the officer committed the conduct or misconduct can fairly lead to the conclusion that the officer is not suitable to be a police officer.

23 Conduct which is destructive of the mutual trust between a police officer and the Commissioner of Police is more likely to mean that removal under s.8 is more appropriate than a disciplinary charge under s.23 of the *Police Act 1892*. It may justify the removal of an officer pursuant to s.8 having regard to the public interest which, by s.33Q of the *Police Act 1892*, is taken to include —

(i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and

(ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

24 Whether the removal of an officer is harsh, oppressive or unfair will depend upon a consideration of all of the circumstances. It is only then that the question can answered: has the Commissioner of Police's right to remove Mr McGrath been exercised so harshly or oppressively against him as to amount to an abuse of that right?

25 This question is the same whether an employee has been dismissed by an employer and claims the dismissal is harsh, oppressive or unfair (it being the question stated by Brinsden J in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union* (1985) 65 WAIG 385 and applied since that time), or whether an officer has been removed under s.8 by the Commissioner of Police (as the WAIRC has stated in the appeal taken by Mr Carlyon against his removal ((2004) 84 WAIG 1395 at [183]).

26 Therefore although Mr McGrath was removed, not dismissed, the question to be asked is the same. In answering the question, the essential difference between a removal and a dismissal means that the WAIRC must not only have regard to the effect

upon Mr McGrath; it must also have regard for the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force and the special nature of the relationship between the Commissioner of Police and members of the Force.

27 We find the relevant facts to be these. Mr McGrath, as a serving police officer of senior constable rank with 16 years' experience, when he was on duty, amongst other things, to detect or prevent speeding and reckless driving, in company with another officer, for no reason:

(a) stopped doing the work he was there to do and returned the marked car to the traffic office yard;

(b) either assisted in disguising an unmarked car or, as he now says, did not assist but reluctantly participated in disguising it, including by the use of an obscenity over the front number plate and removing the rear number plate;

(c) disguised himself with paper or cloth over his head and shoulders;

(d) sat as a passenger in the car while it was deliberately driven at 66kms faster than the speed limit past a multanova in order to activate it;

(e) raised his finger at it when it activated;

(f) returned the unmarked car, assisted in restoring it to its original condition, removed his disguise and returned to duty;

(g) either at the time or soon after, laughed about having done so;

(h) did not act to dissuade Mr Castle or prevent the incident from occurring;

(i) did nothing about it for approximately two years.

28 The material before the WAIRC shows that Mr McGrath did not disclose the incident to any senior officer. Indeed, it was not until Mr Castle informed a senior officer some two years after the event that the involvement of Mr McGrath in the incident came to light.

29 We conclude that the incident was a most serious incident because it occurred during the course of shift and it involved a deception on the part of Mr McGrath regarding his participation in the very conduct that he was on shift to prevent or detect. As the Commissioner of Police observed, Mr McGrath and Mr Castle "swapped roles and became offenders in an area of police enforcement for which they were being employed to prevent and detect".

30 While we appreciate the sincerity with which Mr McGrath has now presented his case, we have not been persuaded that he was the reluctant participant that he now suggests. Mr McGrath raising his finger when the camera flashed shows otherwise. He did not say at the time that he was interviewed that he had been a reluctant participant; he had seen the incident as a joke to be laughed about later; he took deliberate steps to disguise his own appearance and, even if he was not the person who printed the obscenity off the police computer to place over the front numberplate of the car, and even though he was not the driver, he did not try to persuade Mr Castle not to do it. Further, after the event, when he must have known that the speed of the vehicle passing the multanova was a speed significantly in excess of the speed limit, he did nothing to show that he then recognised the action was a serious conflict with his duties as a sworn officer.

31 Mr McGrath submitted that unlike Mr Castle, who had a grievance against an incident which had occurred earlier, Mr McGrath had no reason for doing what he did. We consider, however, that makes Mr McGrath's conduct much harder to explain. Mr McGrath had 16 years' service, he held a senior constable rank and it is not unreasonable to assume that he would understand what conduct was acceptable or unacceptable in a police officer. The fact that he then without any reason participated in a reckless act unacceptable in a police officer, did nothing about it for approximately two years, and only admitted his participation after someone else disclosed it, does call into question his judgment and suitability to be a police officer. We consider that in doing what he did, Mr McGrath's unexplained actions must affect the confidence reposed in him by the Commissioner of Police as the Commissioner has stated. In that event, a disciplinary charge is not likely to be appropriate.

32 We accept that Mr McGrath is now regretful and apologises for his actions. That is, of course, all too late: the appeal is against the decision of the Commissioner of Police on 15 April 2004 that Mr McGrath be removed from the Police Service. It is the task of Mr McGrath to show that the decision made by Commissioner of Police, at the time the Commissioner made it, was harsh, oppressive or unfair. The task of the WAIRC is to consider the circumstances of the decision as it was at the time the decision was made, subject to any new evidence which may be admitted.

33 In his submissions, Mr McGrath insisted that his conduct was a single act of stupidity and did not justify dismissal. We have given consideration to this submission. In an ordinary employment relationship, a single act of misconduct will not ordinarily warrant a summary dismissal; a single act of carelessness or negligence can provide grounds for summary dismissal only if it, or the circumstances surrounding it, show that there has been a deliberate flouting of the essential contractual conditions. The question whether that has occurred is a question of fact and degree. However conduct destructive of the mutual trust between the employer and employee can justify dismissal. Applying that to the facts of this case, we consider that for a senior constable of 16 years' service who is on duty to prevent and detect traffic offences to deliberately and with planning participate in committing the very offence he is on duty to prevent is a clear example of a deliberate flouting of the essential contractual conditions between him and the Commissioner of Police. It is conduct destructive of the mutual trust between them.

34 The incident cannot be passed off as a "practical joke" as Mr McGrath submits in the second ground of appeal. There is no suggestion that anyone other than Mr Castle and Mr McGrath considered the incident a joke. Certainly, the multanova operator did not consider it a joke because, on Mr McGrath's evidence in the interview, the multanova operator called up the traffic office to report the incident and requested, we think ironically, whether there were any police vehicles in the area.

35 The Commissioner of Police has exercised the power given to him under s.8 of the *Police Act 1892* to remove Mr McGrath because he had lost confidence in him. To put the matter another way, the Commissioner of Police lost confidence in a police officer of Senior Constable rank with 16 years' experience, who was held in reasonable regard within the community as well as the Police Service (based upon the references given on his behalf), for the very reason that notwithstanding that rank, seniority and standing Mr McGrath had failed to appreciate at the time he did it the grave seriousness of his conduct. Had he shown the judgment expected of a police officer of that rank, seniority and standing, Mr McGrath would not have participated in the event even as a passive or reluctant participant.

36 Mr McGrath also appeals on the basis that his dismissal was because of adverse publicity generated by the Commissioner of Police or his authorised representatives in circumstances where the same conduct would not have resulted in his removal if the publicity had not been received. With this in mind, we have re-examined the reasons given by the Commissioner of Police for his decision to remove Mr McGrath.

37 We note that the Commissioner of Police refers to the publicity generated some six weeks after the incident by Superintendent Watson in the local newspaper with the multanova photograph being published. We pause to note that the action of Superintendent Watson and the resulting publicity is a measure of how serious the incident was in fact. It reinforces, in our view, that the failure on the part of Mr McGrath to appreciate that seriousness prior to his participation in the event, is telling against him.

38 We do not see any other part of the reasons of the Commissioner of Police as being based upon any resulting publicity from the public exposure that the persons in the photograph were in fact on-duty police officers.

39 The newspaper extract of 13 January 2004 corresponds in time to the completion of the internal investigation. The article states that the constables would be required to show cause why they should not be dismissed. Commander Balchin stated that the investigation had cast serious doubts on their suitability to remain in the Police Service. We consider those comments to be factually correct on the chronology given to us. We do not see the comment within the article that the constables are "likely to be sacked" as capable of generating an expectation that could have influenced the eventual decision of the Commissioner of Police. This latter comment appears to be merely speculation on the part of the journalist given the then current state of affairs, rather than any official statement made by any person involved in the decision making process.

40 The newspaper report of 22 April 2004 notes that "the two officers will almost certainly be sacked from their jobs". We note that this article was two days before the Commissioner of Police wrote to the Minister for Police. We see this article in similar vein to the earlier article referred to: they are both comments relating to the progress of the move to have them removed following the completion of the internal investigation.

41 The final issue raised by Mr McGrath concerns the statement that only one police officer in the Notre Dame incident was dismissed while other officers involved in the incident were not dismissed. Mr McGrath invited us to compare what is understood about the actions of the other police officers with his own actions to support a proposition that his removal was harsh by comparison.

42 As we observed during the hearing, the WAIRC has no detail before us of the Notre Dame incident. This makes Mr McGrath's attempt to draw a comparison somewhat difficult. Where comparative unfair treatment is alleged, as Mr McGrath does in relation to the Notre Dame incident (and wished to do in relation to a number of other incidents which occurred well before he responded to the s.8 Notice but to which he did not refer in his response) it is not appropriate to assume that punishment which appears more lenient on one occasion is the standard by which punishment in a different circumstance on a later occasion should be measured. To put it another way, the punishment that may have been given on the earlier occasion may have been due to particular circumstances not revealed or have been simply too lenient. It cannot be safely used for comparative purposes unless all the facts are the same.

43 Ultimately, the fairness or otherwise of the removal of Mr McGrath will depend upon Mr McGrath's circumstances in the context of the incident which occurred rather than what may, or may not have in a different incident (or which may have occurred on an earlier, and on considerably earlier, press reports of previous events).

44 We consider that the integrity, honesty and conduct of members of the police force was called into question by Mr McGrath's action in company with Mr Castle. The consequences for Mr McGrath have indeed been dire: he has lost his job with its attendant income and standing in the community; this has materially affected him in his personal life as well as directly financially. We find however that the need to maintain public confidence in the conduct and standard of performance of members of the Police Force and the special nature of the relationship between the Commissioner of Police and members of the Force are factors which must outweigh those consequences.

45 We therefore conclude that Mr McGrath has not been able to show that his removal was harsh, oppressive or unfair and accordingly the appeal is dismissed.

2005 WAIRC 01986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE RUSSELL MCGRATH
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	FRIDAY, 8 JULY 2005
FILE NO/S	APPL 718 OF 2004
CITATION NO.	2005 WAIRC 01986

Result	Appeal dismissed
Representation	
Appellant	Mr W. McGrath
Respondent	Mr R. Andretich (of counsel)

Order

HAVING HEARD Mr W. McGrath on his own behalf as the applicant and Mr R. Andretich (of counsel) on behalf of the respondent, the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and the *Police Act 1892* hereby orders -

THAT the appeal pursuant to s.33P of the *Police Act 1892* be and is hereby dismissed.

(Sgd.) A R BEECH,
Chief Commissioner.
On Behalf of the
[L.S.] Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2005 WAIRC 01687

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALEXANDER THOMAS BROOKS
	APPLICANT
	-v-
	BOEING HOLDINGS PTY LTD T/AS BOEING PLUMBING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 26 MAY 2005
FILE NO.	APPL 1037 OF 2004
CITATION NO.	2005 WAIRC 01687

Catchwords	Termination of employment – Contractual benefits claim — Entitlements under contract of employment – Unilateral reduction in employee's salary – Employer purported to unilaterally vary the contract of employment - No application of mistake doctrine - Application allowed – Order for payment of contractual benefits issued – *Industrial Relations Act 1979* (WA) s 7 "industrial matter", s 29(1)(b)(ii).
Result	Order issued
Representation	
Applicant	Mr D Harvey as agent
Respondent	Mr R Collinson as agent

Reasons for Decision

1 The applicant by this application claims that pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") he has been denied a contractual benefit in the sum of $11,187.93 by way of underpayment of wages. The respondent denies that it is indebted to the applicant in the sum claimed or at all.

Facts

2 The factual background is relatively straightforward. The applicant testified that he commenced employment with the respondent as an apprentice plumber on or about 28 July 2003. Prior to his commencement, the applicant testified that he had a telephone conversation with Mr Glenn Hooley, the respondent's assistant manager. In that telephone call, the applicant testified that he discussed the prospect of an apprenticeship with the respondent. The applicant testified that during this telephone discussion, he referred to his work experience and that rates of pay were discussed, but there was no mention of any applicable industrial award. An interview then took place involving the applicant, Mr Hooley and Mr Mark Hooley, the respondent's operations co-ordinator. It was the applicant's evidence that at this interview, the issue of remuneration was discussed and that the applicant was informed that because he was to be a mature age apprentice, he would receive a higher rate of pay with the rate being $426.45 per week translating to $22,175.40 per annum. The applicant was emphatic there was no mention of any award during this interview.

3 The applicant testified that given his past experience as a mature age employee, he would have more to offer the respondent and the respondent was prepared to offer him an apprenticeship on this basis, which he accepted.

4 Some weeks after commencing employment, the applicant testified he noticed on his pay slip that his weekly wage had dropped substantially. Tendered as exhibit A1, were pay slips for the applicant for the pay dates of 20 August, 3 September 2003 and 18 August 2004. The pay slip for 20 August 2003 refers to an annual salary of $22,175.40. The pay slip for 3 September 2003 refers to an annual salary of $12,731.68.

5 The applicant testified that Mr Mark Hooley called him into his office and said that his salary had to be reduced because the respondent company was bound by a Federal award that being the Plumbing Industry (Queensland and WA) Award 1999 and not the relevant State award in relation to apprentices, that being the Building Trades (Construction) Award 1987. The applicant testified that he was given no choice and Mr Hooley simply said "that's it" or words to that effect. The discussion was apparently very brief. The applicant was not happy with this change and this was confirmed by the testimony of Mr Mark Hooley, who said that when he informed the applicant of the reduction in his rate of pay, the applicant shrugged his shoulders but was clearly not happy. According to Mr Hooley, the applicant was said to have said something about the importance of completing his apprenticeship.

6 The applicant testified that he did not accept this situation but had no real alternative because he could not afford to leave his employment given his then personal circumstances. He also said that he did not have access to a computer or even a mobile telephone, and was working full time. He did however ultimately commence seeking other employment. It was not until some months later in February 2004, that the applicant had a meeting with Mr Arnold, the respondent's general manager. The applicant said he again raised the issue of his wage reduction and said that he had done some research into the issue and felt that the question of State or federal award coverage had no bearing on the agreement he reached with the respondent and that his salary had been reduced by approximately 42%. Mr Arnold, on the applicant's evidence, committed to getting back to the applicant about this matter but he never did on the applicant's testimony. Mr Arnold recalled this meeting but wasn't sure whether it was in his office or in the respondent's car park. In any event, he did recall the applicant raising the issue with him and the fact that the applicant informed him that he could not afford to live on his reduced income.

7 Mr Glenn Hooley could not recall the telephone call with the applicant prior to his interview, but did say that during the interview he only referred to the "award rate" in terms of the applicant's rate of pay as an apprentice. He testified that he did not know the actual rate of pay but also added that when he found out after discussing the matter with the respondent's accountant after the applicant commenced employment, that there was to be a reduction, he then spoke to the applicant about paying the higher rate and informed the applicant that he would need to put in extra effort as a consequence. Importantly, Mr Glenn Hooley could not recall whether his discussion with the respondent's accountant was prior to or after the interview with and subsequent engagement of the applicant as an apprentice. Otherwise, Mr Glenn Hooley's recollection of these events was not particularly good.

Consideration

8 It is necessary for the applicant to establish his claim to a contractual entitlement as particularised in his application. The relevant principles in relation to matters of this kind are well settled in this jurisdiction and I simply refer to the decision of the Full Bench in *Hotcopper v Saab* (2001) 81 WAIG 2704 in that regard. It is incumbent on the applicant to establish that his claim relates to an industrial matter; that he is an employee; that he is employed under a contract of service; that the benefit claimed is an entitlement under his contract of service; that the benefit does not arise under an award or order of the Commission; and that the benefit must have been denied by the employer.

9 There is no issue in this matter that the applicant was at the material times an employee and the subject matter of his claim is an industrial matter for the purposes of s 7 of the Act. The agent for the respondent Mr Collinson argued that it was an express term of the applicant's contract of employment that it be in accordance with the "applicable award" and therefore, the respondent being bound by the federal award that was the rate of pay contracted by agreement. In the alternative, his submission was that in any event, the applicant consented to the reduction in his rate of pay, following his discussion with Mr Mark Hooley, and his failure to follow the matter up in a more timely manner, was evidence of that fact.

10 On the other hand, the agent for the applicant Mr Harvey, argued simply that the applicant had agreed on a rate of pay at the interview he attended, was paid that rate of pay for some weeks and it was reduced without his agreement. The applicant simply seeks to recover what is due to him.

11 It is first necessary for the Commission to make findings of fact. There is a conflict in the evidence between the applicant and the respondent as to most importantly, what was discussed and agreed at the interview prior to the applicant's engagement as an apprentice. Having carefully considered this issue, and observed the witnesses testify, I prefer the applicant's version of events. The applicant was emphatic in his recollection of the matters discussed both over the telephone and during the course of the interview for employment. His testimony that he raised the question of his wages, being an adult apprentice with financial commitments, as being a matter of common sense, strikes me as something a person in the applicant's position would raise regarding any future employment. Additionally, both Messrs Glenn and Mark Hooley did not have a good recollection of the interview and Mr Glenn Hooley could not at all recall the telephone conversation with the applicant. The applicant's testimony is also consistent with the terms of exhibit A1 that being the relevant pay slips furnished by the respondent. Moreover, Mr Glenn Hooley, as noted above, could not recall whether he had the discussion with the respondent's accountant prior to or after the interview with the applicant. If the discussion was prior, and he was informed of the higher rate of pay at that time, then that would be entirely consistent with the applicant's testimony as to the discussion at the interview.

12 I am therefore satisfied that the applicant accepted an offer of employment as an apprentice plumber with the respondent at a weekly rate of wage of $426.45 per week or $22,175.40 per annum. I am also satisfied that there was no reference to any award at the time the applicant accepted the offer of employment. Even if there was, I note that at the material time, that being July 2003, the minimum rate of pay for an adult apprentice, 21 years of age or over, was not less than $406.70 per week or $21,148.40 per annum: *State Wage Case 2003* (2003) 83 WAIG 1899. Therefore, in any event, the rate of pay agreed between the applicant and the respondent, on the evidence consistent with my findings, was in excess of that prescribed by any relevant award and it is trite to observe that in those circumstances, the entire amount may be prosecuted as a non-award contractual benefit as a single debt due and owing*: Roberts v Groome* (1984) 64 WAIG 774; *Steele v Tardiani and Ors* [1946] 72 CLR 386; *Mason v Bastow* (1989) 70 WAIG 19.

13 I am therefore satisfied and I find that the applicant has established that he was an employee employed pursuant to a contract of service with the agreed rate of annual salary as claimed and that that rate of salary was not a rate prescribed by an award or order of this Commission under the Act.

14 The next issue is whether there was any agreement to vary the rate of pay when the rate was reduced from $22,175.40 per annum to $12,731.68 per annum some weeks after the applicant commenced employment. I am not to any extent satisfied that the applicant so agreed. It was plain on the evidence that the applicant was not given any option as to this issue and he was simply informed by the respondent that his rate of pay would be, if it had not already been, reduced. The evidence of the applicant was consistent with that of Mr Mark Hooley that the applicant was not at all happy with this change. I also do not accept that merely because the applicant remained in employment, that he thereby, on the respondent's submission, accepted the variation to his contract of employment. I dealt with a not dissimilar issue in *Catena v Bell Potter Securities Ltd* (2003) 83 WAIG 3151 in relation to whether, in the face of a unilateral repudiation by an employer of the contract of employment, remaining in employment constituted tacit acceptance of the variation, I said at 3153 as follows:

> *"As to the proposition that employees were informed that if they remained in employment then they would be taken to accept the variation, I am not persuaded to this view on the evidence. On the evidence I find that the respondent simply announced its decision and informed the employees, including the applicant, in blunt and offensive terms, that they could either stay or go but the reduction in remuneration would apply. Simply because the applicant remained in the employment for a period of time, clearly under protest, did not amount to consenting to the variation to his contractual arrangements. On any view of the evidence, the respondent repudiated the applicant's contract of employment, and the applicant did not accept that repudiation. He was contractually bound to remain in employment which he did: Belo Fisheries v Froggett (1983) 63 WAIG 2394 per Kennedy J at 2395.*

Counsel for the applicant also referred to a decision of the House of Lords in Rigby v Ferodo (1988) ICR 429. In this case, the employee was a lathe operator and had been employed since 1964. In 1982, the employer encountered serious financial difficulty and as a result, reduced the wages of all employees by five per cent. The union, of which the employee was a member, did not expressly accept or reject the proposed reduction on behalf of the employees. The employees did not consent to this change. In 1984, the employee commenced proceedings for damages for breach of contract. At first instance, Ognall J held that the employer had underpaid the employee and ordered damages be assessed.

On appeal to the Court of Appeal, the employer's appeal was dismissed. In the House of Lords, in relation to the question of the employee's acceptance or otherwise of the variation to his contract, Oliver LJ said at 34-35 as follows:

> *"Whatever may be the position under a contract of service where the repudiation takes the form either of a walk-out by the employee or of a refusal by the employer any longer to regard the employee as his servant, I know of no principle of law that any breach which the innocent party is entitled to treat as repudiatory of the other party's obligations brings the contract to an end automatically. No authority has been cited for so broad a proposition and indeed Mr. Wingate-Saul has not contended for it. What he has submitted is that where there is a combination of three factors, that is to say, (a) a breach of contract going to an essential term, (b) a desire in the party in breach either not to continue the contract or to continue it in a different form and (c) no practical option in the other party but to accept the breach, then the contract is automatically brought to an end. My Lords, for my part, I have found myself unable either to accept this formulation as a matter of law or to see why it should be so. I entirely fail to see how the continuance of the primary contractual obligation can be made to depend upon the subjective desire of the contract-breaker and I do not understand what is meant by the injured party having no alternative but to accept the breach. If this means that, if the contract-breaker persists, the injured party may have to put up with the fact that he will not be able to enforce the primary obligation of performance, that is, of course, true of every contract which is not susceptible of a decree of specific performance. If it means that he also has no alternative to accepting the breach as a repudiation and thus terminating the contract, it begs the question. For my part, I can see no reason in law or logic why, leaving aside for the moment the extreme case of outright dismissal or walk-out, a contract of employment should be on any different footing from any other contract as regards the principle that "an unaccepted repudiation is a thing writ in water and of no value to anybody": per Asquith L.J. in Howard v. Pickford Truck Co. Ltd [1951] 1 K.B. 417, 421.*
>
> *My Lords, the one thing that is clear in this case is that the appellant had no intention whatever of terminating the contracts of employment with its workforce except by compelling the acceptance of new contractual terms which Mr. Rigby and his fellow C.S.E.U. members were, as they made it quite clear, unwilling to accept and which they never did accept. Faced with that situation the appellant could have chosen to terminate their contracts on proper notice. It chose not to do so. It continued to employ them, week by week, under contracts which entitled them to a certain level of wages but withheld from them a part of that entitlement. I can, in those circumstances, see no answer at all to Mr. Rigby's claim and the trial judge and the Court of Appeal were, in my judgement, plainly right in the conclusions at which they arrived.*
>
> *It has been submitted that there was some sort of implied acceptance on the part of Mr. Rigby of the appellant's repudiation by working on. At the trial this was put on the basis of estoppel, waiver and acquiescence. All three were rejected by the trial judge and, in my judgement, he was, on the facts which he found, quite plainly right to reject them. I can, for my part, see no other basis upon which it can be argued that the continued working by Mr. Rigby and his acceptance for the time being and under protest of the wage that the appellant, with full knowledge of his lack of agreement, chose to pay him is to be construed as an acceptance by him either of the repudiation by the appellant of the original continuing contract or of the new terms which the appellant was seeking to impose."*

15 In my opinion, similar observations apply in this case. Additionally, not only was the applicant contractually bound to serve the respondent as an employee and to continue to do so pursuant to his contract of service as an apprentice, he was also subject to and bound by an apprenticeship agreement with the respondent which imposed reciprocal obligations on the parties in that regard also. In my opinion, it is simply not open to suggest, as the respondent has, that there was implicit acceptance of the respondent's unilateral repudiation of the contract.

16 It was also somewhat faintly submitted by the respondent that the doctrine of mistake may entitle the respondent to relief in this matter. I am not persuaded that this is so. The only possible doctrine of mistake at common law that may be said to be brought into play in this matter is unilateral mistake. That is where one party to a contract makes a mistake fundamental to its terms to vitiate the bargain and the other party is or should have been aware of the error. In these cases there is generally a requirement that for the mistaken party to be entitled to relief, the other party must have acted unconscionably. In *Taylor v Johnson* (1983) 151 CLR 422 [57 ALJR 197; 45 ALR 265], Mason ACJ, Murphy and Deane JJ held that:

> *"[A] party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension."*

17 There were no such circumstances in existence in this matter. I am satisfied that the applicant has established his claim and that he is entitled to an order in his favour in respect of the contractual debt due and owing being the balance of the rate of pay claimed, that being $11,187.93, which amount, I should add, was not in dispute.

18 I order accordingly.

2005 WAIRC 01841

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALEXANDER THOMAS BROOKS
	APPLICANT
	-v-
	BOEING HOLDINGS PTY LTD T/AS BOEING PLUMBING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 21 JUNE 2005
FILE NO.	APPL 1037 OF 2004
CITATION NO.	2005 WAIRC 01841

Catchwords	Industrial law - Reasons for decision and minute of proposed order previously issued by Commission - Request for a speaking to the minutes by the respondent - Commission determined that matters raised were not capable of being raised in a speaking to the minutes - Minute of proposed order reflected Commission's reasons for decision - Amendment made prior to delivery of the final order of Commission's own motion - *Industrial Relations Act 1979* (WA) s 27(1)(m).
Result	Order issued
Representation	
Applicant	Mr D Harvey as agent
Respondent	Mr R Collinson as agent

Supplementary Reasons for Decision

1 A minute of proposed order was issued by the Commission on 26 May 2005 in respect of this matter. In a letter dated 3 June 2005 the agent for the respondent requested a speaking to the minutes. The matter was listed for a hearing in this regard on 14 June 2005.

2 The agent for the respondent raised issues relating to an alleged discrepancy in the amount claimed by the applicant, indicating that the Commission may have mistaken the respondent's concession in respect of the amount claimed. There were also other matters raised in the respondent's agent's letter going to deductions that it maintained should be made to any final order to issue.

3 The Commission determined that the matters raised by the respondent were not matters capable of being raised in a speaking to the minutes on the basis that the minute of proposed order reflected the Commission's reasons for decision. The agent for the respondent was invited to make another application should he wish to do so. The Commission briefly adjourned to allow the agent for the respondent an opportunity to seek instructions as to these issues. Following the brief adjournment, the agent for the respondent advised the Commission that he no longer wished to pursue the matters previously raised.

4 The Commission is not, until the minute of proposed order is perfected, functus officio. In the absence of an application by the respondent for leave to re-open, the Commission itself is able to correct any errors or omissions prior to the delivery of the final order pursuant to s 27(1)(m) of the Industrial Relations Act 1979 ("the Act"): *Aussie Online Limited (ACN 004 160 927) v John Lane* (2001) 81 WAIG 2511. The power conferred on the Commission by s 27(1)(m) is broad. It is in the public interest as well as the interests of the parties to the proceedings, that any unintended consequences of a determination by the Commission be averted. On a review of the record of the proceedings, it appears that the Commission may have misapprehended the concession made by the agent for the respondent as to the sum in issue between the parties. The Commission has however, based on the uncontested evidence adduced in the proceedings, calculated the amount paid to the applicant over his employment as against the amount he should have been paid based on the findings the Commission has made. This is based on the terms of exhibit A1, containing payslips for the applicant from the commencement of his employment, including the periods where his rate of pay was unilaterally reduced to $12,731.68 per annum in or about 3 September 2003 and was subsequently increased to $16,870.88 per annum in or about 18 August 2004. Adopting this method of calculation, the Commission has determined that the amount to be awarded to the applicant should be amended, with the revised amount being $11,170.86.

5 A revised minute of proposed orders now issues.

2005 WAIRC 01870

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALEXANDER THOMAS BROOKS
	APPLICANT
	-v-
	BOEING HOLDINGS PTY LTD T/AS BOEING PLUMBING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 JUNE 2005
FILE NO/S	APPL 1037 OF 2004
CITATION NO.	2005 WAIRC 01870

Result	Application upheld. Order issued.
Representation	
Applicant	Mr D Harvey as agent
Respondent	Mr R Collinson as agent

Order

HAVING heard Mr D Harvey as agent on behalf of the applicant and Mr R Collinson 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 respondent pay to the applicant the sum of $11,170.86 as a denied contractual benefit less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 21 days of the date of this order.

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

2005 WAIRC 01792

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID SANDERS **APPLICANT**
	-v-
	SOILAND PTY LTD **RESPONDENT**
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 10 JUNE 2005
FILE NO.	APPL 1452 OF 2004
CITATION NO.	2005 WAIRC 01792

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Direction to work unreasonable overtime - Principles in relation to reasonable overtime applied - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 114; *Transport Workers (General) Award No. 10 of 1961*.
Result	Declaration made that the Applicant unfairly dismissed. Respondent ordered to pay the Applicant $5,281.48 as compensation.
Representation	
Applicant	Mr N Hodgson (as agent)
Respondent	Mr A Beer

Reasons for Decision

1 This is an application by David Sanders ("the Applicant") made under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") for orders pursuant to s 23A of the Act. The Applicant claims that he was summarily dismissed by Soiland Pty Ltd ("the Respondent") on 18 October 2004 and his dismissal was harsh, oppressive and unfair.

Background

2 The Respondent's business operates six days a week. Their business is to deliver soils and mulches to garden centres and members of the public. The Respondent also collects green waste for local government authorities. The Applicant was employed by the Respondent as a truck driver and his job was to pick up and deliver soil, garden mixes and mulches. The Applicant commenced employment with the Respondent as a casual employee on 2 March 2004. The Applicant became a permanent employee of the Respondent on 24 April 2004. Whilst engaged as a casual and a permanent employee his hours of work varied. The Applicant's employment was terminated after he informed his employer he was not available to work on Saturdays. The Applicant says that he refused to work on Saturdays because of his family circumstances. In particular, he says his family responsibilities required him to spend more time with his children and his wife. His usual start time was 6:00 am and he finished work when he completed his deliveries for the day. During the period the Applicant was a casual employee, his hours of work varied from 9.75 hours to 54.5 hours per week. After the Applicant became a permanent employee, the Applicant usually worked in excess of 50 hours a week. During that time when he worked Saturdays, he worked up to 69 hours a week.

3 The Respondent says that it was a condition of the Applicant's employment that the Applicant work on Saturdays. The Respondent says that after the Applicant consistently refused to work on Saturdays, the Applicant was dismissed for disobeying a lawful order.

4 It is common ground that the Applicant's terms and conditions of employments were covered by the provisions of the *Transport Workers (General) Award No. 10 of 1961* ("the Award"). It is also common ground that the Applicant's rate of pay whilst employed by the Respondent was $14.76 per hour. The Applicant says that pursuant to clause 12(3)(a) (now clause 3.2.2.1) of the Award the Respondent was only lawfully entitled to direct him to work "reasonable overtime" and the requirement by the Respondent that he work Saturdays was in all circumstances unreasonable.

The Evidence

5 The Applicant testified that prior to commencing work for the Respondent; the only information given to him about the job was from another truck driver employed by the Respondent who told him that the Respondent was a good employer because they were flexible about Saturday work. The day after he spoke to this driver the Respondent's Transport Manager, Mr Colin Constantine, telephoned the Applicant and asked him to come in for an induction as he had the job. The Applicant says that

the first time he became aware that he would have to work on Saturdays was when he attended the induction and was informed by Mr Constantine that he had to work each Saturday. He says that if he had been informed prior to commencing work that he had to work every Saturday, he would not have taken the job. However, when cross-examined about this issue he agreed that he had completed an employment application form dated 27 February 2004 (which was prior to the commencement of his employment). He said, however, he received a lot of documents at his induction. In the employment application form, the Applicant was requested to tick the following boxes, which indicated his availability for work. He did so as follows:

"If required, are you prepared and available to work:

Afternoon Shift	Yes ☐	No ☑	Night Shift	Yes ☐	No ☑
Weekends	Yes ☑	No ☐	Public Holidays	Yes ☑	No ☐

If requested would you be able to work outside of normal hours? (Regularly)

Occasionally ☐ Rarely ☐ No☐ Would you be able to work alone ☑

Remote Location ☐ *No*

What is your preferred location: *Perth"*

6 When asked what he meant by circling "Regularly" on the form, he said he wanted to work overtime but he did not think it would mean working every Saturday. After he commenced work, the Applicant enjoyed his job. He had an excellent working relationship with those he worked with and he got on very well with the Respondent's customers. He said, however, that not long after he commenced work for the Respondent, he had problems at home because he was working on Saturdays. The Applicant is the father of two girls from a previous marriage who are 11 and 14 years old. His wife, Deborah Sanders, has two girls from a previous marriage aged 12 and 15 years old who live with her and the Applicant. They also have a son who is almost 2 years old. The Applicant's two girls from his previous marriage visit his home every second weekend and he picks them up at 5:00 pm on Friday and returns them to their mother's house at 5:00 pm on the following Sunday night. The Applicant explained that when he worked on a Saturday, he had to go to bed by 8:30 pm on Friday night and usually when he went to bed at that time the children were still up and he did not have an opportunity to spend sufficient time with them.

7 About six weeks after he commenced work on 2 March 2004, the Applicant approached Mr Constantine and asked him whether he could work alternative Saturdays because he wished to spend time with his children from his previous marriage when they visited every second weekend. Mr Constantine agreed to this arrangement. The Applicant then worked every second Saturday until about three weeks before his employment was terminated.

8 The Applicant testified that when he worked on a Saturday, he usually worked up to 70 hours that week and when he worked Monday to Friday he worked approximately 60 hours each week. However, when cross-examined the Respondent put to the Applicant a record of all the hours worked by him and it became clear that the Applicant did not work in any one week 70 hours. However, from the time he became permanent until his employment was terminated, Exhibit 8 records that the Applicant's hours of work each week varied from 51 hours to 69 hours each week. In some of these weeks, the Applicant worked Saturdays and in others he did not. When he was a permanent employee and worked on Saturdays, his hours of work varied from 62 to 69 hours. When he did not work Saturdays, his hours varied from 51 to 59 hours. (I have not taken into account the weeks when public holidays occurred as public holiday hours are not accounted for in Exhibit 8.)

9 The Applicant testified that on a Friday night, about three weeks before his employment was terminated, he and his wife received a telephone call informing them that his father-in-law had possibly had a heart attack. The Applicant said that his wife became very distressed about this news, so he telephoned Mr Constantine and told him that he was unable to come into work the next day, which was a Saturday. The Applicant says that Mr Constantine was very understanding and said, "Okay, but don't make a habit of it." Over the weekend the Applicant and his wife decided that life was too short for him to continue working long hours, as doing so put too much pressure on his family. They agreed he would speak to Mr Constantine on the following Monday and tell him that he would not be available anymore to work on Saturdays. The Applicant spoke to Mr Constantine on the following Monday. Mr Constantine told him it was not an option for him (the Applicant) not to be available to work on Saturdays as the Respondent ran a six-day operation. Mr Constantine also told him he was doing the wrong thing and he could go about it the right way or the wrong way. Mr Constantine gave him an option to resign and return as a casual employee and still work five days a week. Mr Constantine told him that the right way would be to resign and be re-employed the following Monday as a casual as they were short of drivers, but the wrong way was to continue to refuse to work Saturdays and if he did that he (the Applicant) would not work as a truck driver again.

10 The Applicant testified that working as casual was not an option for him, as he had plans to purchase a house. He said you cannot obtain a mortgage to purchase a house or obtain a car loan if you are a casual employee. Mr Constantine told him that if he refused to work on Saturdays he would receive a written warning on each occasion he refused until he had been given three written warnings. Then he would be "out the door". He explained to Mr Constantine that he did want to work but he could not work on Saturdays. The Applicant says that he talked with Mr Constantine every day about not working on Saturdays and explained to him that his wife had a history of depression, his son was very young and he (the Applicant) needed to spend more time with his family. He said he also explained it was too much for his wife to look after their infant son by herself and he was very concerned about his wife because of her father's illness.

11 The Applicant spoke to an organiser employed by the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch ("the Union"), Mr Tim Dawson, who became involved in the discussions. Mr Dawson and the Applicant debated this issue with Mr Constantine for several weeks. On two consecutive weeks, the Applicant received written warnings for not attending work. On Tuesday, 5 October 2004, he received a warning after he failed to work on Saturday, 2 October 2004. The second notice was issued on Tuesday, 11 October 2004, after he refused to work on Saturday, 9 October 2004. On Friday, 15 October 2004, Mr Constantine asked the Applicant whether he was coming to work the following day (Saturday) and the Applicant said, "No." Mr Constantine then said to him, "When you come to work next Monday, do not bring your lunch as you will be 'getting the boot'." The Applicant says that he arrived at work the following Monday at 5:45 am. He spoke to Mr Constantine shortly thereafter. Mr Constantine gave the Applicant a third warning letter, told him he was terminated and asked him to sign a release form for superannuation. The Applicant was paid for the hours he worked up to the date of termination, one week's pay in lieu of notice plus accrued annual leave.

12 It was contended by the Respondent that the Applicant had refused to work Saturdays to reduce his income, so as to reduce his Australian Government Child Support Agency ("the CSA") payments. The Applicant disagreed that was the reason he refused to work on Saturdays. In support of this contention the Respondent put three documents to the Applicant. The first was a memorandum dated 11 June 2004 from the Respondent's payroll manager, Lynda Anderson, in which Ms Anderson provided to the CSA an estimate of the Applicant's year to date earnings and a payroll summary of payments made to him from 5 March 2004 until 4 June 2004. In that memorandum dated 11 June 2004, she stated as follows:

"Please find enclosed a year to date earnings report for David Sanders. It is difficult to estimate his yearly income due to our business being seasonal. As winter is approaching we become quiet and overtime will be reduced.

By using the report enclosed I can conclude some 'rough' figures for you.

$14038.20 / 14 wks (employed)	$1002.72 week
$1002.72 * 52	$52141 per annum"

13 In the second document dated 30 June 2004, Ms Anderson stated:

"As of the week ending 03rd July 2004 Mr Sanders will be ceasing to work Saturday's [sic]. This will reduce his overtime dramatically and his salary will also be reduced by approximately $10000 per annum. Please find enclosed a pay slip reflecting these changes."

14 The third document is a letter addressed to Ms Anderson from the Regional Registrar of the CSA, asking for the completion of a form headed Confirmation of a Person's Employment, in which the Applicant's name is stated as the employee in relation to which they sought information. When cross-examined about those documents, the Applicant testified that he had not seen these documents before. He, however, agreed that he had requested Ms Anderson to provide information to the CSA, as the CSA requires him to provide information about his income each year and whenever there is any change in his level of his income.

15 The contents of a statutory declaration made by Mr Constantine on 18 February 2005, was also put to the Applicant in cross-examination. In the statutory declaration, Mr Constantine says, "The first inclination I had of David and his desire not to work Saturdays was after he came to me and made a request for a letter from the Company to say that he only receives between $35,000 and $40,000 per annum, as he needed it for the Child Support Agency which would influence his Child Support payments. I wouldn't agree to that. So he went to the Payroll Manager, Lynda Anderson who also refused to provide such a letter." The Applicant denied that he had such a conversation with Mr Constantine. He, however, agreed that he did ask for Ms Anderson to provide information to the CSA. Mr Constantine then says in his statutory declaration, "Two or three days after this, which would have been approximately the end of May or early June 2004 David said he could only work every 2nd Saturday. I said that shouldn't be a problem I can use a casual." The Applicant agreed that this statement was correct. Mr Constantine then says in his statutory declaration, "Then approximately two weeks later David told me he couldn't work any Saturdays. I ask [sic] him why and he said he could make more selling bits and pieces for cash. I told him that would be unacceptable and suggested he look for other employment, which might be more suitable. David said he would go to the Union. I said don't worry I speak to them myself and did." The Applicant denied that he had told Mr Constantine that he would make more selling bits and pieces for cash. However, he agreed that sometime later Mr Constantine told him that it would not be acceptable that he (the Applicant) not work on Saturdays and for him to look for other employment. The Applicant says that Mr Constantine did not call in the Union, he did.

16 After the Applicant's employment terminated he obtained casual employment almost immediately. After four weeks, he commenced a permanent position and now earns $950 per week or a flat rate of $19.00 an hour. During the four week period prior to commencing the permanent position, he earned a total amount of $1,750 (gross) in casual earnings. The Applicant gave uncontradicted evidence that whilst he was employed by the Respondent he earned approximately $1,100 per week and he now receives about $150 per week less than he was earning before. In the Applicant's current position he is not required to work on Saturdays. He said his hours in his new position vary but he works approximately 50 hours per week.

17 Deborah Sanders gave evidence that she has been married to the Applicant for four years. She said that each day the Applicant went to work for the Respondent he got up at 4:30 am. On the Saturdays he worked, he sometimes arrived home by 2:30 pm but it was usually about 4:30 pm. Ms Sanders testified that she enjoys all the children and has fun with them but when the Applicant is at home she enjoys the children even more. She says that when the Applicant entered into the arrangement to work every alternative Saturday in July 2004, he did so at her instigation because she was concerned that he needed to keep up his communication with his children from his previous marriage, as his ex-wife had become critical that he was not home the whole weekend when the children came to see them. Consequently, she became concerned that the Applicant's ex-wife would stop them from seeing his children. She also testified that it became more and more stressful at home when the Applicant was working on Saturdays even when his children were not there and her girls were at their father's house, as she needed the Applicant at home to help care for their son. She said that she suffers from depression, which had been diagnosed 10 years previously but she had another bout in August 2003 and had not recovered. She became resentful that the Applicant was working alternate Saturdays and her depression worsened when she received a telephone call about her father's heart attack in the beginning of September 2004. At that time, she felt she was "going downhill". She needed help with her son and the night she received the telephone call about her father was a "breaking point". She said that they had discussed before that he should not work on Saturdays and they discussed it again. She said that although she did not want people to know that she suffered from depression, she wanted the Applicant to speak to Mr Constantine about her condition.

18 Other than to challenge the fact that Ms Sanders did not produce any medical evidence about her depression, Ms Sanders' evidence was not substantially challenged in cross-examination.

19 The Respondent elected not to call any witnesses to give evidence in the proceedings but sought to rely upon the statutory declaration made by Mr Constantine and the documents tendered in cross-examination.

Submissions

20 The Respondent contends that it operates six days a week. It says that it is common practice in the transport industry that truck drivers work long hours and it was reasonable to require the Applicant to work on Saturdays. Further, the Respondent says the evidence establishes that prior to commencing employment the Applicant accepted it was a condition of his employment that he make himself available for work on Saturdays. The Respondent contends the real reason why the Applicant did not want to work on Saturdays was because he wanted to reduce his CSA payments. Further, it says that the Applicant was not dismissed unfairly because it made the offer to him to work as a casual employee. The Respondent also says the evidence given by the Applicant about his level of income with his new employer, should not be accepted by the Commission and there is insufficient evidence before the Commission that he took adequate steps to mitigate his loss by seeking work as soon as his employment was terminated. In all the circumstances the Respondent says that the Applicant's application should be dismissed.

21 It is contended on behalf of the Applicant that the Respondent's argument that it was a condition of his contract of employment he work on Saturdays should be rejected, as pursuant to s 114 of the Act parties cannot contract out of the Award. In particular, it is argued the parties cannot contract out of clause 12(3)(a) of the Award which only enables an employer to direct an employee to work "reasonable" overtime. The Applicant says that in all the circumstances the requirement by the Respondent for the Applicant to work on Saturdays in October 2004 did not constitute a direction to work "reasonable overtime". In support of the Applicant's submissions, the Applicant's agent tendered a document containing calculations of the

cost of nine hours' work on a Saturday if payment was made to the Applicant and to a casual employee, which showed the difference in cost to the Respondent if they engaged a casual on a Saturday was $25.09. However on checking the calculations the actual difference in cost to the Respondent appears to be $50.25.

Credibility

22 It became clear when the Applicant was cross-examined about his recollection of how many weeks prior to the termination of his employment he ceased to work overtime on Saturdays his recollection was not entirely reliable. It appears from his hours worked (Exhibit 8) that the Applicant would have been due to work on Saturday, 18 September 2004, which was four weeks before his employment was terminated on 18 October 2004, and not three weeks. However, it was apparent this document was not made available to the Applicant until he was cross-examined. In my view his recollection in relation to this issue is not material. I do not accept the Applicant's evidence that he would not have taken the job if he knew he had to work on Saturdays, as it is plain that he filled out an application for employment, which indicated that he was willing to work on weekends regularly. Notwithstanding these findings, I did not find the Applicant to be generally an unreliable witness. It is plain from the application form that the number and frequency of hours of overtime he would be required to work during the week and on weekends was not set out or indicated in the document. Further, I accept the Applicant's evidence that after he had worked Saturdays regularly for a period of time that he realised working long hours did in fact affect his obligations and duties to his children and his wife. I am satisfied that the Applicant's wife was a credible witness. Her evidence was not substantially challenged in cross-examination. I do not accept the matters set out in Mr Constantine's statutory declaration where they conflict with the evidence given by the Applicant, as Mr Constantine was not called to give evidence in these proceedings and his statement was not able to be tested in cross-examination. When the principles enunciated by the High Court in *Jones v Dunkel* (1959) 101 CLR 298 are applied, the Commission is entitled to take into consideration that where there is one person who could have given evidence to refute the Applicant's evidence and that person has not been called by the Respondent, the Commission is entitled to draw the inference that that person's evidence would not have assisted the Respondent's case. Nor was Ms Anderson, the Respondent's payroll manager, called to give evidence. Accordingly, I find that the Applicant's reason for not wishing to work on Saturdays each week or each fortnight was because it interfered with his obligations and duties as a father and as a husband.

Legal Principles – Reasonable Overtime

23 The requirement in the Award that an employer only has a right to direct an employee to work reasonable overtime is a common provision found in awards of this Commission and other industrial tribunals in Australia. Such provisions have a very long history (see, for example, the discussion in the *Forty-hour Week Case* (1947) 59 CAR 581). Since that time there have been no hard or fast rules or adoption of any particular formulae by industrial tribunals for ascertaining a number of hours an employee can be directed to work overtime. In the C P Mills and G H Sorrell, *Federal Industrial Law* (5th ed) at paragraph [214], the learned authors observed in relation to the requirement to work reasonable overtime:

> "Questions as to the reasonableness of the employer's request to work overtime are to be determined in relation both to the employee's conditions and the employer's business: *Metal Trades Employers' Association v Boilermakers Society of Aust* (1960) 4 FLR 333 noted 105 CAR 961. On the employer's side, 'reasonable' overtime is not limited to that required for essential maintenance and production work: *Aust Glass Manufacturers Co Pty Ltd v Amalgamated Engineering Union* (1960) 1 FLR 302; 105 CAR 971n, but the regular working, say of 10 or more hours overtime each week, without any effort to organize a method of work that would avoid that extent of overtime, would probably be unreasonable: *Metal Industries Association of SA v Federated Moulders (Metals) Union* (1963) 105 CAR 1015. On the employee's side, it would be relevant to consider the amount of overtime worked earlier in the same week, the conditions of the working place, his personal state of health and his commitments outside his employment, but an employer who is seeking to establish that his request that the employee should work overtime is reasonable, does not have to adduce information on matters that are entirely within the mind of the employee: *Re Vickers Ruwolt Pty Ltd* (1962) 105 CAR 989 esp per Dunphy J, at 996-7. In the last-mentioned case, his Honour pointed out that what is meant by reasonable overtime in this context is a question of law, or at least a mixed question of law and fact, and involves the exercise of the judicial function. See also *Re Liquor Trades (Hotels and Wine Saloons) Award* (1963) 5 FLR 89; 105 CAR 987n."

24 Since the provisions restricting an employer's right to direct an employee to work reasonable overtime have been formulated, industrial tribunals have interpreted such provisions as requiring an employer to consider not only their own requirements but an employee's conditions and personal circumstances. In *Metal Trades Employers Association v Boilermakers Society of Australia* (1960) 4 FLR 333 at 334, Dunphy J with whom Morgan J agreed observed:

> "… the point is that the award provides for reasonable overtime and reasonable overtime is not one way; it must be considered in relation to the workers' conditions and also in relation to the employer's business, and there is no sanction for any union fixing, arbitrarily, a limit. The way to achieve such a result is to approach the proper award-maker and have the award, in terms, limited in such a fashion."

25 More recently Fielding C, as he then was, in 1991 observed in *Brehaut v ICI Australia Operations Pty Ltd* (1991) 71 WAIG 1309 at 1309:

> "There are no firm quantum limits for determining what is reasonable overtime. Rather, as pointed out by McCusker J. in *Buick v. Selby International* (1989) AILR 48 'the reasonableness is decided by considering the difficulty faced by the employer and the options available to it compared with the consequence imposed on the worker having to work the overtime requested'. In this context 'each worker must be considered individually and each occasion considered independently'. Thus what is reasonable in a particular case will depend upon the circumstances of that case. The issues involved in such a question were summarised by Joskle J. in *Vickers Ruwolt Pty Ltd v. Federated Moulders' (Metals) Union of Australia* (1962) 105 CAR 989 at 1001 as follows–
>
> > 'What is reasonable overtime depends upon all the circumstances of the particular case. It is a question of what is a reasonable amount of overtime to be worked in all the circumstances. It is wrong to decide this entirely from the employer's point of view and likewise entirely from the employee's point of view, though the matters upon which both employer and employee base their opinions may be very important matters for consideration. It is not the test to ask simply is the employer's request for overtime reasonable, still less to act upon his dictum that the overtime is 'essential'."

26 Joskle J in Vickers Ruwolt Pty Ltd v Federated Moulders' (Metals) Union of Australia (op cit) then went on to say in the same passage:

> "It may appear so to him, particularly if an emergency has arisen. On the other hand, it may be made at a time when the employee has already worked a considerable amount of overtime and should not reasonably be expected to work longer. It is not the employer's point of view that alone is to be given consideration. It is not enough to say that as a result of overtime not being worked he will suffer loss and that this should not be permitted since he is the provider of the work

> for the employee, although the employee in return provides his labour. If the employee is overworked the loss to both employer and employee may be greater through the employee's health being affected whereby he may not only lose his health and the benefit of the work provided for him, but the employer may also lose a skilled worker, which is a substantial loss, and may eventually be a greater loss to the employer than loss or wastage of material in his factory or establishment. Merely to ask, is the employer's request for overtime reasonable, may entirely fail to take all the circumstances into consideration, and unless this is done it is impossible to say whether the request is for 'reasonable overtime'."

27 Similar observations were made by Wilcox CJ in *Gibson v Bosmac Pty Ltd* (1995) 130 ALR 245 at 253. The Chief Justice in that matter after agreeing with the submission that in considering what is reasonable overtime, it is not sufficient to only consider the employer's needs, it is also necessary to take into account any obligations and interests of the employee, observed:

> "Employees are people, not robots. Most have obligations to their families and others. Most have private interests and commitments, to which they are entitled to have regard in deciding whether to work particular overtime."

Conclusion

28 The overall issue to be determined by the Commission is whether the legal right of the Respondent to dismiss the Applicant has been exercised harshly or oppressively against the employee, so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles and 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).

29 The first question is whether the onus of proof lies on the Applicant. In *Newmont Australia Ltd v Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 the Full Bench of the Commission observed that where an employee's employment was terminated by summary dismissal there is an obligation upon the employer to show on balance that misconduct had in fact occurred. As the Applicant in this matter was told he would be dismissed if he continued to refuse to work Saturdays, was he summarily dismissed?

30 The Applicant's contract was not terminated by notice but he was paid in lieu of notice. In *The Federated Miscellaneous Workers' Union of Australia, WA Branch v Cat Welfare Society Incorporated* (1991) 71 WAIG 2014 at 2019 Sharkey P and Gregor C observed:

> "It seems to us that whether a dismissal has occurred in circumstances where pay in lieu of notice is made, that the question is one of mixed fact and law as to whether what occurred was a summary dismissal or not.
>
> One consideration is that it depends whether such payment is permissible. That in turn depends on the contract and its construction (see Macken J J, McCarry G and Sappideen C "The Law of Employment", 3rd Edition, pages 170-172). In some industries, also, it might be said to be a custom. If then, a payment in lieu of notice were not provided for in the contract, then proper notice has to be given or there is a summary dismissal. The same would apply if there were no custom or usage.
>
> It follows that a summary dismissal, as a matter of fact and law, cannot be altered in its nature by payment in lieu of notice."
>
> More recently in *Sanders v Snell* [1998] HCA 64 at [16]; (1998) 196 CLR 329 at 337 Gleeson CJ, Gaudron, Kirby and Hayne JJ held that where there is no condition in a contact of employment for payment in lieu of notice, the employer is in breach of the contract if the employer does not give the employee requisite notice of termination. In that case there was a written contract of employment which specified a period of notice to be given.

31 Where an employee is dismissed summarily the onus is on the Applicant to demonstrate the dismissal was not fair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that the summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679). There was no evidence that the Applicant's contract of employment or the Award allowed for or provided for payment in lieu of notice. It is my view that the Applicant was summarily terminated and the onus of proving the circumstances justifying the termination rests upon the Respondent. Even if I am wrong in relation to this issue, it is my view for the reasons set out below that the Applicant would satisfy the requisite onus that he was unfairly dismissed.

32 The submission made on behalf of the Applicant that pursuant to s 114 of the Act, the Applicant and the Respondent cannot contract out of clause 12(3)(a) of the Award is correct. Any direction given by the Respondent to the Applicant to work overtime must be a direction to work reasonable overtime. The parties cannot contract out of that restriction on the employer's right to require the Applicant to work overtime. Section 114(1) provides:

> "Subject to this Act, a person shall not be freed or discharged from any liability or penalty or from the obligation of any award, industrial agreement or order of the Commission by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award, industrial agreement or order of the Commission, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled."

33 Having considered all of the evidence given in these proceedings, it is patently clear to me that the requirement by the Respondent of the Applicant to work each Saturday or every second Saturday was unreasonable. When Exhibit 8 is analysed it shows the Applicant worked an average of 55 hours a week on Monday to Friday (when he did not work on Saturdays and being the median between 59 and 51 hours), from the time he was made permanent until the date his employment was terminated. Consequently the Applicant was consistently working very long hours each week without working on Saturdays. The evidence establishes that when regard is had to the Applicant's personal circumstances working on Saturdays interfered with his obligations to his family. I reject the Respondent's contention that the Applicant wished to cease working on Saturdays to reduce his CSA payments. The fact that long hours of work can have a negative effect on the family of employees was discussed at length in research considered by the Full Bench in *Re Coal Mining Industry (Production and Engineering) Consolidated Award 1997 and Ors (Reasonable Working Hours Test Case)* (2002) PR 072002. The Respondent has not put before the Commission any evidence as to why it needed the Applicant to work additional overtime on Saturdays, other than to submit that they are a six day a week operation. In all the circumstances the requirement to work overtime on Saturdays was not reasonable.

Quantum

34 Reinstatement is not sought by the Applicant, nor am I satisfied that reinstatement would be practicable.

35 The Respondent argues that the Commission should not exercise its discretion to make an order for compensation as the Applicant has failed to mitigate his loss. The duty to mitigate was considered by the Full Bench in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316 in which the President observed the following principles are well established:

"1. The duty to mitigate loss in claims of unfair dismissal lies on the claimant employee (see Bogunovich v Bayside Western Australia Pty Ltd 79 WAIG 8 (FB)).

2. In practical terms, this requires the employee to diligently seek suitable alternative employment (see Brace v Calder and Others [1895] 2 QB 253).

3. The onus of proof of failure to mitigate loss is on the respondent (see Metal Fabrications (Vic) Pty Ltd v Kelcey [1986] VR 507 (FC), Goldburg v Shell Oil Co of Australia Ltd (1990) 95 ALR 711 (FC), Prus-Grzybowski v Everingham and Others (1986) 45 ALR 468, 87 FLR 182 (Fed Ct FC) and McGregor on Damages (15th Edition 1988) at page 723.

4. (a) The obligation to mitigate loss is an obligation to act reasonably in the mitigation of loss but not an obligation which a reasonable and prudent person would not undertake.

(b) This duty to act reasonably to mitigate damage does not generally require the employee to take employment of a different or inferior kind (see "Truth" and "Sportsman" Limited v Molesworth [1956] AR(NSW) 924; Bostik (Australia) Pty Ltd [1991] v Gorgevski (No 1) 36 FCR 20; 41 IR 452 and compare Dunstan v The National Mutual Life Association of Australia Ltd (1992) 5 VIR 73).

(c) In some cases, it may be unreasonable not to accept employment at a lower status and salary level (see Yetton v Eastwoods Froy Ltd [1967] 1 WLR 104, for example)."

36 I am satisfied that the Applicant has mitigated his loss. He clearly took steps to find alternative employment and did so in a short period of time. The Applicant seeks an order that the Respondent pay him compensation of $8,150 assessed at four weeks' pay at the rate of $1,100 per week less $1,750 (being the amount earnt as casual earnings), together with an ongoing loss of $150 from the date of termination until the date of the hearing which was 24 weeks.

37 Having heard the evidence and reviewed Exhibits 1 and 8, I am not satisfied that an order for compensation should be assessed in the manner claimed. If the Applicant had not been dismissed he would have continued to work ordinary hours and overtime from Monday to Friday each week as a permanent employee. Consequently, it is my opinion that compensation should be assessed by regard to his average hours of work, which were from 51 to 59 hours a week, when he was a permanent employee and did not work on Saturdays. When this amount is averaged, his average hours of work can be assessed as 55 hours per week. It appears from Exhibit 8 that all hours were worked within the spread of hours in clause 9 of the Award but exceeded a 38 hour week by 17 hours or 3.4 hours per day. Clause 12(1)(b) of the Award required each day to stand alone and for the first two hours of overtime to be paid at time and a half and for the remaining time to be paid at double time. When these provisions are applied to an hourly rate of $14.76 per hour and it is assumed he worked the same length of overtime each day, the Applicant would have been paid as follows:

(a)	Ordinary hours	38		@	$14.76			$560.88
(b)	Overtime	2 hours	× 1½	@	$14.76	$44.28		
		1.4 hours	× 2	@	$14.76	$41.33		
						$85.61	× 5 days	$428.05
								$988.93
(c)	Meals (clause 15)		× 5	@	$6.80			$34.00
							Total =	$1,022.93

38 When calculated in this manner, four weeks' pay would total $4,091.72. The Applicant was paid one week's pay in lieu of notice. Consequently, I will deduct $560.88 and $1,750 (his casual earnings) from the amount of $4,091.72, which brings this component of loss to $1,780.84. As to the Applicant's ongoing loss, I assess his ongoing loss from the time he commenced his current position as $72.93 per week. As his loss had been ongoing for 24 weeks and continued to be ongoing at the time of the hearing, I am of the opinion that the Applicant has established his loss is likely to continue for some time into the future. Consequently, I will assess his ongoing loss at $72.93 for 48 weeks, which is an amount of $3,500.64.

39 For the reasons set out above I will make an order declaring the Applicant was unfairly dismissed and an order that the Respondent pay the Applicant $5,281.48.

2005 WAIRC 01810

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID SANDERS
	APPLICANT
	-v-
	SOILAND PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 14 JUNE 2005
FILE NO/S	APPL 1452 OF 2004
CITATION NO.	2005 WAIRC 01810

Result	Declaration made that the Applicant unfairly dismissed. Respondent ordered to pay the Applicant $5,281.48.
Representation	
Applicant	Mr N Hodgson (as agent)
Respondent	Mr A Beer

Order

Having heard Mr Hodgson on behalf of the Applicant and Mr Beer 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 $5,281.48.

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

2005 WAIRC 01951

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLEY MAY LADYMAN
	APPLICANT
	-v-
	MS JULIE McKIE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 1 JULY 2005
FILE NO.	APPL 1345 OF 2004
CITATION NO.	2005 WAIRC 01951

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Whether application to amend notice of application by changing name of named respondent should be granted - Relevant principles to be applied - Commission not satisfied that discretion should be exercised - Appliation dismissed - *Industrial Relations Act 1979* (WA) s 27(1)(c), s 27(1)(m), s 29(1)(b)(i)
Result	Order issued
Representation	
Applicant	In person
Respondent	Mr J Brits of counsel

Reasons for Decision

1 The substantive application in this matter, pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"), was filed by the applicant against the named respondent Ms Julie McKie. Conciliation by a Deputy Registrar was unsuccessful in resolving the matter. An issue has been raised as to the proper identity of the named respondent. By notice of answer and counter proposal filed on 2 November 2004 the respondent averred that it was never the employer of the applicant.

2 The Commission of its motion listed this matter for determination. The applicant appeared on her own behalf, and the respondent appeared through Mr Brits of counsel. I should note that on 2 June 2005, before this matter was listed for hearing by the Commission, the applicant filed an amended notice of application, to seek to substitute the name Carnarvon Medical Service Aboriginal Corporation in lieu of Ms Julie McKie as the named respondent.

3 Counsel for the respondent objected to the proposed amendment. He submitted that whilst the Commission may have the power to amend the application pursuant to s 27(1) of the Act in the present case, the discretion to amend should not be exercised. Counsel submitted that there was ample material to enable the applicant to correctly name her former employer before commencing these proceedings. Tendered in evidence were copies of various documents including a pay advice with a copy of a cheque for the applicant's final payment, all bearing the name "Carnarvon Medical Service Aboriginal Corporation" ("CMSAC"). Additionally, tendered as exhibit R2, was the applicant's letter of appointment, un-dated but signed by the applicant on 20 April 2004. The letter of appointment is on the letter head of CMSAC and references are contained in it to CMSAC as the applicant's employer, including provisions regarding termination of employment and confidentiality. The applicant signed an acceptance of her position at CMSAC in the acknowledgement provision of the letter of offer of employment.

4 Additionally, tendered as exhibit R3, was the applicant's letter of termination of employment dated 8 October 2004. This letter was again on the letter head of CMSAC and referred, in the first paragraph to the following:

> *"We wish to advise you that we are no longer offering you employment with Carnarvon Medical Service Aboriginal Corporation to take effect from 6 October 2004, due to your deliberate insubordination in ignoring the direct instructions of the HACC Co-ordinator, Julie McKie, and then after having been invited to discuss your actions in a rational matter, subjecting Ms McKie to verbal abuse and racial vilification."*

5 There are further references in the letter to CMSAC. The letter is signed by a Mr Richardson described as the "Financial Controller/Acting Chief Executive Officer." Also tendered as exhibit R4, was a letter written by the applicant dated 14 October 2004 to the CEO of CMSAC referring to the circumstances of her dismissal and the incident said to have occurred with Ms McKie. I should observe at this point, that it was common ground that Ms McKee was an employee of CMSAC, and was engaged in the position as the HACC co-ordinator, to whom the applicant apparently reported.

6 All of these documents were acknowledged by the applicant and she did not cavil with any of their content. Furthermore, there was a submission by the respondent that at some point in time, the applicant had been a member of the governing council of CMSAC, a fact not disputed by the applicant.

7 In essence, the applicant submitted that at the time she commenced these proceedings she was confused and was not clear as to who her employer was. She regarded Ms McKie as her "boss" and that is why she named her as the respondent to the notice of application.

Consideration

8 The Commission is empowered, pursuant to s 27(1)(m) of the Act, to "amend or waive any error, defect, or irregularity whether in substance or in form". That power is a very broad power and enables the Commission to amend a notice of application by changing the name of a named respondent, even if that involves the substitution of a corporation for a natural person: *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375. However, even though the Commission has the power to do so, the exercise of the power is discretionary and is not automatic. In my view, the naming of the respondent employer by an applicant commencing proceedings of this kind is not a matter of mere technicality. It is fundamental to the exercise of the Commission's jurisdiction, that proceedings alleging harsh, oppressive or unfair dismissal be commenced against the applicant's former employer, whether that is a natural person, partnership or corporation. That is so, because it is only the former employer that may "dismiss" such an applicant, which then grounds the claim in the jurisdiction of the Commission for the purposes of s 29(1)(b)(i) of the Act.

9 In my opinion, it is incumbent on applicant commencing proceedings in this aspect of the Commission's jurisdiction to at least undertake some inquiry as to the proper identity of their former employer, before filing the notice of application. In most cases such inquiries may be as rudimentary as examining any letter of appointment, pay advices etc, which will generally disclose the proper identity of the employer. In other cases, where such is not clear, a company search may be necessary. Regardless, it is in my view, incumbent on an applicant whether represented or not, to take these steps so that the proceedings can be commenced on the proper footing. The Commission, in exercising its discretion under s 26(1)(c) of the Act, is to have regard to all persons directly affected by the matter, not just the former employee.

10 At the outset, it is important to observe that the notice of answer and counterproposal, filed on 2 November 2004, took issue with the proper identity of the named respondent. This matter was also the subject of submissions at the conciliation conference before a Deputy Registrar.

11 However, it was not until 2 June 2005, that the Applicant sought to amend the notice of application. Furthermore, in this case, I am satisfied this was not a circumstance where the employer took any steps to deliberately obscure the proper identity of the applicant's employer. The documents tendered in evidence, make it quite plain in my view, that at all material times, CMSAC was the applicant's employer. These documents included the letter of appointment; payroll advices; the letter of termination of employment; and indeed, correspondence sent by the applicant herself to CMSAC. In my view, even a cursory review of this material, makes it abundantly clear that certainly, the named respondent, Ms McKie, was not the applicant's employer. It would appear that the applicant has not taken any real steps to ascertain the proper identity of her employer before commencing these proceedings, and moreover, did not seek to address the matter for many months even after having been put on notice, that it would be alleged that the named respondent Ms McKie, was not and never had been, her employer.

12 In my view, the evidence simply does not disclose the circumstance in which there was any confusion as to the proper identity of the applicant's employer, and certainly not in any way deliberately contributed to by CMSAC. Additionally, the failure by the applicant to take any steps for many months after being put on notice that the named respondent was not her employer, is in my view, a relevant consideration in whether or not to exercise the discretion. In its totality, in my view, there was an abundance of material readily accessible to the applicant, which would have enabled her quite easily, even with the most rudimentary advice, to properly name her former employer, for the purposes of commencing these proceedings.

13 Having regard to all of the circumstances and the relevant authorities, I am not persuaded the Commission should exercise its discretion on this occasion. Accordingly, the application having been commenced against a person who was not the applicant's former employer, it cannot be established that there was any dismissal from employment and therefore, the application must be dismissed for want of jurisdiction.

2005 WAIRC 01947

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLEY MAY LADYMAN
	APPLICANT
	-v-
	MS JULIE MCKIE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 1 JULY 2005
FILE NO/S	APPL 1345 OF 2004
CITATION NO.	2005 WAIRC 01947

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr J Brits of counsel

Order

HAVING heard Ms B Ladyman on her own behalf and Mr J Brits of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2005 WAIRC 01965

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GONZALO PORTILLA
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 5 JULY 2005
FILE NO.	APPL 1656 OF 2004
CITATION NO.	2005 WAIRC 01965

CatchWords	Termination of Employment – Harsh, oppressive or unfair dismissal – Safety breaches – Inconsistency of treatment – Issues of honesty – Fairness of dismissal - Relevant principles applied – Application dismissed - Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
Result	Application Dismissed
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Mr A Lucev of Counsel and with him Mr R Kelly of Counsel

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant, Mr Gonzalo Portilla, worked for the respondent company as a Mineworker – Plant Operator for approximately 27 years. He was dismissed on 2 December 2004 and paid notice in lieu of 5 weeks. His letter of termination states:

> "I refer to the disciplinary inquiry conducted on 8, 18 and 29 November 2004 into your actions on 21 October 2004 when you were operating the D10 dozer on the Finucane Island primary surge stockpile.
>
> On 21 October 2001 (sic) it was alleged that you walked on the stockpile without authorisation.
>
> In the Company's safety inquiry conducted on 21, 22 and 25 October 2004 into the incident, you repeatedly denied that you had walked on the stockpile notwithstanding the fact that a number of witnesses stated that they had seen you do so. Further in the disciplinary inquiry into the incident you continued to maintain that you had not walked on the stockpile.
>
> In fact it was not until 18 November 2004, when the disciplinary inquiry was drawing to a close, that you admitted walking on the stockpile.
>
> Your actions in walking on the stockpile had the potential of placing yourself in danger, which is entirely unacceptable.
>
> Further, as you have acknowledged, your actions were in breach of the Company's safety protocols.
>
> Your actions in walking on the stockpile justify the termination of your employment particularly given that you received a written warning dated 22 June 2004 for a similar incident where you failed to comply with the Company's safety requirements and put yourself in danger.
>
> Following that incident you were given further training in relation to safety awareness and put on notice that your involvement in any further incidents of a similar nature may result in disciplinary action up to and including termination of your employment.
>
> In addition your lack of candour in responding to the questions about the incident, in both the safety and disciplinary inquiries, further justify your dismissal.
>
> In all the circumstances, including those referred to above, and having considered all matters raised by you, the Company considers that you are unsuitable for further employment and your employment is terminated in accordance with clause 9(3) of the Award with a payment in lieu of notice.
>
> Please contact HR Services to finalise those aspects of the termination of your employment."

2 The incident which ultimately led to Mr Portilla's termination occurred on 21 October 2004. Mr Portilla was operating a bulldozer at the top of a stockpile. He was moving ore to service a 992 loader which was filling trucks below. It is common ground that he demounted the bulldozer and walked on the stockpile. Mr Portilla was witnessed walking on the stockpile and this started a process of investigation which eventually led to his dismissal. In relation to why he walked on the stockpile, Mr Portilla says in his statement at hearing:

> "When I got off the dozer and walked on the stockpile I just wanted to get the job done. I didn't think about whether I should walk on the stockpile or not. Later on, I realised I shouldn't have walked on it but at the time I didn't think about it. If I had thought about it or I had remembered I wouldn't have done it. I have used the dozer on the stockpile for many, many years and it easy to forget about not walking on it." (paragraph 16)

3 Mr Portilla had maintained initially that he did not walk on the stockpile, but merely the arm of the bulldozer. He continued to maintain this statement, through successive interviews, until just prior to 18 November 2004. Mr Connors, acting on Mr Portilla's behalf, contacted Mr Swinnerton, the Superintendent, to advise that Mr Portilla admitted walking on the stockpile. Mr Portilla says in his statement that originally he panicked as he thought he might lose his job. Once he had denied walking on the stockpile it became very difficult for him to later say he had done so. The pressure of several meetings became too much for him and he admitted his error.

4 Mr Portilla's work record does not display any other breaches of safety or poor conduct (see Mr Sproule's statement at paragraph 10). This is with the exception of a safety incident on 16 June 2004 when Mr Portilla was instructed by Mr Chomkhamsing, a Senior Production Technician, to clear material from a slew gear. Mr Portilla performed the task in an

unsafe manner and was counselled, disciplined and retrained. The outcome of that event was that Mr Portilla was issued with the following letter:

> "Written Warning
>
> A disciplinary inquiry was conducted on Friday, 18 June 2004 into your actions on Wednesday; 16 June 2004 when you were cleaning on SR2.
>
> As you are aware, failure to attach a personal danger tag to an isolator, when there is a chance of personal injury from the unexpected operation or movement of plant, is a breach of BHP Billiton Iron Ore Tagging Regulations.
>
> In the inquiry, you acknowledged that you had breached tagging regulations 1.2 A and B. Your actions had the potential of placing yourself in danger and this is not acceptable practice on this site.
>
> Further, no work is to be conducted at height without fall protection such as a safety harness or scaffolding with handrails.
>
> You acknowledged that whilst attempting to clean the slew gear on SR2 by standing on the bogey arm, you were at risk of serious injury in the event that you had fallen. Again this is not acceptable practice on this site.
>
> Finally, you should follow the instructions that you are given by the Senior Production Technician or Production Supervisor on shift.
>
> In all of the circumstances and in accordance with part 8 of the BHP Billiton Iron Ore Tagging Regulations you are now issued with this written warning.
>
> Should you in future be involved in conduct of a similar nature, you may be subject to disciplinary action up to and including termination of your employment.
>
> As discussed during the inquiry you will also be required to attend a refresher briefing on the BHP Billiton Iron Ore Tagging Regulations and Steps to Zero Harm.
>
> I will advise you shortly regarding an appropriate time to attend this briefing."

5 Evidence for the applicant was given by Mr Robert Carter, mineworker at Finucane Island and the applicant. Evidence for the respondent was given by Mr Leigh Cook, Manager, Finucane Island; Mr Mark Swinnerton, Superintendent Production, Finucane Island; Mr Robert David Sproule, Employee Relations Coordinator, Asset Development Project; Mr Matthew Currie, Maintenance Superintendent; Mr Allen Armstrong, Resource Co-ordinator, Finucane Island and Mr David Drury, Projects Coordinator, Finucane Island.

6 I do not recite all the evidence given as it is not necessary to do so. This issue is what were Mr Portilla's actions on the day and whether these actions, coupled with the earlier warning, justified dismissal in all the circumstances. The test to be applied is that enunciated in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 of a fair go all round. Mr Schapper for the applicant submitted also that Mr Portilla's dismissal was harsh and unfair when compared to the treatment given by Mr Cook to Mr Chomkhamsing for the safety breaches he had committed.

7 This is a brief history of the matter and outline of the matters in contention.

Closing Submissions

8 I will cover the closing submissions in full as they display all of the arguments of the parties. It is also clear from those submissions that whilst counsel for the applicant complains that Mr Portilla may have been misunderstood during the inquiry and discipline processes, and encourages the Commission to assess carefully the evidence of the applicant before the Commission, there is no claim as to the procedural unfairness of the dismissal.

9 Mr Lucev for the respondent submits that the application ought to be dismissed because Mr Portilla knew the rule required him not to walk on the stockpile. He lied initially to the disciplinary inquiry and then admitted on 18 November 2004 that he knew he should not walk on the stockpile because it is not safe [Exhibit R4, RDS8]. He said on that occasion as follows:

> "The feeders could be running. I think it was safe because the feeders were blocked. I had been dozing over them and the plant wasn't running."

At that time he agreed it was not safe to walk close to the live face. He says he walked on the stockpile that day to have a look at what the 992 was dozing. He volunteered that there used to be a sign indicating not to walk on the stockpile. Mr Lucev says that Mr Portilla did not say at that time, that because the sign was no longer there he thought he could now walk on the stockpile. He simply says on the day he forgot that he should not walk on the stockpile. Mr Lucev says Mr Portilla lied previously because he was scared he might be dismissed.

10 Mr Lucev submits that the evidence at interview of Mr Portilla on 18 November 2004 is consistent with the evidence of Mr Sproule and Mr Swinnerton, namely that it is common understanding amongst the workforce that nobody is to walk on the live stockpile. At that time Mr Portilla admitted that he had done the wrong thing. Mr Lucev submits that the fact that Mr Portilla admitted that he forgot about it meant that he knew about it.

11 Mr Lucev submits that Mr Portilla admitted in the interview on 8 November 2004 [Exhibit R4, RDS5] that control normally calls before they start the feeders. Mr Lucev submits that Mr Portilla was out of the cab for two periods so he might not have heard the call that had come through. Mr Portilla admitted in the interview on 8 November 2004 that he should never come out of the cab and that if he cannot see properly he should call control. Mr Lucev submits that Mr Portilla knew that he should not have walked on the live edge and peered over, which is ultimately what he did and that he should have called. Mr Portilla knew that he was not to walk on top of the feeders. Initially however he maintained that he had only stayed on the dozer and that he had permission to operate the dozer on the stockpile.

12 Mr Lucev says that the evidence of Mr Portilla, Mr Drury and Mr Swinnerton is consistent that the stockpile is not live if you know where the feeders are because you can see them as the ore has been levelled down. He says it is common understanding that if the ore is above the horizontal level of feeders, then it is a live stockpile. Mr Lucev submits that Mr Portilla had not isolated the feeders. He had breached the tagging regulations and he had simply heard on the radio from the supervisor that the feeders would be shut down. Mr Portilla did not hear the call from Mr Murray Hirini advising him to come down off the stockpile. Mr Lucev submits that Mr Portilla knew from the very beginning that he had breached the rule of walking on the stockpile. He lied by maintaining that he had remained on the bulldozer. Mr Portilla's own evidence is that later he went home and analysed what he had done before he decided to tell the truth.

13 Mr Lucev says that Mr Portilla also lied at hearing in respect of his position on the stockpile. He said at hearing that he was only out of the cab for a few seconds and was no more than two or three metres away. Mr Portilla says he was only on the flat ground. This evidence is in contrast to Mr Drury who was not cross-examined on this point. Mr Drury says [Exhibit R1, DJD2] as follows:

> "I looked over to the primary stockpile area and saw a person standing up on the South end of the stockpile between 10 and 15 metres in front of and slightly above a dozer parked on the stockpile".

Mr Drury was directly opposite at right angles and had a clear view of the position where Mr Portilla was standing. Mr Drury gave evidence that he was about 70 metres away. Mr Drury's evidence is that the person was standing within a couple of metres of the live face of the stockpile and a loader had been working on that live face not long before the incident. Similar evidence is given by Mr Armstrong [Exhibit R2, ADA1 and ADA2]. He gave evidence that Mr Portilla was 15 or 20 metres in front of the bulldozer. He was 5 metres higher than the bulldozer and well in front of the blade. Mr Portilla was adamant in cross-examination that he did not move in front of the blade of the bulldozer. Mr Lucev submits that it is also evident from Mr Cook's witness statement [Exhibit R8, LDC1] and the diagram therein that Mr Portilla was well in advance of the bulldozer. The same is apparent in Mr Swinnerton's statement [Exhibit R6, MLS 11] which is the ICAM report which places Mr Portilla at the time of the incident at the edge of the stockpile and a level higher than the bulldozer. This is not evidence the witnesses were cross-examined upon. Based on this evidence, Mr Lucev submits that the only finding the Commission can make is that Mr Portilla's evidence is not credible and he lied in respect of his position on the stockpile.

14 Mr Lucev submits that Mr Portilla lied because his position on the stockpile put him across the feeders which is where he knew he was not supposed to walk. The position in which Mr Portilla was standing was put to him by Mr Sproule during the disciplinary process and Mr Portilla decided not to comment. Mr Lucev submits that Mr Portilla maintained the lie because he knew that he ought not to walk on top of the feeders or close to the face. Mr Lucev referred to the case in *Concut Pty Ltd v Worrell and Another* (2000) 176 ALR 693 which Kirby J said:

> "It cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal".

Mr Lucev refers to Mr Portilla's behaviour as a continuing calculated course of conduct in respect of his lying. Mr Lucev submits that Mr Portilla's termination could be upheld on the lack of candour alone, it being misconduct in itself. Mr Portilla knew and acknowledged that his conduct during the inquiry would be taken into account in determining his penalty. Mr Lucev said that Mr Portilla had lied on 21, 22 and 25 October and again on 8 November 2004, and again at hearing. It cannot be said that Mr Portilla lied in panic. He assessed the situation.

15 Mr Lucev says of Mr Portilla's evidence that often he did not listen to the question, often he did not answer the question that was asked, more often he argued the toss for the purpose of persuading or putting his point of view across. Mr Sproule found him easy to talk to during the disciplinary inquiry. His literacy skills as demonstrated in reading documents at hearing was certainly confident. Mr Lucev submits that Mr Drury was cross-examined about his understanding of stockpiles, feeder throat dynamics and how cavities form. Mr Cook's evidence [Exhibit R8, paragraph 15] which was not cross-examined was that Mr Portilla was working above the undermined live working face. Mr Swinnerton's statement also establishes that feeders were live because they were not isolated.

16 Mr Lucev says that the evidence unchallenged was that in the June 2004 incident, Mr Portilla lied about the height at which he was working. He has already had a second chance. There has been no dispute about the June warning or any of the elements of it until now. Mr Portilla gave an assurance at that time that he would never again breach safety. Against this background the issue of Mr Portilla having his own rules about when it is safe to walk on the stockpile simply cannot stand. The issue of Mr Portilla having his own rules was not raised during the disciplinary inquiry and was only raised at hearing. This notion is inherently dangerous in any event. Mr Lucev says in respect of the comparison to the incidents involving Mr Chomkhamsing there is no issue of lying or lack of candour in the latter matters. Mr Chomkhamsing gave a wrong answer at interview which was quickly corrected. It was not a calculated course of deceit over a period of weeks through many interviews as portrayed by Mr Portilla. Mr Chomkhamsing's incident was treated for the purpose of the tagging regulation as a first offence. His previous incident was over two years old and was characterised by Mr Cook as minor. It had occurred at a time in 2002 when there was a lack of safety culture at Finucane Island. Mr Lucev submits also that the evidence of Mr Cook in relation to Mr Chomkhamsing was placed in a difficult pressured position for which he was not capable or trained. Mr Lucev submits that Mr Portilla's length of service would not save him in respect of his culpability for the breaches, two of them occurring within a matter of four months. Mr Lucev says there has been a total failure on behalf of Mr Portilla to mitigate his loss following his dismissal.

17 Mr Schapper, for the applicant, says in closing submission that at the time Mr Portilla walked on the stockpile there was in fact no rule governing walking on the stockpile. In the handbook "Steps to Zero Harm", which is distributed to employees and which Mr Portilla was refreshed on in June 2004, there are wide variety of procedures set out. There is nothing in the handbook in respect of the stockpile. Mr Schapper says it was common understanding on site that you did not walk on the stockpile. However, Mr Portilla had been working on the stockpile since 1980. Mr Portilla's general understanding of the overall proposition that you do not walk on the stock pile was subject to his experience, put up over the last 25 years, of actually working on the stockpile. It is clear that from the notice of the meeting on 18 November 2004 that Mr Portilla knew this general rule subject to certain things. Mr Portilla indicated you did not walk on the stockpile when the feeders are running. The feeders were not running that day and were shut down from the beginning of the shift for maintenance. They were shut down for the whole of the shift. He also knew that you did not walk on the stockpile under or near the primary stacker because you might get iron ore dumped on you. He knew also that you did not walk on the stockpile if you did not know the ground. You do not walk on the stockpile if you cannot see eg. at night time. In other words, having worked on the stockpile Mr Portilla said that you get a feeling for the ground. Therefore after working on the stockpile on the bulldozer for several hours the ground is packed hard like concrete and Mr Portilla knows it does not collapse in those circumstances. Hence Mr Portilla relied on his experience.

18 Mr Armstrong, in his evidence at paragraph 28, indicated that he did not consider there was reasonable prospect of the stockpile collapsing on itself. The risk of a collapse was low at that time. Mr Swinnerton at paragraph 92 says that the risk of collapse was moderate.

19 Mr Schapper says the company never told Mr Portilla not to walk on the stockpile. It is not like tagging regulations which were repeatedly advised to staff. There is no protocol about that. In fact, following the interview on 8 November 2004 Mr Sproule says in his statement at paragraph 36: "It was also not clear to me that Mr Portilla fully understood that he should not walk on the primary surge stockpile". Mr Schapper says in fact all is not clear that Mr Portilla understood that he should not walk on the primary stockpile in certain circumstances. Mr Portilla had formulated his own rules in the absence of any clarity from the employer.

20 Mr Schapper submits that the Commission should be very careful in evaluating the submissions made by Mr Lucev and the interviews conducted with Mr Portilla to understand Mr Portilla's understanding of what was being put to him. It was said that Mr Portilla walked on the stockpile at least twice that day. There may have been more occasions. Mr Schapper says, "We don't really even know how many times he was on the stockpile and hence whether the position that he was talking about was

the position that the witnesses were talking about." Mr Schapper says there is little in the witness statements taken at the time of the incident to indicate whether the face of the stockpile was undermined. Mr Portilla said in evidence that when he looked over the edge the ore was inclined and sloping away. He was not cross-examined on that. The actions of Mr Portilla in the circumstances barely amount to misconduct. The only matter the respondent can rely upon is that there was a sign saying "No unauthorised access to the stockpile". That is reported in the ICAM report. Mr Portilla's evidence is that he was authorised to be on the stockpile as he was directed to work on the stockpile. The sign does not say do not walk on the stockpile.

21 Mr Schapper submits that even when the company makes formal rules and trains people in them, people are still liable to forget. The company recognises this by the refresher courses they undertake. It is also recognised by mentions at toolbox meetings and other reminders.

22 Mr Schapper submits that Mr Portilla was never reminded not to walk on the stockpile or the rules governing stockpiles. In terms of culpability, he submits that Mr Portilla's conduct was of a very low order. He should not be disciplined for exposing one's self to danger if he did not and could not reasonably have been expected to know that he should not have done so. One is disciplined not for the consequence or potential consequence of the conduct, but one is disciplined for the actual conduct and culpability of that conduct. Mr Schapper submits that in contrast the culpability of the conduct of Mr Chomkhamsing was of quite a different order. Mr Chomkhamsing had a heavy obligation on him because he was in a supervisory position to ensure the rules were complied with. He was not merely in the supervisory position but had been a Senior Production Technician for 3 years. Mr Chomkhamsing was also culpable because he had been reminded by Mr Swinnerton an hour before in relation to this specific deed. Additionally, two years before he had done precisely the same thing and had been refreshed in the procedures and in front of his whole shift his conduct was exposed and the whole shift was retrained in the isolation procedures. To say it was a minor isolation breach is not credible. To say there was a slack safety culture at Finucane island in 2002 is not to the point as the matter was treated seriously and the whole shift was retrained. Mr Chomkhamsing's conduct was compounded by the fact that he did not complete a JSA when the job required the completion of a JSA. The other workers which he supervised were exposed to danger for about an hour. Mr Chomkhamsing also failed to observe the working at heights procedure. The ratings scale used in the ICAM for Mr Portilla's incident rated a score of 4. Where as Mr Chomkhamsing's incident would have rated at 5 +.

23 Mr Schapper submits that whether you look at the two incidents in respect of the risk of injury or the nature of the injury or in respect of the culpability of the individual's conduct Mr Chomkhamsing's conduct was far more serious than Mr Portilla's. This was in fact the position reached in cross-examination after some time with Mr Cook, on Mr Schapper's submission. This is not withstanding, in Mr Schapper's submission, the diversion from answering questions in respect of the respondent's witnesses. Mr Schapper submits that it is not the respondent's submission that Mr Chomkhamsing's conduct is not more serious, rather that it is not a relevant comparison to be drawn. The respondent says these cases are not comparable as Mr Portilla lied. The respondent says also that there is a difference in respect of organisational factors as evidenced by Mr Cook, and Mr Portilla's instances were recent. Mr Schapper submits that it is not relevant to say that it was the organisation's fault for putting Mr Chomkhamsing in the supervisory position when he was not capable of handling it. The fact that Mr Chomkhamsing had too much to do on the day does not ignore the express instruction given by Mr Swinnerton an hour before to ensure isolation and the other breaches of procedure.

24 Mr Schapper submits that the stockpile incident is not an isolation incident in the sense that even if the feeders had been isolated, the rule according to the company is one still does not walk on the stockpile as there may be cavities. Mr Portilla's isolation breach in June 2004 is more recent than Mr Chomkhamsing's incident however, the breach is of a different nature to the second incident involving Mr Portilla. It is not irrelevant, but it is of less relevance. It is not the case that he walked on the stockpile in June 2004 and then after warning walked again on the stockpile in October 2004. In comparison, the two incidents involving Mr Chomkhamsing are very similar.

25 Mr Schapper submits that Mr Portilla conceded he was untruthful in the first interviews, that is, the safety inquiries. Mr Schapper referred to the matter of *Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch v BHP Iron Ore Ltd* 81 WAIG 1393 involving Mr Robinson, a locomotive driver with BHP at Port Hedland. In that matter, Kenner C found that the fact that Mr Johnson wrote derogatory comments on an affidavit to be used in proceedings in the Federal Court was not a breach of the company's harassment policy and did not constitute misconduct. Mr Robinson was found to have been dismissed unfairly. In that matter the company was taken to have waived the issue of lying because they did not rely on it in determining Mr Robinson's services in the first place. Kenner C commented that the question of dishonesty in Mr Robinson's case was not such as to warrant dismissal in any event. He had some difficulties, he was afraid he would lose his job. He lied in respect of matter that was not to do with operational issues. Mr Schapper also referred to the matter of *The Federal Engine Drivers and Firemen's Union of Workers of Western Australia v Mt Newman Mining Co Pty Limited* 60 WAIG 1333. This case involved lying about an operational matter during inquiry. In Mr Portilla's case he did lie about an operational matter but the company, in the first instance, was not deceived by it. Mr Portilla then told the truth. Mr Portilla should be given some credit for coming forward with the truth ultimately and in fact during the process. In fact he told the truth that he had told a lie. Mr Schapper submits as follows:

> "There is an irony in the dismissal of Mr Portilla for doing something on the stockpile which, if it was wrong, was barely wrong, but being dismissed because he lied about not doing something that he did not know was wrong and Jimmy Chomkhamsing not being dismissed for exposing three lives to risk of death over a period of an hour on two independent accounts as a consequence of multiple failures of his duty, multiple misconducts, following in turn from a very similar incident just two years before". (Transcript p.299-300)

26 Mr Schapper submits that the difference in treatment might be explicable on account that Mr Chomkhamsing was the son-in-law or stepson of Mr Cook's mate (Mr Murray Hunt). Mr Schapper submits that it might also be explicable on the basis that Mr Chomkhamsing worked under an Australian Workplace Agreement whereas Mr Portilla worked as an award employee.

The Evidence

27 Counsel for the applicant made submission as to the care with which the Commission should treat the evidence of Mr Portilla, given that English is not his natural language. I have listened carefully to the evidence of Mr Portilla and paid close attention to the manner in which it was given. I should add that the issue was raised with counsel for the applicant as to whether Mr Portilla required an interpreter and he did not. It is my impression that Mr Portilla has reasonable facility in reading English. In terms of understanding what is said to him he also has reasonable facility. I would qualify this by saying that on occasion he did not understand the questions which were put to him. However, in the main he did understand the questions which were put to him but was, on occasion, intent on answering the question in a manner which suited his purpose. He is not the only witness to have done so. In other words, he answered on occasion to leave the impression or information in the mind of the Commission which he wanted to impart, irrespective of the question. There is then the question of Mr Portilla's ability to express himself in English. My impression is that his ability to express himself in English is less than his ability to understand spoken English.

28 A significant part of the applicant's case goes to the question of culpability. That is whether Mr Portilla knew what he did was wrong. This of course first relates to what Mr Portilla actually did on the day in question. The work that Mr Portilla was generally engaged in that day is perhaps best expressed in paragraphs 7 to 13 of Mr Swinnerton's statement [Exhibit R6].

> "7 On 20 October 2004 I had authorised work to be done on the primary surge stockpile at Finucane Island. This work involved removing ore from the stockpile, as it was approaching maximum capacity, and taking that ore to J31South.
>
> 8 The primary surge stockpile is a bottom fed stockpile. This means that there are a number of vibratory feeders at the bottom of the stockpile, which the ore is drawn through and then deposited onto a belt in a tunnel located beneath the primary surge.
>
> 9 There are two main ways of removing the ore from the primary surge stockpile. The first is to draw the ore into the feeders and process it. The second is to remove the ore using a front end loader and trucks, and then transfer the ore to a dead stockpile.
>
> 10 A dead stockpile is where the stockpile can only be accessed by mobile plant and the ore can only be removed using mobile plant. A live stockpile is where the ore can be removed using fixed plant (such as a feeder or reclaimer).
>
> 11 In removing the ore using a front end loader, the front end loader operates at ground level and digs from the side of the stockpile. This causes scalloping in the stockpile, as the front end loader cannot reach up to the top of the stockpile.
>
> 12 There is also a dozer on top of the stockpile. The dozer is on top of the stockpile to push ore from the top of the stockpile over the edge to create loose ore for the front end loader to pick up. This also prevents scalloping from getting too pronounced and potential collapses occurring.
>
> 13 The dozer also creates room for stacking on top of the stockpile by pushing the ore away from the top so that the stacker can stack more ore on top."

29 There is a difference in the evidence between the parties as to whether the stockpile was 'scalloped' and the state of the feeders, or state of knowledge of the feeders. I will return to this, but the most important question is what did Mr Portilla do on 21 October 2004? On this issue of what Mr Portilla actually did in walking on the stockpile, there is a difference in evidence between the witnesses for the respondent and the evidence of Mr Portilla. The initial evidence of Mr Portilla was that he did not walk on the stockpile and only walked on the arm of the bulldozer (see the photograph marked figure 1 in the ICAM report, ie MLS 11 in Exhibit R6, and paragraphs 21 to 26 of that statement). His evidence on 18 November 2004, when he admitted that he had lied during the initial stages of the investigation, was that he had stood on the stockpile near to or on the high point. He disputed that he had stood close to feeder 31 (MLS15). He believed it was safe because the feeders were not running. He wanted to look at what the 992 loader was doing to see if there was much room. He simply forgot about not walking on the stockpile. He lied because he thought he might lose his job. At all times Mr Portilla was clear that one does not walk "on top of the feeders" [MLS12, and again at question 7 in MLS13]. At interview on 8 November 2004 he went on to say that you need permission to walk near the feeders and only when the stockpile is very low and you can see the feeders. He said that the feeders were shut down at the time; he knew this from the radio and the supervisor. He says also that the stockpile was safe as he had run the bulldozer for hours and the ore was packed like concrete. The ore was on an inclined slope to the south-west and west of the dozer. He wanted to see if there was enough ore and to reduce the work for the dozer.

30 Mr Portilla was then asked to put his case at a meeting on 29 November 2004 as to why he should not be dismissed. The conclusions from the disciplinary inquiry were expressed in an email from Mr Swinnerton to Mr Cook on 2 December 2004 [MLS17]. The conclusions were:

> "1) That he walked on the primary surge stockpile.
>
> 2) He placed himself at risk by been in close proximity to feeders and the live face.
>
> 3) He was aware that the risk was unacceptable.
>
> 4) He lied during the disciplinary enquiry and he maintained the lie for 3 weeks.
>
> 5) He is an experienced dozer operator and he is experienced at working on stockpiles."

It is really items 2 and 3 of the conclusions that are under challenge.

31 Again at the meeting on 2 December 2004 when he was dismissed Mr Portilla said that he had walked on the stockpile but not over the feeders, the plant was not running, he had driven over the feeders and the conditions were safe. He knew this from many years of experience.

32 Mr Cook's evidence about what he saw on 21 October 2004 is as follows:

> "12 We were standing somewhere between CN45 and the hopper. Mr Drury turned to me and said look at that, are you allowed to do that. I asked what. He said the bloke on the surge and then pointed in that direction.
>
> 13 At that stage we were approximately 100 metres away directly parallel to the edge of the stockpile and in line with the dozer operator (side on view).
>
> 14 When I looked over I observed a dozer some distance away from the live working face edge of the stockpile parked up. Away from the dozer there was a person, who I saw walking up to the edge of the stockpile (at the top level at the leading edge).
>
> 15 The stockpile was almost full and the person was approximately 17 to 20 metres up. He appeared to be looking down at the loader operator on the ground who was operating on the live working face of the stockpile. He also appeared to be above the undermined live working face, which is a protruding edge caused by the fact that it the live working face has been eroded from underneath.
>
> 16 We were also in line with the bottom draw down feeders, which are located at the bottom of the stockpile and into which the ore is drawn down. In order for this person to get where he was from the dozer, in my opinion if he walked in a direct line he would have walked over some of the feeders." [Exhibit R8]

Under cross-examination Mr Cook was queried as to the height of the stockpile which he put at 17 to 20 metres, when the ICAM report assessed the height at 10 metres. He was not asked about Mr Portilla's actual position on the stockpile.

33 Mr Armstrong's evidence is as follows:

> "9 On 21 October 2004 Leigh Cook, Manager Mining, Dave Drury, Projects coordinator, and myself had just come out of substation 5, which is located just north of the CN45A (a conveyor belt).

10 We were heading south on the access road at the time. I was thinking about a major shutdown that was planned when Mr Cook asked me who was that standing on the stockpile. We were approximately 80 to 100 metres away from the stockpile at the time.

11 I looked over and saw a person standing on the primary or west surge stockpile. The primary stockpile is a live stockpile, which means that it has live feeders at the base of the stockpile which the ore is fed through. The person was situated towards the southern end of the stockpile, although our view was semi-obstructed.

12 The stockpile also appeared to have a lot of product on it at the time.

13 However, when we moved approximately 10 metres parallel to the stockpile we got a clearer view of what was happening.

14 It was clear to me that the person was not near the dozer on top of the stockpile and that he was standing on the material product on the edge or tip of a face that had been worked on by a loader (although there was no loader working on the face of the time). The person looked to be between 15 and 20 metres from the dozer at a higher elevation." [Exhibit R2]

Under cross-examination Mr Armstrong was not challenged on this observation other than to establish that he was on the east side of the stockpile and was moving south when he saw Mr Portilla.

34 Mr Drury's evidence is as follows:

"16 On 21 October 2004 I was standing with Allen Armstrong and Mr Cook adjacent to the stop sign at the rail crossing next to CN45A. We were discussing the aspects of a job that was happening in the area.

17 I was facing the area of the primary surge stockpile and noticed someone standing up on that stockpile in front of a dozer (we were approximately 80 to 90 metres away). He appeared to be standing on a bench of ore that was slightly higher than the tracks of the dozer. He appeared to be 10 to 15 metres from the dozer and 2 to 3 metres from the stockpile face.

18 The person was facing out looking at the face of the stockpile. I was aware that a front end loader had been working at the bottom of the stockpile a short time before. However, the front end loader was not there at that time.

19 I did not recognise who this person was.

20 I commented to Mr Cook, with words to the effect, that's not right, he should not be doing that. Mr Cook appeared to be astounding at what was happening. He confirmed that was not the right thing to be doing." [Exhibit R1]

Under cross-examination Mr Drury advised that he was about 70 metres from the stockpile as he had paced out the distance. He said, "That's not right, he shouldn't be doing that."

35 Mr Portilla's evidence is as follows:

"What were you doing out of the dozer before they called you?-- -Yeah, I - - I walked to see about 3 or 4 metres from the edge, to see how much material had been pushing from the edge because it was getting too much ...(indistinct)... down and there's not enough room from the - - from the front-end loader so when you fill? up this cavity underneath you - - you push another side. So that's what I was doing because when ...(indistinct)... come from the primary stacker there's so much material so I want to know exactly if you can push more. So that's why I went to have a look.

All right. And when you had a look, what did you see?---Well, I see the - - the rocks falling - - well, they're falling far away from the edge - - far away.

……..

MR SCHAPPER: Yes. But - - ?--- - - 40 - - maybe 40 degrees or 35 degrees, something like that.

Right. So it was an incline down?---Yes.

Yes. And when you said that you went to look to see how far you could push or if it was too far, what were you looking for?---Well, I looking for Don? - - the duty of care, Don had no-one - - myself, put myself in danger so it was fair bid so I went another side, close - - close to the west side which is ...(indistinct)... instead? to the east side because I was pushing for? the west to the corner." (Transcript pp.17, 18)

Under cross-examination Mr Portilla says as follows:

"Mm hm. And when you went to have a look on the day of the incident you were looking over the edge to see whether the cavity was full or not, or how much material was in the cavity?---Yeah. How many times did Mr Hirini call you to - - to bring the dozer down, do you know?---Well, in this particular time I - - that's where I was look to the - - outside of the dozer I was looking so know - - when I back to the - - to the dozer he called me. I don't know if they call before but I think they call me. That's what they told me, I've been called before - - before, a few seconds before because I know not stay very long there. Just have a look." (Transcript p.36)

36 Mr Portilla spoke to Mr Hirini and was instructed to take the bulldozer off the stockpile. It would seem that he spoke to Mr Hirini once, that Mr Hirini had tried to contact him previously and that Mr Hirini was contacting him arising from Mr Portilla having been sighted walking on the stockpile. Therefore it is probable, if there were any doubt, that it is this instance when Mr Portilla stood on the stockpile, that he was seen by others. That is when Mr Portilla had looked over the edge he was sighted, rather than any other time that he may have walked on the stockpile. Mr Portilla gave evidence that he had walked on the stockpile at least twice that day. Mr Portilla says that he was absent from the cabin of the bulldozer for a matter of seconds. He knows this because he was called shortly before, did not receive that call and did "not stay very long there".

37 Importantly, Mr Portilla was cross-examined at length as to his actual movements when he, at that time, descended from the bulldozer (see Transcript pp. 36-43). He was adamant that he remained roughly on the same level as the bulldozer, did not pass the blades of the bulldozer, was about 3 metres from the edge and moved a matter of only metres from the body of the bulldozer.

38 There is some evidence which I did not query at hearing and which I admit that I do not fully understand having now read the transcript. This evidence relates to in which direction Mr Portilla walked. He appears to say that he walked to the east side of the stockpile and he had been pushing ore to the west corner of the stockpile. No issue was made of this by either counsel and I do not consider that it changes the relevant evidence that he was seen by three others standing on the stockpile. Mr Armstrong says he was to the east of the stockpile.

39 It is difficult to reconcile the evidence of Mr Portilla and his earlier answer to questions on 18 November 2004 as to his position on the stockpile on that day. Mr Portilla admitted that he was near the high point of the stockpile [Exhibit R6, MLS 15]. He does not admit to being near the feeders. Mr Schapper submits that Mr Portilla's evidence is that he walked on the stockpile on more than one occasion, and that is consistent with his earlier statements. The point is that the issue relates to Mr Portilla's attempt to look over the edge of the stockpile to ascertain whether there was sufficient ore below. The issue is whether this position on the stockpile put Mr Portilla directly at risk and whether Mr Portilla knew this. The evidence of Mr Portilla is clearly inconsistent with three witnesses who saw him that morning. Mr Drury, Mr Cook and Mr Armstrong gave reports to the ICAM enquiry that Mr Portilla was at a high point on the stockpile, away from the bulldozer and near the edge of the stockpile. Mr Cook's unchallenged evidence is that Mr Portilla's position meant that he would have walked over the feeders. There can be no doubt that Mr Portilla knew that he was not to stand on the stockpile over the feeders. He said that from the outset.

40 Mr Portilla said on 18 November and again on 2 December 2004 that he was standing in a safe position. He knew this to be the case from years working on the stockpile. He says that the ore was packed like concrete because he had been running the bulldozer over the area for hours. He said in his evidence that he had various rules for when you do not stand on the stockpile. In other words, he knew it was not safe to stand on the stockpile except in certain circumstances which he outlined in his evidence. Hence he maintains that what he was doing on that day was safe. I cannot see how this can be so.

41 As stated, Mr Portilla was cross-examined at length about the position in which he was standing when he exited the bulldozer to look over the edge. He made it clear that he was at the same level as the bulldozer, to the side of it and not past the blade of the bulldozer. This position cannot and does not equate with the position he was observed to be in. He was adamant, and there was no misunderstanding that he knew what was being put to him, that he was not standing at a position some metres in front of the bulldozer, or on a higher level. He was certainly adamant that he had proper recall of the incident and where he was standing. If I am to believe this then three other observers on the day, who were approximately 70 to 100 metres away, must be wrong as to what they saw. Mr Swinnerton entertained this possibility as potentially a parallax error. He rightly discarded that possibility. I consider it improbable that Mr Portilla was standing in the position he said he did.

42 The fact is that three other persons saw him standing near the edge of the stockpile and in a higher position to the bulldozer. It would seem that he was standing on mounded ore that had been pushed toward the edge for the 992 loader to clear. There is no suggestion in the evidence that all three of these observers made up a story as to what they commonly saw. Mr Portilla left the bulldozer to look over the edge to see if there was enough ore down below. It would seem more likely then, that he was standing close to the edge he had worked and about 3 metres from the edge. Mr Portilla gave evidence that the stockpile slopes were inclined. However, Mr Cook gave evidence that the face of the stockpile was scalloped. The importance of the difference being whether the stockpile was less stable in a scalloped condition. Mr Drury gave evidence that a loader had been working that face shortly before he saw Mr Portilla. Mr Armstrong considered that Mr Portilla's actions were dangerous (paragraph 27), but he did not consider that the stockpile would collapse (paragraph 28). Mr Swinnerton from his investigation concluded rightly in my view that:

> "Mr Portilla was standing in close proximity to the edge and the witnesses had also reported that the edge was vertical with evidence of an under-mined face with a concave nature. Such an edge would be inherently stable. Further, Mr Portilla had recently pushed ore to the edge, meaning that the ore was likely to be unstable and at risk of collapse." [Exhibit R6; paragraph 87].

43 The importance of this finding is two-fold. Firstly, the actions of Mr Portilla were inherently dangerous and potentially put his life at risk. Secondly, Mr Portilla, who lied earlier to the investigation, then told the truth, has now been untruthful to the Commission as to what he actually did on that day.

44 Did Mr Portilla know that his action in walking on the stockpile was dangerous and prohibited? The answer, in my view, must be yes. Mr Portilla gave varying evidence on this point. He said that there was a sign many years ago indicating that walking on the stockpile was prohibited. The only sign now indicated that no one could be on the stockpile unless authorised. He says he was authorised to be on the stockpile as he had to move the stockpile. This evidence weighs in Mr Portilla's favour and in my view was a genuine explanation that meant there could be some doubt about what actions were prohibited on the stockpile. Counsel for the applicant submits rightly that there was no express rule or training in relation to not walking on the stockpile. The respondent's evidence is that it was commonly known that one does not walk on a live stockpile. The respondent has now taken measures to ensure this is clearly known and not in doubt. However, Mr Portilla also gave evidence that he was not to walk on the stockpile in certain conditions. These included not near the primary stacker when the feeder was running, on night shift, when the feeder was empty, when the feeder was full (I do not fully understand this point) and when there is an appearance of cavities. He accepts that it can be dangerous to walk on the stockpile but that through his years of experience he knew the stockpile at that time was 100% safe. He says that he had been bulldozing on the stockpile for several hours previously, moving backwards and forwards, and the ore was packed like concrete.

45 Mr Portilla agrees that he told Mr Swinnerton that he had not walked on the stockpile at the time of the demonstration shortly after the incident. In fact, he told Mr Swinnerton that he had walked on the arm of the bulldozer. The only reason that Mr Portilla consistently proffered for not telling the truth was that he was worried about losing his job.

46 The other relevant factors when determining the risk involved in Mr Portilla's actions is the proximity of Mr Portilla to the feeders. Mr Swinnerton's conclusions as to the position of Mr Portilla on the stockpile and the potential risks, following his investigation, are contained succinctly in paragraphs 76 to 92 of his statement. Part of those conclusions are that Mr Portilla was standing close to feeder 31 (paragraph 76) and that the feeder was live (paragraph 84). As I understand the evidence, Mr Portilla disputes strongly that he was standing near the feeder. At all times during the investigation and at hearing Mr Portilla agreed that standing over the feeders was dangerous. Mr Portilla said when interviewed on 8 November 2004 that standing, he supposed, 4 metres from the feeders was safe. It can be assumed, and it is the evidence of Mr Swinnerton and Mr Drury, that standing near feeders is dangerous. The diagram in paragraph 8 of Mr Swinnerton's statement gives a good visual reason why this is so. The importance of this is that if Mr Portilla was standing near the feeder then he knew that this action was dangerous and prohibited. He knew that this action was not consistent with the rules which he says he established for himself, through years of experience, about when it was safe to walk on the stockpile. I consider it probable that Mr Portilla walked over the feeders; an action which he knew to be unsafe.

47 As to whether the feeder was live there is a dispute on this point. It is the case that the feeder was not isolated and that Mr Portilla did not know if the feeder was isolated. Mr Portilla says quite rightly that the feeder was not operating and he knew this because he was advised that the feeder was in shutdown mode. There is then the evidence and submissions as to whether Mr Portilla could have known the actual state of the feeder as he was at times out of radio contact. It is the case that the feeder was not operating at that time and hence the risk was reduced. It is also the case that Mr Portilla worked on the knowledge that the feeder was not operating. It is also the case that Mr Portilla had no control over the operation of the feeder because the

feeder was not positively isolated. Weighing each of these factors does not substantially alter the fact that Mr Portilla walked and stood in a location on the stockpile which he knew to be inherently dangerous to himself.

48 As to why Mr Portilla has not been truthful before the Commission, I consider this is because his actual actions do not fit comfortably with the evidence he gave that in certain conditions, through experience, he knew that where he walked and stood was safe because it was packed like concrete. In actual fact, where he stood could not have been in that condition and he did walk over the feeders which he knew to be unsafe.

49 As to the answer why Mr Portilla put himself at risk, I consider that Mr Portilla provided that answer readily at the interview on 18 November 2004. He indicated that it had never crossed his mind. He was intent on getting the job done. His actions since have been attempts variously to cover or justify his actions to save his job. He knew readily on his own evidence that his job was at risk because he had breached safety requirements, and had done so in the recent past as well.

50 It is the case in my view that the lack of truthfulness on the part of Mr Portilla is very important in determining this matter. Mr Portilla has not been honest before the Commission as to his actual behaviour. He knows he was not to act as he did and that what he did was inherently dangerous. He potentially put his life at risk. He has been untruthful in an effort to regain his job. I do not consider that in these circumstances I should act to overturn the decision of the employer to dismiss Mr Portilla. There must be a residual concern that Mr Portilla has lied previously about his behaviour involving safety issues and has been prepared to do so again. This can legitimately engender aspects of doubt and mistrust in the mind of an employer. I do not then consider that the employer has acted in a manner in dismissing Mr Portilla that can be characterised as an abuse of that right (see Kennedy J in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (op cit) @387).

The Other Incidents

51 It is the case that Mr Portilla had failed to observe the necessary safety procedures in June 2004 and had been disciplined for this and retrained. Mr Portilla gave evidence in relation to the incident on 16 June 2004 that he had asked Mr Chomkhamsing if he could lock the machine and this had been refused. This displayed a sense of safety awareness. He was told, after having attempted to clean the machinery, to continue to do what he could do vis-a-vis the cleaning of the machine. There is no doubt in my view that he performed this work in a manner unsafe. Notwithstanding that he told Mr Jones, a charge hand, where he was and to contact him if the machine was to move. He was then stopped from cleaning by a Mr Harvey who saw that he was working in an unsafe position. Whilst I accept the explanation given by Mr Portilla that he used his best endeavours to do the job, this does not change his lack of adherence to and awareness of safety matters. I do not consider in the circumstances that the disciplinary action taken against him on that occasion was unwarranted. I note also that it was not challenged at that time.

52 There is then the comparison of the consistency of treatment between Mr Portilla and Mr Chomkhamsing (see *Capral Aluminium Ltd v Sae* (1997) 75 IR 65; *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron ore Pty Ltd* 84 WAIG 3787 (*Burtenshaw case*)). Mr Schapper cross-examined extensively Mr Swinnerton and Mr Cook about Mr Chomkhamsing and made submissions that the actions of Mr Chomkhamsing were more culpable and dangerous than the actions of Mr Portilla. In short, I agree mostly with those submissions. There is one very clear and important difference between the two employees and that relates to the issue of truthfulness.

53 There is no evidence to suggest that Mr Portilla was discriminated against as he was an award covered employee. There is evidence to find that Mr Chomkhamsing received more favourable treatment than he deserved, especially if one makes a comparison to the treatment afforded Mr Portilla, and this goes to the seriousness of the actual breaches. The two incidents are not directly comparable but the seriousness of Mr Chomkhamsing's actions was readily apparent. Mr Schapper would have the Commission draw the conclusion that this was due to a relationship which Mr Cook had with Mr Chomkhamsing's step-father. This allegation was put to Mr Cook and strongly denied. However, when one looks at the evidence of Mr Cook in its totality there are sufficient reasons to conclude that Mr Chomkhamsing was given more lenient treatment than he deserved. Mr Cook says that Mr Hunt was a colleague, not a friend. Mr Cook dined with Mr Hunt and his family in Perth, so it would seem they were on friendly terms.

54 I do not accept the prime reason put forward by Mr Cook that somehow he bore some of the blame for Mr Chomkhamsing's actions as he put him in a supervisory position which Mr Chomkhamsing was not equipped to perform. I do not accept also the suggestion that the first breach was somehow lessened because there was a lax safety culture at Finucane Island at that time. In respect of the second breach, Mr Chomkhamsing was an experienced Senior Production Technician who should have known that his actions were dangerous and potentially fatal. Most relevantly, Mr Chomkhamsing had been instructed less than an hour before the event by Mr Swinnerton about isolations. This was completely ignored or forgotten by Mr Chomkhamsing. This contrasts to Mr Portilla who at no time received any specific instruction about walking on the stockpile. It was simply generally known; and I would add was known by Mr Portilla. Mr Portilla's actions jeopardised his own safety on both occasions. Mr Chomkhamsing's actions also jeopardised other workers. The potential seriousness of Mr Chomkhamsing's lack of attentiveness or disregard for safety could then have been much more serious.

55 Mr Schapper's submission is also that Mr Chomkhamsing lied during the inquiry process. This submission is correct and the point was admitted under cross-examination by Mr Swinnerton. However, the denial which Mr Chomkhamsing made during the investigation was soon corrected. His conduct in that regard is not of the same magnitude as Mr Portilla, even taking into account some leniency as to whether Mr Portilla correctly understood all that was put to him. Mr Chomkhamsing's two incidents were about two years apart. Mr Portilla's two incidents were four months apart. Mr Chomkhamsing's incidents were not dissimilar breaches for which originally the whole team were retrained. Mr Portilla's two incidents were of a different character and he was originally retrained. Mr Chomkhamsing style of safety breach was the subject of regular update or reminder within work groups. Mr Portilla's second breach was not subject to regular provision of information.

56 Mr Cook's evidence with regard to Mr Chomkhamsing's incident and the penalty imposed is as follows:

> "51 In respect of the Jimmy Chomkhamsing incident that occurred on 25 November 2004, a number of discussions were held as to whether his employment should be terminated given the seriousness of what had occurred.
>
> 52 As part of this process Mr Swinnerton spoke to his supervision past and present and reviewed these comments. However, the decision was made not to terminate Mr Chomkhamsing's employment on the basis of:
>
> (a) his previous work record and ethic;
>
> (b) his honesty in dealing with the Company during the course of the inquiries; and
>
> (c) that he was in an acting position at the time.
>
> 53 However, given the seriousness of this matter he was demoted from the position of responsibility as senior production technician to production technician. This also involved a monetary penalty with a loss of income." [Exhibit R8]

57 Mr Portilla's work record and ethic were good; they were not under any challenge. He has worked for the respondent for 27 years. I have dealt with the other two matters which Mr Cook considered relevant to his decision not to dismiss Mr Chomkhamsing. Mr Swinnerton and Mr Cook gave evidence that the decision whether to dismiss Mr Chomkhamsing was a narrow or difficult decision and was made after some discussion. Mr Swinnerton said that he left open his recommendation to Mr Cook in respect of Mr Chomkhamsing, but recommended the dismissal of Mr Portilla. As I have said, I do not accept the argument that somehow the organisation shouldered some blame for putting Mr Chomkhamsing in a supervisory position. This employee was in a responsible position, should have known his actions were wrong, was effectively forewarned an hour previously and put at serious risk the lives of three people. His actions were in my view more serious than Mr Portilla's. The factors that weigh against Mr Portilla in comparison are that his earlier breach was fairly recent and importantly his lack of candour.

58 In the Full Bench's decision in *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron ore Pty Ltd* 84 WAIG 3787 @ 3796 the Hon. President (with the Chief Commissioner) said as follows:

> "In our opinion, the other drivers were treated far too leniently, as was the controller, Mr Mike Le Flohic in Rudland's Case (op cit). Whether they or any of them should have been dismissed is not a matter for the Full Bench to determine in these proceedings. Whether because they were treated leniently it was inconsistent and unfair to dismiss Mr Burtenshaw is the question on which a finding should have been made, and in relation to which a finding must now be made."

59 For the reasons I have expressed above I do not consider that I should overturn the employer's decision and re-instate Mr Portilla. I do not find that he was dismissed unfairly and his lack of candour has been a decisive factor in reaching that conclusion. In respect of Mr Chomkhamsing, whereas the facts in both matters are different, they are capable of relevant comparison. Mr Chomkhamsing's treatment by the employer, given the circumstances known at time of decision, has indeed been more lenient than that afforded Mr Portilla, given the circumstances known by the employer at the time of decision. However, the matter I am determining is Mr Portilla's dismissal. I would issue an order dismissing the application.

2005 WAIRC 01966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GONZALO PORTILLA
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 5 JULY 2005
FILE NO	APPL 1656 OF 2004
CITATION NO.	2005 WAIRC 01966

Result	Application dismissed
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Mr A Lucev of Counsel and with him Mr R Kelly of Counsel

Order

HAVING heard Mr D Schapper of Counsel on behalf of the applicant and Mr A Lucev of Counsel and with him 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 orders:

THAT the application be and is hereby dismissed.

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

2005 WAIRC 01988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA UNDERDOWN
	APPLICANT
	-v-
	DOWFORD INVESTMENTS PTYLTD T/AS MOUNT BARKER CHICKEN
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 5TH JULY 2005
FILE NO.	APPL 1688 OF 2004
CITATION NO.	2005 WAIRC 01988

CatchWords	**Termination of employment-contractual entitlements-principles applied –Industrial Relations Act, 1979. s29..**
Result	Contractual Benefit Awarded
Representation	
Applicant	Mr Arthur Heedes, as Agent.
Respondent	Mr Damien Cronin, of Counsel, and with him Ms L. Ranford.

Reasons for Decision

Introduction

1 The Applicant in this matter Samantha Underdown (the Applicant) has applied to the Commission for orders pursuant to s23A of the Industrial Relations Act, 1979 (the Act) claiming that she has outstanding benefits being non award entitlements due to her at the completion of a contract of employment between her and Dowford Investments Pty Ltd trading as Mt Barker Chicken (the Respondent).

2 It should be noted that there had been other proceedings before the Commission otherwise constituted concerning contractual benefits arriving from this contract of employment. Those matters were subject to an appeal to the Full Bench in *Samantha Underdown v Dowford Investments Pty Ltd (2005)* 85 WAIG 1437. The decision the Full Bench issued on the 8th April 2005. It is not argued before the Commission in these proceedings that the issue raised by this application, which is a claim for alleged underpayment of telephone accounts has been the subject of previous proceedings. No issue of *res judica* has been brought to the Commission's attention. In particular there is a concession from the Respondent concerning it's status as a party to these proceedings (see Transcript P8/9).

3 Therefore the Commission has proceeded to deal with the matter as a new claim unimpaired by any other previous proceedings before the Commission.

The Claim

4 The agreement between the party is a simple one. The Applicant says she was employed by Milne Feeds Pty Ltd a predecessor to the Respondent in April 2001. She entered into a written contract on the 2nd April 2001. That contract is evidenced in a letter captioned 'Letter of Offer' (Exhibit D5) which confirms the offer of employment and the terms of the engagement. Relative to these proceedings is Clause18, Reimbursement of Expenses, which provides as follows:

> **Reimbursement of Expenses:**
>
> "Milne Feeds will reimburse you for all reasonable expenses incurred by you in the course of carrying out your duties, where such expenses have been approved in advance, are substantiated by receipts or other appropriate documentation and were reasonably incurred."

Applicant's Contentions

5 The offer was signed by Bevan Treloar, General Manager, Meat Division, who gave evidence in these proceedings, and it is also signed by the Applicant. There is no dispute from either party that at the time it was signed, the contract contained all of the arrangements between the parties.

6 The Applicant says that state of affairs however did not continue. She said she was on call 24 hours a day 7 days a week and was required to be in constant contact with colleagues, suppliers and customers at all hours of the day. She raised this with Mr Treloar telling him that the cost of maintaining her own telephone as communication device was significant and she wanted some relief from that expense.

7 It is the Applicant's contention that Mr Treloar recognised that her contract did not provide for payment. He verbally agreed to amend the contract. Proof of this was that subsequently she was reimbursed in full for the cost per month of her mobile phone and there was no prior monthly approval required or given.

8 Her evidence is that the arrangement between Mr Treloar and herself was a collateral arrangement to the written contract which appears in Exhibit 5. It was distinguishable because there was no need nor did she ever obtain approval for expenses in advance.

9 Later on in the employment relationship the contract of employment was waived. The base salary and other provisions including title were changed but the full reimbursement of the monthly mobile phone bill was reaffirmed and so were the terms upon which the money was paid. There was no written expression of these new arrangements they sat as a further collateral amendment to her contract of employment.

10 The Applicant further says that in 2003 there was an attempt made to have her take a company mobile telephone however the Applicant says that she had just commenced a new 2 year phone contract. There was significant expense to change company stationery and business cards so it was agreed between her and the Respondent to keep the contractual benefit in place for the time being. It is further the evidence of the Applicant that the benefit of paying her mobile telephone continued unchanged and uninterrupted from July 2001 until December 2003.

11 It appears that in January 2004 the Respondent declined to continue to make the payments and it is its failure to pay which gives rise to the Applicant's claim which is set out in Exhibit H1.

12 That exhibit claims that from December 2003 until August 2004 there was a total sum due of $1466.28. This claim is supported by mobile phone accounts which detail the payments. There is also further support to the Applicant's contentions in Exhibit H3 which provide details of the phone calls made.

13 It should be said at this stage that the Respondent does not appear to challenge that amount in part. Its position is there is no entitlement at all because the conditions of the written contract were not met in that the Applicant did not obtain prior approval for the payments to be made.

Respondents Contentions

14 The Respondent's position can be encapsulated as follows; that there is no contractual entitlement for payment of the phone costs, the contract clearly provided that reimbursement would be payable for any reasonable expense incurred in carrying out duties but only where such expense had been approved in advance or was substantiated by receipts or appropriate documentation and reasonably incurred. The Applicant was on leave because she was ill between January 2004 to August 2004. For the period of the claim she was not performing any work authorised by the Respondent so therefore any telephone usage was not authorised nor was there reasonable occurrence of expenses that the Respondent thought it was obliged to repay.

15 What is said further by the Respondent was that the Applicant's own evidence does not support the contention that there was an unconditional contractual entitlement to reimbursement for telephone expenses. The Respondent relies on the written contract of employment quoted previously in this decision which it says means that expenses which are reasonably incurred by an employee in the course of duty will be reimbursed. The evidence of Mr Calligaro was that the way the payment should be made consistent with the contract and Mr Treloar's evidence was that he never approved anything other than claims which were consistent with the contract. The Respondent's position is that the conversation with Mr Treloar upon which the Applicant relies never took place. There is nothing in writing to evidence a variation to the contract but even if there was there is nothing in the evidence which indicates that payment should have been made during the period of sickness.

Witness Credibility

16 The Commission heard evidence from the Applicant.

17 I have carefully reviewed her evidence both from the transcript and from the video and audio records and have concluded that there is no reason why the Commission ought to conclude that she was not a witness of truth.

18 The evidence of the Applicant was strong and her recall of the arrangement she said she made with Mr Treloar was unshaken in cross examination. There is no reason why the Commission should discredit her evidence in terms of its truthfulness. She should be regarded as a truthful witness and I find accordingly.

19 The main evidence for the Respondent was given by Mr Bevan Treloar. Again, nothing in Mr Treloar's evidence indicates that he is not a truthful person and that the evidence he gave the Commission was not as he recalled the events. The same can be said of Mr Calligaro.

Analysis and Conclusions

20 This being the case the Commission has witnesses it should regard as truthful and it must draw conclusions on the surrounding facts as to which story on the balance of probabilities is more likely to be correct. Significantly here is a case where a witness who appears to be a truthful witness remembers the details of an arrangement made some three months after the written contract was entered into on the 2nd April 2001. The Applicant's has strong recall of the evidence. She was convincing when she said that she had became worried about the inordinate personal expense she was bearing by receiving and having to action phone calls from customers and colleagues outside of the office telephone system and that she raised it with Mr Treloar. Her recollections of those events are strong. So was her contention that she was never instructed not to do the work.

21 On the other hand, Mr Treloar does not recall the conversation. He was examined in chief on the matter and crossed examined and he still maintained that he could not recall making the arrangements. He did not deny that he made the arrangements when he had the opportunity to do so. His position was he did not recall whether he did or he did not.

22 The Respondent argues that the written word of the contract should be accepted unless there are good reasons to depart from it and in this case there are none. In my assessment that is not a reasonable view of what occurred or of the evidence.

23 It seems perfectly reasonable that when the contract had been made with Milne Stockfeeds and the Applicant, found she was not getting her telephone calls paid that she asked for some arrangement to be made. I accept her evidence that there was no approval in advance as is required by the contract, that a pattern of payments occurred in accordance with her understanding of the arrangement and that pattern of payments lasted for almost two years until she became ill.

24 The Applicant was seriously ill but the evidence is clear that even though she was not able to work she received phone calls and dealt with them as if she was working and there were costs arising for use of her telephone in doing so.

25 The claim that she makes is supported by sufficient documentary evidence to conclude that it is legitimate in terms of what work she said she did on her private telephone between December 2003 and June 2004.

Finding

26 It is open to conclude and I do that there was a contractual arrangement between the parties made by the Applicant and Bevan Treloar in July 2001 that the arrangement was a collateral arrangement to the written contract which had been made on the 2nd April 2001. The arrangement was a verbal one which provides for a scheme of payments in a different matter to that prescribed in the contract. There is sufficient evidence to conclude that the Applicant did continue to assist the Respondent in its operations by way of receiving and making telephone calls while she was on extended sick leave.

27 The Applicant is entitled to relief if she has a contract with the Respondent not being an award or order of the Commission which creates an entitlement that she has not received.

28 The Commission is to discover the terms of the contract and if the discovery reveals that there is an entitlement that has not been paid there is power to give affect to the contract by making an order. *Perth Finishing College Pty Ltd v Susan Watts (1989)* 69 WAIG 2307 *(Belo Fisheries v Froggett (1983)* 63 WAIG 2394)

29 Considering all of the evidence and in particular that the verbal evidence of the Applicant is truthful and ought to be given weight. While the documentary evidence is not singularly persurve the verbal evidence of the Applicant is strong and should be accepted. For those reasons and the other finding made here I have concluded that she is entitled a contractual benefit that has not been paid. The Commission will award her the amount set out in Exhibit H1 in the sum of $1466.28.

2005 WAIRC 01987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA UNDERDOWN
	APPLICANT
	-v-
	DOWFORD INVESTMENTS PTYLTD T/AS MOUNT BARKER CHICKEN
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY 6TH JULY 2005
FILE NO/S	APPL 1688 OF 2004
CITATION NO.	2005 WAIRC 01987

Result	Contractual Benefit Awarded
Representation	
Applicant	Mr Arthur Heedes, as Agent
Respondent	Mr Damien Cronin, of Counsel, and with him Ms L. Randford

Order

HAVING heard Mr A. Heedes on behalf of the Applicant and Mr D. Cronin, of Counsel, and with him Ms L. Randford for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act*, 1979, hereby orders:

THAT the Respondent pay Ms Samantha Underdown the sum of $1466.28.

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

2005 WAIRC 01960

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATE AMBER WALLIS
	APPLICANT
	-v-
	BURBRIDGE GROUP PTY LTD T/A ZORRO'S RESTAURANT, MADDINGTON
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 5 JULY 2005
FILE NO.	APPL 246 OF 2005
CITATION NO.	2005 WAIRC 01960

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 received out of time
Representation	
Applicant	Mr T Crossley-Solomon as Agent
Respondent	No appearance

Reasons for Decision

1 The applicant has given evidence that she was employed by the respondent from 9 to 26 November 2004. It is clear though from her evidence that her employment terminated on 23 November 2004, it being a Tuesday. It was not until March 2005 that she lodged an application pursuant to s.29(1)(b)(i) of the Industrial Relations Act, 1979 ("the Act"), claiming she had been harshly, oppressively or unfairly dismissed. The application was lodged greater than 10 weeks out of time. The applicant seeks an extension of time in which to file the application. Section 29(3) of the Act provides 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."

2 The applicant was engaged in the hospitality industry for approximately 8 years prior to her termination of employment. She was employed by the respondent as the restaurant supervisor at Zorro's Restaurant, Maddington. She says that her employment was not of a probational nature and she did not receive a letter of appointment. Her duties included running the restaurant, preparing rosters for staff, hiring staff, stock ordering and money handling. Her supervisor was a Mr Mark Williams who was a project manager for the restaurant, although she had very little contact with Mr Williams. Her employer was represented by Mr Richard Trainer.

3 The applicant worked 6 – 7 days per week and was paid $24.00 per hour, fortnightly. She was employed for 2 weeks. She says that there was no discussion with Mr Williams regarding her performance.

4 On Monday 22 November 2004, the applicant started work at approximately 1.00pm. That evening, Mr Trainer brought into the restaurant a young woman named Sam. Nothing was mentioned to the appellant about the purpose of Sam being in the restaurant and so she later asked Sam what her role was and Sam replied that she was there to take over the applicant's job. The applicant says that she was shocked and stunned by this.

5 At around 6.30pm the applicant spoke to the head chef, Karen, and asked her if she knew what was going on. Karen told her that she knew about it and that Sam had been brought in to take over the applicant's job. The applicant said that she continued to work although she was very upset. Between 8.00pm and 8.30pm, she spoke to Karen and said that she was very upset and did not believe that she could work out the rest of her shift. The applicant informed Karen of what was required for the rest of the evening and she says she asked Karen if she could go home. She says that Karen said that it was ok. She said goodbye to Sam in passing. She left approximately 2 hours prior to the normal end of her shift, which was when the restaurant closed. She went home, saw that her child was in bed, spoke to her partner and went to bed.

6 On the next morning at around 8.00am, the applicant telephoned Mr Trainer's personal assistant, Dianne, and asked if she knew what was going on. Dianne informed her that she did not know what was going on and would have Mr Trainer contact her. Some time between 9.00am and 10.00am that day, Mr Trainer telephoned the applicant. She asked him what was going on and why Sam had been brought in. He advised her that Sam was there to take over from her, and that the applicant was no

longer required. The applicant asked why and he replied that she was not customer service-orientated and was not doing her daily totals correctly. In respect of the customer service orientation, the applicant says that she told Mr Trainer that he was the first person who had ever said that to her.

7 The applicant says that Mr Trainer commented to her that by leaving early the previous evening she had abandoned her employment and that was not on. She told him that she was extremely distressed and it was not fair to not tell her what was going on. She says that he changed the subject. She asked if she could still work at the restaurant but as a waitress and he declined this offer. He said to her that she should speak to Dianne, his personal assistant, regarding the rest of her wages. The conversation ended at this point.

8 The applicant said that over the next 4 weeks she made numerous calls to Dianne regarding her pay and was given a number of excuses including that the paperwork for the applicant and all other staff had been lost. The applicant received no satisfaction and stopped calling about 4 weeks later.

9 The applicant has given evidence of her domestic circumstances over the remainder of November and December 2004 and January and February 2005. During this time she was taking care of her 12 month old child following the break up with her partner at the end November/early December. Her partner had been caring for the child while she worked. She moved house in early December 2004 on account of the break up. She managed to arrange 3 days per week child care to take effect from early January to enable her to look for work.

10 The applicant says that around 8 March 2005, she went to visit a previous employer who told her about the Commission and her right to make an application to the Commission. She was also told of an industrial agent who could assist her and how to contact him. Immediately upon being advised of this she sought out the appropriate contact telephone numbers, contacted the agent and an application was filed within 24 hours.

11 The applicant says that the reason why she did not file her application within time was that she was not aware of the existence of the Commission or her capacity to make an application and she did not know of the 28 day time limit. She says she acted as quickly as she became aware of that opportunity.

12 The applicant says that the dismissal was very unfair because it was without good reason, it was done over the telephone and without warning.

13 The applicant says that to her knowledge the restaurant closed down in early December 2004.

14 The decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General of the Department of Education of Western Australia* (2004) 84 WAIG 683 sets out the tests to be applied in these circumstances. The tests include that, prima facie, time limits set out in legislation should be complied with unless there is an acceptable explanation of the delay which makes it equitable to grant an extension of the time limit. There is also consideration of the action taken by the applicant to contest the termination other than by applying under the Act. The length of time taken and whether there is a sufficiently arguable case are also considerations.

15 In this case, the length of the delay is in excess of 10 weeks. Given that the time limit is 28 days, a period of 10 weeks in excess of that is lengthy.

16 The applicant has taken no steps to contest the termination.

17 There is an issue of possible prejudice to the respondent, including prejudice caused by the delay. The appellant says there is no prejudice to the respondent. The respondent did not appear before the Commission and the Notices of Hearing sent to the respondent's registered address have been returned to the Commission marked that the respondent has left the address. Whilst the respondent is not before the Commission to argue the matter, some question arises in my mind as to the respondent's capacity to argue against the dismissal. This is, firstly because the respondent is unaware of the hearing due to its failure to notify the appropriate authorities of a change of address. Secondly, with the restaurant having closed in December 2004, one can imagine that there may be some prejudice to the respondent caused by the delay. However, these are matters of speculation, and not helpful to the final consideration of the issue.

18 The evidence given by the applicant suggests that there is at least an arguable case on the basis of the summary manner in which she was treated in the termination. According to her, she was given no warning of the respondent's intentions, and no opportunity to answer any criticism about her performance. Others knew of her replacement before she did, and her replacement was brought into the workplace without any explanation being given to her. On the face of the evidence there is the basis for a claim of unfairness in the dismissal.

19 The only reason the applicant has given for the delay is her lack of knowledge of her rights to make a claim. Further, she did not challenge the dismissal.

20 In weighing the factors in this case, I conclude that notwithstanding that the length of the delay, the reasons for the delay and the lack of challenge to the dismissal are not supportive of the application to extend time, given the arguable case on the merits of the substantive claim, I find that it would be unfair not to receive the application out of time. Accordingly, the application will be received.

2005 WAIRC 01961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATE AMBER WALLIS
	APPLICANT
	-v-
	BURBRIDGE GROUP PTY LTD T/A ZORRO'S RESTAURANT, MADDINGTON
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 5 JULY 2005
FILE NO	APPL 246 OF 2005
CITATION NO.	2005 WAIRC 01961

Result Application received out of time

Order

HAVING heard Mr T Crossley-Solomon on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application to receive the referral out of time be and is hereby granted.

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

2005 WAIRC 01917

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	TUESDAY, 28 JUNE 2005
FILE NO.	APPL 201 OF 2005
CITATION NO.	2005 WAIRC 01917

CatchWords	Termination of employment - Harsh, oppressive or unfair dismissal - Whether employee was assaulted - Credibility of witnesses - Fairness of dismissal - Compensation - Relevant principles applied - Industrial Relations Act 1979 (WA) s.29(1)(b)(i)
Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr P Whitcher
Respondent	Mr D Jones, as agent

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant, Mr Peter Whitcher, worked for the respondent from January 2004 to 21 January 2005 in the Retravision store in South Hedland as a delivery driver's offsider. Mr Whitcher was dismissed without notice on 21 January 2005 following an incident with Mr Anagnostopoulos, the owner of the store. He was paid his outstanding annual leave entitlements on termination. He does not seek re-instatement, as he says that he could not work with someone who assaulted him. He claims compensation for lost income.

2 The matter came on for hearing initially pursuant to s.29(3) of the Act. The Commission decided that, on the evidence, the applicant was dismissed summarily and that it would have been unfair not to have accepted the referral of the application being out of time. In evidence given during that hearing, the applicant says of the incident as follows:

> "George asked us to do a delivery, a aircon, at quarter past five, but I didn't know the address, and I didn't have an invoice to say where it was going. George showed us which air-conditioner it was, so I started grabbing the aircon out. I wanted to be exactly sure, so I went and asked him for the - - the invoice, and he told me to "Fuck off". He - - I then went back out the back, grabbed the air-conditioner out. He come around the side, screaming, carrying on. I was in the corner. He come charging, pushed the air-conditioner into my legs, jumped on top of the box, said, "I'll smash you." He clenched his fist, hit me in the mouth, told me to, "Get out. You're fired. You're sacked. Leave my shop." So I left the shop." (Transcript pp.6, 7)

3 After Mr Whitcher left the shop he says that Mr Anagnostopoulos followed him and asked whether he owed him any money. The applicant replied, "No".

4 He says of the respondent's Notice of Answer and Counterproposal as follows:

> "Well, I've worked there on four different occasions. I haven't been sacked on three different occasions. I've never stole anything in my life from there. I wasn't dismissed for theft. I haven't been spoken to for four different occasions." (Transcript p.9)

5 Under cross-examination the applicant says that he worked for the respondent twice. He denies that he was ever sacked for stealing. Mr Whitcher says that on two occasions he was spoken to by Mr Anagnostopoulos, in the presence of Mr Bernie Gorringe (a fellow employee) and the applicant's brother-in-law (who also worked at the store) about his attitude. He denies that he ever screamed in the shop or said to Mr Anagnostopoulos, "don't tell me what to do. You're not my mother". He says that in their exchange on 21 January 2005 he told Mr Anagnostopoulos that he could not talk to him like that.

6 The applicant has worked for the respondent for nearly four years all up. He says that the day before he served the application on the respondent, Mr Anagnostopoulos offered him back his job if he changed his attitude. The offer was to re-commence work the next day. Mr Whitcher refused the offer and had someone drop off the application to Mr Anagnostopoulos (Transcript pp.12-15). After he received the application, Mr Anagnostopoulos saw Mr Whitcher and sought to dissuade him from the application. They had been neighbours for many years. Mr Whitcher says that Mr Anagnostopoulos harassed his family about the issue.

7 Mr Whitcher says that he received one warning that he might lose his job if he did not change his attitude. He later said that he was spoken to twice in this fashion. The applicant says that Mr Anagnostopoulos punched him in the mouth on 21 January 2005 and that he had Mr Anagnostopoulos charged with assault.

8 The applicant says that he earned $554 gross per week with the respondent. Since his termination he has sought work and started work on 23 March 2005 doing casual work at the Lodge Motel. He has earned a total of approximately $563 to $663 in net income.

9 He says that he looked for work everywhere. He put in applications with Allied Pickfords, Grace Removals and Barclay Mining.

10 At the hearing on 24 May 2005, Mr Peter Whitcher gave evidence that at 5.15 pm on 21 January 2005 at Lil's Retravision, Mr Anagnostopoulos requested that he deliver a 2½ horse-power split air-conditioner. He says further that Mr Anagnostopoulos indicated which air-conditioner he wanted delivered by touching the box of the air-conditioner. In order to ascertain whether the air-conditioner was the correct model, Mr Whitcher then says that he asked Mr Anagnostopoulos for the invoice as he did not have a copy. Mr Anagnostopoulos was at the front desk. Mr Anagnostopoulos told him to "fuck off" (Transcript p.7). Consequently, Mr Whitcher says that he went around the back to where the air-conditioner was. He says he proceeded to get behind the air-conditioner and push it. At this point he says that Mr Anagnostopoulos came around the corner and shouted, "Youse are fucking idiots", presumably referring to Mr Jamie Doherty and himself, and "that's the wrong effing air-conditioner" (Transcript pp.17, 18). Mr Whitcher changed some of his evidence as to the words used in cross-examination. He says that Mr Anagnostopoulos, "pushed the air-conditioner into my legs, pushed me in the corner, jumped on the box, started abusing me, grabbed me and punched me in the mouth" (Transcript p.8). Mr Whitcher gave further evidence that Mr Anagnostopoulos jumped on top of the air-conditioner box so that his knees were on top of the box and said, "I should smash you" (Transcript p.20). He then says Mr Anagnostopoulos punched him in the mouth with his clenched right fist. While this occurred, he says that Mr Doherty was behind Mr Anagnostopoulos. He gave evidence that Mr Gorringe came in after the incident was over.

11 Mr Whitcher denies that he was shouting during the incident, that he said "you're not my mother" and that Mr Anagnostopoulos was trying to get him to lower his voice by saying "Shh" and putting his open hand in front of Mr Whitcher's face (Transcript p.21). Mr Whitcher does however acknowledge that he was offered another chance to work at Lil's Retravision on the basis that he did what he was told and did not shout and raise his voice in the store in the presence of customers (Transcript p.13). He says Mr Gorringe spoke to him on many occasions to tell him to behave, do his job, not answer back or argue. He agrees that he once reduced Mrs Anderson to tears in frustration as he would not do as instructed. He agrees that on many occasions he was a difficult person to work with when he was in the wrong mood. Mr Whitcher says that following the incident, Mr Anagnostopoulos said that he was very annoyed and that, "You're sacked. Get out of my store". Mr Whitcher denies that he subsequently said, "I quit anyway". Mr Whitcher says that he then left the store and Mr Anagnostopoulos followed and asked whether he was owed any money, to which Mr Whitcher responded "No" (Transcript p.23). Mr Whitcher gave evidence that he had collected his pay at lunch time that day which included two weeks' holiday pay.

12 Mr Whitcher says that Mr Anagnostopoulos told him that the air-conditioner was a 2 ½ horse-power split air-conditioner and he says the wall or window air-conditioners were at the front of the store (Transcript p.18). The split air-conditioners were in the stores area. The box which Mr Anagnostopoulos touched was a long, skinny box. The window air-conditioners came in a big square box.

13 Mr Whitcher's evidence changed under cross-examination to say that Mr Anagnostopoulos started shouting as he came closer to him in the storage area; not when he arrived at the stores area. Mr Whitcher says he got a "fat lip" from the punch (Transcript, p.22). He denies that Mr Gorringe stood between Mr Anagnostopoulos and him. He says Mr Gorringe arrived after the altercation.

14 Mr Whitcher says that 2 or 3 weeks after the termination, Mr Anagnostopoulos offered him his job back if he changed his attitude. Mr Whitcher thought about the offer then telephoned Mr Anagnostopoulos to reject the offer. The offer was conditional upon Mr Whitcher doing as he was told, not arguing and not shouting in the store. Mr Whitcher says as follows:

> "Right, well, tell me, after you allege he punched you in the mouth, what happened?---George walked away and went and seen Bernie. Bernie told George to settle down. So Jamie walked forward and I walked behind Jamie. I left the store. I walked past George and he says, "You're sacked. Get out of my store." I walked out the door. George followed and asked if we owed - - if he owed us anything, and I said, "No"." (Transcript p.26).

15 At the hearing on 8 April 2005, Mr Anagnostopoulos gave evidence that on 21 January 2005 the applicant was to deliver a window air-conditioner. The applicant got the invoice wrong and selected a split air-conditioner. He says that Mr Whitcher had the experience to get it right and did not. The invoices have to be checked very carefully to get the right product. He says that he had the following exchange then with Mr Whitcher:

> "And as they were lifting the air-conditioner, I said, "What are you doing? It's the wrong one. This is a split air-conditioner, not a window. Why don't you look at your paper?" I got very upset when he said to me, "Don't tell me what to do. You're not my mother." I says, "Peter, we've gone down that road a hundred times. I've had enough of you. Your attitude is not right for the floor or the showroom. All you have to do is put it back and pick up the correct one, and let's go for the delivery. It's getting very late. It's another 20 minutes before you've got to knock off, so we've got to do it. What are you argue about?" And he started screaming." (Transcript p.24)

He then says:

> "And I pushed the air-conditioner towards him and I said, "Put it back". I did not hurt him in any way whatsoever. I did push that. And he started screaming.
>
> ……..
>
> "Oh, shut up", and I put fingers, "Shush. Oi." I - - I wanted to - - I've got too many people in the - - customers in the shop. I can't afford him screaming." (Transcript p.25)

16 Mr Anagnostopoulos demonstrated at hearing what motion he says he made. He thrust his hand out quickly with the one finger extended and he pushed the fingers to his lips to demonstrate that he had applied his fingers to the applicant's lips to silence him in the shop.

17 Mr Anagnostopoulos says that Mr Gorringe and the applicant's brother-in-law (Mr Doherty) then arrived and took over. Mr Anagnostopoulos says that he told the applicant:

> "Peter, it's not working between - - between us. You are not changing attitude. This is the last time. You're gone. You've got 2 weeks' pay as a holiday. In the meantime, you are given - - you're gone. I don't want any more. I don't want to upset the relationship between you and - - your family and my family." (Transcript p.25)

18 He says that he did not pay the applicant any notice. At the time of the incident he says that the applicant, his brother-in-law and he were present but that others in the shop could hear them. He says that he had his back to the shop and the shop is very open in layout.

19 Mr Anagnostopoulos gave evidence that there were close family connections between his family and Mr Whitcher and his family. Mr Anagnostopoulos says that Mr Whitcher worked for him for about 4 years all up. He says his first contract of employment lasted about 2 years and he was terminated for screaming. He said he would upset the drivers. His second period of employment lasted about 6 to 8 months. It came to an end because of Mr Whitcher's screaming. Mr Anagnostopoulos corrected himself and said the second time Mr Whitcher left because he was taking soap powder from the washing machines. The third time he left he resigned and found another job. On the most recent occasion that Mr Whitcher was employed, Mr Anagnostopoulos says that he gave him a job on the condition that Mr Whitcher did not scream in the shop and make Linda (i.e. Mrs Anderson) cry. Mr Anagnostopoulos says that when Mr Whitcher was last employed, he had to talk to Mr Whitcher on three occasions about him screaming in the shop and hurting Linda's feelings. Mr Anagnostopoulos says that he last warned Mr Whitcher about two weeks prior to his dismissal.

20 At the hearing on 24 May 2005, Mr Anagnostopoulos says that he gave Mr Whitcher a job, on the most recent occasion, on one condition, that is, he was not to scream in the shop or at Mrs Anderson (Transcript p.46). Subsequently, he says he had to counsel Mr Whitcher about this behaviour, in the presence of Mr Gorringe and Mr Doherty on three occasions. The last occasion this happened was 2 weeks before Mr Whitcher's dismissal. Otherwise Mr Whitcher was a very good worker.

21 Mr Anagnostopoulos gave evidence that on 21 January 2005 he was in the corridor of his store and pointed at the wall air-conditioner (2 to 3 metres away) and said to Mr Whitcher and Mr Doherty, "here's the invoice. Take that air-conditioner there, and take it to that address." He says he gave them the invoice. He says if they did not have the invoice they would not have known the address and where to go. He denies that they asked him for an invoice or that he told them to "fuck off"

22 Mr Anagnostopoulos says that as Mr Whitcher and Mr Doherty went to the stores area, he knew they were getting the wrong air-conditioner, as the wall air-conditioners are in the main area of the store, and so he followed them. As he entered the stores area Mr Whitcher was pulling the unit (angling it) from the wall; Mr Doherty was "sitting at the back of Peter". Mr Anagnostopoulos says he was 10 feet away and that he asked them, "What are you doing? This is the wrong one". He denies that he swore at them. He told them to read the invoice and said, "can't you read?" Mr Anagnostopoulos says Mr Whitcher "started going off the deep end". He says he went and pushed the air-conditioner back against the wall. He denies that he banged Mr Whitcher's leg or pushed him. He denies that he jumped on the box or punched Mr Whitcher. He says he leaned against the box.

23 Mr Anagnostopoulos says that he told Mr Whitcher to, "go and get that damn thing, will you?" and Mr Whitcher replied, "Don't tell me what to do. You not my mother." There was then this exchange: "And what did you say in response to that?---I walked away and I said, "That's it. I had enough. I'm up to here. Every day I got 40 people working for me and I got to come and teach you how to behave in the shop. I had enough of you. I don't want you here any more. I want out of this relationship. Terminate." (Transcript p.58)

24 Mr Anagnostopoulos says that about 3 ½ weeks after the dismissal, Mrs Anderson telephoned him and asked him to take Mr Whitcher back. Mr Anagnostopoulos agreed. Mr Anagnostopoulos says that they had the following exchange:

> "And what did you tell him?---I said, "Look, if you behave yourself, and all I want from you no screaming in the shop, especially when there are customers there, ...(indistinct)... we'll give you your job back." He said to me, "You going to give me extra money?" I said, "Peter, I'm asking you if you want your job back. You have a family. I don't care if you don't want the job back," and he said to me, "I'll think about it." I said, "Okay, whatever you want."" (Transcript p.61)

25 Mr Anagnostopoulos says that Mr Whitcher is a very good worker. He says that every now and then he just goes off the deep end. Mr Anagnostopoulos says he never received a response and 3 days later the application for unfair dismissal arrived.

26 Apart from Mr Whitcher and Mr Anagnostopoulos, evidence was given by Mr Jamie Doherty (a delivery driver for the respondent and the applicant's brother-in-law), Mr Bernie Gorringe (a manager for the respondent at the relevant time), Mr Paternostera (a delivery driver for the respondent) and Mrs Anderson (a manager of the respondent's furniture store).

27 Mr Gorringe gave evidence that he was 5 metres away from the stores area and he says:

> "I heard Peter raise his voice and I excused myself from the - - -
>
> WITNESS: - - myself from the - - from the customer and walked out the back and I - - when I walked - - once I got to the doorway where Peter and George and Jamie were, or Peter's brother-in-law, George was over near Peter with his hand up and was asking him - - well, was "Shh," and then I moved over towards them and I stood between them and asked them to move apart." (Transcript pp. 67, 68).

28 Mr Gorringe did not see Mr Anagnostopoulos make any aggressive gesture towards Mr Whitcher.

29 In answer to questions from the Commission, Mr Gorringe says he only saw Mr Anagnostopoulos walk to the stores area, he did not see Mr Whitcher and Mr Doherty until he had entered the stores area himself. He heard loud voices whilst serving a customer and he went to the stores area. He says he entered the stores area about 1 ½ to 2 minutes after he saw Mr Anagnostopoulos go to the stores area. He says it would have been about 30 to 45 seconds between hearing raised voices (ie. Mr Whitcher and Mr Anagnostopoulos) before entering the store room. They were arguing. When he entered the stores area and "stood between the two men he heard Mr Anagnostopoulos say words to the effect that "you're sacked" and Mr Whitcher reply, "no, I quit, and I'll see you in Court". He did not notice anything unusual about their faces; there was no swelling.

30 Mr Doherty gave evidence that Mr Anagnostopoulos asked him to deliver an air-conditioner. He pointed it out to Mr Doherty and Mr Whitcher. They started pulling it out; they needed to ensure they had the right model. They walked over to Mr Anagnostopoulos; Mr Whitcher asked him for the receipt. Mr Anagnostopoulos told him to "eff off". They went back to the air-conditioner that they thought Mr Anagnostopoulos had pointed out and started taking it out. Mr Anagnostopoulos came around the corner and started yelling at Mr Whitcher. Mr Doherty says, "Then the fight sort of broke out." Mr Anagnostopoulos pushed the air-conditioner up against Mr Whitcher's legs, trapping him in the corner. Mr Doherty then says,

> "Then George sort of got on top of the box with his fist raised and had Peter by the shirt. Peter also had his fist in the air saying, "If you hit me, I'm going to hit you." Yeah, George pushed his hands forward and got Peter in the mouth and, and like, towards the end of the fight – – like, Peter didn't retaliate back." (Transcript p.28)

Mr Doherty says that another employee then came along and told them to be quiet. Mr Anagnostopoulos then said to Mr Whitcher that he was sacked and Mr Doherty and Mr Whitcher walked outside. Mr Doherty says that Mr Gorringe came along about 5 to 10 seconds before it was all over.

31 Under cross-examination Mr Doherty agreed that Mr Whitcher has the ability to get offside with people because he does not follow their instructions (Transcript p.30). He says this would happen once every couple of weeks. He was present when Mr

Gorringe told Mr Whitcher to "just do his job, don't answer back and don't shout in the store". Mr Doherty says when they first spoke to Mr Anagnostopoulos, Mr Anagnostopoulos was in the middle aisle of the store; he was next to the fridges. Mr Doherty says they talked to him there and then Mr Anagnostopoulos walked down to the back of the store and showed them the air-conditioner. Mr Anagnostopoulos then walked over to the other side of the store. When Mr Whitcher asked Mr Anagnostopoulos for the receipt, Mr Doherty says that Mr Anagnostopoulos told Mr Whitcher to "Eff off" and says that Mr Anagnostopoulos was "basically screaming".

32 Mr Doherty says that Mr Anagnostopoulos came around the corner of the stores area, swearing and carrying on. Mr Anagnostopoulos was out of control. Mr Anagnostopoulos called Mr Whitcher a "fucking idiot". Mr Whitcher was down the end of the store room behind the air-conditioning box, which was at an angle. Mr Doherty says that Mr Anagnostopoulos pushed the box against Mr Whitcher's legs, put a knee on the box, he put both hands on Mr Whitcher's t-shirt and pushed his hands forward. In doing so he hit Mr Whitcher in the mouth. Mr Doherty denies Mr Anagnostopoulos put his finger to his mouth and said, "shhh", to quieten Mr Whitcher. Mr Doherty says that Mr Whitcher was standing there with his fist closed saying that he would hit Mr Anagnostopoulos. He said, "I'll hit you back". He says of Mr Anagnostopoulos's actions, "Well, I wouldn't call it a punch but, like, when you put your hands like that and punch somebody in the mouth, I mean, that's - - that's a small punch; I dunno." (Transcript p.38). Mr Doherty denies that Mr Whitcher said, "he punched me" and that Mr Doherty responded "when". Mr Doherty says that when they walked down that corridor after the incident, Mr Whitcher said to him to look at his lip. Mr Doherty said he noticed a bit of a raised lip like he had been punched.

33 Mr Doherty says that Mr Anagnostopoulos after the direct confrontation said to Mr Whitcher words to the effect that he was fed up with him; he did not want him there anymore and he wanted him to leave. About this time, Mr Gorringe entered and came between the two men to calm them down. Mr Gorringe put his hand between the two men to try and separate them.

34 I do not recite the evidence of Mr Paternostera. His evidence has little significance for determining this matter and in any event I prefer the evidence of Mrs Anderson. The evidence of Mrs Anderson is essentially that Mr Whitcher was a good worker, but he frustrated her as he argued and would not do as instructed. His actions reduced her to tears on at least one occasion (Transcript pp.83, 84)

35 The credibility of key witnesses is a significant factor in this matter. It cannot be the case that the evidence differs simply as a matter of recall. For the witnesses who were present during the incident on 21 January 2005 there are distinct conflicts in the evidence as to what happened and what was said. There are two sides to the evidence and needless to say both cannot be correct and truthful. The central question is whether Mr Anagnostopoulos physically assaulted Mr Whitcher. There are other issues but these are not as central to deciding this matter. The applicant agreed under cross-examination that he had been counselled and warned about his tendency to argue, to not do as instructed and to raise his voice in the store. Albeit Mr Whitcher denied at the initial hearing that he had screamed in the store. There is a difference as to how many times he was counselled about his behaviour, however, he agrees that both Mr Gorringe and Mr Anagnostopoulos spoke to him about these matters. Mr Gorringe says in answer to questions from the Commission that these discussions were more in the form of counselling. They occurred mostly after Mr Whitcher had argued loudly with Mr Anagnostopoulos. Mr Anagnostopoulos says that he warned Mr Whitcher on more than one occasion that he would put his job in jeopardy if he continued to not do as instructed, to argue back and to scream in the store. Mr Whitcher concedes that he was warned that he was not to do these things, that his job might be in jeopardy and that, on the last occasion he was employed, he was explicitly told that he would be re-employed conditional on him changing his attitude and behaviour as to these complaints.

36 I return to the central issue and the credibility of the witnesses. In summary, I have confidence and can accept without hesitation the evidence of Mr Gorringe and Mrs Anderson. Mrs Anderson's evidence is relevant in that she says that Mr Whitcher's behaviour reduced her to tears on at least one occasion; most recently four weeks prior to his dismissal. Mr Whitcher was argumentative, vocal and would not do as directed. This frustrated her to the point of crying. Mr Anagnostopoulos had to talk to him about this. She thinks that Mr Whitcher was otherwise a good worker. She thinks that Mr Whitcher was employed by the respondent on probably four separate occasions. She was not able to give any evidence as to the actual incident on 21 January 2005.

37 The evidence of Mr Gorringe is important for determining this issue. I rely on his evidence over that of Mr Whitcher, Mr Anagnostopoulos and Mr Doherty. Mr Gorringe of course was present for only part of the exchange between Mr Whitcher and Mr Anagnostopoulos. Mr Gorringe was questioned closely by the Commission. He says that he was serving a customer near the fridges and the washing machines. He did not see Mr Whitcher and Mr Doherty go to the stores area. He did see Mr Anagnostopoulos walk to the stores area. He was walking normally. Mr Gorringe says that about 1 ½ to 2 minutes later he entered the stores area after he had heard voices arguing. He, at that time, had excused himself from the customer and it had taken him about 30 to 45 seconds after he heard Mr Whitcher and Mr Anagnostopoulos for him to get to the entrance of the stores area. At that time he saw Mr Anagnostopoulos facing Mr Whitcher and they were standing about two feet apart on his estimation. They were standing to the side of an air-conditioner box. Mr Anagnostopoulos had his hand up (approximately shoulder high) and the palm of the hand facing Mr Whitcher. Mr Anagnostopoulos' hand was not in contact with Mr Whitcher. Mr Anagnostopoulos was saying, "shuh", to Mr Whitcher. Mr Gorringe did not see Mr Doherty at first. He saw him later as Mr Gorringe left the stores area and returned to the counter and to another customer. Mr Anagnostopoulos had preceded him out of the stores area. He does not know what Mr Whitcher and Mr Doherty did then. When he first entered the stores area Mr Gorringe went and stood between the two men and told them to calm down. He says that he did not see Mr Anagnostopoulos on the air-conditioning box. He could see clearly the faces of Mr Anagnostopoulos and Mr Whitcher and neither person had marks on their faces. Mr Gorringe did not hear Mr Whitcher or Mr Anagnostopoulos in the store other than their brief exchange in the stores area. He says that Mr Anagnostopoulos is normally a loud speaker and was no louder than normal in the exchange. Mr Whitcher was louder than Mr Anagnostopoulos and he sounded agitated.

38 Mr Doherty's evidence was tailored to support the applicant's case in my view. Mr Doherty says quite clearly that Mr Whitcher and he spoke to Mr Anagnostopoulos, on the second occasion, near the car park entrance to the store and just off the middle aisle. This position is close to the centre of the store and certainly quite visible within the store for customers and staff. This is a distance of some 20 to 25 metres away from the stores area, on my estimation, and having heard the evidence about the layout of goods in the store. I should say that whilst I have not inspected the store I am familiar with the general layout, albeit not the position of stock in the store, due to having walked through the store on numerous occasions as the middle aisle serves as an entrance to the main shopping complex from the car park. The point is that the store is relatively open in layout, a person yelling could easily be heard in the store. Mr Gorringe was serving a customer not far from where Mr Anagnostopoulos was situated and not far from the stores area. Mr Doherty and Mr Whitcher say that after they went to the stores area, they returned to Mr Anagnostopoulos and Mr Whitcher asked him for the invoice for the air-conditioner. They are quite emphatic on this point. Mr Whitcher says that Mr Anagnostopoulos told him to "fuck off". Mr Doherty's evidence importantly is that Mr Anagnostopoulos yelled out these words.

39 It is improbable in my view that Mr Anagnostopoulos yelled out these words in effectively the middle of his store. Mr Anagnostopoulos talks very loudly. His evidence is that this results from a 40% hearing loss in his left ear. If Mr Anagnostopoulos was talking louder than normal, or indeed yelling, it would be very obvious and audible in the store. If he swore in the store it would be very noteworthy. I am sure the whole store would have heard it. Mr Gorringe who was nearby did not hear this. There is no evidence that Mr Anagnostopoulos is prone to swearing. The common evidence is instead that he frequently complained to the applicant about him screaming in the store. Mr Anagnostopoulos says that this is simply not acceptable in a retail environment with customers present. It is unlikely then that Mr Anagnostopoulos swore loudly in the middle of the store as Mr Doherty says. This point in Mr Doherty's evidence was said, in my view, to reinforce the evidence of Mr Whitcher and he that the respondent had acted inappropriately and told them to "fuck off".

40 There is a dispute also as to whether Mr Anagostopoulos gave them the invoice. I consider it more probable that Mr Anagnostopoulos simply gave them the invoice and told them to deliver the wall air-conditioning unit. The respondent makes the valid point that the men could not have known where to deliver the unit without the invoice. He says also that he pointed to the wall air-conditioners, which were a matter of metres away in the body of the store, and told them to deliver the unit. Mr Whitcher said initially that he needed the invoice to check the address; he then said that he needed the invoice to check that he had the right unit. Yet he also says that Mr Anagnostopoulos had pointed out the unit to them by touching the box. It is not clear to me why he needed to check that he had the right unit if the respondent had actually touched the box containing the unit and told him to deliver a split unit as Mr Whitcher would have the Commission believe.

41 This raises an additional question as to whether Mr Anagnostopoulos entered the stores area twice during this exchange, as Mr Whitcher and Mr Doherty maintain, or whether he later followed them to the stores area as is the evidence of Mr Anagnostopoulos, because he knew they were going to the wrong units. Mr Gorringe did not see Mr Whitcher and Mr Doherty go into or come out of the stores area. He only saw Mr Anagnostopoulos go into the stores area shortly before the confrontation. Given the proximity of Mr Gorringe to the event, however, it is more likely that Mr Gorringe simply missed seeing the two men go into the stores area, rather than also miss seeing Mr Anagnostopoulos enter and depart that area, then the two men depart the area and then return to the stores area. Mr Gorringe's recall is more consistent with the evidence of Mr Anagnostopoulos than that of Mr Whitcher or Mr Doherty.

42 The evidence of Mr Anagnostopoulos must be treated carefully, as must the evidence of Mr Whitcher. The evidence of both men cannot be accepted without question or close assessment for differing reasons. Mr Anagnostopoulos' evidence as to what was said in the exchange between Mr Whitcher and he is inconsistent and elaborate. He kept offering different versions as to what was actually said. His approach to giving this evidence was more than simply a lack of precision or recall. It was an attempt to persuade. Mr Whitcher was much briefer and more precise in his evidence, and on occasion readily conceded some adverse points in cross-examination. His evidence was also inconsistent as to what was said. This could be an inadequate recall of a heated exchange; except this is not how Mr Whitcher portrays his evidence. He was very confident about what happened and what was said. In addition, on very basic points Mr Whitcher's evidence is contradictory and altered under cross-examination. He at first indicated that he had not screamed in the store. He later says that he did and that it was a condition upon which his last period of employment was offered. He says that he worked for the respondent twice, yet originally said four times. His evidence about counselling also changed in character. Having seen both witnesses give their evidence and then having read again their evidence in the transcript, I am confirmed in my view that the evidence of Mr Anagnostopoulos is more reliable than that of Mr Whitcher.

43 Another important aspect of Mr Gorringe's evidence is that he stood between Mr Whitcher and Mr Anagostopoulos to separate them. Mr Whitcher says he did not. More relevantly, Mr Gorringe, in answer to my question, says that he did not notice any mark on the face of either man. Mr Doherty says that as they were exiting the stores area, after the incident, Mr Whitcher drew his attention to his lip. Mr Doherty says that Mr Whitcher's lip was a bit raised like he had been punched. It is of course possible that any swelling occurred after Mr Gorringe's departure from the stores area, however, on all the evidence the time span is only a matter of seconds. Mr Gorringe further says that when he entered the stores area, which would have been about two minutes at most after Mr Anagnostopoulos entered the area, he saw Mr Anagnostopoulos with his open hand in front of Mr Whitcher's face and the respondent said "shuh" to Mr Whitcher. This is more consistent with Mr Anagnostopoulos' evidence. It is of course possible that the respondent punched the applicant before Mr Gorringe entered the stores area. However, for all the reasons expressed above I find that it is probable that Mr Anagnostopoulos did not punch or hit Mr Whitcher in the face as alleged. I note also that the account of the contact to the face given by Mr Whitcher differs from that given by Mr Doherty.

44 This finding deals with the key issue in dispute; namely the question of whether the employer assaulted the employee. If Mr Anagnostopoulos had acted as alleged, then clearly the dismissal would have been harsh, oppressive and unfair. There is still the issue of whether Mr Whitcher's dismissal was unfair in any event. The test to be applied is that found in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 of a fair go all round. The dismissal was unfair for the following reasons. The dismissal was summary in nature and there was no valid reason for a summary dismissal. For this reason alone the dismissal was unfair. The question then arises whether Mr Whitcher should, as submitted by Mr Jones for the respondent, been dismissed in any event on notice.

45 The most that can be said of Mr Whitcher's actions on that day is that he did not adequately follow his instructions, he argued with the respondent and he was speaking loudly in the stores area, which is part of the shop. Mr Whitcher had behaved worse than that in the recent past by reducing Mrs Anderson to tears. Mr Anagnostopoulos spoke to him about that. He kept employing Mr Whitcher. There is a long history of family links between the two men. Mr Anagnostopoulos re-employed Mr Whitcher three times. On the most recent occasion, Mr Anagnostopoulos offered the job because Mr Whitcher was out of work and had a family to support. It was a condition of his employment, accepted as such by Mr Whitcher under cross-examination, that he not argue back and scream in the shop. He had been counselled for this before and knew his employment was in jeopardy because of his behaviour.

46 Weighed against these factors are that Mr Anagnostopoulos, in my view, instigated the dispute which led to the dismissal and then dismissed Mr Whitcher in the heat of the exchange. There is no evidence that Mr Whitcher was physical towards Mr Anagnostopoulos, except that Mr Doherty says Mr Whitcher had raised a fist in response to Mr Anagnostopoulos' aggressive approach. I doubt this evidence. The exchange was heated. Mr Gorringe heard the raised voices; mostly Mr Whitcher it would seem, and came and separated the two men. Mr Anagnostopoulos came into the stores area and complained aggressively to the two men about their actions. I do not consider that he was calm at this stage. Having seen him give his evidence, and when one considers all the evidence in context, he was clearly agitated by the mistake which Mr Whitcher and Mr Doherty had made by selecting the wrong air-conditioner. Importantly, Mr Anagostopoulos said, on the first occasion he gave evidence, as follows:

> "And I pushed the air-conditioner towards him and I said, "Put it back". I did not hurt him in any way whatsoever. I did push that. And he started screaming.
>
> ……..
>
> "Oh, shut up", and I put fingers, "Shush. Oi." I - - I wanted to - - I've got too many people in the - - customers in the shop. I can't afford him screaming." (Transcript p.25)

47 He later says he pushed the air-conditioner back against the wall. Mr Whitcher says that the respondent pushed the box into his legs. I find that Mr Anagnostopoulos did push the air-conditioner into Mr Whitcher's legs. Mr Anagostopoulos also in his own evidence at the initial hearing and in his Notice of Answer and Counterproposal says that he put his finger to Mr Whitcher's lips to silence him. These unnecessary and aggressive acts clearly caused offence to Mr Whitcher. Mr Anagnostopoulos must shoulder the greater responsibility for the incident and should have handled the matter in a calmer and more considered manner. This does not excuse the behaviour of Mr Whitcher who knew his behaviour would not be tolerated by the respondent. Mr Anagnostopoulos then dismissed the applicant in the heat of the exchange and it is Mr Gorringe's evidence that Mr Whitcher said in reply words to the effect that he quit.

48 I do not consider that the approach adopted by Mr Anagostopoulos was fair in all the circumstances, notwithstanding that Mr Whitcher had repeated behaviour which he had been warned about several times and his employment was conditional upon him not arguing and screaming in the shop. For these reasons, I find the dismissal to be unfair, and unfair not simply due to the lack of notice. Having made this finding I need to consider whether re-instatement is practicable. Given the history of Mr Whitcher's employment, given the background of family friendships and given Mr Whitcher was re-employed on three separate occasions I would have thought that re-instatement was practicable. Mr Anagnostopoulos thought it was because on the request of Mrs Anderson he offered Mr Whitcher back his job, on the same conditions which he had earlier applied. Mr Whitcher rejected the offer and made application to the Commission instead. He says because he could not work for someone who assaulted him. I have found against him on this point and it does not benefit his case to accuse Mr Anagnostopoulos of assault in pursuit of his claim. Re-instatement is in fact now not practicable because the applicant has made and persisted with an accusation of assault. The first occasion when Mr Anagnostopoulos became aware of this accusation was in the application. Mr Whitcher says that he reported Mr Anagnostopoulos to the Police, but the respondent says that he is not otherwise aware of this.

49 As re-instatement is not practicable, I need to consider the issue of mitigation and compensation (*Ramsay Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8). Mr Whitcher has been largely unemployed since his dismissal except for some minimal casual work at the Lodge. He gave evidence unchallenged as to the unsuccessful efforts he has undertaken to seek employment. The nature of the dismissal does not have a bearing on the calculation of compensation. Compensation is for loss and is not designed as a punishment directed toward an employer for his actions. Given the facts in this matter and having regard for my obligations under section 26 of the Act, I consider the loss suffered by Mr Whitcher is not the whole of the period he has claimed. The loss suffered is the period up to the time when he could have and should have resumed employment with the respondent. There was no allegation of assault standing in the way of resuming the employment relationship at that point. Mr Whitcher had previously been employed by the respondent on four separate occasions. There had been a history of connections between the two men and their families. But for his rejection of the offer of employment for a fifth time, Mr Whitcher would have been employed by the respondent and possibly continued to still be employed. I so find. It is the attitude he took to the offer and the spurious allegation he made against Mr Anagnostopoulos which prevented that from occurring. He should not be allowed to enjoy some windfall gain from such an approach.

50 I calculate the loss as follows. Mr Anagnostopoulos says that he made the offer the day before he received the application. This evidence comes from the questions in cross-examination at the initial hearing. Mr Whitcher agrees that the offer from Mr Anagnostopoulos was made one day prior to serving the application on Mr Anagnostopoulos (Transcript p. 25). He could have resumed work the next day. This confirms that Mr Anagnostopoulos acted in good faith in offering Mr Whitcher his job back before the application was received. Mr Whitcher was to consider the offer and get back to Mr Anagnostopoulos. There is uncertainty as to when the application was received by Mr Anagnostopoulos. The declaration of service suggests that the application was served on 1 March 2005. However, that declaration was witnessed on Monday, 28 February 2005. Therefore I cannot rely necessarily on the declaration to ascertain when Mr Anagnostopoulos received the application. However, I consider that it is likely that Mr Anagnostopoulos received the application on 1 March 2005 which means he could have resumed work on 1 March 2005 as his discussion with Mr Anagnostopoulos would have been the day before. The application was returned to the applicant by mail, from the Commission, on 23 February 2005. Albeit Mr Whitcher may have had the application to serve on 24 or 25 February 2005, I consider it more likely that he would not have received the application until Friday, 25 February 2005 and would not have had the discussion with Mr Anagnostopoulos until Monday, 28 February 2005. He was then potentially to start work on the Tuesday. Mr Whitcher was paid annual leave until 4 February 2005. Therefore I calculate his loss as from 7 February to 28 February 2005 inclusive. This is a total of 16 working days. He received $554 gross per week hence I calculate his total loss as $1772.80 less any taxation payable to the Commissioner for Taxation. This is the amount I would award in compensation. I will issue an order that it be paid within 7 days from the date of the order.

2005 WAIRC 01968

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	TUESDAY, 5 JULY 2005
FILE NO	APPL 201 OF 2005
CITATION NO.	2005 WAIRC 01968

Result Applicant dismissed unfairly; compensation awarded
Representation
Applicant Mr P Whitcher
Respondent Mr D Jones, as agent

Order

HAVING HEARD Mr P Whitcher on his own behalf and Mr D Jones on behalf of the respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby:

(1) DECLARES that the applicant, Peter John Whitcher, was harshly and unfairly dismissed by the respondent on the 21st day of January 2005;

(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 $1772.80 to Peter John Whitcher, less any taxation that may be payable to the Commissioner of Taxation.

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

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Alexander Ottaway	WPC and I Parker T/As Video Ezy Duncraig	APPL 492/2005	Chief Commissioner A R Beech	Discontinued
Amanda Cooke	PNDT	APPL 603/2005	Chief Commissioner A R Beech	Discontinued
Andrea Louise James	Young Achievement Australia	APPL 384/2005	Commissioner P E Scott	Discontinued
Angela Marie Fritzsch	Sandra Fromson as trustee for the SL Fromson Trust t/as SL Office Services	APPL 480/2005	Chief Commissioner A R Beech	Discontinued
Anthony Richard Alexander Hilton	Energy Publications, Alloa Holdings Pty Ltd as trustee for The Oil and Gas Trust	APPL 258/2005	Commissioner S M Mayman	Discontinued
Bryan Bailey	Diesal Motors Trucks	APPL 196/2005	Commissioner S Wood	Discontinued
Carrie Louise Joy	The Crepe Cafe	APPL 1379/2004	Commissioner J H Smith	Discontinued
Cheryl Lee Moir	Forstaff Services	APPL 997/2004	Senior Commissioner J F Gregor	Discontinued
Christi Roxane Brockliss	Jarndu Yawuru Aboriginal Corporation	APPL 439/2005	Chief Commissioner A R Beech	Discontinued
Christoper Graeme Wilkes	Piacentini & Son Pty Ltd	APPL 337/2005	Commissioner S J Kenner	Discontinued
Christopher Phillip Leeds	Ballys Bar	APPL 173/2005	Commissioner S J Kenner	Discontinued
Chula Abeyasirwardane	Promina Group Limited As Parent Company to Australian Alliance Insurance	APPL 285/2005	Commissioner S J Kenner	Discontinued
Claire Ashton	Donelle Enterprises Pty Ltd	APPL 373/2005	Commissioner S J Kenner	Discontinued
Clare Donnellan	Warren Strange Director of Kantech International Pty Ltd t/as Strange Drilling	APPL 1635/2004	Commissioner S J Kenner	Discontinued
Claudine Glick	ASA Consultants Pty Ltd	APPL 1907/2003	Commissioner J H Smith	Discontinued
Craige Neil Purslowe	Invocare	APPL 523/2005	Chief Commissioner A R Beech	Discontinued
Daren Matthew Rogers	WA Bluemetal ABN 32 094 536 764	APPL 462/2005	Commissioner J H Smith	Discontinued

Parties		File Number	Commissioner	Result
David Laurance Johnson	Arthur Boyd	APPL 336/2005	Senior Commissioner J F Gregor	Discontinued
David Phillip Higgs	Concept Steel Constructions	APPL 457/2005	Commissioner P E Scott	Discontinued
David Roberts	Westaff (Australia) Pty Ltd	APPL 126/2005	Commissioner S M Mayman	Discontinued
Dawn Sally Alone	Noongar Employment and Enterprise Development Aboriginal Corporation	APPL 1567/2004	Commissioner J H Smith	Discontinued
Duncan J Co-Cliff	Department of Education and Training	APPL 504/2005	Commissioner P E Scott	Dismissed
Fleur Dione Warnock	Computer Corp	APPL 190/2005	Commissioner S M Mayman	Discontinued
Gerald Stokes	Manday Investments Pty Ltd	APPL 1564/2004	Senior Commissioner J F Gregor	Discontinued
Glenn Wallis	Mr Shane Joynson	APPL 263/2005	Commissioner S J Kenner	Discontinued
Hayley Marie Lynch	Zoo Products Pet's Department Store	APPL 393/2005	Commissioner P E Scott	Discontinued
Hugh Bryce	Community Choice Home Loans	APPL 1358/2004	Commissioner J L Harrison	Discontinued
Hugh Gemmell Bryce	Community Choice Home Loans	APPL 37/2005	Commissioner J L Harrison	Discontinued
Isaac Kendall Tredrea	Medivenn Pty Ltd (ABN 94 653531467)	APPL 529/2005	Commissioner S Wood	Discontinued
Jack Vorstenbosch	Brian Millar; Jane Millar; Metro Ballistrades	APPL 399/2005	Commissioner S M Mayman	Discontinued
Jade Tanya Smith	Rowland Wilson Realty Pty Ltd	APPL 365/2005	Commissioner S J Kenner	Discontinued
Jason Cowan	Siemens Thiess Communications Joint Venture	APPL 188/2005	Commissioner J L Harrison	Discontinued
Jeffrey Phillip Vercoe	Nissen Holdings Pty Ltd	APPL 103/2005	Commissioner S M Mayman	Discontinued
Jeremy Paul Piotrowski	Integrated Group Limited	APPL 248/2005	Commissioner S J Kenner	Discontinued
John Plug	Genesis Craft	APPL 474/2005	Commissioner P E Scott	Discontinued
Karl Josef Edlinger	Barminco	APPL 339/2005	Commissioner S J Kenner	Discontinued
Keri McGuinness	Yamatji Marlpa Barna Baba Maava Aboriginal Corporation	APPL 332/2005	Commissioner S M Mayman	Discontinued
Kylie Maree Farrell	Pat and Michael Holland	APPL 557/2005	Chief Commissioner A R Beech	Discontinued
Linda Anne Godbier	Flanders Investments P/L	APPL 484/2005	Commissioner S J Kenner	Discontinued
Lorraine Elizabeth Hollett	Atlas Copco Australia Pty Ltd (ABN 70 000 086 706)	APPL 419/2005	Commissioner J H Smith	Discontinued
Luke William Leschke	Steve Brayshaw	APPL 1213/2003	Commissioner J L Harrison	Dismissed
Malcolm Vern Dronsfield	Rosendorf Diamond Jewellers Pty Ltd	APPL 1065/2004	Commissioner J L Harrison	Dismissed
Manson Basil Craig	The Goose Cafe And Restaurant	APPL 313/2005	Commissioner S J Kenner	Discontinued
Marie White	Ogden IFC (Perth) Pty Ltd	APPL 328/2005	Commissioner J H Smith	Discontinued
Meagan Anne Calvert	Mills and Hassall	APPL 321/2005	Commissioner S Mayman	Discontinued
Mei Fun Ho	CPE Health Care	APPL 19/2004	Commissioner J L Harrison	Discontinued

Parties		File Number	Commissioner	Result
Michael William McQueen	Elloise Pty Ltd trading as Remax Preferred	APPL 1525/2004	Commissioner J H Smith	Dismissed
Michail Nicolia Marshall	Compass Group (Australia) Pty Ltd	APPL 1495/2004	Chief Commissioner A R Beech	Dismissed
Miss Ailsa Belinda Bowyer	DCK Australia Pty Ltd	APPL 110/2005	Chief Commissioner A R Beech	Discontinued
Mr Edward Dangla Cruz	Rottnest Island Authority	APPL 102/2005	Commissioner J H Smith	Dismissed
Mr James William Haynes	Arnotts Biscuits	APPL 49/2005	Chief Commissioner A R Beech	Dismissed
Mr Robert Roy Duncanson	Avon Catchment Council Inc.	APPL 125/2005	Commissioner S M Mayman	Discontinued
Mr Tim Lavender	Kanowna Belle Gold Mines Ltd t/as Placer Dome Asia Pacific	APPL 1616/2004	Senior Commissioner J F Gregor	Discontinued
Natasha Karthryn Tryl	Orion (WA) Pty Ltd	APPL 402/2005	Commissioner J L Harrison	Discontinued
Nikola Pirot	Arctic Cold Stores Pty Ltd	APPL 236/2005	Commissioner J H Smith	Discontinued
Omar Ali	Supply Connections	APPL 530/2005	Commissioner S Wood	Discontinued
Patrice Marie Leahy	The City of Kwinana	APPL 516/2005	Chief Commissioner A R Beech	Discontinued
Patricia Renouf	Irdi Legal	APPL 374/2005	Commissioner S J Kenner	Discontinued
Paul John Rogers	NSK Australia Pty Ltd	APPL 377/2005	Commissioner J H Smith	Discontinued
Paul Kelly	Key Group Engineering	APPL 395/2005	Commissioner S M Mayman	Discontinued
Paul Lazarakis	John DaSilva of Abramoff Holding Pty Ltd	APPL 405/2005	Senior Commissioner J F Gregor	Discontinued
Philip Ross Couper	BDO Chartered Accountants & Advisers	APPL 125/2004	Commissioner S Wood	Discontinued
Robert Allan Withnall	PDR Enterprises Pty Ltd T/As Jolly Frog Café	APPL 1478/2004	Commissioner J L Harrison	Discontinued
Robert Frederick Green	BGC Construction Pty Ltd	APPL 24/2005	Commissioner S J Kenner	Discontinued
Robert Myles	ABC Blinds Curtains Security	APPL 1533/2004	Commissioner S J Kenner	Discontinued
Robert Reid Donald	John DaSilva of Abramoff Holdings Pty Ltd	APPL 404/2005	Senior Commissioner J F Gregor	Discontinued
Rosanne Meredith Hoffman	Monty Shipman	APPL 314/2005	Commissioner S M Mayman	Discontinued
Ross Murray Cunningham	Westaff (Australia) Pty Ltd	APPL 293/2005	Commissioner J L Harrison	Discontinued
Sandra Jane Rankin	Centor	APPL 298/2005	Commissioner J L Harrison	Discontinued
Shari Decano McLane	Telstra, Julia Ross Recruitment	APPL 1573/2004	Commissioner J H Smith	Discontinued
Tahnya Michelle Herbert	Maddison Avenue Brothel	APPL 106/2005	Commissioner J L Harrison	Dismissed
Wayne David Shortland	Lombardi Nominees Pty Ltd T/A Howard Porter	APPL 185/2005	Commissioner S M Mayman	Discontinued
Wayne Hancock	Nu-Tech Engineering	APPL 331/2005	Senior Commissioner J F Gregor	Discontinued

Parties		File Number	Commissioner	Result
William Patrick Tully	Fortron Automotive Treatments Pty Ltd	APPL 26/2005	Commissioner J L Harrison	Discontinued
William Robertson	Geraldton Newspaper Limited	APPL 257/2005	Commissioner S Wood	Discontinued
Wolfgang Konrad	The University Club of Western Australia Pty Ltd	APPL 310/2005	Commissioner P E Scott	Discontinued

CONFERENCES—Matters arising out of—

2005 WAIRC 01838

DISPUTE REGARDING CHANGES TO THE DRUG AND ALCOHOL POLICY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND OTHERS

APPLICANTS

-v-

BHP BILLITON IRON ORE PTY LTD

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE MONDAY, 20 JUNE 2005
FILE NO. C 32 OF 2005
CITATION NO. 2005 WAIRC 01838

Result Rescind order of 27 May 2005
Representation
Applicants Mr G Wood
Respondent Mr R Lilburne of Counsel

Order

WHEREAS this is an application made pursuant to section 44 of the Industrial Relations Act 1979 and involves a dispute about the changes proposed by the respondent to the company wide Drug and Alcohol Policy; and

WHEREAS the Commission issued an order on 27 May 2005 pursuant to ss.44(6)(a) and 44(ba)(ii) of the Industrial Relations Act 1979; and

WHEREAS the Commission convened conferences on 14 and 20 June 2005 at which both parties agreed that the order of 27 May 2005 should be rescinded;

NOW THEREFORE having heard Mr G Wood on behalf of the applicants and Mr R Lilburne of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the order issued on 27 May 2005 be, and is hereby rescinded.

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

2005 WAIRC 01847

DISPUTE REGARDING MOVEMENT OF EMPLOYEE AND DECREASE IN WAGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

CHUBB SECURITY

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 21 JUNE 2005
FILE NO/S C 105 OF 2005
CITATION NO. 2005 WAIRC 01847

Result Jurisdiction found.
Interim order issued.

Order

WHEREAS on 16 June 2005 the applicant applied to the Commission for an urgent conference pursuant to Section 44 of the *Industrial Relations Act 1979* ("the Act"); and

WHEREAS the Commission convened a conference on 17 June 2005 and was informed by the applicant that David Cordes, a member of the applicant union, is to be moved from his role as a security officer at the BP Refinery site in Kwinana and relocated to the CSBP Kwinana site as at 20 June 2005; and

WHEREAS the applicant advised the Commission that Mr Cordes did not wish to relocate to take up this position for a number of reasons; and

WHEREAS the applicant advised the Commission that Mr Cordes was employed under the terms and conditions of the *BP Refinery (Kwinana) Security Officers' Award 1978* ("the State Award") and additional common law conditions; and

WHEREAS the respondent argues that Mr Cordes was employed under the terms of a Federal award, the *Security Officers' (Western Australia) Interim Award 1996* ("the Federal Award") and that as the Federal Award contains a disputes procedure which refers to the Australian Industrial Relations Commission ("AIRC") assisting in the resolution of disputes, this Commission therefore had no jurisdiction to deal with this application and as a result the respondent was not prepared to become involved in any conciliation proceedings in relation to this matter; and

WHEREAS as the issue of the Commission's jurisdiction to hear this application was raised by the respondent, the parties were required to file and serve submissions by midday 20 June 2005 in relation to the Commission's jurisdiction to deal with this application and if it was found that the Commission had jurisdiction to deal with this application, whether or not an order should issue retaining the status quo for Mr Cordes pending further proceedings taking place in relation to this application; and

WHEREAS the following submissions were made by the respondent and the applicant in support of their claims:

Respondent

1. The respondent argues that the Commission does not have the power to deal with this application as the respondent is bound by the Federal Award as a successor to a named respondent, Mr Cordes is employed in one of the Federal Award's classifications and the Federal Award provides for access to the AIRC to settle disputes;
2. An application was filed in the AIRC in relation to this matter on 20 June 2005;
3. The respondent maintains that it is not a respondent to the State Award;
4. Under his contract of employment with the respondent Mr Cordes is required to work at various sites;
5. The respondent has investigated issues raised by Mr Cordes in relation to his transfer and has concluded that there is no sound basis for him to refuse the transfer;
6. There is a meeting between Mr Cordes and the respondent on Wednesday 22 June 2005 to discuss Mr Cordes' concerns.

Applicant

1. The applicant argues that the respondent is bound by the State Award as it took over its current contract at Kwinana Oil Refinery from MSS Guard Services;
2. Mr Cordes is currently paid the hourly rate provided for in the State Award, compared with a lesser amount for Mr Cordes' classification under the Federal Award ($14.88 compared with $13.77);
3. The respondent has previously indicated to the applicant that the State award applies to its employees at Kwinana Oil Refinery and relies on an email dated 18 February 2005 from the respondent (Attachment B);
4. Even if the Federal Award applies to Mr Cordes, the applicant argues that as this award does not cover the transfer of an employee there is therefore no bar to Commission dealing with this matter;
5. The applicant argues there is a substantive issue to be tried as Mr Cordes has family responsibilities which would be affected if he changed to the proposed roster at CSBP, Mr Cordes is allergic to ammonia and Mr Cordes' conditions of employment and remuneration will diminish if he is transferred;
6. The applicant argues there is little, if any detriment to the respondent in granting an interim order that Mr Cordes remain at Kwinana Oil Refinery pending any arbitration of the issue in dispute; and
7. The applicant maintains that the meeting between the parties scheduled for 22 June 2005 is to discuss medical issues relating to Mr Cordes.

WHEREAS the Commission is of the view that it has jurisdiction to deal with this application as there is no evidence currently before the Commission that the Federal award applies to the respondent, as the respondent is not a named respondent to the Federal award (the scope clause of the Federal Award applies to named respondents) and no information was presented by the respondent in support of its claim that it was a successor to a named respondent to the Federal Award; and

WHEREAS in any event there is no reference in the Federal Award to the issue of an employee's transfer from one site to another site; and

WHEREAS the Commission is of the view that as the issue before the Commission is an industrial matter that it has the jurisdiction to issue an order pursuant to s44 of the Act, in particular under s44(6)(ba)(ii), which enables the Commission to issue orders which the Commission considers appropriate in the circumstances in relation to an industrial matter which will enable conciliation or arbitration to resolve the matter in question; and

WHEREAS the Commission has formed the view that an order should be considered in relation to this application pending conciliation and/or arbitration of the issue in dispute as this will enable conciliation and/or arbitration to occur to resolve the matter in question; and

WHEREAS when applying the tests of whether or not an order should issue in relation to this application and after considering the submissions from each party the Commission has formed the view that there is a substantial issue to be tried in relation Mr Cordes' health and safety, family responsibilities and remuneration and the Commission is also of the view that the consequences of issuing an order that the status quo be retained in relation to Mr Cordes' employment is not irreversible. The Commission is also of the

view that in all of the circumstances the detriment to Mr Cordes is greater than the detriment to the respondent if an interim order does not issue;

NOW THEREFORE the Commission having formed the view that it has jurisdiction to deal with this applicant and that in the circumstances an order is necessary to retain Mr Cordes at the BP Refinery Kwinana pending further conciliation and/or arbitration taking place in order to resolve this matter, and pursuant to the powers conferred on it under the Act and in particular s44(6), hereby orders:

1) THAT the Commission has jurisdiction to deal with this application.

2) THAT on an interim basis the respondent continue to employ Mr Cordes on a full-time basis at Kwinana Oil Refinery under his existing terms and conditions of employment undertaking security duties pending the outcome of conciliation and/or arbitration in relation to this matter.

3) THAT liberty to apply is reserved to the parties in relation to this order.

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

2005 WAIRC 01955

A DISPUTE REGARDING ALLEGED UNFAIR DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS UNION OF W.A. (INCORPORATED) **APPLICANT**
	-v-
	MR PAUL ALBERT, DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 1 JULY 2005
FILE NO/S	C 83 OF 2005
CITATION NO.	2005 WAIRC 01955

Result Application for Interim Order granted

Order

WHEREAS on 12 May 2005 The State Teachers Union of WA (Inc) ("the applicant") applied to the Commission for a conference pursuant to Section 44 of the *Industrial Relations Act 1979* ("the Act") in relation to the termination by the respondent of one of its members, Ms Patricia Heppolette; and

WHEREAS the Commission convened a conference on 1 June 2005 for the purpose of conciliating between the parties in relation to the dispute; and

WHEREAS at the conclusion of this conference the parties remained in dispute over Ms Heppolette's termination and the applicant sought an interim reinstatement order pending the hearing and determination of this matter; and

WHEREAS the applicant is seeking the following relief:-

> That Ms Heppolette be reinstated to her former position with the respondent without loss of salary, entitlements and continuity of service until this application has been heard and determined; and

WHEREAS the Commission advised the parties that the issue of whether or not and interim order should issue pending arbitration of the issues in dispute would be dealt with by way of written submissions to be filed by close of business 9 June 2005 and a hearing was held on 21 June 2005 for further submissions in relation to this issue; and

WHEREAS the applicant argued the following in support of its claim that an interim reinstatement order should issue:-

I. The applicant maintains that there is merit to its claim that Ms Heppolette was unfairly terminated and argues that there are serious issues to be tried in relation to her termination. The applicant argues that regard should be had to Ms Heppolette's lengthy employment history with the respondent and that Ms Heppolette was made permanent by the respondent in 2002 after working full time with the respondent for some years. The applicant argues that as Ms Heppolette successfully undertook many years of relief teaching prior to working with the respondent this should also be taken into account. The applicant argues that soon after Ms Heppolette commenced employment at Padbury Senior High School ("the School") in January 2004, after complaints were made by students about Ms Heppolette, hasty and unfavourable opinions were formed about Ms Heppolette's teaching abilities and the applicant maintains that Ms Heppolette was not provided with appropriate support at this time. The applicant argues that the removal of a year 12 class from Ms Heppolette under duress further undermined Ms Heppolette's standing in the eyes of students and this impacted on Ms Heppolette's self esteem and confidence.

II. The applicant argues that the respondent acted contrary to the *Public Sector Management Act 1994* ("the PSM Act") and the *Government School Teachers' and School Administrators' Certified Agreement 2004* when dealing with two grievances lodged by Ms Heppolette in 2004 in relation to her treatment whilst at the School and the applicant maintains that Ms Heppolette was treated unfairly and denied natural justice during the Performance Management process instituted at the School as she was not given a fair and reasonable opportunity to reply to the complaints made against her and the comments she did make were disregarded. Even though improvements were made by Ms Heppolette during the disciplinary process, the School failed to extend the timeframe of the Performance Improvement Programme undertaken by Ms Heppolette which was possible under the respondent's policies. The applicant maintains that the report into Ms Heppolette's alleged

substandard performance is biased and flawed as it failed to give sufficient weight to evidence given by two staff members who supported Ms Heppolette's claims that her performance was not substandard. The applicant also argues that as Ms Heppolette demonstrated that her performance was reasonable at Kelmscott Senior High School throughout Term 1, 2005 this highlights that her treatment at the School was unfair and oppressive.

III. The applicant argues that Ms Heppolette should be reinstated on an interim basis as Ms Heppolette continued to teach at the School without incident until the end of 2004 after her performance was determined to be substandard and Ms Heppolette taught without any issues being raised at Kelmscott Senior High School until April 2005.

IV. The applicant maintains that when Ms Heppolette was terminated the respondent failed to explore alternatives to her dismissal and the respondent failed to take into account Ms Heppolette's loyal employment history spanning five years.

V. The applicant argues there is no detriment to the respondent if Ms Heppolette is reinstated and submits that the balance of convenience lies with Ms Heppolette being reinstated on an interim basis as she has been employed by the respondent for over five years, she has long term financial commitments and even though Ms Heppolette has obtained some casual work since being terminated she is currently experiencing financial hardship. The applicant argues that if Ms Heppolette is reinstated on an interim basis it is reversible if the applicant is unsuccessful in its claim and the applicant argues that this application was lodged in a reasonable timeframe after Ms Heppolette was terminated.

WHEREAS the respondent argued the following in support of its claim that an interim reinstatement order should not issue:-

I. The respondent maintains that it had a valid reason for terminating Ms Heppolette and that she was not denied procedural fairness given the process adopted by the respondent in assessing Ms Heppolette's performance and when effecting her termination. The respondent submits that Ms Heppolette has a history of performance difficulties, notwithstanding her permanent status with the respondent. The respondent argues that when Ms Heppolette was employed at Morley Senior High School she did not have a full workload and was only able to cope with her responsibilities with the support and assistance of colleagues. The respondent argues that when Ms Heppolette taught at Hampton Senior High School in 2003 concerns were raised about Ms Heppolette's classroom management, lesson planning and parental concerns about Ms Heppolette were also raised.

II. After Ms Heppolette commenced employment at the School, issues arose as at 2 February 2004 concerning Ms Heppolette's performance and there were approximately 50 documented incidents concerning Ms Heploette raised by students, parents and colleagues. The School appointed a mentor to assist Ms Heppolette as early as 8 March 2004 and after agreed goals were identified by Ms Heppolette and her line manager in March 2004, written and verbal feedback was continuously provided by the School to Ms Heppolette. On 29 April 2004 the School's Deputy Principal was formally notified of concerns about Ms Heppolette's performance and at a meeting held on 7 May 2004 the respondent maintains that Mr Heppolette volunteered to relinquish her year 12 senior English class. The respondent acknowledges that on 21 May 2004 Ms Heppolette advised the School that her decision to give up the year 12 senior English class was made under duress.

III. Following further concerns about Ms Heppolette's performance being raised by students and parents, Ms Heppolette was subject to the respondent's Management of Unsatisfactory Performance Policy and Procedures process. On 30 June 2004 a Performance Management Process spanning approximately five weeks was instituted by the School in relation to Ms Heppolette, consistent with the respondent's standard processes regarding performance management. The respondent maintains that after this process was properly conducted the School concluded that Ms Heppolette's performance remained unsatisfactory and referred the issue of Ms Heppolette's performance to the respondent.

IV. Ms Heppolette's performance was then investigated pursuant to section 79(5) of the PSM Act and subsequent to this investigation Ms Heppolette was notified in September 2004 that her performance was found to be substandard. As Ms Heppolette disputed that her performance was substandard, an independent investigator was appointed on 25 October 2004 and the investigator's report was submitted to the Director General on 10 January 2005. The respondent advised Ms Heppolette of his preliminary findings on 2 February 2005 and Ms Heppolette was asked to provide a response and did so on 25 February 2005. In response the respondent advised Ms Heppolette's representatives on 5 April 2005 that it intended terminating Ms Heppolette.

V. The respondent maintains that the process used to terminate Ms Heppolette was thorough and carefully documented and was in line with the relevant procedures and that Ms Heppolette was given the opportunity to participate at every stage. The conclusions and findings of the independent investigator were considered by the Director General and after further information was obtained and considered at Ms Heppolette's request, a determination was made that Ms Heppolette be terminated.

VI. The respondent argues that as Ms Heppolette's performance was assessed to be below the acceptable standard and as Ms Heppolette was given assistance, training and support throughout the process to demonstrate an acceptable standard of performance, it is inappropriate that she be reinstated. The respondent argues that reinstating Ms Heppolette on an interim basis is inappropriate as Ms Heppolette is unable to perform at a satisfactory level and her reinstatement would merely recreate the circumstances that led to her termination.

VII. Even though the applicant maintains that Ms Heppolette had a distinguished and exemplary teaching career in India prior to relocating to Australia and is well qualified, the respondent claims that relief teaching and other employment undertaken by Ms Heppolette prior to commencing employment with the respondent is different to the requirements of being a permanent teacher in the Western Australian education system.

VIII. The respondent maintains that the disadvantage to the respondent is substantial compared to that of the applicant if Ms Heppolette is reinstated on an interim basis as the respondent must ensure positive academic outcomes for its students. As Ms Heppolette has been determined to have performed at a substandard level she is therefore unable to deliver this required standard.

IX. The respondent maintains that this application was not lodged expeditiously as it was lodged 27 days after Ms Heppolette was terminated.

WHEREAS the Commission is of the view that the matter before it is an industrial matter as it relates to Ms Heppolette's rights as an employee; and

WHEREAS the Commission is of the view that it has jurisdiction to issue an interim reinstatement order pursuant to s 44(6) of the Act in particular under s 44(6)(bb)(i) and s 44(6)(bb)(ii) which enables the Commission to issue orders which the Commission is

otherwise authorised to make under this Act in relation to an industrial matter and in the case of a claim of harsh, oppressive or unfair dismissal make any interim order the Commission thinks appropriate pending resolution of the claim; and

WHEREAS taking into account the terms of the Act and in particular s 44(6) of the Act whereby the Commission has the power to give such directions and make such orders that the Commission considers appropriate in the circumstances; and

WHEREAS the Commission has formed the view that an interim reinstatement order should be considered in this instance pending arbitration of the issues in dispute; and

WHEREAS when taking into account the tests relevant to whether or not an interim order should issue which are as follows (see *Thomas James Brown v President State School Teachers Union of WA (Inc) and Others* [1989] 69 WAIG 1390 and *Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch v Burswood Resort Management Limited* [2004] 84 WAIG 2366) :-

> The principles applicable to the making of an interim order have been set out by his Honour the President Sharkey in *Thomas James Brown v President, State School Teachers Union of WA (Inc) and Others* (1989) 69 WAIG 1390. In this decision the President stated at 1393:-
>
> > "It seems to me that the principles which apply to the granting of interim injunction proceeding are most applicable here, with such modifications as this jurisdiction requires.
> >
> > The applicant must therefore establish: –
> >
> > (a) That as a matter of discretion, it is just and correct for me to make the order in all the circumstances.
> >
> > (b) That, in fact, there is a substantial matter to be tried.
> >
> > (c) That the plaintiff has a *prima facie* case for relief if the evidence on which the order is made is accepted at trial.
> >
> > In addition, the Commission must consider: –
> >
> > (a) The damage which may be done to the respondent by granting the order as against the damage to the applicant if it is not granted.
> >
> > (b) Any irreversible consequences of the granting of the order.
> >
> > (c) The promptness or otherwise of the application.
> >
> > (d) Any other relevant consideration." and

WHEREAS the issuance of an interim reinstatement order needs to take into account the interests of both parties without reaching any concluded view about the merits of such an application; and

WHEREAS after considering the arguments put by both parties the Commission has formed the view that an interim reinstatement order should issue based on the following preliminary views:-

> On the information currently before me, it is my view that the applicant has demonstrated that there may well be substantial issues to be tried in relation to Ms Heppolette's termination and that there is a prima facie case for relief if the applicant can demonstrate its case at hearing.
>
> I take into account that prior to experiencing difficulties at the School, Ms Heppolette had been employed by the respondent for approximately four years, Ms Heppolette was made permanent by the respondent in 2002 and Ms Heppolette passed the respondent's normal performance management processes prior to 2004. Further, the respondent also continued to employ Ms Heppolette without any apparent significant incidents in relation to Ms Heppolette's performance subsequent to the respondent determining that her performance was unsatisfactory (although I acknowledge that Ms Heppolette was given classroom assistance at the end of 2004 at the School). It is also the case that Ms Heppolette improved her performance in some areas once issues were raised with her by the School and at least one colleague did not take any issue with Ms Heppolette's performance or questioned the quality of learning outcomes for one of her classes.
>
> As Ms Heppolette's performance improved in some areas whilst she was under the respondent's Performance Improvement Plan, which only covered a short period of approximately four weeks, there could be some merit to the applicant's argument that this plan could have been extended, particularly when Ms Heppolette's length of employment with the respondent as well as the short period of review is taken into account.
>
> I find that the balance of convenience in relation to whether or not an interim reinstatement order should issue lies with the applicant in this instance as I accept that Ms Heppolette will find it difficult to return to her role as a teacher if she is away from teaching for any length of time and I accept that Ms Heppolette will continue to suffer financial detriment if an interim reinstatement order does not issue.
>
> I note that the consequences of issuing an interim reinstatement order in this instance are not irreversible and I accept that even though this application was lodged 27 days after the date on which Ms Heppolette was terminated, it is my view that this application was lodged within a reasonable timeframe after Ms Heppolette was terminated.
>
> However, given that the respondent has raised issues which could be of some substance about the standard of Ms Heppolette's performance during the period she worked at the School, I am not disposed to order that Ms Heppolette be reinstated to her date of termination. In reaching this conclusion I note that this issue can be finalised when this matter is finally determined.

In the circumstances I will issue an interim order reinstating Ms Heppolette to her former full time position with the respondent, on an interim basis to undertake the same or similar duties to those that she was undertaking prior to her termination; and

WHEREAS a speaking to the minutes was held on the forenoon of Friday 1 July 2005 in respect to the minutes of proposed order that issued on Tuesday 28 June 2005; and

WHEREAS the Commission is of the view after hearing submissions from the parties that amendments should be made to the proposed orders and recitals and that an additional order should be included; and

NOW THEREFORE I the undersigned pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby orders:-

(1) THAT by 18 July 2005, Ms Heppolette be reinstated on an interim basis to a full time teaching position with the respondent in the metropolitan area, undertaking the same or similar duties to those that she was undertaking prior to her termination.

(2) THAT liberty to apply be granted to the parties in relation to Order (1).

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

CORRECTIONS—

2005 WAIRC 01798

EDUCATION DEPARTMENT MINISTERIAL OFFICERS SALARIES ALLOWANCES AND CONDITIONS AWARD 1983 NO 5 OF 1983 (PARTLY RELACED BY PSA A3/89)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING AND THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	N/A
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON PUBLIC SERVICE ARBITRATOR
DATE	MONDAY, 13 JUNE 2005
FILE NO.	P 27 OF 2004
CITATION NO.	2005 WAIRC 01798

Result Correction order issued

Correction Order

WHEREAS an application was made to vary the Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No 5 of 1983 (Partly replaced by PSA A3/89) on 11 November 2004; and

WHEREAS on 23 December 2004 an Order was deposited in the office of the Registrar in relation to this application; and

WHEREAS on 23 May 2005 the Commission was made aware that the schedules attached to the Order contained an error in respect of Clause 10. – Salaries. As a result the Commission contacted the parties in relation to issuing a correction order; and

WHEREAS on or about 24 May 2005 both parties agreed to such an order issuing; and

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

THAT the Schedules attached to the Order dated 23 December 2004 with respect to application P 27 of 2004 be corrected in accordance with the following Schedule.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] Public Service Arbitrator.

SCHEDULE

1. Schedule A: Delete subparagraph (2)(a) of Item 72 and insert the following in lieu thereof:

(2) (a) Officer Level 1

Level 1	Salary Per Annum $	Arbitrated Safety Net Adjustment $	Total Salary Per Annum $
1st year (21 years)	17867	5094	22961
2nd year	18394	5094	23488
3rd year	18920	5094	24014
4th year	19443	5179	24622
5th year	19970	5179	25149
6th year	20496	5179	25675
7th year	21101	5095	26196
8th year	21520	5095	26615
9th year	22139	5095	27234

2. Schedule B: Delete subparagraph (2)(a) of Clause 10. – Salaries and insert the following in lieu thereof:

(2) (a) Officer Level 1

Level 1	Salary Per Annum $	Arbitrated Safety Net Adjustment $	Total Salary Per Annum $
1st year (21 years)	17867	5094	22961
2nd year	18394	5094	23488
3rd year	18920	5094	24014
4th year	19443	5179	24622
5th year	19970	5179	25149
6th year	20496	5179	25675
7th year	21101	5095	26196
8th year	21520	5095	26615
9th year	22139	5095	27234

2005 WAIRC 01867

CULTURAL CENTRE AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

LIBRARY BOARD OF WESTERN AUSTRALIA AND OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER A R BEECH
DATE FRIDAY, 24 JUNE 2005
FILE NO. APPL 688 OF 2003
CITATION NO. 2005 WAIRC 01867

Result Correction Order Issued

Correction Order

WHEREAS on 11 March 2005 an order in this matter was deposited in the Office of the Registrar;

AND WHEREAS on 9 June 2005 the respondents' representative advised the Commission that the order contained an error;

AND WHEREAS the respondents' representative requested that the Commission issue an order to correct that error;

AND WHEREAS the applicant had no objection to the Commission issuing a Correction order;

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

THAT clause 1 (a) in the schedule to the Order issued by the Commission in Application 688 of 2003 on 11 March 2005 be replaced by item 1 (a) in the attached schedule.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (9)(a) of this clause and insert the following in lieu thereof:

(9) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $9.20 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each meal by the employer or be paid $5.35 for each meal so required.

PRACTICE NOTES—

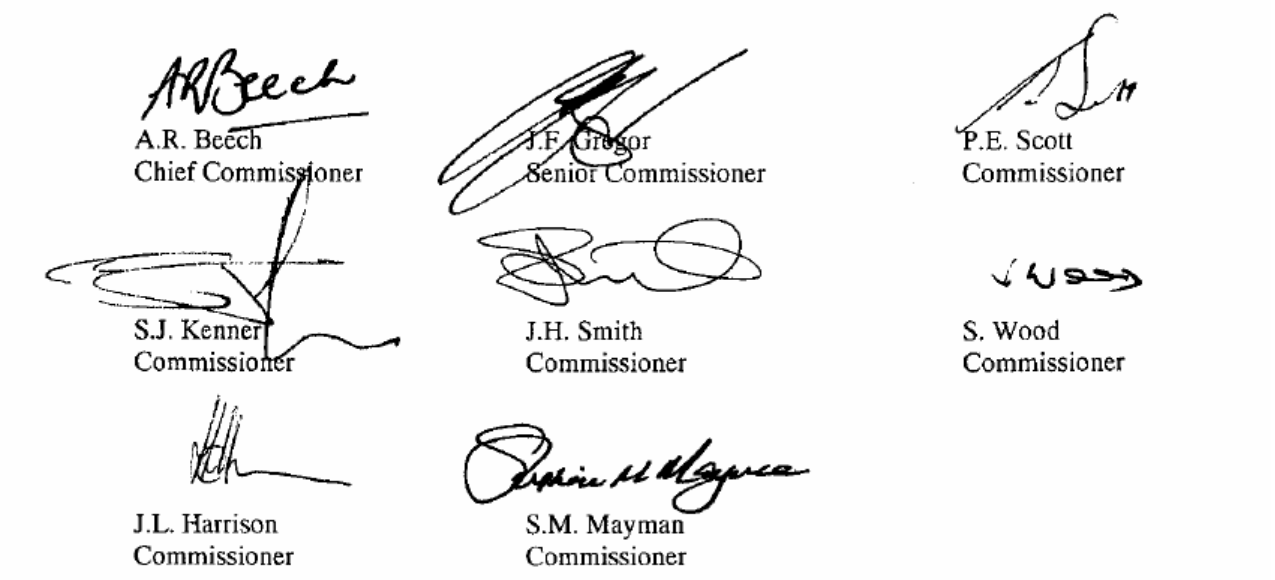
DELIVERY OF RESERVED DECISIONS
OTHER THAN FULL BENCH OR PRESIDENT
21 June 2005

The general policy of Commissioners is that reserved decisions should be delivered as soon as practicable after the completion of the hearing. Commissioners may give parties an approximate time frame for this to occur taking into account the Commissioner's other commitments. In some cases it is necessary to deliver a decision as a matter of urgency. In others, where the issues are more complex or where there have been lengthy hearings or hearings involving considerable reference material a longer period may be required for writing reasons for decision.

It is difficult to lay down hard and fast time limits. There are times when the pressure of hearings or urgent conferences on Commissioners is very great and the time available to them for writing decisions is insufficient. That has been the case from time to time in the last few years. Parties or their solicitors or agents should not feel inhibited from making enquiries regarding the progress of a decision which has not been delivered within any time frame given to them at the conclusion of the hearing.

Where a party to proceedings wishes to enquire about the time being taken for the delivery of a reserved decision they, through their solicitor or agent or in person if unrepresented, should contact the Associate to the Commissioner, or to the Associate to the Senior Commissioner of a Commission in Court Session, concerned and request to be advised of the progress of the decision.

If after having taken the step above the party wishes to pursue the enquiry further, through their solicitor or agent or in person if unrepresented, they may raise the matter by letter addressed to the Chief Commissioner who will raise the matter with the Commissioner concerned.



PROCEDURAL DIRECTIONS AND ORDERS—

2005 WAIRC 00175

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JANICE PATRICIA MACEY & JOHN WILLIAM MACEY
	APPLICANTS
	-v-
	NEVERETT PTY LTD T/A CHAMPION BAY RETREAT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 27 JANUARY 2005
FILE NO.	APPL 1266 OF 2004, APPL 1267 OF 2004
CITATION NO.	2005 WAIRC 00175

Result	Direction issued
Representation	
Applicant	Mr C Gabelish as agent
Respondent	Ms S Chelvanayagam of counsel

Direction

HAVING heard Mr C Gabelish as agent on behalf of the applicant and Ms S Chelvanayagam 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 herein applications be and are hereby joined and will be heard and determined together.
2. THAT each party shall give an informal discovery by serving its list of documents by 10 February 2005.
3. THAT inspection of documents shall be completed by 17 February 2005.
4. 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.
5. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely with documents referred to annexed no later than 14 days prior to the date of hearing.
6. 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.
7. THAT the matter be listed for hearing for one day.
8. THAT the parties have liberty to apply on short notice.

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

2005 WAIRC 01809

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ROSS MCLEOD
	APPLICANT
	-v-
	STOCK ROAD MARKET TAVERN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 14 JUNE 2005
FILE NO	APPL 21 OF 2005
CITATION NO.	2005 WAIRC 01809

Result	Order issued changing name of respondent
Representation	
Applicant	Mr G. Slattery (of counsel)
Respondent	Mr A. Wilson (of counsel)

Order

WHEREAS an application was lodged in the Commission pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

AND WHEREAS at a conference convened on 2 June 2005 it came to the attention of the Commission that the respondent had been incorrectly named in the application;

AND WHEREAS the parties agreed to amend the respondent's name;

AND WHEREAS the Commission formed the view that it was appropriate to make the amendment;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me, and by consent, hereby order -

THAT the name of the respondent be deleted and replaced by Ships' Refuelers Pty Ltd trading as Stock Road Market Tavern.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2005 WAIRC 01806

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY DANIEL BURNS
	APPLICANT
	-v-
	WESTPOINT ELECTRICS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 14 JUNE 2005
FILE NO/S	APPL 89 OF 2005
CITATION NO.	2005 WAIRC 01806

Result	Order issued changing name of respondent
Representation	
Applicant	Ms K Wroughton (of counsel)
Respondent	Mr J. Gregorio

Order

WHEREAS an application was lodged in the Commission pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

AND WHEREAS at a hearing on 7 June 2005 it came to the attention of the Commission that the respondent had been incorrectly named in the application;

AND WHEREAS the parties agreed to amend the respondent's name;

AND WHEREAS the Commission formed the view that it was appropriate to make the amendment;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me, and by consent, hereby order -

THAT the name of the respondent be deleted and replaced by Westpoint Electrics Pty Ltd

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2005 WAIRC 01967

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN RAYMOND GREEN
	APPLICANT
	-v-
	MR BIRD'S MYO
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 5 JULY 2005
FILE NO/S	APPL 441 OF 2005
CITATION NO.	2005 WAIRC 01967

Result	Respondent's name substituted
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr N Bird

Order

HAVING heard Mr Trainer as agent on behalf of the Applicant and Mr Bird 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, Mr Birds MYO Pty Ltd trading as Mr Bird's MYO.

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

2005 WAIRC 01822

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NIREN PRAKASH PHILLIP
	APPLICANT
	-v-
	VIC PARK MOTOR CITY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 16 JUNE 2005
FILE NO/S	APPL 469 OF 2005
CITATION NO.	2005 WAIRC 01822

Result	Order made substituting Respondent's name
Representation	
Applicant	In person
Respondent	Mr G T Miller (as agent)

Order

Having heard the Applicant 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, Cavalier Asset Pty Ltd trading as Vic Park Motor City.

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

2005 WAIRC 01969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BOYD WILSON PARKER
	APPLICANT
	-v-
	BRADLEY WYLDE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 6 JULY 2005
FILE NO	APPL 593 OF 2005
CITATION NO.	2005 WAIRC 01969

Result	Application to receive referral out of time granted

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979 filed beyond the 28 days allowed by the Act; and

WHEREAS on the 4th day of July 2005, the Respondent's representative advised the Commission that he does not oppose the application being accepted out of time; and

WHEREAS the Commission has considered the matter in light of the tests set out in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (IAC) 84 WAIG 683 and the requirements of Section 29(3) of the Industrial Relations Act 1979, and concluded that in the circumstances, it would be unfair not to accept the application notwithstanding that it was referred to the Commission out of time;

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

THAT the application to receive the referral out of time be and is hereby granted.

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

2005 WAIRC 01863

DISPUTE REGARDING RECLASSIFICATION OF EMPLOYMENT LEVEL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT** **-v-** DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE HON. MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICVES ACT (WA) AS THE BOARD OF METROPOLITAN HEALTH SERVICE AT NORTH METROPOLITAN AREA HEALTH SERVICE **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	THURSDAY, 23 JUNE 2005
FILE NO.	PSAC 25 OF 2005
CITATION NO.	2005 WAIRC 01863

Result Recommendation Issued

Recommendation

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS this matter concerns the appropriate classification level for the position of Manager, West Australian Limb Service for Amputees; and

WHEREAS on the 23rd day of June 2005, the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conference the Public Service Arbitrator issued a recommendation regarding the appropriate classification level for the Manager position based on consideration of the two assessment reports produced for the Classification Review Committee;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby recommends:

THAT the appropriate classification level for the position of Manager, West Australian Limb Service for Amputees is HSU Level 9.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australia Red Cross Blood Service - Western Australia (ASU) Enter prise Agreement 2004 AG 82/2005	16/06/2005	Australian Red Cross Blood Service - Western Australia	Australian Services Union, West Australian Clerical and Services Branch	Commissioner P E Scott	Agreement Registered
Australia Red Cross Blood Service - Western Australia (ASU) Enter prise Agreement 2005 AG 82/2005	N/A	Australian Red Cross Blood Service - Western Australia	Australian Services Union, West Australian Clerical and Services Branch	Commissioner P E Scott	Correction Order Issued
Caesar Stone / CFMEUW Industrial Agreement 2002-2005 AG 80/2005	9/06/2005	The Construction, Forestry, Mining and Energy Union of Workers	Caesar Stone Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Deep Green Landscaping / CFMEUW Industrial Agreement 2002-2005 AG 77/2005	1/07/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for the Rose Landscape Trust t/a DeepGreen Landscaping	Senior Commissioner J F Gregor	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Distinct Carpentry / CFMEUW Industrial Agreement 2002-2005 AG 79/2005	9/06/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for the Bolton Family Trust & The Trustee for the Rhodes Family Trust t/a Distinct Carpentry	Senior Commissioner J F Gregor	Agreement Registered
HHH Transport / CFMEUW Hazelmere Industrial Agreement 2004-2005 AG 78/2005	1/07/2005	The Construction, Forestry, Mining and Energy Union of Workers	HHH Transport Australia Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Inner City Building Company / CFMEUW Industrial Agreement 2005-2008 AG 60/2005	7/06/2005	The Construction, Forestry, Mining and Energy Union of Workers	Inner City Building Company Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
IPC Industrial Maintenance Pty Ltd Wesfarmers CSBP Plant Shutdown Agreement 2004 AG 274/2004	N/A	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	IPC Industrial Maintenance Pty Ltd	Chief Commissioner A R Beech	Discontinued
LHMU - iPlex Pipelines (Warehouse) Union Recognition Agreement2005 AG 65/2005	17/06/2005	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Iplex Pipelines Australia Pty Ltd	Commissioner S Wood	Agreement Registered
Passline Personnel Australia / CFMEUW Industrial Agreement 2002-2005 AG 62/2005	7/06/2005	The Construction, Forestry, Mining and Energy Union of Workers	Passline Personnel Australia	Senior Commissioner J F Gregor	Agreement Registered
Tonlar Contracting / CFMEUW Industrial Agreement 2002-2005 AG 63/2005	7/06/2005	The Construction, Forestry, Mining and Energy Union of Workers	Paul A Larter t/a Tonlar Contracting	Senior Commissioner J F Gregor	Agreement Registered
Western Australia Police Motor Vehicle Allowance Agreement 2005 PSAAG 13/2005	16/06/2005	Commissioner of Police	The Western Australian Police Union of Workers	Commissioner P E Scott	Agreement Registered
Western Mechanical & Electrical Pty Ltd Enterprise BargainingAgreement 2005 AG 76/2005	27/06/2005	Communications, Electrical, Electronic,Energy,Information, Postal, Plumbing, and AlliedWorkers Union of Australia, Engineering & Electric	Western Mechanical Electrical	Senior Commissioner J F Gregor	Agreement Registered

INDUSTRIAL AGREEMENTS—BARGAINING—
Matters dealt with—

2005 WAIRC 01837

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIALUNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA,UNION OF WORKERS

APPLICANT

-v-

SEALANES (1985) PTY LTD

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE MONDAY, 20 JUNE 2005
FILE NO/S APPL 1228 OF 2003
CITATION NO. 2005 WAIRC 01837

Result Jurisdiction found

Order

HAVING HEARD Mr T Pope as agent by way of written submissions on behalf of the applicant and Ms L Nickels of counsel by way of written submissions on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Commission has jurisdiction to deal with this application; and

THAT the respondent's application to dismiss this application for want of jurisdiction shall be and is herby dismissed.

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

2005 WAIRC 01861

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA,UNION OF WORKERS, TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANTS
	-v-
	SEALANES (1985) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 22 JUNE 2005
FILE NO/S	APPL 1228 OF 2003
CITATION NO.	2005 WAIRC 01861

Result	Application for adjournment dismissed. Order for further and better particulars and discovery issued
Representation	
Applicants	Mr T Pope (as agent)
Respondent	Mr T Caspersz (of counsel)

Order

WHEREAS this application was remitted back to the Commission by the Full Bench for further hearing and determination on 13 September 2004; and

WHEREAS the parties were notified on 12 May 2005 that this matter would be listed for hearing and determination on 27 and 28 June 2005; and

WHEREAS on 20 May 2005 the respondent submitted that the Commission did not have jurisdiction to deal with this application. After considering written submissions from the parties in relation to this issue the Commission advised the parties that it was of the view that it had jurisdiction to deal with this application and that reasons for this decision would issue at a later date; and

WHEREAS on 21 June 2005 the respondent applied to the Commission for an adjournment of the hearing listed for 27 and 28 June 2005 on the basis that it had lodged an appeal to the Full Bench against the Commission's decision and that it had jurisdiction to deal with this application and would be seeking to stay any hearing in relation to this matter; and

WHEREAS a conference was convened on 22 June 2005 in order to hear from the parties in relation to whether or not the hearing of this application should be adjourned and to deal with the applicants' claim about the respondent's lack of provision of discoverable documents and other relevant documentation; and

WHEREAS in support of its application for an adjournment of the hearing until the outcome of its stay application was known the respondent argued that its appeal to the Full Bench involved a serious question to be tried, that a stay of the hearing of this matter, which was necessary to maintain the status quo could not be heard until after 27 and 28 June 2005, the application for a stay has prospects of success, there was no pressing need for an enterprise order and therefore there was no real prejudice to the applicants, there was prejudice to the respondent if an adjournment is not granted, the respondent would be denied procedural fairness if an adjournment is not granted and public interest favours the granting of an adjournment; and

WHEREAS the applicants argued that the hearing should not be adjourned as the employees who could be covered by an enterprise order at the respondent's premises wanted the matter to be brought to finality and maintained that if relevant information was expeditiously supplied by the respondent, the applicants are in a position to proceed with the hearing listed for 27 and 28 June 2005; and

WHEREAS having considered the submissions from the parties the Commission is of the view that the respondent's application to adjourn the hearing should be dismissed as it was the Commission's view that it had already determined that it had jurisdiction to deal with this application, the Commission was required under the *Industrial Relations Act 1979* to act expeditiously when dealing with matters before it and the Commission was not persuaded in this instance that a refusal to grant an adjournment would result in a serious injustice to the respondent; and

WHEREAS the Commission was advised at the conference that a number of procedural requirements outlined in the Commission's letter to the parties dated 12 May 2005 relating to the provision of information and documentation had not been complied with by the parties; and

WHEREAS the respondent conceded that it had not supplied the applicants copies of the documents it would be relying on at the hearing by the required date and that despite approaches from the applicants the respondent had not agreed on information to be supplied to the Commission prior to the hearing; and

WHEREAS the applicants conceded that it did not supply the names of witnesses to be called at the hearing by the due date but did so at the conference; and

WHEREAS taking into account that some relevant information was supplied to the applicants by the respondent on 21 June 2005; and

WHEREAS taking into account that the applicants and the respondent have been on notice since 12 May 2005 of the dates for hearing this matter and when the issue of jurisdiction was raised by the respondent the parties were reminded that the hearing dates remained in place pending the resolution of this issue; and

WHEREAS the Commission was of the view that relevant information and the discovery of documents to be relied upon at the hearing by the respondent, which should have been previously provided to the applicants, be provided expeditiously;

WHEREAS a speaking to the minutes was held on the afternoon of 22 June 2005 in respect to the minutes of proposed order that issued on 22 June 2005; and

WHEREAS the Commission is of the view after hearing submissions from the parties that amendments should be made to the proposed orders and recitals and that an additional order should be included; and

NOW THEREFORE I the undersigned pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby orders –

1) THAT the respondent's application to adjourn the hearing of this matter be dismissed.

2) THAT the following information be filed in the Commission and served on the applicants by the respondent by 4:00 pm 23 June 2005 –

   (i) a summary of the hours worked by all current and former employees, for the period 2 March 2004 to 23 June 2005, who were subject to the terms and conditions of the enterprise order when it issued on 2 March 2004;

   (ii) a summary of the terms and conditions of employment, including wage rates, of the employees referred to in Order 2(i) for the period 2 March 2004 to 23 June 2005; and

   (iii) a list of witnesses to be called by the respondent.

3) THAT by 4:00 pm 23 June 2005 the respondent provide to The Shop, Distributive and Allied Employees' Association of Western Australia (as agent for the other applicants) copies of all documents it intends to rely on at the hearing set down for 27 and 28 June 2005.

4) THAT by 4:00 pm 23 June 2005 the applicants provide to the respondent submissions outlining the basis on which it argues that the wage rates contained in the enterprise order should apply to employees to be covered by the enterprise order.

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

NOTICES—Appointments—

Industrial Relations Act 1979

I, the undersigned, the HONOURABLE MICHAEL JOHN MURRAY, Acting Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(6) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE RENE LUCIEN LEMIERE, a Judge of the Supreme Court of Western Australia, to be an Acting Ordinary Member of the Western Australian Industrial Appeal Court from 1 July until 31 July 2005 or until the completion of the hearing and determination of any proceedings his Honour may be participating in at the expiration of that period.

As witness my hand this 28th day of June 2005.

ACTING CHIEF JUSTICE OF WESTERN AUSTRALIA

PUBLIC SERVICE APPEAL BOARD—

2005 WAIRC 01935

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR JOHN AVENARIUS BORGER
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT – CHAIRMAN MR B HEWSON – BOARD MEMBER MR D HARTLEY – BOARD MEMBER
DATE	THURSDAY, 30 JUNE 2005
FILE NO.	PSAB 1 OF 2005
CITATION NO.	2005 WAIRC 01935

CatchWords	Public Service Appeal Board – Appeal against finding that the appellant committed breach of discipline – Appeal against decision to demote and transfer the appellant – Appeal upheld in part – *Industrial Relations Act 1979* (WA) s 80I – *Public Sector Management Act 1994* (WA) Part 5, Division 3 Application to adjourn proceedings – Relevant principles considered – Counsel not fully briefed – Second application to adjourn granted – *Industrial Relations Act 1979* (WA) s 27(1)(f) Application for costs – Relevant principles considered – Disproportionate burden on appellant if ordered to pay costs – Application for costs dismissed - *Industrial Relations Act 1979* (WA), s 27 (1)(c), s 31(3)
Result	Appeal upheld in part
Representation	
Appellant	Mr P Fraser of counsel and later Ms C Crawford of counsel and with her Ms R Amey of counsel
Respondent	Mr D Matthews of counsel and with him Ms R Hartley of counsel

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board ("the Board").

Applications for Adjournment

2 The history of the hearing of this appeal is relevant to questions of applications for adjournment made by the appellant and an application for costs made by the respondent upon the attendance of a number of its witnesses for the hearing on 9 March 2005. That history includes that on 5 January 2005 the appellant lodged the Notice of Appeal and an application to the Public Service Arbitrator for interim orders. The application made to the Public Service Arbitrator is not a matter for consideration here.

3 The appellant appealed, amongst other things, against the respondent's decision to transfer him which required that he and his family relocate from Three Springs to Lake Grace, some significant distance away. Given that no interim orders had issued to enable him to remain in Three Springs pending the outcome of the appeal, there was a need for the appeal to be heard in a particularly expeditious manner. Therefore, on 21 January 2005, at the direction of the Board the Associate, Natasha Firth, contacted the appellant's solicitors regarding an estimate of the time the hearing would take and unavailable dates. Ms Amey, the appellant's solicitor, said she would advise the Board of the available dates the following week.

4 On 25 January 2005, Ms Firth again called Ms Amey, who said that she would forward her unavailable dates but that the beginning of March 2005 sounded appropriate at that stage. On 27 January 2005 Ms Amey provided her available dates by facsimile transmission. On 1 February 2005, Ms Firth called Ms Amey to discuss certain matters and she was advised that Ms Amey had given only her unavailable dates and she would contact Mr Hooker, of counsel, who had been engaged by the appellant to see if his commitments could be rearranged to enable a hearing in March 2005. On 3 February 2005, Ms Amey telephoned Ms Firth and advised that Mr Hooker could not reschedule his commitments so she sought a listing in June. Following further consultation with the parties, on 7 February 2005, the Associate called Ms Amey who said that she would consult Mr Hooker again regarding his availability. She said that the listing dates also depended upon whether the appellant obtained discovery and if there was sufficient time to prepare.

5 On 9 February 2005, Ms Firth called Ms Amey to seek her confirmation of availability for early March. On 10 February 2005, Ms Amey returned Ms Firth's call saying that she was still trying to contact Mr Hooker. She indicated that she had received a letter from the respondent that it would provide discoverable documents by the following week.

6 On 17 February 2005, Ms Firth again called Ms Amey and left a message requesting that she telephone. On 22 February 2005, having received no response from Ms Amey, Ms Firth again called Ms Amey and left a message for her to call and she did so. Ms Amey advised that she was still waiting for discovery from the respondent as promised the previous week. She indicated that provided that discovery was received by the following day or the day after, i.e. by 24 February 2005, the early March listing was fine and she said she was happy for a Notice of Hearing to issue. She said that she would contact the Commission if there were any difficulties with discovery and preparation time. Accordingly a Notice of Hearing for the matter to be heard on Tuesday, Wednesday and Friday, 8, 9 and 11 March 2005 was issued on 22 February 2005.

7 On 1 March 2005, Ms Amey contacted Ms Firth advising that the respondent had not provided discoverable documents until late on Friday, 25 February 2005. As she was out of the office on Monday, 28 February 2005, and given the volume of

documents and the lateness with which they were provided, Ms Amey said she believed that the appellant would not be ready for a hearing the following week and foreshadowed an application for adjournment.

8 On 2 March 2005, the appellant formally requested that the matter be adjourned citing the unavailability of counsel, the late provision of discovery by the respondent, and the large volume of documents to be examined, as well as asserting that the matter had been listed in error and ought to be vacated. On 3 March 2005, the respondent advised that he did not consent to the matter being vacated "administratively", the application was very late, the Board was required to act with a maximum of expedition and particularly so in the instant case, counsel's availability was not a good reason to adjourn and that, in the provision of discovery, the respondent had provided all the documents set out in the appellant's wide request. This was done to expedite rather than to delay the matter by arguing about the documents sought. The respondent asserted that there was ample time for consideration of the documents provided.

9 The Board convened on Friday, 4 March 2005 to consider the application to adjourn. Having heard the submissions of the parties, the Board decided against granting an adjournment. The Board's decision was based on a number of factors, the first of which was that this was a matter which was said to be requiring urgent action because of the need for the appellant to transfer in accordance with the respondent's direction. It was also clear that there had been a lack of diligent application to the matter by the appellant's solicitors in terms of preparing for the hearing, given its wide ranging application for discovery which appears to have been beyond what was necessary for the pursuit of the appeal. The respondent attempted to co-operate with the appellant for the purposes of expediting the appeal. We accept that on the face of it, the respondent was late in providing discovery. However, there appears to be a good reason for this, in that the respondent responded to the discovery application rather than challenging the relevance of the documents sought and thereby wasting valuable time and effort on the part of all concerned. The respondent simply provided the documents. This resulted in a significant volume of documents, including a great deal of repetition to take account of the manner in which discovery had been sought. The detailed discovery sought included copies of emails exchanged between a number of people. Therefore, in relation to each person, there were his or her own emails and responses from others to them. Some email correspondence was in the form of a chain of emails. Therefore, many of the emails were repeated as they were provided in respect of each person separately. Mr Matthews for the respondent says that he was able to go through the documents in a day and a half. The documents were provided to the appellant's solicitors a full week before the hearing.

10 It is noted, though, that the reports of the investigator and inquirer were, according to Mr Matthews, provided to the appellant on 30 November 2004 and again soon after a conference convened by the Public Service Arbitrator on 14 January 2005.

11 It seemed too, that the appellant's solicitors did not act diligently in pursuing the question of availability of counsel and, if he were unavailable, what alternative action might be taken.

12 Interestingly, in the letter of 2 March 2005 setting out the application for adjournment, Ms Amey stated that the Notice of Hearing was received on 24 February 2005. She also said that the listing of the appeal "has come to the attention of counsel and myself in the last 24 hours". Given that Ms Amey had been advised by Ms Firth of the listing on 22 February 2005, and the Notice of Hearing had issued that day, i.e. a full week before Ms Amey's letter, and received by the appellant's solicitors on 24 February 2005 this comment is inexplicable and extraordinary.

13 In the circumstances, the Board decided that the hearing would proceed. The hearing had been scheduled for Tuesday, Wednesday and Friday, 8, 9 and 11 March 2005. Given the parties' advice that the hearing was unlikely to take the full period of time allocated, it was decided to vacate the Tuesday and convene on the Wednesday and Friday, and subject to the availability of the parties possibly on the Thursday. By delaying the commencement of the hearing until the Wednesday, the appellant had an additional day to prepare. Accordingly, the hearing was to proceed.

14 When the hearing commenced on 9 March 2005, the appellant had instructed new counsel, Ms Crawford. Ms Crawford made a further application for adjournment on the basis of her late involvement in the matter and consequent inability to be fully briefed. It appears though, from the submissions made to the Board, that the appellant's solicitors had once again not acted diligently in advising new counsel of the arrangements which had been made. This all appeared to be conceded by Ms Crawford, albeit that she graciously did not cast direct blame on the solicitors for the appellant.

15 The Board decided to grant the adjournment sought by Ms Crawford on behalf of the appellant on the basis that she was not in a position to proceed due to the difficulties which had arisen in her being fully briefed by the appellant's solicitors. To have required the hearing to proceed in those circumstances would have been unfair on the appellant. The Board accordingly indicated that it would vacate the hearing dates set and the matter was rescheduled for hearing at the earliest opportunity.

16 However a difficulty arose for the respondent. The Board had decided on Friday, 4 March 2005 that the hearing would proceed on the following Wednesday, 9 March 2005. As would have been anticipated, the respondent ensured that his witnesses were available for the hearing on 9 March 2005. Accordingly, those witnesses attended, some of them travelling from Three Springs and Geraldton and requiring overnight accommodation for the purpose. The respondent has made an application for the costs incurred as a consequence of the hearing being adjourned on 9 March 2005. We shall deal with that application later in these reasons.

The Appeal

17 The appellant appeals against the respondent's finding that he committed a breach of discipline, in that he physically assaulted and verbally abused David Caudwell, and against the penalty applied, being to reduce his level of classification from Level 7 to Level 5, Year 4 Development Officer and transfer him to Lake Grace.

18 The appellant has been employed by the respondent for many years, firstly from 1985 to 1997, having been previously employed by the Agriculture Protection Board in 1982. In 1997, he went to Tasmania where he spent 4 years and afterwards returned to the Department of Agriculture ("the Department"), where he has been since then.

19 The appellant's position at the time of the events the subject of this appeal was as District Manager, Three Springs. His position is classified at Level 7. The Three Springs District Office has approximately 9 staff and provides services to approximately 250 farmer clients in the agricultural district.

20 Amongst others employed in the Three Springs District Office at the relevant time were Sherri Hunter, Level 2 Administration Officer; Jennifer Ruth Bairstow, Natural Resources Management Officer; Sam Mills, Biosecurity Officer; and Douglas Hamilton, Development Officer.

21 The Three Springs District Office is part of the Northern Agricultural Region which has its head office in Geraldton. Bethel Hayes, Senior Administration Officer, and Peter Leonard Metcalfe, Regional Manager, work in that office. There is also David Joseph Caudwell, the Manager, Management Services for the Northern Agricultural Region. Mr Caudwell's responsibilities include ensuring the compliance of the Department and its officers with processes, procedures and policies and

ensuring adequate business services are provided to the Department's offices. He described his role as including assisting the District Managers with their administration and management issues.

22 The Three Springs office contains a central reception area and foyer, and a corridor to some offices, the first such office being that normally occupied by the appellant. It contains a workstation against the wall and a round table in the centre of the room. Immediately along the corridor, behind his office, is the office occupied by Jennifer Bairstow. The appellant's workstation faces the wall adjoining Ms Bairstow's office and her desk is adjacent to that adjoining wall. The adjoining wall is of single brick construction with glass panels between the top of the brick wall and the ceiling. The wall down the corridor appears also to be made of single brick with glass panels at the top. There are gaps between some of the glass panels. There are also glass louvres above the doors. On the other side of the foyer, beyond the reception desk, is a conference or board room. In addition there is a photocopy room and other administration facilities. The flooring of the reception area and offices appears to be vinyl over concrete. Beyond the foyer at the back of the building is a verandah. The evidence given in respect of the construction and layout of the office was related to what might or might not have been heard by people in the office of interactions between the appellant and Mr Caudwell on 20 September 2004.

23 There is no dispute between the parties that for some considerable time prior to 20 September 2004 there had been attempts made to fill a position of Development Officer at the Three Springs District Office and that a selection process had been undertaken. The appellant was the chairman of the selection panel. There was an advertised vacancy ("AV") file associated with the vacancy and the process for filling that vacancy. Streamlined processes and benchmarks with timeframes had been put in place by the Department for the filling of vacancies. The selection panel had made its choice and prepared a report which, as part of his role in ensuring compliance with procedures, Mr Caudwell had received. He prepared a report, the Quality Assurance Review - Selection Process report ("the QA report"), which conveyed his views of the process followed by the selection panel and its compliance with policy. The report was forwarded to the appellant for rectification of some issues according to Mr Caudwell's assessment of the process undertaken by the panel.

24 The appellant was concerned at the time taken for the QA report to be finalised. Further, he disagreed with Mr Caudwell's view about the interpretation of one of the selection criteria.

25 There was evidence and it is not in contention that on Monday, 20 September 2004, Mr Caudwell travelled to Three Springs with Bethel Hayes for their regular meeting of Senior Administration Officers (SAOs). This meeting was to be held at the Three Springs District Office and was to include Stephanie Bates from the Moora District Office, Sherri Hunter from Three Springs, Ms Hayes and Mr Caudwell.

26 The appellant knew that Mr Caudwell was due to attend the Three Springs District Office on 20 September 2004 for the SAO's meeting and wished to speak to him about the AV file. The appellant and Mr Caudwell were in disagreement about whether the selection process had been appropriately carried out and in particular the selection panel's conclusion in respect of one candidate and whether he had demonstrated that he met a particular selection criterion.

27 Ms Hayes and Mr Caudwell arrived at the Three Springs District Office in time for a 10.30am start to the SAO's meeting, however, for a number of reasons it did not commence on time. The meeting was to be held in the conference room. Ms Hunter, Ms Bates and Ms Hayes were in the conference room prior to the commencement of the meeting when the appellant went in there looking to speak with Mr Caudwell. Mr Caudwell was not there but entered the building soon thereafter and the appellant asked him to come to his office. There was discussion between them about the AV file and Mr Caudwell's QA report. The evidence of both the appellant and Mr Caudwell as to the exact conversation and sequence of events which followed conflicts, with each of them giving evidence which has changed over time. However, what generally happened was this. When the appellant saw Mr Caudwell he asked to speak with him in his office. As Mr Caudwell walked towards the appellant's office he said that he would be prepared to talk to him provided the appellant did not try to "get up" him as he had done previously. The appellant responded to the effect that Mr Caudwell had been trying to "get up" him more than he had Mr Caudwell. We conclude that this meant that Mr Caudwell said he was prepared to talk to the appellant provided there was no acrimony on the appellant's part, and the appellant said there had been greater acrimony on Mr Caudwell's part. This refers to recent issues where Mr Caudwell had been involved in an investigation of the appellant's travel claims, and allegations that the Three Springs District Office had not met its obligations regarding certain matters.

28 In any event, there was clearly a history between the appellant and Mr Caudwell which went with them into the meeting. The appellant asserted to Mr Caudwell that the appellant's interpretation of a particular candidate not meeting a selection criterion was correct. Mr Caudwell disagreed. The appellant was frustrated that the report which he and the panel had prepared regarding the selection had been held up, waiting for approximately 24 days before the QA report from Mr Caudwell had been provided. The QA report indicated some issues which required attention. The appellant says that he had conferred with another officer from the Human Resources section of the Department and believed that he had that officer's support for his interpretation of the selection criteria and that he intended to seek clarification of that from the Department.

29 The appellant was at least frustrated, if not angry, and believed that the process was being unduly delayed by Mr Caudwell. He claims to have indicated to Mr Caudwell that notwithstanding his concerns and disagreement about the issues between them in respect of the QA report, he had in fact made the necessary amendments to the selection panel's report in response to the QA report and expected Mr Caudwell to take the AV file with him and ensure the process continued without further delay. The appellant claims that he said to Mr Caudwell that he had made the changes which were required in the selection panel's report but disagreed with the QA report.

30 It is claimed by Mr Caudwell that in the course of their discussions in the appellant's office the appellant described a comment contained within the QA report as "crap – that's wrong" or "bullshit", he was going to have it clarified and had then pushed the file across the table towards Mr Caudwell. He said that the appellant had told him "it's finished", and to take the file and "piss off", or that he had been told to "piss off".

31 Mr Caudwell's evidence demonstrates that he believed that the appellant had not amended the report as necessary and Mr Caudwell was not going to take the file with him in those circumstances.

32 The appellant left his office, leaving Mr Caudwell there, and leaving the AV file on the round table. Mr Caudwell then got up and left the room, also leaving the AV file on the table. He did not intend taking the file with him because he believed the necessary changes had not been made. The appellant returned to his office within a matter of seconds and discovered the file was still on the table. By this time Mr Caudwell was halfway across the foyer heading towards the conference room, and the appellant called him back to take the file with him. Mr Caudwell turned around and went back to where the appellant was standing, roughly at the entrance to the corridor leading from the foyer to the offices. It is alleged by Mr Caudwell that they were standing face to face, 2 to 3 feet apart when the appellant told him to take the file, as it was finished. The appellant says that he swung the AV file from about shoulder height to hip height towards Mr Caudwell and he says Mr Caudwell's hands were ready to receive the file. However, Mr Caudwell says he was not expecting to receive the file, and that the file hit him in

the middle of his chest and hit his glasses which were hanging from a cord around his neck, knocking the lenses of the glasses out of the frames and onto the floor. He says the file landed on the floor. He described the file as landing on its bottom corner and bursting open. He says that he started to bend to retrieve the lenses from his glasses and that when he got up, the appellant had gone. He says he bent down to pick up the file and put the documents back into the file.

33 The appellant says that he was unaware that the file came into contact with Mr Caudwell's chest or glasses. He says he was unaware of the file falling to the floor or of any damage to Mr Caudwell's glasses.

34 No-one who gave evidence heard any sound which might have been made by the file falling on the floor. However, we note that in their evidence they responded to whether they had heard any sound which reflected the file being dropped flat on its face on the carpeted floor of the court room, not of it falling on its edge on the vinyl covered concrete floor. It seems though that no-one was aware of any exchange between the appellant and Mr Caudwell in the foyer.

35 Mr Caudwell says that as he moved across the reception area after picking up the AV file, he heard the appellant say something to him which he did not understand. There were people in the reception area and so he suggested to the appellant that they go outside to discuss the matter. The two of them went outside onto the verandah. There is no suggestion that during this discussion Mr Caudwell indicated to the appellant that his glasses had been damaged during the file being conveyed to him. It is clear that the two of them exchanged comments to the effect that they were each going to report the other regarding the progress of the AV file, the dispute between them about the interpretation of the selection criterion and whether or not a particular candidate met the criterion. Mr Caudwell says that he told the appellant that he was going to complain about his behaviour. The appellant said that he was going to report the Mr Caudwell to Mike Marsh, the Executive Director, Corporate Services, for holding up the process of the selection of a Development Officer.

36 The appellant appears to have again said that a point made in the QA report was "bullshit", and walked away. Mr Caudwell says he called to the appellant, asking him if the selection panel's report had been revised in line with the QA report. He says the appellant waved over his shoulder saying "it was all done – finished". The appellant is said to have responded to Mr Caudwell saying that the appellant would never listen, by saying "that's crap" (Exhibit R4).

37 Mr Caudwell went into the SAO's meeting where he did not participate in the discussions but asked if anyone had heard what was going on. Those in the meeting responded that they had not heard and Mr Caudwell indicated that the appellant had broken his glasses. He sat at the conference table attempting to fix them and then asked if anyone had any tools that he could use. He was told that they did not and was directed to the hardware shop. He says that he went to the shop and bought a box of jeweller's screwdrivers to fix his glasses. He says that he went back to the meeting and spent most of the time distracted and making notes.

38 Later that day, Mr Caudwell made a diary note setting out the sequence of events, however, it is noted that his evidence and the diary note conflict in some aspects. It is also noted that when Mr Caudwell wrote to the appellant on 22 September 2004, two days after the incident, he did not mention any aspect of the alleged verbal abuse or assault (Exhibit R6). At one stage during the hearing he said that his evidence was correct and at another that the diary note was correct.

39 The appellant denies that he used abusive terms in his discussion with Mr Caudwell or that he assaulted him, saying that he was not aware of the AV file coming into contact with Mr Caudwell. He denies that he thrust the file at him aggressively and does not believe that the file fell on the floor. He also says he was not aware that Mr Caudwell's glasses were damaged. He says that he would have apologised had he been aware of the glasses having been broken.

40 The appellant and Mr Caudwell exchanged emails over the next few days. They were in the following terms:

"**From:** Caudwell, David

Sent: Wednesday, 22 September 2004 10:05 AM

To: Borger, John

Cc: Metcalfe, Peter

Subject: Selection Report - P98000353 - AV File 2337

Importance: High

Sensitivity: Confidential

Good Morning John,

You'll recall calling me into your office at Three Springs on Monday, to discuss the AV file for the above position.

You asserted a series of statements about (1) the delays in processing the AV file which you hold me responsible for, and (2) item 9 in the QA report I sent to you, which refers to applicants being assessed against requirements which are not part of the core essential selection criteria, specifically, assessing Mr Yokwe as being "unable to demonstrate an understanding of Western Australian agriculture".

I asked you several times if you had dealt with all the items raised in the QA report, and you consistently confirmed you had, and insisted you were finished with the AV file, and demanded that I take it with me.

I have checked your amended selection report, and find that you have not dealt with all items identified in the QA report. In particular, I am very concerned that your report continues to assess Mr Yokwe exactly as before, which is a serious error in the report. If allowed through, it places the department open to challenge by Mr Yokwe, and could derail the whole selection process, which represents a significant investment already by the department. As an aside, I also continue to have reservations about a lack of relevant justification as to why Mr Yokwe wasn't found to be the superior candidate. That was alluded to in Item 7 of the QA report.

I have arranged for the return of the AV file to you, which includes a copy of this email, the QA report, and all other documents that were in the file when you threw it at me in Three Springs.

Please do not re-submit the file to the regional manager until all items in the QA report have been satisfactorily addressed. Thank you.

(Exhibit R5)

From:	Borger, John
Sent:	Wednesday, September 22, 2004 10:47 AM
To:	Caudwell, David
Cc:	Metcalfe, Peter
Subject:	RE: Selection Report - P98000353 - AV File 2337
Sensitivity:	Confidential

David

I am intrigued by your issues.

Firstly when I did the report I showed it to Roger Heath who read it and suggested some alterations which I amended.

Roger was quite satisfied with the end product.

My objections to your QA approach are related to the time involved. You have had the report now in the grips of your QA program for about a month now.

I am aware we need a consistent approach but surely speed is also an issue here.

I have been contacted by the applicants with comments like "you said it would only take 3 to 4 weeks.

The initial process for this position was done by myself and Don Telfer, and I am aware that as the first selection under the new system it was a learning exercise for both me and Don, but your Quality Assurance process has taken more time than the whole process combined.

And it is continuing.

Rather than send your AV file back in the post, why not fax the alterations you have in mind. This is the process that I and Don Telfer used

It is a lot quicker.

The stated aim of this new system is to process the Job selection process far quicker than the past.

Mr Yokwe failed in the interview process because he was unable to demonstrate expertise or understanding of the extension aspects of the Development officer role. He also had no knowledge or understanding of relevant agriculture (ie West Australian agriculture) (sic) This is not surprising as he is recently moved to WA and his experience is basically research. These limitations do fit in around the selection criteria.

If you have problems here speak to Don Telfer for his opinions

Mr Yokwe also did not have a drivers (sic) license (sic).

David

Speed is of the essence. We are dealing here with people

From: Caudwell, David

Sent: Wednesday, 22 September 2004 13:54

To: Borger, John

Cc: Metcalfe, Peter

Subject: RE: Selection Report - P98000353 – AV File 2337

Sensitivity: Confidential

Hi John,

The AV file has been returned to you.

When you have satisfactorily addressed the queries raised in the QA report (which you were originally requested to do on 15th September, and which you assured me in Three Springs on Monday had all been done), please return the AV file with the signed off QA report to the regional manager for him to sign off and progress. Please note John that the matter relating to the assessment of Mr Yokwe was raised in my report at the request of HR. Have a look at your comparative assessment guide – you've given Yokwe a "D" supported by the comment that he doesn't demonstrate knowledge of WA agricultural industries – HE DOESN'T HAVE TO JOHN! You've also commented there that he doesn't demonstrate knowledge of the activities of a development officer – yet in his application I recall that he has work experience in his CV in regard to extending knowledge into communities? In order to discount this, you need some explanation in your selection report – why is this extension related to work experience referred to in Yokwe's application irrelevant in relation to the selection criteria, etc!

John, I'm sorry I can't do more for you – despite my best efforts, I just haven't been able to get across to you what's required, and I can't invest any more time in this. Please return the file when its finalised.

If you have any issues, as I've recommended before, please take them up with Peter Metcalfe. Thank you."

(Exhibit R6)

41 The difficulty associated with this matter is that there were no witnesses to the exchange between Mr Caudwell and the appellant. The closest such evidence was that Jennifer Bairstow was aware of voices. She heard the appellant's voice and said that it was quite loud although the appellant normally speaks quite loudly. She can normally hear voices but not the content of any conversations. On this occasion, she heard two voices, the appellant's naturally quite loud voice and Mr Caudwell's which was not as loud. She says that the appellant was not shouting or yelling that day and she did not hear any of the words that were used. She says that the appellant's tone of voice was slightly annoyed.

42 Ms Bairstow says that she found the appellant approachable and he was helpful to her in settling into the district. She says that he is level-headed and someone who can see both sides of an issue. She has never seen him aggressive and has always seen him quite placid. She would have expected to have heard a file dropped flat against the floor, flush on its face, had one dropped that way near the entrance to the corridor, even if the office door was closed because it is not a heavy door. However, she heard no such noise.

43 Another witness, Ms Hunter, saw the appellant and Mr Caudwell together in the foyer but was not aware of the nature of the discussion or anything further.

44 The question in this appeal comes down to whether the appellant did or did not verbally abuse and physically assault Mr Caudwell.

45 An interesting and relevant part of the background to the relationship between the appellant and Mr Caudwell includes that Mr Caudwell previously undertook an investigation of the appellant's travel claims, as noted earlier. It appears that there was some irregularity in those travel claims brought about by the administration officer signing in the wrong place and accordingly indicating to the appellant that he should sign in the place on the form where the person authorising the claim should sign. The result was that it appeared that the appellant had authorised his own travel claims. However, nothing came of this. Mr Caudwell also played a part in the issue of whether the Three Springs District Office, under the appellant's management, had met certain obligations.

46 Our clear impression of Mr Caudwell is of his being a zealous administration officer concerned with compliance with procedures in a manner which could be described as overly pedantic and bureaucratic. He was provocative towards the appellant in his responses to him. He was no shrinking violet faced with an aggressive recalcitrant manager. On the contrary he was provocative and unhelpful.

47 On the way into the appellant's office when the appellant invited him to go and have a discussion with him, Mr Caudwell said to the appellant that he would come in and talk to him provided that the appellant did not "get up him" as he had in the past, to which the appellant is said to have responded that he had not got up him as much as Mr Caudwell had got up him before, or something to that effect. Therefore, the ground was laid for the two of them to be in conflict, quite apart from the issues of the delay in processing the AV file and the selection of the new Development Officer, and the different interpretation they each had of the selection criterion.

48 We accept that the appellant was frustrated by the delay in Mr Caudwell's preparation of the QA report and by Mr Caudwell's pedantic and bureaucratic approach. We accept too, Ms Bairstow's description of the appellant, being loud-spoken but not aggressive and being quite placid. However, his own witness, Sherri Hunter, whose evidence is also credible, said that only a couple of years previously the appellant had been aggressive in his management such that she complained about him. She says that he has since improved and changed his ways.

49 On 20 September 2004 the appellant wanted the vacancy filled expeditiously. He was perhaps justifiably frustrated and angry at Mr Caudwell's approach, and allowed his frustration to govern his response. We find that the appellant spoke to Mr Caudwell in a slightly raised voice and, rather than abusing Mr Caudwell, he directed his disagreement to the QA report, describing the view held by Mr Caudwell of the appropriate interpretation of the selection criterion and the appropriate process as "bullshit" and/or "crap". The use of such slang or coarse terms in such a discussion cannot reasonably be regarded as verbal abuse when the whole situation is viewed in context. We are not satisfied that the appellant told Mr Caudwell to take the file and "piss off" as Mr Caudwell said in his evidence. We are not satisfied that his language or tone constituted verbal abuse towards Mr Caudwell. In the context of Mr Caudwell's approach at that time, and previously, we find that a degree of frustration on the appellant's part was to be expected. However, he let Mr Caudwell aggravate him.

50 We find that in handing over the AV file to Mr Caudwell, the appellant did so in a manner designed to vent his frustration and anger, and he swung the file forcefully at Mr Caudwell such that it connected with Mr Caudwell more heavily than was reasonable and that it struck his glasses causing the lenses to fall out. We accept that the lenses of the glasses fell out of the frames, as Mr Caudwell spoke of it later in the conference room and sought tools to repair the glasses. The physical force used by the appellant in conveying the file to Mr Caudwell was excessive and inappropriate. Such behaviour in an employee, let alone a manager, is unacceptable and worthy of some disciplinary action.

Penalty

51 The appellant has been demoted and transferred. The respondent does not deny that the appellant was given no opportunity to address the issue of penalty after the decision had been made finding him guilty of the breach of discipline. In this case, the transfer was not merely to a nearby location to which the appellant would have easy access and could commute. Rather it required that he uproot his family and move hundreds of kilometres. The respondent, in failing to give the appellant an opportunity to be heard regarding the penalty of transfer, denied the appellant the opportunity to put forward information about the full impact of a transfer, not just on him, but also on his family.

52 The appellant's conduct could best be described as a little aggressive in response to provocation and there was a lack of the control one should expect of a manager in dealing with a fellow employee. Had that employee been a subordinate of the appellant's, the impact of that conduct may have been more serious but in this case the other employee was not a subordinate of the appellant, and was not intimidated by the appellant. On the contrary, he played his own active part in the circumstances as they unfolded. While serious, the appellant's conduct does not warrant the high level of penalty of either the transfer or demotion which have been applied. In terms of an assault, it must be categorised as being at the very low end of the spectrum. It caused no harm to Mr Caudwell. It did not actually break his glasses but forced the lenses from their frames such that they were repairable by Mr Caudwell himself with the use of a small screwdriver.

53 We find the penalty of a transfer and demotion to be harsh in those circumstances. The appropriate penalty, commensurate with the circumstances and the appellant's actions, would be a reprimand and a forfeiture of 5 days' pay.

54 We see no reason why the appellant could not continue in his role as District Manager. There is no suggestion that the appellant would not be able to continue to work at the Three Springs District Office as a District Manager having the respect of his staff. That was clear from the evidence of the officers who work there with him. There will, of course, need to be some work undertaken to ensure that the appellant, Mr Caudwell and Mr Metcalfe, the Regional Manager, are able to work productively and harmoniously together and that is a matter for the respondent to manage.

55 We would uphold the appeal and find that the appellant has demonstrated that the respondent has erred in concluding that he verbally abused Mr Caudwell. There has been a technical assault of Mr Caudwell but the penalty for that conduct was quite disproportionate to the act.

The Respondent's Application For Costs

56 The respondent has sought an order for costs in respect of the costs incurred for witnesses who attended the hearing scheduled for 9 March 2005 which was adjourned following a second adjournment application by the appellant.

57 It is quite clear that the appellant's solicitors failed to deal with the scheduling of this matter and the adjournment applications in a professional and expeditious manner. The appellant claims that the respondent failed to provide documents in a timely manner. It is true that the respondent was late in providing all of the documents which had been sought by the appellant albeit it seems that some of those documents were not relevant to these proceedings. The appellant's solicitors were also lax in informing counsel and briefing alternative counsel when it became clear that the original application for an adjournment had not been successful.

58 The Board granted an adjournment on the second application following Ms Crawford's appearance on the basis that it would be unfair on the appellant for his newly briefed counsel to be required to proceed with a hearing when there had been very little chance for counsel to have viewed documents or been thoroughly briefed. That matter could have been remedied by a diligent approach to the matter by the appellant's solicitors in the first instance.

59 The test for awarding costs in this jurisdiction is that they will not be awarded except in extreme cases (*Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* 73 WAIG 26). Under the circumstances, this case might be described as meeting the extreme case test. The costs sought by the respondent are the costs of bringing its witnesses from the country to attend the hearing and the witnesses then not being required, and the costs of the respondent's inquirer and investigator attending the

hearing. The total of those costs sought is $2,468.24. That the appellant is bound by the actions of his solicitors is confirmed by s.31(3) of the Industrial Relations Act 1979.

60 However, it is difficult to conclude that the appellant, an individual successfully challenging what ultimately has been the harsh decision of the employer in terms of the findings and penalty, should bear the respondent's costs when acting against a government department with significant resources. It would be a disproportionate burden upon the appellant to have to pay those costs compared with the burden on the respondent, a government department and funded by the taxpayers. The appellant has given evidence of the costs that he has already incurred and is likely to incur in pursuing this matter. It would not be appropriate in our view for the appellant to be required to reimburse the respondent for the costs in these circumstances.

61 Therefore, although the test in *Brailey v Mendex* (supra) is met, in balancing all of the circumstances and interests of the parties, we would dismiss the application for costs.

2005 WAIRC 01936

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN AVENARIUS BORGER
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT - CHAIRMAN MR B HEWSON - BOARD MEMBER MR D HARTLEY - BOARD MEMBER
DATE	THURSDAY, 30 JUNE 2005
FILE NO	PSAB 1 OF 2005
CITATION NO.	2005 WAIRC 01936

Result Appeal upheld in part

Order

HAVING heard Mr P Fraser of counsel and later Ms C Crawford of counsel and with her Ms R Amey of counsel on behalf of the appellant and Mr D Matthews of counsel and with him Ms R Hartley of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders that:

1. THE appeal be and is hereby upheld in part.
2. THE respondent's finding that the appellant committed a breach of discipline in that he verbally abused Mr Caudwell be and is hereby quashed.
3 THE respondent's decision to impose the penalty of reducing the appellant's level of classification and transferring him be and is hereby quashed, and a penalty of a reprimand and a fine of 5 days' remuneration be and is hereby imposed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2005 WAIRC 01918

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NANCY SIEW MUAY NGIAM
	APPELLANT
	-v-
	DR RUTH SHEARN DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD CHAIRMAN - COMMISSIONER P E SCOTT BOARD MEMBER – MR K TRENT BOARD MEMBER – MS R MASSEY
DATE	TUESDAY, 28 JUNE 2005
FILE NO	PSAB 2 OF 2005
CITATION NO.	2005 WAIRC 01918

Result Appeal dismissed

Order

WHEREAS this is an appeal pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS on the 21st day of April 2005, the Public Service Appeal Board convened a conference to discuss scheduling and interlocutory matters; and

WHEREAS the conference adjourned to allow the Appellant to seek representation; and

WHEREAS on the 23rd day of June 2005, the Appellant's representative filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2005 WAIRC 01807

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREW CHARLES STEVENS
	APPELLANT
	-v-
	DEPARTMENT OF PLANNING & INFRASTRUCTURE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD CHAIRMAN - COMMISSIONER P E SCOTT BOARD MEMBER – MR K TRENT BOARD MEMBER – MR W WINCHESTER
DATE	TUESDAY, 14 JUNE 2005
FILE NO	PSAB 5 OF 2005
CITATION NO.	2005 WAIRC 01807

Result Appeal dismissed

Order

WHEREAS this is an appeal pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS the appeal was listed for hearing and determination on the 4th and 5th days of July 2005; and

WHEREAS on the 13th day of June 2005, the Appellant's representative filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(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 22 of 2004	Flavio Perlini	Department of Housing and Works	Scott C.	Granted	30/06/2005
PSA 35 of 2004	Jenny Wignall	Minister for Health in Right of the Metropolitan Health Service	Scott C.	Dismissed	8/07/2005
PSA128 of 2004	Joanne Kay Conduit	Commissioner of Police	Scott C.	Withdrawn by Leave	5/07/2005
PSA 9 of 2005	David Holmes	Registrar/Chief Executive Officer, Western Australian Industrial Relations Commission	Scott C.	Withdrawn by Leave	23/06/2005
PSA10 of 2005	Nic Lucano	Registrar/Chief Executive Officer, Western Australian Industrial Relations Commission	Scott C.	Withdrawn by Leave	23/06/2005

OCCUPATIONAL SAFETY AND HEALTH ACT
—Matters Dealt With—

2005 WAIRC 01869

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SITTING AS THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	WAYNE VIGAR SHEETMETAL PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 24 JUNE 2005
FILE NO.	OSHT 2 OF 2005
CITATION NO.	2005 WAIRC 01869

CatchWords	Occupational Safety and Health Tribunal – Further review of WorkSafe Commissioner's decision – Guarding of hydraulic brake press – Improvement notice affirmed with modification – *Occupational Safety and Health Act 1984* - s.51A – Validity of an improvement notice issued to incorrectly named entity – The nature of a referral to the Tribunal**.**
Result	Improvement Notice 89800088 affirmed with modification
Representation	
Applicant	Mr D Turner
Respondent	Ms A Crichton-Browne (of counsel)

Reasons for Decision

Introduction

1 On 27 April 2005 Wayne Vigar Pty Ltd ("the employer") filed an application under the *Occupational Safety and Health Act 1984* ("the Act") for a Further Review of the WorkSafe Western Australia Commissioner's ("the WorkSafe Commissioner") decision relating to Improvement Notice 89800088 ("the notice") before the Occupational Safety and Health Tribunal ("the Tribunal").

2 The notice, to which this review relates, was issued by Mr P Rowe, an Inspector with the Department of Employment and Consumer Protection – WorkSafe ("WorkSafe") to Wayne Vigar t/a Wayne Vigar Pty Ltd on 17 March 2005 as follows:

> "1. In relation to:
>
> GUARDING OF HYDRAULIC PRESS
>
> At 9 MILLY CT MALAGA 6090 on 15 Mar 2005
>
> I have formed the opinion that you are contravening Regulation 4.37(1)(f) of the Occupational Safety and Health Regulations 1996 and the grounds for my opinion are:
>
> The hydraulic press, an item of plant at the workplace, is not adequately guarded in accordance with Regulation 4.29, in that there is no guard on the front or sides of the press. This exposes your employees to the risk of serious injury should they make contact with the moving parts.
>
> You are required to remedy the above by no later than 13 June 2005 at 1400 hours.
>
> 2. You are directed to take the following measures:
>
> Ensure there are adequate guards fitted to the front and side of the point of operation that ensures that as far as is practicable, the press is securely guarded. Ensure the guards are in accordance with AS4024.1(1996) referred to as AS1219."

3 The employer than sought a Review of the notice under s51 of the Act. Following her review the WorkSafe Commissioner wrote, advising of the outcome:

> "Mr David Turner
>
> Wayne Vigar Pty Ltd
>
> 9 Milly Ct
>
> MALAGA WA 6090
>
> Fax: 9248 1755
>
> Dear Mr Turner
>
> Review of Improvement Notice No 89800088
>
> In response to your request of the 17 March 2005 the above Improvement Notice has been reviewed in accordance with Section 51 of the *Occupational Safety and Health Act 1984.*
>
> Having considered your submission and the circumstances in which the notice was issued, I have decided to affirm the content of the notice. In doing so, I would like to note that I have been informed that the guarding system fitted to the press does not comply to Standards and is ineffective.
>
> For the information of your employees, you are directed to display a copy of this letter and the notice it modifies in a prominent place at any workplace affected by the notice.
>
> Yours sincerely
>
> Nina Lyhne

WorkSafe Western Australia Commissioner

26 April 2005"

4 To deal with matters such as referrals under s51A expediently, the Tribunal has determined on this occasion, and in future such occasions, that the WorkSafe Commissioner be named as respondent.

5 Having regard to the Act as a whole, and to s51A in particular, the Tribunal is obliged to enquire into the circumstances relating to the notice and determine, based on the WorkSafe Commissioner's decision, whether or not the hydraulic brake press ("the press") at the employer's premises contravenes r4.29 in that there is no guard on the front or sides of the press, and furthermore determine whether there ought to be guards fitted to the front and side point of operation ensuring, so far as is practicable, the press is securely guarded.

6 The relevant provisions of the *Occupational Safety & Health Regulations 1996* ("the Regulations") referred to in the notice are as follows:

"**4.37 Duties of certain persons as to use of plant**

(1) A person who at a workplace, is an employer, main contractor, a self-employed person, a person having control of the workplace or a person having control of access to the workplace must ensure –

(a) …

(f) That every dangerous part of a fixed, mobile or hand held powered plant is, as far as practicable, securely fenced or guarded in accordance with Regulation 4.29 unless the plant is so positioned or constructed that it is as safe as it would be if securely fenced or guarded;"

R4.29 referred to in the notice is as follows:

"**4.29 Possible means of reducing risks in relation to plant**

The means referred to in Regulations 4.23(3)(a) … and 4.37(1)(f) are -

(a) …

(i) ensuring, in the case where guarding should be provided for the plant, that the guarding comprises —

(i) a permanently fixed physical barrier for cases in which, during normal operation, maintenance or cleaning of the plant, no person would need either complete or partial access to the dangerous area;

(ii) an interlocked physical barrier for cases in which during normal operation, maintenance or cleaning of the plant, a person may require complete or partial access to the dangerous area; or

(iii) a physical barrier securely fixed in position by means of fasteners or other suitable devices sufficient to ensure that the guard cannot be altered or removed without the aid of a tool or key for cases where neither a permanently fixed physical barrier nor an interlocked physical barrier is practicable,

but, if none of the guards described in subparagraphs (i), (ii) or (iii) is practicable, the provision of a presence sensing safeguard system;"

7 The issue for further review by the Tribunal arose when a WorkSafe Inspector formed the opinion that employees working in the vicinity of the press were exposed to a risk of serious injury in the event they made contact with the moving parts. As a result of forming that opinion the notice was issued requiring the employer to fit guards in accordance with AS4024.1 (1996) referred to as AS1219.

8 If, on the evidence and submissions before the Tribunal, it is determined that a risk of serious injury exists as identified by the notice and furthermore, if in my opinion, the review into the circumstances establishes that on the evidence available, the Inspector was justified in forming the opinion in question, then the Tribunal will affirm the decision of the WorkSafe Western Australia Commissioner issued on 26 April 2005. Alternatively, if the evidence and submissions persuade the Tribunal that the risk of serious injury is present but may be addressed slightly differently then the Tribunal will affirm WorkSafe's decision (as per 26 April 2005) with modification(s). If however, having enquired into the circumstances relating to the notice, the Tribunal is of the view that the Inspector was not justified in forming the opinion in question, in this case a requirement that the press be adequately guarded, then the decision of the WorkSafe Commissioner will be cancelled and the Tribunal will make such other decision as is considered appropriate.

Preliminary Considerations

Advice by WorkSafe relating to the notice

9 The Tribunal was advised by WorkSafe prior to commencement of proceedings that Wayne Vigar t/a Wayne Vigar Pty Ltd, identified on the notice by the Inspector as an entity, did not exist. WorkSafe advised that the name of the relevant entity was Wayne Vigar Sheetmetal Pty Ltd. Further, on the Form 1A Notice of Referral to the Tribunal the employer had identified the entity as Wayne Vigar Pty Ltd.

10 The Tribunal considered the advice and asked each of the parties, namely WorkSafe and the employer, as a preliminary issue to address the purported error in the name of the employer at the commencement of proceedings.

11 By consent of the parties and following the exercise of the Tribunal's discretion, at the commencement of proceedings an Order was issued amending the name of the applicant from Wayne Vigar t/a Wayne Vigar Pty Ltd, to Wayne Vigar Sheetmetal Pty Ltd. This Order did not amend the notice issued by the Inspector.

Application by WorkSafe to refer matters to the Full Bench

12 The Tribunal received an application from WorkSafe requesting the Tribunal refer to the Full Bench, with the consent of the President, two questions of law pursuant to s27(1)(u) of the *Industrial Relations Act 1979*. Those questions read as follows:

'1. If an Improvement Notice or Prohibition Notice is issued to the wrong person or something that is not a legal entity, is the notice invalid? Can the Tribunal remedy such a fault using its power in section 51A(5)(b) or (c) of the *Occupational Safety and Health Act 1984*?'

'2. What is the nature of a referral pursuant to section 51A of the *Occupational Safety and Health Act 1984*?'

13 WorkSafe submitted to the Tribunal that to deal with questions of law in this way is an efficient and effective way of having legal issues determined and that a determination by the Tribunal is not binding with respect to legal issues.

14 In considering whether I ought exercise my discretion and refer the questions of law to the Full Bench, I am mindful of a number of factors.

15 Firstly, it is open to either party to appeal the Tribunal's decision to the Full Bench, in accordance with s51I of the Act. Without going into the detail of that section the appeal clearly may be instituted by a party to the proceedings at first instance

or an intervenor. It is trite to say that the Full Bench is bound to decide appeals according to law and to act within jurisdiction. Secondly, the Tribunal has had regard for the Act as a whole and the specific provisions relating to s51A matters. This requires the Tribunal to act as quickly as practicable in determining a matter referred under s51A of the Act. Thirdly, the operation of any Improvement Notice is suspended under the Act once the notice is referred to the WorkSafe Commissioner for review at first instance as per s51(7)(a). A similar effect occurs once a person or entity issued with an Improvement Notice refers that Notice in accordance with s51A to the Tribunal for further review as per s51A(7)(a).

16 In determining this matter the Tribunal considers that the implications with respect to health and safety of the persons immediately affected and the public interest as a whole in Western Australia are considerably greater than the delay that might result if a party were to exercise their right and lodge an appeal to the Full Bench in accordance with the provisions of the Act or alternatively, if the Tribunal was to refer the questions of law to the Full Bench, with the consent of the President.

17 Accordingly, I find it is inappropriate in the circumstances to refer the questions of law, with the consent of the President, to the Full Bench.

18 The Tribunal now turns to consider the merit of this matter.

Position of Employer

19 The employer submitted that in accordance with s51(5)(c) of the Act, the Tribunal ought revoke the notice and issue an direction that he ought be permitted to continue the operations in his workplace with the current safety system without having to install a guard on the front of the press.

20 The employer amended his position at the conclusion of proceedings to seek a revocation of the notice on the basis that it was issued to an entity that did not exist namely, Wayne Vigar t/a Wayne Vigar Pty Ltd. As its secondary position, in the event the Tribunal determined that the notice was in fact issued to Wayne Vigar Sheetmetal Pty Ltd, the Tribunal ought exercise its power pursuant to s51A(5)(c) of the Act and revoke the decision of WorkSafe.

Position of WorkSafe

21 WorkSafe submitted that the Tribunal ought affirm the notice on the grounds that the press is in breach of r4.37(1)(f).

22 In the event the Tribunal determines that the notice was issued to Wayne Vigar, there are no reasonable grounds for the issuing of the notice to Wayne Vigar, the Tribunal ought exercise its power pursuant to s51A(5)(c) of the Act to revoke the decision of the WorkSafe Commissioner and cancel the notice.

23 As a second remedy, in the event the Tribunal determines that the notice was issued to Wayne Vigar Pty Ltd, because there is no such person, therefore the notice was always invalid and the Tribunal ought exercise its power pursuant to s27(1)(a) of the *Industrial Relations Act 1979* to dismiss the matter on the basis that the notice is invalid.

24 In the event that the Tribunal considers that there are reasonable grounds for the notice to have been issued to Wayne Vigar Sheetmetal Pty Ltd because, despite the misdescription, that person was not under any misapprehension as to the fact the notice was issued to it, then on the basis of the evidence, the Tribunal ought exercise its power pursuant to s51A(5)(a) of the Act to affirm the decision of the WorkSafe Commissioner, noting that the Tribunal has determined as a matter of fact that the person to whom the notice was issued was Wayne Vigar Sheetmetal Pty Ltd. WorkSafe's position is that the Tribunal does not have the power to amend the notice at first instance.

The Workplace

25 Wayne Vigar Sheetmetal Pty Ltd is a metal fabrication shop where a number of persons are employed including an apprentice.

26 The premises have had installed in recent months a press which is used to bend sheetmetal. The press creates locked seams on sheet metal and is in use for three days in the working week for approximately half a day at a time. The operators who use the machine could be either Mr Turner, Mr Vigar or a second year apprentice. The work on the press is repetitive, particularly when the fabrication of downpipes is being undertaken.

27 The actual process involves sheet metal being placed in between the blade and the die. The press pushes the two together to a pre-set point to achieve a bend; on some occasions 90 degrees, others 45 degrees, whatever the die is set to achieve. The press is 3.2 metres long and weighs in the order of 8 tonnes. In terms of the weight, as it undertakes the bend when set at maximum power the press will deliver 63 tonnes of pressure at the point of the blade.

Employer's evidence and submissions on substantive matter

28 The employer submitted that the notice at first instance failed to take into account the safety system in operation at the employer's workplace. The employer further submitted that:

> "…the press brake operates in the pulse mode that a light curtain guard would operate – this system is failsafe and tamper proof and therefore complies with the Act. The Australian Standard is a guide, not law, and this press complies with the intent of the Standards."
>
> (*Extract from Form 1A Notice of Referral*)

29 Mr Turner on behalf of the employer gave evidence the press was in compliance with r4.37(1)(f). This was supported by a WorkSafe Information Sheet on Brake Presses. (*Exhibit W2*) Mr Turner, in evidence about the publication said:

> "…it (the document) gives a …a number of descriptions of the current operation of our press that the press complies to, which says that the press can be operated in pulse mode 'when all of the following apply' and there are six points. All of these points our press complies to and its… its in relation to the press being operated with front guard removed. …'Sometimes it may be necessary for the operator's hands to be close to the blade', etc, etc …"
>
> (*Extract from transcript, page 23*)

It is the employer's view that his press does comply with all of the criteria specified in the WorkSafe document.

30 Mr Turner, further submitted that the press at his workplace, complied with r4.29 of the Act. The press has a safety system called an "Easiguard System" installed. This safety system is an integral part of a light curtain electronic guarding system for a brake press. Even if a light curtain was installed it was Mr Turner's evidence that:

> "…in other words, if a hand or an arm or a piece of work material or anything breaks that light – the Easiguard System that's on our press puts the press into pulse mode. It doesn't stop operating. It goes into pulse mode. Our press operates in that pulse mode at all times. It can't operate any other way."
>
> (*Extract of transcript, page 10*)

31 The employer submitted that the company had done a risk assessment and on that basis considered they were operating the machine in a safe mode at all times. Further, he considered that even if a light curtain was installed there would be no change to the mode of operation. The only difference would occur when a person was outside the light curtain, the machine would

operate at high speed. In the pulse mode, once the light curtain is breached the press would descend in 10mm steps, stopping 6mm from the material and then undertaking the pressing stroke at less than 10mm per second. Further, the employer suggested that WorkSafe did not understand how a light curtain operated, a view Mr Turner submitted he had put to the WorkSafe Inspector who issued the notice at first instance, Mr Arthur Livock, an Inspector and Manager of the Manufacturing Section of WorkSafe, and subsequently, the WorkSafe Commissioner. This evidence together with that of WorkSafe has been critical to the Tribunal's findings.

32 The cost of installing a guard as requested by WorkSafe would, in Mr Turner's evidence be minimal, given that the machine was new and the supplier had agreed to install it for no charge. From a productivity point of view Mr Turner submitted:

> "… probably we would gain in productivity because if we're outside the light curtain when we're operating the machine and it's operating at probably ten times the speed it operates now, it – it would increase productivity, but we made this decision at the time of ordering the machine. We do not want it to operate at that speed."
>
> (*Extract from transcript, page 12)*

The employer submitted in evidence there were a number of reasons for adopting that view. One of the reasons was where the operator is replacing material in the machine they can do so fairly quickly but where they are placing it at precise points such as the blade impact point they need time to look at that and it was considered that operating the machine in the permanent pulse mode cut down on the number of mistakes that people make. Accordingly, it is a benefit in the fabrication of products to have the press permanently operating in the slow mode.

33 Mr Turner conceded in cross-examination that in circumstances where the press was operating and a limb or digit remained under the blade it would cause a serious injury, possibly amputation or severe crushing.

34 Mr Turner emphasised that when the light was penetrated by a hand or body then the press would continue to operate in pulse mode.

35 At the time Inspector Rowe first issued the notice Mr Turner indicated he had refused to acknowledge receipt of the notice until such time as he received the form which would allow a review to the WorkSafe Commissioner, to be submitted. Following receipt of that form, evidence was led that the notice was signed by Mr Turner on behalf of the employer as having been received.

36 Mr Wayne Vigar, a company director of the employer, gave evidence of his experience with working in sheetmetal shops with presses of a similar type. In that evidence Mr Vigar submitted where press brakes with light guards were fitted and the light guard was breached by the operator then the press would convert to pulse mode and continue to operate. Furthermore, Mr Vigar confirmed that a risk assessment of the press had been undertaken when the machine was first purchased. It came with signs and the safety procedures had been worked through together with a representative of the supplier.

WorkSafe Commissioner's submissions and evidence on substantive matters

37 Inspector Rowe gave evidence that on 17 March 2005 he visited the premises of the employer, observed the press and issued the notice to Wayne Vigar t/a Wayne Vigar Pty Ltd on the grounds that he had formed the opinion that the employer was contravening r4.37(1)(f) of the Regulations. Inspector Rowe submitted in evidence:

(a) that the person to whom the notice was issued was an employer or a person in control of the workplace in Malaga;

(b) that the blade of the brake press was a dangerous part of fixed plant;

(c) that the blade was not securely fenced or guarded in accordance with r4.37(1)(f);

(d) there were a number of measures that could be used to meet the terms or requirements of r4.29;

(e) none of the options outlined in r4.29(i) were in place on the brake press in question.

38 Inspector Livock, a Senior Inspector with WorkSafe, gave evidence that injuries caused by brake presses are, apart from fatalities, the most serious injuries that occur whilst persons are at work and that the incidence of such injuries are on the rise in Western Australia. Such injuries have been determined by WorkSafe to be a priority area of focus. In his view it would have been practicable for the brake press to be operated with one or more of the means of guarding listed in r4.29(i) in particular, a presence sensing/light curtain/light guard.

39 Mr Livock gave further evidence that is critical in my view to the misunderstanding that appeared to develop between the employer and the WorkSafe Commissioner in relation to this matter namely, that it is permissible to operate a brake press in pulse mode, which is in a mode without any guards and still conform with r4.37(1)(f). However, this can only occur in certain circumstances. Mr Livock submitted:

> "But the bottom line is … and this is the problem when you are working with the pulse mode. If there is a section of the blade where there is a gap more than 10mm, it's quite possible for you to have your fingers in there and if you push the pedal you'll lose your fingers. And, from what I saw with the product Mr Turner demonstrated, it's quite practicable to operate (the press) with a light guard and I actually think Mr Turner himself has indicated it could even improve his productivity. So I don't think there is any question that it isn't practicable."
>
> *(Extract from transcript, page 67)*

Mr Livock submitted where there is a press in operation with a light guard fitted it is possible to switch the press to the mute point where it was impracticable to work with the light guard on because the fabricated product was fouling the guard itself. In these circumstances the press is switched to mute and the warning lights come on. Supervisors in these circumstances, in the evidence of Inspector Livock, have to be in attendance, or certainly they should be, and only skilled people ought operate the plant. This approach should only be undertaken where the other options are not available or not practicable and the circumstances at the employer's premises do not conform with such a circumstance. Mr Livock gave evidence that a "presence-sensing safeguard system" as referred to in the Regulations or as referred to by Mr Turner a "pulse mode system", are not to be considered as a substitute for the provision of effective guards. The pulse mode system was only to be used where it was impracticable to work with a light guard system. Such circumstances were to be considered the exception to the rule rather than as a standard barrier as referred to in r4.29.

40 Further evidence was given by Mr Livock with respect to the various options laid out for guarding of plant such the type of press installed at the employer's workplace. Under r4.29(i) there are a number of options for guarding namely: a permanently fixed barrier, an interlocked physical barrier or a physical barrier which ensures that the guard cannot be altered or removed without the aid of a tool or key for cases. Mr Livock's evidence was that in his opinion the light guard met the requirement simply because on the press owned by the employer half of the light guard control system was already in place; the Easiguard System. He went on to submit that the light guard was the only part missing. Under r4.29, in the evidence submitted by Mr Livock, the guarding options must fall within the definition of practicability and given that the Easiguard System was already

in place on the employer's press then the focus was on the provision of a light guard to complete the physical barrier prescribed under r4.29(i).

41 The WorkSafe Commissioner submitted that an Inspector was restricted in the issuing of an improvement notice pursuant to s48 of the Act to circumstances where all of the following criteria were being met:

(a) the notice is issued to a person;

(b) the Inspector is of the opinion that a person is contravening a provision of the Act, or contravened a provision of the Act in circumstances that make it likely the contravention will continue or be repeated; and

(c) the Inspector has reasonable grounds for his or her opinion.

In respect of the issuance of the notice to the employer the WorkSafe Commissioner submitted that each of the criteria had been met.

Conclusion and Findings with respect to substantive matters

42 With the consent of both parties I inspected the workplace and in particular the brake press and discussed the manner in which the work was carried out in the vicinity of the press. I thank both parties for their assistance and I thank Mr Turner in particular for permitting the Tribunal to visit the workplace.

43 The preliminary issue for consideration by the Tribunal is whether the impact of the error in the naming of the entity on the notice prevents the Tribunal from determining the matter or, alternatively, whether the Tribunal has the power to resolve the defect to allow the substantive s51A enquiry as referred to the Tribunal to proceed and be determined in accordance with s51A.

44 In considering this the Tribunal is obliged to consider the circumstances under which this notice was referred to the Tribunal. Namely, on 27 April 2005 Wayne Vigar Pty Ltd, filed in the Commission a Form 1A, Notice of Referral to Tribunal. Following the issuance of the notice on 17 March 2005 the employer referred the notice for review to the WorkSafe Commissioner in accordance with s51 of the Act and on 26 April 2005 she affirmed the content of the notice.

45 The powers of the Tribunal in considering an application referred under s51A of the Act are to enquire into the circumstances relating to the notice and affirm that notice with appropriate modifications or cancel the notice. Section 51A does not on the face of it appear to extend power to the Tribunal to amend the notice at first instance. In addition, the Regulations are silent regarding the power of the Tribunal to amend the notice at first instance.

46 Under s51I of the Act a number of provisions of the *Industrial Relations Act 1979* are incorporated into the operation of the Tribunal. Relevantly, s26(1) of the *Industrial Relations Act 1979* requires that the Commission shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal form. The question that needs to be considered is whether an Improvement Notice that names the employer incorrectly is an invalid notice and, whether the incorrect naming of the employer in an Improvement Notice can be considered a "technicality" for the purposes of a referral to the Tribunal.

47 It is the Tribunal's view that this would depend upon the circumstances in each case. The Tribunal notes that the Inspector when first issuing the notice, identified the entity as "Wayne Vigar t/a Wayne Vigar Pty Ltd". Further, that in the correspondence from the WorkSafe Commissioner, dated 26 April 2005 affirming the content of the notice, the correspondence is addressed to Wayne Vigar Pty Ltd. On balance, the question to be considered is whether this is a technical mistake identifying the correct business identity for the purposes of the various sections of the Act, and in particular s48.

48 It is most relevant to the Tribunal's determination to note that the correct employer, even though incorrectly named, accepted that a notice had been issued because his next step was to access his right pursuant to s51 of the Act and submit that notice for review to the WorkSafe Commissioner. Again, it would appear, the correct employer, even though incorrectly identified, accepted that the notice had been affirmed by the WorkSafe Commissioner because the employer then made this application for further review.

49 Also relevant to note is that the employer identified his own business entity as "Wayne Vigar Pty Ltd" on the Form 1A, Notice of Referral to the Tribunal, in essence, perpetrating the incorrect naming. This strongly suggests to the Tribunal that the incorrect naming is, of itself, a mere technicality with no practical effect or consequence. The least it is suggesting is that the employer would suffer no prejudice if the notice was to be regarded as a valid notice for the purposes of s51A.

50 Having considered the submissions of the employer and the Worksafe Commissioner and having regard for the circumstances on this occasion, particularly with respect to the employer's actions in exercising his rights pursuant to s51 and s51A of the Act I find that the Tribunal is able to deal with the issue as referred and deal with the notice as if it had been a notice issued to Wayne Vigar Sheetmetal Pty Ltd. The incorrect naming of the employer on this occasion is a technical error of no practical consequence.

51 Support for this proposition is drawn from the powers of the Tribunal as prescribed in s51I of the Act. The incorporation in that section of the Act of s27(1)(m) of the *Industrial Relations Act 1979* allows the Tribunal to "correct, amend or waive any error, defect, or irregularity whether in substance or in form". Provisions of that subsection are considered to be quite broad and in the view of Senior Commissioner G L Fielding in the Full Bench decision *Parveen Kaur Rai v Dogrin Pty Ltd* (1999) 80 WAIG 1375 are not just limited to the amendment of an error but "empower the Commission to correct the same". A similar approach was indicated in *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* (1991) 173 CLR 231, 261.

52 Having made my determination on this occasion that the impact of the error can be viewed as technical it is important to indicate this that may not be the case in other matters. Where a Worksafe Inspector incorrectly identifies an employer on a notice the outcome may result in the whole process being brought into question which would require the Tribunal to revoke the decision of the Worksafe Commissioner. It is unnecessary to emphasise the implications that this could have for the health and safety of persons immediately affected.

53 I therefore determine that, for the purposes of dealing with the WorkSafe Commissioner's decision, the notice on this occasion and, for the purposes of this application, is to be viewed as a valid notice.

54 Having considered the evidence in relation to the press there are a number of issues on which the parties agree:

(a) the brake press in situ at the workplace currently operates without a light curtain in place;

(b) the employer owned and operated the press;

(c) the employer operated the press in pulse mode at all times;

(d) the blade of the brake press is a dangerous part of the machine that together with the weight behind the machine can cause crushing injuries that may result in amputation; and

(e) the supplier of the brake press offered to fit the brake press with a light guard at no cost to the employer.

55 I have had the benefit of listening to all four witnesses in these proceedings. The Tribunal finds their evidence to be forthright and given in an open manner. It is always open to a Commissioner in such circumstances to believe part of what a witness has said and to reject another part of that evidence. Insofar as is necessary I refer to the Industrial Appeal Court's decision in *Cousins v YMCA* (2001) 82 WAIG 5 at para 43. In the case of evidence given by Mr Turner and Mr Vigar I consider that their evidence with respect to the operation of a brake press with a light guard in situ to be based on a partial understanding of how a light guard operates on a press of this nature. Their evidence asserted that where a light curtain or laser guard is in situ and the laser is breached then the brake press will always operate in pulse mode. In contrast, on the evidence of Mr Livock, the breach of a light guard is considered to cause the brake press to cease operating in all circumstances except where the system is switched to operate in pulse mode. I prefer the evidence of Mr Livock on this issue. I find that a light curtain, in situ on a brake press such as that in operation at the workplace provides protection in and around the operating area and when breached by part of the body (including limbs, digits) causes the press to stop operating and does not move into pulse mode unless the press is actively switched across to pulse mode. I find that this should only be undertaken where it is not practicable to guard the press in any other manner.

56 The Tribunal finds that the press in place at the employer's premises in Malaga is a dangerous piece of machinery and further, that the operation of the press as currently in situ is in breach of r4.29.

57 The Tribunal considers it is practicable in terms of the definition of practicability under the Act for the installation of a light guard curtain to be given effect as soon as possible having regard to the risk of serious injury associated with operating the press unguarded.

58 The Tribunal therefore affirms the decision of the WorkSafe Western Australia Commissioner with modification. The modification relates to the time in which the employer has to install the light curtain. I find it appropriate given that the supplier, on Mr Turner's own evidence, has offered to fit the light curtain without cost to the employer and having regard to the availability of labour and parts in the fitting of such a light curtain it is appropriate to provide the employer with three weeks for installation from the date of operation of the order to issue in this matter.

Other Matters

59 The second question of law submitted by WorkSafe for consideration was:

> 'What is the nature of a referral pursuant to s51A of the *Occupational Safety and Health Act* 1984?'

In support of their application the WorkSafe Commissioner submitted there was some ambiguity in s51A of the Act as to the exact nature of a review and further, that parties coming before the Tribunal will need to know the nature of a reference made pursuant to s51A of the Act, as this will affect the way they present their cases.

60 In determining the nature of a review by the Tribunal the question is whether such a referral requires a review of the decision of the WorkSafe Commissioner or a review of the decision of the Inspector who issued the notice at first instance by way of a re-hearing.

61 The WorkSafe Commissioner submitted that between 1985 and 1995 the Western Australian Industrial Relations Commission considered prohibition notices. In such matters the Commission was required to put itself into the shoes of the Inspector who issued the prohibition notice and with the benefit of further evidence, decide if he or she could reasonably form the opinion formed by the Inspector. Support for this proposition is to be found in the decision of the Industrial Appeal Court, *Wormald Security Australia Pty Ltd v Peter Rohan, Dept of Occupational Health, Safety and Welfare* (1993) 74 WAIG 2 per Franklin J at 4.

62 The WorkSafe Commissioner submitted that if evidence relating to the WorkSafe Commissioner's considerations in reaching her decision pursuant to a s51 review is considered to be relevant then there is likely to be a substantial impact on WorkSafe's record keeping of the decision making process of both prohibition and improvement notices referred to the WorkSafe Commissioner.

63 The employer submitted he was in no position to comment on the powers of the Tribunal and limited his submissions to his belief that the matter ought be decided in such a manner as to set precedent for future cases.

64 In considering this matter I am obliged to take into consideration the Act as a whole, the rights of the parties and the nature and structure of s51A in particular.

65 I find that the WorkSafe Commissioner is an administrative authority for the purposes of considering case law on this matter. In such circumstances where a right of appeal is provided to a court, in this case to the Tribunal from a decision of an administrative authority, in this case the WorkSafe Commissioner, the review is to be by way of re-hearing. This refers to the process of undertaking a matter as a hearing de novo although clearly such an approach can vary: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) HCA 47 (31 August 2000) 118.

66 Section 51A(2) provides that a further review by the Tribunal of improvement and prohibition notices issued by WorkSafe shall be "in the nature of a re-hearing". The statute makes no provision for the manner in which a re-hearing, is to be undertaken by the Tribunal nor does it in any way specify what type of procedure is to be adopted in regard to the evidence relied upon by the Tribunal in determining what action to take with respect to the notice issued at first instance.

67 The Tribunal finds that any matter referred under s51A must allow the applicant to have a right to challenge or bring submissions about evidence on which the WorkSafe Commissioner has acted. To be a fair procedure, any applicant in such a matter ought have the right to place submissions, whether in writing or through oral evidence, before the Tribunal to refute the evidence relied upon by the Inspector in issuing the notice at first instance and the WorkSafe Commissioner subsequently affirming, modifying or revoking that notice under s51.

68 A consideration by the Tribunal pursuant to s51A is intended to be a hearing de novo. The basis for such an approach is drawn from *Tsintris v Roads and Traffic Authority of New South Wales and Anor* (1991) 25 NSWLR at 72, 73 Lee J proffers the following:

> "… The appeal is one from an administrative decision in which the plaintiff has played no real part in respect of which she has no right to advance witnesses or challenge the basis upon which the authority is acting, seems to me to lead inevitably to a conclusion that the appeal given by s7(4) and stated to be 'in the nature of a re-hearing' is intended to be a hearing de novo."

In that same decision Lee J quoted the words of O'Bryan J from *Basser v Medical Board of Victoria* [1981] VR 953 at 962:

> "I am satisfied that the proper course for me was to follow Smith J, in *Georgoussis'* Case and allow the appellant a re-hearing in the fullest sense since he requested it. The expression 'in the nature of in s11(3) comprehends that the essential quality or characteristic of the appeal shall be a re-hearing. The fact that the legislature has conferred jurisdiction upon a single Judge tends to confirm in my mind that the form of a re-hearing required by s11(3) is one in which the court must hear the evidence afresh when either the appellant or the respondent requests it do so."

69 Further, given that the matter is conferred by statute to be by way of re-hearing the Tribunal draws on the decision of *Cummins v MacKenzie* [1979] 2NSWLR 803 where Sheppard J concluded that the appeal to a Magistrate under consideration required a hearing de novo and made the observation (at 809):

> "…The matter being by way of re-hearing, what the Commissioner has done in a particular case is irrelevant, except insofar as it is necessary to know that he has cancelled the licence, that being the justification for the court's exercise of jurisdiction. Furthermore, the appeal being by way of re-hearing, all matters occurring down to the time when the matter comes before the court are relevant to be taken into account."

70 I therefore find that when a matter is referred by an applicant pursuant to s51A the issue for consideration is the notice at first instance. To ensure a fair and equitable process in the proceedings before the Tribunal the applicant is entitled to bring all matters and require all documentation or information to be placed before the Tribunal up until the time in which the matter is heard. This may, in some cases, involve a request for information relied upon the WorkSafe Commissioner in reviewing the notice pursuant to s51. I so find.

71 The parties before the Tribunal under a s51A referral will have the opportunity to agree that all of or only a portion of the material can be used in evidence. Hopefully, in this way, the review process before the Tribunal may be shortened by agreement so that much of the evidence is submitted in this way.

72 When a matter such as this is referred to the Tribunal, s.51A (4) of the Act requires the Tribunal to act as quickly as is practicable in determining the matter. The reason for that mandatory requirement is obvious: a prohibition or an improvement notice is quite likely to be issued to address a workplace that poses a risk of harm or injury to its employees. In this case, as the Tribunal has found, the unguarded press posed such a danger.

73 The referral of this matter to the Tribunal meant that the operation of the notice was suspended: s.51A(7). The matter was therefore listed most promptly. This prompt listing met with no opposition from the employer.

74 It is appropriate to place on the record that while every endeavour to accommodate the availability of WorkSafe's representatives will be undertaken, the Tribunal's obligation is to act as quickly as is practicable in determining a matter. That obligation does not allow a delay merely to accommodate WorkSafe's representatives.

75 The evidence regarding the substantive matter to be determined was relatively straightforward and could have been determined quickly after the hearing. Much time has been spent, however, determining the preliminary issue raised by WorkSafe regarding in particular, the nature of the proceedings. Contrary to the view submitted by Worksafe, the Tribunal's decision in this matter is the law, and remains the law until it is corrected upon appeal: s34 of the *Industrial Relations Act, 1979* as applied to these proceedings by s.51I of the Act.

76 A Minute of Proposed Order now issues.

2005 WAIRC 01919

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	WAYNE VIGAR SHEETMETAL PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 JUNE 2005
FILE NO	OSHT 2 OF 2005
CITATION NO.	2005 WAIRC 01919

Result	Decision of WorkSafe Western Australia Commissioner affirmed with modification – Improvement Notice 89800088
Representation	
Applicant	Mr D Turner (on his own behalf)
Respondent	Ms A Crichton-Browne (of counsel)

Order

HAVING HEARD Mr D Turner on behalf of the applicant and Ms A Crichton-Browne (of counsel) on behalf of the respondent, the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under s.51A of the *Occupational Safety and Health Act 1984* hereby orders:

1. THAT the decision of the WorkSafe Western Australia Commissioner of 26 April 2005 be affirmed with modification in accordance with s51A(5)(b) of the *Occupational Safety and Health Act 1984*; and

2. THAT the modification referred to in part 1 of this Order extend to Wayne Vigar Sheetmetal Pty Ltd the period for compliance with Improvement Notice 89800088 to 21 (twenty one) days from the date of this Order.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.